E M E R G E N C Y
EFFECTIVE DATE OF STATUTE SOUGHT TO BE STAYED: NOVEMBER 1, 2014

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff/Appellant, vs. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health, (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants/Appellees.	)	No. ____________________

APPELLANT'S EMERGENCY MOTION FOR A TEMPORARY INJUNCTION OR, IN THE ALTERNATIVE, AN EMERGENCY STAY OF THE DISTRICT COURT'S ORDER TO PRESERVE THE *STATUS QUO*

Pursuant to 12 Okla. Stat. § 990.4(C), Appellant Larry Burns, D.O., respectfully requests an emergency temporary injunction, or, in the alternative, an emergency stay to preserve the *status quo* during the pendency of his appeal. Dr. Burns moved for a temporary injunction below to enjoin Senate Bill 1848 (2014 Okla. Sess. Law Serv. Ch. 370 (West)) ("S.B. 1848" or "the Act"), which, if allowed to go into effect on November 1, 2014, will deprive Dr. Burns of several rights secured by the Oklahoma Constitution and irreparably harm Dr. Burns and his patients. On October 24, 2014, District Court Judge Bills Graves, with no analysis, held that Dr. Burns failed to establish a likelihood of success on the merits of his

single-subject, special law, and unconstitutional delegation claims. As Dr. Burns established, however, S.B. 1848 offends the rights of all Oklahoma citizens by violating the Oklahoma Constitution's single-subject mandate, targeting physicians who provide abortion and their patients for discriminatory treatment, and unconstitutionally delegating legislative authority to unelected officials. The Act would deprive Dr. Burns of his livelihood and deprive women throughout the state of Oklahoma of access to safe medical care.[1]

For the Court's convenience, Dr. Burns incorporates by reference and attaches his Petition, Defendants' Answer, Dr. Burns's Motion for a Temporary Injunction, Dr. Burns's Memo of Law In Support Of His Motion for a Temporary Injunction, Defendants' Response, Dr. Burns's Reply, and the Transcript of Proceedings below. Dr. Burns incorporates by reference his Petition in Error and his Motion to Retain.

When considering a motion for stay or a temporary injunction, this Court considers: a) a likelihood of success on appeal; b) the threat of irreparable harm if relief is not granted; c) potential harm to the opposing party; d) any risk of harm to the public interest. Okla. Sup. Ct. R. 1.15(c)(2); *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460. The purpose of a temporary injunction is to preserve the *status quo* and prevent the perpetration of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered. *Okla. Pub. Employees Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504.

S.B. 1848 prohibits the performance of an abortion unless a physician with admitting privileges at a general hospital within thirty miles of the facility is present at the facility, and

[1] Judge Graves held that Dr. Burns has standing to assert each of his Constitutional claims, but had no standing to additionally assert those claims on behalf of his patients. Although Judge Graves's holding flies in the face of settled law, it does not impact the analysis of claims presented here under the Oklahoma Constitution. The irreparable harm to the women of Oklahoma may be considered in weighing the risk of harm to the public interest.

exposes abortion providers to criminal and civil penalties. It is composed of six distinct provisions covering different subjects. The admitting privileges provision reads as follows:

> On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

2014 Okla. Sess. Law Serv. Ch. 370, § 1(B) (West).

Dr. Burns is a doctor of osteopathic medicine, licensed by the State of Oklahoma. Dr. Burns performs first trimester surgical and medication abortions. He has been providing safe abortion care in Norman, Oklahoma for 41 years. Dr. Burns's patients come from all around the state, as well as from neighboring states. Even before S.B. 1848, Dr. Burns was subject to extensive regulations governing patient care, infection control, personnel, emergency protocols, doctor qualifications, recordkeeping, and reporting obligations. At present, as is also required of all physicians who provide outpatient surgical procedures at ambulatory surgical centers, *see* OKLA. ADMIN. CODE § 310:615-5-1(h) (2014), 27 OK Reg. 2536 (2014), Dr. Burns already has a transfer agreement with a physician with hospital privileges at Norman Hospital in the event of an emergency in compliance with OKLA. ADMIN. CODE § 310:600-9-6(9) (2014). Burns Aff. ¶ 7.[2]

Legal abortion is one of the safest medical procedures in the United States;

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[2] The Affidavit of Larry A. Burns, D.O., dated October 1, 2014, is annexed as Appendix 2 to Plaintiff's Motion for A Temporary Injunction and for Expedited Briefing and Hearing on That Motion Or, Alternatively, for a Temporary Restraining Order Pending the Outcome of That Motion filed on October 2, 2014 ("Plaintiff's Motion for A Temporary Injunction"), which is found in the Exhibits to the Emergency Motion for Stay at Exhibit 3.

approximately 3 in 10 women will obtain an abortion by the age of 45. Estes Aff. ¶¶ 23.[3] Most abortions can be safely performed in an outpatient setting, and only 1.3% of women in the United States obtaining first trimester surgical abortions experience even minor complications. *Id*. ¶¶ 24, 53. The prevalence of major complications requiring treatment at a hospital is approximately 0.05%. *Id*. ¶ 24. The risks of abortion compare favorably with the risks of other gynecologic and non-gynecologic procedures that are typically performed in office-based settings. *Id*. ¶¶ 18–20. The District Court did not reject this evidence and did not make contrary findings of fact.

Dr. Burns does not currently have admitting privileges because they are not necessary to ensure the health of his patients. Complications are very rare among Dr. Burns's patients. In four decades, only one patient, suffering from prolonged anesthetic effect, was transported by ambulance from the clinic. Burns Aff. ¶ 17. That patient awoke by the time the ambulance arrived, was taken to the hospital for observation, and, when Dr. Burns went to the hospital to check on her, was in good condition and released within three hours of her arrival. *Id*. Dr. Burns provides his patients with a telephone number where they can reach him at all times. Burns Aff. ¶ 11.

In the very rare case in which the patient needs to be treated at a hospital, the quality of care the patient receives will not be affected by whether the abortion provider has admitting privileges at that particular hospital. Estes Aff. ¶¶ 38–39. Emergency room physicians, regardless of whether they perform abortions, are qualified to manage the care of a patient experiencing a complication from an abortion, because such complications are the same as

[3] The Affidavit of Christopher M. Estes, M.D., M.P.H., dated October 1, 2014, is annexed as Appendix 2 to Plaintiff's Motion for A Temporary Injunction, which is found in the Exhibits to the Emergency Motion for Stay at Exhibit 3.

those that would follow a spontaneous miscarriage or other gynecologic surgery. *Id*. Moreover, if a complication requiring emergency treatment occurs after a patient has left the clinic, she should proceed to the nearest emergency room, which would not necessarily or even likely be a hospital at which Dr. Burns may be able to obtain privileges. Burns Aff. ¶ 15; Estes Aff. ¶¶ 40–45. The admitting privileges requirement will not improve the ability of women to receive safe abortion care in Oklahoma. Estes Aff. ¶¶ 48, 53. In fact, the requirement departs from accepted medical practice. *Id.* ¶ 30; Burns Aff. ¶ 19.

S.B. 1848 is composed of six distinct provisions covering different subjects with no common theme or purpose, in violation of the Oklahoma Constitution's single-subject rule. OKLA. CONST. art. V, § 57. In addition to the admitting privileges provision, S.B. 1848 directs the State Board of Health to establish standards for abortion facilities addressing (a) supplies and equipment; (b) the training of physicians assistants and volunteers; (c) the medical screening and evaluation of abortion patients; (d) the performance of abortions and post-procedure follow-up care; and additionally requires (e) facilities performing abortions to report a patient's or a "born-alive child's injury" to the State Board of Health and other professional licensing and regulatory boards. 2014 Okla. Sess. Law Serv. Ch. 370, §§ 1(A), 1(C)–1(G) (West). In *Nova Health Sys*. *v*. *Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d 380, 382, this Court struck down a statute regulating abortion, holding that although each provision concerned "freedom of conscience," the statute was "obviously violative" of the single-subject rule because it comprised portions of five bills and involved multiple subjects. The Court admonished:

> We are growing weary of admonishing the Legislature for so flagrantly violating the terms of the Oklahoma Constitution. It is a waste of time for the Legislature and the Court, and a waste of the taxpayer's money. . . .

> [W]e again restate: THE CLEAR LANGUAGE OF THE OKLAHOMA CONSTITUTION REQUIRES THAT ALL LEGISLATIVE ACTS SHALL EMBRACE BUT ONE SUBJECT.

Id. at ¶ 1, 381–82 (emphasis in original). The admitting privileges provision failed to pass as a stand-alone bill and was only enacted when combined with five other unrelated provisions; it is quintessential logrolling. *See In re Initiative Petition No. 382*, 2006 OK 45, ¶¶ 14–15, 142 P.3d 400, 407–408; *Douglas v. Cox Ret. Props., Inc*., 2013 OK 37, ¶¶ 10–11, 302 P.3d 789, 793–94.

In addition, by requiring only physicians who provide abortion services to obtain hospital admitting privileges, the law targets Dr. Burns and his patients for discriminatory treatment in violation of the constitutional prohibition against special laws. OKLA. CONST. art. V, § 59; *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822, 824–25. For example, in *Nova Health Sys. v. Pruitt*, No. 2:12-cv-00395, 2012 WL 1034022 (Dist. Ct. Okla. Cnty. Mar. 28, 2012), the court permanently enjoined a mandatory ultrasound requirement that subjected physicians to unique professional burdens, holding that the law improperly addressed only patients and physicians concerning abortions and did not address patients and physicians concerning "other medical care where a general law could clearly be made applicable." Moreover, there is no "valid legislative objective" for singling out physicians who perform abortions from all other doctors who provide outpatient surgical procedures or abortion patients from all other surgical outpatients. *See Reynolds*, 1988 OK 88, 760 P.2d 816, 822. As courts across the country have recognized, admitting privileges statutes like S.B. 1848 do not advance an asserted interest in women's health. *Planned Parenthood Se., Inc. v. Strange*, 2:13CV405-MHT, 2014 WL 3809403, at *41 (M.D. Ala. Aug. 4, 2014) (privileges requirement fell outside the range of standard medical practice and would undermine women's

health by cutting off access); *Planned Parenthood of Wis. v. Van Hollen*, No. 13–cv–465–wmc, 2013 WL 3989238, *14 (W.D. Wis. Aug. 2, 2013) ("[D]efendants are unlikely to establish . . . that there is a reasonable relationship between the admitting privileges requirement and maternal health."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013), *rev'd on other grounds*, 748 F.3d 583 (5th Cir. 2014) ("[T]here is no rational relationship between improved patient outcomes and hospital admitting privileges within 30 miles of a facility in which a physician provides abortion services."). Further, admitting privileges laws are not consistent with accepted medical practices. *See* Am. College of Obstetricians and Gynecologists, *Guidelines for Women's Health: A Resource Manual* 433 (3d ed. 2007); ACOG/AMA Amici Curiae Brief, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) (No. 13-51088), 2013 WL 6837500. Similarly, the Oklahoma State Medical Association ("OSMA") opposed S.B. 1848, warning that it "may not reflect the best interest of the patient." Burns Aff. ¶ 19, Ex. A. Rather than advancing women's health, S.B 1848 will have the effect of closing one of three clinics in Oklahoma, drastically reducing the availability of services to women throughout the State, and thereby exposing them to greater health risks. Estes Aff. ¶¶ 50–52; Burns Aff. ¶¶ 34–35.

The Act is also an unconstitutional delegation of legislative authority to hospital boards to determine, without requirements prescribed by the legislature, which physicians can provide abortions. OKLA. CONST. art. IV, § 1; art. V, § 1. Hospital boards grant admitting privileges based on varying requirements that are not related to a physician's qualifications. In fact, in response to Dr. Burns's assertion that admitting privileges are not a proxy for clinical expertise,

the State readily admitted that "we don't particularly care what their [the hospitals'] standards are." Ex. 7 (10/17/14 Hrg.) at 36.

It is a clear violation of the non-delegation doctrine for the legislature to make hospital boards gatekeepers for abortion access in the state. "The formulation of policy is a legislature's primary responsibility," protecting voters' ability to hold policy-makers accountability for the policies they set. *See Democratic Party of Okla. v. Estep*, 1982 OK 106, 652 P.2d 271, 277 n.25. The Legislature's abdication of its responsibility is an affront to all Oklahoma citizens. *See id. at* 277–78; *Oklahoma City v. State ex. rel. Dep't of Labor*, 1995 OK 107, 918 P.2d 26, 29–30.

Finally, although Dr. Burns has applied for admitting privileges at all 16 of the eligible hospitals within 30 miles of his practice, Burns Aff. ¶¶ 22–32, those hospitals are under no obligation to act on his applications within a certain period of time, and it is highly unlikely that he will receive admitting privileges decisions from all hospitals prior to the Act taking effect, in violation of his procedural due process rights. OKLA. CONST. art II, § 7. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014); *June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD-RLB, 2014 WL 4296679, at *7 (M.D. La. Aug. 31, 2014).

In ruling against Dr. Burns's due process claim, Judge Graves relied on mistakes of fact and law. First, Dr. Burns did not wait "51 days after S.B. 1848 was enacted" before applying to the first hospital. Order Denying Temporary Injunction, Case No. CV-2014-1896, (Filed Oct. 24, 2014) at p. 3. As is evident in Exhibit 3, (Appendix 2, Ex. B), July 18, 2014 is that date on the letter sent by Norman Regional Hospital notifying Dr. Burns that his application was denied; Dr. Burns had applied prior to that date. Second, in *Abbott*, 748 F.3d

583, the Fifth Circuit stayed enforcement of the admitting privileges law until physicians had heard back on all their admitting privileges applications – as long as the applications were submitted *by the effective date of the statute.* Here, Dr. Burns clearly submitted all his applications well before the November 1, 2014 effective date.

With respect to Dr. Burns's showing of irreparable harm, Judge Graves disregarded prevailing legal standard. Oklahoma law defines "irreparable" harm as "incapable of being fully compensated by money damages. . . ." *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶ 28, 39 P.3d 152, 159. If allowed to take effect, the Act would deprive Dr. Burns of several rights secured by the Oklahoma Constitution. Such deprivation of constitutional rights is *per se* irreparable harm. *See Caldwell*, 2014 WL 4296679 at *7 (plaintiffs showed admitting privileges requirement would irreparably injure physicians where challenged law violated due process rights) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury")). Second, if S.B. 1848 is allowed to take effect, Dr. Burns will be forced to close his practice and deprived of his livelihood. *See Okla. Pub. Emps. Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 34, 330 P.3d 497, 509.

Further, there are only two other abortion providers in Oklahoma; one in Oklahoma City and one in Tulsa. Out of the total number of abortions performed in 2013,[4] Dr. Burns performed 44 percent of the procedures. Burns Aff. ¶ 10. If Dr. Burns is forced to stop providing abortions, even assuming both other clinics are able to stay open, they are unlikely to be able to meet the increased demand for medical services. Burns Aff. ¶¶ 34, 35. Women

[4] *Abortion Surveillance in Oklahoma, 2002-2013 Summary Report*, OKLAHOMA DEPARTMENT OF HEALTH, *available at* http://www.ok.gov/health2/documents/HCI_2002-2013ITOPtrends.pdf (last visited Oct. 1, 2014).

will therefore likely face delays in obtaining abortions, increasing their risk of complications and costs. Estes Aff. ¶ 50. Delay will also mean that some women do not get appointments in time to qualify for a medication abortion. *Id*. Other women may progress beyond the time when legal second trimester abortion is available in Oklahoma. *Id.*

Although legal abortion is a very safe procedure, the risks increase as the pregnancy advances. *Id.* Thus, delays increase the risk of complications, thereby undermining rather than furthering women's health. Estes. Aff. ¶¶ 49–51. For some women, the burdens created by S.B. 1848 may cause them to carry an unwanted pregnancy to term or attempt a self-induced abortion. *Id.* ¶¶ 51–52. These real-life consequences are inevitable if S.B. 1848 substantially reduces access to abortion. *Id.*

Unlike Dr. Burns and his patients, the Defendants will suffer no harm if a temporary injunction is granted. A temporary injunction would allow Dr. Burns to continue to provide -- and women to receive -- access to abortion from a doctor with an impeccable safety record. This would also preserve the *status quo* while this Court has an opportunity to consider whether the Act runs afoul of the Oklahoma Constitution. *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 13, 181 P.3d 750, 753 ("[A] temporary injunction is . . . designed to preserve the . . . status quo until a final determination of the controversy.") Moreover, it is well-settled that the enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884 at *3 (W.D. Okla. Oct. 11, 2006).

For the foregoing reasons, Dr. Burns respectfully requests that this Court enter a temporary injunction or stay of proceedings to preserve the *status quo* and prevent enforcement

of S.B. 1848 during the pendency of this litigation.[5]

Dated: October 27, 2014

Respectfully submitted,

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J. Blake Patton, OBA No.30673
Walding & Patton
400 N. Walker Ave., Suite 195
Oklahoma City, OK 73102-1889
Telephone: (405) 605-4440

Martha M. Hardwick, OBA No. 3847
P. O. Box 307
Pauls Valley, Oklahoma 73075
Telephone: (918) 749-3313

Janet Crepps*
South Carolina Bar No. 15902
Alaska Bar No. 8407062
Ilene Jaroslaw**
New York Bar No. 2241131
Genevieve Scott**
New York Bar No. 4922811
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
Telephone: (917) 637-3697
Fax: (917) 637-3666
Out-of-State Attorney Application and Motion to Associate Pending
**Admitted to Practice by Order dated Oct. 2, 2014*

ATTORNEYS FOR PLAINTIFF

[5] A judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence. *Dowell v. Pletcher*, 2013 OK 50, 304 P.3d 457, 460. Because the district court misapplied the law and disregarded the uncontroverted evidentiary record in this case, the district court's decision was clearly an abuse of discretion.

APPELLANT'S CERTIFICATE OF COMPLIANCE
WITH SUPREME COURT RULE 1.15(c)(1)

Pursuant to Sup. Ct. R. 1.15(c)(1), counsel for Appellant Larry A. Burns, D.O., certifies that it requests this Court to act within less than a week on its application for stay in order to effect the relief requested because, following a hearing on October 17, 2014, Judge Graves took the issue under advisement and did not issue an Order Denying Appellant's Motion for a Temporary Injunction until Friday, October 24, 2014, and the statute at issue is scheduled to take effect on November 1, 2014.

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J. Blake Patton, OBA No. 30673
Walding & Patton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th of October, 2014, of a copy of the foregoing was served via U.S. mail, postage prepaid, on the following:

M. Daniel Weitman, Assistant Attorney General
Sarah Greenwalt, Assistant Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105

____
J. Blake Patton, Esq.