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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, UTAH

PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff,

Plaintiff,

v.

STATE OF UTAH, *et al.*,

Defendants.

SECOND MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

Oral Argument Requested

Case No. 220903886

Judge Andrew Stone

TABLE OF CONTENTS

Exhibits

A Declaration of David Turok, M.D., M.P.H., FACOG in Support of Plaintiff's Motion for a Temporary Restraining Order ("First Turok Decl.")

B Declaration of David Turok, M.D., M.P.H., FACOG in Support of Plaintiff's Second Motion for a Preliminary Injunction ("Second Turok Decl.")

C Declaration of Annabel Sheinberg in Support of Plaintiff's Second Motion for a Preliminary Injunction ("Sheinberg Decl.")

D Declaration of Colleen M. Heflin in Support of Plaintiff's Motion for a Preliminary Injunction ("Heflin Decl.")

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Legislation, and Constitutional Provisions

Rules

Regulations

Other Authorities

SUMMARY OF DISPOSITION REQUESTED AND SUPPORTING GROUNDS

Last summer, when the U.S. Supreme Court overruled *Roe v. Wade* and Utah's near-total abortion ban took effect, this Court entered emergency relief pursuant to the protections of the Utah Constitution to preserve the safe and legal access to pre-viability abortion that Utahns have relied on for the past fifty years. *See* Order Granting Prelim. Inj. ("PI Order"); Senate Bill 174, 2020 Leg., Gen. Sess. (Utah 2020) (codified at Utah Code Ann. tit. 76, ch. 7A) (the "Trigger Ban"). The State's appeal of that preliminary injunction is fully briefed and pending before the Utah Supreme Court.

With the Trigger Ban enjoined by this Court and pending review by the Utah Supreme Court, the Utah Legislature sought an alternative means to its desired end: state control over women's reproductive freedom and bodily autonomy. This time, its solution was to ban abortion *clinics*. House Bill 467, 2023 Leg., Gen. Sess. (Utah 2023) ("HB 467") requires all abortions to be performed in a hospital and criminalizes abortions performed in licensed abortion clinics (the "Clinic Ban"). Because hospitals in Utah provide abortion only in a narrow set of circumstances, licensed abortion clinics provide over 95 percent of the abortions in the state, just as safely and at far lower cost than hospitals. The Clinic Ban therefore functionally bans abortion in Utah.

Accordingly, if left unrestrained, the Clinic Ban will effectively nullify this Court's 2022 preliminary injunction. Plaintiff Planned Parenthood Association of Utah ("PPAU") will be forced to stop providing abortion under any circumstance. The vast majority of Utahns will be left without access to legal abortions in their home state. Women will be forced to carry pregnancies to term against their will; to remain pregnant until they can travel out of state to access this critical, time-sensitive medical care, at great cost to themselves and their families even if they are able to obtain an appointment and make this trip; or to attempt to self-manage their abortions outside the medical

system. And Utahns will lose their constitutional rights to determine the composition of their families; to gender equality; to bodily integrity; and to make private health care decisions—each an irreparable constitutional harm.[1]

To be clear, the Clinic Ban amends both the Trigger Ban, Utah Code Ann. § 76-7a-201, and Utah's 18-Week Ban, now codified at Utah Code Ann. § 76-7-302, to require all abortions permitted under either of those laws to be performed in a hospital. 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.

A functional ban on abortions, accomplished by delicensing and intimidating abortion providers, violates multiple provisions of the Utah Constitution just as an express abortion ban does. PPAU therefore 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.

STATEMENT OF FACTS

I. PPAU AND ITS SERVICES

PPAU is a Utah non-profit organization dedicated to ensuring Utahns' access to affordable, high-quality sexual and reproductive health care. Decl. of David Turok, M.D., M.P.H., FACOG in

[1] PPAU uses "woman" or "women" as a short-hand for people who are or may become pregnant, but people of a range of gender identities, including transgender men and gender-diverse individuals, may become pregnant and seek abortion, and are also harmed by HB 467.

Supp. of Pl.'s Mot. for TRO ("First Turok Decl.") ¶¶ 12–13, submitted in support of the temporary restraining order of the Trigger Ban and attached hereto for ease of reference as Exhibit A; Decl. of David Turok, M.D., M.P.H., FACOG in Supp. of Pl.'s Second Mot. for Prelim. Inj. ("Second Turok Decl.") ¶¶ 12–13, attached hereto as Exhibit B. Through its physicians licensed to practice in Utah, PPAU provides abortion at three health centers. Second Turok Decl. ¶ 14. PPAU is one of only two outpatient abortion providers in Utah. *Id*. ¶ 63.

Each of PPAU's three health centers is licensed as an "abortion clinic" under Utah law. *Id*. ¶ 14; Decl. of Annabel Sheinberg in Supp. of Pl.'s Second Mot. for Prelim. Inj. ("Sheinberg Decl.") ¶ 4, attached hereto as Exhibit C. To maintain these facility licenses, PPAU must submit license renewal applications to the Utah Department of Health and Human Services ("DHHS") annually; comply with the requirements in Utah Code title 76, chapter 7, part 3, Abortion, including the recordkeeping and reporting requirements of section 313; and adhere to the health, safety, sanitary, and recordkeeping requirements established by R432-600 of the Utah Administrative Code. Utah Code Ann. §§ 26-21-6.5(4); 26-21-8(4)(a). At least twice each year, DHHS inspects each of PPAU's three licensed facilities to ensure that the abortion clinic is complying with all applicable statutory and licensing requirements. Utah Code Ann. §§ 26-21-6.5(4)(f), (5). At least one of these two inspections must be a surprise inspection, without advance notice to PPAU. Utah Code Ann. § 26-21-6.5(5).

II. THE TRIGGER BAN

In 2020, the Utah Legislature enacted the Trigger Ban, which bars abortion at any point in pregnancy with limited exceptions. As detailed in PPAU's first motion for a preliminary injunction, Mot. for Prelim. Inj. ("First PI Mot.) at 3, the Trigger Ban provided that it would take effect only upon certification "that a court of binding authority ha[d] held that a state may prohibit

the abortion of [a fetus] at any time during the gestational period." 2020 Utah Laws ch. 279, § 4(2). This condition was met last year, soon after the U.S. Supreme Court held that *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny were overruled, eliminating nearly fifty years of precedent protecting a federal substantive due process right to abortion until viability. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). Shortly thereafter, the Utah Senate announced that the Utah legislative general counsel had issued the certification required for the Trigger Ban to take effect. First PI Mot. at 3–4.

Upon certification of the Trigger Ban in June 2022, PPAU was forced to stop providing abortions that did not meet the Ban's limited exceptions. The next day, PPAU filed this litigation and sought emergency injunctive relief against the Trigger Ban. This Court granted a temporary restraining order on June 27, 2022, allowing PPAU to continue to provide abortion services.

PPAU then moved for a preliminary injunction, alleging that the Trigger Ban violated Utahns' rights under the Utah Constitution. After further briefing and oral argument, this Court preliminarily enjoined the Trigger Ban on July 11, 2022. In its Order, the Court found that PPAU had "made a strong showing that, without a preliminary injunction, the [Trigger Ban would] cause irreparable harm to PPAU, its patients, and its staff," that the balance of harms weighed in PPAU's favor, and that a preliminary injunction would be in the public interest. PI Order ¶¶ 3–5. The Court granted the preliminary injunction on the grounds that PPAU had raised "at least serious issues on the merits that should be the subject of further litigation." PI Order ¶¶ 6–7. Under this injunction, PPAU 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.

The State petitioned the Utah Supreme Court for permission to appeal the preliminary injunction and moved to stay the preliminary injunction pending appeal. On October 3, 2022, the

Supreme Court denied the motion to stay but granted the petition for interlocutory appeal. Order, *State v. PPAU*, No. 20220696-SC (Utah Oct. 3, 2022). Briefing in that appeal was completed on February 21, 2023.

III. UTAH HOUSE BILL 467

Even as the Utah Supreme Court prepared to decide that appeal, however, the Utah Legislature enacted a new abortion ban, scheduled to take effect on May 3, 2023. HB 467 makes it illegal in Utah to provide an abortion anywhere other than a hospital, unless a medical emergency necessitates performing the abortion in another location. HB 467 §§ 17–18, 28–29 (amending Utah Code Ann. §§ 76-7-301(6), -302(3); 76-7a-101(4), -201(2)(b)). HB 467 also eliminates the longstanding licensure category of abortion clinics, prohibiting the Utah Department of Health and Human Services ("DHHS") from issuing any abortion clinic licenses after May 2, 2023 and requiring DHHS to revoke the license of any facility other than a hospital that provides an abortion. *See* HB 467 §§ 1–6, 16, 21, 24, 28 (amending Utah Code Ann. §§ 26-21-2, -6.5(1)–(2); 26-21-7, -11(2); 26-21-8, -25; 76-7-301, -305, -314; 76-7a-101). Collectively, these provisions ban abortion in Utah anywhere other than at a hospital (the "Clinic Ban"). Notably, neither HB 467's sponsors nor Governor Cox claimed to justify the Clinic Ban on health or safety grounds; rather, HB 467's supporters presented it as a "clarifying" bill that would complement and facilitate the Trigger Ban's elimination of abortion in virtually all circumstances with limited exceptions—despite that the Trigger Ban remains enjoined.[2]

[2] *Hearing on H.B. 467 before the H.*, 2023 Leg., Gen Sess., recording starting at 01:22:20 (Utah Feb. 17, 2023) (statement of Rep. Karianne Lisonbee, floor sponsor of HB 467) (explaining that HB 467 "unlicenses abortion clinics that are specifically there to conduct elective abortions" but permits other clinics to provide abortions "for people who fall under exemptions [to the Trigger Ban]" and clarifies those Trigger Ban exceptions), available at https://le.utah.gov/av/floorArchive.Jsp? markerID=122136; *Hearing on H.B. 467 before the S.*, 2023 Leg., Gen. Sess., recording starting at 01:42:04 (Utah March 2, 2023) (statement of Sen. Daniel McCay, floor

Violating the Clinic Ban is punishable as a second-degree felony, with the possibility of imprisonment for up to fifteen years and aggressive criminal fines (up to $10,000 for individuals and up to $20,000 for corporations), and by adverse licensure consequences for both facilities and providers. *See* HB 467 §§ 5, 17, 24–25, 29 (amending Utah Code Ann. § 26-21-11(2)); 76-7-302(3), -314(3), -314.5(1); 76-7a-201(2)(b)); Utah Code Ann. §§ 76-3-203(2), -301(1)(a), -302(1). Additionally, under separate provisions of HB 467, the Utah Division of Professional Licensing ("DOPL") can deny or revoke a medical professional's license if DOPL believes the practitioner has violated the Clinic Ban, regardless of whether the practitioner is ultimately found criminally liable for violating the Ban. HB 467 §§ 7–14 (amending Utah Code Ann. §§ 58-31b-502(1)(q); 58-44a-502(8); 58-67-304, -502(1)(e); 58-68-304, -502(1)(e); 58-70a-501; 58-77-603)) (the "Professional Licensing Penalties").

Given the threat of these severe criminal and professional penalties, PPAU will be unable to perform abortions under any circumstance if the Clinic Ban takes effect, even though this Court's injunction against the Trigger Ban remains in place. Because Utah hospitals do not provide abortion outside of a few narrow circumstances and over 95 percent of abortions in Utah are provided by a licensed abortion clinic, the Clinic Ban functionally bans abortion in Utah.

HB 467 was signed by the Governor on March 15, 2023, and is set to take effect on May 3, 2023. If the Clinic Ban is allowed to take effect, PPAU, its staff, and its patients will suffer the

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sponsor of HB 467) (explaining that HB 467 aims "to ensure our state strikes the best balance of protecting innocent life and protecting the women who experience rare and dangerous complications during pregnancy"), available at https://le.utah.gov/av/floorArchive.jsp?markerID=123524; *Governor's Monthly News Conference, March 2023*, PBS Utah, recording starting at 00:16:20 (Mar. 16, 2023), https://www.pbsutah.org/pbs-utah-productions/series/governors-monthly-conference/ (explaining that the intent of HB 467 is to clarify the Trigger Ban's exceptions and to require that abortions that fall within those exceptions be provided only in hospitals).

same harms they would have suffered under the Trigger Ban, including irreparable violations of their rights under the Utah Constitution. *See* PI Order ¶ 3.

IV. HB 467'S CLINIC BAN EFFECTIVELY BANS ABORTION IN UTAH

By criminalizing abortion at abortion clinics, the Clinic Ban criminalizes the vast majority of abortions provided in the state. Over 95 percent of the abortions in Utah are provided by PPAU's licensed abortion clinics or by the only other Utah outpatient abortion provider—Wasatch Women's Center, located in Salt Lake City. Second Turok Decl. ¶ 63. This is consistent with nationwide rates. In 2020, up to 97 percent of abortions nationally were performed in outpatient clinics or physicians' offices and as little as 3 percent of abortions were performed in hospitals. *Id*. ¶ 64. If the Clinic Ban takes effect on May 3, 2023, Utah's outpatient abortion providers will be forced to stop providing abortions under any circumstance. *Id*. ¶ 7.

Utah hospitals cannot and will not step in to replace abortion clinics as generally-available abortion providers. As HB 467's legislative sponsors and Governor Cox implicitly recognized in focusing their justifications for the Clinic Ban on abortions that fall within the Trigger Ban's narrow exceptions,[3] abortion is generally only performed by Utah hospitals as a result of one of two circumstances: either a medical condition that seriously threatens a patient's life or health or a diagnosis of a grave fetal anomaly. *Id*. ¶ 65. Utah law prohibits the use of state funds to pay for abortion other than to protect the life of the patient, to prevent significant damage to one of the patient's major bodily functions, or in cases of rape or incest that have been reported to law enforcement. Utah Code Ann. § 76-7-331(2). This prevents public hospitals like the University of Utah Hospital from offering abortions to the general public. Second Turok Decl. ¶ 65. Fewer than

[3] *See supra* note 2 (collecting legislative testimony that HB 467 would require hospitals to perform abortions only under the Trigger Ban's exceptions).

30 pregnancy terminations are performed by University of Utah providers each year.[4] Additionally, Utah law allows medical facilities and providers to refuse to provide abortion on moral or religious grounds. Utah Code Ann. § 76-7-306. Reflecting this, five Utah hospitals recently acquired by a Catholic-affiliated hospital system will not "provide elective abortions . . . in order to align with their new owner's 'ethical and religious directives.'"[5]

Even if a Utah hospital were willing to provide abortion in a wider range of circumstances, the logistics of providing abortion in a hospital setting would make it extremely difficult for a hospital to offer more than five abortion appointments a day. *Id.* ¶ 68. This would be a woefully inadequate substitute for the number of patients currently seen by Utah's outpatient abortion clinics, where, as explained below, people can obtain abortion just as safely and at far lower cost. *Id*. ¶ 60; *see infra* Statement of Facts, Part V. Hospitals currently struggle with staffing shortages for surgical care, contributing to delays in case scheduling. *Id*. ¶ 68. Abortions performed at hospitals are usually performed by induction, requiring an operating room, extensive staffing (including an anesthesiologist), increased costs, increased patient pain, and a much longer investment of time for patients. *Id.* And at hospitals like the University of Utah, the vast majority of abortion patients receive general anesthesia, increasing the total appointment time, post-procedure recovery time, and staffing and facility requirements. *Id.* ¶ 69. All these factors mean that Utah hospitals would only be able to provide at best a small fraction of the abortion care currently offered by licensed abortion clinics, even if hospitals were willing to provide generally-

[4] *University of Utah Statement: U.S. Supreme Court's overturn of Roe v. Wade*, Univ. of Utah (June 24, 2022), https://attheu.utah.edu/facultystaff/university-of-utah-statement-u-s-supreme-courts-overturn-of-roe-v-wade/.

[5] Paighten Harkins, *As 5 Utah hospitals change hands, will it mean less reproductive care?*, Salt Lake Tribune (March 27, 2023), https://www.sltrib.com/news/2023/03/27/utah-shifts-abortions-hospitals/.

available abortion services rather than limiting their services to abortions for medical indications or grave fetal anomalies.

Additionally, the criminal penalties and Professional Licensing Penalties attached to the Clinic Ban will chill medical providers' willingness to provide abortion even where it is permitted by the terms of the Ban. Physicians considering providing abortion in Utah will be keenly aware of the current national political landscape and the threat of zealous prosecutors or private litigants attempting to push the boundaries of the law to punish abortion providers. *Id.* ¶ 85. Hospital physicians who lack experience providing abortion or familiarity with Utah abortion law will be even less comfortable taking on the criminal and professional risks that the Clinic Ban and Professional Licensing Penalties attach to performing abortion. *Id.* ¶ 86. Indeed, this chilling effect is already being felt by physicians in other states with punitive abortion laws, with dire consequences for patients in need of care. *Id.* ¶ 83. And abortion bans in other states are deterring physicians from providing even other forms of obstetrical care—for example, leading one hospital in Idaho to stop providing labor and delivery services entirely.[6] *Id.* ¶ 89.

By banning abortion at abortion clinics, HB 467's Clinic Ban prohibits abortion as effectively as the Trigger Ban already enjoined by this Court.

V. HB 467'S CLINIC BAN DOES NOT IMPROVE ABORTION SAFETY

Robust medical evidence demonstrates that first- and second-trimester abortion is just as safe when provided in an outpatient clinic as it is when provided in a general hospital. Second Turok Decl. ¶¶ 7, 43. Regardless of where it is performed, abortion is one of the safest procedures in contemporary medical practice and many times safer than labor and delivery, which Utah law

[6] Gloria Oladipo, *Idaho hospital to stop delivering babies as doctors flee over abortion ban*, The Guardian (March 20, 2023), https://www.theguardian.com/us-news/2023/mar/20/idaho-bonner-hospital-baby-delivery-abortion-ban.

allows women to undergo at home.[7] *Id*. ¶¶ 32, 36–7. All methods of abortion provided at PPAU—medication abortion, aspiration abortion, and dilation and evacuation ("D&E")—are simple, straightforward medical treatments that typically take no more than ten minutes to perform, involve no incisions, have an extremely low complication rate, and, nationwide, are almost always provided in outpatient, office-based settings. *Id*. ¶¶ 27, 30. 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. *Id*. ¶ 34. Published research conducted in Utah concluded that second-trimester D&Es in dedicated outpatient facilities, such as PPAU's health centers, could be safer and less expensive than hospital-based D&Es or abortion by induction of labor. *Id*. ¶ 44.

Indeed, like other medical procedures, abortion is safest when performed by experienced clinicians. *Id*. ¶ 43. PPAU physicians have incredibly low abortion complication rates and superb safety records. Because PPAU specializes in providing patient-centered, holistic sexual and reproductive health care, PPAU patients benefit from receiving care from highly experienced and specialized providers and staff. *Id*. ¶ 46. In recognition of PPAU's providers' skill and experience, Utah hospitals throughout Utah and the Intermountain West regularly refer complicated or high-risk D&E cases to PPAU physicians. Upon receiving these referrals, PPAU physicians determine the most appropriate setting for the patient's care, which is usually PPAU's Metro Health Center in Salt Lake City. *See id*. ¶ 42.

Meanwhile, the features that differentiate hospitals from abortion clinics include system operations requirements, staffing requirements, and building construction requirements. These features are not relevant or necessary in the context of abortion care and provide no medical

[7] *See* Utah Code Ann. § 58-77-304 (recognizing "the right of parents to deliver their baby where, when, how, and with whom they choose").

benefit. *Id*. ¶ 50. This is particularly so for medication abortion, where the patient simply takes two sets of pills. *Id*. ¶ 51.

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. *Id*. ¶ 57. Most cases of cervical laceration are managed in the clinic setting either with Monsel's Solution or suture. *Id*. Cases of incomplete abortion are generally managed through repeat aspiration or medication. *Id*. 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. *Id*. ¶¶ 58–9.

Procedures with higher complication rates than abortion are routinely, and without controversy, performed in outpatient, office-based settings throughout Utah. These include vasectomies, colonoscopies, wisdom teeth extractions, and surgical removal of the tonsils. *Id*. ¶ 35. Most relevantly, although a woman is more than 12 times more likely to die from childbirth than from having an abortion, Utah law permits physicians and certified nurse-midwives to deliver babies in locations other than a hospital, including at birthing centers and even in private homes. Utah Code Ann. § 58-77-304 ("Nothing in this chapter abridges, limits, or changes in any way the right of parents to deliver their baby where, when, how, and with whom they choose, regardless of licensure under this chapter."); *id*. § 26-21-29; Second Turok Decl. ¶¶ 36–7.

For all these reasons, 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 agree that abortions can be provided safely in office-based settings and that a hospital setting is not clinically necessary. *Id*. ¶ 48.

A PRELIMINARY INJUNCTION IS WARRANTED

A preliminary injunction is "preventative in nature" and "serves to 'preserve the status quo pending the outcome of the case.'" *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (citations omitted). The decision whether to grant a preliminary injunction is committed to the sound discretion of the district court. *See id.* ¶ 6.

When this Court preliminarily enjoined the Trigger Ban, Utah rules authorized preliminary injunctive relief where the movant demonstrated (1) that the movant would suffer irreparable harm without the injunction; (2) that the threatened injury to the movant outweighed any injury to the party restrained; (3) that the injunction would not be adverse to the public interest; and (4) either that there was a substantial likelihood that the movant would prevail on the merits of the underlying claim, or that the case presented serious issues on the merits which should be the subject of further litigation. Utah R. Civ. P. 65A(e) (2022). Transparently in response to this Court's order enjoining the Trigger Ban based on its determination that PPAU had "demonstrated that there are *at least* serious issues on the merits that should be the subject of further litigation," PI Order ¶ 6 (emphasis added), however, the Legislature amended Utah's longstanding preliminary injunction standard to require a showing in every case of substantial likelihood of prevailing on the merits. House Joint Resolution 2, 2023 Leg., Gen. Sess. (2023) ("HJR 2"). The other Rule 65A factors remain unchanged.

As set forth below, PPAU satisfies each part of the Rule 65A test for the Clinic Ban, which bans abortion for the vast majority of Utahns just like the Trigger Ban.

I. PPAU IS SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS THAT THE CLINIC BAN VIOLATES THE UTAH CONSTITUTION

First, the Clinic Ban distinguishes between similarly-situated health care facilities—hospitals and licensed abortion clinics—without any safety justification for doing so, in violation of the Utah Constitution's Uniform Operation of the Laws Clause.

Second, because the Clinic Ban accomplishes in effect what the Trigger Ban sought to do directly, PPAU is substantially likely to prevail on the merits of many of the same constitutional claims it previously asserted in challenging the Trigger Ban: the right to determine one's own family composition; the right to equal protection under Utah's Equal Rights Provision and Uniform Operation of Laws Clause; the right to bodily integrity; and the right to privacy. In addition to the argument and evidence presented for the first time in support of this motion, PPAU incorporates by reference all briefing and evidence submitted in support of its motion for a preliminary injunction against the Trigger Ban.[8]

A. The Clinic Ban distinguishes between licensed abortion clinics and hospitals without justification.

PPAU's licensed abortion clinics provide abortion just as safely as Utah hospitals do. The Clinic Ban's distinction between these two types of health care facilities—criminalizing abortion at one but not the other—fails to advance any reasonable government objective and violates the Utah Constitution's Uniform Operation of Laws ("UOL") Clause.

That clause provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Although sometimes described as a "state-law counterpart to the federal Equal Protection Clause," *State v. Canton*, 2013 UT 44, ¶ 35, 308 P.3d 517, the UOL Clause's

[8] As explained in PPAU's first PI motion, PPAU has standing in this case to litigate claims on behalf of itself, its staff, and its patients. First PI Mot. at 4–6; PI Reply at 3–5.

language is distinct from that used in the U.S. Constitution, *see* U.S. Const. amend. XIV, § 1 (prohibiting a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws"). This "differing language," in addition to different "context[] and jurisprudential considerations found in and surrounding the two provisions[,] have led to differing legal consequences" under the Utah Constitution and its federal counterpart. *State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476 (internal quotation marks omitted); *accord Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993). "The most notable of these differing legal consequences is that" the Uniform Operation Clause "demands more than facial uniformity; the law's operation must be uniform" as well. *Drej*, 2010 UT 35, ¶ 33; *accord DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036.

Utah courts apply a "three-step inquiry" to UOL Clause claims, asking "(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." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 29, 452 P.3d 1109 (quoting *State v. Robinson*, 2011 UT 30, ¶ 17, 254 P.3d 183); *see also Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶¶ 11–28, 524 P.3d 573 (explaining that this modern formulation is the applicable standard). PPAU is substantially likely to prevail at each step.

1. The Clinic Ban creates a classification between licensed abortion clinics and "hospitals."

The Clinic Ban creates a classification between hospitals and abortion clinics by making it a crime to provide abortion in one but not the other.[9] Under the Clinic Ban, "[a]n abortion may be

[9] Collectively, the Clinic Ban appears at HB 467 § 17 (amending Utah Code Ann. § 76-7-302(3)) ("An abortion may be performed only in . . . a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency."); *id.* § 29 (amending Utah Code

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)).

2. Licensed abortion clinics and "hospitals" are similarly situated.

This classification between licensed abortion clinics and "hospitals" constitutes disparate treatment of health care facilities that are similarly situated for purposes of abortion safety.

Abortion is just as safe when provided by experienced clinicians in outpatient settings as when provided at hospitals. *See supra* Statement of Facts, Part V. Indeed, the Clinic Ban itself defines "hospital" to include some outpatient health centers, implicitly recognizing that hospitals and outpatient clinics are similarly situated. Under HB 467, the definition of "hospital" includes health care facilities other than general hospitals so long as abortion is provided (1) by physicians who are credentialed at a general hospital to provide abortion using the same procedure; and (2) as safely as it would be at a hospital. HB 467 § 16 (amending Utah Code Ann. § 76-7-301(6)).[10]

Ann. § 76-7a-201(2)(b)) ("An abortion may be performed only[] . . . in a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency."); *id.* § 16 (amending Utah Code Ann. § 76-7-301(6)) (defining "hospital"); *id.* § 28 (amending Utah Code Ann. § 76-7a-101(4)) (defining "hospital"); *id.* §§ 2, 5 (amending Utah Code Ann. §§ 26-21-6.5(1)(b), -11(2)) (barring licensed abortion clinics from providing abortions in violation of Utah law, including the Clinic Ban); *id.*, §§ 1–4, 6, 21, 24 (amending Utah Code Ann. §§ 26-21-2, -6.5, -7–8, -25; 76-7-305(2)(a), -314(7)) (eliminating the "abortion clinic" licensure category); HB 467, §§ 24–25 (amending Utah Code Ann. §§ 76-7-314; 76-7-314.5) (criminalizing violations of the Utah Criminal Code, Title 76, Chapter 7, Part 3, including HB 467's hospital requirement as codified at Utah Code Ann. § 76-7-302(3)).

[10] In full, as amended by section 16 of HB 467, title 76, chapter 7, section 301(6) of the Utah Code provides that "'Hospital' means: (a) a general hospital licensed by the department according to Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act; and (b) a clinic or other medical facility . . . that meets the following criteria: (i) a clinician who performs

PPAU provides abortion via physicians who are credentialed to provide those same methods of abortion at a hospital, and, as explained above, those methods of abortion are as safe at an outpatient clinic like PPAU's licensed abortion clinics as they would be if provided at a hospital. *Supra* Statement of Facts, Part V. Accordingly, HB 467's alternative definition of "hospital" *includes* some licensed abortion clinics by its terms.[11] Indeed, HB 467 actually defines "abortion clinic" to *exclude* facilities that satisfy the definition of "hospital," apparently recognizing that these two categories overlap. HB 467 § 1 (amending Utah Code Ann. § 26-21-2(1)(b)) ("'Abortion clinic' does not mean a clinic that meets the definition of hospital under Section 76-7-301 or Section 76-7a-101.").

Because this expanded definition of "hospital" appears to apply to PPAU's licensed abortion clinics, PPAU asked DHHS how PPAU's licensed abortion clinics could become designated as "hospitals" under HB 467, such that they could remain licensed as abortion clinics and continue providing abortion after May 3, 2023, notwithstanding the Clinic Ban. Sheinberg Decl. ¶ 15. But DHHS informed PPAU that only licensed hospitals and satellite clinics operating under a general hospital's license would be eligible for the Clinic Ban's expanded "hospital" definition, despite that this limitation appears nowhere in the text of HB 467. *Id.* ¶¶ 16–17. Thus, PPAU's licensed abortion clinics do not satisfy the statutory and regulatory requirements for licensure as a general hospital under the Clinic Ban in operation.

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procedures at the clinic is required to be credentialed to perform the same procedures at a general hospital licensed by the department; and (ii) any procedures performed at the clinic are done with the same level of safety for the pregnant woman and unborn child as would be available in a general hospital licensed by the department."

[11] HB 467 adds this same definition of "hospital" to the Trigger Ban's definitions provision and requires abortions performed under one of the Trigger Ban's exceptions to be performed in a "hospital." *See* HB 467 §§ 28–29 (amending Utah Code Ann. §§ 76-7a-101(4), -201(2)(b)). This amendment to the Trigger Ban's exceptions will not take effect, however, while the underlying Trigger Ban prohibition remains enjoined by this Court.

Therefore, notwithstanding that PPAU's licensed abortion clinics are similarly situated to hospitals and even qualify as "hospitals" under the text of HB 467 itself, the Clinic Ban will, in operation, force PPAU to stop providing abortion on May 3, 2023.

3. The Clinic Ban's disparate treatment of licensed abortion clinics and "hospitals" does not further any reasonable objective.

Because the Clinic Ban's legislative classification implicates the fundamental constitutional rights to family self-determination, gender equality, bodily integrity, and privacy, heightened scrutiny applies, *Salt Lake City Corporation v. Utah Inland Port Authority*, 2022 UT 27, ¶ 17, and the Ban fails that review. *See infra* Part I.B. But because the Clinic Ban fails even rational basis, PPAU is substantially likely to prevail on its UOL Claim wholly independent of its other constitutional claims, particularly given that Utah's "rationally related" test may be more exacting than its federal counterpart. *See Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988); *Malan v. Lewis*, 693 P.2d 661, 670–71 (Utah 1984).

Abortion is just as safe, if not safer, in an outpatient clinic as in a hospital, so the Clinic Ban does not further any general government interest in patient safety, particularly given the Clinic Ban's allowance of abortion at *some* outpatient clinics. *Supra* Part I.A.2. And notably, even 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.

For example, during legislative debate, in response to the concern that the Clinic Ban would force abortion patients to obtain care in a restrictive and expensive hospital setting without any safety benefit (even if they could find a hospital willing to provide their procedure), HB 467's House sponsor did not attempt to justify the bill's hospital requirement on safety grounds. Rather,

she responded that the Clinic Ban would still allow *some* clinics to continue providing abortion—just not *PPAU*'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.[12]

One additional legislative purpose of the Clinic Ban, then, appears to have been to prevent PPAU, specifically, from providing abortion, even as it permitted equivalent outpatient clinics satisfying HB 467's expanded definition of "hospital" to continue to provide abortion. Of course, neither animus against PPAU nor a desire to sabotage this litigation are *reasonable* government objectives. *See Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶ 11; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (holding that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *Lee*, 867 P.2d at 580 (making clear that a bare desire to engage in "invidious discrimination" can never be a legitimate state interest); *cf. Brian High Dev., LC v. Brian Head Town*, 2015 UT App 100, ¶ 9, 348 P.3d 1209. Indeed, exempting *some* outpatient clinics, but not PPAU, from the Clinic Ban's legislative classification would offend the "historical understanding" of the UOL Clause as well as its modern formulation. *See Utah Inland Port Auth.*, 2022 UT 27, ¶ 13 (quoting *Canton*, 2013 UT 44, ¶ 34 & nn. 7–8); *Malan*, 693 P.2d at 671–72 (explaining that laws with exceptions that "in

[12] *Hearing on H.B. 467 before the H. Judiciary Comm.*, recording starting at 00:08:40 (Utah Feb. 15, 2023) (statement of Rep. Karianne Lisonbee, floor sponsor of HB 467), available at https://le.utah.gov/av/committeeArchive.jsp?timelineID=225717; *see also Hearing on H.B. 467 before the H.*, *supra* note 2, recording starting at 01:22:20 (statement of Rep. Karianne Lisonbee, floor sponsor of HB 467) (explaining that HB 467 "unlicenses abortion clinics that are specifically there to conduct elective abortions" but that the bill permits other clinics to provide abortions "for people who fall under exemptions [to the Trigger Ban]"); *id*. at 01:28:06 (Rep. Lisonbee stating that under HB 467, "services in clinics will never be eliminated").

effect change the nature of the act" and "result in only a small number of persons being subject to the act" violate the UOL Clause).

Nor is the Clinic Ban rationally related to a government interest in promoting potential life. By its terms, the Clinic Ban changes where—not whether—Utahns may have abortions. Meanwhile, the Clinic Ban's functional effect of banning abortion in Utah, thereby subjecting Utah women to forced pregnancy and all the physical, personal, and financial harms that entails, is a vastly overbroad means of serving any purported interest in promoting childbirth: instead of making it easier to have a child, the State has imposed additional burdens on Utah women and families. A statute's degree of over- and under-inclusiveness is relevant in applying Utah's rationally-related test. *See, e.g.*, *Malan*, 693 P.2d at 672; *Merrill v. Utah Lab. Comm'n*, 2009 UT 26, ¶ 38, 223 P.3d 1089, *on reh'g*, 2009 UT 74, ¶ 38, 223 P.3d 1099. Furthermore, the Clinic Ban will likely deter even some Utahns who want to expand their families from becoming pregnant, due to legitimate concerns over whether they would be able to access abortion at a Utah hospital should a future pregnancy become complicated. Second Turok Decl. ¶ 76. And because the Clinic Ban will interfere with Utah hospitals' ability to recruit and retain OB/GYNs, Utah patients seeking other kinds of obstetric and gynecological care will face an even worse provider shortage, further undermining the State's purported interest in promoting healthy pregnancies and childbirth. *Id*. ¶¶ 73, 88–9.

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. PPAU is therefore substantially likely to prevail on the merits of its claim that the Clinic Ban violates the Uniform Operation of Laws Clause.

B. As a near-total ban on abortion in Utah, the Clinic Ban violates the Utah Constitution for the same reasons the Trigger Ban does.

In preliminarily enjoining the Trigger Ban last summer, this Court concluded that PPAU had shown "at least serious issues on the merits that should be the subject of further litigation," including as to: (1) a right to determine one's own family composition under article I, sections 2, 25, and 27 of the Utah Constitution; (2) a right to equal protection under Utah's Equal Rights Amendment (article IV, section 1 of the Utah Constitution); (3) a right to the uniform operation of laws under article I, sections 2 and 24 of the Utah Constitution; (4) a right to bodily integrity under article I, sections 1, 7, and 11 of the Utah Constitution; and (5) a right to privacy under article I, sections 1 and 14 of the Utah Constitution. PI Order ¶ 6. Even as the Trigger Ban remains enjoined by this Court, however, the Clinic Ban, if it takes effect on May 3, will *independently* ban the vast majority of abortions in Utah. It therefore violates the Utah Constitution for all the same reasons the Trigger Ban does.

1. Right to Determine One's Family Composition

By preventing people from deciding whether to end their pregnancies, the Clinic Ban violates Utahns' right to determine the composition of their families. *See In re J.P.*, 648 P.2d 1364, 1372–74 (Utah 1982) (recognizing family rights as "fundamental" and protected under article I, sections 2, 25, and 27 of the Utah Constitution); *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 73, 250 P.3d 465 (describing the right to parent as "fundamental"); *see also, e.g.*, *In re Castillo*, 632 P.2d 855, 856 (Utah 1981) ("[T]he ideals of individual liberty which . . . [are] essential in a free society . . . protect the sanctity of one's home and family."). As discussed in detail in PPAU's first motion for a preliminary injunction, First PI Mot. at 19–22, customs and traditions from the time of Utah's founding reflect Utah's long-held understanding that people

should be free to determine the composition of their families.[13] By effectively banning abortion in Utah, the Clinic Ban eliminates this fundamental right to determine one's family composition and to decide for oneself and one's family how best to care for one's existing children.

Most Utahns obtaining abortions are already parents, and they generally make their abortion decisions after weighing the impact of a new child on their other children. First Turok Decl. ¶¶ 19, 43. These patients frequently conclude that having another child will make it harder for them to meet their existing children's needs for emotional, physical, and economic support. *Id.* ¶ 19. Substantial research shows that the impact of denying abortions to women who seek them has long-lasting and negative repercussions for those women's families. *See id.* ¶ 43; Decl. of Colleen M. Heflin in Supp. of Pl.'s Mot. for Prelim. Inj. ("Heflin Decl.") ¶ 43, attached hereto as Exhibit D. Other families receive grave fetal diagnoses during pregnancy and determine that the care and attention required by a new child would make it impossible to fulfill the rest of their family's needs. First Turok Decl. ¶ 19. Finally, some Utahns who want to expand their families will be deterred from doing so by the Clinic Ban, out of a fear that, should a desired pregnancy become complicated, they will be unable to obtain the care they need at a Utah hospital. Second Turok Decl. ¶ 76.

These decisions are protected by the Utah Constitution. As Utah courts have recognized, "family autonomy helps to assure the diversity characteristic of a free society." *In re J.P.*, 648 P.2d at 1376; *cf.* Utah Code Ann. § 58-77-304 (recognizing "the right of parents to deliver their baby

[13] *See, e.g.*, Introduction, at ix–xi, *Women in Utah History* (eds. Patricia Lyn Scott & Linda Thatcher 2005), available at https://digitalcommons.usu.edu/cgi/viewcontent.cgi?Article=1108&context=usupress_pubs; *see also* Carrie Hillyard, *The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 BYU J. Pub. L. 117, 122 (1996); Lisa Madsen Pearson & Carol Cornwall Madsen, *Innovation and Accommodation: The Legal Status of Women in Territorial Utah, 1850–1896*, at 41, 44, 47, in *Women in Utah History* (eds. Patricia Lyn Scott & Linda Thatcher 2005), available at https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1108&context=usupress_pubs.

where, when, how, and with whom they choose" and providing that nothing in the professional licensing statutes "abridges, limits, or changes [that right] in any way"). "A statute that infringes upon this 'fundamental' right" to parent "is subject to heightened scrutiny" and is presumptively unconstitutional. *Jensen*, 2011 UT 17, ¶ 72. It is the State's burden to demonstrate that the statute "(1) furthers a compelling state interest and (2) 'the means adopted are narrowly tailored to achieve the basic statutory purpose.'" *Id.* (quoting *Wells v. Children's Aid Soc'y of Utah*, 681 P.2d 199, 206 (Utah 1984)); *see also Utah Safe to Learn—Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 24, 94 P.3d 217. The Clinic Ban cannot meet this or any other standard.

The legislative sponsors of HB 467 explained that they intended the bill to balance two specific state interests: "protecting innocent life," including "the unborn," while also "protecting women who experience rare and dangerous complications during pregnancy."[14] As explained above, *supra* Part I.A.3, the contours of the Clinic Ban make clear that the law does not substantially further an interest in fetal life, and that it is not narrowly tailored to that goal. Moreover, as PPAU detailed in seeking injunctive relief against the Trigger Ban, First PI Mot. at 22, asserting a government interest in "unborn life" to justify the Clinic Ban infringes on the rights of Utahns who do not share the State's view of when life begins. The State's view enforces outdated gender stereotypes by, among other things, endorsing the conscription of women into "the home and the rearing of the family," *Stanton v. Stanton*, 421 U.S. 7 (1975), despite the increased risks to their physical and mental health, financial stability, and long-term well-being.

[14] *Hearing on H.B. 467 before the H. supra* note 2, recording starting at 01:21:15 (statement of Rep. Karianne Lisonbee, floor sponsor of HB 467); *id*. at 01:35:47 (statement of Rep. Lisonbee) (stating her belief that "life begins at implantation" and that Utah has a tradition of "protecting the unborn" by outlawing abortion); *Hearing on H.B. 467 before the S., supra* note 2, recording starting at 01:45:25 (statement of Sen. Daniel McCay, floor sponsor of HB 467) (noting that he worked to ensure HB 467 "strikes [a] balance [between] protecting innocent li[ves] and protecting [] women who experience rare and dangerous complications during pregnancy").

See First Turok Decl. ¶ 5; Second Turok Decl. ¶ 8. And it enshrines into law the State's moral disapproval of women who do not wish to be parents or to have additional children. Even if this interest is legitimate—which it is not—it cannot be compelling because it intrinsically values potential life over the lives of Utah's current citizens. *Cf. Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 640 (Utah 1989) ("The second issue under our analytical model is the legitimacy of the objectives pursued by the legislation.").

Nor can the Clinic Ban be supported by any asserted interest in patient health and safety. First, it is not clear the State asserts any such interest; to the contrary, as discussed above, *supra* Part I.A, legislative history and public statements in connection with the Clinic Ban's enactment reflect a clear focus on clarifying the scope of the Trigger Ban's exceptions and ensuring that abortions *that fall within those narrow exceptions* are provided in hospitals rather than in licensed abortion clinics—not any claim that abortions cannot generally be safely provided in abortion clinics.[15] But at any rate, the Clinic Ban is not narrowly tailored to achieve that purpose, *Jensen*, 2011 UT 17, ¶ 72, and indeed, does nothing to advance it.

First, for patients with *uncomplicated* pregnancies, the methods of abortion provided at PPAU are just as safe when provided by PPAU's experienced clinicians at PPAU's licensed abortion clinics as when provided at a Utah hospital, as discussed at length above. *Supra* Statement of Facts, Part V. Requiring those patients to attempt to obtain an abortion at a Utah hospital, therefore, does nothing to promote their health or safety and instead effectively bars them from

[15] The State's claimed interest in "protecting women who experience rare and dangerous complications during pregnancy" may have motivated some of HB 467's amendments to the Trigger Ban's exceptions—like removing a medically-inappropriate "immediacy" requirement from the definition of "medical emergency," *see* HB 467 § 28 (amending Utah Code Ann. § 76-7a-101(5)—even as other HB 467 amendments narrow the Trigger Ban's exceptions and worsen its constitutional defects, *see* HB 467 § 29 (amending Utah Code Ann. § 76-7a-201(1)(c) (eliminating the rape and incest exception for patients more than 18 weeks pregnant). Because the Trigger Ban remains enjoined, however, these amendments have no operative effect.

receiving an abortion at all. As a result, the vast majority of patients will be forced to seek abortion out-of-state or remain pregnant and ultimately give birth against their will, a process at least 12 times more deadly than abortion. Second Turok Decl. ¶ 37, 72.

Second, even for patients who do "experience rare and dangerous complications during pregnancy," the Clinic Ban interferes with their ability to receive the best possible care: as discussed above, abortion will simply not be available at many Utah hospitals. *Id*. ¶ 7. Currently, hospitals throughout Utah refer complicated and high-risk abortion patients to PPAU physicians, who often treat those patients at PPAU's Metro Health Center. *Id*. ¶¶ 42, 47. The Clinic Ban would remove this option. Patients seeking abortion to avert the risks of a serious pregnancy complication will therefore have to find a hospital—and individual clinicians—willing to provide abortion despite the chilling effect of HB 467's heightened licensing and professional penalties. *Id*. ¶ 77, 82–6. These difficulties and delays in obtaining medically necessary care will increase the risk of their already risky pregnancies. *Id*. ¶ 75. Therefore, rather than being narrowly tailored to a government interest in protecting the health of patients with complicated pregnancies, the Clinic Ban is both grossly overbroad and contrary to this interest.

Because the Clinic Ban is neither supported by a compelling state interest, nor narrowly tailored to further any purported interest, it violates Utahns' fundamental right to decide, without unwarranted governmental interference, how their families should be composed. And as explained above, *supra* Part I.A.3, the Clinic Ban fails even rational basis review.

2. Right to Gender Equality under the Equal Rights Provision and the Uniform Operation of Laws Clause

As discussed in depth in PPAU's first motion for a preliminary injunction, First PI Mot. at 24–35, two separate provisions of the Utah Constitution establish Utahns' right to gender equality. First, the Equal Rights Provision forbids laws that result in either disparate treatment or disparate

impact on women as compared to men. Utah Const. art. IV, § 1. Second, the UOL Clause prohibits laws that discriminate "on the basis of a 'suspect class' (e.g., race or gender)," *Canton*, 2013 UT 44, ¶ 36, and requires not only "facial uniformity" in the operation of Utah statutes, but uniformity in "the law's operation" as well, *Drej*, 2010 UT 35, ¶ 33 (internal quotation marks omitted); *accord DIRECTV*, 2015 UT 93, ¶ 49. The Clinic Ban implicates both by restricting health care sought predominantly by women to an unnecessarily restrictive and inaccessible setting, thereby effectively banning that care and preventing women, but not men, from determining the course of their lives, without regard to the increased physical, personal, and financial harms this restriction will inflict. Second Turok Decl. ¶ 61; *cf. Redwood Gym v. Salt Lake Cnty. Comm'n*, 624 P.2d 1138, 1147 (Utah 1981) (finding no sex classification created by economic regulation on "opposite-sex massage[s]" because it did not "place either sex at an inherent legal disadvantage vis-a-vis the other"); *see also N.M. Right to Choose/NARAL v. Johnson*, 126 N.M. 788, ¶¶ 38–43, 975 P.2d 841 (1998) (requiring a compelling justification for using "classifications based on the unique ability of women to become pregnant and bear children . . . to the disadvantage of the persons they classify"); *Canton*, 2013 UT 44, ¶ 36.

Claims under the Equal Rights Provision, and UOL Clause claims involving discrimination on the basis of a suspect class such as gender, are subject to a heightened degree of scrutiny. The 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.[16] *See Est. of Scheller v. Pessetto*, 783 P.2d 70,

[16] Because the Utah Constitution includes both an Equal Rights Provision and a Uniform Operation of Laws Clause, it must have been understood that the two provisions provided different protections. The Uniform Operation of Laws Clause already subjects discriminatory classifications to heightened scrutiny. *Canton*, 2013 UT 44, ¶ 36. The Equal Rights Provision, which was added to the Utah Constitution after the Uniform Operation of Laws Clause, would therefore likely have been understood to go beyond these protections. Otherwise, it would have been superfluous.

76–77 (Utah Ct. App. 1989). If the law does either of those things, then strict scrutiny applies, and the State bears the burden of showing that the Act is supported by a "*compelling*" interest while also advancing that interest in "the *least restrictive means* possible." *In re Adoption of J.S.*, 2014 UT 51, ¶ 69 (emphasis in original) (describing strict scrutiny standard applicable to race-based challenges under UOL Clause); *see also, e.g.*, *Johnson*, 126 N.M. 788, ¶ 47 (applying strict scrutiny under New Mexico's Equal Rights Amendment).

Like the Trigger Ban, the Clinic Ban cannot survive this review. The Clinic Ban "operates to the disadvantage of persons so classified." *Johnson*, 126 N.M. 788, ¶ 40 (citation omitted). By functionally banning abortion for the vast majority of Utahns, *supra* pp. 7–9, the Clinic Ban disproportionately limits women's bodily autonomy and liberty, their ability to decide for themselves matters of great consequence to their lives, and their ability to obtain the same education and financial independence available to those who cannot become pregnant. These disproportionate effects flatly undermine women's equal privileges of citizenship.

Moreover, for all the reasons described in Part I.A.3, the Clinic Ban is not supported by a legitimate, much less compelling, state interest, nor does it use the least restrictive means of advancing the State's purported interest in the law. It is irrelevant that the Clinic Ban may be motivated by an interest in regulating pregnancy, a physical characteristic unique to one sex. "Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 40 Conn. Supp. 394, 444, 515 A.2d 134 (Super. Ct. 1986). Such laws have the disproportionate effect of keeping women from full participation in society. *See Johnson*, 126 N.M. 788, ¶ 40; *Planned Parenthood of Mich. v. Att'y Gen. of the State of Mich.*, No. 22-000044, 2022 WL 7076177, at *16 (Mich. Cl. Ct. Sept. 7, 2022) (recognizing

Similarly, the plain text of the Equal Rights Provision protects the equal enjoyment of not only civil, political, and religious rights, but also privileges.

that near-total abortion ban "deprives *only women* of their ability to thrive as contributing participants in [the] world outside the[ir] home"). While "[i]nherent differences between men and women . . . remain cause for celebration, ... [they] may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (internal quotation marks & citation omitted). Moreover, as Utah's constitutional convention history confirms, First PI Mot. at 24–31; Reply in Supp. of Pl.'s Mot. for Prelim. Inj. ("PI Reply") at 8–14, the founders rejected arguments that perceived biological differences between the sexes justified inequality between them. Classifications, then, based solely on these differences that work to disadvantage women are not legitimate.

Because the Clinic Ban disproportionately disadvantages women, and because it is not narrowly tailored to further a compelling state interest, it violates Utah's Equal Rights Provision and UOL Clause.

Even if strict scrutiny does not apply here, at a minimum, the Court must review PPAU's claims under the "intermediate scrutiny" standard applicable to a gender-based classification under federal law, the baseline identified by the Utah Supreme Court for this type of claim. *See Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986); *In re Adoption of J.S.*, 2014 UT 51, ¶¶ 68–74 & n.24 (applying same standard to UOL Clause case); *Est. of Scheller*, 783 P.2d at 77. That intermediate standard requires the State to demonstrate "an *important* governmental interest that is *substantially* advanced by the legislation." *In re Adoption of J.S.*, 2014 UT 51, ¶ 69 (emphasis in original). The Clinic Ban also fails this level of review. "For 'official action that closes a door or denies opportunity to women (or to men),' it is difficult for the government to show that its discriminatory policy 'substantially' advances an important objective." *In re Adoption of J.S.*, 2014 UT 51, ¶ 70 (quoting *Virginia*, 518 U.S. at 532). The Ban denies women (but not men) the ability to make

decisions about their own bodies and forces women (but not men) to unwillingly take on increased medical risks simply as a result of having sex. This serves not to "preserv[e] meaningful opportunities to both sexes," *id.*, but to penalize only women for behavior that both sexes engage in. The Clinic Ban thus violates the Equal Rights Provision and UOL Clause under either standard of review.

3. Right to Bodily Integrity

The Clinic Ban violates the fundamental right of pregnant Utahns to bodily integrity. As the Utah Supreme Court has recognized, this right inheres in article I, section 11 of the Utah Constitution, which provides that "[e]very person, for an injury done to him in his person . . . shall have remedy by due course of law." *Malan*, 693 P.2d at 674 n.17 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)). And it is bolstered by numerous other provisions of the state constitution and applicable precedent. *See, e.g.*, Utah Const. art. I, § 1 ("All persons have the inherent and inalienable right to enjoy and defend their lives and liberties[.]"); *id.* § 7 ("No person shall be deprived of life, liberty or property, without due process of law."); *id.* § 14 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated[.]").

The right to bodily integrity undoubtedly protects one's ability to be free from nonconsensual "harmful or offensive contact." *Wagner v. State*, 2005 UT 54, ¶¶ 51, 57, 122 P.3d 599. But it also protects one's "right of security of bodily comfort which one has provided for oneself." *Buchanan v. Crites*, 106 Utah 428, 150 P.2d 100, 105–06 (1944) (discussing "bodily security" and treating it analogously to "bodily integrity"), *overruled on other grounds*. In the context of search and seizures, for example, Utah courts have held that bodily integrity is threatened by "intruding into the suspect's living room, eavesdropping on phone calls, or

compelling the suspect to go to the police station with the officers." *State v. Alverez*, 2006 UT 61, ¶ 34, 147 P.3d 425. And Utah's body of tort law recognizes that "the law of torts, and battery in particular, was designed to protect people from unacceptable invasions of bodily integrity." *Wagner*, 2005 UT 54, ¶ 57. The right also underpins the common-law doctrine of informed consent in medical decision making. *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980) ("This duty to inform stems from the fiduciary nature of the relationship and the patient's right to determine what shall or shall not be done with his body." (citation omitted)).

Forcing someone to remain pregnant against their will, as the Clinic Ban does, is a fundamental violation of the right to control one's bodily integrity. For a host of reasons, the decision to become or remain pregnant is one of the most personal and consequential a person will make in a lifetime. First PI Mot. at 11. By preventing pregnant people in Utah from ending their pregnancies, the Clinic Ban forces them to submit to more than nine months of dramatic physical transformation, implicating the most personal aspects of their lives and identities, without their consent. *See id*. at 8–11. The Clinic Ban thus clearly invades Utahns' bodily integrity, as other states have found when considering whether such a right encompasses a right to decide to have an abortion. *E.g*. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (citing and quoting *Jarvis v. Levine*, 418 N.W.2d 139, 148–50 (Minn. 1988)); *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 648–49, 417 N.E.2d 387 (1981) (citation omitted); *Planned Parenthood of Mich.*, 2022 WL 7076177, at *7–13 (holding that an abortion ban violates Michigan's right to bodily integrity, because "[i]nherent in the right of bodily integrity is the right to bodily autonomy, to make decisions about how one's body will be used, 'a right of self-determination in matters that touch individual opinion and personal attitude'" (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 US 624, 630–31 (1943))). Pregnant people in Utah also have a strong liberty interest in being free

from the "nonconsensual" invasion of their bodily integrity, *id.* at *7, and the Clinic Ban infringes on that right.

The Clinic Ban also forces pregnant people to endure increased physical risk from pregnancy and childbirth, including an increased risk of death, and more invasive medical interventions such as delivery by C-section. First Turok Decl. ¶¶ 24–35; Second Turok Decl. ¶¶ 36–40. And the rare patients who may be able to obtain an abortion at a Utah hospital under the Clinic Ban will be exposed to more extensive and invasive medical interventions, such as general anesthesia or abortion by induction, and may face an increased risk of harm from less experienced clinicians than they would find at an outpatient abortion clinic like PPAU's. Second Turok Decl. ¶¶ 68–9. This, too, infringes on the right to bodily integrity. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 616–18, 646–50, 678, 440 P.3d 461 (2019) (per curium).

"Where a statute infringes on a fundamental right, the means adopted must be narrowly tailored to achieve the basic statutory purpose." *Jones v. Jones*, 2013 UT App 174, ¶ 34, 307 P.3d 598 (internal quotation marks & citation omitted), *aff'd*, 2015 UT 84, 359 P.3d 603. As discussed above, the Clinic Ban is not supported by a legitimate, much less compelling, state interest, and it does not sufficiently advance any asserted state interest, no matter the standard of constitutional review. *See supra* Part I.B.1.

4. Right to Privacy

Utah's right to privacy, Utah Const. article I, section 14, "extend[s] to protect against intrusion into or exposure of not only things which might result in actual harm or damage, but also to things which might result in shame or humiliation, or merely violate one's pride in keeping [one's] private affairs to [one]self." *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980). It "includes those aspects of an individual's activities and manner of living that would generally be

regarded as being of such personal and private nature as to belong to" the individual "and to be of no proper concern to others." *Id.*; *see also Allen v. Trueman, Judge of the 2d Jud. Dist.*, 100 Utah 36, 110 P.2d 355, 360 (1941). In these ways, the right to privacy under the Utah Constitution fairly encompasses both a right to decisional privacy—the privacy of one's affairs—and to informational privacy—security from unwarranted disclosures of one's personal information. HB 467's Clinic Ban violates at least the first of these two components.

An individual's pregnancy and decision to form family relationships is one such "activit[y] and manner of living that would generally be regarded as being of such personal and private nature as to belong to [one]self and to be of no proper concern to others." *Redding*, 606 P.2d at 1195. Even though Utah banned abortion at the time of its founding, women still sought abortions,[17] particularly before "quickening," and abortifacients were widely available both through the mail and at pharmacies.[18] First PI Mot. at 41–42. Today, generations of women have now grown to have a reasonable expectation that their private decision making includes an ability to decide to end a pregnancy. Medical advances have likewise changed how individuals experience and understand abortion, allowing for greater patient privacy surrounding the abortion decision. *See* First Turok Decl. ¶ 17. For example, more than two decades ago, the U.S. Food and Drug

[17] *See, e.g.*, B.O.L. Potter, M.D., Letter, *That Abortion Case*, Salt Lake City Tribune, Nov. 6, 1884, at 4, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=13120260#g3.

[18] *See* Advertisement, *Mesmin's French Female Pills*, Daily Enquirer, Apr. 10, 1893, at 2, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=1466218#g1; Advertisement, *Dr. Mott's Pennyroyal Pills*, The Ogden Daily Standard, May 2, 1893, at 2, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=7514821#g1; Advertisement, *Dr. Martel's Female Pills*, Deseret Evening News, Sept. 12, 1910, at 9, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=2356506#g8. For a fulsome accounting of the history of abortifacient advertising in Utah newspapers, *see* Amanda Hendrix-Komoto, *The Other Crime: Abortion and Contraception in Nineteenth- and Twentieth-Century Utah*, 53 Dialogue 33, 41–42 (2020).

Administration approved the labeling of a medication specifically for abortion, and the use of that medication has allowed patients to pass pregnancies at home or in other private settings. *See id.*; Second Turok Decl. ¶ 23.

This precedent and history establish that the right to privacy under the Utah Constitution encompasses a right to choose to end a pregnancy through abortion. Interpreting their constitutional privacy protections, numerous other states have reached the same conclusion. *See, e.g.*, *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023); *Armstrong v. State*, 1999 MT 261, ¶ 47, 296 Mont. 361, 989 P.2d 364; *Am. Acad. of Pediatrics v. Lundgren*, 16 Cal. 4th 307, 327, 940 P.2d 797 (1997); *Hope v. Perales*, 83 N.Y.2d 563, 575, 634 N.E.2d 183 (1994); *Maher*, 40 Conn. Supp. 394, 426; *see also Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 964, 968–69 (Alaska 1997); *In re TW*, 551 So. 2d 1186, 1192–93 (Fla. 1989); *Right to Choose v. Byrne*, 91 N.J. 287, 303–04, 450 A.2d 925 (1982). The Clinic Ban infringes on Utahns' right to privacy by subjecting a highly personal medical decision to government scrutiny and control, and by requiring patients to obtain abortions in a hospital rather than in a more personal outpatient clinic setting, risking the confidentiality of their care. *See* Second Turok Decl. ¶¶ 69, 71.

Because the Clinic Ban infringes on the fundamental right to privacy, heightened scrutiny applies. As discussed above, the Clinic Ban is not supported by a legitimate, much less compelling, state interest, and it does not sufficiently advance any asserted state interest, no matter the standard of constitutional review. *See supra* Part I.B.1; *Jones*, 2013 UT App 174, ¶ 34 (internal quotation marks & citation omitted), *aff'd*, 2015 UT 84. Accordingly, PPAU is substantially likely to prevail on its claim that the Clinic Ban violates the right to privacy.

II. PPAU, ITS PATIENTS, AND ITS STAFF WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

PPAU incorporates by reference all briefing and evidence submitted in support of its motion for a preliminary injunction against the Trigger Ban, which surveyed in great detail the harms that a near-total abortion ban will cause PPAU, its staff, and pregnant Utahns and their families. *See* First PI Mot. at 6–16; PI Reply at 6–7. In granting a preliminary injunction against the Trigger Ban, this Court found that this briefing and evidence constituted a "strong showing that, without a preliminary injunction," the Trigger Ban would "cause irreparable harm to PPAU, its patients, and its staff." PI Order ¶ 3. The same holds true for the Clinic Ban.

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.

PPAU and its staff will also suffer harms that cannot be compensated after judgment, including being forced to cease offering medical care they have trained for years and even decades specifically to provide or else risk felony criminal prosecution and loss of their professional

licenses, with dire consequences for their vocations and livelihoods. *See* First Turok Decl. ¶ 3; Second Turok Decl. ¶ 87 ("On a personal note, I have devoted my entire career to providing all people, regardless of their financial resources, the full range of top quality reproductive health care, including abortions, but HB 467 would bar me from providing my patients the full spectrum of reproductive health care."). The Clinic Ban and Professional Licensing Penalties will harm PPAU's ability to recruit and retain physicians to provide even other types of sexual and reproductive health care, a consequence that will likely affect patient care at Utah hospitals as well. Second Turok Decl. ¶ 88.

In addition to these irreparable physical, personal, professional, and economic harms, the Clinic Ban will deny PPAU's patients access to medical care that is both time-sensitive and constitutionally protected. First PI Mot. at 17–45; PI Reply at 7–25; *supra* Part I.B. The loss of a constitutional right is alone sufficient to justify injunctive relief. *See Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978) (affirming temporary restraining order to protect religious rights); *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (emphasizing when a constitutional right "is involved, most courts hold that no further showing of irreparable injury is necessary" (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001))).[19] The presumption of irreparable injury from a constitutional violation applies with special force in the context of abortion: "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) (infringement of constitutional right to have an abortion

[19] Where persuasive, Utah courts may look to federal case law, as well as precedent from other states, as to the scope of irreparable harm. *See, e.g., Zagg, Inc. v. Harmer*, 2015 UT App 52, ¶ 8, 345 P.3d 1273.

"mandates" a finding of irreparable injury because an infringement "cannot be undone by monetary relief").

To prevent these certain and imminent harms, the Court should enter a second preliminary injunction blocking enforcement of the Clinic Ban and the new Professional Licensing Penalties added by HB 467.

III. THE THREATENED INJURY TO PPAU, ITS PATIENTS, AND ITS STAFF OUTWEIGHS ANY INJURY TO THE STATE, AND AN INJUNCTION WOULD NOT BE ADVERSE TO THE PUBLIC INTEREST

Just as this Court found in entering a preliminary injunction against the Trigger Ban, PI Order ¶¶ 4–5, PPAU satisfies the last two Rule 65A factors, too.

PPAU and its patients face far greater harm if the Clinic Ban is allowed to go into effect than Defendants will face if the Court enters an injunction to preserve the status quo.

The public has a substantial interest in an injunction blocking a law that, like the Trigger Ban, would fundamentally upset the longstanding status quo on which Utah women and their families have relied upon for at least five decades. *Cf. Utah Med. Prod., Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998) (upholding trial court determination that injunction was contrary to public interest where it would have "remove[d] a valuable medical device . . . from certain markets").

The State's interest, if any, is marginal by comparison. The State "does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). 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.

The balance of equities and public interest thus weigh decisively in PPAU's favor.

IV. AN INJUNCTION SHOULD BE ISSUED WITHOUT POSTING OF SECURITY

Under Rule 65A(c), the Court "has wide discretion in the matter of requiring security" as a condition for a temporary restraining order or preliminary injunction. *See Wallace*, 573 P.2d at 1287. "[I]f there is an absence of proof showing a likelihood of harm" to Defendants from an injunction, "certainly no bond is necessary." *Id.*; *accord Kenny v. Rich*, 2008 UT App 209, ¶ 40, 186 P.3d 989. The Court should use that discretion to waive the security requirement here, where the relief sought will result in no monetary loss for Defendants and is necessary to protect the constitutional rights of PPAU and its patients. *See, e.g.*, *Wallace*, 573 P.2d at 1287 (affirming trial court's waiver of security requirement in constitutional rights case).

CONCLUSION

For the foregoing reasons, PPAU respectfully requests that this Court enter a preliminary injunction that enjoins and restrains Defendants and their officers, employees, servants, agents, appointees, and successors from administering and enforcing HB 467's Clinic Ban and Professional Licensing Penalties with respect to any abortion provided during the pendency of either this injunction or the injunction against the Trigger Ban, including in any future enforcement actions for conduct in reliance on either injunction, and that such an injunction issue without posting of security.