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

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, d/b/a PLANNED PARENTHOOD GREAT PLAINS and STEPHANIE HO, M.D., on behalf of themselves and their patients, Plaintiffs, v. LARRY JEGLEY, Prosecuting Attorney for Pulaski County, in his official capacity, his agents and successors; MATT DURRETT, Prosecuting Attorney for Washington County, in his official capacity, his agents and successors, Defendants.	No. 4:15-cv-00784-KGB

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs respond to questions raised by this Court at the June 8, 2018 hearing on Plaintiffs' Renewed Motion for Temporary Restraining Order and in its June 8th Order, ECF No. 105. Plaintiffs submit that while this Court is not required by the mandate rule to re-open the record, it can and should do so, as legal and factual developments in the past two years only reinforce this Court's previous findings that the contracted physician requirement provides no benefits and only serves to unduly burden a large fraction of affected women. The record before the Court, including the evidence submitted in support of Plaintiffs' Renewed Motion for Temporary Restraining Order (the "Motion"), ECF No. 84, is more than sufficient for this Court to make the findings required by the Eighth Circuit and issue a temporary restraining order.

As the Court is aware, medication abortion has been entirely unavailable in Arkansas and abortions have only been available in Little Rock for two weeks. In the absence of a temporary

restraining order by Friday, June 15, Plaintiffs will have to contact additional patients scheduled for the following Tuesday, and let them know that they will have to seek a surgical procedure at Little Rock Family Planning Services ("LRFP") or travel out of state for a medication abortion.

THE QUESTIONS RAISED BY THIS COURT

I. The mandate rule does not require this Court to re-open the record, but this Court can and should do so.

This Court has asked the parties to brief "whether the mandate rule . . . dictates that the Court re-open the record in this matter." Order at 1. It does not. Rather, this Court has *discretion* to re-open the record on all issues pertinent to this case, and it should do so.

In describing the mandate rule, the Eighth Circuit explained that "'[w]hen a case has been decided . . . on appeal and remanded, every question decided by the appellate court, whether expressly or by necessary implication, is finally settled and determined, thus creating a mandate for the lower court.'" *In re Tri-State Fin., LLC*, 885 F.3d 528, 533 (8th Cir. 2018) (quoting *In re Usery*, 242 B.R. 450, 457 (B.A.P. 8th Cir. 1999), *aff'd*, 242 F.3d 378 (8th Cir. 2000)). "The mandate of the appellate court is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue that was not expressly or impliedly disposed of on appeal." *Id.* at 533. Thus, on remand, "a trial court is bound by its own prior rulings only to the extent the appellate court explicitly or implicitly adopted those findings in resolving the appeal." *Id*. "The application of the mandate rule . . . depends substantially upon the language of the appellate court's opinion." *Usery*, 242 B.R. at 457 (quoting *Bailey v. Henslee*, 309 F.2d 840, 843 (8th Cir. 1962)).

Here, the Eighth Circuit reversed and remanded because it held that this Court "failed to make factual findings estimating the number of women burdened by the statute." *Planned*

Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 955 (8th Cir. 2017); *see also id.* at 959 ("[I]n order to sustain a facial challenge and grant a preliminary injunction, the district 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."). But the Eighth Circuit's ruling was confined to the proof it deemed necessary to meet the "undue burden" test. It did not make any findings about that proof. Namely, it did not make any factual findings about the burdens the contracted physician imposes. And it also found it "unnecessary to reach the issue of the contract-physician requirement's benefits." *Id.* at 960 n.9.

The Eighth Circuit, therefore, did not "finally settle[,] . . . determine[]" or "dispose of" any factual issue presented by Plaintiffs' motion, including whether and how many women are burdened by the requirement, and whether the requirement provides any benefits. Instead, the Eighth Circuit stated that "where the district court did not make the necessary factual findings . . . the better course is to afford the district court an opportunity to make appropriate findings of fact and conclusions of law." *Jegley*, 864 F.3d at 960. Therefore, under the mandate rule, this Court is neither compelled to, nor precluded from, reopening the record in this case on any relevant issue.

While the Court is not compelled to do so, this Court can and should re-open the record as to all issues necessary to determine whether the contracted physician requirement is likely unconstitutional. *See Moore v. Plaster*, 313 F.3d 442, 444 (8th Cir. 2002) (district court did not abuse its discretion or exceed scope of appellate court's mandate in allowing defendants to submit additional evidence on remand); *Barrett v. Claycomb*, 936 F. Supp. 2d 1099, 1102 (W.D. Mo. 2013) (noting that, in connection with second preliminary injunction motion filed after appellate court vacated earlier preliminary injunction order, "parties were [] offered the

opportunity [by the district court] to present additional evidence"). As this Court acknowledged, there have been new developments in both the facts and the law pertinent to this case since this Court's March 2016 preliminary injunction order. *See* Order at 1–2. For instance, as this Court recognized, the Food and Drug Administration updated the final printed label for Mifeprex, so that the regimen described on the new label reflects Plaintiffs' evidence-based regimen. *See id.* at 1–2. And since March 2016, there are more than two years of additional data relating to the safe provision of medication abortion. Moreover, medication abortion has increased in popularity, including in Arkansas.[1] And since the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which was issued two months after this Court issued the preliminary injunction in this case, court after court to consider requirements like the one here has concluded that *Whole Woman's Health* controls and that such laws likely impose undue burdens on the right to choose abortion. *See Currier v. Jackson Women's Health Org.*, 136 S. Ct. 2536 (2016), *partial perm. inj. granted*, Order, No. 3:12-cv-00436-DPJ-FKB (S.D. Miss. Mar. 17, 2017) (attached as Ex. 1); *Schimel v. Planned Parenthood of Wis., Inc.*, 136 S. Ct. 2545 (2016); *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp. 3d 729 (W.D. Mo. Apr. 19, 2017); *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. Apr. 26, 2017); *see also* Mot. to Dismiss Appeal, *Planned Parenthood Se. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016) (attached as Ex. 2) (Alabama stating that "because Alabama's law is identical in all relevant respects to the law at issue in *Whole Woman's Health*, there is now no good faith argument that the law is constitutional under controlling precedent"); Partial

[1] A recent analysis by the National Academy of Science, Engineering, and Medicine, for example, found that medication abortion is extremely safe, highly effective and rarely results in complications. *See* Nat'l Acad. of Sci., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States* at 2-6, 2-9 (2018). And, this report found that medication abortion is increasingly popular among women seeking abortions. *Id.* at 2-6.

Judgment on Consent, *Adams & Boyle v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 14, 2017) (attached as Ex. 3) (agreeing not to enforce admitting privileges law after *Whole Woman's Health*).[2]

There is no reason that this Court's order should not reflect these developments in law and fact. This Court should, therefore, re-open the record, and grant Plaintiffs' motion as the factual and legal developments over the past two years only serve to reinforce this Court's findings that the contracted physician requirement provides no benefits and unduly burdens women seeking medication abortion in Arkansas.

II. The Court should satisfy the Eighth Circuit's mandate by finding that the contracted physician requirement results in a large fraction of affected women being unduly burdened, provides no benefits, and the burdens imposed substantially outweigh any benefit.

This Court asked for briefing from the parties as to "what additional findings of fact . . . the Court must make to satisfy the Eighth Circuit's mandate." Order at 2.

[2] Earlier this week, in *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, the district court denied the plaintiffs' motion for preliminary injunction, finding that while the regulation at issue restricted the provision of medication abortion, surgical abortion was able to be provided in all relevant areas of the state. Order and Op. Denyings Pls.' Mot. for Prelim. Inj., *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 4:17-cv-4207-BP, at 16–17 & n.14 (W.D. Mo. June 11, 2018) (attached as Ex. 4). Here, by contrast, surgical abortion is not available in Fayetteville. Indeed, Dr. Heflin's estimate that 25% of women will be prevented from obtaining any abortion only includes in the numerator women obtaining a medication abortion at the Fayetteville health center in the absence of the requirement. Moreover, the *Williams* court also found that medication abortion is extremely safe and that the Missouri regulation, which is very similar to the contracted physician requirement, "has virtually no benefit" and "simply constitutes a backdoor effort to require admitting privileges in an attempt to avoid (or ignore) *Hellerstedt*." *Id.* at 13 & n.11. When balanced against this lack of any benefit, the extreme burdens of preventing 25% of all women seeking medication abortion in Arkansas from obtaining any abortion are clearly undue, making the outcome of the balance different here than in *Williams*.

A. The Court Should Find a Large Fraction of Women Are Unduly Burdened.

As was the case in 2016, neither Plaintiffs nor LRFP can comply with the requirement, thereby eliminating access to medication abortion statewide and shutting down abortion access in Fayetteville.[3] The evidence before the Court demonstrates that as result of this contraction of services, a large fraction of the relevant women will be unduly burdened.

As this Court recognized, and as Defendants concede, the Eighth Circuit has already specified the relevant denominator. Tr. of Hr'g on Mot. for TRO at 28:25 ("the decision directly addresses a denominator"); Defs.' Resp. in Opp. to Pls.' Latest Mot. for TRO ("Defs.' Resp."), at 26 n.8, ECF No. 101. The Eighth Circuit stated that "because the contract-physician requirement only applies to medication-abortion providers, the 'relevant denominator' here is women seeking medication abortions in Arkansas." *Jegley*, 864 F.3d at 958; *see also id.* ("The Supreme Court has clarified that cases in which the provision at issue is *relevant* is a narrower category than all women, pregnant women, or even *women seeking abortions* identified by the State." (citing *Whole Woman's Health*, 136 S. Ct. at 2320) (internal quotation marks omitted)).

As Plaintiffs explain in more detail in their Brief in Support of Renewed Motion for Temporary Restraining Order, the numerator consists of women who are unduly burdened by the requirement. Pls.' Br. in Supp. of Renewed Mot. for TRO at 16–19, ECF No. 85. Plaintiffs

[3] Defendants inexplicably claim that women seeking medication abortion "may obtain an abortion from any number of private practitioners" in the state who, according to Defendants, provide medication abortion. Defs.' Resp. at 6. Despite repeatedly referring to these private practitioners, Defendants have never identified who these physicians are or how many such physicians exist. This is despite the fact that *every* physician who provides medication abortion must, under Arkansas law, file with the state induced termination of pregnancy reports, Ark. Admin. Code § 007.12.1-12.0(d), and must report the number of informed consent certifications received from abortion patients, Ark. Admin. Code § 060.00.1-36(N)(f)(B). If the state is unable to identify these providers and Plaintiffs do not know who they are, it is difficult to see how they could possibly provide a meaningful point of access for women seeking abortions.

submitted evidence showing that 25% of all women seeking medication abortions in the state will be prevented entirely from obtaining any abortion.[4] *Id.* at 12, 17. The evidence also shows that 70% of women seeking medication abortions will have to travel to Little Rock (which is 190 miles, one way, from Fayetteville, where they would have gotten their abortions but for the requirement), resulting in delays that increase the risk of the procedure, as well as having to take time off work, arrange childcare, and arrange the necessary transportation and funds required to travel. These burdens will fall hardest on low-income women, with evidence showing that 57% of Fayetteville patients are at or below 110% of the federal poverty level. Decl. of Stephanie Ho, MD ¶ 21, attached as Ex. 2 to Pls.' Renewed Mot. for TRO, ECF No. 84. And 100% of affected women will be denied a safe, early method of abortion that many of them strongly prefer and for some is medically indicated. Therefore, to satisfy the Eighth Circuit's mandate this Court should find that, at a minimum, due to the requirement, more than 25% of all medication abortion patients will be prevented entirely, delayed, and otherwise burdened in accessing abortion, and that this likely constitutes a "large fraction" of women seeking medication abortions.

Defendants claim Plaintiffs must demonstrate that "'*practically all* of the affected women would face a substantial obstacle in obtaining an abortion.'" Defs.' Resp. at 29. As an initial matter, because 100% of the relevant group of women will be prohibited from obtaining medication abortions, Plaintiffs *have* shown that "practically all" of the affected women are unduly burdened by the contracted physician requirement.[5] But even if loss of a safe, early

[4] Defendants do not, and cannot, claim that being prevented from obtaining an abortion entirely is not a cognizable burden.

[5] Defendants claim, citing *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), that eliminating a safe, common, and popular method of abortion is not a cognizable burden. *See* Defs.' Resp. at 24. But *DeWine* was decided before *Whole Woman's Health* and does not employ the balancing analysis the Eighth Circuit recognized *Whole*

method of abortion were not a cognizable burden, neither the Supreme Court nor the Eighth Circuit has ever required the showing Defendants suggest. *See, e.g.*, *Jegley*, 864 F.3d at 960 (stating only that the district court "should conduct fact finding concerning the number of women unduly burdened by the contract-physician requirement and determine whether that number constitutes a 'large fraction'").[6] And indeed, requiring a showing that "practically all" or "the vast majority" are burdened to grant facial relief is inconsistent with the result in *Whole Woman's Health*. There, the district court explained that it was "impossible to divine exactly how many women in Texas may be affected by any individual factor or combination of factors" and enjoined the law based on its finding that a "*significant but ultimately unknowable*" number of women would be unduly burdened. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683, 686 (W.D. Tex. 2014). In this case, there is no doubt that a significant number of women seeking medication abortion are unduly burdened. This Court, therefore, can and should find, based on

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Woman's Health requires. In contrast, the Ninth Circuit employed such an analysis and found that a law similar to the one upheld in *DeWine* likely imposed an undue burden because, among other reasons, "medication abortion is a common procedure strongly favored over surgical abortion by many women." *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014), *cert denied*, 135 S. Ct. 870 (2014). Defendants' attempt to cite *Gonzales* in support, Defs.' Resp. at 24, similarly fails. *Gonzales* held merely that the government may bar a seldom-used abortion procedure used later in pregnancy when the ban advances important state interests and "implicates additional moral and ethical concerns that justify a special prohibition." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). None of that is present here.

[6] For this argument, Defendants rely on another Sixth Circuit pre-*Whole Woman's Health* case, *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006). But *Taft*, and the majority of the cases on which it relies, address the very different context of laws enacted in order to make sure that women's decision making is more informed. *See Taft*, 468 F.3d 361 (considering challenges to parental involvement and two-trip informed consent requirements and citing similar cases). In these cases, patients who overcame the requirements' burdens and obtained an abortion presumably received some benefit from the requirements. Here, in contrast to these cases (but like in *Whole Woman's Health*), this Court has already, correctly, recognized that the contracted physician requirement does nothing to advance patient safety. Further, *none* of the cases *Taft* cites, *see* 468 F.3d at 373, require a finding that "practically all" women would be substantially burdened in order to strike a statute. *Taft*'s anomalous analysis is thus flatly unsupported by the cases it cites.

the evidence before it, that the contracted physician requirement—which would bar 25% of affected women from getting an abortion entirely, force 70% of affected women to travel hundreds of miles to access an abortion, and require 100% of affected women to have a surgical procedure (when they otherwise would have had a safe medication abortion)—unduly burdens a large fraction of women seeking medication abortion in Arkansas.

B. The Court should find that the contracted physician requirement confers no medical benefit.

This Court already found that the contracted physician requirement does not benefit women. Factual and legal developments since this Court's preliminary injunction order—including two years of additional data relating to the safe provision and increasing popularity of medication abortion, and the Supreme Court's findings on the safety of abortion and the lack of any benefits conferred by the similar Texas admitting privileges requirement—only bolster this Court's 2016 findings on this issue. Defendants' claims that Plaintiffs supposedly "concede" that the contracted physician requirement "mandates 'good medical practice' and will benefit patients," Defs.' Resp. at 6, are baseless and willingly ignore both Plaintiffs' arguments and the extensive evidence in front of this Court demonstrating that the requirement provides no benefits whatsoever.

Defendants' claims that *Whole Woman's Health* "specifically relied on (and blessed)," Defs.' Resp. at 20, Texas's pre-existing requirement that abortion providers have a "working arrangement" with a physician with privileges are similarly misplaced. The pre-existing Texas requirement was not at issue in *Whole Woman's Health* and not before the Court; the Court had no occasion to comment on any benefits provided by the requirement and did not do so. Instead, the Supreme Court approvingly cited the Texas district court findings regarding the safety of

abortion and the lack of benefits provided by the admitting privileges requirement—findings that are very similar to the ones made by this Court in granting the preliminary injunction. *See Whole Woman's Health*, 136 S. Ct. at 2311. This Court's findings regarding the safety of medication abortion and the lack of any benefit provided by the contracted physician requirement remain as true today as they were two years ago—and they are further supported by *Whole Woman's Health*.

Finally, while Defendants latch onto the Eighth Circuit's statement that it saw "some benefit for patients where the State mandates continuity-of-care standards," *Jegley*, 864 F.3d at 960 n.9, the Eighth Circuit was simply mistaken in its assumption that there are no such existing standards and that "Planned Parenthood could unilaterally decide to discontinue its twenty-four-hour nurse-staffed phone line." *Id*. It could not: the nurse line is required by Arkansas law, Ark. Admin. Code § 007.05.2-7(E), as are a whole host of other requirements mandated by the state. *See, e.g.*, *id.* § 007.05.2-4 (licensing requirements); *id.* § 007.05.2-6 (general administration); *id.* § 007.05.2-7 (staffing and patient care); *id.* § 007.05.2-8 (requirements regarding emergency transfer, complications, and reporting); *id.* § 007.05.2-10 (infection control); *id.* § 007.05.2-12 (physical facility requirements). What is relevant here is that *this* requirement, which has such dramatic effects, does not promote continuity of care, as this Court already found. *See* Prelim. Inj. Order at 31–35, ECF No. 60 (finding the requirement does not promote continuity of care because, for example, "[n]othing in this provision requires a contracted physician who has admitting privileges to care for a patient who has complications from a medication abortion or to see the patient before the complications arise, accompany the patient to the hospital, treat her there, visit her, or call her"). And in fact, despite medication abortion being provided in Arkansas without a contracted physician for a decade, Arkansas cannot identify "a single instance in which

the . . . requirement would have helped even one woman obtain better treatment," *Whole Woman's Health*, 136 S. Ct. at 2311. This Court should, therefore, find that like the Texas admitting privileges requirement, the contracted physician requirement "br[ings] about no . . . health-related benefit." *Id.* at 2311; *see also* Br. of Am. Coll. of Obstetricians & Gynecologists & Am. Pub. Health Ass'n as Amici Curiae in Support of Pet'rs at 4 (Sup. Ct. Feb. 1, 2018) (Arkansas requirement "does nothing to protect the health and safety of women and is inimical to modern medical practice").

C. This Court should find that any benefits conferred by the contracted physician requirement are substantially outweighed by the burdens it imposes.

As the Eighth Circuit recognized, under *Whole Woman's Health*, the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309; *see also Jegley*, 864 F.3d at 958. Defendants, citing the Eighth Circuit's description of *Whole Woman's Health*, claim that any burdens imposed must "substantially outweigh" any benefits, but the Supreme Court made clear that courts "appl[y] the correct legal standard" when they "weigh[] the asserted benefits against the burdens." 136 S. Ct. at 2310.

Regardless, Plaintiffs here easily satisfy Defendants' more stringent "substantially outweigh" test as the requirement provides no medical benefit at all and the burdens it imposes are extreme. This Court should, therefore, find that Plaintiffs are likely to succeed on the merits of their claim because the "requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women seeking medication abortion in Arkansas." *Jegley*, 864 F.3d at 960 n.9.

III. This Court is not precluded from issuing a second temporary restraining order or second preliminary injunction.

This Court asked the parties to brief "whether there is any bar that prevents a party from filing multiple requests for temporary restraining orders or preliminary injunctions in a given case." Order at 2. There is no such bar; rather "[t]he decision to issue a preliminary injunction is within a district court's discretion in the first instance." *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1026 (8th Cir. 2003). It is within this Court's sound discretion to issue a second temporary restraining order (and a second preliminary injunction after plaintiffs' forthcoming motion). Courts in this circuit have permitted and ruled on parties' motions for temporary injunctive relief, where parties have filed multiple such motions in a given case. The procedural history of *Barrett v. Claycomb* illustrates just that. In that case, the district court granted plaintiffs' motions for a temporary restraining order and a preliminary injunction. *See Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013); *Barrett v. Claycomb*, No. 11-CV-04242-NKL, 2011 WL 5827783 (W.D. Mo. Nov. 18, 2011). Defendants appealed and the Eighth Circuit vacated the preliminary injunction. *Barrett v. Claycomb*, 705 F.3d at 318. Plaintiffs moved again for a second preliminary injunction, which the district court again granted. *Barrett v. Claycomb*, 936 F. Supp. 2d at 1101–02 (W.D. Mo. 2013); *see also H & R Block Tax Servs. LLC v. Acevedo-Lopez*, 742 F.3d 1074, 1076, 1078 (8th Cir. 2014) (contemplating that plaintiff might again "pursue[] its [preliminary injunction] motion on remand"); *Ouchita Watch League v. U.S. Forest Serv.*, 4:11-CV-00425-JM & 4:11-CV-00782-JM, 2014 WL 11498055 (E.D. Ark. Dec. 15, 2014) (considering plaintiffs' second motion for preliminary injunction); *Jacob v. Bd. of Dirs. of Little Rock Sch. Dist.*, 4:06-CV-01007-GTE, 2006 WL 2792172, at *1–2 (E.D. Ark. Sept. 28, 2006) (same).

CONCLUSION

For the reasons stated above, in Plaintiffs' Brief in Support of Renewed Motion for Temporary Restraining Order, and presented at oral argument, Plaintiffs respectfully request this Court grant Plaintiffs' Motion and issue a temporary restraining order.

Dated: June 13, 2018

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 provide service upon all counsel of record.

/s/ Maithreyi Ratakonda
Maithreyi Ratakonda