**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF ARKANSAS**
**WESTERN DIVISION**

**PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, d/b/a PLANNED PARENTHOOD OF THE HEARTLAND; and STEPHANIE HO, M.D., on behalf of herself and her patients** **PLAINTIFF**

**VS.** **Case No. 4:15-cv-00784-KGB**

**LARRY JEGLEY, Prosecuting Attorney for Pulaski County, in his official capacity, his agents and successors; and MATT DURRETT, Prosecuting Attorney for Washington County, in his official capacity, his agents and successors** **DEFENDANTS**

**DEFENDANTS' RESPONSE TO ISSUES RAISED BY THE COURT AT THE TRO HEARING**

Pursuant to this Court's order requesting supplemental briefing concerning the scope of proceedings on remand, Defendant submits this memorandum. Under the Eighth Circuit's order in this case, the preliminary injunction proceedings in this matter should be at an end or, alternatively, if this Court believes a preliminary injunction request remains pending, it should proceed to decide that remanded motion on the original record before it. Indeed, to permit Plaintiffs Stephanie Ho and Planned Parenthood to reopen the preliminary injunction record more than two years after they initially sought a preliminary injunction to submit evidence that they opted not to submit originally in support of their motion would effectively reward Plaintiffs' lack of diligence during the first preliminary injunction proceeding. And as Plaintiffs have effectively conceded through their efforts to introduce new (though *still* insufficient evidence), in conducting that review, this Court should conclude that a preliminary injunction is unwarranted

because Plaintiffs have not shown that "the contract-physician requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women seeking medication abortion in Arkansas." *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017).

**Issue 1:** Whether the mandate rule dictates that the Court re-open the record as to Plaintiffs' request for injunctive relief. **Issue 2:** If permitted to, whether the Court should re-open the record as to Plaintiffs' request for injunctive relief.

The preliminary injunction proceedings in this case should be concluded.[1] The Eighth Circuit's opinion vacating this Court's preliminary injunction order does not require, or even necessarily contemplate further proceedings regarding injunctive relief. The Eighth Circuit simply reversed this Court's analysis of whether Plaintiffs successfully showed the contract-physician requirement imposes an undue burden on a large fraction of women seeking medication abortion in Arkansas—a determination that goes to the merits of the case. When the Eighth Circuit contemplates further proceedings concerning injunctive relief, it has specifically said so. *See, e.g., See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc) ("The preliminary injunction is vacated without prejudice to the entry of injunctive relief, if during the trial of the case it appears that such relief should be given."); *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 505 (8th Cir. 1987) ("The preliminary injunction . . . is vacated without prejudice to the entry of subsequent injunctive relief, if during or after trial on the merits it appears that such relief should be granted."). That

[1]Until this Court highlighted the issue of what remains pending before this Court, to be frank, Defendants had not considered whether the preliminary injunction phase of this matter had effectively concluded, but upon review of the relevant case law, Defendants now believe the proper approach is to deny the injunction and proceed to the merits.

the Eighth Circuit chose not to do so here indicates that the preliminary injunction phase of this case is effectively concluded. Further, Plaintiffs, having failed to bring sufficient evidence on their first request for injunctive relief and having declined to press this case forward to a determination on the merits while the appeal was pending, should not be rewarded with a second bite at the preliminary injunction apple, absent showing a profound change in circumstances.[2] This Court should therefore deny Plaintiffs' request for injunctive relief and allow the case to proceed to a determination on the merits.

Alternatively, if the preliminary injunction proceedings have not concluded, it is Plaintiffs' original preliminary injunction that remains pending before this Court. *Jegley*, 864 F.3d at 961. Viewed in this light, Plaintiffs' renewed motion for a TRO is subsumed by their earlier request for a preliminary injunction, and ruling on Plaintiffs' motion for a preliminary injunction will dispose of both motions. The Eighth Circuit did not remand this case with specific instructions that this Court take any additional evidence on Plaintiffs' request for injunctive relief. Because the opinion is silent on this point, whether to re-open the record on Plaintiffs' motion for a preliminary injunction is a decision that rests with this Court. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572 (1943) (where the district court improperly interpreted and applied the controlling law in the case, whether additional evidence must be taken on remand is a question for the district court).

This Court should decline to re-open the record as to Plaintiffs' preliminary injunction motion. "Normally, parties are expected to present all of their evidence in their case in chief."

[2] As explained below, no changed circumstances exist, and the procedural posture of this case is entirely due to Plaintiffs' lack of diligence in bringing sufficient evidence in their first motion for injunctive relief, as well as their failure to press the case forward to a determination on the merits during the pendency of the appeal. *See infra* at pp. 4-5.

*Gathright v. St. Louis Teacher's Credit Union*, 97 F.3d 266, 268 (8th Cir. 1996) (quoting *Skogen v. Dow Chem. Co.*, 375 F.2d 692, 705 (8th Cir. 1967)). "[P]arties ought to be 'held to the requirement that they present their strongest case for [relief] when the matter is first raised.'" *Siemens Westinghouse Power Corp. v. Dick Corp.*, 219 F.R.D. 552, 554 (S.D.N.Y. 2004) (quoting *Allstate Fin. Corp. v. Zimmerman*, 296 F.2d 797, 799 (5th Cir. 1961)). Requests for injunctive relief in particular are equitable in nature, so underlying fairness concerns should guide this Court's determination as to whether to re-open the record on Plaintiffs' motion. The Court should decline to do so because no good cause exists.

"The primary measure of good cause is the movant's diligence . . . ." *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006) (considering good cause in the context of amending pleadings). In the initial preliminary injunction proceedings before this Court, Plaintiffs decided what evidence to present and not to present. In particular, in arguing that they were entitled to facial relief, Plaintiffs opted not to present any credible evidence concerning the number of women who would allegedly face a substantial obstacle if Plaintiffs decided to stop performing abortions. Indeed, as the Eighth Circuit noted in vacating this Court's previous order, the *only* evidence on this point was the testimony of Dr. Henshaw that "approximately 4.8 to 6.0 percent" of women seeking medication abortions in Arkansas would forgo the procedure, a number the court was "skeptical" case close to a large fraction. *Jegley*, 864 F.3d at 959 n.8. Having made the decision to only present that testimony and argue that was sufficient to demonstrate that the contract-physician requirement was facially invalid, Plaintiffs should not be relieved by this Court of the consequences of that decision by giving them an opportunity to supplement the record by introducing—insufficient as it may likewise be—additional evidence on this and other

points. Indeed, doing so—more than two years after Plaintiffs initially sought and obtained a preliminary injunction—would effectively reward the utter lack of diligence in the first instance.

Further, Plaintiffs' complete lack of diligence is underscored by their decision not to press forward with the merits of this matter, gather additional evidence, and introduce that evidence while Defendants' successful appeal on the preliminary injunction was pending. In fact, Plaintiffs' lack of diligence is all the more apparent when one considers that they declined to press their case forward after the Eighth Circuit vacated this Court's preliminary injunction order. Nothing prevented Plaintiffs from proceeding while the Supreme Court considered their petition for *certiorari* and, given the low chance of the Supreme Court granting their petition (let alone granting the summary reversal that Plaintiffs sought), it would have been prudent for them to do so. They chose not to, and they should not be rewarded for their lack of diligence. There has been "no change in the law, no newly discovered facts, or any other changed circumstance" that would justify excusing Plaintiffs decision to sit on their heels. *Rahn*, 464 F.3d at 718. To the contrary, Plaintiffs simply failed to submit evidence from which the Court could find that Plaintiffs demonstrated a likelihood of success under *Casey*'s "large fraction" test, and the Eighth Circuit accordingly vacated this Court's preliminary injunction order.[3] This Court should decide Plaintiffs' motion for injunctive relief on the current record, and the case should thereafter move forward toward a determination on the merits.

If this Court decides to reopen the record on the preliminary injunction, as previously explained and discussed in greater detail below, this Court should conduct an evidentiary hearing

[3] The Food and Drug Administration's change in mifepristone labeling is not a change in circumstance that would excuse Plaintiffs' lack of diligence or otherwise justify reopening the record. That change occurred before the Eighth Circuit appeal in this matter was fully briefed, and Plaintiffs informed the Eighth Circuit they had moved to drop their appeal before that court considered this matter. *See* 8th Cir. Case No. 16-2334, Appellees' Br. at 14 n.8.

that allows Defendants to—at a minimum—cross-examine Stephanie Ho, Lori Williams, and Colleen Heflin concerning the rank hearsay, unsupported assertions, and claims made in their various declarations that purportedly support Plaintiffs' latest request to block the contract-physician requirement.

**Issue 3:** What additional fact finding the Court must conduct to satisfy the Eighth Circuit's mandate.

The Eighth Circuit's unanimous order in this matter requires this Court to conduct additional fact finding as to both the benefits and burdens of the contract-physician requirement and determine whether the benefits—including those Plaintiffs have conceded exist—substantially outweigh that Plaintiffs allege. *Jegley*, 864 F.3d 960 n.9.

*First*, on the benefits side of the analysis, the Eighth Circuit noted that this Court's "method" of analysis concerning the benefits of the requirement was erroneous. *Id*. As a consequence, the Eighth Circuit directed this Court to consider the "benefit for patients where the State mandates continuity-of-care standards—especially in the face of known complications and where there previously had been no state requirements." *Id*.

*Second*, on the burdens side of the analysis, the Eighth Circuit held that, at a minimum, this Court must determine whether the contract-physician requirement constitutes "an undue burden for a large fraction of women seeking medication abortions in Arkansas." *Jegley*, 864 F.3d at 958. As that court explained, "to sustain a facial challenge and grant a preliminary injunction" here, this Court "was required to make a finding that the Act's contract-physician requirement is an undue burden for a large fraction of women seeking medication abortions in Arkansas." *Jegley*, 864 F.3d at 958. Thus, under that decision, before granting any relief (temporary, preliminary, or otherwise), this Court must conduct "fact finding concerning the

number of women unduly burdened by the contract-physician requirement"—"either because they would forgo the procedure or postpone it"—"and determine whether that number constitutes a 'large fraction.'" *Id.* at 960.

As to what exactly constitutes a large fraction, the Eighth Circuit defined both the numerator and the denominator. To start, the Eighth Circuit explained that, as this Court noted at the initial TRO hearing, the "relevant denominator" is "women seeking medication abortions in Arkansas." *Id*. at 958. The numerator, by contrast, as the Eighth Circuit held, is the number of those women who "would actually forgo abortions" or "postpone" them and face materially increased risks from the procedure they undergo because of the contract-physician requirement. *Id.* at 959-60. And case law from other circuits establishes that the result only constitutes a large fraction if "*practically all* of the affected women would face a substantial obstacle in obtaining an abortion." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (emphasis in original).

Moreover, aptly illustrating the analysis that this Court must conduct, just two days ago, another district court in this circuit denied a preliminary injunction sought by Planned Parenthood against an even more demanding restriction than is at issue in this case because Planned Parenthood had not demonstrated that requirement's benefits were substantially outweighed by the burdens it imposed. *See Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 17-4207-CV-C-BP, ECF No. 143 (W.D. Mo. June 11, 2018 (Attached as Exhibit A). Applying the Eighth Circuit's decision in *Jegley* to a regulation that Planned Parenthood asserted deprived women in the Columbia and Springfield, Missouri areas of access to medication abortion, that court determined that even though the challenged provision "has virtually no benefit," slip op. at 3, Planned Parenthood was not entitled to a preliminary

injunction because it failed to show that the challenged "regulation imposes an undue burden on women's right to obtain an abortion." *Id*. at 3 n.11. The court noted expert testimony that 14% of the women who desire a medication abortion will forgo or postpone their abortions because of the increased distance to Kansas City or St. Louis." *Id*. at 16. However, like the Sixth Circuit, the court held that "the Constitution protects women's right to an abortion, not women's right to a particular method of abortion." *Id*. at 17 (citing *Planned Parenthood SW Ohio Region v. DeWine,* 696 F.3d 490, 516 (6th Cir. 2012)). Given the availability of a safe alternative—surgical abortion—which the Columbia clinic did provide and the Springfield clinic could provide, no "substantial obstacle" to abortion access existed. *Id*. at 17. Thus, even though the regulation had virtually no benefit, a preliminary injunction was not warranted because it imposed no undue burden.

*The type of fact finding proceedings which must occur*

As noted above, given that Plaintiffs' new evidence comprises only unsubstantiated and largely hearsay declaration testimony, if the Court reopens the record and considers those representations, adversarial testing of these allegations is needed. Only after allowing discovery and cross-examination of Plaintiffs' new witness testimony could this Court conduct the fact finding mandated by the Eighth Circuit. "[A] motion for a preliminary junction supported only by written evidence"—like Plaintiffs' affidavits in this case—"usually will be denied when the facts are in dispute." *United Centrifugal Pumps v. Cusimano*, 708 F. Supp. 1038, 1042 (W.D. Ark. 1988), *judgment aff'd without opinion*, 889 F.2d 1090 (8th Cir. 1989). While it is true that, as this Court has noted, "[a] preliminary injunction may be granted based on less formal procedures and on less extensive evidence than in a trial on the merits, . . . "[p]articularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving

party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing." *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004).[4] Given the extraordinary relief requested by Plaintiffs on remand, if this Court reopens the record, it must allow sufficient discovery and adversarial testing of Plaintiffs' evidence before ruling on their request for injunctive relief.

**Issue 4:** Whether a party may file multiple TRO/PI requests in a given case.

Defendants are unaware of any authority specifically addressing whether a party may have more than one motion for injunctive relief pending at the same time. But what is clear is that after the issuance of a decision on a preliminary injunction, Plaintiffs may not file a second without "stat[ing] new facts warranting reconsideration of the prior decision." *F.W. Kerr Chemical Co. v. Crandall Associate, Inc.*, 815 F.2d 426, 428 (6th Cir. 1987). Plaintiffs do not—and cannot make—such a claim here because the facts of this case have not changed in the two-and-a-half years this case has been pending. Likewise, the law remains unchanged as well—*Hellerstedt* broke no new ground as far as the Supreme Court's undue burden analysis. Plaintiffs

[4] It is well-settled among the circuits that the unexamined affidavit testimony submitted by Plaintiffs cannot sustain a motion for preliminary injunction where the facts are in dispute. *See, e.g., Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) ("[I]f questions of fact had been in dispute, an evidentiary hearing would have been required."); *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981) ("It is well established that, in general, a motion for a preliminary injunction should not be resolved on the basis of affidavits alone. Normally, an evidentiary hearing is required to decide credibility issues."); *Forts v. Ward*, 566 F.2d 849, 851 (2d Cir. 1977) (same); *Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 356 (5th Cir. 1971) (same); *Consolidation Coal Co. v. Disabled Miners of S.W. Va.*, 442 F.2d 1261, 1269-70 (4th Cir. 1971) (same); 11A Charles Allen Wright, et al., *Federal Practice and Procedure* § 2949 (3d ed. 2014) (noting that while an evidentiary hearing is not always required, there is a "strong preference ... for oral evidence" in preliminary injunction proceedings and that most courts require an evidentiary hearing where there are disputed facts).

should have presented their strongest case two years ago when they first asked the Court for injunctive relief and should not be allowed to manipulate the process by engaging in piecemeal litigation.

**Issue 5:** Whether the consolidation of injunctive relief and a trial on the merits is warranted.

Defendants are opposed to consolidation at this time. Defendants have thus far been denied the opportunity for any meaningful discovery in this case. Defendants have served only a limited set of interrogatories and requests for production over two years ago. *See* ECF No. 46 at 1 (discussing the discovery). No witnesses have been deposed, and Defendants have not yet had the opportunity to explore any of the factual allegations regarding Plaintiffs' attempt to comply with the contract-physician requirement—certainly not their latest allegations. The Court should allow the parties to proceed with the scheduled Rule 26(f) conference and present the Court with a proposed discovery plan and schedule in their Rule 26(f) Report, as contemplated by the Court's previous order. ECF No. 94.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all parties who have entered an appearance.

/s/ *Dylan L. Jacobs*
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