IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATES IN OBSTETRICS	:	
& GYNECOLOGY, et. al,	:	CIVIL ACTION NO. 03-CV-2313
Plaintiffs,	:	
v.	:	JURY TRIAL DEMANDED
	:	
UPPER MERION TOWNSHIP, et al.,	:	
Defendants.	:	

PLAINTIFFS' POST-HEARING BRIEF

I. INTRODUCTION

Plaintiffs, by and through the undersigned counsel, submit this Post-Hearing Brief to address the following issues requested by the Court:

(1) whether abstention is warranted in this matter,

(2) whether Plaintiffs have standing to pursue an injunction claim on their patients' behalf, and

(3) whether the Plaintiffs and their patients have suffered irreparable harm.

These issues were already addressed in large measure in Plaintiffs' Brief Re: Abstention Requirements for Issuing a Preliminary Injunction pursuant to the *Gwynedd* Properties decision, which was filed with the Court on July 11, 2003. A courtesy copy of this brief is attached hereto as Plaintiffs' Exhibit D. Plaintiffs refer the Court to that Brief for a more detailed discussion of the legal issues, which will be concisely addressed here in the order listed above.

II. THE COURT SHOULD NOT ABSTAIN FROM ISSUING A PRELIMINARY INJUNCTION

In its Opinion of July 16, 2003, the Court held that abstention was improper with respect to Plaintiffs' damages claim, and was improper with respect to the claims for injunctive relief on all doctrines except *Younger v. Harris,* 401 U.S. 37 (1971). As to *Younger* abstention on the injunction claim, the Court reserved decision on two issues: (a) whether the state proceedings afforded Plaintiffs an adequate opportunity to raise their federal claims (if not, *Younger* abstention would be improper); and (b) even if they did, were the state proceedings filed in bad faith (if so, *Younger* abstention would also be improper.)

It is important to keep in mind that if Plaintiffs have met their burden of proving that the state proceedings did not afford them an adequate opportunity to raise their federal claims, the Court never even has to reach the issue of bad faith. This is because all three *Younger* elements must be met before abstention is warranted, even in cases involving preliminary injunctive relief. *See Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1204, fn 13 (3rd Cir. 1992) (considering *Younger* elements).[1] (In *Gwynedd*, the Third Circuit let the damages claim go forward because a different prong of *Younger* was unsatisfied.) In this case, the Court should

[1] All three *Younger* elements were considered in *Gwynedd*. In addition to finding ongoing state court proceedings, the Third Circuit found in *Gwynedd* that important state interests were implicated and the Plaintiff was afforded an adequate opportunity to raise federal claims in state court. *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d at fn. 13. The Third Circuit also noted that the Plaintiff conceded abstention could have been appropriate under *Younger*, a concession not made in instant case. *Id.* at 1204.

There are other important ways in which the facts relevant to *Younger* abstention on the preliminary injunction differ in these two cases. Unlike the rights implicated in the present case, *Gwynedd* did not involve fundamental constitutional rights. *Id.* at 1196. Moreover, the parties in *Gwynedd* were the same in the federal and state court proceedings. *Id.* at 1197-98 (the common identity of a corporation and its shareholder noted in *Gwynedd* obviously cannot extend to Associates' patients in this matter). Finally, with respect to the third element of the *Younger* test, the court in *Gwynedd* noted that "nothing has been brought to the court's attention that would suggest that the Court of Common Pleas of Montgomery County would not entertain these claims against these defendants as it has all of the many others plaintiff has pressed upon it." *Id.* at 1203. This is, of course, directly contrary to the record before the court in the instant litigation.

not abstain from awarding injunctive relief because the third prong of *Younger* clearly has not been satisfied.

A. PLAINTIFFS WERE REPEATEDLY DENIED AN OPPORTUNITY TO RAISE FEDERAL CLAIMS IN STATE PROCEEDINGS.

The third prong of the *Younger* test requires consideration of whether the Plaintiffs have had a "full and fair opportunity to litigate" their federal constitutional claims in pending state proceedings. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). In its Memorandum of July 16, 2003, the Court already found that Associates' selective enforcement claim has not actually been litigated in state court and no state court has ruled on the merits of the claim. *Associates in Obstetrics & Gynecology v. Upper Merion Twp.,* 270 F. Supp. 2d 633, 644-45 (E.D. Pa. 2003)("It is clear from the *Desi's Pizza* ruling that Associates' selective enforcement claim has not been actually litigated in state court and no state court has ruled on the merits of the claim."). The Court also noted that the assertion that Associates did not have an opportunity to raise its federal constitutional claims before the Zoning Hearing Board was "supported to a significant extent by the exhibits of proceedings before the Zoning Hearing Board." *Id.* at 651. These exhibits show conclusively that every time Associates tried to develop a record to support its selective enforcement claim, the Township objected and the Zoning Hearing Board sustained the objection. *Id.* at 638-41, 645; Plaintiffs' Supplemental Brief re: Rooker-Feldman Doctrine ("Plaintiffs' Rooker-Feldman Brief") at Exhibits 1, 7.

The Court also stated that "the Court of Common Pleas opinion dated March 13, 2003 in No. 02-10780 held that Plaintiffs' 'substantive challenge' (which presumably includes the constitutional claim) was not properly before the Zoning Hearing Board because Associates did not have standing…." *Id.* at 651. The record also conclusively establishes that Associates was

never permitted to develop an evidentiary record in the Court of Common Pleas to support its constitutional selective enforcement claim.[2] *Id.* at 645; Plaintiffs' Rooker-Feldman Brief at Exhibits 5, 17.

Indeed, the only uncertainty the Court had concerning whether this third prong of *Younger* had been satisfied was its comment that "neither side explains why the court's opinion has a heading as to a 'constitutional' challenge."[3] *Id.* at 651. But the Common Pleas Court never addressed the merits of any constitutional challenge. Plaintiffs' Rooker-Feldman Brief at Exhibit 4. Rather, it simply held that, for several reasons, Associates lacked standing to raise the issue. *Id*. As a result, the Common Pleas Court refused to address the constitutional issue on the merits. *Id*. at pp. 9-12. When Associates then asserted that it could raise the challenge in court even if it lacked standing to do so before the Zoning Hearing Board, the Common Pleas Court rejected that argument as well. Plaintiffs' Rooker-Feldman Brief at Exhibit 4, p. 12.

The denial of any opportunity to raise the constitutional issue in state court is reiterated by a reading of Judge Subers' opinion of April 22, 2003 where he held that he would not address the selective enforcement issue because it had been considered and rejected by the March 13 decision. Plaintiffs' Rooker-Feldman Brief at Exhibit 17, pp. 4-5. Review of the March 13 decision shows that Judge Subers was clearly wrong, and that the state courts have **never** dealt

[2] The facts showing that Plaintiffs have not been permitted to develop an evidentiary record in any state proceeding to support their constitutional selective enforcement claim, or otherwise to litigate that claim, were set forth in detail in Plaintiffs' Rooker-Feldman Brief filed on June 30, 2003 and in their Supplemental Brief re: Associates' Constitutional Challenge Before State Court Submitted to the Court on October 3, 2003. The Court's opinion of July 16 essentially reiterated these facts.

[3] The March 13, 2003 Common Pleas Court opinion has a section titled "PART II. THE AWS CHALLENGES ON CONSTITUTIONAL GROUNDS FAIL." Plaintiffs' Rooker-Feldman Brief at Exhibit 4, p. 9.

with the constitutional claim on the merits. *Associates in Obstetrics & Gynecology v. Upper Merion Twp.,* 270 F. Supp. 2d at fn. 5; Plaintiffs' Rooker-Feldman Brief at Exhibit 4.

The record clearly shows that Associates has been completely blocked in its efforts to litigate its constitutional claims in state court. It has been forbidden to develop an evidentiary record, both at the Zoning Hearing Board and in the Court of Common Pleas. It has been found to lack standing to raise the issue based on state procedural requirements that treat it as a renter rather than a landowner. It has been told in one case that it cannot be heard because its position was already heard and rejected in a prior case, where the record shows this to be untrue.

Indeed, the refusal of the Zoning Hearing Board and Court of Common Pleas to hear the constitutional claims is consistent with the general principle that local zoning hearing board proceedings and appeals based thereon provide "an insufficient forum to raise federal civil rights claims such as §1983 claims and §1985(3) claims." *Barnes Foundation v. Township of Lower Merion*, 927 F. Supp 874, 879 (E.D. Pa. 1996). The Township should be well aware of this principle, as it was recently applied against it in another case before this Court. See *Hankin Family Partnership v. Upper Merion Twp.,* 2002 WL 461794, *7 (E.D. Pa. 2002) *vacated on other grounds by* 2003 WL 21213332 (3rd Cir 2003) ("due to its limited jurisdiction, a Zoning Board proceeding is not an adequate forum in which federal civil rights claims may be raised and the Court of Common Pleas of Montgomery County could review only those claims that were decided by the Board below"); *see also Chantilly Farms, Inc. v. West Pikeland Twp.*, 2001 WL 290645, *8 (E. D. Pa. 2001)(third *Younger* prong not satisfied because state court zoning appeal was inadequate forum to raise constitutional issues).

Now the Defendants come before this Court, and contend that the federal court should abstain from adjudicating Associates' constitutional claim because Associates has had a full and

fair opportunity to litigate that claim in state court. It is not an overstatement to say that the implications of Defendants' position are frightening, because they leave no avenue open for the full and fair litigation of a fundamental constitutional right. Similar arguments were made and, fortunately, rejected during the civil rights struggles of the 1960s. *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965) (finding federal injunctive relief warranted when defense of state's criminal prosecution would not assure adequate vindication of constitutional rights); *McNeese v. Board of Ed. for Community Unit School Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 83 S. Ct. 1433 (1963) (upholding the rights of segregated students to seek federal protection against abuses of state power); *U. S. v. Price*, 383 U.S. 787, 86 S. Ct. 1152 (1966) (finding right to federal relief when state officers allegedly conspired to punish, threaten and kill three persons); *see also Mitchum v. Foster*, 407 U.S. 225, 240 (1972)(stating §1983 was intended to enforce the 14th Amendment when "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights"). These Defendants first assured that the state judicial process turned a deaf ear to the claim; now they ask the federal court to do the same. There is no where else for Plaintiffs to go.

The third prong of abstention under *Younger* is premised upon the theory that "[t]he accused should first set up and rely upon his defense in the state courts… unless it plainly appears that this course would not afford adequate protection." *Younger v. Harris*, 401 U.S. at 45, *quoting Fenner v. Boykin*, 271 U.S. 240, 244 (1926). Implicit in the opportunity to "set up and rely upon" a defense is the ability to offer evidence. It is fundamental that a litigant cannot be found to have been afforded an opportunity to raise a federal claim in a state proceeding where the state adjudicative bodies (the Zoning Hearing Board and the Court of Common Pleas)

never permitted the litigant to develop an evidentiary record to support its federal claim. *Id.*; *Spargo v. New York State Commission on Judicial Conduct*, 244 F. Supp. 2d 72, 85 (N.D.N.Y. 2003)("It is fallacious to argue that abstention is appropriate because plaintiffs necessarily have an opportunity to be heard in state proceedings, when in the history of state court proceedings no such claim has ever been heard."); *Cf. Superintendent, Massachusetts Correctional Institution, Walpole v. Hill,* 472 U.S. 445, 454, 105 S. Ct. 2768, 2773 (1985)(stating due process required that defendant have an opportunity to call witnesses and present documentary evidence). Because Plaintiffs have proved that they have been denied an adequate opportunity to litigate their civil rights claims in the pending state court proceedings, Plaintiffs have met their burden of proving that the third prong of the *Younger* test has not been met, and therefore that abstention is improper.

B. ASSOCIATES' ASSERTION OF THE PATIENTS' INTERESTS PRECLUDES ABSTENTION.

1. Associates has derivative standing to represent the interests of its patients.

The Court has requested Plaintiffs to respond to the defense argument that Plaintiffs lack standing to represent the rights of prospective patients. Defendants have argued in the Supplemental Memorandum of Law in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction ("Defendants' Supplemental Memorandum"), filed on September 30, 2003 that Dr. Brigham lacks third party standing to assert the privacy rights of potential patients seeking abortions. (It is unclear whether Defendants are drawing a distinction between Dr. Brigham and Associates. Presumably they are not, because later in their brief they refer to both.) With due respect to Defendants, their approach is completely wrong, This has been a well-settled issue for several decades, going back to the early days of abortion jurisprudence.

Defendants' position is based primarily on *Pennsylvania Psychiatric Society v. Green Health Services, Inc.,* 280 F.3d 278 (3rd Cir. 2002). The case itself is inapposite because the issue there was whether the Pennsylvania Psychiatric Society had **associational** standing to represent the claims of its member psychiatrists, and of its members' patients. (The court had no difficulty finding that the psychiatrists themselves had standing to present the claims of their patients, but only the Association, not the doctors, was a party to the suit).

Neither Associates nor Dr. Brigham relies on the doctrine of associational standing. They stand in the shoes of the doctors insofar as standing is concerned, not the shoes of some representative organization. In apparent recognition of this fact, Defendants are reduced to the argument that Associates has failed to establish the "close relationship" necessary for third party standing. The argument seems to be based solely on a statement in paragraph 17 of the Third Amended Complaint ("Amended Complaint") taken out of context, that "Associates' practice is targeted to women seeking abortions who do not have a doctor-patient relationship with a medical practice from which they can secure abortion services…." Defendants' Supplemental Memorandum at p. 3. From that, Defendants argue that Plaintiffs have admitted that they do not themselves have a doctor-patient relationship with the women to whom they provide abortion services. *Id.*

Associates admits that some women who have come to its office obtain their gynecological care from other practices, while others use Associates for, *inter alia*, their ob-gyn care. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 32 lines 1-3. But the statement in paragraph 17 of the Amended Complaint does not by any stretch mean that once those women walk through Associates' door, they do not establish a doctor-patient relationship with Associates. Of course they become the patients of the practice. Their records are subject to the

same levels of confidentiality as any other doctor-patient records. The testimony showed that they receive medical treatment, counseling and follow-up care. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 18 lines 18-23.

The "close relationship" referenced in *Pennsylvania Psychiatric Society* is not defined as a long-standing relationship between doctor and patient. Instead, the Third Circuit said:

> We next turn to whether the psychiatrists and their patients have a sufficiently "close relationship" which will permit the physicians to effectively advance their patients' claims. *To meet this standard,* this relationship must permit the psychiatrists to operate "'fully, or very nearly, as effective a proponent'" of their patients' rights as the patients themselves.

280 F.3d at 289 (emphasis added). The Third Circuit then noted that physicians are routinely authorized to pursue claims of their patients, citing abortion cases to support this conclusion. *Id.* at fn. 12.

There are so many cases holding that abortion providers such as Associates have unquestioned standing to assert the claims of their patients that the issue no longer can be considered in doubt. They include: *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)(plaintiffs were five abortion clinics and one doctor); *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983)(plaintiffs were three corporations that operated abortion clinics, and a doctor); *Planned Parenthood Association v. Ashcroft,* 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed.2d 733 (1983)(plaintiffs were Planned Parenthood, an abortion clinic, and two doctors); *Planned Parenthood of Central New Jersey v. Farmer,* 220 F.3d 127, 147 (3d Cir. 2000)(plaintiffs were physicians and Planned Parenthood, an abortion "clinic"; district court held that both had standing; Third Circuit did not address the argument that Planned Parenthood lacked standing because no evidence had been introduced at the hearing that it actually performed abortions, but

did note that the Supreme Court has held that abortion clinics who actually provide abortions have standing on behalf of their patients); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh,* 737 F.2d 283, 290 n.6 (3d Cir. 1984)(plaintiffs were physicians, a physicians' professional organization, and "several clinic providers of first-trimester abortions" (552 F. Supp. 791, 793); district court found all had standing; Third Circuit affirmed that all had standing to raise the interests "of patients and customers"); *Women's Medical Center of Providence, Inc. v. Roberts,* 512 F. Supp. 316 (D.R.I. 1981)(a particularly compelling statement supporting the standing of the Women's Medical Center and Planned Parenthood, both medical facilities that provide abortion services).

There is, quite simply, no basis upon which to distinguish Associates from any of the medical facilities providing abortion services in all of the above cases that have uniformly been found to have standing to assert the constitutional claims of women seeking abortions. In *Singleton v. Wulff,* 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed.2d 826 (1976), the Supreme Court explained why it is so critical, in abortion jurisprudence, to permit abortion providers to present the claims of women who might require abortion services, given the obstacles of privacy and mootness. The opinion of Chief Judge Pettine in *Women's Medical Center of Providence, Inc. v. Roberts,* 512 F. Supp. 316 (D.R.I. 1981) eloquently explains the barriers to women coming forward as plaintiffs, even under a pseudonym:

> Certainly, a pseudonym disguises the name of a plaintiff insofar as the assigned case-name will not reflect the real name of the person who brought the action. However, I do not accept the surmise that such anonymity abrogates the obstacles to the bringing of suit by a woman seeking to challenge an abortion statute. The cloak of anonymity does not eviscerate the specter of a trial in which the privacy of the woman's abortion decision will be open to exacting public scrutiny. Nor does a pseudonym provide a mask to hide behind while testifying. …. Long experience as a Federal District Court Judge has taught me that in cases involving controversial and emotional public issues, the potential of a court-room appearance can be a very imposing deterrent to a law-suit. Particularly in a

> close-knit community, extensive press coverage combined with natural curiosity and a packed court-room will not long protect the anonymity that Justice Powell finds so effective. In my opinion, Justice Blackmun is correct in finding that the fear of publicity operates as a "genuine obstacle" to actions challenging abortion statutes by women who seek abortions.

Women's Medical Center of Providence, Inc. v. Roberts, 512 F. Supp. at fn. 8. Defendants' argument that Plaintiffs lack standing to assert the constitutional claims of their patients has no merit whatsoever.

2. There are No Ongoing State Proceedings Involving the Patients.

If non-parties to a pending state proceeding may independently assert their own constitutional rights in a separate federal action, then "the interests of these plaintiffs alone are sufficient to justify the court's consideration of the application for a preliminary injunction" and *Younger* concerns are not implicated. *New Jersey-Philadelphia Presbytery,* 654 F. 2d 868, 881 (3rd Cir. 1981); *Sullivan v. City of Pittsburgh,* 811 F.2d 171 (3rd Cir. 1987) *cert. denied*, 484 U.S. 849 (1987). Therefore, abstention in this case also is inappropriate based on this principle:

- It is undisputed that the patients were not party to any of the pending state court proceedings.
- Patients' constitutional interests in protecting their fundamental right to choose were never considered by the state courts.[4] *See supra* section IIB(1).
- The patients' and Plaintiffs interests in the outcome of this litigation differ substantially. While the patients' interest is in obtaining information about and accessing low-cost abortion services, Plaintiffs seek to operate a business that provides, *inter alia*, abortion services to

[4] Defendants claim that Plaintiffs represented patients' interests, relying upon a single assertion in paragraph 42 of their Counterclaim to the Township's Complaint in Equity to Enjoin Zoning Violation and in its Application for Review of Commonwealth Stay Order before the Pennsylvania Supreme Court. Defendants' Supplemental Memorandum at p. 5. As this Court has already determined, even though Associates may have raised civil rights concerns, they were never actually addressed. Moreover, this allegation in paragraph 42 of the Counterclaim refers to harm to the public interest if an injunction were to issue, and does not purport nor can it be construed to raise a claim on behalf of patients.

patients, and to utilize their leasehold as permitted by law. *See Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Com'n*, 685 F.2d 974, 981 (5th Cir. 1982) ("We recognize that the general rights of the Plaintiff women and doctors in making the abortion decision are legally distinct from any rights the Center may assert"); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education* 654 F.2d at 878 (distinguishing the rights of plaintiff students to learn from the rights of the state defendant to teach religious doctrine).

Accordingly, patients are legally entitled to bring their own federal court action to assert their constitutional rights. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d at 881.

Relying on the First Circuit's opinion in *Casa Marie, Inc., et. al. v. Superior Court of Puerto Rico for the District of Arecibo*, 988 F.2d 252 (1st Cir. 1993), Defendants argue that this Court should abstain because patients (1) are not named Plaintiffs in the federal action; (2) have not attempted to assert their federal rights independent of the named Plaintiffs; and (3) have interests that are significantly intertwined with those of the federal Plaintiffs. The very different circumstances of that case, however, do not justify abstention in the instant case. Although the elderly and handicapped resident plaintiffs of Casa Marie, Inc., were not parties to the ongoing state proceedings, several other residents had intervened in the state court proceedings to assert the same interests. *Casa Marie, Inc., et. al v. Superior Court of Puerto Rico for the District of Arecibo*, 988 F.2d at pp. 255, 265, 268. Thus, unlike this case, the new plaintiffs were bound by the state court judgment where their co-lessees had an opportunity to raise federal claims in ongoing state court proceedings. *Id*. at p. 268. Relying on *Collins v. County of Kendall*, 807 F. 2d 95 (7th Cir. 1986) (finding parties with common economic interests intertwined for the

purposes of *Younger*), the Court in *Casa Marie* also found the property interests of the federal and state court parties eventually intertwined, relying in part on the history of intervention by non-party residents of Casa Marie, Inc. *Id*. at 268-269.

In this case, it is true that patients are not named plaintiffs. While the plaintiffs in *New Jersey-Philadelphia Presbytery* were named, this distinction does not bear on abstention. Unlike the plaintiff students in *New Jersey-Philadelphia Presbytery,* abortion patients face grave impediments (well-recognized in abortion jurisprudence) to direct participation in this lawsuit. Given the importance of this lawsuit to the patients' fundamental constitutional interests, it would be unreasonable to abstain from issuing a preliminary injunction because patients are not "named" plaintiffs when there is no authority to support such a severe result.

The patients did not attempt to intervene in state court proceedings,[5] nor were they required to intervene, even if they could have.[6]

> *Younger* has yet to be interpreted by the Supreme Court to require both abstention by a federal court and intervention by a potential private state litigant... More fundamentally, a rule that considers the possibility of permissive state intervention dispositive of identity for *Younger* purposes ignores the most significant issue that a federal court asked to abstain must address, namely, whether 'the party to the federal case may fully litigate his claim before the state court.'

[5] Unlike the intervenors in *Casa Marie*, there is no reason patients would have even known about the state court litigation.

[6] Certainly, if the zoning hearing board and the state courts were unwilling to consider the Plaintiffs' constitutional claims, it is unreasonable to expect that they would have been willing to hear them on behalf of patient intervenors. Moreover, it is doubtful that patients would have been permitted to intervene without a specific property interest in the immediate vicinity of Associates' office. *See* Pa. R. Civ. Proc. 2327; *Larock v. Sugarloaf Tp. Zoning Hearing Bd.,* 740 A.2d 308 (Pa. Cmwlth. 1999); *Acorn Development Corp. v. Zoning Hearing Bd. of Upper Merion Tp.*, 523 A.2d 436 (Pa. Cmwlth. 1987). The primarily young and low income women who are Associates' patients are unlikely to be property owners. Transcript of October 3, 2003, at p. 30 line 23 - p. 31 line 22.

Sullivan v. City of Pittsburgh, 811 F.2d at 178 (citation omitted). Patients and Plaintiffs do not share economic or property interests, and are thus, not interrelated.[7] Accordingly, as in *New Jersey-Philadelphia Presbytery*, the interests of the patients are sufficient to justify the court's consideration of the application for a preliminary injunction.

C. EVEN IF ALL THREE ELEMENTS OF *YOUNGER* ARE SATISFIED, ABSTENTION IS INAPPROPRIATE BECAUSE THE STATE COURT PROCEEDINGS WERE INITIATED BY THE TOWNSHIP IN BAD FAITH AND BECAUSE EXTRAORDINARY CIRCUMSTANCES EXIST.

Even if all three elements of *Younger* abstention are satisfied, abstention is inappropriate if "the state proceedings are undertaken in bad faith, or if there are other extraordinary circumstances." *Gwynedd Properties Inc. v. Lower Gwynedd Township*, 970 F.2d at 1200. Abstention is also inappropriate in this case because the state court injunction proceedings were initiated in bad faith and because there are extraordinary circumstances that outweigh the interest in the comity of the courts.

1. The State Court Injunction Proceedings Were Initiated in Bad Faith and to Harass the Plaintiffs.

Younger abstention is clearly improper where state action is motivated by a suspect classification or is taken in retaliation for the exercise of constitutional rights and where multiple prosecutions indicate harassing conduct. *Grimm v. Borough of Norristown,* 226 F. Supp. 2d 606 (E.D. Pa. 2002). There is a wealth of evidence that the Township initiated unprecedented and numerous actions against Plaintiffs, driven by the personal animus of Dan Rooney ("Rooney"), a

[7] At footnote 5 of their Supplemental Memorandum, Defendants claim that Plaintiffs may not "argue that their interests are sufficiently intertwined to warrant pursuit of patients' rights in a representative capacity and then detach themselves from patients in a Younger analysis." This is wrong. The standards for the two are quite different. For *Younger* purposes, interrelatedness is limited to consideration of "the "identity of economic activities and interests." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d at 878. This differs significantly from the "effective proponent" standard for derivative representation discussed above. *See supra,* Section IIB(1).

member of the Board of Supervisors ("Board") and an avowed anti-abortion activist, acting in concert with third parties affiliated with a local anti-abortion organization. The evidence that the Township took unprecedented actions against Associates within hours of receiving strident, anti-abortion e-mails from Rooney undercuts the credibility of the Township witnesses that Rooney was simply one of five Supervisors whose missives did not affect their actions. The Township's enforcement actions were taken to harass and retaliate against Plaintiffs for providing constitutionally-protected abortion services within the Township.[8]

- In the morning of August 15, 2001, the Township made a preliminary determination that Associates' use was a permitted use. Exhibit P-1; Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 16 line 12- p. 18 line 18. On the afternoon of August 15, 2001, Township representatives received two e-mails from Rooney unequivocally expressing his anti-abortion animus and "disdain" for the presence of Associates in the Township, and demanding to know how Associates was operating in the Township without the Board's knowledge. Exhibits P-1, P-7, P-8. As a direct result of these e-mails:
    1. The Township Zoning Officer, Mark Zadroga ("Zadroga") concluded that Associates was not a permitted use *because it performs abortions*. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 61 line 9 - p. 62 line 10. At the time

[8] In this federal matter, the Plaintiffs do not ask the Court to determine whether the Township's zoning determination with regard to Associates was proper. That issue was pending before the state appellate court which affirmed the lower court on October 15, 2003. Rather, Plaintiffs ask this Court to consider whether the Township's *selective* enforcement actions were constitutional, and whether the Defendants' treatment of Plaintiffs was motivated by anti-abortion animus. Accordingly, whether Associates' use was properly characterized as a "clinic" for zoning purposes by the Township is irrelevant and Dr. Henshaw's use of term "clinic" in his profession, does not bear on the questions at issue here. Transcript of October 1, 2003 at p. 155 lines 7-13. The evidence is undisputed that there are many clinics in the Township presently violating the Zoning Code, but except for Associates, all others have been allowed to do so with impunity. Transcript of October 1, 2003, p. 115 line 2- p. 130 line 8; transcript of October 2, 2003, p. 118 lines 6-14; p. 130 lines 11-14; Exhibits P-24 – P-29.

he made this decision, Mr. Zadroga knew nothing about Associates other than the fact that it performed abortions. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 72 lines 10-13.

2. Zadroga reviewed this decision with the Township Manager, who had held that position for more than 20 years, and knew or should have known that the Zoning Code had not been enforced against other clinics in the Township, such as Kremer Eye Center, Lasik Plus, Physicians Body Contouring Center, Inc., Children's Hospital of Philadelphia, and Fugo Eye Institute. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 115 line 2- p. 130 line 8; Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 209 lines 9- 17; p. 213 lines 18-23; p. 222 lines 11-24; Exhibits P-24 – P-29.

3. Contrary to the Township's usual practice of allowing a business to apply for a use and occupancy permit before evaluating the proposed use (even after a business has been operating without a use and occupancy permit), on August 16, 2001, the Township issued an immediate cease and desist order to Associates, but issued friendly reminder letters to other tenants (including a cosmetic surgeon's office) of the same building not known to provide abortions and who had not applied for Use and Occupancy permits. Exhibits P-1, P-9, P-11, Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 74 line 15- p. 76 line 14; Amended Complaint and Answer at ¶¶36, 37.

- On June 5, 2002, the Zoning Hearing Board affirmed the Township's decision to issue a cease and desist order. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 86 lines 11-17. Rooney immediately joined in a "prayer circle" with anti-abortion activists *in the*

Township building. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 67 line 12- p. 68 line 2. Five days later, on June 10, 2002, Rooney sent an e-mail to various Township officials stating that he would "like nothing better than locks on their doors today!!" and requesting an update "on the closing of this clinic." Exhibit P-17. As a direct result of this e-mail, the Township took several immediate steps:

1. On June 10, 2002, the Township explained to Rooney that while the normal procedure would be to issue citations, the Board of Supervisors could authorize the Solicitor to go to court to get an injunction to force Associates' closing. Exhibit P-17. The Township also explicitly acknowledged the "objective of closing the facility." *Id.*

2. On June 11, 2002, without a meeting or a public vote of the Board of Supervisors as required by Pennsylvania law, 65 Pa. C. S. §702 *et. seq*., the Township filed a Complaint in the Montgomery County Court of Common Pleas seeking an injunction to force the closing of Associates. Amended Complaint at ¶ 61, Defendants' Answer to Third Amended Complaint ("Answer") at ¶61; Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 74 line 24- p.77 line 22.

3. In an obvious, heavy-handed attempt to intimidate Associates, on June 11, 2002, the Township Zoning Officer, accompanied by Detective Sergeant Jeff McCabe, hand-delivered an Enforcement Notice to Associates. Exhibits P-17- P-19, Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 99 line 9- p. 101 line 21. This was the only time the Zoning Officer ever hand-delivered an enforcement notice or showed up at a business

with a police officer. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 99 line 14- p. 100 line 1. The Township intentionally omitted the notice of right to appeal in the Enforcement Notice required by the Pennsylvania Municipalities Planning Code ("MPC"), § 616.1(c), 53 P.S. §10616.1(c). Exhibit P-18, Plaintiffs' Rooker-Feldman Brief at Exhibit 7, p. 49 lines 13-22.

4. Beginning the following day, the Township began to issue criminal citations to Associates on a daily basis. Exhibit P-48, Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 104 line 20- p. 105 line 1. The Township issued these daily citations in spite of the fact that under the MPC, enforcement proceedings are stayed pending appeal, and that all enforcement proceedings are civil in nature. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 107 line 6 – p. 108 line 2; MPC §§ 616.1(c), 617.1, 915.1, 53 P.S. §§10616.1(c), 10617.1, 10915.1. The Township Zoning Officer never issued daily criminal citations to anyone except Associates. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 106 lines 6-13.

- After the Montgomery County Court of Common Pleas issued a stay against the criminal proceedings in November, 2002, the Township acknowledged it had no legal basis for seeking criminal enforcement of zoning violations against Associates. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 113, lines 9-12; Amended Complaint and Answer at ¶83. Driven by the anti-abortion animus of Rooney, the Township immediately filed a civil complaint against Associates seeking a monetary judgment

retroactive to June 11, 2002, notwithstanding that the MPC provides that such fines cannot be imposed until the district justice determines that there has been a violation, 53 P.S. §10617.2(a). Exhibit P-49, page 2. The Township filed this Complaint as a result of an *ex parte* communication between the District Justice and the Township in which the District Justice advised the Township to seek judgment retroactive to June 11, 2002. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 111 line 10- p. 113 line 8. The Township had never filed a civil complaint for alleged zoning code violations. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 112 line 19- p. 113 line 12.

- On January 10, 2003, the Township filed a complaint in equity with a petition for a preliminary injunction in the Montgomery County Court of Common Pleas. Amended Complaint and Answer at ¶92. The Township filed this complaint without a public vote or meeting of the Board contrary to the Pennsylvania Sunshine Act ("Sunshine Act"). Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 74 line 24- p.77 line 22; 65 Pa. C. S. §702 *et. seq*. The injunction was granted on March 11, 2003, and Associates was forced to close its doors. Plaintiffs' Plaintiffs' Rooker-Feldman Brief at Exhibit 16. This was the only time in at least 20 years that the Township ever attempted to close a business through injunctive relief. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 110 lines 12-16, p. 120 lines 14-17.
- Notwithstanding that any official action of the Board must take place at an open meeting and that all votes must be recorded, the Township has produced no evidence to show that the Board ever voted at an open meeting to initiate any of the numerous proceedings in

this case, including the lawsuit which resulted in the forced closure of Associates.[9] The Sunshine Act, 65 Pa. C. S. §702 *et. seq;* transcript of October 3, 2003, Plaintiff's Exhibit C at p. 74 line 24- p.77 line 22. (While the Board did not vote or deliberate to initiate state court lawsuits against Associates at an open meeting, the Board did find it necessary to deliberate and vote on a proposed settlement in defense of the instant lawsuit at an open meeting. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 82 lines 6-14.)

- Even though the Township admits that there are businesses within the Township that are appropriately characterized as clinics but are not lawfully situated under its zoning code, the Township has taken no action to enforce its zoning code against such businesses. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 115 line 2- p. 130 line 8; transcript of October 2, 2003, Plaintiff's Exhibit B at p. 118 lines 6-14; p. 130 lines 11-14.
- Although the Township's Zoning Officer, Mark Zadroga, assumed his position in 2001 and, therefore, did not issue U&O permits to other "clinics," his superiors, John Waters, Director of Safety and Codes Enforcement, and Ronald Wagenmann, Township Manager, have held their current positions with the Township for many years (14 years and 21 years, respectively) and knew or should have known that the Township was selectively enforcing the Zoning Code against Associates solely because Associates provides abortions. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 209 lines 9, p. 118 lines 12-13, 19-24, p. 126 line 11- p. 128 line 16.

[9] The Sunshine Act also provides that executive sessions may not be used as a subterfuge to defeat the purpose of open meetings, and that business transacted at a meeting that violates the Sunshine Act is void and may be enjoined. 65 Pa. C.S. §§708(c), 713.

These unprecedented actions and deviations from the Township's normal procedures, initiated in response to Rooney's many powerful expressions of his personal animus towards abortion, provide overwhelming evidence of the Township's bad faith initiation of state court proceedings and its purposeful harassment of the Plaintiffs because they lawfully provided constitutionally protected abortion services.

2. Abstention is Inappropriate Due to the Presence of Extraordinary Circumstances.

The health risks associated with the closure of Associates create extraordinary circumstances that preclude abstention. *See Sullivan v. City of Pittsburgh,* 811 F.2d at 180 (finding possible harm to recovering alcoholic residents of a treatment facility threatened with closure constitute extraordinary circumstances precluding abstention under *Younger).* These risks are derived from delay in obtaining an abortion, which results in increased risk of medical complications and mortality. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 152 lines 13-20.

- When an abortion facility stops providing services, some women delay obtaining abortions. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 152 line 24- p. 153 line 2.
- Increased distance to an abortion facility, including crossing county lines, causes some pregnant women to delay getting an abortion. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 143, line 15 - p. 148, line 20.
    - Associates is readily accessible by public transportation. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 140 lines 20-22; Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 18 lines 12-17.

- For patients living in Upper Merion Township, there is no other low-cost abortion provider in the county and access to abortion providers in Philadelphia requires significantly increased travel time and distance. Exhibits P-42; P-51; Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 150 lines 14-20; Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 92 lines 19-25.

- Even small increases in the cost of an abortion procedure may cause a pregnant woman to delay abortion. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 143, line 15 – p. 145 line 2, p. 149, line 5 – p. 150 line 2.
  - When an abortion provider stops providing services, the average cost of abortion increases. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 151, line 12- p. 152 line 4.
  - Associates is the only low cost abortion provider in Montgomery County who advertises. Exhibits P-40, P-41.
  - Of all of the abortion providers who advertise in the Norristown/King of Prussia and Philadelphia telephone books, Associates' charge to complete a surgical abortion (including ultrasound) was the lowest available for patients providing proof of medical assistance, and the second lowest for patients without such proof. Exhibit P-40, P-43, Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 32 line 18 - p. 33 line 21, p. 90 line 9- p. 94 line 19.

- The Supreme Court has recognized that, where patients are denied their right of access to abortion services, serious harm may result:

> 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 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 v. Wade, 410 U.S. 113, 153 (1973).

- Women who carry their pregnancies to term face greater health risks than those who abort their children. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 152 lines 13-20.
- "The closing of Associates makes it impossible for a certain number of women -- and I think the estimate of 130 a year is probably reasonable -- makes it impossible for that number of women to have abortions who would otherwise have been able to get services at Associates." Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 153 lines 10-14. (While the Court may or may not choose to accept Dr. Henshaw's estimate of the number of women who might be affected, the colloquy between the Court and Dr. Henshaw clearly indicated a recognition that *some* number of women would be affected. Transcript of October 1, 2003, Plaintiff's Exhibit A at p. 194 line 16- 195 line 17. Whatever the number, to those women, the harm is both serious and irreparable.)
- Untreated sexually transmitted diseases ("STDs") can cause serious health problems including cancer, infertility and death. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 23 lines 6-9.
- Undiagnosed and untreated STDs can be spread to the public and can increase exponentially the number of people facing serious health problems. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 18 lines 22-23, p. 21 line 6- p. 22 line 8.
- Prior to being forced to closed, Associates provided testing and treatment for some STDs and was ready to start providing free testing and treatment for additional STDs as party to

a contract with the Commonwealth of Pennsylvania. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 21 line 7 – p. 23 line 25; Exhibit P-39.

Abstention is inappropriate in the face of such extraordinary circumstances.

III. PLAINTIFFS AND THEIR CURRENT AND PROSPECTIVE PATIENTS WILL SUFFER IRREPARABLE HARM *PENDENTE LITE* UNLESS A PRELIMINARY INJUNCTION IS GRANTED.

Plaintiffs and their current and prospective patients will be irreparably harmed if a preliminary injunction is not granted. Where the injury cannot be compensated by monetary damages either because damages are not a reasonable substitute or because they cannot be ascertained, courts will find the harm to be irreparable. *A.L.K. Corp. v. Columbia Pictures Industries, Inc*., 440 F.2d 761 (3rd Cir. 1971).

a. Without an Injunction, Current and Prospective Patients Whose Access to Abortion and STD Testing and Treatment Will Suffer Irreparable Harm *Pendente Lite*.

Without a preliminary injunction restoring Plaintiffs to the *status quo ante,* patients will suffer irreparable harm as detailed in section IIC(2) *supra*:

- Psychological and physical harm to patients who carry unwanted pregnancies to term. *See supra* section IIC(2); *Roe v. Wade*, 410 U.S. at 153.
- Increased health risks of complications and mortality resulting from delayed access to abortion services. *See supra* section IIC(2);
- Risk of infertility, cancer, death and other physical harm resulting from lack of access to STD testing and treatment. *See supra* section IIC(2).

These harms cannot be compensated by monetary damages, even if they could be ascertained. *See Sullivan v. City of Pittsburgh*, 811 F.2d at 183 (finding same threat to health that created

extraordinary circumstances under *Younger* also demonstrated irreparable harm sufficient to grant injunctive relief).

b. Plaintiffs Will Suffer Irreparable Harm *Pendente Lite* Unless a Preliminary Injunction is Granted.

Associates and Dr. Brigham will also suffer irreparable harm unless a preliminary injunction is granted:

- While Associates provided services for nearly two years, it has provided no services to any patients since March 13, 2003 and lost revenue that cannot be ascertained. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 150 lines 10-15. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996)(upholding finding of irreparable harm when loss of revenue was incalculable).
- While in operation, Associates maintained ongoing relationships with at least some of its patients. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 32 lines 1-3. "Undoubtedly, [Associates] would lose some patients and there is no way of knowing how many. Absent speculation and conjecture, [Associates'] business loss cannot be reasonably measured." *Carlini v. Highmark*, 756 A.2d 1182 (Pa. Cmwlth. 2000); s*ee West Penn Specialty MSO, Inc. v. Nolan*, 737 A.2d 295, 298-299 (Pa. Super. 1999); *Quigley Corp. v. Gumtech Intern, Inc.*, 2000 W.L. 424269 (E.D. Pa. 2000). Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 151 lines 1-8.

- The harm to Associates' general goodwill and reputation stemming from its inability to provide its advertised services is incalculable, and, thus, irreparable.[10] For example, damage to Associates' goodwill occurs when, like the customers in *Ross-Simons*, patients are disappointed to learn that Associates does not provide the services advertised in the telephone directories and the internet. Exhibits P-40, P-41. "By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d at 20; *Dominion Bankshares Corporation v. Devon Holding Co.,* 690 F. Supp. 338, 348 (E.D. Pa. 1988), *citing Chips 'N Twigs, Inc.*, *v. Chip-Chip, Ltd.,* 414 F. Supp 1003, 1019 (E.D. Pa. 1976).
- With 11 years remaining on its lease, Associates has a significant property interest in its office in King of Prussia. Exhibit P-46, Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 139 lines 6-15. The location of this office directly across from the King of Prussia Mall is unique because it is easy to find, readily accessible via public transportation and is convenient to major highways. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 140 line 17, p. 141 line 10. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 18 lines 6-17, Exhibit P-42. It also provides a professional, safe environment for Associates and its patients. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 141 lines 13-22. Forfeiture of these benefits cannot be measured or compensated in dollars. Neither can the damage associated with relocation to another office in King of Prussia be measured in monetary terms, even if relocation

[10] The entire body of law enforcing restrictive covenants in the employment context is premised on the idea that a "company's clientele is an asset of value which has been acquired by virtue of effort and expenditures over a period of time, and which should be protected as a form of property." Black, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 653 (1960).

were feasible, which the unchallenged testimony has shown that it is not. Transcript of October 3, 2003, Plaintiff's Exhibit C at p. 11 lines 3-6. Thus, deprivation of this unique property interest constitutes irreparable harm. *See Varsames v. Palazzolo*, 96 F. Supp. 361, 367 (S.D.N.Y. 2000); *J.C. Penney Company, Inc. v. Giant Eagle, Inc.*, 813 F. Supp. 360 (W.D. Pa., 1992); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989).

The fact that Dr. Brigham also owns other medical practices (none of which are in close proximity to Associates) has no bearing on Plaintiffs' entitlement to preliminary injunctive relief, because the losses to Associates cannot be compensated with monetary damages. Exhibit D-16. Transcript of October 2, 2003, Plaintiff's Exhibit B at p. 194 lines 5-11. *See e.g. K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d at 915 (granting national chain preliminary injunctive relief for harm to one store); *J.C. Penney Company, Inc. v. Giant Eagle, Inc.*, 813 F. Supp. at 360 (same).

III. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that they be granted the requested preliminary injunction.

Respectfully submitted:

Dated: _____

_____

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CERTIFICATE OF SERVICE

I, Mandy C. Rosenblum, Esquire, hereby certify that I caused a true and correct copy of the foregoing document to be served by U.S. Mail to the following persons on the date indicated below:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATES IN OBSTETRICS & GYNECOLOGY, et. al
Plaintiffs,
v.

CIVIL ACTION NO. 03-CV-2313

JURY TRIAL DEMANDED

UPPER MERION TOWNSHIP, et al.
Defendants

ADMISSIONS OF DEFENDANTS
TO ALLEGATIONS IN
PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs, by and through the undersigned counsel, submit the admissions of Defendants in their Answer to certain allegations in Plaintiffs' Third Amended Complaint, as follows:

1. Plaintiff, Associates in Obstetrics & Gynecology ("Associates"), is a corporation organized under the laws of the Commonwealth of Pennsylvania with a place of business located at 677 West DeKalb Pike, Suite 301, King of Prussia, Montgomery County, Pennsylvania 19406 (the "Subject Premises"). [Answer to Plaintiffs' Third Amended Complaint ("Answer"), ¶3].

2. Defendant, Upper Merion Township, is a municipal corporation and body politic, organized under the 2nd Class Township Code, Act of May 1, 1933, P.L. 103, No. 69, as amended by the Act of November 9, 1995, P.L. 350, No. 60, see 53 P.S. §65101-68701, with offices located at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. [Answer, ¶6].

3. Defendant Board of Supervisors is the governing body of the Township of Upper Merion, composed of the individually-named defendant supervisors. [Answer, ¶7].

4. Defendants Barbara S. Frailey, Dan Rooney, Fiorindo A. Vagnozzi, Ralph P. Volpe and Anthony J. Volpi are members of the Board of Supervisors and adults residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. Each is sued in his official and individual capacity. [Answer, ¶8].

5. Defendant Zoning Hearing Board is the entity charged with conducting hearings and appeals regarding, *inter alia,* zoning enforcement determinations by the Township. Plaintiff is informed and believes and thereupon alleges that the Zoning Hearing Board and the Board of Supervisors are separate entities. [Answer, ¶9].

6. Defendants Edward McBride, Michael Fiore, and William Whitmore are members of the Zoning Hearing Board of Upper Merion Township and adults residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. Each is sued in his official capacity. [Answer, ¶10].

7. Defendant Ronald G. Wagenmann, is the Manager of Upper Merion Township and is an adult residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. He is sued in his official and individual capacity. [Answer, ¶11].

8. Defendant Mark A. Zadroga, is the Township Zoning Officer and is an adult residing in this judicial district with a place of business at 175 West Valley Forge

Road, King of Prussia, Montgomery County, Pennsylvania 19406. He is sued in his official and individual capacity. [Answer, ¶12].

9. In April 2001, Associates began operating at 677 West DeKalb Pike, Suite 301, King of Prussia, Montgomery County, Pennsylvania 19406. [Answer, ¶14].

10. Admitted that the named sexually transmitted diseases are serious. [Answer, ¶20].

11. Admitted that Defendants first became aware of anti-abortion protestors at Plaintiffs' business in August 2001. [Answer, ¶23].

12. The Code contains no definition of the terms "clinic" or "professional office." [Answer, ¶31].

13. Admitted that on August 16, 2001 the Township Zoning Officer issued the cease and desist order referenced in the complaint. [Answer, ¶33].

14. Admitted that lack of a use and occupancy permit, by itself, would not generally result in issuance of a cease and desist order. [Answer, ¶36].

15. Admitted that other tenants of 677 DeKalb Pike were told to apply for U&O permits. [Answer, ¶37].

16. Admitted that Plaintiff is registered as an abortion facility by the Commonwealth of Pennsylvania. [Answer, ¶40].

17. Associates appealed the cease and desist order to the Upper Merion Township Zoning Hearing Board. [Answer, ¶45].

18. Admitted that the Zoning Hearing Board hearings occurred over seven sessions. [Answer, ¶46].

19. Admitted that the Zoning Hearing Board upheld the Zoning Officer's decision on or around June 5, 2002. [Answer, ¶47].

20. Associates timely appealed the Zoning Hearing Board decision to the Montgomery County Court of Common Pleas, which affirmed the decision after argument, but without hearing. [Answer, ¶56].

21. Admitted that the Township issued an Enforcement Notice on June 11, 2002. [Answer, ¶57].

22. Admitted that the June 11, 2002 Enforcement Notice issued by the Township contained no notice of the right of appeal. [Answer, ¶60].

23. Admitted that the Township sought an injunction requiring Plaintiffs to cease operating as a clinic at 677 DeKalb Pike. [Answer, ¶61].

24. The Township's request for injunctive relief was denied by the Court of Common Pleas on July 24, 2002. [Answer, ¶62].

25. Admitted that Plaintiffs appealed the Enforcement Notice to the Zoning Hearing Board. [Answer, ¶64].

26. Six weeks after the filing of Associates' appeal to the Zoning Hearing Board, the Zoning Hearing Board heard the appeal. [Answer, ¶65].

27. Admitted that the Zoning Hearing Board upheld the Enforcement Notice. [Answer, ¶69].

28. Associates timely appealed the Zoning Hearing Board's decision to uphold the Enforcement Notice to the Court of Common Pleas, where the appeal is presently pending. [Answer, ¶70].

29. Admitted that the Township issued numerous citations to Plaintiffs. [Answer, ¶72].

30. Admitted that the citations were scheduled to be heard by the District Justice. [Answer, ¶73].

31. On October 18, 2002, the District Justice did not conduct trial on the above-described summary offenses, but rather announced he had made his determination after oral argument. [Answer, ¶74].

32. The District Justice thereafter issued a series of "District Justice Payment Orders" to Associates. A copy of one such orders is attached hereto as Exhibit "A." [Answer, ¶77].

33. Admitted that oral argument, and not a trial, occurred before the District Justice. [Answer, ¶80].

34. On November 18, 2002, Associates appealed the District Justice Judgment to the Court of Common Pleas and applied for a stay of that judgment. [Answer, ¶81].

35. Associates' application for stay was granted by the Court of Common Pleas. [Answer, ¶83].

36. The Township's civil enforcement action was heard by the District Justice on January 15, 2003. [Answer, ¶86].

37. Plaintiffs timely filed a Notice of Appeal from these judgments with the Montgomery County Court of Common Pleas, with petition for stay. (Civil Action No. 03-01767). [Answer, ¶89].

38. In response to Plaintiffs' appeal, the Township filed a Complaint seeking the imposition of civil fines against Associates and Dr. Brigham from the date of the District Justice January 2003 hearing, which is also currently pending. [Answer, ¶91].

39. On January 10, 2003, the Township filed a second complaint in equity with the Montgomery County Court of Common Pleas against Associates, again seeking the immediate closure of Associates' office. [Answer, ¶92].

40. In response, Associates filed an Answer, New Matter and Counterclaim in Civil Action No. 03-00544 raising, *inter alia*, its claim that the Township was engaged in selective enforcement of the Zoning Code against plaintiffs because of their provision of abortion services. [Answer, ¶93].

41. On March 11, 2003, the Court of Common Pleas issued a temporary injunction pursuant to which Associates was forced to cease operations. [Answer, ¶94].

42. Associates has appealed the issuance of the temporary injunction to the Commonwealth Court. [Answer, ¶97].

43. Associates' emergency application to stay enforcement of the order enjoining its operations was denied by the Commonwealth Court; on review, the Supreme Court of Pennsylvania declined to reverse the stay. [Answer, ¶98].

44. Admitted that Plaintiffs and their landlord are engaged in litigation with respect to the lease agreement between them. [Answer, ¶122].

Respectfully submitted:

_____

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I, Mandy C. Rosenblum, Esquire, hereby certify that I caused a true and correct copy of the foregoing document to be served by U.S. Mail to the following persons on the date indicated below:

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