UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MAGISTRATE JUDGE SCHEER

NORTHLAND FAMILY PLANNING CLINIC, INC., et al. Plaintiffs,	Civil Action No.: 03CV71054DT
v.	
JANET OLSZEWSKI, et al. Defendants.	ROBERT H. CLELAND

03 MAR 17 PM 1:59 FILED

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

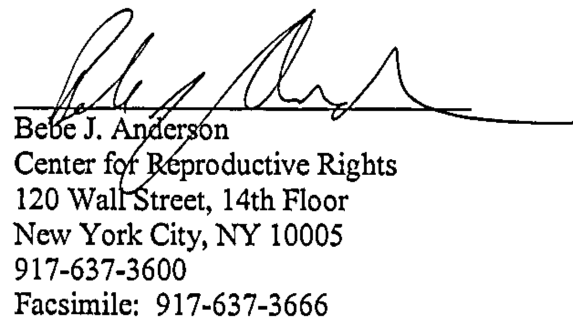
Plaintiffs, by and through their undersigned attorneys, hereby move this Court pursuant to Fed. R. Civ. P. 65 (a) and Local Rules 65.1 to issue a temporary restraining order and/or preliminary injunction prohibiting the defendants, and their agents and successors in office, from enforcing the delay in payment provisions of Act No. 685, Michigan Public Acts of 2002, scheduled to go into effect on March 31, 2003. The delay in payment provisions -- Sec. 17015(9) and related language in Sec. 17015(11)(c) -- will prevent abortion providers from obtaining payment for medical services rendered to patients and from performing abortions even when they have complied with those provisions. The challenged provisions impose vague and contradictory requirements upon abortion providers, subjecting them to licensure penalties without adequately describing the conduct proscribed. If the delay in payment provisions are not enjoined before that effective date, Plaintiffs and their patients will suffer immediate and irreparable injury, loss, or damage, as set forth in the accompanying declarations and Memorandum of Law in support of this motion

This motion is made upon the accompanying Complaint, Plaintiffs' Memorandum of Law in Support of this Motion, and the Declarations of Renee Chelian, Anise Burrell, and Carmen Franco.

WHEREFORE Plaintiffs respectfully ask that this Court grant Plaintiffs' request for a temporary restraining order and/or preliminary injunction enjoining Defendants, their agents and successors from enforcing the delay in payment provisions of Act No. 685, Michigan Public Acts of 2002 (to be codified at Mich. Comp. Laws § 333.17015(9), (11)(c)).

Dated: March 14th, 2003.

Respectfully Submitted,



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MAGISTRATE JUDGE SCHEER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

03CV71054DT

ROBERT H. CLE

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.) Plaintiffs,) v.) JANET OLSZEWSKI, et al.) Defendants.)	Civil Action No.:_______________

03 MAR 17 PM 2: 1
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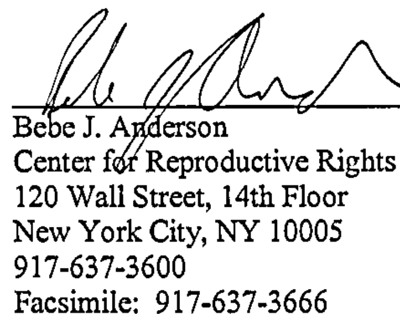
PLAINTIFFS' MOTION FOR EXPEDITED HEARING

Plaintiffs, by and through their undersigned counsel, hereby request an expedited hearing on Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction. This case involves the constitutionality of the latest amendments to Michigan's law delineating special informed consent requirements for abortions. This request is made necessary by the fact that unless a temporary restraining order or preliminary injunction is issued preventing enforcement of the delay in payment provisions of Act No. 685, Michigan Public Acts of 2002 (to be codified at Mich. Comp. Laws § 333.17015(9), (11)(c)), those provisions will be into effect on March 31, 2003. Plaintiffs have moved for temporary and preliminary injunctive relief because the new law threatens the constitutional rights and the health of Plaintiffs' patients in need of abortion services in Michigan. If the delay in payment provisions go into effect on March 31, 2003, that will result in immediate and irreparable confusion for abortion providers and impaired access to abortions and to other services -- such as ultrasounds and pregnancy tests -- that women need in order to make the decision whether to seek an abortion. For these reasons, Plaintiffs respectfully request an expedited hearing so that this Court can decided Plaintiffs' request for a temporary

restraining order and/or preliminary injunction enjoining enforcement of the delay in payment provisions.

Respectfully submitted this 14th day of March, 2003.



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.) Plaintiffs,)) v.)) JANET OLSZEWSKI, et al.)) Defendants.)	Civil Action No.:________________

PLAINTIFFS' PROPOSED ORDER GRANTING EXPEDITED HEARING

The Court, having considered Plaintiffs' request for an expedited hearing on Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, hereby ORDERS that the a hearing on this matter shall be held on the ______ day of March, 2003 at _______ am/pm.

Dated this _______ day of March, 2003.

____
United States District Judge

MAGISTRATE JUDGE SCHEER ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT H. CLELAND

NORTHLAND FAMILY PLANNING CLINIC, INC., et al. Plaintiffs, v. JANET OLSZEWSKI, et al. Defendants.	Civil Action No.: 03CV71054-DT

FILED 03 MAR 17 PM 2:19

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

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Concise Statement of Issues Presented

Plaintiffs' motion presents the following issues:

1. Whether the delay in payment provisions are impermissibly vague because they fail to provide abortion providers with notice of the conduct that is proscribed and subject them to arbitrary enforcement?

2. Whether the delay in payment provisions violate physicians' and women's rights to equal protection under the law because they single out abortion providers and their patients for unique burdens without being even rationally related to legitimate state interests?

3. Whether an injunction should issue because, in addition to establishing a likelihood of success on the merits, Plaintiffs have met all of the other requirements for injunctive relief?

TABLE OF CONTENTS

INTRODUCTION 1

THE STATUTORY FRAMEWORK 1

STATEMENT OF FACTS 3

ARGUMENT 6

I. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of Their Claims. 7

A. Plaintiffs Are Likely to Succeed on Their Claim that the Delay in Payment Provisions are Unconstitutionally Vague. 7

B.Plaintiffs Are Likely to Succeed on Their Claim that the Delay in Payment Provisions Violate Physicians' and Patients' Rights to Equal Protection 12

1. The Delay in Payment Provisions Improperly Burden Women's Right to Obtain Abortions and to Make Fully Informed Decisions about Their Reproductive Choices. 12

2. The Delay in Payment Provisions Impermissibly Discriminate on the Basis of Sex. 14

3. The Delay in Payment Provisions Discriminate between Physicians who Provide Abortions and All Other Physicians. 16

II. Plaintiffs Satisfy the Other Three Factors Required For Injunctive Relief. 19

CONCLUSION 20

CONTROLLING OR MOST APPROPRIATE AUTHORITY

IN SUPPORT OF RELIEF SOUGHT

Issue 1

Baggett v. Bullitt, 377 U.S. 360 (1964) 8

Colautti v. Franklin, 439 U.S. 379 (1979) 8

Grayned v. City of Rockford, 408 U.S. 104 (1972) 7, 8

Peoples Rights Org. v. City of Columbus, 152 F.2d 522 (6th Cir. 1998) 7

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 11

Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995) 9

Women's Med. Ctr. of NW Houston v. Bell, 248 F.3d 411 (5th Cir. 2001) 8

Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997) 7

Issue 2

City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432 (1985) 12

Geduldig v. Aiello, 417 U.S. 484 (1974) 15

Lindsey v. Normet, 405 U.S. 56 (1972) 16

Mahoning Women's Ctr. v. Hunter, 610 F.2d 456 (6th Cir. 1979) vacated on other grounds, 447 U.S. 918 (1980) 13, 14

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 15

Peoples Rights Org. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998) 16, 18

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 13

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 15

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 13

Roe v. Wade, 410 U.S. 113 (1973) 12-13

Romer v. Evans, 517 U.S. 620 (1996) 16, 18

Saenz v. Roe, 526 U.S. 489 (1999) 13

Shapiro v. Thompson, 394 U.S. 618 (1969) 13

Stenberg v. Carhart, 530 U.S. 914 (2000) 13

United States v. Craven, 478 F.2d. 1329 (6th Cir. 1973) 13

United States v. Virginia, 518 U.S. 515 (1996) 15
Williams v. Rhodes, 393 U.S. 23 (1968) 12

Issue 3

Cyberspace, Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999), aff'd mem., 238 F.3d 420 (6th Cir. 2000) 6

Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. Unit B 1981).......... 19

Elrod v. Burns, 427 U.S. 347 (1976) 19

Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982).......... 20

Memphis Planned Parenthood v. Sundquist, 175 F.3d 456 (6th Cir. 1999) 6

Phillips v. Michigan Dep't of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990), aff'd mem., 932 F.2d 969 (6th Cir. 1991).......... 19

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) 7

Sluiter v. Blue Cross & Blue Shield of Michigan, 979 F. Supp. 1131 (E.D. Mich. 1997) 7

Stenberg v. Cheker Oil Co., 573 F.2d 921 (6th Cir. 1978) 7

United States v. Bayshore Assocs., Inc., 934 F.2d 1391 (6th Cir. 1991) 6-7

Univ. of Texas v. Camenisch, 451 U.S. 390 (1981) 7

11A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 2951 (Supp. 1999) 7

INTRODUCTION

Plaintiffs seek a temporary restraining order and/or preliminary injunction against enforcement of portions of Act No. 685 of Michigan Public Acts of 2002 ("Act No. 685"). The challenged portions of Act No. 685 -- Sec. 17015(9) and related language in Sec. 17015(11)(c) ("the delay in payment provisions") -- prevent abortion providers from obtaining payment for medical services rendered to patients and prevent abortion providers from performing abortions even when they have complied with the delay in payment provisions. The delay in payment provisions in Act No. 685, which is scheduled to take effect on March 31, 2003, impose vague and contradictory requirements upon abortion providers, subjecting them to licensure penalties, without adequately describing the conduct proscribed. If those provisions are permitted to go into effect, women's access to reproductive health services -- abortions and the other services women need in order to make the decision whether to seek an abortion -- will be impaired. Plaintiffs are likely to prevail on their claims that the delay in payment provisions in Act No. 685 are unconstitutionally vague and violate their and their patients' equal protection rights. Therefore, those provisions should be enjoined by this Court prior to March 31, 2003.

THE STATUTORY FRAMEWORK

Act No. 685 amends, inter alia, Michigan's 24-hour waiting period statute, Mich. Comp. Laws § 333.17015, which has been in force subject to settlement agreements approved by this Court in 1999 and 2001, and to a ruling by this Court in 2002. Plaintiffs challenge the constitutionality of Subsection (9) and the related portion of Subsection (11)(c) of MCL 333.17015, as amended by Act No. 685. Those provisions replace statutory provisions that this Court found unconstitutionally vague in a decision issued on February 26, 2002.

Act No. 685 amended § 333.17015 by, inter alia, replacing the prior Subsection (9) in its entirety. Prior to enactment of Act No. 685, Subsection (9) read:

> A physician shall not require or obtain payment for an abortion related medical service provided to a patient who has inquired about an abortion or scheduled an abortion until the expiration of the 24-hour period required in subsection (3).

Mich. Comp. Laws § 333.17015(9). The term "abortion related medical service" was not defined. See Mich. Comp. Laws § 333.17015. This Court ruled that then Subsection (9) was void for vagueness. Northland Family Planning Clinic v. Granholm, Civ. Action No. 01-CV-70549, Memorandum Opinion and Order (Feb. 26, 2002).

Act No. 685 amended Subsection (9) to read:

> This subsection does not prohibit notifying the patient that payment for medical services will be required or that collection of payment in full for all medical services provided or planned may be demanded after the 24-hour period described in this subsection has expired. A physician or an agent of the physician shall not collect payment, in whole or in part, for a medical service provided to or planned for a patient before the expiration of 24 hours from the time the patient has done either or both of the following, except in the case of a physician or an agent of a physician receiving capitated payments or under a salary arrangement for providing those medical services:
>
> (a) Inquired about obtaining an abortion after her pregnancy is confirmed and she has received from that physician or a qualified person assisting the physician the information required under subsection (3)(c) and (d) [the state-mandated materials regarding abortion procedures and fetal development].
>
> (b) Scheduled an abortion to be performed by that physician.

Act No. 685, § 17015(9). Act No. 685 added a definition of the term "medical service," which means "the provision of a treatment, procedure, medication, examination, diagnostic test, assessment, or counseling, including, but not limited to, a pregnancy test, ultrasound, pelvic examination, or an abortion." Act. No. 685, § 17015(2)(c).

Subsection (11)(c) of Act No. 685 requires the Department to "[d]evelop, draft, and print . . . an acknowledgment and consent form" that contains only the language specified in the statute. Before performing an abortion, a physician or qualified person assisting the physician

must obtain the patient's signature on that form. The prior version of Subsection (11)(c) required that the patient certify that she had not been required to make certain payments, but that was stricken pursuant to this Court's prior vagueness ruling.

Act No. 685 made only minor changes in the wording of the portion of Subsection (11)(c) that related to the delay in payment issue. It amended Subsection (11)(c) so that it now requires that the patient certify, in relevant part, that she had:

> not been required to make any payments for an abortion or any medical service before the expiration of 24 hours after [she had] received the written materials listed in paragraphs (a), (b), and (c) above [the state-mandated materials regarding abortion procedures, fetal development, and prenatal care], or 24 hours after the time and date listed on the confirmation form if paragraphs (a), (b), and (c) were viewed from the state of Michigan internet website.

Act No. 685, § 17015(11)(c). This amendment reflects the change from "abortion related medical service" to "medical service" in the Subsection (9) but does not reflect the other new wording in that Subsection.

Act No. 685 imposes civil penalties on persons who violate its terms, including the delay in payment provision. If a disciplinary committee finds that a health professional has violated Act No. 685, it may impose one or more of the following licensure penalties: denial, revocation, restitution, probation, suspension, limitation, reprimand, or fine. <u>See</u> Mich. Comp. Laws §§ 333.16221(m), 333.16266. There is no limitation on the amount of the fine that may be imposed. <u>See</u> Mich. Comp. Laws § 333.16266. Collection of payment by an agent of the physician may also violate the statute. Act No. 685, § 17015(9). Act. No. 685 contains no scienter requirement. Therefore, even physicians and clinic staff who inadvertently violate its terms are civilly liable.

<u>STATEMENT OF FACTS</u>

Currently, Michigan providers of reproductive health services -- including providers of abortions -- are allowed by law to obtain prompt payment for medical services rendered to

patients, as are the providers of other medical services. Chelian Decl. ¶ 5. The Plaintiffs all provide abortions, but in addition provide a variety of other reproductive health care services. Id. ¶ 2; Burrell Decl. ¶ 2; Franco Decl. ¶ 2; Compl., ¶¶ 9-13. Although the Plaintiff clinics provide some free services -- in particular, urine pregnancy tests -- they charge a fee for most of the medical services that they provide, including ultrasounds, physical examinations, early pregnancy tests, and blood pregnancy tests. Chelian Dec.¶ 5; Burrell Decl. ¶ 17; Franco Decl. ¶ 8. Most of their patients do not have insurance coverage for those services and are required to pay for the medical service at the time they receive the service; for patients with insurance coverage, their insurance plan is billed at the time they receive the service. Chelian Decl. ¶ 19; Burrell Decl. ¶ 17; Franco Decl. ¶ 15.

Women come to the Plaintiff clinics seeking medical services for a variety of reasons. Chelian Decl. ¶¶ 10-11; Burrell Decl. ¶¶ 10-15; Franco Decl. ¶ 9. Some of the medical services provided by Plaintiffs -- such as pregnancy tests, ultrasounds, and physical examinations -- provide patients with information they need in order to learn whether they are pregnant and, if so, whether they will carry their pregnancy to term or seek an abortion. Chelian Decl. ¶ 10; Burrell Decl. ¶ 10, 13; Franco Decl. ¶ 9. Some of the patients who receive such services decide to carry their pregnancies to term, and others decide to terminate their pregnancies. Chelian Decl. ¶¶ 11, 16; Burrell Decl. ¶ 11; Franco Decl. ¶ 9. Some of the pregnant women intend to continue their pregnancy but change their minds, such as when they find out their fetus has a severe fetal anomaly. Franco Decl. ¶ 9. Others come to the Plaintiff clinics having decided to obtain an abortion; some of these women do so, but others change their mind and carry their pregnancies to term. Chelian Decl. ¶¶ 10, 16; Burrell Decl. ¶¶ 11-12; Franco Decl. ¶¶ 9, 12. In many cases, Plaintiffs provide medical services to patients before the day the patient receives an

abortion. Chelian Decl. ¶¶ 11-12, 15-17; Burrell Decl. ¶¶ 10, 12-13; Franco Decl. ¶¶ 9, 11. In some of those cases, the patients do not return to Plaintiffs for further services. Chelian Decl. ¶ 16; Burrell Decl. ¶¶ 11-12; Franco Decl. ¶ 12.

The Plaintiff clinics need to obtain prompt payment for rendered medical services in order to stay in business. Chelian Decl. ¶ 21. If a patient chooses not to return to the clinic, for whatever reason, after she has received services such as physician counseling, a pregnancy test, physical examination, or an ultrasound, the clinic may never be able to recoup its costs for such services. Chelian Decl. ¶ 21; Burrell Decl. ¶ 12; Franco Decl. ¶ 8. Therefore, if the Plaintiff clinics are not able to collect payment at the time services are rendered, they will lose money. Chelian Decl. ¶ 21; Burrell Decl. ¶ 17; Franco Decl. ¶ 13.

As a result, the delay in payment provisions will harm abortion providers and their patients. Some of the Plaintiff clinics may be unable to stay in business. Chelian Decl. ¶ 21. Alternatively, some of the Plaintiff clinics may have to raise their fees for services to make up for the fees they are unable to collect, thus making their services more expensive for all women and inaccessible for some. Franco Decl. ¶¶ 13, 16. Or some of the Plaintiff clinics may only provide services on the same day that an abortion is performed on the patient, by which time she will have already received or reviewed the state-mandated materials, so that they can collect payment the day the service is provided. Franco Decl. ¶ 14; Burrell Decl. ¶ 17. In that situation, some women suffer impairment of their ability to access medical services that they need in order to exercise their right to reproductive choice. Franco Decl. ¶¶ 13-14; Burrell Decl. ¶ 18. Also, women will experience delays in obtaining an abortion, because the clinics will have to allow more time for each patient on the day of the procedure, to provide those other services. Franco Decl. ¶ 14.

Given the lack of clarity in the delay in payment provisions, Plaintiffs may inadvertently fail to comply with them, with the resultant risk of civil penalties. See Section I.A, infra. Moreover, even where they have complied with Subsection (9), women may be unable to certify that they have paid for any service within 24 hours of receiving or viewing the state-mandated materials, as required under Subsection (11)(c). See id. As a result, women will be unable to receive scheduled abortions.

Furthermore, prohibiting the Plaintiff clinics from obtaining prompt payment for services rendered will leave them vulnerable to abusive conduct by anti-choice activists. The staff of at least one of the Plaintiff clinics believes that previous "patients" have actually been anti-choice activists seeking to expend the staff's time and the clinic's resources. Chelian Decl. ¶ 22. By preventing Plaintiffs from obtaining payment for services as they are provided, the delay in payment provisions would enable such individuals to repeatedly seek "abortion related" services without paying for them, in an effort to put Plaintiffs out of business. Id.

ARGUMENT

This Court should consider four factors in evaluating Plaintiffs' motion for a temporary restraining order and/or preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." Memphis Planned Parenthood v. Sundquist, 175 F.3d 456, 460 (6th Cir. 1999); see also Cyberspace, Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 753 (E.D. Mich. 1999), aff'd mem., 328 F.3d 420 (6th Cir. 2000). A motion for a temporary restraining order is considered under the same standards as a preliminary injunction. See United States v. Bayshore Assocs., Inc., 934

F.2d 1391, 1398 (6th Cir. 1991) (determining that "once the TRO was extended by the parties' stipulation it became, for all intents and purposes, a preliminary injunction"); 11A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 2951, at 254 (Supp. 1999). The four factors should be balanced, and no single one should be determinative of the appropriateness of granting the injunction.. See Sundquist, 175 F.3d at 460.

The primary purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981); see also Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226 (6th Cir. 1996). The prevention of irreparable harm, however, is of paramount concern when determining whether to grant equitable relief. See, e.g., Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978); Sluiter v. Blue Cross & Blue Shield of Michigan, 979 F. Supp. 1131, 1136 (E.D. Mich. 1997).

Plaintiffs and their patients will suffer irreparable harm without equitable relief. Indeed, each of the four factors to be considered favors issuing injunctive relief in this case. Accordingly, Plaintiffs' motion for a temporary restraining order and/or preliminary injunction should be granted.

I. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of Their Claims.

A. Plaintiffs Are Likely to Succeed on Their Claim that the Delay in Payment Provisions are Unconstitutionally Vague.

"It is a fundamental component of due process that a law is void-for-vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); accord Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 533 (6th Cir. 1998); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997). Vague laws offend at least two fundamental values. First, they fail to provide the persons targeted by the statutes with "a

reasonable opportunity to know what is prohibited, so that [they] may act accordingly." Grayned, 408 U.S. at 108. Thus, vague laws may act as a trap for the innocent. See id. Second, vague laws pose the risk of arbitrary enforcement. Where a statute imposes quasi-criminal penalties, such as fines and licensure revocation, it must define its terms "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." See Women's Med. Ctr. of NW Houston v. Bell, 248 F.3d 411, 422 (5th Cir. 2001) (internal citations omitted).

"[T]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." Voinovich, 130 F.3d at 197 (internal citations omitted). As the Supreme Court has recognized, vague laws are especially problematic when "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391 (1979) (citations omitted); see also Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Vague standards of proscribed conduct, coupled with the prospect of arbitrary enforcement, will in many instances cause persons to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." Baggett, 377 U.S. at 372 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). And a vague statute is particularly likely to inhibit constitutionally protected conduct when the statute lacks a scienter requirement and therefore punishes even inadvertent violations of its terms. See Colautti, 439 U.S. at 396 (stating that "a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions"). Following these principles, the Sixth Circuit struck down an abortion statute that

punished abortion providers without a scienter requirement. See Voinovich, 130 F.3d at 205; see also Planned Parenthood v. Miller, 63 F.3d 1452, 1465 (8th Cir. 1995).

Here, violation of the delay in payment provisions exposes physicians to the risk of civil penalties, including fines and loss of their license to practice medicine. Yet it does so without clearly describing the conduct in which physicians and their agents may not lawfully engage. The meaning of the delay in payment provisions is unclear in several ways, including, but not limited to, those discussed below.

First, the payment prohibition imposed by Act. No. 685 is unclear because the wording of the required certification form that a patient must sign before obtaining an abortion is inconsistent with the wording of Subsection (9). Subsection (11)(c) requires a patient to certify that she has not been required to pay for any medical services before the expiration of 24 hours from the time she obtained the state-mandated materials regarding abortion procedures, fetal development, and prenatal care from any authorized source, including other physicians or the State's website.[1] Thus, for patients that obtain abortions, that section appears to preclude collection for any medical services until at least 24 hours after the patient receives or views the state-mandated information, irrespective of when the medical service was rendered. In contrast, Subsection (9) states that a physician or his/her agent may not collect payment before the expiration of 24 hours from the time the patient has either received the state-mandated information from *that* physician *or* she has scheduled an abortion to be performed by that physician.

[1] The settlement in the first challenge to, inter alia, Section 333.17015 provided that a physician other than the physician who performs an abortion may provide the state-mandated materials to a woman. See Northland Family Planning Clinic v. Engler, No. 94-75351, Final Order ¶ 9 (June 17, 1999).

Therefore, it is unclear whether a physician can perform an abortion on a patient if, for example, the patient received an ultrasound and paid for that service 24 hours after she scheduled her abortion but before she received the state-mandated materials. Similarly, it is unclear whether a physician can perform an abortion on a patient who received an ultrasound, decided to carry her pregnancy to term, paid for her ultrasound, and later returned to the same clinic for an abortion. In both of these cases, the patient could not truthfully certify that she had not been required to pay for a medical service before the expiration of 24 hours after she received or viewed the state-mandated materials. Similarly, if a patient has viewed the state website and comes to a clinic for a physical examination the same day, can the clinic charge her for that examination; if it does, is that patient then precluded from obtaining an abortion at that clinic later because she cannot sign the certification form? See Chelian Decl. ¶¶ 14-15; Burrell Decl. ¶ 15.

Second, it is unclear from the wording of Subsection (9) itself when payment may be collected for medical services that have already been provided. If a woman obtains medical services unconnected with her pregnancy on the same day that she schedules an abortion, is the clinic precluded from collecting payment for those services? What if a woman schedules an abortion and obtains an ultrasound, but upon viewing the ultrasound results changes her mind and cancels her appointment for an abortion; must the clinic wait 24 hours before collecting payment for the ultrasound? Must a clinic interrogate each woman seeking services to make sure that she has not received or viewed the state-mandated materials or scheduled an abortion within the past 24 hours before collecting payment? May a clinic bill an insurance company for payment immediately, but not collect payment from an uninsured patient at the time the service is provided? See Chelian Decl. ¶¶ 12-13, 16, 18-19; Burrell Decl. ¶¶ 11, 13-14; Franco Decl. ¶¶

8-10, 12, 15.

Third, it is unclear whether the collection of payment for rendered medical services is prohibited for 24 hours *only if* one of two events has occurred: the patient has either scheduled an abortion or received the state-mandated information from that physician. In part, this lack of clarity stems from the conflict between the wording of Subsections (9) and (11)(c), but it also arises from the nonsensical nature of such a prohibition. For example, it does not make sense that payment can be collected if an ultrasound is provided, the fee is collected, and only then is the patient handed the state-mandated material, but not if the clinic hands the patient the state-mandated material, either before or after the ultrasound is provided, but before payment is collected. If a woman obtains an ultrasound and does not indicate whether she is obtaining an abortion, may the clinic collect payment, but not if the woman says she does want an abortion and schedules an appointment? See Chelian Decl. ¶ 17; Franco Decl. ¶ 11.

Here, the vague delay in payment provisions will impair women's ability to exercise their constitutional right to choose. Some women will be precluding from obtaining an abortion, because they cannot sign the required certification form. Other women will be unable to obtain medical services such as pregnancy tests, ultrasounds, and gynecological examinations, which are precisely the services that are needed by women who are attempting to exercise their constitutional right to *decide* whether to obtain an abortion. See Planned Parenthood v. Casey, 505 U.S. 833, 852-53, 857 (1992) (discussing the constitutional right to make personal decisions relating to family relationships and childbearing); see also Statement of Facts, supra.

Accordingly, Plaintiffs are likely to prevail on their claim that the delay in payment provisions are void for vagueness.

B. Plaintiffs Are Likely to Succeed on Their Claim that the Delay in Payment Provisions Violate Physicians' and Patients' Rights to Equal Protection.

Plaintiffs are also likely to succeed on the merits of their claim that the delay in payment provisions violate the equal protection rights of physicians and their patients. The Equal Protection Clause of the United States Constitution "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). Although the Constitution does not prohibit all forms of "discrimination" among groups, it does forbid distinctions that (1) are invidious, (2) unnecessarily burden the fundamental rights of one group, or (3) are arbitrary or irrational. See, e.g., Cleburne, 473 U.S. at 439-42; Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

The delay in payment provisions create three impermissible classifications: (1) between patients who seek abortions and those who seek other medical services; (2) between men and women seeking health care; and (3) between physicians who provide abortions and those who provide other types of medical care.

1. The Delay in Payment Provisions Improperly Burden Women's Right to Obtain Abortions and to Make Fully Informed Decisions about Their Reproductive Choices.

The delay in payment provisions will impermissibly interfere with women's fundamental right to make an informed choice about whether to continue their pregnancy or to seek an abortion by restricting women's access to abortion and the medical services they need to exercise their right of reproductive choice. See Statement of Facts, supra. Because reproductive health care providers will be compelled to raise their fees, stop providing necessary services, delay the provision of services, or even go out of business, the delay in payment provisions will make it

more difficult for women to exercise their fundamental right to choose. See Roe v. Wade, 410 U.S. 113 (1973) (right to abortion prior to viability is part of fundamental rights to liberty and privacy); see also Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (right to choose abortion prior to viability is an established principle); Casey, 505 U.S. at 846, 852-53, 857 (1992) (same); Mahoning Women's Ctr. v. Hunter, 610 F.2d 456, 460 (6th Cir. 1979) (applying strict scrutiny to equal protection challenge to regulations of abortion providers), vacated on other grounds, 447 U.S. 918 (1980).

Where, as here, the exercise of a fundamental right is burdened, this Court must apply strict scrutiny, even if that right is not actually violated. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("any classification which serves to penalize the exercise of [a constitutional] right" must meet strict scrutiny); id. at 638 (because classification "touch[ed]" on fundamental right, it was subject to strict scrutiny); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983) (strict scrutiny applied when government action "impinges" upon a fundamental right); United States v. Craven, 478 F.2d. 1329, 1338 (6th Cir. 1973) (strict scrutiny applies when legislative classifications "affect" fundamental rights). To survive strict scrutiny, the restriction or burden on the exercise of a fundamental right must be necessary to serve a compelling state interest. See Saenz v. Roe, 526 U.S. 489, 499 (1999); Mahoning, 610 F.2d at 460.

The only two state interests that have been recognized as compelling in the abortion context are the interests in maternal health and potential life. Casey, 505 U.S. at 878; Roe, 410 U.S. at 162. The state's interest in potential life can only be promoted prior to viability through means "calculated to inform the woman's free choice, not hinder it." Casey, 505 U.S. at 877. The delay in payment provisions do not serve either of these two recognized state interests.

First, the delay in payment provisions do not serve an interest in potential life. Asking patients to pay for services that they *have actually received* is standard medical practice and does not exert any undue influence on a patient's decision about whether to carry to term. Just as patients who consult with an orthopedic surgeon are no more likely to choose to proceed with surgery merely because the surgeon requests that they pay for diagnostic x-rays, women are no more likely to choose abortion merely because they have paid for diagnostic services such as pregnancy tests or ultrasounds. Second, the delay in payment provisions bear no relation to maternal health whatsoever.

Instead, the delay in payment provisions' real impact will be to make it *more* difficult for women to make an independent choice about whether or not to continue their pregnancy, thus undermining the entire purported purpose of "informed consent" statutes like Act No. 685. As the Sixth Circuit recognized in Mahoning, the constitutionality of a provision, like the delay in payment provisions, which places restrictions on abortion providers must be judged by its actual impact on a woman's right to abortion. See 610 F.2d at 460. If permitted to take effect, the delay in payment provisions will cause health care providers to delay or cease providing services such as pregnancy tests, ultrasounds, and consultations. See Statement of Facts, supra. Yet, these are precisely the services that women need in order to make an informed decision about how to proceed with their pregnancy. See id. Thus, the delay in payment provisions will prevent the "effective enjoyment" of a woman's constitutional right to decide whether to terminate her pregnancy. Mahoning, 610 F.2d at 460.

2. The Delay in Payment Provisions Impermissibly Discriminate on the Basis of Sex.

The delay in payment provisions burden only women's ability to obtain health care, not men's. It therefore also impermissibly discriminates on the basis of sex. "Classifications based

upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (citing Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting)).

Classifications based on sex are subject to an intermediate level of review. See, e.g., United States v. Virginia, 518 U.S. 515, 531 (1996). "[A] party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification. To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" United States v. Virginia, 518 U.S. at 524 (quoting Mississippi Univ. for Women v. Hogan, 485 U.S. 718, 724 (1982)). The delay in payment provisions fail this standard.

Like other gender-based laws, the delay in payment provisions will harm women in the guise of providing them a benefit, by making it more difficult for them to make informed decisions about their medical care and to obtain desired abortions.[2] Further, the discriminatory means employed – regulating only abortion and none of the medical care sought by men or by both men and women – is not substantially related to the achievement of any important government objective. Accordingly, the delay in payment provisions impermissibly discriminates on the basis of sex.

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2 Geduldig v. Aiello, 417 U.S. 484 (1974), is not to the contrary. The Geduldig Court held that *withholding a benefit* from pregnant persons did not constitute sex discrimination. 417 U.S. at 494. The Court has applied a different analysis to government actions that *impose a disability* on pregnant women and has treated such restrictions as sex discrimination. See Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (holding that discriminatory pregnancy leave policy constituted sex discrimination under Title VII).

3. The Delay in Payment Provisions Discriminate between Physicians who Provide Abortions and All Other Physicians.

The delay in payment provisions single out physicians who provide a full range of reproductive health care for the imposition of a unique burden: a restriction on obtaining prompt payment for already-rendered services. Even if this Court applies only rational basis review, those provisions still must fall, because this differential treatment of health care providers who perform abortions and those who perform other medical services is not rationally related to a legitimate state interest. To be rational, classifications must be "reasonably tailored to achieve [the state's] ends and . . . [must be] uniformly and nondiscriminatorily applied." Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Rational basis review is "not toothless," and both the Sixth Circuit and the Supreme Court have struck down statutes after finding that they were irrational under the Equal Protection Clause. See Romer v. Evans, 517 U.S. 620, 631-33 (1996); Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 531-32 (6th Cir. 1998) (striking down statute restricting the possession of certain firearms). As the Supreme Court ruled in Romer:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer, 517 U.S. at 632-33.

The delay in payment provisions are wholly irrational and serve no legitimate state interest whatsoever. There is simply no justification for prohibiting Plaintiffs from obtaining payment for services that they have *actually provided*. Cf. Lindsey, 405 U.S. at 78 ("nothing in the special purposes of the [statute at issue] or in the special characteristics of the [regulated] relationship . . . warrant[ed] this discrimination"). Section 17014 states that the overall purpose

of the Act is to ensure women access to "objective, truthful information," while Section 17014(h) purports that the payment delay provisions are necessary for "consumer protection" of "women contemplating an abortion decision." Mich. Comp. Laws § 333.17014. Yet the 24 hour delay provision is not reasonably tailored to achieve either of these ends. Requiring a delay in payment for services already provided to women contemplating an abortion will in no way serve to "provide objective, truthful information." Likewise, it is incomprehensible how prohibiting Plaintiffs from being paid for services they have already provided will offer even a modicum of "consumer protection."

Section 17014(h) further states that "since the legislature and abortion providers have determined that a woman's right to give informed consent to an abortion can be protected by means other than the patient having to travel to the abortion facility during the 24-hour waiting period, the legislature finds that abortion providers do not have a legitimate claim of necessity in obtaining payments during the 24- hour waiting period." This statement is simply a non-sequitur and makes no sense whatsoever when applied to services that have actually been performed. The fact that some women elect to receive the state-mandated materials at home has absolutely no bearing on whether a health care provider is entitled to prompt payment for a service which a patient wants to receive before the day she comes in for the abortion itself.

The delay in payment provisions do not merely prevent a health care provider from obtaining payment for an abortion before it is performed. Act No. 685's broad definition of "medical services" makes it clear that it may apply to a variety of routine gynecological services provided to patients, frequently before the patient has made a final determination about whether or not to seek an abortion. Thus, those provisions do not forbid collection of payment only from women contemplating an abortion decision. See Chelian Decl. ¶¶ 7, 9. Nor do they apply to all

women contemplating an abortion decision. See id. ¶¶ 9, 17-19. Moreover, the provisions do not prohibit only deposits or pre-payment for medical services. Instead, they prohibit collecting payment for services that have already been rendered. It is simply irrational to conclude that a woman's ability to make an informed, uncoerced choice as to whether to terminate her pregnancy will be influenced by whether she has had to pay for, e.g., an ultrasound or pregnancy test she received. See Chelian Decl. ¶ 9.

In fact, as discussed above, the delay in payment provisions will operate to undermine Act No. 685's stated purpose -- that women receive information they need in order to decide whether to terminate a pregnancy. Perversely, the delay in payment provision seems to give health care providers an incentive to pressure women to come back to that provider for an abortion, so as to obtain payment for the services already provided.

If permitted to take effect, the delay in payment provisions will merely make it more difficult for women to obtain needed medical services. Thus, like the statute at issue in Peoples Rights Org., the delay in payment provisions "fail[], indeed def[y]" the rational basis inquiry. See 152 F.3d at 532. Importantly, the fact that the delay in payment provisions are directed towards only a small, politically unpopular group -- abortion providers -- bolsters this conclusion. As the Supreme Court has cautioned, courts must carefully question classifications that disadvantage politically unpopular groups because such classifications "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. at 634. The delay in payment provisions are nothing more than an attempt to make it more difficult for abortion providers to conduct their practice of medicine, and this Court is likely to find them unconstitutional under the Equal Protection Clause.

II. Plaintiffs Satisfy the Other Three Factors Required For Injunctive Relief.

Under well-established precedent, irreparable injury exists whenever a statute violates individuals' constitutional rights. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976); Phillips v. Michigan Dep't of Corrs., 731 F. Supp. 792, 801 (W.D. Mich. 1990) ("when an alleged deprivation of a constitutional right is involved, no further showing of irreparable harm is necessary"), aff'd mem., 932 F.2d 969 (6th Cir. 1991); Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981) ("the constitutional right of privacy is threatened in fact or in fact being impaired, and this conclusion mandates a finding of irreparable injury") (quotation omitted).

If the delay in payment provisions take effect, they will harm abortion providers and their patients. Abortion providers either will discontinue the provision of services prior to the day the abortion is performed -- which will impair women's access to information they need to exercise their right of reproductive choice; raise their prices, which will mean some women will be unable to access their services; or suffer financial losses which may cause them to go out of business, thus impairing women's ability to exercise their right of reproductive choice. Moreover, given the lack of clarity in the delay in payment provisions, abortion providers may inadvertently fail to comply with them, with the resultant risk of civil penalties. Even where they do correctly comply with the vague Subsection (9), some women may be unable to sign the certification required by Subsection (11)(c), and therefore will be unable to receive scheduled abortions. See Sections I.A, I.B, supra. The Act therefore interferes with the constitutional rights of both the Plaintiffs and their patients and, absent injunctive relief, will cause them irreparable harm.

Further, Defendants will suffer no harm if this Court issues a preliminary injunction. The injunction will merely maintain the status quo while the constitutionality of the Act is decided.

Thus, given the harm that Plaintiffs and their patients will experience if the Act takes effect, the balance of hardships tips decidedly in Plaintiffs' favor.

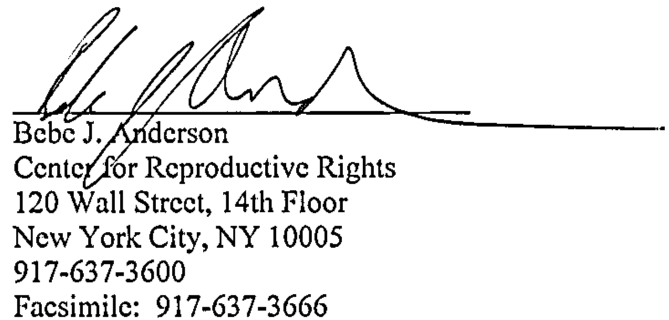
Finally, granting injunctive relief will serve the public interest because it will protect both the constitutional rights of abortion providers and of women in need of abortion services. The public has no interest in effectuating an unconstitutional statute. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982).

CONCLUSION

For all the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary restraining order and/or preliminary injunction against enforcement of the delay in payment provisions in Act No. 685 of Michigan Public Acts of 2002.

Dated: March 14, 2003.

Respectfully Submitted,



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