IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al. Plaintiffs, v. PETER LYSKOWSKI, in his official capacity as Director of the Missouri Department of Health and Senior Services, et al. Defendants.	)	Case No. 2:16-cv-04313-HFS

PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the Court's February 14, 2017 Scheduling Order, ECF No. 51, and in response to State Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, ("Defs.' Suppl. Br.") ECF No. 65, Plaintiffs submit these Supplemental Suggestions in Further Support of Motion for Preliminary Injunction.

The information Plaintiffs RHS and Comprehensive Health have produced in discovery regarding post-abortion complications and anticipated adverse events experienced by their patients underscores that abortion is extremely safe with a very low rate of complications, particularly serious complications. The State Defendants argue that the information Plaintiffs have produced shows that there are "significant health risks" from abortion, but the information produced in discovery reflects that over the five-year period from 2012–2016, Plaintiff RHS had an abortion complication rate of only 0.18%, and a rate of adverse events of 0.72%. Even combining adverse events and complications, the discovery responses reflect an overall rate of a

patient experiencing one of these outcomes of 0.91%. Ex. 1 to Defs.' Suppl. Br.[1] at RHS0001–5. Comprehensive Health's Columbia health center only provided medication abortions during two five-month time periods from 2012–2016 due to the Restrictions, Decl. of Laura McQuade in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 19–22; Pl. Comprehensive Health of Planned Parenthood Great Plains' Objections and Responses to Def. Hawley's Prelim.-Inj.-Related Discovery Requests at 5–6, attached hereto as Ex. A, and reported only one complication and five adverse events out of 219 abortions, Ex. 2 to Defs.' Suppl. Br.[2] at CompHealth000001–2.[3] Defendants' quibbles over small differences between published complication rates and the rates reflected in Plaintiffs' discovery materials (which, at any rate, were based on slightly different categorizations, as explained below) are simply irrelevant to the larger point – that abortion, both generally and as provided by Plaintiffs, is extremely safe.

Furthermore, as in their Surreply Suggestions, ECF No. 56, the State Defendants make no attempt in their Supplemental Brief to show that the Restrictions at issue in this case do *anything* to either reduce the rate of complications from abortion or improve the way complications are treated. They state that the Restrictions challenged in this case are "designed to address" post-abortion complications, Defs' Suppl. Br. at 1, but they fail to explain how. Their repeated failed attempts to show that abortion is unsafe do not undermine the clear evidence in the record that the Restrictions do nothing to improve patient care in the rare event of a complication, as Dr.

[1] Defendants have moved to file this Exhibit under seal, ECF No. 64, pursuant to the parties' Proposed Stipulated Protective Order, ECF No. 58-1, but the Court has not yet ruled on that motion.

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[3] The extremely small sample size of abortions provided at the Columbia health center during this five-year period (219 total abortions), Ex. 2 to Defs.' Suppl. Br. at CompHealth000002, makes it impossible to calculate rates of complications or adverse events with any reliability, as the State Defendants concede. Defs.' Suppl. Br. at 3.

Eisenberg has explained, and as the Supreme Court has held. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311, 2315–16; Corrected Decl. of David L. Eisenberg in Supp. of Pls.' Mot. for Prelim. Inj., ("Initial Eisenberg Decl.") ECF No. 63-1, ¶¶ 13–14; 30–34, 38, 39–49; Rebuttal Decl. of David L. Eisenberg in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 42-1, ¶¶ 19–23, 24, 27–28. The Restrictions simply do not further the state's interest in women's health.[4]

To address State Defendants' failed arguments more specifically, first, they misleadingly state that 84 of RHS's patients (out of nearly 25,000) *required* hospital treatment following an abortion, Defs.' Suppl. Br. at 1–2, when in fact many of the patients who had hospital contact either did not receive any treatment in the hospital at all, or went to a hospital emergency department even though the treatment they received (such as aspiration of retained products of conception) was not urgent, Initial Eisenberg Decl. ¶ 33, and could have been provided via a return visit to the health center or other non-ASC outpatient facility. Third Rebuttal Declaration of David L. Eisenberg in Support of Plaintiffs' Motion for Preliminary Injunction ("Third Eisenberg Rebuttal") ¶¶ 5–8, attached hereto as Exhibit B. The State Defendants also make misleading comparisons to data in the literature, comparing the rates of RHS's patients who had any hospital contact at all with one study's rate of patients who had complications serious enough to require overnight *admission* to the hospital. Defs.' Suppl. Br. at 2; Third Eisenberg Rebuttal ¶ 9. Even including all of RHS's patients who had any hospital contact at all, the rate of hospital contact was only 0.32%, or about 3 patients in 1000, a very low rate.[5]

[4] Indeed, the complications and adverse events reflected in Plaintiffs' discovery responses—which Defendants contend show that abortion is dangerous—all occurred while the challenged Restrictions were in effect.

[5] The State Defendants are similarly misleading regarding instances in which Comprehensive Health's Columbia health center patients have had hospital contact—they state that there was a

The State Defendants also focus on the extremely small number of RHS's patients who had hospital contact due to a serious complication following an abortion, Defs.' Suppl. Br. at 2, but the fact that serious complications from abortion do, very rarely, happen (as they do with all outpatient procedures) does not mean that the procedure is not overall extremely safe. Indeed, as Dr. Eisenberg explains, the types of serious complications that very rarely result from abortion are the very same that can result from miscarriage management and other gynecological procedures—procedures that are not required to be performed in an ASC and for which physicians are not required to have hospital privileges or a transfer agreement. Third Eisenberg Rebuttal ¶ 6. Moreover, as discussed above, the Restrictions at issue in this case do nothing to affect the frequency with which serious complications occur or how they are treated. *Id.* ¶ 7.

With regard to medication abortion, the State Defendants similarly gloss over the details of RHS's discovery response in order to try to make RHS's practices sound unsafe. They state that 119 RHS patients experienced a complication following medication abortion, Defs.' Suppl. Br. at 3, but ignore the fact that only 6 patients experienced a complication, while the remainder experienced a less serious anticipated adverse event. Ex. 1 to Defs.' Suppl. Br. at RHS0001–5. Defendants similarly try to paint the rate of hospital contact for RHS patients following abortion as high, Defs.' Suppl. Br. at 4, but the rate of only 0.39%, or approximately 4 in 1000 medication abortion patients, is very low and underscores the safety of medication abortion.[6]

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hospital contact rate of 1.4%, despite acknowledging that the sample size is likely too small to be meaningful, Defs.' Suppl. Br. at 4, and gloss over the fact that this only represents three patients.

[6] Defendants' focus on ongoing pregnancies following medication abortions is also misplaced, since ongoing pregnancies following medication abortion result when the pills a patient takes in order to induce a medication abortion do not work to terminate the pregnancy, and therefore the rate at which ongoing pregnancies occur has nothing to do with the quality of care at a given health center. Regardless, the rate of ongoing pregnancies or the follow up treatment required is not affected by the Restrictions. Third Eisenberg Rebuttal ¶ 11.

Finally, the State Defendants make the inflammatory and false assertion that RHS underreports the rate of hospital transfers of patients experiencing abortion complications, based on information in the public domain from the St. Louis Fire Department regarding how many times an ambulance was called to RHS's St. Louis health center during the period from 2009 through April 2016. Defs.' Suppl. Br. at 4–5, Ex. 3. However, as Dr. Eisenberg explains, the Fire Department information reflects *all* EMS responses to the facility and not just those related to abortion complications, and thus does nothing to call into question the accuracy of RHS's discovery responses. Third Eisenberg Rebuttal ¶ 13 (explaining that ambulances have been called for patients seeking services other than abortion, patients who had abortion appointments but had medical emergencies unrelated to abortion, staff members, and non-patient visitors to the RHS location). The State Defendants' accusation that ambulance calls to the RHS location show that RHS underreports abortion complications is therefore baseless and inaccurate.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

s/ Arthur A. Benson II

Arthur A. Benson II, Mo. Bar No. 21107
Jamie Kathryn Lansford Mo. Bar No. 31133
Arthur Benson & Associates
4006 Central Avenue
Kansas City, Missouri 64111
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com

and

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

s/ Melissa A. Cohen

Melissa A. Cohen (*admitted pro hac vice*)
Jennifer Sandman (*admitted pro hac vice*)
Planned Parenthood Federation of America, Inc.
123 William Street
New York, New York 10038
(212) 261-4649
(212) 247-6811 (telefacsimile)
melissa.cohen@ppfa.org
jennifer.sandman@ppfa.org

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2017 a copy of the foregoing has been served upon all counsel of record in this action by electronic service through the Court's CM/ECF system.

/s/ Melissa A. Cohen
Melissa A. Cohen

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al. Plaintiffs, v. PETER LYSKOWSKI, in his official capacity as Director of the Missouri Department of Health and Senior Services, et al. Defendants.	)	Case No. 2:16-cv-04313-HFS

PLAINTIFF COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS' OBJECTIONS AND RESPONSES TO DEFENDANT HAWLEY'S PRELIMINARY-INJUNCTION-RELATED DISCOVERY REQUESTS

Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Comprehensive Health") hereby responds and objects to Defendant Hawley's First Set of Preliminary-Injunction-Related Interrogatories Directed to Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Interrogatories") and Defendant Hawley's First Set of Preliminary-Injunction-Related Requests for the Production of Documents Directed to Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Requests for Production").

GENERAL OBJECTIONS

1. Comprehensive Health herein sets forth its General Objections, which are continuing objections and responses to each specific Interrogatory or Request for Production that follows, whether or not the General Objections are referenced in the specific Interrogatory or Request for Production. Comprehensive Health's objections and responses herein shall not waive or prejudice any further objections it may later assert. The failure to list a particular

general objection in a given response should not be construed as a waiver of that objection.

2. Comprehensive Health objects to each of Defendant Hawley's ("Defendant") Interrogatories and Requests for Production to the extent that it seeks information or documents protected from disclosure by any privilege or immunity, including the attorney-client privilege, the attorney work product doctrine, or any other privilege, immunity, principle, doctrine, or rule of confidentiality. If any protected information or material is disclosed, such disclosure is not intentional and shall not be deemed a waiver of any privilege or protection. Comprehensive Health further objects to the extent Defendant's Interrogatories and Requests for Production seek information or documents prepared in anticipation, or during the course, of any litigation, or which otherwise constitute or disclose the mental impressions, conclusions, opinions, or legal theories of any attorney for Comprehensive Health.

3. Comprehensive Health objects to each of Defendant's Definitions, Instructions, Interrogatories and Requests for Production to the extent that it seeks to impose obligations on Comprehensive Health in excess of those set forth in the Federal Rules of Civil Procedure or the Local Rules for the United States District Court, Western District of Missouri.

4. To the extent an Interrogatory or Request for Production requires the disclosure of confidential information, Comprehensive Health's responses shall be subject to the parties' Stipulated Protective Order.

5. Comprehensive Health objects to each of Defendant's Interrogatories and Requests for Production to the extent it seeks information or documents that are neither relevant to the issues in this litigation nor reasonably calculated to lead to the discovery of admissible evidence. To the extent Comprehensive Health provides information or documents in response

to these Interrogatories and Requests for Production, Comprehensive Health does not concede that the information or documents are admissible in evidence or relevant to the claims and defenses of any party to this litigation.

6. Comprehensive Health objects to each of Defendant's Interrogatories and Requests for Production insofar as it seeks information or documents that are unreasonably cumulative or duplicative, already in the possession of Defendant, primarily or exclusively within Defendant's knowledge or control, or obtainable from some other source that is less burdensome or less expensive. Comprehensive Health objects to Defendant's Requests for Production to the extent they seek documents beyond those in the possession, custody, or control of Comprehensive Health. Comprehensive Health further objects to the extent Defendant's Requests for Production seek documents in a format in which those documents are not maintained in the ordinary course of business.

7. Comprehensive Health objects to each of Defendants' Interrogatories, Requests for Production, and Requests for Admission to the extent it is unclear, vague, ambiguous, overbroad, or unduly burdensome.

8. Comprehensive Health objects to each of Defendants' Interrogatories or Requests for Production requesting "all," "each," "every," or "any" of the referenced information or documents on the grounds that such requests are overbroad and unduly burdensome, seek irrelevant information, do not describe the information sought with sufficient particularity, and seek to impose obligations beyond those imposed by law. Comprehensive Health further objects to the extent Defendant's Requests for Production request voluminous information that Comprehensive Health can locate and copy only at tremendous expense of money and/or personnel resources, or that will create a significant

delay that would be disproportionate to the probative value or relevance of the material sought. Comprehensive Health will construe the terms of all such Interrogatories or Requests for Production to request that Comprehensive Health use reasonable diligence to locate responsive non-privileged information and documents, based on inquiry of those persons who may reasonably be expected to possess such information and on examination of those sources that may reasonably be expected to yield such information.

9. To the extent Comprehensive Health responds to these Interrogatories, Requests for Production, and Requests for Admission, it does not waive Comprehensive Health's foregoing objections nor does it concede that any information or document requested or provided in response thereto is relevant to any claim or defense of a party in the pending action or admissible before the District Court. Comprehensive Health expressly reserves:

a. the right to object, on the grounds of competency, relevance, materiality, privilege, or any other applicable ground, to the use of responses provided to these Interrogatories or Requests for Production, or the subject matter thereof, in any subsequent proceeding in, or the hearing of, this or any other action;

b. the right to object on any ground to other Interrogatories, Document Requests, or other discovery proceedings involving or relating to the subject matter of these requests; and

c. the right to supplement its responses should further investigation or discovery disclose additional information.

OBJECTIONS TO DEFINITIONS

1. Comprehensive Health objects to the definition of "complication" contained in Defendant's Interrogatories to the extent it encompasses items that are not recognized as complications of abortion.

SPECIFIC OBJECTIONS AND RESPONSES TO DEFENDANT HAWLEY'S FIRST SET OF PRELIMINARY-INJUNCTION-RELATED INTERROGATORIES

Comprehensive Health incorporates by reference its General Objections and Objections to Definitions in response to each of Defendant's Interrogatories. Comprehensive Health states that the following responses are true and complete to the best of its knowledge at this time, while reserving the right to identify additional facts, amend or supplement any answer, or raise additional objections during the course of these proceedings.

1. For the period from January 1, 2012 to the present, identify the number of abortion procedures that have resulted in complications at the Columbia Center abortion facility located at 711 North Providence Road, Columbia, Missouri 65203. For each procedure that resulted in a complication, identify (1) the date of the procedure, (2) the nature of the procedure, (3) the gestational age of the fetus at which the abortion procedure was performed, (4) the nature of the complication, (5) the nature of the treatment for the complication, and (6) whether the complication resulted in hospitalization of the patient or other follow-up care, including the nature of the follow-up care.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000001. For clarity, Comprehensive Health has subdivided the broad category of complications into complications and less serious anticipated

adverse events, consistent with the approach taken in the literature. Comprehensive Health notes that abortion was provided only intermittently at the Columbia health center during the period from 2012 through 2016. Specifically, medication abortion only was available at the Columbia health center from February to June 2012 and from July to November 2015.

2. For the period from January 1, 2012 to the present, identify the total number of abortion procedures performed at the Columbia Center abortion facility located at 711 North Providence Road, Columbia, Missouri 65203. For each procedure, identify (1) the date of the procedure, (2) the nature of the procedure, and (3) the gestational age of the fetus at which the abortion procedure was performed.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000002.

3. For the period of January 1, 2012 to the present, identify all written policies and procedures of Comprehensive Health of Planned Parenthood Great Plains that address or pertain in any way to hospital transfers, medical emergencies, treatment of complications, and continuity of care for patients.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000003-135.

SPECIFIC OBJECTIONS AND RESPONSES TO DEFENDANT HAWLEY'S FIRST SET OF PRELIMINARY-INJUNCTION-RELATED REQUESTS FOR THE PRODUCTION OF DOCUMENTS

Comprehensive Health incorporates by reference its General Objections and Objections to Definitions in response to each of Defendant's Requests for Production. Comprehensive Health

states that the following responses are true and complete to the best of its knowledge at this time, while reserving the right to identify additional facts, amend or supplement any answer, or raise additional objections during the course of these proceedings.

1. All documents, communications, and/or other materials relied upon in preparing your response to Interrogatory No. 1.

Objections: Comprehensive Health objects to Request for Production No. 1 to the extent that it is overbroad and unduly burdensome. Comprehensive Health further objects to the extent that Request for Production No. 1 seeks documents that contain individually identifiable health information within the meaning of the Health Insurance Portability and Accountability Act or that would violate any other applicable law or patient confidentiality for Comprehensive Health to disclose.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000001.

2. All documents, communications, and/or other materials relied upon in preparing your response to Interrogatory No. 2.

Objections: Comprehensive Health objects to Request for Production No. 2 to the extent that it is overbroad and unduly burdensome. Comprehensive Health further objects to the extent that Request for Production No. 2 seeks documents that contain individually identifiable health information within the meaning of the Health Insurance Portability and Accountability Act or that would violate any other applicable law or patient confidentiality for Comprehensive Health to disclose.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000002.

3. All written policies and procedures identified in response to Interrogatory No. 3.

Response: Subject to and without waiving the foregoing objections, Comprehensive Health refers Defendant to CompHealth000003-135.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

s/ Arthur A. Benson II

Arthur A. Benson II, Mo. Bar No. 21107
Jamie Kathryn Lansford, Mo. Bar No. 31133
Arthur Benson & Associates
4006 Central Avenue
Kansas City, Missouri 64111
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com
jlansford@bensonlaw.com

and

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

s/ Melissa A. Cohen

Melissa A. Cohen (*admitted pro hac vice*)
Jennifer Sandman (*admitted pro hac vice*)
Planned Parenthood Federation of America, Inc.
123 William Street
New York, New York 10038
(212) 261-4649
(212) 247-6811 (telefacsimile)
melissa.cohen@ppfa.org
jennifer.sandman@ppfa.org

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017 a copy of Plaintiff Comprehensive Health of Planned Parenthood Great Plains' Objections and Responses to Defendant Hawley's Preliminary-Injunction-Related Discovery Requests was served on the following counsel of record via electronic mail:

Emily A. Dodge
emily.dodge@ago.mo.gov

John Sauer
John.sauer@ago.mo.gov

Norman Rouse
twelch@cwrcave.com

Travis Willingham
twillingham@jacksongov.org

Ron Sweet
rsweet@boonecountymo.org

Todd Myers
tmeyers@greenecountymo.gov

/s/ Melissa A. Cohen
Melissa A. Cohen

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al. Plaintiffs, v. PETER LYSKOWSKI, in his official capacity as Director of the Missouri Department of Health and Senior Services, et al. Defendants.	)	Case No. 2:16-cv-04313-HFS

THIRD REBUTTAL DECLARATION OF DAVID L. EISENBERG IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

David L. Eisenberg declares the following:

1. I previously submitted three declarations in this case entitled "Corrected Declaration of David L. Eisenberg in Support of Plaintiffs' Motion for a Preliminary Injunction" ("Initial Decl."), ECF No. 63-1, dated March 3, 2017; "Rebuttal Declaration of David L. Eisenberg in Support of Plaintiffs' Motion for a Preliminary Injunction" ("Rebuttal Decl."), ECF No. 42-1, dated January 31, 2017, and "Supplemental Rebuttal Declaration of David L. Eisenberg in Support of Plaintiffs' Motion for a Preliminary Injunction," ECF No. 62-2, dated March 3, 2017. A copy of my curriculum vitae was attached to my initial declaration as Exhibit A. *See* ECF No. 15-3. I submit this additional rebuttal in my personal capacity, and hold the opinions in this declaration to a reasonable degree of medical certainty. This declaration represents my opinions alone. I do not speak for or serve as an authorized representative of Washington University School of Medicine or Barnes-Jewish Hospital.

2. I have reviewed the State Defendants' Supplemental Brief in Opposition to

Plaintiffs' Motion for Preliminary Injunction, ("Defs.' Suppl. Br.") ECF No. 65, regarding the discovery responses Plaintiffs have provided in this case on patient outcomes following abortion, including complications and anticipated adverse events. The fact that I do not address a particular statement or assertion made by the State Defendants does not necessarily mean that I agree with the statement or assertion.

3. The State Defendants in their Supplemental Brief state that Reproductive Health Services of Planned Parenthood of the St. Louis Region's ("RHS") complication data "illustrate[s] the health risks from abortion procedures that the regulations challenged in this case are designed to address," Defs.' Suppl. Br. at 1, but they make no attempt to argue that the Restrictions at issue in this case either lower the incidence of complications or affect the way complications from abortion are treated. Nor could they since, as I have explained multiple times, the Restrictions do neither. Initial Decl. ¶¶ 13–14; 30–34, 38, 39–49; Rebuttal Decl. ¶¶ 19–23, 24, 27–28. Indeed, the Restrictions did not prevent any additional complications from occurring during the five year period for which RHS provided data, nor did they change how any of the complications that did occur were treated, as I explain further below.

4. Furthermore, the State Defendants make a number of misleading assertions regarding the incidence and seriousness of complications and adverse events reflected in RHS's discovery responses in an attempt to make RHS's provision of abortion sound dangerous. But, in fact, these responses reflect that RHS's provision of abortion care is extremely safe and its rates of complications are very low. Indeed, they reflect an overall complication rate of only 0.18%, and a rate of adverse events of 0.72%. Even combining adverse events and complications, the discovery responses reflect an overall rate of a patient experiencing one of these outcomes of 0.91%.

5. The State Defendants first assert that "84 [RHS] patients have required hospital treatment after abortion procedures at its St. Louis facility during the last five years, including at least 21 emergency transfers to the hospital." Defs.' Suppl. Br. at 1–2. This misleading attempt to make RHS's patient care sound dangerous leaves out critical details about the data produced by RHS in discovery. First, of the 21 abortion patients transferred to the hospital from RHS (out of nearly 25,000 abortion patients), at least 4 were transferred out of an abundance of caution, but did not actually receive any further treatment at the hospital. Ex. 1 to Defs.' Suppl. Br.[1] at RHS0004–5 (noting one patient monitored and released following a post-procedure seizure, two patients monitored and released following excessive bleeding that was treated in the health center, one patient monitored and released after hospital ruled out a perforation). It is the mark of a responsible provider to transfer patients if there is a concern that they may need a higher level of care, and the fact that RHS sometimes transfers patients out of an abundance of caution shows that it is a safe provider, not a dangerous one.

6. The State Defendants are correct that a very small number of the patients who were transferred to the hospital did experience a serious complication. Defs.' Suppl. Br. at 2. However, the fact that serious complications from abortion happen very rarely (as they do with all outpatient procedures) does not mean that the procedure is not overall extremely safe. Furthermore, the types of serious complications that very rarely result from abortion are the very same serious complications that rarely result from miscarriage management and other gynecological procedures, such as hysteroscopy and dilation and curettage procedures that occur for reasons unrelated to pregnancy—procedures that are not required to be performed in an

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ambulatory surgical center ("ASC") and for which physicians are not required to have hospital privileges or a transfer agreement. Despite the State Defendants' implications, there is nothing uniquely dangerous about abortion that justifies the Restrictions at issue in this case.

7. Indeed, as I have previously explained, the fact that serious complications do, rarely, occur is not affected by whether an abortion is performed in an ASC or a physician's office (indeed, all of the abortions performed at RHS were done in an ASC), and the treatment of those complications is not affected by whether the physician who provided the abortion has local hospital privileges. For example, when an abortion patient is transferred from RHS to the hospital, the physician who provided the abortion typically does not go with the patient to the hospital or treat the patient in the hospital. Instead, as I have previously explained, Initial Decl. ¶¶ 39-40, RHS staff contacts the hospital emergency department staff and/or the on-call ob/gyn at the hospital to transfer care of the patient, and the hospital-based physician provides any necessary treatment. While all of RHS's physicians have local hospital privileges, that fact is irrelevant to how patients are treated in the case of a transfer.

8. Second, of the 63 RHS patients who visited an emergency department on their own, or were referred by RHS's after-hours line, many of those patients did not actually *require* hospital treatment. RHS's patients may seek care in hospital emergency departments because they live too far from RHS to return for treatment, do not want to wait for the next available appointment at RHS, or they are concerned about symptoms that are not actually dangerous.[2] However, most of these patients (39) simply had a reaspiration procedure that could have been done at a non-ASC outpatient facility. *See* Ex. 1 to Defs.' Supp Br. at RHS0001–5 It is therefore

[2] Furthermore, certain patient populations, including patients on Medicaid, tend to utilize hospital emergency departments as their health care provider of first resort. Ushma D. Uphadhyay, et al. *Incidence of Emergency Department Visits and Complications After Abortion*. 125 Obstetrics & Gynecology 175, 182 (2015).

misleading to say that all of these patients "required" hospital treatment. In any event, even including *all* of the patients who were transferred and who visited a hospital emergency department on their own, 84 patients having hospital contact out of the nearly 25,000 patients who had abortions at RHS during the five-year period of data provided by RHS is a very low hospital contact rate of 0.3% and only underscores how safe abortion is.

9. Furthermore, the State Defendants' statement that RHS's rate of complications requiring hospital treatment is higher than that predicted by the Weitz study I have relied upon in my prior declarations is incorrect. The 0.05% rate predicted by Weitz and colleagues for "major complications" includes only those patients who were *admitted* to the hospital or who required surgery or a blood transfusion following a first trimester surgical abortion.[3] In contrast, the State Defendants look at RHS data regarding any patient who had any hospital contact at all following a surgical abortion, even though the majority of the RHS patients who had hospital contact following a surgical abortion simply had a reaspiration procedure in a hospital emergency department and were not admitted to the hospital. Defs.' Suppl. Br. at 2; Ex. 1 to Defs.' Suppl. Br. at RHS0001–5. Therefore, when the State Defendants assert that RHS's hospitalization rate is higher than that predicted by Weitz and colleagues, they are comparing apples to oranges in a misleading way. Indeed, the State Defendants concede that, even including patients who only needed a reaspiration procedure and were not admitted to the hospital, only 0.28% of first trimester surgical abortion patients had hospital contact, a very low rate.[4] Defs.' Suppl. Br. at 2–

[3] Tracy A. Weitz, et al. *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. of Pub. Health 454, 456 (2013).

[4] The State Defendants also make an even more misleading comparison, stating that RHS's hospital treatment rate is "over six times" that predicted by Weitz and colleagues, Defs.' Suppl. Br. at 2, but here they include all RHS patients who had *any* hospital contact following a surgical

3.

10. The State Defendants' characterization of RHS's complication rates following medication abortion is similarly misleading.[5] Of the 119 patients who experienced either a complication or an anticipated adverse event following medication abortion during the five year period for which RHS produced data, only 6 experienced a complication, while the remainder experienced a less serious anticipated adverse event. Ex. 1 to Defs.' Suppl. Br. at RHS0001–5. While State Defendants take issue with our distinction between complications and anticipated adverse events, the literature routinely recognizes similar categorizations based on severity. For example, Cleland et al. discuss "significant adverse events and significant outcomes," while Weitz et al. and Upahdyay et al. discuss "major complications" and "minor complications."[6] Regardless of word choice, in understanding the safety of any medical procedure, including abortion, it is important to look at the severity of the outcome at issue, and it is misleading for the State Defendants to lump all adverse outcomes together into one large category called "complications" without regard to severity.

11. The State Defendants also focus on the rate of ongoing pregnancy following medication abortion at RHS. Defs.' Suppl. Br. at 3. They are correct that RHS's rate is higher than the 0.5% rate noted in the Cleland study, but RHS's rate of 1.3% is still very low. There are a number of possible explanations for this difference including that the rate of ongoing pregnancy increases as gestational age increases. The Cleland study does not provide data

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abortion *regardless* of gestational age and compare that with the Weitz data regarding *first trimester* surgical abortion patients who were *admitted* to the hospital.

[5] The same is true of the State Defendants' characterization of the discovery regarding medication abortion complications at the Columbia health center, as even Defendants concede that the sample size for the Columbia information is likely too small to be reliable. Defs.' Suppl. Br. at 3.

[6] Weitz, *supra* n. 1 at 458, Kelly Cleland et al., *Significant Adverse Events and Outcomes After Medical Abortion*. 121 Obstetrics & Gynecology 166, 168 (2013); Uphadhyay, *Supra* n. 2 at 176.

regarding the gestational ages at which patients had a medication abortion, but if they were concentrated at lower gestational ages than those at which RHS's patients underwent medication abortion, that could help explain the difference. The small sample size of the RHS data (approximately 6000 medication abortions as compared with over 230,000 studied by Cleland and colleagues) may also help explain the difference. In any event, ongoing pregnancies following medication abortion result when the pills a patient takes in order to induce a medication abortion do not work to terminate the pregnancy, and therefore the rate at which ongoing pregnancies occur has nothing to do with the quality of care at a given health center. Furthermore, ongoing pregnancies are not serious—they are anticipated adverse events that patients are counseled about when they choose medication abortion and that require only a second dose of medication or an aspiration procedure at the health center. For these reasons, the incidence and treatment of ongoing pregnancies is not affected by the Restrictions at issue in this case. The failure rate of a pill regimen is not affected by the physical facility in which the initial pill is taken, nor by whether the administering physician has hospital privileges. And the treatment for ongoing pregnancies—either pills or an aspiration procedure—is not affected by whether the health center is an ASC, for all the reasons I have previously stated, and since the treatment can occur in the health center, whether the physician has hospital privileges is irrelevant.

12. Similarly, the State Defendants note that RHS's patients had a higher (but still very low) rate of hospital contact following medication abortion than that found in the Cleland study. Defs.' Suppl. Br. at 4. As with the ongoing pregnancy rates, the smaller sample size of RHS patients as compared with large sample size of the Cleland study may account for the difference but, importantly RHS's hospital contact rate for medication abortion of 0.39% is still

very low, and in fact includes only 25 patients, 5 of whom experienced a complication and 20 of whom experienced an anticipated adverse event.

13. Finally, the State Defendants accuse RHS of under-reporting hospital transfers of patients experiencing abortion complications, based on information in the public domain from the St. Louis Fire Department regarding how many times an ambulance was called to RHS's St. Louis health center during the period from 2009 through April 2016. Defs' Suppl. Br. at 5. However, this information does not call into question the accuracy of RHS's discovery responses. RHS has a large number of patients, staff, and visitors come through its health center each year, and provides a range of non-abortion healthcare services. At times there are emergencies unrelated to abortion that require an ambulance to be called to the facility. For example, as Medical Director, I am aware that ambulances have been called for patients seeking services other than abortion, including patients who have fainted or suffered falls. Patients who have abortion appointments have had medical emergencies unrelated to abortion, including one patient with a known seizure disorder who had a seizure prior to her procedure and another who arrived at the health center with symptoms of a serious allergic reaction. In addition, staff members have had medical emergencies, including a staff member who suffered a fall, one who had stroke symptoms, and another who had a seizure. Non-patient visitors have also had emergencies, including a patient's friend who fainted at the RHS location. The State Defendants' accusation that ambulance calls to the RHS location show that RHS underreports abortion complications is therefore baseless and inaccurate.

14. The State Defendants point to the fact that the list of Fire Department EMS calls categorizes more transfers as "hemorrhage" than the data RHS produced in discovery, Defs.' Suppl. Br. at 5, but this is not surprising since the fire department list includes any complication

that results in bleeding in the "hemorrhage" category, whereas the RHS information separates complications based on the cause of bleeding, where possible. For example, cervical lacerations and uterine perforations are separate categories in the RHS data, but are included within the hemorrhage category in the fire department list. *See* ECF 65-1; Ex. 1 to Defs.' Suppl. Br. at RHS0001–5. Therefore the higher number of "hemorrhage" transfers listed in the EMS document, even if they were all abortion patients, does not appear to represent additional patients who experience hemorrhage, but simply the fact that RHS and the Fire Department categorize these patients differently.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 10, 2017

s/ David L. Eisenberg
David L. Eisenberg, MD, MPH