IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff, **Plaintiff,** **vs.** **STATE OF UTAH, *et al.*,** **Defendants.**	**MEMORANDUM DECISION** **CASE NO. 220903886** **Judge Andrew H. Stone**

This matter came before the Court for hearing on April 28, 2023, in connection with the plaintiff's Second Motion for a Preliminary Injunction ("Second Motion"). At the conclusion of the hearing, the Court took the matter under advisement. After further considering the parties' written submissions, the relevant legal authorities, and counsel's oral argument the Court rules as follows.

PROCEDURAL BACKGROUND

On July 19, 2022, this Court entered an Order Granting Plaintiff's Motion for a Preliminary Injunction. The Order pertained to Senate Bill 174, 2020 Leg., Gen. Sess. (Utah 2020) (codified at Utah Code Ann. tit. 76, ch. 7A), referred to as the "Trigger Ban".

The defendants (collectively referred to as the "State") filed a Petition for Permission to Appeal an Interlocutory Order. On October 3, 2022, the Utah Supreme Court granted the Petition and the appeal is currently pending. Case No. 20220696-SC. The appeal presents issues of

standing and whether the plaintiff "failed to show a substantial likelihood of success or serious issue on their claims that the Utah Constitution impliedly protects a right to abortion." (Petition at p. 5).

The State moved to stay this Court's Order granting the plaintiff's preliminary injunction pending appeal. The Utah Supreme Court denied that motion. Under the injunction, the plaintiff "has continued to provide abortions up to 18 weeks of pregnancy, which is the legal limit pursuant to a separate provision of Utah law not challenged in this litigation." (Second Motion at p. 4).

On April 3, 2023, the plaintiff filed an Expedited Motion for Leave to File First Supplemental Complaint. On that same date, the plaintiff filed the currently pending Second Motion.

In its Motion for Leave, the plaintiff indicates that the Utah Legislature had enacted in March of 2023, House Bill 467, 2023 Leg., Gen. Sess. (Utah 2023) ("HB 467"). The plaintiff asserts that HB 467, which it refers to as the "Clinic Ban," requires all abortions to be performed in a hospital and criminalizes abortions performed in licensed abortion clinics. (Second Motion at p. 1).

The plaintiff sought leave to file a supplemental or amended complaint to address HB 467's amendments. The State filed a Response to the plaintiff's Motion which did not oppose the proposed amendment, but which noted the following:

> The interlocutory appeal divests this Court of jurisdiction over the issues on appeal. See In re Discipline of Pendleton, 2000 UT 77, ¶¶ 36-37, 11 P.3d 284 ("The [district court] case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court . . .") (internal citation omitted). The State does not interpret the new claims of Plaintiff's proposed Supplemental Complaint as interfering with the issues on appeal but, to the extent they do, this Court lacks jurisdiction to take action upon the Motion until after the Supreme Court issues its decision in Case No. 20220696-SC.

(Response at p. 2). On April 17, 2023, the Court entered an Order Granting Plaintiff's Expedited Motion for Leave to File First Supplemental Complaint. The Court now addresses the Second Motion.

COURT'S JURISDICTION DURING PENDENCY OF INTERLOCUTORY APPEAL

While the State touches on the Court's jurisdiction in its Response, neither side has elaborated on this fundamental issue. Thus, the Court addresses the extent to which it retains jurisdiction to consider the issues presented in the Second Motion, following the State's interlocutory appeal.

In the Pendleton case, which is referenced in the State's Response to the plaintiff's Motion for Leave, the OPC commenced a disciplinary proceeding against Pendleton following criminal charges being filed against him. Pendleton, 11 P.3d at 287. Pendleton filed an interlocutory appeal of the trial court's interim suspension order. Id. at 288. Pendleton argued to the trial court that it lacked jurisdiction over his case during the pendency of his appeal. Id. at 289. As a corollary, he argued that he had no duty to respond to the OPC's discovery requests, served during this time. Id. The trial court denied Pendleton's motion for a protective order seeking relief from the OPC's requested discovery, but did not address jurisdiction. Id.

On appeal, in considering the denial of Pendleton's motion, the Utah Supreme Court addressed Pendleton's jurisdictional issues. The court noted as follows:

> Moreover, it is generally recognized that the granting of an interlocutory appeal does not normally divest the district court of jurisdiction over the underlying matter. See 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3921.2, at 53–64 (1996); see also, e.g., Ex Parte Nat'l Enameling & Stamping Co., 201 U.S. 156, 162, 26 S.Ct. 404, 50 L.Ed. 707 (1906) ("It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered."); Equal Employment Opportunity Comm'n v. Norris, Nos. 99–5068, 99–5089, 216 F.3d 1087, 2000 U.S.App. LEXIS 14680, at *3–*4 (10th Cir. June 27, 2000). When the scope of the interlocutory appeal is not

> affected by litigation of the underlying action, the interest in expediting litigation requires that the district court proceed with the action. See 16 Wright, supra, at 54, 56.

Id. at 293-294.

The court ruled that "the pending proceeding to determine whether permanent disciplinary sanctions should be imposed against Pendleton was in no way dependent upon our disposition of Pendleton's interlocutory appeal. Thus, even though the disciplinary court failed to address this issue, the disciplinary court retained jurisdiction over the ongoing disciplinary proceeding, and the OPC was entitled to proceed with discovery." Id. at 294.

The case of Saunders v. Sharp, 818 P.2d 574, 577-578 (Utah App. 1991), while not an interlocutory appeal case, is also instructive. In that case, during the pendency of an appeal from the trial court's judgment, the trial judge entered post-judgment orders. Those, then, became the subject of a second appeal. One aspect of the appeal was the award of post-judgment attorney fees, which the appellant claimed went beyond the district court's jurisdiction:

> Initially, White Pine argues the district court had no jurisdiction to award additional attorney fees. White Pine relies on the principle that "the trial court is divested of jurisdiction over a case while it is under advisement on appeal." See White v. State, 795 P.2d 648, 650 (Utah 1990).
>
> Generally, when a party files a timely notice of appeal, the court that issued the judgment loses jurisdiction over the matters on appeal. As with many general rules, however, there are exceptions. Courts have concluded that even where a trial court is otherwise divested of jurisdiction due to an appeal, the trial court retains the power to act on collateral matters. The Utah Supreme Court implicitly recognized this exception in White, indicating that to prevent unnecessary delay, "where any action by the trial court is not likely to modify a party's rights with respect to the issues raised on appeal," the trial court could act. 795 P.2d at 650. Most appellate courts that have addressed the propriety of a post-judgment motion for attorney fees have concluded that the issue of attorney fees involved a collateral matter, and thus the matter was appropriately considered by the trial court after an appeal was filed.

Id.

Under these cases, this Court retains limited jurisdiction over matters that are independent of, collateral or supplemental to, the issues presented in the State's interlocutory appeal. As the Court analyzes the arguments presented in the briefing, it will indicate whether the issues involved are collateral to or inextricably bound up with the merits of the issues on appeal, thus determining the scope of this Court's jurisdiction.

FACTUAL BACKGROUND

The plaintiff has proffered evidence in the form of Declarations submitted by the following individuals: (1) David Turok, M.D., the plaintiff's Director of Surgical Services; (2) Annabel Sheinberg, the plaintiff's Vice President of External Affairs and (3) Colleen M. Heflin, a Professor of Public Administration and International Affairs at the Maxwell School of Citizenship and Public Affairs at Syracuse University.

Dr. Turok has submitted dual Declarations, both of which were considered by the Court. The Court will refer to Dr. Turok's first Declaration, submitted in support of the plaintiff's Motion for TRO, as "First Turok Decl." His second Declaration, submitted in support of the Second Motion, will be referred to as "Second Turok Decl."

Further, the Court again considered the Brief of Amici Curiae ("Brief") filed by the American College of Obstetricians and Gynecologists, the American Medical Association, and the Society for Maternal-Fetal Medicine. This Brief was filed in connection with the plaintiff's first Motion for Preliminary Injunction. The "[a]mici curiae are leading medical societies representing physicians, nurses, and other clinicians who serve patients in Utah and nationwide, and whose policies represent the education, training, and experience of the vast majority of clinicians in this country." (Brief at p. 2). The Brief discusses a number of medical articles and other authoritative medical literature which are pertinent to the Clinic Ban.

The State has not proffered any evidence to rebut the substance of the plaintiff's evidence, relying primarily on conclusory allegations and the legal argument that the Utah Constitution does not establish a right to abortion.

The unrebutted evidence presented by the plaintiff is summarized as follows[1]:

1. Through its physicians licensed to practice in Utah, the plaintiff provides abortion at three health centers. Second Turok Decl. ¶ 14. The plaintiff is one of only two outpatient abortion providers in Utah. *Id.* ¶ 63.
2. Each of the plaintiff's three health centers is licensed as an "abortion clinic" under Utah law. Second Turok Decl. ¶ 14. Decl. of Annabel Sheinberg in Supp. of Pl.'s Second Mot. for Prelim. Inj. ("Sheinberg Decl.") ¶ 4.
3. The plaintiff and one other abortion clinic currently provide more than 95 percent of Utah abortions. Second Turok Decl. ¶7
4. The plaintiff is currently providing abortions up to 18 weeks from the first day of the patient's last menstrual period confirmed by ultrasound and as permitted by Utah's 18-Week Ban. Second Turok Decl. ¶15
5. Abortions at the plaintiff's clinics are performed by board-certified physicians licensed to practice in Utah. Second Turok Decl. ¶16
6. The various methods of abortion provided by the plaintiff are simple, straightforward medical treatments that typically take no more than 10 minutes, have an extremely low complication rate, are almost always provided in outpatient, office-based settings, and,

[1] Quotations and citations omitted.

unlike some other office-based procedures such as vasectomies, involve no incisions. Second Turok Decl. ¶18.

7. Abortion is one of the safest procedures in contemporary medical practice and is safely and routinely provided in outpatient settings in countries around the world. Second Turok Decl. ¶32.

8. Major complications, defined as those requiring hospital admission, surgery, or blood transfusion, occur in just 0.23 percent of abortions performed in outpatient, office-based settings. Second Turok Decl. ¶34.

9. Abortion compares favorably, with a markedly lower complication rate, to other procedures routinely performed in outpatient, office-based settings, including vasectomies. Second Turok Decl. ¶35.

10. There is no medical reason to require abortion to take place in hospitals and not abortion clinics. In Utah, as is done throughout the country, legal abortions are safely and routinely performed in doctors' offices and outpatient health center settings. Second Turok Decl. ¶41

11. No scientific evidence indicates abortions performed in a hospital are safer than those performed in an appropriate outpatient, office-based setting. To the contrary, as is true for nearly every medical procedure, fewer complications are seen in settings that perform higher volumes of the same procedure, making abortion clinics like the plaintiff's safer than hospitals for most abortion patients. Second Turok Decl. ¶43.

12. Published research supports the conclusion that abortion is safest when performed by clinicians who have lots of experience providing abortions. Second Turok Decl. ¶44.

13. The plaintiff's physicians have low abortion complication rates and superb safety records. Second Turok Decl. ¶48.

14. National medical experts such as the National Academies of Sciences, Engineering, and Medicine, the American College of Obstetricians and Gynecologists, and the American Public Health Association reject the notion that abortions should be performed in hospitals. Id.

15. Abortion is rarely performed in hospital settings. Both the University of Utah Hospital and Intermountain Healthcare, Utah's largest hospital system, only provide abortion as a result of maternal medical conditions, grave or lethal fetal anomalies, or rape or incest, and follow internal rules against providing abortion in all other circumstances. Induction abortion, the method of abortion most appropriately performed in a hospital setting, is only performed at the University of Utah Hospital once every few weeks. Second Turok Decl. ¶49.

16. In Utah, procedures with risks similar to the risks associated with abortion— including endometrial biopsy, colposcopy, hysteroscopy (scoping of the cervix and uterus), Loop Electrosurgical Excision Procedure ("LEEP") (removing pre-cancerous cells from the cervix), and dilation and curettage for miscarriage management, which, from a clinical perspective, is the same procedure as aspiration abortion—are routinely performed in outpatient clinics and physicians' offices rather than in hospitals. Second Turok Decl. ¶54.

17. Procedures with higher complication rates than abortion are routinely, and without controversy, performed in outpatient, office-based settings throughout Utah. These include colonoscopies, wisdom teeth extractions, tonsillectomies, and vasectomies. Second Turok Decl. ¶55.

18. Even in the rare event that an abortion complication arises during the procedure, it can nearly always be safely and appropriately managed in an outpatient office setting. For example, most cases of hemorrhage (the technical term for bleeding) are managed in the

clinical setting with uterotonic medications, like misoprostol, that cause uterine contractions and reduce bleeding and with uterine massage. Second Turok Decl. ¶57.

19. Most cases of cervical laceration are managed in the clinic setting either with Monsel's Solution or suture. Cases of incomplete abortion are generally managed through repeat aspiration or medication. In the exceedingly rare event that a higher level of care is needed to manage complications, patients are safely stabilized and transferred to a hospital, sometimes even more quickly than they would be transferred between departments within the same hospital system. Second Turok Decl. ¶¶57–9.

20. Dr. Turok is not aware of any detailed or coordinated plan by a Utah hospital to expand its capacity to provide abortions to more patients in the event HB 467 takes effect. Second Turok Decl. ¶67.

21. In practice, the Clinic Ban will drive most people seeking abortion out of state or force them to remain pregnant and ultimately give birth against their will. Patients unable to immediately receive abortion care at a Utah hospital as a result of hospital policies and capacity will be forced to delay receiving abortion care in Utah while they wait for an appointment at a Utah hospital (if they found a hospital willing to provide their procedure) or, more likely, travel out of state to obtain an abortion elsewhere. In either scenario, the abortion will almost certainly be performed later in pregnancy than if the patient had access to care at the plaintiff's clinics. Second Turok Decl. ¶72.

22. HB 467 only permits facilities licensed as "hospitals," not abortion clinics, to perform abortions as of May 3, 2023. Under HB 467's expanded definition of "hospital," PPAU's licensed abortion clinics should qualify as "hospitals" and therefore should be able to continue performing abortions. But DHHS has adopted an interpretation of HB 467 that

prevents the plaintiff from qualifying as a "hospital" notwithstanding the language of HB 467. Sheinberg Decl. ¶7.

23. Because HB 467's expanded definition of "hospital" appears to apply to plaintiff's licensed abortion clinics, on March 20, 2023, Ms. Sheinberg met with the director of the DHHS Division of Licensing and Background Checks and asked what the plaintiff's licensed abortion clinics would need to do to be designated as "hospitals" under HB 467, such that they could remain licensed and continue providing abortion after May 2, 2023, despite HB 467. Sheinberg Decl. ¶15.
24. At that meeting, the DHHS licensing division director informed Ms. Sheinberg that only licensed general hospitals and satellite facilities operating under a general hospital's license would be eligible for HB 467's expanded "hospital" definition. Sheinberg Decl. ¶16.
25. The next day, by email, Ms. Sheinberg asked the DHHS licensing division director to confirm this understanding. She responded on March 27, 2023, confirming that the plaintiff's health centers would either have to be licensed as general hospitals or have to operate as satellite facilities under a general hospital license in order to continue providing abortion after May 2, 2023. Sheinberg Decl. ¶17.

LEGAL ANALYSIS

The plaintiff "urges the Court to enter a preliminary injunction against the Clinic Ban before its May 3, 2023, effective date, to preserve the status quo currently maintained by the preliminary injunction against the Trigger Ban while it addresses the significant constitutional violations concurrently inflicted by the two laws." (Second Motion at p. 2). In addressing the

interplay between the Trigger Ban and the Clinic Ban, the plaintiff frames the scope of its Second Motion as follows:

> But because amendments to the Trigger Ban have no operative effect while the underlying Trigger Ban prohibition remains enjoined by this Court, this motion seeks preliminary injunctive relief against the Clinic Ban only to the extent that it requires abortions before 18 weeks LMP to be performed in a "hospital" as defined by HB 467; prohibits licensed "abortion clinics" from providing abortions before 18 weeks LMP; and eliminates "abortion clinics" as a facility licensure category.

(Second Motion at p. 2).

Under Rule 65A(e) of the Utah Rules of Civil Procedure, as amended and effective February 14, 2023, a preliminary injunction may issue only upon a showing by the applicant that:

> (1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim;
>
> (2) the applicant will suffer irreparable harm unless the order or injunction issues;
>
> (3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; and
>
> (4) the order or injunction, if issued, would not be adverse to the public interest.

Utah R. Civ. P. 65A(e).

The Court begins its analysis with the "substantial likelihood" of prevailing factor. The plaintiff argues that it is substantially likely to prevail on the merits of its claims that the Clinic Ban violates the Utah Constitution. The plaintiff breaks out its arguments as follows: First, the plaintiff argues that the Clinic Ban violates the Utah Constitution's Uniform Operation of the Laws Clause ("UOL Clause"). Next, echoing the arguments raised in its initial Motion for a Preliminary Injunction, the plaintiff argues that the Clinic Ban functionally eliminates access to abortion in violation of the Utah Constitution. Incorporating by reference the briefing and evidence submitted in support of this initial Motion pertaining to the Trigger Ban, the plaintiff argues that the Clinic

Ban similarly violates constitutional rights such as the right to determine one's own family composition, a right to equal protection and the right to bodily integrity. (Second Motion at p. 20).

Before commencing its substantive analysis, the Court must first address the jurisdictional implications of the plaintiff's second argument. Specifically, this argument is inextricably bound up with the merits of the issues on appeal and is beyond the scope of this Court's jurisdiction. So too is the State's argument in Opposition that the Court must assess, as a threshold legal matter, whether the Utah Constitution establishes a right to an abortion. Where the State's Petition for interlocutory appeal specifically challenges the granting of the preliminary injunction of the Trigger Ban by arguing that plaintiff cannot establish an implied state constitutional right to abortion, this "threshold" question posed in the State's Opposition clearly interferes with the issues on appeal and thus, the Court is divested of jurisdiction to consider it.

In contrast, the plaintiff's argument that the Clinic Ban creates a classification between two types of health care facilities, in violation of the UOL Clause, presents a new issue which is collateral to and separate from the issues on appeal. However, as will be discussed below, the level of scrutiny to be applied to the Clinic Ban under the UOL Clause also has jurisdictional implications.

With these jurisdictional parameters in mind, the Court addresses whether the plaintiff is substantially likely to prevail on the merits of its claim that the Clinic Ban violates the UOL Clause. The UOL Clause provides: "All laws of a general nature shall have a uniform operation." Utah Const. art. I, § 24. "The modern formulation of uniform operation is different [from historical understanding]. It treats the requirement of uniform operation as a state-law counterpart to the federal Equal Protection Clause." State v. Canton, 2013 UT 44, ¶ 35, 308 P.3d 517. Further, in Merrill v. Utah Labor Comm'n, 2009 UT 26, ¶ 7, 223 P.3d 1089, the Utah Supreme Court observed:

> The uniform operation of laws provision and the Equal Protection clause address similar concerns in determining the constitutionality of a statute. Both have as their basic concept the settled concern of the law that the legislature be restrained from the fundamentally unfair practice of creating classifications that result in different treatment being given [to] persons who are, in fact, similarly situated. The two provisions are substantially parallel. Accordingly, because our review [of] legislative classifications under article I, section 24 [of the Utah Constitution] ... is at least as exacting and, in some circumstances, more rigorous than the standard applied under the [Fourteenth Amendment of the] federal constitution, we evaluate the constitutionality of the statute under Utah law.

Id. (alterations in original) (internal quotation marks omitted).

"Our cases have established a three-step framework for assessing whether a legislative classification runs afoul of the modern formulation of uniform operation. We ask '(1) whether the statute creates any classifications; (2) whether the classifications impose any disparate treatment on persons similarly situated; and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity.'" Taylorsville City v. Mitchell, 466 P.3d 148, 155 (Utah 2020) (citing Count My Vote, Inc. v. Cox, 2019 UT 60, ¶ 29, 452 P.3d 1109 (citation omitted)). The "last. step incorporates varying standards of scrutiny" under which "most classifications are presumptively permissible, and thus subject only to rational basis review." Id. (citing Canton, 2013 UT at ¶ 36) (citation and internal quotation marks omitted). "Heightened scrutiny applies only if a classification implicates a fundamental right or draws a distinction based on a 'suspect class' such as race or gender. Otherwise, the standard is rational basis—a low bar requiring only a 'reasonable objective' for any disparate treatment." Id. (citations omitted).

Under this three-step framework, the Court finds that the plaintiff is likely to succeed in arguing that the Clinic Ban creates classifications between licensed abortion clinics and hospitals which impose disparate treatment of health care facilities without any reasonable objective.

First, the plaintiff has persuasively argued that the Clinic Ban creates a classification between hospitals and abortion clinics with respect to where an abortion may be performed. As the Second Motion points out:

> Under the Clinic Ban, '[a]n abortion may be performed only in a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.' HB 467 §17 (amending Utah Code Ann. § 76-7-302(3)). Meanwhile, 'a licensed abortion clinic may not perform an abortion in violation of any provision of state law,' including this hospital requirement. Id. §2 (amending Utah Code Ann. § 26-21-6.5(1)(b)). The Clinic Ban requires DHHS to revoke the license of any health care facility other than a hospital that provides an abortion. Id. § 5 (amending Utah Code Ann. § 26-21-11(2)).

(Second Motion at pp. 14-15). The Court finds that the plaintiff is likely to succeed on the merits of its argument that the new statutory scheme, where one class of regulated abortion providers is required to close while another class of providers is allowed to operate, constitutes a "straightforward classification triggering scrutiny under the UOL Clause." (Reply at pp. 6-7).

The Court is not persuaded by the State's argument that the statute eliminates a classification of separate clinics rather than creating one. The Court looks at the effect of the new statute at the time of its enactment, rather than ignoring the status quo ante. The new statute recognizes the different classifications of providers, and then treats the classes differently. If the statute seeks to eliminate one kind of provider, that is also a classification and the extreme in disparate treatment, as discussed below.

Next, the plaintiff is likely to succeed on its argument that the classification between licensed abortion clinics and "hospitals" constitutes disparate treatment of health care facilities that are similarly situated for purposes of abortion safety. (Second Motion at p. 15). Indeed, the Clinic Ban's expanded definition of "hospital" to include certain outpatient clinics constitutes an implicit recognition that these health care facilities are indeed similarly situated, but licensed abortion clinics are singled out and treated differently. Sheinberg Decl. ¶¶15-17. Yet, as the

plaintiff observes, the factual record confirms that the "plaintiff provides abortion via physicians who are credentialed to provide those same methods of abortion at a hospital, and . . . those methods of abortion are as safe at an outpatient clinic like [the plaintiff's] licensed abortion clinics as they would be if provided at a hospital." (Second Motion at p. 16).

The State argues that abortion clinics and "hospitals," even under the expanded definition, are not similarly situated because they are subject to differing standards of care and provide differing levels of care. (Opp. at p. 58). But merely reciting the differing licensure requirements for hospitals and clinics does not explain how those differences affect the provision of abortion services in the first 18 weeks. Based on plaintiff's unrebutted evidence, in terms of the treatment provided in performing abortion as a routine and common medical procedure and considering patient health and safety, these health care facilities provide comparable care and can be considered similarly situated. Second Turok Decl. ¶¶32-33.

Finally, the Court turns to the third step of the uniform operation analysis. In this regard, there is an issue as to the level of review which the Legislature's classification is subject to. Given the jurisdictional limitations discussed above, the Court cannot reach the inquiry of whether the classification implicates a fundamental right which would require a heightened scrutiny analysis.

During oral argument, counsel for the plaintiff suggested that while being mindful of jurisdictional limitations, the Court could still apply an intermediate level of scrutiny. Counsel cited Est. of Scheller v. Pessetto, 783 P.2d 70, 76–77 (Utah Ct. App. 1989), in support of this proposition. In Scheller, the court indicated that "[s]tatutory schemes which are gender-based are examined on an intermediate level under the fourteenth amendment. Gender-based classifications must serve important governmental objectives and must be substantially related to achieving those

objectives in order to withstand judicial scrutiny under the equal protection clause." Id. at 72 (citations omitted).

In its Second Motion, the plaintiff argues "[t]he analysis first asks whether a law results in either disparate treatment or disparate impact on women as compared to men, or whether it disproportionately impairs women's ability to fully enjoy their privileges and civil, political, and religious rights." (Second Motion at p. 25). The factual record supports that the Clinic Ban poses an inherent disadvantage to women by severely restricting their accessibility to abortion care as compared to men, who can obtain vasectomies, for instance, a procedure with higher complication rates than abortion which, as Dr. Turok attests, are performed in outpatient, office-based settings throughout Utah. Second Turok Decl. ¶35.

While this is a persuasive argument, the Court is primarily focused on the classification and disparate treatment of health care facilities that are similarly situated under the UOL Clause. The Second Motion does not offer a fully developed argument that the Clinic Ban involves suspect or gender-based classification under the Equal Protection Clause. For that reason, the Court will not reach the merits of this issue at this juncture, but will instead apply a "rational basis" review for the uniform operation test. Salt Lake City Corp. v. Utah Inland Port Auth., 2022 UT 27, 524 P.3d 573, 578. And in this case and on the present record, that review is enough to likely invalidate the law under the UOL Clause.

Under the rational basis standard, a "classification is reasonably related to its legitimate objectives" if "the classification is reasonable," "the objectives of the legislative action are legitimate," and "there is a reasonable relationship between the classification and the legislative purpose." State v. Outzen, 2017 UT 30, ¶ 20, 408 P.3d 334 (citations omitted). "The first step in the test is to determine if the classification made in the statute is reasonable. In deciding if a

classification is reasonable, we have considered: (1) if there is a greater burden on one class as opposed to another without a reason; (2) if the statute results in unfair discrimination; (3) if the statute creates a classification that is arbitrary or unreasonable; or (4) if the statute singles out similarly situated people or groups without justification." Merrill, 2009 UT at ¶10 (citation omitted).

The Court finds that the plaintiff has made a strong showing of its likelihood to succeed on its argument that the Legislature was not reasonable in imposing different burdens on licensed abortion clinics then hospitals because this classification singles out the plaintiff and other licensed abortion clinics without a rational basis. The Clinic Ban places a greater burden on licensed abortion clinics by criminalizing abortions performed in such clinics despite the unrebutted evidence that abortions performed in an outpatient clinic are equally as safe as those performed in a hospital. The plaintiff has advanced a factual record supporting the conclusion that the Legislature's classification is unreasonable and appears to single out abortion clinics without any justification.

Indeed, the Legislature's objective in enacting the Clinic Ban is nebulous. In its Opposition, the State asserts that the Legislature's "reasonable objective" was "improving the safety for both mother and unborn child in the provision of abortion, especially in the realm of surgical services and emergency care." (Opp. at p. 52). Yet, the plaintiff explains that "HB 467's sponsors did not claim that the Clinic Ban was intended to promote a government interest in patient safety and did not identify any evidence that abortions provided in general hospitals are safer than the same method of abortion provided in an outpatient clinic." (Second Motion at p. 17). The plaintiff points to the legislative debate where HB 467's House sponsor indicated that the Clinic Ban would

still allow some clinics to continue providing abortion— just not the plaintiff's licensed abortion clinics:

> I actually don't think that that is what this bill does . . . the language about hospitals is the existing language. There is a deletion of Planned Parenthood—or I'm sorry, of abortion clinics. . . . This [bill] doesn't preclude an individual to visit their doctor in a clinic environment and receive a prescription . . . . We are certainly not pigeonholing patients into one type of service.

(Second Motion at p. 18) (citation omitted).

Ultimately, the plaintiff is likely to succeed in arguing that the Clinic Ban fails even under the rational basis test because the classifications established under the Clinic Ban are not reasonable and appear to directly and discriminatorily target the plaintiff. "The Clinic Ban's distinction between licensed abortion clinics and hospitals fails to promote patient safety, and indeed lacks a rational relationship to any government interest other than preventing abortion clinics from providing abortion—and that interest is not a legitimate one." (Second Motion at p. 19).

Based on the foregoing, the Court finds that the plaintiff is substantially likely to prevail on the merits of its claim that the Clinic Ban violates the Uniform Operation of Laws Clause. The Court further finds that the plaintiff has advanced sufficient evidence to also satisfy the remaining three preliminary injunction requirements.

On the irreparable harm prong of Rule 65A, Dr. Turok's dual Declarations along with Ms. Heflin's Declaration and the Brief all speak to and provide proof of the irreparable harm that Utahns seeking an abortion will suffer if the Clinic Ban goes into effect. The plaintiff has articulated the reasons for and the likelihood of the injury to its patients if they are unable to access time-sensitive abortion care:

> In short, the Clinic Ban will force many Utahns seeking an abortion to carry pregnancies to term against their will, with all of the physical, emotional, and financial costs that entails.

> First Turok Decl. ¶ 5; see also id. ¶¶ 21–43; see also Heflin Decl. ¶¶ 41–42. Some Utahns will inevitably turn to self-managed abortion by buying pills or other items online and outside the U.S. healthcare system, which may in some cases be unsafe, ineffective, and/or subject the person to criminal investigation or prosecution. First Turok Decl. ¶ 22. And even Utahns who are ultimately able to obtain an abortion—either because they have been able to scrape together the resources to travel out of state or because they are able to obtain an abortion at a Utah hospital—will suffer irreparable harm. Id. ¶¶ 44–54; see also Heflin Decl. ¶¶ 34–40. Specifically, patients who obtain abortions in Utah hospitals will be forced to bear dramatically increased costs, loss of confidentiality, greater medical risk, scheduling delays and the associated increases in cost and medical risk, and a much greater investment of total appointment time compared to the status quo. Second Turok Decl. ¶ 69.

(Second Motion at p. 33).

Presently, abortions are rarely performed in hospital settings and Dr. Turok is not aware of any detailed or coordinated plan by a Utah hospital to expand its capacity to provide abortions to more patients in the event HB 467 takes effect. Second Turok Decl. ¶¶49, 67. There is an absence of evidence from the State to counter Dr. Turok's statement that "the Clinic Ban will drive most people seeking abortion out of state or force them to remain pregnant and ultimately give birth against their will. Patients unable to immediately receive abortion care at a Utah hospital as a result of hospital policies and capacity will be forced to delay receiving abortion care in Utah while they wait for an appointment at a Utah hospital (if they found a hospital willing to provide their procedure) or, more likely, travel out of state to obtain an abortion elsewhere. In either scenario, the abortion will almost certainly be performed later in pregnancy than if the patient had access to care at the plaintiff's clinics." Second Turok Decl. ¶72.

Next, the evidence clearly indicates that the threatened injury to the plaintiff and its patients outweighs whatever damage the State would suffer if the Clinic Ban is allowed to go into effect, rather than preserving the status quo. The plaintiff has persuasively argued that "[t]he balance of equities and public interest thus weigh decisively in [the plaintiff's] favor." (Second Motion at p. 35). Further, given the absence of evidence from the State, there is nothing before the Court to

indicate that an injunction would be adverse to the public interest. In terms of the State's and the public's interest, the plaintiff correctly observes that "Utah already bans nearly all abortions after 18 weeks of pregnancy, including in cases of rape or incest. See Utah Code Ann. § 76-7-302(2) (as amended by HB 467). An injunction against the Clinic Ban would not prevent Utah from enforcing this ban on abortions after 18 weeks' gestation." Id.

Accordingly, the Court grants the plaintiff's Second Motion and enters a preliminary injunction that enjoins and restrains the State from administering and enforcing HB 467 in so far as it requires abortions before 18 weeks LMP to be performed in a "hospital" as defined by HB 467; prohibits licensed "abortion clinics" from providing abortions before 18 weeks LMP; and eliminates "abortion clinics" as a facility licensure category or imposes penalties with respect to any such abortion provided during the pendency of this injunction. The injunction is issued without the posting of security.

Plaintiff to submit a comprehensive Order.

Dated this 2nd day of May, 2023.

ANDREW H. STONE
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220903886 by the method and on the date specified.

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05/02/2023 /s/ ALEXANDRA HANSON

Date: _____ _____

Signature