

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

WHOLE WOMAN’S HEALTH; <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 14-CV-284-LY
DAVID LAKEY, M.D.; <i>et al.</i> ,	)	
	)	
Defendants.	)	

**PLAINTIFFS’ MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 65(b), Plaintiffs Nova Health Systems d/b/a Reproductive Services (“Reproductive Services”) and Pamela J. Richter, D.O. (collectively “movants”), by and through their undersigned attorneys, file this motion for a temporary restraining order to prevent Defendants from enforcing Section 2 of Texas House Bill No. 2 (the “Act”)<sup>1</sup>, codified at Tex. Health & Safety Code Ann. § 171.0031, and its implementing regulations, 25 Tex. Admin Code §§ 139.53(c), 139.56(a) (collectively, the “admitting privileges requirement”), against the licensed abortion facility operated by Reproductive Services in El Paso (the “El Paso clinic”) and Dr. Richter pending resolution of the motion for a preliminary injunction filed by movants and other Plaintiffs.<sup>2</sup> Due to threatened enforcement of the

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<sup>1</sup> This provision provides, in relevant part, that “[a] physician performing or inducing an abortion must . . . have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. § 171.0031.

<sup>2</sup> In support of this motion for a temporary restraining order, the movants are submitting the declaration of Gerri Laster dated April 14, 2014, and the declaration of Stephanie Toti dated April 14, 2014. In addition, the movants also rely on the declarations submitted in support of Plaintiffs’ amended motion for a preliminary injunction (Dkt. # 12).

admitting privileges requirement, the El Paso clinic had to cease providing abortion services on Friday afternoon, and will not be able to resume providing abortion services absent relief from the Court.

### **BACKGROUND**

On April 3, 2014, the movants and other Plaintiffs filed a motion for a preliminary injunction against certain applications of the admitting privileges requirement and requested a hearing.<sup>3</sup> Pls. Amended Mot. for a Preliminary Inj. (Dkt. # 12). Defendants' response is due today, *see* Local Rules CV-6 and CV-7(e)(2), and Plaintiffs' reply will be due on April 24, 2014, *see* Local Rules CV-6 and CV-7(f)(2). As a result of events subsequent to the filing of the motion for a preliminary injunction, the El Paso clinic had to cease providing abortion services on Friday afternoon, April 11, 2014.

The only physician who provides abortion services at the El Paso clinic is Dr. Richter. Laster 04-01-14 Decl. ¶ 10 (Dkt. # 12-4). On January 13, 2014, Dr. Richter was granted temporary admitting privileges at Foundation Surgical Hospital of El Paso ("Foundation Hospital"), located within 30 miles of the El Paso clinic. *Id.* ¶¶ 17, 21 & Ex. A. Those admitting privileges were effective for 120 days, through May 13, 2014. *Id.* ¶ 21 & Ex. A. Subsequently, Foundation Hospital declined to extend admitting privileges to Dr. Richter beyond May 13, 2014, and no other hospital within 30 miles of the El Paso clinic has been willing to extend admitting privileges to Dr. Richter. *Id.* ¶¶ 17-22.

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<sup>3</sup> Reproductive Services and Dr. Richter seek a preliminary injunction against application of the admitting privileges requirement to the El Paso clinic. Whole Woman's Health and Dr. Sherwood C. Lynn, Jr., seek a preliminary injunction against application of the admitting privileges requirement to the licensed abortion facility owned by Whole Woman's Health in McAllen (the "McAllen clinic"). Alternatively, each set of Plaintiffs seeks a preliminary injunction against application of the admitting privileges requirement to the performance of medical abortions at each of their respective clinics.

On April 3, 2014, after the motion for a preliminary injunction had been filed, Reproductive Services received in the mail a Statement of Deficiencies dated April 1, 2014, from the Texas Department of State Health Services (“DSHS”), alleging that the El Paso clinic was not in compliance with the admitting privileges requirement. Laster 04-14-14 Decl. ¶ 2 & Ex. A. The next day, Reproductive Services sent a response by facsimile and mail explaining that the El Paso clinic was in compliance with the admitting privileges requirement because Dr. Richter had admitting privileges at Foundation Hospital through May 13, 2014. *Id.* ¶ 3 & Ex. B. On April 11, 2014, Reproductive Services received in the mail another letter from DSHS stating the agency’s view that Dr. Richter’s temporary admitting privileges did not satisfy the admitting privileges requirement. *Id.* ¶ 4 & Ex. C. The letter also stated: “The consequences of noncompliance with this law are serious for the facility and physician. Enforcement action against a facility found to have violated Health and Safety Code Chapter 171 includes revocation of the facility license. Physicians who violate this law will expose themselves to criminal liability.” *Id.*

Subsequently, one of Reproductive Services’ attorneys contacted Foundation Hospital to confirm that Dr. Richter’s temporary admitting privileges remain in effect. In response, a representative of Foundation Hospital indicated in a voicemail message that the hospital would no longer honor those admitting privileges. Toti Decl. ¶¶ 2-3. Other physicians providing abortion services in Texas have recently had their admitting privileges revoked in response to pressure from abortion opponents following enactment of the admitting privileges requirement. *Id.* ¶¶ 5-6 & Ex. A.

In light of these events, absent relief from the Court, Reproductive Services and Dr. Richter cannot continue to provide abortion services at the El Paso clinic without risking

substantial penalties. They have canceled appointments with seven patients who had been scheduled to receive abortion services today. Laster 04-14-14 Decl. ¶ 5. They have 27 additional patients scheduled through April 23, 2014, including 13 scheduled for tomorrow. *Id.* ¶ 6. In addition, since Friday, they have received calls from four patients seeking to make appointments for abortion care; they have not scheduled appointments for these patients. *Id.* ¶ 7. Without the ability to provide abortion services, Reproductive Services will not be able to sustain the El Paso clinic indefinitely, and it will be forced to close. Laster 04-01-14 Decl. ¶¶ 27-28 (Dkt. # 12-4).

The issuance of a temporary restraining order will not pose a threat to the health or welfare of the public. Dr. Richter can safely provide abortion services at the El Paso clinic without having admitting privileges at a local hospital, as she has done for over a decade. She is a highly qualified and experienced physician. In addition to her work at the El Paso clinic, she is also employed by the State of Texas; she serves as a staff physician for the State-supported living center (“State Center”) in El Paso operated by the Texas Department of Aging and Disability Services (“DADS”). Laster 04-01-14 Decl. ¶ 11 (Dkt. # 12-4). There, she provides general medical care and gynecological services to people with intellectual and developmental disabilities who are medically fragile or have behavioral problems. *Id.* ¶ 11. During the past ten years, Dr. Richter has performed over 17,000 abortions at the El Paso clinic, and not a single patient required transfer to a hospital.<sup>4</sup> *Id.* ¶ 25. From 1990-2001, Dr. Richter operated a private family medicine practice in El Paso. *Id.* ¶ 14. During that time, she maintained admitting

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<sup>4</sup> Nevertheless, the El Paso clinic has a protocol in place for responding to a medical emergency that requires patient transport to a nearby hospital. Laster 04-01-14 Decl. ¶ 29 (Dkt. # 12-4). The protocol is aimed at protecting patient health and maintaining continuity of care. *Id.* The El Paso clinic also ensures that Dr. Richter maintains an agreement with a backup physician who has admitting privileges at a local hospital. *Id.* ¶ 30.

privileges at a local hospital. *Id.* After she closed her private practice, she was no longer able to meet the hospital's minimum patient admission requirement, and her admitting privileges were not renewed. *Id.*

Apart from the El Paso clinic, there is only one other licensed abortion facility west of San Antonio, and it does not provide medical abortion services. Laster 04-14-14 Decl. ¶ 8. Women who are unable to get an appointment with this clinic, and those seeking medical abortions, would be forced to travel out-of-state or to San Antonio, which is more than 550 miles from El Paso. *Id.* Many women who seek abortion services at the El Paso clinic are poor and lack access to reliable transportation. *Id.* ¶¶ 32-35. For them, having to travel a distance of over 1,100 miles round-trip would be a substantial obstacle. *See* Appx. A to Mem. of Law in Supp. of Pls.' Amended Mot. for a Preliminary Inj. ("PI Mem.") at 12-13 (Dkt. # 15-1); *cf.* Carreon Decl. ¶¶ 6-12 (Dkt. # 12-3); Felix Decl. ¶¶ 30-32 (Dkt. # 12-7). The majority of patients at the El Paso clinic seek medical abortion services. Laster 04-14-14 Decl. ¶ 9.

Although abortion is very safe throughout pregnancy, the risks of experiencing an abortion-related complication increase with gestational age. Fine Decl. ¶ 33 (Dkt. # 12-5); Raymond Decl. ¶ 44 (Dkt. # 12-6). As a result, women who are delayed in accessing abortion services are subject to greater health risks than women who are not delayed. Fine Decl. ¶ 33 (Dkt. # 12-5); Raymond Decl. ¶ 44 (Dkt. # 12-6). Further, women who are unable to obtain abortions must instead carry their pregnancies to term and give birth. Fine Decl. ¶ 34 (Dkt. # 12-5); Raymond Decl. ¶ 45 (Dkt. # 12-6). These women are also subject to increased health risks because the risk of death from childbirth is 14 times higher than the risk of death from abortion. Fine Decl. ¶ 34 (Dkt. # 12-5); Raymond Decl. ¶ 45 (Dkt. # 12-6).

Additionally, some women who cannot access legal abortion services will instead attempt self-induction of abortion. *See* Raymond Decl. ¶ 46 (Dkt. # 12-6); Hagstrom Miller Decl. ¶ 24 (Dkt. # 12-1); Carreon Decl. ¶¶ 15-16, 18 (Dkt. # 12-3); Felix Decl ¶ 33 (Dkt. # 12-7); Laster 04-01-14 Decl. ¶¶ 33, 35 (Dkt. # 12-4); *see generally McCormack v. Hiedman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (concerning a pregnant woman who attempted abortion by ingesting drugs purchased over the internet because she could not access professional abortion services); *In re J.M.S.*, 280 P.3d 410, 411 (Utah 2011) (concerning a pregnant woman who attempted abortion by soliciting a stranger to punch her in the abdomen because she could not access professional abortion services); *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. App. 1998) (concerning a pregnant woman who attempted abortion by shooting herself in the abdomen with a handgun because she could not access professional abortion services); *State v. Ashley*, 701 So.2d 338, 339 (Fla. 1997) (same).

Since the Act forced the closure of all of the licensed abortion facilities in the Rio Grande Valley, there has been a significant increase in the number of women there attempting self-abortion. Hagstrom Miller Decl. ¶ 24 (Dkt. # 12-1); Carreon Decl. ¶ 15 (Dkt. # 12-3). These women used a variety of methods, including herbal teas, douches, physical trauma to the abdomen, and medications purchased on the black market. Hagstrom Miller Decl. ¶ 24 (Dkt. # 12-1); Carreon Decl. ¶¶ 15-16 (Dkt. # 12-3). Given the similarities in the demographics of West Texas and the Rio Grande Valley, *see* PI Mem. at 8, and the proximity of West Texas to Mexico where misoprostol, an abortifacient medication, is widely available over-the-counter, *see* Laster 04-01-14 Decl. ¶¶ 34 (Dkt. # 12-4), it is reasonable to expect a similar increase in attempted self-abortion among women in West Texas if the El Paso clinic closes.

#### **LEGAL AUTHORITIES SUPPORTING THE MOTION**

The purpose of a temporary restraining order is to preserve the *status quo* until the Court is able to hold a preliminary injunction hearing. *See Rio Bravo Produce, Ltd. v. Superior Tomato-Avocado, Ltd., Inc.*, No. SA-11-CA-1126-XR, 2011 WL 6938450, \*2 (W.D. Tex. Dec. 30, 2011) (citing *Granny Goose Foods, Inc., v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974)). A temporary restraining order may be granted on an *ex parte* basis if (1) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. *Id.* (citing Fed. R. Civ. P. 65(b)).

Here, the declarations of Gerri Laster and Stephanie Toti demonstrate that movants and their patients will suffer immediate and irreparable harm if a temporary restraining order is not granted because the El Paso clinic will be unable to provide abortion services. It will be at least another week before Plaintiffs' motion for a preliminary injunction is fully briefed, and the Court will likely require additional time to hold a hearing on that motion. Movants will have to cancel 13 appointments with patients who are scheduled to have an abortion at the El Paso clinic tomorrow, and 14 additional appointments that are scheduled through April 23, 2014. *See supra* at 3.

For the reasons set forth in the memorandum of law in support of Plaintiffs' motion for a preliminary injunction, the deprivation of constitutional rights caused by application of the admitting privileges requirement to the El Paso clinic constitutes irreparable harm as a matter of law. *See* PI Mem. at 9 (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)); *see also Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013) ("The State has plainly informed the Clinic that it will be closed pursuant to a

statute that appears to fail the undue-burden test. Considering this, and the other articulated and unrebutted harms, the Court concludes that the irreparable injuries alleged are sufficiently imminent to justify preliminary injunctive relief at this time.”) In addition, the destruction of movants’ medical practice that would occur if the El Paso clinic cannot continue providing abortion services, *see supra* at 4, constitutes irreparable injury. *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (explaining that irreparable injury exists “where the potential economic loss is so great as to threaten the existence of the movant’s business” and collecting cases). Furthermore, the increased health risks that patients will face as a result of the cancelation of their appointments at the El Paso clinic also constitute irreparable injury. *See supra* at 5-6.

The declaration of Stephanie Toti, submitted herewith, certifies that counsel for Defendants Lakey and Robinson have entered appearances in this action and will receive notice of this motion via the CM/ECF system. Toti Decl. ¶ 10. Further, Defendant Esparza, the District Attorney for El Paso County, has been sent a copy of this motion and the supporting papers via email and overnight mail. *Id.* ¶ 11. None of the remaining Defendants has jurisdiction over the El Paso clinic. *Id.* ¶ 12.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully ask the Court to enter a temporary restraining order, without bond, restraining Defendants Lakey, Robinson, and Esparza, as well as their employees, agents, and successors in office from enforcing the admitting privileges requirement:

- a. as applied to the El Paso clinic and Dr. Richter; and/or
- b. as applied to the provision of medical abortion at the El Paso clinic;

and enter such other and further relief as the Court deems just, proper, and equitable.

Dated: April 14, 2014

Respectfully submitted,

/s/ Jan Soifer

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### **CERTIFICATE OF SERVICE**

I hereby certify that on April 14, 2014, I served the foregoing via the CM/ECF system.

/s/ Jan Soifer

Jan Soifer