No. 11-___

IN THE

Supreme Court of the United States

NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS NULIFE PREGNANCY RESOURCE CENTER,
Petitioner,

v.

PLANNED PARENTHOOD OF THE HEARTLAND, *et al*.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals has a duty to address the lack of subject matter jurisdiction for a district court injunction, on a timely appeal.

2. Whether subject matter jurisdiction exists to invalidate a state abortion statute creating a private cause of action, in a federal lawsuit brought against executive officials who lack enforcement authority under the statute.

3. Whether an entity adversely affected by a sweeping injunction lacking in jurisdiction has a right to intervene and appeal.

PARTIES TO THE PROCEEDINGS

Petitioner:

Nebraskans United for Life, doing business as NuLife Pregnancy Resource Center,
Movant-Appellant below

Respondents:

Planned Parenthood of the Heartland and Dr. Jill L. Meadows,
Plaintiffs-Appellees below

Dave Heineman, Governor of Nebraska, Jon Bruning, Attorney General of Nebraska, Kerry Winterer, Chief Executive Officer, and Dr. Joann Schaefer, Director of the Division of Public Health, Nebraska Department of Health and Human Services, Crystal Higgins, President, Nebraska Board of Nursing, and Brenda Bergman-Evans, President, Nebraska Board of Advanced Practice Registered Nurses, all in their official capacities,
Defendants-Appellees below

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Nebraskans United for Life doing business as NuLife Pregnancy Resource Center discloses that it has no parent companies, and no publicly traded corporations own any stock in it.

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PETITION FOR A WRIT OF CERTIORARI

Nebraskans United for Life, doing business as NuLife Pregnancy Resource Center ("NuLife"), respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review its judgment, which affirmed an injunction by expressly declining to address the apparent lack of subject matter jurisdiction for the injunction.

OPINIONS BELOW

The opinion of the court of appeals from which this appeal is taken is reported at 664 F.3d 716 and reproduced in the appendix hereto ("App.") at 1a-6a. The two relevant underlying opinions of the U.S. District Court are available at 724 F. Supp. 2d 1025, 1030 (D. Neb. 2010) (finding subject matter jurisdiction) (App. 7a-50a) and U.S. Dist. LEXIS 123281 (D. Neb. Nov. 4, 2010) (App. 54a-60a) (denying motion to intervene). Unreported orders include the district court order and final judgment dated Aug. 24, 2010 (App. 51a-53a) and the appellate denial of the petition for rehearing *en banc*, which was rendered on February 3, 2012 (*id.* at 61a-62a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit was entered on December 16, 2011. (App. 1a-6a) The petition for rehearing *en banc* was denied on February 3, 2012. (App. 61a-62a) On April 19, Justice Alito granted Petitioner's application (No.

11A922) to extend the deadline for this filing to and including June 4, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution limits federal subject matter jurisdiction to "Cases" and "Controversies".

Nebraska LB 594, 101st Leg. Reg. Sess. (Neb. 2010) (App. 63a-82a) established a private cause of action for women who are injured by abortion without the protection of informed consent.

INTRODUCTION

"[W]e … do not reach NuLife's arguments concerning the district court's jurisdiction." (App. 6a n.3) So held the court below, in affirming a district court injunction lacking in subject matter jurisdiction. But federal appellate courts are duty-bound to consider and reach the issue of jurisdiction, even *sua sponte* if necessary. It is contrary to the U.S. Constitution and federalism for an appellate court to affirm an injunction against state law where, as here, the injunction has an obvious jurisdictional defect highlighted by the appellant. The Eighth Circuit decision below should be reviewed and reversed for affirming an injunction by refusing to consider its lack of jurisdiction.

All federal courts have a duty to consider jurisdictional defects, including lack of jurisdiction in lower courts. *See Steel Co. v. Citizens for a Better*

Env't, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, ***but also that of the lower courts in a cause under review***, even though the parties are prepared to concede it.") (quotation omitted, emphasis added); Sup. Ct. Rule 14(g)(ii) (requiring explanation and review of "the basis for federal jurisdiction in the court of first instance"). Otherwise, as here, unconstitutional federal injunctions against state laws remain in place at the expense of federalism.

There is paramount importance to the underlying issue in this case: invalidation by federal courts of state abortion legislation. Due primarily to federal court nullification of state laws, the abortion rate in the United States is far higher than in the nations of Western Europe and Israel,[1] and the abortion rate is increasing here.[2] In Israel, abortions are allowed only on special approval for women between the ages of 18 and 40, an exception for economic hardship was abolished, and no hospital in Jerusalem will perform an abortion beyond 24 weeks gestation.[3] In many Western European nations, abortions after the first trimester are prohibited, and in Germany a three-day waiting period is required before an abortion is performed within the first trimester.[4] But in the United States, sweeping federal court injunctions

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[1] http://www.guttmacher.org/pubs/ib_0599.html (viewed 5/11/12).

[2] http://www.guttmacher.org/pubs/fb_induced_abortion.html (viewed 5/12/12).

[3] http://www.jewishvirtuallibrary.org/jsource/Health/abort1.html (viewed 5/26/12).

[4] http://news.bbc.co.uk/2/hi/6235557.stm (viewed 5/26/12).

interfere with similar state restrictions. Where, as here, the federal court injunction is without jurisdiction, then appellate review should vacate it.

Federal court jurisdiction obviously does not extend to invalidate the abortion laws in Israel and Germany; nor does federal jurisdiction extend to facial challenges against state laws creating private causes of action for abortion. Yet each year federal district courts enter sweeping injunctions against state laws that concern abortion, as occurred below. The resulting abortion rate thereby continues to be much higher in the United States than in comparable European nations.

In the past decade this Court has reviewed only one federal injunction against a state abortion law. *See Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006).[5] Moreover, in *Ayotte* this Court merely remanded on a procedural issue. The last substantive ruling by this Court on a state abortion law was nearly a dozen years ago, in a case affecting only a miniscule percentage of abortions. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (addressing state regulation of partial-birth abortion).

This lawsuit was brought against executive officials who have no enforcement powers with respect to the private cause of action created for women by the Nebraska legislature. Attorney General Jon Bruning, having no stake in the lawsuit and planning to campaign as a moderate for the U.S.

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[5] A year later – more than five years ago – this Court then upheld a *federal* law affecting only the small number of partial-birth abortions in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Senate,[6] first feigned a defense of the law but then did the exact opposite. Within the time span of only a few days in August 2010, he switched from defending the law to agreeing to a sweeping federal court injunction against it. Someone hurt by the injunction – Petitioner – promptly moved to intervene and appealed within the 30-day deadline. The court of appeals had a duty to review the lack of jurisdiction for the harmful, unjustified injunction, but the Eighth Circuit erred in abdicating that duty.

STATEMENT OF THE CASE

There are no material facts in dispute for the purposes of this Petition.

By a vote of 40-9, the unicameral Nebraska legislature passed LB 594 (the "Act") to establish a private cause of action for women who have abortions without informed consent. On April 13, 2010, the Nebraska Governor signed this into law. LB 594, 101st Leg. Reg. Sess. (Neb. 2010), codified within NEB. REV. STAT. §§ 28-325, 28-340, 38-2021, 28-101, 28-326, 28-327, 28-327.01, 28-327.03, 28-327.04. (App. 63a-82a).[7]

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[6] Ironically, although Jon Bruning subsequently raised $3.5 million for his campaign for U.S. Senate after attempting to avoid the abortion issue by dropping his defense of LB 594, he then lost the primary to an opponent who raised only $400,000. Robynn Tysver and Jeffrey Robb, **"**Fischer an upset winner in Senate race; The state senator surges past GOP rivals Jon Bruning and Don Stenberg; she'll face Bob Kerrey in the fall." *Omaha World-Herald* 1A (May 16, 2012).

[7] http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=6605 (viewed 5/25/12).

Shortly prior to its effective date of July 15, 2010, Respondents Planned Parenthood of the Heartland and Dr. Jill L. Meadows (collectively, "Planned Parenthood") brought a facial challenge to the constitutionality of the Act, by suing executive officials who lack any enforcement power under it.

The executive officials, lacking any stake in this case, first defended the law but then abruptly capitulated in mid-August 2010. The district court immediately entered a sweeping injunction, declaring the Act to be unconstitutional. *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010) (App. 7a-50a). Petitioner intervened and appealed, but the Eighth Circuit affirmed by expressly declining to address the lack of jurisdiction for the injunction. (App. 1a-6a)

A. Nebraska LB 594.

The Nebraska Legislature specifically found, based on extensive testimony, that the abortion industry had not been providing sufficient information to its patients:

> [t]hat the existing standard of care for preabortion screening and counseling is not adequate to protect the health needs of women ... [and t]hat clarifying the minimum standard of care for preabortion screening and counseling in statute is a practical means of protecting the well-being of women and may better ensure that abortion doctors are sufficiently aware of each patient's risk profile so they may give each patient a well-informed medical opinion regarding her unique case ....

NEB. REV. STAT. §28-325(6)-(7). Illustrative of the testimony supporting this finding was a witness who had an abortion; she asked the Legislative Judiciary Committee to "decrease the likelihood of more women suffering needlessly from unwanted abortions by supporting LB 594 and ensure that women receive the proper medical care they deserve." Judiciary Committee Hearing, LB 594, 101st Leg., 1st Sess. 67-68 (March 5, 2009) (quoted at C.A. App. 112a).[8]

LB 594, enacted in response to this testimony, clarifies what constitutes informed consent for abortion. (App. 63a-82a) The Act supplemented the informed consent criteria of NEB. REV. STAT. §28-327 for voluntary and informed abortions, by including the evaluation of the pregnant woman at least one hour prior to the abortion for any "risk factors associated with abortion," *id*. §28-327(4)(b), and informing the pregnant woman and the physician who will perform the abortion of the evaluation's results in writing. (App. 72a) This disclosure entails, at a minimum, a checklist to identify the positive and negative results for each such risk factor. *Id*. §28-327(4)(c) (App. 72a).

LB 594 established that the risk factors that should be disclosed are those identified in peer-reviewed medical journals. NEB. REV. STAT. §28-326(11). This is the same standard of care for disclosure of risk factors that is commonly used for other medical procedures and treatments. *See, e.g.*, Dr. Orient Affidavit ¶¶ 12-18 (C.A. App. 285a-286a).

Sections 6 and 7 of the Act provide for a civil cause of action for women who were denied informed

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[8] "C.A. App. __" refers to the Appendix filed with the court of appeals in the proceeding below.

consent prior to an abortion. A woman subjected to abortion without informed consent may sue for the wrongful death of an unborn child under NEB. REV. STAT. §30-809, if proven that there were intentional, knowing, or negligent failures to comply with the amended informed consent provisions of §28-327. *See* Act, §6 (App. 74a).

Affirmative defenses for the abortion provider are allowed if a statistically validated survey of the general population of women of reproductive age, conducted within three years of the contested abortion, demonstrates that fewer than 5% of women would consider the contested information relevant to an abortion decision. *See* Act, §10(5) (App. 76a). The Act also establishes a statute of limitations for any claims based on lack of informed consent of two years subsequent to the incident, or one year subsequent to when discovery was reasonably possible but in no event more than ten years after the incident. *See* Act, §11(1) (App. 76a).

The Act provides that §28-327 does not define a standard of care for any medical procedure other than induced abortions, *see* Act, §11(2) (App. 77a), and that violations of its provisions "shall not provide grounds for any criminal action or disciplinary action against or revocation of a license to practice medicine and surgery pursuant to the Uniform Credentialing Act." Act, §11(3) (App. 77a).

B. Proceedings Below.

On June 28, 2010, Plaintiff Planned Parenthood of the Heartland filed its Complaint and Motion for a Preliminary Injunction in federal district court

against executive officials: the governor, the attorney general, and two officials in the state Department of Health and Human Services, and two presidents of nursing boards. Two weeks later, on July 12, Planned Parenthood of the Heartland added Dr. Jill Meadows, its Medical Director, as a second plaintiff (collectively, "Planned Parenthood"). Within two days, on July 14, the district court below granted plaintiffs' demand for a preliminary injunction against the Act. (App. 50a)

Petitioner NuLife provides services to women who decide against having an abortion, "including pregnancy tests, peer counseling, and self-help classes, as well as goods such as clothing, furniture, diapers, and formula." (App. 3a) NuLife was adversely affected by this injunction and moved to intervene to appeal it. (C.A. App. 177a-178a) The district subsequently denied NuLife's motion to intervene (C.A. App. 181a-182a), and NuLife's appeal of the preliminary injunction became moot.

In a surprise move, the state defendants next agreed to plaintiffs' demands and filed a stipulation on August 18, 2010, for a permanent injunction against the Act and a declaration that the Act is unconstitutional. (C.A. App. 183a-186a) A mere six days later, on August 24, the lower court approved this settlement and entered a final judgment declaring the heart of the Act to be unconstitutional. (App. 51a-53a)

Injured by the permanent injunction, NuLife moved to object to its lack of jurisdiction. (C.A. App. 227a-238a, 295a-297a) NuLife also filed a timely Notice of Appeal. The district court denied NuLife's second motion to intervene on November 4 (App. 54a-

60a), which NuLife additionally appealed in a timely manner.

On appeal, NuLife emphasized the lack of subject matter jurisdiction for the injunction, but the Eighth Circuit expressly declined to address that issue: "[w]e … do not reach NuLife's arguments concerning the district court's jurisdiction." (App. 6a n.3)

Instead, the Eighth Circuit affirmed the injunction by holding that NuLife's second motion to intervene – after the permanent injunction was issued – was untimely. (App. 4a-6a) "[T]he litigation was terminated procedurally, NuLife failed to justify its delay in light of its prior knowledge of the case, and the parties would be prejudiced because final judgment on their settlement had already been entered," the appellate court held below. (*Id.* at 5a)

The court of appeals denied NuLife's petition for rehearing *en banc,* and this petition is timely.

REASONS FOR GRANTING THE PETITION

The decision below creates splits in Circuit authority on three important issues relating to federal subject matter jurisdiction.

First, the decision below conflicts with holdings with other Circuits on whether there is a threshold duty for an appellate court to review the lack of jurisdiction for an injunction by the district court. The Eighth Circuit departed from the standard in four other Circuits by expressly declining to correct an error in jurisdiction by a lower court under its supervision. This new approach by the Eighth Circuit opens the door to expanding federal jurisdiction at the district court level without appellate review.

Second, the decision below creates a conflict on the whether subject matter jurisdiction exists for facial challenges to state abortion laws that merely establish a private cause of action. The Eighth Circuit held contrary to the Fifth and Tenth Circuits by allowing and affirming a broad injunction against a state private cause of action despite the lack of any enforcement power by the defendants in the case.

Third, the decision below conflicts with another Circuit on the right to intervene post-judgment as necessary. A post-judgment right to intervene, within the time period for appealing, must remain available where, as here, executive officials surprisingly capitulate in a lawsuit having significant public importance. The Eighth Circuit departed from the D.C. Circuit in denying this essential right.

This Court should grant this Petition to resolve these Circuit conflicts, on issues of substantial national importance.

I. The Decision Below Creates a Circuit Split on the Duty of an Appellate Court to Address a Jurisdictional Defect in District Court.

The Eighth Circuit decision below conflicts with Second, Fifth, Sixth and Tenth Circuit precedents by expressly refraining from addressing a jurisdictional defect in a district court injunction: "we … do not reach NuLife's arguments concerning the district court's jurisdiction." (App. 6a n.3) The contrary holdings of the other Circuits is as follows:

Second Circuit: On a procedural posture similar to this case, the Second Circuit addressed and

resolved the issue of subject matter jurisdiction for the district court which had been raised by proposed intervenors, despite affirming a denial of their motion to intervene:

> [The proposed intervenors] raise a question as to subject-matter jurisdiction, not discussed by the district court; but since we have "a special obligation" to satisfy ourselves of our own jurisdiction as well as that of the district court, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986), we consider the issue on our own motion ….

American Lung Ass'n v. Reilly, 962 F.2d 258, 262 (2d Cir. 1992).

Fifth Circuit: "***Jurisdiction must be decided first***." *Vargas v. Stone Container Corp.*, 144 Fed. Appx. 365, 367 (5th Cir. 2005) (emphasis added). "The Supreme Court has held that federal courts should not assume without deciding jurisdiction over a claim and then reject it on the merits." *Id.*

Sixth Circuit: "[U]nder circumstances where a controversy has become moot before final appellate adjudication the lower court decision is remanded to the trial court with instructions to vacate the judgment below and dismiss the complaint." *Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 842 (6th Cir. 1988). The Sixth Circuit does not, as held by the Eighth Circuit below, deny an appeal and leave in place a district court judgment lacking in jurisdiction. *See also WJW-TV, Inc. v. Cleveland*, 878 F.2d 906, 912 (6th

Cir.), *cert. denied*, 493 U.S. 819 (1989) (due to mootness of the appeal, "the judgment of the United States District Court for the Northern District of Ohio is VACATED and REMANDED with instructions to dismiss the complaint").

Tenth Circuit: Where neither party, nor any intervenor, raised the issue of lack of subject matter jurisdiction in the proceeding below, the appellate court should raise the issue on its own, and order dismissal of the case by the district court if jurisdiction was lacking below. *See State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1270, 1272 (10th Cir. 1998). "[W]hen lack of subject matter jurisdiction (i.e., mootness) is noticed …, the appropriate remedy involves … dismissing the appellate matter, vacating the district court's judgment, and remanding with instructions to dismiss the underlying case without prejudice." *Neiberger v. Rudek*, 2011 U.S. App. LEXIS 24190, *11-*12 (10th Cir. Dec. 6, 2011) (citing *Miller v. Glanz*, 331 Fed. Appx. 608, 611 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 2403 (2010)). The Tenth Circuit emphasized, in the analogous context of a Certificate of Appealability (COA), that even a lack of appellate jurisdiction "does not deprive the appellate court of the power to vacate the district court's judgment and direct dismissal" when a matter is rendered moot on appeal. *Miller*, 331 Fed. Appx. at 611.

In departing from the foregoing Circuits, the Eighth Circuit decision strayed from a basic principle dating back at least to 1804: jurisdictional defects in

district court must be addressed by an appellate court, even when conceded below. *See Capron v. Van Noorden*, 6 U.S. 126, 2 Cranch 126 (1804) (overturning a judgment for defendant at the insistence of the losing plaintiff who argued on appeal that *he* had failed to properly allege jurisdiction below).

II. The Decision Below Creates a Circuit Split on Federal Court Jurisdiction for Facial Challenges to State Abortion Laws that Establish a Private Cause of Action.

The Eighth Circuit decision conflicts with the Fifth and Tenth Circuits concerning whether plaintiffs must show an actual or imminent injury in a facial challenge to an abortion law. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (no jurisdiction over an alleged injury that is not "actual or imminent"). By allowing an injunction to stand without proof of an actual or imminent injury and redressability, the Eighth Circuit split with the Fifth and Tenth Circuits.

This lawsuit was brought by Planned Parenthood against executive officials who had never threatened enforcement under the Act, and indeed lacked any enforcement powers under the Act. (App. 9a) The Act even expressly prohibits enforcement actions by state officials. Act, §11(3) (App. 77a). The district court below expressly recognized that "several circuit courts have held that federal courts cannot enjoin public officials from enforcing a statute when the statute creates a private, civil cause of action." (*Id.* 27a) (citing rulings from the Fifth, Seventh, Tenth,

and Eleventh Circuits). But then the district court departed from the other Circuits by finding jurisdiction despite a lack of any threatened or imminent injury (*id.* 28a-29a), and the Eighth Circuit affirmed.

This directly conflicts with the Fifth Circuit, which properly found a lack of jurisdiction where, as below, plaintiffs sued state officials to challenge a statute that created a private cause of action for harm caused by abortion. *Okpalobi v. Foster,* 244 F.3d 405 (5th Cir. 2001) (*en banc*). "Because these [state] defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court." *Id.* at 427.

The Fifth Circuit explained:

> The defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit. Nor do the defendants have any authority under the laws of Louisiana to order what cases the judiciary of Louisiana may hear or not hear.

Id. Accordingly, the Fifth Circuit dismissed the claims for lack of jurisdiction because plaintiffs "confused the statute's immediate coercive effect on the plaintiff[] with any coercive effect that might be applied by the defendants." *Id.* at 426. In sharp contrast with the decision below, the Fifth Circuit *en banc* ordered that the matter be "REMANDED for entry of judgment of dismissal." *Id.*

The Eighth Circuit decision below likewise conflicts with the Tenth Circuit, which rejected on jurisdictional grounds a challenge to an abortion law that

created a private cause of action concerning abortion. *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005). The statute at issue there established a private cause of action for minors, who had abortions, to recover the costs of subsequent medical expenses if the abortions were performed without parental consent. The Tenth Circuit found no Article III jurisdiction, due to a lack of causation and redressability with respect to the defendants, who were not likely to sue the abortion providers under the statute.

The Tenth Court held that:

> there is no evidence that the defendants have done or have threatened to do anything that presents a substantial likelihood of causing Nova harm. ... The plaintiff's burden of demonstrating causation is not satisfied when "speculative inferences are necessary to connect [its] injury to the challenged actions."

416 F.3d at 1157 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976)). The Court held that "Article III does not permit us to decide the merits of" plaintiff's claims. 416 F.3d at 1158.

The Tenth Circuit also found an additional, independent basis for the lack of jurisdiction, which exists below as well – a lack of redressability:

> More fundamentally, [plaintiff's argument] overlooks the principle that it must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly.

416 F.3d at 1159 (citing numerous precedents). "Article III sensibly requires the federal courts to refrain from determining the validity of that legislation until the issue reaches us as part of a genuine case or con-

troversy between adverse parties." 416 F.3d at 1160. The Tenth Circuit vacated the district court judgment and ordered dismissal "for lack of standing." *Id*.

In conflict with these other Circuits, the Eighth Circuit decision below affirmed an expansive view of jurisdiction over abortion legislation that fails to adhere to the spirit of the unanimous decision by this Court in *Ayotte*. *See Ayotte*, 546 U.S. at 323 (cautioning lower courts against invalidating more than is justified in state abortion laws). *See also Morales v. TWA*, 504 U.S. 374, 382-83 (1992) ("This problem [of overly broad district court injunctions] is vividly enough illustrated by the blunderbuss injunction in the present case ….").

In the case at bar there was no threatened enforcement of the Nebraska statute against plaintiffs, and certainly no *imminent* injury to support jurisdiction for the injunction below. By allowing jurisdiction over a facial challenge to an abortion law without any threatened or plausible enforcement of it by defendants, the decision below creates a conflict that warrants granting the Petition to resolve.

III. The Decision Below Creates a Circuit Split Concerning Whether Post-Judgment Intervention, Prior to the Deadline for Appeal, is Timely.

The decision below by the Eighth Circuit denying post-judgment intervention, prior to the deadline for appeal, is also in conflict with the D.C. Circuit. "[I]nadequate representation in the decision whether to appeal created special circumstances that made

post-judgment intervention appropriate and timely." *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). *See also Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972).

The Eighth Circuit departed from the D.C. Circuit and the teachings of this Court in declaring post-judgment intervention, within the time for appeal, to be untimely. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 n.16 (1977) ("Insofar as the motions to intervene in these cases were made within the applicable time for filing an appeal, they are consistent with our opinion and judgment in the present case.").

On the highly politicized issues of abortion and same-sex marriage, a right to timely post-judgment intervention is essential to obtain appellate review of injunctions invalidating legislation. For example, in litigation challenging the Defense of Marriage Act (DOMA), the Obama Administration decided to drop its defense of an important law, and intervention was properly allowed post-judgment for the appeal. *Commonwealth of Mass. v. U.S. Dep't of HHS*, Case No. 10-2204 (1st Cir. June 16, 2011) (allowing intervention in the appellate proceeding). Likewise, post-judgment intervention to defend an abortion statute is appropriate where, as below, state officials drop their defense of it.

Injunctions lacking in jurisdiction – but agreed to by the original parties – are not immune from post-judgment intervention by other injured entities. The Eighth Circuit created a Circuit conflict by holding otherwise.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 1, 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-3298

PLANNED PARENTHOOD OF THE HEARTLAND;
DR. JILL L. MEADOWS,

Plaintiffs-Appellees,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY; JON BRUNING, ATTORNEY GENERAL OF NEBRASKA, IN HIS OFFICIAL CAPACITY; KERRY WINTERER, CHIEF EXECUTIVE OFFICER, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES IN HIS OFFICIAL CAPACITY; DR. JOANN SCHAEFER, DIRECTOR OF THE DIVISION OF PUBLIC HEALTH, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; CRYSTAL HIGGINS, PRESIDENT, NEBRASKA BOARD OF NURSING, IN HER OFFICIAL CAPACITY; BRENDA BERGMAN-EVANS, PRESIDENT, NEBRASKA BOARD OF ADVANCED PRACTICE REGISTERED NURSES, IN HER OFFICIAL CAPACITY,

Defendants-Appellees,

v.

EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND; COALITION ON ABORTION AND BREAST CANCER; CREIGHTON STUDENTS FOR LIFE; STUDENTS FOR LIFE OF AMERICA,

Movants,

NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS NULIFE PREGNANCY RESOURCE CENTER,

Movant-Appellant.

Appeal from the United States
District Court for the
District of Nebraska.

Submitted: October 19, 2011
Filed: December 16, 2011

Before BYE, SMITH, and COLLOTON, Circuit Judges.

BYE, Circuit Judge.

Planned Parenthood of the Heartland and Dr. Jill Meadows (collectively, "Planned Parenthood") brought suit against various state officials in Nebraska challenging new requirements to the State's informed consent procedures for abortions. After the district court[1] granted preliminary injunctive relief against the law, Nebraskans United for Life ("NuLife") moved to intervene for the limited purpose of appealing the preliminary injunction. The court denied the motion, and the next day the parties filed a stipulation from a settlement they reached. The court thereafter issued a final judgment declaring the law unconstitutional and permanently enjoining its enforcement. NuLife again moved to intervene—this time as a defendant—and moved for reconsideration of the court's final judgment. The court denied both motions, from which NuLife now appeals. We affirm.

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[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

I

The underlying case concerns the constitutionality of recent changes to Nebraska's abortion laws. *See* L.B. 594, 101st Leg. Reg. Sess. (Neb. 2010) ("the Act"). Among other requirements, the Act expanded Nebraska's voluntary and informed consent provisions and established a private cause of action for a woman for the wrongful death of her unborn child. *Id.* Planned Parenthood brought suit seeking declaratory and injunctive relief against the Act. On July 14, 2010, the district court granted a preliminary injunction, concluding Planned Parenthood was likely to succeed on its claim the Act was unconstitutional because the Act imposed impossible requirements on medical providers, was unduly vague, and required providers to provide untruthful, misleading, and irrelevant information to patients.

One month later, on the last day to file a notice of appeal, NuLife moved to intervene "for the limited purpose of appealing and seeking reconsideration" of the preliminary injunction. NuLife provides services to women, including pregnancy tests, peer counseling, and self-help classes, as well as goods such as clothing, furniture, diapers, and formula. On August 17, 2010, the court denied NuLife's motion to intervene. The next day, the parties filed a stipulation to the entry of judgment, and an order granting final declaratory and injunctive relief. On August 24, 2010, the court issued its final judgment declaring the Act unconstitutional and permanently enjoining the defendants from enforcing the Act.

On September 21, 2010, NuLife again moved to intervene, this time as a defendant, and it filed a motion for reconsideration of the final judgment. The court denied NuLife's motion to intervene, concluding

NuLife lacked standing, the motion was untimely under Federal Rule of Civil Procedure 24(a), and the parties would be prejudiced by permitting intervention under Rule 24(b); the court also denied NuLife's motion for reconsideration of the final judgment as moot. NuLife appeals.

II

Rule 24 provides for intervention as a matter of right and on a permissive basis. In either circumstance, NuLife's motion to intervene must be timely. *Am. Civil Liberties Union*, 643 F.3d at 1093. We review a district court's timeliness determination for abuse of discretion, directing courts to consider:

> (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties.

Id. at 1094.

"The issue of the timeliness of a motion to intervene is a threshold issue." *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010). "The general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir. 1976). This case is slightly different from the general rule, however, because NuLife moved to intervene twice—once after the preliminary injunction was entered, and once after final judgment was entered. Nonetheless, in similar circumstances we have affirmed the untime-

liness of a motion to intervene. *See Ritchie*, 620 F.3d at 833 ("When a party had knowledge of all the facts—as [the movant] did—and failed to raise the issue when first presented with an opportunity to do so, subsequent intervention is untimely.").

The record demonstrates the district court considered the proper factors, including the fact the litigation was terminated procedurally, NuLife failed to justify its delay in light of its prior knowledge of the case, and the parties would be prejudiced because final judgment on their settlement had already been entered. *See Am. Civil Liberties Union*, 643 F.3d at 1094 (noting the district court considered the movants' knowledge of the suit from its inception, their failure to offer an adequate explanation for the delay, and the prejudice to the parties); *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998) ("[The district court] noted that the movants had not sought to intervene until the latest opportunity, and that their delayed entry would prejudice the [plaintiffs], who would be forced to respond to the movants' arguments."). Given these findings, the district court did not abuse its discretion by denying NuLife's motion as untimely.[2] Indeed, "[w]e have denied motions to intervene in cases with far less docket activity." *Ritchie*, 620 F.3d at 832.

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[2] NuLife relies on *Planned Parenthood Minn., N.D., S.D. v. Alpha Center*, 213 F. App'x 508, 509 (8th Cir. 2007) (unpublished) (per curiam), which involved an intervenors' appeal from a district court's decision to terminate its status in the case. Even without regard to the procedural differences, *Alpha Center* is of little import because it contained no discussion of timeliness—the dispositive issue in this case.

III

We affirm the district court's denial of NuLife's motion to intervene as untimely. Given this holding, we need not reach the alternative bases relied upon by the district court to deny NuLife's motion to intervene.[3]

[3] Because we conclude the district court properly denied NuLife's motion to intervene, we also do not reach NuLife's arguments concerning the district court's jurisdiction. *See Bauer v. Transitional Sch. Dist. of City of St. Louis*, 255 F.3d 478, 480 (8th Cir. 2001) ("Because we conclude that we lack appellate jurisdiction, we do not reach the underlying federal subject matter jurisdiction questions.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Case No. 4:10CV3122

PLANNED PARENTHOOD OF THE HEARTLAND; AND DR. JILL L. MEADOWS,

Plaintiffs,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY; JON BRUNING, ATTORNEY GENERAL OF NEBRASKA, IN HIS OFFICIAL CAPACITY; KERRY WINTERER, CHIEF EXECUTIVE OFFICER, AND DR. JOANN SCHAEFER, DIRECTOR OF THE DIVISION OF PUBLIC HEALTH, NEBRASKA DEPARTMENT OF HEALTH AND SERVICES, IN THEIR OFFICIAL CAPACITIES; AND CRYSTAL HIGGINS, PRESIDENT, NEBRASKA BOARD OF NURSING, AND BRENDA BERGMAN-EVANS, PRESIDENT, NEBRASKA BOARD OF ADVANCED PRACTICE REGISTERED NURSES, IN THEIR OFFICIAL CAPACITIES,

Defendants,

MEMORANDUM AND ORDER

This matter is before the Court on the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Filing No. 2).[1] The Motion is

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[1] On July 12, 2010, Planned Parenthood moved to amend its Complaint to add as a party plaintiff Dr. Jill L. Meadows, M.D. The Court granted the motion, and the Amended Complaint appears at Filing No. 51.

supported by a brief and indexes of evidence (Filing Nos. 4, 3, and 31). Defendants entered a Notice of Appearance (Filing No. 21), and the Court conferred with counsel for the parties on June 29, 2010, for purposes of establishing a briefing schedule. In accordance with the agreed upon schedule, Defendants submitted their Brief (Filing No. 39) and Index of Evidence (Filing No. 40), and Plaintiffs submitted a Reply Brief (Filing No. 49). Defendants objected (Filing No. 37) to Plaintiffs' Index of Evidence, and Plaintiffs responded to the objections (Filing No. 50). Although the Defendants' evidentiary objections will be denied for purposes of the Court's analysis of the pending Motion, the Court has considered the objections when determining what weight to give to the Plaintiffs' evidence. Oral argument was heard on July 13, 2010. For the reasons discussed below, the Motion will be granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Planned Parenthood of the Heartland ("Planned Parenthood") is a not-for-profit corporation doing business in Nebraska. (Amended Compl., Filing No. 51, ¶ 7.) It operates a health center in Lincoln, Nebraska, licensed by the Nebraska Department of Health and Human Services ("DHHS"). The center "provides a broad range of reproductive health services, including, but not limited to, physical exams; pregnancy testing and planning services; contraception and contraceptive education; HIV testing; testing and treatment for sexually transmitted infections; screening for breast, cervical, colon, prostate and testicular cancer; and abortion." (*Id.*) Planned Parenthood intends to open a similar center in Omaha this year, and it provides similar services in Iowa and advertises those services in Nebraska. (*Id.*) Planned

Parenthood employs registered nurses and nurse practitioners, licensed by DHHS, to assist the physician with abortion procedures. (*Id.*) Planned Parenthood brought this action "on its own behalf and on behalf of its current and future physicians, nurses, employees, staff, servants, officers and agents who participate in abortions, and on behalf of its current and future patients seeking abortion services." (*Id.*)

Plaintiff Dr. Jill Meadows is a practicing obstetrician and gynecologist, and Planned Parenthood's Medical Director. (*Id.* ¶ 8). She is licensed to practice medicine in Nebraska, and, in addition to her duties of ensuring that all Planned Parenthood's medical services comply with applicable legal and professional obligations, she provides medical services, including some abortion services, in Nebraska. (*Id.*) She brought the action on her own behalf and on behalf of her current and future patients seeking abortion services. (*Id.*)

Defendant Dave Heineman is the Governor of Nebraska. Defendant Jon Bruning is the Attorney General of Nebraska. Both have broad powers to enforce and defend Nebraska statutes. Defendant Kerry Winterer is the Chief Executive Officer of DHHS. Defendant Dr. Joann Schaefer is the Director of the Division of Public Health, one of six divisions within DHHS, and its Chief Medical Officer. Dr. Schaefer has the power and duty to take disciplinary action against health care facilities, registered nurses, and nurse practitioners. Defendants Crystal Higgins and Brenda Bergman-Evans are the Presidents of the Nebraska Board of Nursing and Board of Advanced Practice Registered Nurses, respectively, which provide recommendations related to the issuance or denial of nursing credentials, and discipline

of nurses. All Defendants have been sued in their official capacities only. (*Id.* ¶¶ 9-11.)

On April 13, 2010, Governor Heineman approved a Legislative Bill passed by the Nebraska Legislature, "LB 594," that will become effective July 15, 2010. (*Id.* ¶¶ 1, 2, 9, and Exhibit 1, Filing No. 1-1.) The bill contains eighteen sections. It amends nine existing Nebraska statutes related to abortion; creates seven new statutes related to abortion; provides for severability of the bill's sections, and parts of its sections, in the event that any section or part of a section is declared invalid or unconstitutional; and repeals the nine original statutes that the bill amended.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, challenging LB 594 on seven constitutional bases. First, they contend that the bill is an effective ban on abortion in violation of their present and future patients' Fourteenth Amendment rights of liberty and privacy. Second, they allege that the bill is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. Third, they allege that the bill compels the disclosure of untruthful, misleading, irrelevant and unreasonable information to patients, in violation of the First Amendment rights of medical professionals, and resulting in an undue burden on the exercise of patients' Fourteenth Amendment rights. Fourth, they allege that the bill violates the Commerce Clause and Due Process Clause by purporting to subject out-of-state providers to the bill's mandates. Fifth, they allege that the bill violates medical providers' and patients' rights of Equal Protection under the Fourteenth Amendment, because the bill treats informed consent for abortion differently than informed

consent for any other medical service or procedure. Sixth, they allege that the bill violates patients' rights of liberty and privacy under the Fourteenth Amendment by requiring them to disclose personal information not medically relevant to the abortion procedure as a condition to obtaining an abortion. Seventh, they allege that the bill violates minors' rights of liberty and privacy under the Fourteenth Amendment by requiring them to disclose, including to a parent, personal information not medically relevant to the abortion procedure.

Plaintiffs moved for a Temporary Restraining Order and Preliminary Injunction to prevent the bill from taking effect on July 15, 2010, and they also seek a judgment declaring that the bill is unconstitutional and that the Defendants are permanently enjoined from enforcing it. At the time of oral argument, Plaintiffs acknowledged that they are not asking the Court to enjoin the effective date of the bill or the bill itself, but to enjoin the Defendants from enforcing its terms.

STATUTORY FRAMEWORK

I. LEGISLATIVE BILL 594

LB 594 amends nine statutes, and creates seven new statutes, all within the Nebraska Criminal Code, and all related to abortion. Five of the bill's sections that amend existing statutes do not contain substantive amendments, but simply conform or harmonize statutory language to allow appropriate cross-reference to other statutes. Accordingly, sections 1, 13, 14, 15, and 16 of the bill will not be discussed. Section 17 provides for severability of the bill's sections, and parts of its sections, in the event that any section or part of a section is declared invalid or unconstitu-

tional. Section 18 repeals original statutes amended by the bill. It is Sections 2 through 12 that contain language that will be addressed by the Court for purposes of the pending Motion for Temporary Restraining Order.

Section 2 of the bill would amend Neb. Rev. Stat. § 28-325, a statute that expresses the Nebraska Legislature's opinion, intent, and motivation, and includes other precatory language, but does not impose any specific legal duties, obligations, or penalties. This statute declares the Legislature's view that *Roe v. Wade*, 410 U.S. 113 (1973), was a "legislative intrusion of the United States Supreme Court" that "removed the protection afforded the unborn" and that members of the Legislature "expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of [*Roe*]," and intend "to provide protection for the life of the unborn child whenever possible." LB 594 would add to this section, inter alia, an expression of the Legislature's opinion that "the existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women," and "[t]hat clarifying the minimum standard of care for preabortion screening and counseling in statute is a practical means of protecting the well-being of women[.]" Nothing in the amendments to § 28-325 imposes any duty, obligation, or penalty, or directly restricts access to products or services related to abortion.

Section 3 of the bill would amend Neb. Rev. Stat. § 28-326, a statute that contains definitions related to the topic of abortion. LB 594 would add three new definitions.

> (2) Complications associated with abortion means any adverse physical, psychological, or emotional reaction that is reported in a peer-reviewed journal to be statistically associated with abortion such that there is less than a five percent probability ($P < .05$) that the result is due to chance.
>
> . . . .
>
> (11) Risk factor associated with abortion means any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications associated with abortion such that there is less than a five percent probability ($P < .05$) that such statistical association is due to chance. Such information on risk factors shall have been published in any peer-reviewed journals indexed by the United States National Library of Medicine's search services (PubMed or MEDLINE) or in any journal included in the Thomson Reuters Scientific Master Journal List not less than twelve months prior to the day preabortion screening was provided[.]
>
> (12) Self-induced abortion means any abortion or menstrual extraction attempted or completed by a pregnant woman on her own body[.]

Although this section merely provides definitions, it may impose new duties, obligations, or penalties, because other pre-LB 594 statutes use terms similar to one or more of the newly defined terms, such as "medical risks associated with the particular abortion procedure," contained in Neb. Rev. Stat. § 28-327(1).

Section 4 of the bill would amend Neb. Rev. Stat. § 28-327, a statute that prohibits abortions "except

with the voluntary and informed consent of the woman[.]" As § 28-327 appears before amendment by LB 594, it contains five sub-sections and fifteen sub-subsections, setting out at least 36 discrete requirements for voluntary, informed consent to an abortion. Section 4 of the bill would add to these requirements:

> (4) At least one hour prior to the performance of an abortion, a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act has:
>
> (a) Evaluated the pregnant woman to identify if the pregnant woman had the perception of feeling pressured or coerced into seeking or consenting to an abortion;
>
> (b) Evaluated the pregnant woman to identify the presence of any risk factors associated with abortion;
>
> (c) Informed the pregnant woman and the physician who is to perform the abortion of the results of the evaluation in writing. The written evaluation shall include, at a minimum, a checklist identifying both the positive and negative results of the evaluation for each risk factor associated with abortion and both the licensed person's written certification and the woman's written certification that the pregnant woman was informed of the risk factors associated with abortion as discussed; and
>
> (d) Retained a copy of the written evaluation results in the pregnant woman's permanent record;

(5) If any risk factors associated with abortion were identified, the pregnant woman was informed of the following in such manner and detail that a reasonable person would consider material to a decision of undergoing an elective medical procedure;

(a) Each complication associated with each identified risk factor; and

(b) Any quantifiable risk rates whenever such relevant data exists [sic];

(6) The physician performing the abortion has formed a reasonable medical judgment, documented in the permanent record, that:

(a) The preponderance of statistically validated medical studies demonstrates that the physical, psychological, and familial risks associated with abortion for patients with risk factors similar to the patient's risk factors are negligible risks;

(b) Continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated by induced abortion; or

(c) Continuance of the pregnancy would involve less risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated by an induced abortion[.]

Section 5 of the bill would provide: "Any waiver of the evaluations and notices provided for in subdivision (4) of section 28-327 is void and unenforceable."

Section 6 of the bill would provide:

> In addition to whatever remedies are available under the common or statutory laws of this state, the intentional, knowing, or negligent failure to comply with the requirement of section 28-327 shall provide a basis for the following damages:
>
> (1) The award of reasonable costs and attorney's fees; and
>
> (2) recovery for the pregnant woman for the wrongful death of her unborn child under section 30-809 upon proving by a preponderance of evidence that the physician knew or should have known that the pregnant woman's consent was either not fully informed or not fully voluntary pursuant to section 28-327.

Section 7 of the bill would provide that actions may be brought based on alleged failures to comply with the requirements of § 28-327, within the time periods allowed for actions based on malpractice and professional negligence in Neb. Rev. Stat. §§ 28-222 and 44-2828 (providing two-year statutes of limitations for malpractice or professional negligence, but allowing a period of repose up to ten years when a cause of action could not reasonably be discovered within two years).

Section 8 of the bill would provide: "If a physician performed an abortion on a pregnant woman who is a minor without providing the information required in section 28-327 to the pregnant woman's parent or legal guardian, then the physician bears the burden of proving that the pregnant woman was capable of independently evaluating the information given to her."

Section 9 of the bill would provide: "Except in the case of an emergency situation, if a pregnant woman is provided with the information required by section 28-327 less than twenty-four hours before her scheduled abortion, the physician shall bear the burden of proving that the pregnant woman had sufficient reflection time, given her age, maturity, emotional state, and mental capacity, to comprehend and consider such information."

Section 10 of the bill would provide:

> (1) In determining the liability of the physician and the validity of the consent of a pregnant woman, the failure to comply with the requirements of section 28-327 shall create a rebuttable presumption that the pregnant woman would not have undergone the recommended abortion had section 28-327 been complied with by the physician;
>
> (2) The absence of physical injury shall not preclude an award of noneconomic damages including paid, suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or companionship, loss of consortium, injury to reputation, or humiliation associated with the abortion;
>
> (3) The fact that a physician does not perform elective abortions or has not performed elective abortions in the past shall not automatically disqualify such physician from being an expert witness. A licensed obstetrician or family practitioner who regularly assists pregnant women in resolving medical matters related to pregnancy may be qualified to testify as an expert on the

screening, counseling, management, and treatment of pregnancies;

(4) Any physician advertising services in this state shall be deemed to be transaction business in this state pursuant to section 25-536 and shall be subject to the provisions of section 28-327;

(5) It shall be an affirmative defense to an allegation of inadequate disclosure under the requirements of section 28-327 that the defendant omitted the contested information because statistically validated surveys of the general population of women of reproductive age, conducted within the three years before or after the contested abortion, demonstrate that less than five percent of women would consider the contested information to be relevant to an abortion decision; and

(6) In addition to the other remedies available under the common or statutory law of this state, a woman or her survivors shall have a cause of action for reckless endangerment against any person, other than a physician or pharmacist licensed under the Uniform Credentialing Act, who attempts or completes an abortion on the pregnant woman or aids or abets the commission of a self-induced abortion. Proof of injury shall not be required to recover an award, including reasonable costs and attorney's fees, for wrongful death under this subdivision.

Section 11 of the bill would provide:

(1) In the event that any portion of section 28-327 is enjoined and subsequently upheld, the statute of limitations for filing a civil suit under section 28-327 shall be tolled during the period

> for which the injunction is pending and for two years thereafter.
>
> (2) Nothing in section 28-327 shall be construed as defining a standard of care for any medical procedure other than an induced abortion.
>
> (3) A violation of subdivision (4), (5), or (6) of section 28-327 shall not provide grounds for any criminal action or disciplinary action against or revocation of a license to practice medicine and surgery pursuant to the Uniform Credentialing Act.

Section 12 of the bill would amend Neb. Rev. Stat. § 28-327.01 to require DHHS to make available on its website certain materials regarding services available to women.

II. PURPOSE OF THE CRIMINAL CODE

Neb. Rev. Stat. § 28-101 provides: "Sections 28-101 to 28-1350 shall be known and may be cited as the Nebraska Criminal Code." Neb. Rev. Stat. 28-102 provides:

> The general purposes of the provisions governing the definition of offenses are:
>
> (1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
>
> (2) To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
>
> (3) To safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal;

(4) To give fair warning of the nature of the conduct declared to constitute an offense; and

(5) To differentiate on reasonable grounds between serious and minor offenses.

III. LAWS GOVERNING HEALTH CARE FACILITIES

Planned Parenthood operates a "health care facility" as defined in Neb. Rev. Stat. § 71-413. ("Health care facility means an ambulatory surgical center, . . . a health clinic, a hospital, an intermediate care facility, . . . [or] a public health clinic[.]")

Neb. Rev. Stat. § 71-432 provides, in relevant part:

A health care facility or health care service shall not be established, operated, or maintained in this state without first obtaining a license issued by the department [DHHS] under the Health Care Facility Licensure Act. No facility or service shall hold itself out as a health care facility or health care service or as providing health care services unless licensed under the act.

Neb. Rev. Stat. § 71-448 sets out grounds for the Division of Public Health of DHHS to take disciplinary action against a license issued under the Health Care Facility Licensure Act. Such grounds include: "Committing or permitted, aiding, or abetting the commission of any unlawful act." Neb. Rev. Stat. § 71-449 sets out the discipline that DHHS may impose against the license of a health care facility for such a violation, including any combination of the following:

(a) A fine not to exceed ten thousand dollars per violation;

(b) A prohibition on admissions or readmissions, a limitation on enrollment, or a prohibition or limitation on the provision of care or treatment;

(c) A period of probation not to exceed two years during which the facility or service may continue to operate under terms and conditions fixed by the order of probation;

(d) A period of suspension not to exceed three years during which the facility or service may not operate; and

(e) Revocation which is a permanent termination of the license and the licensee may not apply for a license for a minimum of two years after the effective date of the revocation.

Neb. Rev. Stat. § 71-450 provides that DHHS "shall consider," in determining what type of disciplinary action to impose, "the extent to which the provisions of applicable statutes were violated."

IV. LAWS GOVERNING NURSES AND NURSE PRACTITIONERS

Nebraska's Uniform Credentialing Act is found at Neb. Rev. Stat. §§ 38-101 to 38-1,140. It prohibits individuals from engaging in nursing or advanced practice nursing, unless they hold the proper credential from DHHS. (Neb. Rev. Stat. § 38-121.) The Act creates the Boards of Nursing and Advanced Practice Registered Nurses (Neb. Rev. Stat. § 38-167), that "[r]ecommend disciplinary action relating to licenses" of nurses and advanced practice registered nurses (Neb. Rev. Stat. § 38-206). Discipline is imposed by the Director of DHHS, following the filing of a petition, prosecuted by the Nebraska Attorney

General. (Neb. Rev. Stat. §§ 38-176, 38-186). Grounds for discipline include "[f]ailure to comply with any . . . state . . . law . . . that pertains to the applicable profession[.]" (Neb. Rev. Stat. § 38-179(13).) Discipline may include the suspension or revocation of a professional credential, and civil penalties not to exceed $20,000. (Neb. Rev. Stat. § 38- 196, 38-198.)

The Act also contains a reporting requirement, mandating that every credential holder report to DHHS when he or she has first-hand knowledge of facts giving him or her reason to believe that any person in his or her profession has engaged in unprofessional conduct as defined in § 38-179. (Neb. Rev. Stat. §38-1,125(1)(a)(iii). Violations of the terms of the Uniform Credentialing Act give rise to criminal prosecution, and may result in convictions of Class II and III misdemeanors. (Neb. Rev. Stat. § 38-1,118.) The Attorney General must prosecute such civil or criminal actions, at the request of DHHS. (Neb. Rev. Stat. § 38-1,139.)

STANDARD OF REVIEW

In determining whether a preliminary injunction should issue, the Court is required to consider the factors set forth in *Dataphase Systems, Inc. v. C.L. Sys. Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc). A district court should weigh "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id*. A preliminary injunction is considered an extraordinary remedy, and the burden of proving each of the Dataphase factors lies with the party seeking the injunction. *Watkins v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

The Court weighs the same factors to determine whether a temporary restraining order should issue. *Baker Elec. Co-Op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994).

"[W]here a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute . . . district courts [must] make a threshold finding that a party is likely to prevail on the merits." *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc). This standard is more rigorous than "the familiar 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes." *Id.* at 732. The threshold determination of likelihood of success ensures that "preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id.* at 733. "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors." *Id.* at 732.

It is recognized that "if a law is susceptible of a reasonable interpretation which supports its constitutionality, the court must accord the law that meaning." *Jones v. Gale*, 470 F.3d 1261, 1268 (8th Cir. 2006) (quoting *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 482 (8th Cir. 1990)); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) ("To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties."). Accordingly, this

Court begins its analysis by considering Planned Parenthood's likelihood of success on the merits of its challenge to LB 594, recognizing that "an appropriately deferential analysis" must be employed when the constitutionality of a state statute is challenged.

DISCUSSION

I. ARTICLE III CASE OR CONTROVERSY

Defendants argue that LB 594 creates only private, civil remedies, and so Plaintiffs have no standing to challenge the constitutionality of the bill in this forum. Defendants' arguments are well-presented and merit thorough discussion.[2]

A. Plaintiffs' Standing to Obtain Injunctive Relief

Article III of the United States Constitution limits the judicial power of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Cases and controversies are limited to claims alleging some injury in fact that is redressable by a favorable judgment. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Standing is "[o]ne of the controlling elements in the definition of a case or controversy under Article III." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (Kennedy, J., concurring)). Under Article III, the judicial power granted to federal courts "is not an

[2] Assistant Attorney General Katherine Spohn's Brief submitted on behalf of the Defendants was thorough and well-reasoned, despite being prepared on relatively short notice. The very capable representation of the Defendants by the Office of the Nebraska Attorney General obviates the need for the Court to consider amici briefs.

unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "At a constitutional minimum, standing requires three elements: (1) injury-in-fact, (2) causation, and (3) redressablity." *Nolles v. State Comm. for Reorg. of Sch. Dist.*, 524 F.3d 892, 898 (8th Cir. 2008) (internal marks omitted)).

1. Injury-in-Fact

To establish injury-in-fact, the party bringing suit must have a "legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 515 U.S. 737, 743 (1995) (internal marks omitted). A plaintiff challenging a state statute must show "realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *South Dakota Min. Ass'n v. Lawrence County*, 155 F.3d 1005, 1008 (8th Cir. 1998) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). For example, abortion providers face concrete and imminent injury where statutes would cause the provider to lose patients. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005) (abortion provider faced injury of losing minor patients where statute required parental consent before performing abortions on minors).

Plaintiffs have shown that LB 594 creates concrete and imminent injury-in-fact. The bill requires medical providers to conduct risk evaluations and disclosures that appear to be extraordinarily difficult, if not impossible, given the breadth and depth of the research required. The evidence now before the Court indicates that, even if it were possible to comply with

the evaluation and disclosure requirements, Plaintiffs likely would expend much time and incur significant additional expense to comply with the mandates, giving rise to an imminent economic threat. *See Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (identifying abortion provider's injury as a direct financial impact on provider's practice).

Defendants argue that Planned Parenthood cannot show injury-in-fact because LB 594 applies only to individual physicians providing abortions, not to the corporate provider. The language of the bill is not so limited. Section 6 of the bill permits a woman to recover damages, including costs and attorney's fees, upon proving "the intentional, knowing, or negligent failure to comply with the requirements of section 28-327[.]" Although counsel for the Defendants at the time of oral argument stated that this section was intended to create liability only on the part of the physician, a plain reading of the section appears to limit only damages for "wrongful death of the unborn child" to actions against the physician. All other categories of damages appear to be available in actions against other defendants.[3] Accordingly, Plaintiffs have shown imminent threat of economic injury running directly from the bill's mandates, and have shown that the bill's chilling effect on medical personnel may cause them to decline to have any involvement with abortion procedures, further injuring Plaintiffs' interests.

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[3] The bill allows the evaluation and disclosure to be made by a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act. Nothing in the bill appears to prevent a plaintiff from naming such individuals, or a providers such as Planned Parenthood, as defendants.

Of equal or greater significance, Planned Parenthood has shown that, if it allows any doctor to perform an abortion without complying with the bill's mandates, Planned Parenthood may be subject to disciplinary sanctions, including but not limited to, a fine of ten thousand dollars per violation, and suspension or revocation of its health care facility license. Its agents and employees that are licensed by DHHS, other than physicians, also may be subject to administrative sanctions, including loss of license; civil penalties up to $20,000; and criminal prosecution; all compounding the bill's chilling effect, and resulting in injury-in-fact to Plaintiffs.

2. Causation and Redressability

Article III requires that the injury must "be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Parkhurst v. Tabor*, 569 F.3d 861, 866 (8th Cir. 2009). *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (internal marks omitted). At a minimum, a plaintiff must show a substantial likelihood that the conduct of a defendant is the cause of its injury-in-fact. *See Utah v. Evans*, 536 U.S. 452, 464 (2002); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992).

It is true, as the Defendants note, that several circuit courts have held that federal courts cannot enjoin public officials from enforcing a statute when the statute creates a private, civil cause of action. *See Nova Health Sys.*, 416 F.3d at 1159; *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam); *Okpalobi v. Foster*, 244 F.3d 405, 425-30 (5th Cir. 2001) (en banc); *Summit Med. Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1341-42 (11th Cir. 1999).

Here, unlike the cases relied upon by the Defendants, Plaintiffs have demonstrated that the named Defendants are a source of injury-in-fact. Dr. Joann Schaefer, who works for Kerry Winterer, who works for Governor Heineman, holds the power to impose fines on Planned Parenthood in an amount up to $10,000 per violation, and revoke Planned Parenthood's health care facility license, if Planned Parenthood "permits" any doctor to perform an abortion without complying with the mandates of LB 594. Defendants Crystal Higgins and Brenda Bergman-Evans have the power to refer Planned Parenthood's nurses and nurse practitioners to Winterer for disciplinary action, to be prosecuted by Attorney General Bruning, which disciplinary action may result in suspension or revocation of nursing credentials, fines not to exceed $20,000, and criminal prosecution for Class III and Class II misdemeanors.[4]

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 863-64 (8th Cir. 2006), the Eighth Circuit concluded that the Attorney General's and Governor's broad power to enforce Nebraska's constitution and statutes was a sufficient basis to satisfy causation and redressability elements of standing, as well as Eleventh Amendment concerns, where a state statute or constitutional provision erected "a barrier making it more difficult for members of a group to obtain a benefit." *Id*. at 863. LB 594 appears to erect such a barrier, making it more difficult for the Plaintiffs to provide abortion services, and, consequently, more difficult for women to obtain abortions in Nebraska.

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[4] Class III misdemeanors carry penalties of imprisonment up to three months and fines up to $500; and Class II misdemeanors carry penalties of imprisonment up to six months and fines up to $1,000. Neb. Rev. Stat. § 28-106.

Although, as Defendants suggest, Plaintiffs could wait to be sued in a civil action and then raise as a defense LB 594's unconstitutionality, it is more likely that any medical provider, when confronted with the mandates of LB 594, and the extensive civil liability it creates, would simply stop providing abortions. Because very few doctors provide such services now, the constitutionality of LB 594 would evade "ripeness" and review. That would be contrary to the Eighth Circuit's direction as expressed in *Citizens for Equal Protection*.

Injunctive relief restraining these Defendants from taking any action to enforce LB 594 would redress at least part of the Plaintiffs' injury-in-fact. Accordingly, Plaintiffs have shown both causation and redressability, as well as injury, and the Court concludes that Plaintiffs have standing to assert their claims for injunctive relief.

B. Plaintiffs' Standing to Obtain Declaratory Relief

Plaintiffs brought this action pursuant to 28 U.S.C. § 2201 and 2202, and Fed. R. Civ. P. 57 and 65, seeking declaratory and injunctive relief. The applicable statutes provide:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2202.

Fed. R. Civ. P. 57 provides, in relevant part: "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action." Fed. R. Civ. P. 65 prescribes procedures for issuance of preliminary injunctive relief. Rule 65(1)(a)(2) provides that a court may advance the trial on the merits and consolidate the trial with a hearing on a motion for preliminary injunction.

The Supreme Court has recognized "that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief on the other." *Roe*, 410 U.S. at 166 (citing *Zwickler v. Koota*, 389 U.S. 241, 252-55 (1967)). The propriety of declaratory relief may be addressed independent of injunctive relief. *See Steffel v. Thompson*, 415 U.S. 469-70 (1974). Courts have also noted that "pre-enforcement review is usually granted under the Declaratory Judgment Act when a statute, 'imposes costly, self-executing compliance burdens or if it chills protected [constitutional] activity.'" *Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (quoting *Minnesota Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997)).

A district court has "'the duty to decide the appropriateness and the merits of the declaratory request

irrespective of its conclusion as to the propriety of the issuance of the injunction.'" *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974)(quoting *Zwickler*, 389 U.S. at 254). "The question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id*. at 122 (quoting *Maryland Casualty Co. v. Pacific Coal v. Oil Co*., 312 U.S. 270, 273 (1941)). In *Super Tire*, where the plaintiff challenged a regulation that provided a potential, future benefit to third parties, and, as a result, had an indirect negative impact on the plaintiffs, the Supreme Court found "full and complete satisfaction of the requirement of the Constitution's Art. III, § 2, and the Declaratory Judgment Act" where the challenged government policy was "fixed and definite" and "by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 122-23.

Accordingly, the Court concludes that both Plaintiffs have standing to assert their claims for declaratory relief, independent of their claims for injunctive relief.

C. Ripeness and Fitness for Judicial Decision

Ripeness requires that the injury in fact be certainly impending." *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Ripeness separate those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

"Fitness for judicial decision means, most often, that the issue is legal rather than factual. Sufficient hardship is usually found if the regulation imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity." *Minnesota Citizens Concerned for Life*, 113 F.3d at 312 (emphasis in original), citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69-71 (1993)(O'Connor, J., concurring); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995).

The Plaintiffs have met their burden of demonstrating that the enforcement of LB 394 presents them with a real and imminent threat of harm, imposes "costly, self-executing compliance burdens;" and chills protected constitutional activity.

D. Eleventh Amendment Immunity

The Defendants also contend that they are entitled to immunity from suit under the Eleventh Amendment. The Supreme Court has held that the Eleventh Amendment "does not bar a suit against a state official to enjoin enforcement of an allegedly unconstitutional statute, provided that 'such officer [has] some connection with the enforcement of the act.'" *Id.* (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)).

In *Planned Parenthood v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995), the Court upheld a district court's decision finding a South Dakota statute unconstitutional and enjoining its enforcement.[5] The statute allowed for private, civil remedies for viola-

[5] The district court had issued a temporary restraining order, staying the effective date of the act, but it appears that the parties stipulated to the stay "pending final determination of the constitutional questions." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1411 (S.D. 1994).

tions of a parental-notice statute. The named defendants in the action were the Governor and the Attorney General of South Dakota, in their official capacities. It may be inferred from this decision, and the decision in *Citizens for Equal Protection v. Bruning*, that the Eighth Circuit would not find the Eleventh Amendment to be a bar to Plaintiffs' action for injunctive relief against the Defendants named in this case, even absent this Court's causation and redressability findings, above.

It is recognized that in *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1141 (8th Cir. 2005), the Eighth Circuit determined that the Eleventh Amendment did bar a suit against a state official who had no power to enforce the statute. *Id.* at 1145. Here, however, the Defendants do have "some connection with the enforcement of the act" and, accordingly, the Eleventh Amendment does not bar this Court from considering the pending motions.

II. DATAPHASE FACTORS

A. Likelihood of Success on the Merits

As the Eighth Circuit requires, this Court will first consider whether Plaintiffs have demonstrated a likelihood of success on the merits of their claims.

The Defendants recognize that LB 594 is unconstitutional, in part. "Defendants acknowledge that Commerce Clause jurisprudence . . . prohibits the enforcement of §10(4) of LB 594 to conduct that occurs outside the state of Nebraska." (Defendants' Brief, Filing No. 39 at 25). "Despite the fact that §10(4) of LB 594 unconstitutionally extends the reach of the Act to conduct that occurs outside of Nebraska,

it can be severed and the remaining portions of the Act upheld." (*Id.* at 16).

This Court appreciates the Defendants' integrity and candor in acknowledging that LB 594 violates the Commerce Clause of the United States Constitution. This Court concurs with that conclusion and finds that Plaintiffs are not only "likely," but certain to prevail on their challenge to the constitutionality of LB 594, under the Commerce Clause.

The Court will turn to the Plaintiffs' likelihood of success on their liberty-and-privacy-interest, void-for-vagueness, and First Amendment claims. Because, for reasons discussed below, the Court concludes that Plaintiffs have demonstrated a likelihood of success on the merits of those claims, and because the Defendants have conceded Plaintiffs' certainty of success on their Commerce Clause claim, the remaining claims based on Equal Protection, and privacy interests of adult and minor patients with respect to mandated disclosures, will not be addressed at this juncture.

1. Due Process: Liberty and Privacy Interests

The Fourteenth Amendment to the United States Constitution provides, in part, that no State shall deprive any person of liberty without due process of law. The liberty interest protected by the Fourteenth Amendment long has been recognized to encompass a right to be free from undue governmental interference in "matters that are intensely private, such as "marriage, procreation, contraception, family relationship, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). This aspect of due process has, at times, been referred to as "zones of privacy" (*id.* at 712), a "right of privacy" (*id.* at 713),

or simply a "right to be let alone." (*Eisenstadt v. Baird*, 405 U.S. 438 454, n.10 (1972)(quoting *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928)("The makers of our Constitution . . . conferred, as against the government, the right to be let alone – the most comprehensive of rights and the most valued by civilized men.") The right was applied in the context of abortion in *Roe v. Wade*,[6] and has been re-affirmed by the Supreme Court in that context over the last 37 years.

In one case in which it recognized the right of privacy, *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court said: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." *Id.* at 399.

What may constitute undue interference by a state, with respect to this liberty interest in the context of abortion, was recently articulated by the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). "Before [fetal] viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Id.* at 146 (quoting *Planned Parenthood of Southeastern Pennsylvania v.*

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[6] "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

Casey, 505 U.S. 833, 879 (1992)). "It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Id.* (quoting *Casey*, 505 U.S. at 878). "On the other hand, '[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" *Id*. (quoting *Casey*, 505 U.S. at 877).

Accordingly, the issue before this Court with respect to the Plaintiffs' liberty-and-privacy-interest Due Process challenge, is whether the Plaintiffs' are likely to demonstrate that LB 594 has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.[7]

a. Purpose of LB 594

As noted above, in discussion of section 2 of the bill, the section expresses the Nebraska Legislature's concern that "the existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women," and "[t]hat clarifying the minimum standard of care for preabortion screening and counseling in statute is a

[7] Because Plaintiffs provide only pre-viability abortions, there is no issue for the Court to address with respect to fetal viability. Amended Complaint, ¶ 7. With respect to Plaintiffs' standing to assert the rights of patients in connection with the liberty-and-privacy-interest Due Process challenge, Plaintiffs have demonstrated the requisite relationship to the patients, and the patients' lack of ability to assert their own right. *See Singleton*, 428 U.S. at 115-16.

practical means of protecting the well-being of women." The section also re-states the Legislature's earlier language to the effect that the Supreme Court of the United States over-stepped its authority when issuing its decision in Roe v. Wade, and that the Nebraska Legislature intends to protect the life of unborn children whenever possible.

No such legislative concern for the health of women, or of men, has given rise to any remotely similar informed-consent statutes applicable to other medical procedures, regardless of whether such procedures are elective or non-elective, and regardless of whether such procedures pose an equal or greater threat to the physical, mental, and emotional health of the patient. From a plain reading of the language of the bill,[8] and the absence of any similar statutory "protections" for the health of patients in other contexts, this Court infers that the objective underlying LB 594 is the protection of unborn human life.

"[T]he legitimate interest of the Government in protecting the life of the fetus that may become a child" is recognized in Gonzales, 550 U.S. at 146, as it was in Casey, 505 U.S. at 846. The question then becomes whether the purpose of the bill is to effect

[8] [A]s we have held previously, we 'look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose,' which may include evidence in the form of 'statements by lawmakers.'" *Jones v. Gale*, 470 F.3d at 1269 (quoting *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir.2004)). While the legislative history of the bill is in evidence (Filing No. 40), and while other evidence of interest, such as campaign speeches or literature, may be relevant to the determination of the bill's purpose, at this stage of the proceedings the Court relies on the plain language of the bill.

this goal by placing a substantial obstacle in the path of women seeking an abortion.

The bill places certain obstacles in the path of women seeking abortions by (1) requiring medical providers to make risk assessments and disclosures that, if the bill is read literally, would be impossible or nearly impossible to perform,[9] (2) requiring medical providers to speculate about what conduct is mandated under the bill, if it is not to be read literally, but instead given some reasonable interpretation,[10] and (3) placing physicians who perform abortions in immediate jeopardy of crippling civil

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[9] *See* Affidavit of Kelly Blanchard ("Blanchard Aff.") Filing No. 31-5, ¶¶ 12-27.

[10] For example, the definitions of "Complications associated with abortion" and "Risk Factor associated with abortion" in section 3 (2) and (11) of the bill are unclear to this Court, and to the medical professionals whose affidavits are in evidence: Affidavit of Penelope A. Dickey, Filing No. 31-2, ¶¶ 11-14; Affidavit of Paul Appelbaum, M.D., Filing No. 31-3, ¶¶ 3-5; Affidavit of Darla Eisenhauer, M.D., Filing No. 31-4, ¶¶ 5-14; Blanchard Aff. ¶¶ 7-31; Affidavit of Jill Meadows, M.D. ("Meadows Aff."), Filing No. 31-6, ¶¶ 9-38 ("[I]f reasonable limitations may be read into the Act, I do not know how to determine what they are." (*Id.*, ¶ 10).) In further example, the peer-reviewed "International Journal of Qualitative Studies on Health and Well-Being" has been published since 2006 but only articles since 2009 can be searched using PubMed or the search engine used to find articles in the Thomson Rueters Scientific Master Journal List. Similarly, the journal "Psychology, Health & Medicine," was first published in 1996 but can only be searched for articles after 2006. (*See* Blanchard Aff. ¶¶ 13-21.) Thus, even the broadest possible search using search logic of either index will not retrieve every responsive article for a period as short as the last fifteen years. At this early stage of the proceedings, this Court infers that the statements of these medical professionals are credible, based upon their curriculum vitae and the logic of their statements.

litigation, thereby placing women in immediate jeopardy of losing access to physicians who are willing to perform abortions.[11]

The threat of such litigation is real, and imminent. As the Supreme Court said in Gonzales, "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." 550 U.S. at 159. The four dissenting justices in Gonzales considered this "anti-abortion shibboleth" to be patronizing, and a "way of thinking [that] reflects ancient notions about women's place in the family and under the Constitution – ideas that have long since been discredited." (*Id.* at 183-84). Instead, this Court accepts the premise expressed in the majority opinion as reflecting a firm grasp of the obvious: Some women who obtain abortions will come to regret that choice. That fact is inevitable, because any major decision will lead to regret in some percentage of cases.[12] For the woman

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[11] As the Honorable Judge Richard Battey observed when finding certain private, civil remedies unconstitutional in *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1420 (S.D. 1994), enjoining their enactment: "If this statutory provision is allowed to stand, there may not be any provider willing to subject himself or herself to the vagaries of the statute. What then would be the choice remaining for those women who desire to exercise their constitutional rights consistent with *Roe and Casey*?" *Id*., at 1418. Judge Battey noted that there was at that time only one physician in South Dakota willing to perform abortions. *Id.*

[12] Like the Supreme Court majority in Gonzales, this Court has "no reliable data" to measure the phenomenon, but notes that unscientific surveys readily available on the Internet indicate that parent "regret" levels reach as high as the infamous 70 percent tallied by columnist Ann Landers in 1975 when she received 10,000 letters from readers in response to her inquiry:

who comes to regret having had an abortion, LB 594 provides her with a target to blame – a physician stripped of the usual statutory and common law defenses, and made civilly liable for the most extensive damages,[13] byway of an "informed consent" mandate that is either impossible to satisfy, or so vague that the physician (and a jury) are left to speculate about its meaning. LB 594 also provides the remorseful woman and her lawyer with a very substantial financial incentive to initiate such litigation, whether or not she truly does regret her decision to obtain an abortion – her regret is presumed. (Section 10(1).) Although this presumption is "rebuttable," it is difficult to conceive how any defendant could effectively rebut such as assertion.

LB 594 effectively cloaks such plaintiffs as private attorneys general, as is done in RICO[14] and civil

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"Do you regret having children?" The enactment of Nebraska's short-lived "Safe Haven Law" in July of 2008 caused parents from around the nation to stream into Nebraska to relinquish their children. More reliable data are available reflecting regret levels for the decision to marry – an important choice presumably preceded by sober thought and deliberation. The most important choices have consequences, and no matter how well-reasoned and fully deliberated, those decisions can lead to remorse. That is part of the price we pay for our freedom. (Only Edith Piaf was without regret. Had she been sober, she, too, might have had second-thoughts.)

[13] The plaintiff may obtain damages for pain, suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or companionship, loss of consortium, injury to reputation, humiliation, wrongful death of the unborn child, and costs and attorney fees. (Sections 6 (1), (2), (3), and 10 (2).)

[14] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors,

rights actions,[15] with the apparent object of turning them into quasi-prosecutors, dedicated to eliminating the activity the Legislature has found to be objectionable.

The bill's framework, therefore, creates a profound chilling effect, compounded by (1) its purported extension of its reach to any doctor advertising abortion services in Nebraska, whether or not the doctor, patient, or any medical procedure has any other connection with the state (section 10(4)),[16] and (2) its tolling of the statute of limitations for any actions that may accrue while enforcement of the bill is enjoined by a judge or judges questioning its constitutionality (section 11).

Like the civil liability statute addressed by the Eighth Circuit in Planned Parenthood, *Sioux Falls Clinic v. Miller*, LB 594's civil liability mechanism appears to be "more than enough to chill the willingness of physicians to perform abortions, [and] an undue burden on a woman's right to choose whether to terminate her pre-viability pregnancy." 63 F.3d at 1467.

At this preliminary stage, this Court finds that Plaintiffs are likely to succeed on the merits of their

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'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000).

[15] "[I]ndividuals injured by racial discrimination act as "'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989). [T]he . . . plaintiff . . . is . . . 'the chosen instrument of Congress[.]'" *Id*. at 759 (applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.).

[16] Acknowledged by the Defendants to be unconstitutional.

Due Process liberty-and-privacy-interest claim, because the purpose of the bill appears to be the preservation of unborn human life through the creation of substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska.

Defendants suggest that this Court should "go beyond the literal language" of LB 594 and give it a "sensible construction" so as "to effectuate the underlying purposes of the law." (Defendants' Br., Filing No. 39, at 16.) They contend that "[d]espite its admittedly broad language, the Act can be construed to require abortion providers to inform patients of only those risk factors deemed by the abortion provider, in his or her professional judgment, to be relevant to the particular patient, in accordance with the Legislature's intention." (*Id*. at 18.) Defendants note that during floor debate, the sponsoring senator stated that "the Act 'does not impose any requirements on abortion providers that are contrary to the standard of care for screening for which it applied to other medical procedures.'" (*Id*.) The sponsor's assertion is flatly contrary to the language of LB 594, which provides that "Nothing in section 28-327 shall be construed as defining a standard of care for any medical procedure other than an induced abortion." (Section 11(2).)

From a plain reading of the statute, and based on the evidence now available, the only sensible construction that this Court can provide for LB 594's risk-assessment and informed-consent requirements is that the Legislature intended to place a substantial, if not insurmountable, obstacle in the path of any woman seeking an abortion in Nebraska.

b. Effect of LB 594

For the reasons stated above, even if this Court were to presume that the passage of LB 594 was motivated in whole or part by a desire to protect the health of women, this Court finds that the Plaintiffs are likely to succeed on the merits of their Due Process liberty-and-privacy-interest claims, because the effect of LB 594 will be to place substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska.

2. Due Process: Vagueness

Plaintiffs argue that LB 594 is unconstitutionally vague, because it is not clear what the bill requires, "[f]or example whether there are limits on the materials that must be searched or whether providers can use their medical judgment to determine what information must be included in the patient evaluation and discussion." (Plaintiffs' Br., Filing No. 4, at 9).

The void-for-vagueness doctrine was described by the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards

> for those who apply them. ß vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'

Id. at 108-09 (footnote citations omitted).

In *Gonzales*, the Court said: "'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" 550 U.S. at 148-49, quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Posters 'N' Things, Ltd. v. United States*, 551 U.S. 513, 525 (1994).

"[A] vague and broad statute lends itself to selective enforcement against unpopular causes." *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 435 (1963) (finding Virginia's ban against "the improper solicitation of any legal professional business" constitutionally invalid). Such a law "may easily become a weapon of oppression, however evenhanded its terms appear." *Id.* "It makes no difference whether proceedings would actually be commenced." *Id.* Vague, but facially neutral, literacy tests, good character tests, property qualifications, and grandfather clauses were used selectively for decades to prevent black citizens from voting. *North-*

west Austin Municipal Utility Dist. Number One v. Holder, 129 S.Ct. 2504, 2509 (2009) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)).

Plaintiffs are persuasive in their argument that sections 3 and 4 of LB 594 are vague, in that they do not give a person of ordinary intelligence a reasonable opportunity to know what is mandated so that he or she can act accordingly. Because failure to comply with the bill's mandates can lead to fines and severe regulatory penalties, if not criminal prosecution, the Court concludes that Plaintiffs are likely to succeed on the merits of their vagueness challenge.

3. First Amendment

"In general, to address a claim that a state action violates the right not to speak, a court first determines whether the action implicates First Amendment protections." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d at 733 (emphasis in original) (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)). "If it does, the court must determine whether the action is narrowly tailored to serve a compelling state interest." *Id.* (citing *Wooley*, 430 U.S. at 716).

"In [*Casey*], the Supreme Court held that 'a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion' implicates a physician's First Amendment right not to speak, 'but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *Id*. (emphasis in original, quoting *Casey*, 505 U.S. at 884). "However, the Court found no violation of the physician's right not to speak, without need for further analysis of whether the requirements were narrowly tailored to serve a

compelling state interest, . . . where physicians merely were required to give 'truthful, nonmisleading information' relevant to the patient's decision to have an abortion[.]" *Id.* (quoting *Casey*, 505 U.S. at 882).

Plaintiffs have presented substantial evidence that the disclosures mandated by LB 594, if applied literally, will require medical providers to give untruthful, misleading and irrelevant information to patients.[17] Accordingly, the First Amendment rights of medical providers are implicated by the bill's mandates, and the Plaintiffs have demonstrated a likelihood of success of the merits of their First Amendment claim.[18]

For the reasons stated in parts II.A.1., 2., and 3. of this Discussion, above, the Plaintiffs have made a threshold showing that they are likely to prevail on the merits of their liberty-and-property-interest, vagueness, and First Amendment challenges to the

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[17] *See generally* Meadows Aff. ¶¶ 18-38.

[18] Following the analytical framework that appears to be suggested by the Eighth Circuit in *Rounds*, once it is determined that First Amendment rights are implicated, this Court must consider whether LB 594 is "narrowly tailored to serve a compelling state interest." A more logical framework would be to end the inquiry once it is demonstrated that the bill requires medical providers to give untrue, misleading, or irrelevant information to patients. Finding a First Amendment violation at that juncture appears to be consistent with language from *Casey*, referred to by the Supreme Court with approval in *Gonzales*: In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure.' The opinion states "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Gonzales*, 550 U.S. at 163 (internal citations omitted.)

constitutionality of LB 594, as well as the Commerce Clause challenge, conceded by the Defendants. Discussion of the merits of the remaining challenges to the constitutionality of LB 594 will be deferred to the time when the Court addresses the merits of the Plaintiffs' action for Declaratory Judgment.

B. Threat of Irreparable Harm to Plaintiffs

For the reasons discussed in parts I. A., B., and C., above, the Court concludes that Plaintiffs have demonstrated an imminent threat of irreparable harm.

C. Public Interest and Balance of Harms

The public has a strong, legitimate interest in the enactment and enforcement of bills passed by their duly-elected representatives, and that interest weighs heavily against the granting of any injunctive relief.

The public also has an interest in ensuring that women who contemplate abortion receive information that is accurate and not misleading, in a "reasonable framework," so that their decisions will be "well informed" (*Gonzales*, 550 U.S. at 159), and a legitimate interest in "'protecting the integrity and ethics of the medical profession,'" *Id*. at 157 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). LB 594 does not promote either of these interests, and appears to undermine them both, by requiring physicians to disclose information that is misleading, inaccurate, and irrelevant. These interests weigh in favor of granting injunctive relief.

The public also has a legitimate interest in the preservation of unborn human life. LB 594 serves that public interest, but does so by placing substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska. That is not permitted by the United States Constitution, as

interpreted by the United States Supreme Court, and this District Court is bound by those precedents. The public interest in preserving the separation of powers, the supremacy of the United States Constitution, concepts of federalism, and the liberty and privacy interests of individuals in exercising responsible stewardship and personal dominion of their own bodies, all weigh heavily in favor of the granting of injunctive relief.

The public interest, and the balance of harms, both weigh in favor of granting Plaintiffs' Motion, in part, as set forth below.

III. SEVERABILITY

Section 2 of the bill is an expression of legislative opinion that may or may not be an accurate reflection of law and fact, but the section does not impose any duties, obligations, penalties, or liabilities. It is severable from the bill's sections that are subject to constitutional challenge, and Plaintiffs' motion for a temporary restraining order will be denied with respect to that section.

Section 12 of the bill imposes certain duties on DHHS with respect to the content of its Internet web site, but does not impose any duties, obligations, penalties, or liabilities on Plaintiffs or other persons on whose behalf this action is brought. It also is severable from the bill's sections that are subject to constitutional challenge, and Plaintiffs' motion for a temporary restraining order will be denied with respect to that section as well.

Section 17, that provides for severability of sections and parts of sections of the bill, is also not a proper subject of any constitutional challenge. Section 18, that repeals original statutes, likely would be un-

objectionable to Plaintiffs, but is intertwined with the sections that are subject to this temporary restraining order, and so will be included among the sections of the bill subject to the Court's restraining order.

CONCLUSION

LB 594 was passed by the Nebraska Legislature, signed by the Governor, and will become effective July 15, 2010. This Court cannot enjoin the effective date of the bill or the law itself.[19]

This Court can and will enjoin the Defendants from enforcing certain sections of the bill, for the reasons set out in this Memorandum, and will expedite the hearing on the merits of Plaintiffs' action for Declaratory Judgment and permanent injunctive relief.

IT IS ORDERED:

1. Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction (Filing No. 2) is denied in part, as follows:

   With respect to Sections 2 and 12 of Legislative Bill 594, 101st Leg. Reg. Sess. (Neb. 2010), to be codified within Neb. Rev. Stat. §§ 28- 325 and 28-327.01;

   With respect to Section 17 providing for severability of sections; and

   With respect to Section 18, to the extent that it authorizes the repeal of original §§ 28-325 and 28-317.01;

[19] While the U.S. District Court for the District of South Dakota did enjoin the effective date of a statute in *Planned Parenthood, Sioux Falls Clinic v. Miller*, which action was upheld by the Eighth Circuit, it was done with the stipulation of the Governor and Attorney General, the named defendants. *Miller*, 860 F. Supp. At 1421.

2. The Motion is otherwise granted, as follows:

   The Defendants are restrained from taking any action to enforce the remaining sections of Legislative Bill 594, 101st Leg. Sess. (Neb. 2010), specifically amendments to Neb. Rev. Stat. §§ 28-101, 28-326, 28-327, 28-327.03, 28-327.04, 28-340, 38-2021, pending further ruling by this Court on the merits of the Plaintiffs' claim for declaratory judgment and permanent injunctive relief;

3. Defendants will respond to the Plaintiffs' Amended Complaint on or before July 26, 2010;

4. The Defendants' Objection (Filing No. 37) to the Plaintiff's Index of Evidence is denied, without prejudice to reassertion of objections at the hearing on the merits of the Plaintiffs' claim for declaratory and permanent injunctive relief;

5. Counsel for the parties will confer with each other and the Court's courtroom deputy, Ed Champion (402.661.7377) to schedule the hearing on the merits; and

6. The Motion for Leave to File Amici Curiae (Filing No. 41) by Movants Coalition on Abortion and Breast Cancer, Creighton Students for Life, and Eagle Forum Education & Legal Defense Fund, is denied.

DATED this 14th day of July, 2010.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Case No. 4:10CV3122

PLANNED PARENTHOOD OF THE HEARTLAND, AND DR. JILL L. MEADOWS,
Plaintiffs,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY; JON BRUNING, ATTORNEY GENERAL OF NEBRASKA; IN HIS OFFICIAL CAPACITY; KERRY WINTERER, CHIEF EXECUTIVE OFFICER, AND DR. JOANN SCHAEFER, DIRECTOR OF THE DIVISION OF PUBLIC HEALTH, NEBRASKA DEPARTMENT OF HEALTH AND SERVICES, IN THEIR OFFICIAL CAPACITIES; AND CRYSTAL HIGGINS, PRESIDENT, NEBRASKA BOARD OF NURSING, AND BRENDA BERGMAN-EVANS, PRESIDENT, NEBRASKA BOARD OF ADVANCED PRACTICE REGISTERED NURSES, IN THEIR OFFICIAL CAPACITIES,
Defendants.

ORDER AND FINAL JUDGMENT

This matter is before the Court on the parties' Joint Stipulation to Entry of Final Judgment and Permanent Injunction (Filing No. 62). The parties stipulated to the entry of a judgment and an order granting final declaratory and injunctive relief consistent with the Court's Preliminary Injunction (Filing No. 53). The Court concludes that the Stipulation should be approved, and judgment should be

entered in favor of Plaintiffs Planned Parenthood of the Heartland and Dr. Jill L. Meadows, and against Defendants Dave Heineman, Jon Bruning, Kerry Winterer, Dr. Joann Schaefer, Crystal Higgins, and Brenda Bergman-Evans in their official capacities. Accordingly,

IT IS ORDERED:

1. For the reasons set forth in the Court's Preliminary Injunction Order of July 14, 2010 (Filing No. 53), the Court declares that Legislative Bill 594, 101st Leg. Sess. (Neb. 2010) is unconstitutional, except as to the following sections:

   a. Sections 2 and 12 of Legislative Bill 594, 101st Leg. Reg. Sess. (Neb. 2010), to be codified within Neb. Rev. Stat. §§ 28-325 and 28-327.01;

   b. Section 17 providing for severability of sections; and

   c. Section 18, to the extent that it authorizes the repeal of original §§ 28-325 and 28-317.01;

2. The Defendants are permanently enjoined from taking any action to enforce the remaining sections of Legislative Bill 594, 101st Leg. Sess. (Neb. 2010), specifically amendments to Neb. Rev. Stat. §§ 28-101, 28-326, 28-327, 28-327.03, 28-327.04, 28-340, 38-2021; and

3. Plaintiffs' time for filing an application for attorneys' fees and expenses is extended to October 8, 2010.

DATED this 24th day of August, 2010

BY THE COURT:

s/ Laurie Smith Camp
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Case No. 4:10CV3122

PLANNED PARENTHOOD OF THE HEARTLAND, AND DR. JILL L. MEADOWS,
Plaintiffs,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY; JON BRUNING, ATTORNEY GENERAL OF NEBRASKA; IN HIS OFFICIAL CAPACITY; KERRY WINTERER, CHIEF EXECUTIVE OFFICER, AND DR. JOANN SCHAEFER, DIRECTOR OF THE DIVISION OF PUBLIC HEALTH, NEBRASKA DEPARTMENT OF HEALTH AND SERVICES, IN THEIR OFFICIAL CAPACITIES; AND CRYSTAL HIGGINS, PRESIDENT, NEBRASKA BOARD OF NURSING, AND BRENDA BERGMAN-EVANS, PRESIDENT, NEBRASKA BOARD OF ADVANCED PRACTICE REGISTERED NURSES, IN THEIR OFFICIAL CAPACITIES,
Defendants.

ORDER

This matter is before the Court on the Motion for Leave to Intervene (Filing No. 70) filed by Nebraskans United for Life d/b/a NuLife Pregnancy Resource Center ("NuLife"). Movant also seeks reconsideration (Filing No. 73) of the Court's Order and Final Judgment of August 24, 2010 (Filing No. 64). The Court has reviewed the Motions, and to the

extent the Court has jurisdiction to address them, they are denied.

BACKGROUND

On June 28, 2010, Plaintiff Planned Parenthood of the Heartland[1] ("Planned Parenthood") filed its Complaint and a Motion for Preliminary Injunction, challenging the constitutionality of LB 594. On July 14, 2010, after the matter was fully briefed by the parties and following a hearing at which the parties presented oral argument, the Court granted preliminary injunctive relief (Filing No. 53). On August 13, 2010, NuLife filed a motion to intervene "for the limited purposes of appealing and seeking reconsideration of the preliminary injunction," (Filing No. 55) and filed a Notice of Appeal (Filing No. 58). On August 17, 2010, this Court denied NuLife"s motion to intervene (Filing No. 60), to the extent this Court had jurisdiction to consider the matter.

On August 18, 2010, the parties filed a stipulation (Filing No. 62) agreeing to an order granting final declaratory and injunctive relief, and the entry of final judgment. On August 24, 2010, the Court approved the settlement, entered a final judgment, and closed the case on the merits. (Filing No. 64.) NuLife filed the present motions on September 21, 2010.

DISCUSSION

I. Intervention as a Matter of Right

A. Standing

In addition to the requirements of Federal Rule of Civil Procedure 24, the Eighth Circuit requires that

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[1] On July 12, 2010, Planned Parenthood amended its complaint to add Dr. Jill Meadows as a plaintiff.

a party seeking to intervene establish Article III standing. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009). Standing requires a showing of an injury in fact, "which is an injury to a legally protected interest that is concrete, particularized, and either actual or imminent.'" *Id.* at 833ó34 (quoting *Curry v. Regents of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999)). "The purpose of the imminence requirement is to ensure that the alleged injury is not too speculative . . . [and] that the injury is certainly impending.'" *Id.* at 834 (quoting *Lujan v Defenders of Wildlife*, 504 U.S. 555, 564 n. 2 (1992)).

Addressing standing in this context is unusual because NuLife seeks to intervene as a defendant, and the Court must determine whether a *defendant* has suffered a traceable injury that will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61. To the extent that any standing analysis is applicable, NuLife has failed to meet it. NuLife claims it suffers injury because "LB 594 creates rights that benefit [NuLife] that this Court seeks to deny," and "this Court's decision actually harms [NuLife] by suggesting that information that [NuLife] distributes is false and misleading."

Neither of NuLife's proffered bases for standing supports a conclusion that it is in immediate danger of suffering a particularized injury. NuLife argues that LB 594 would make abortions less likely, thereby creating a right that NuLife can enforce. NuLife also argues that it competes with Planned Parenthood for customers, and a decrease in customers for Planned Parenthood will increase NuLife's market. This reasoning fails for at least two reasons. First, LB 594 would not create any right that could

be enforced directly by NuLife or by any competing health clinic. Second, NuLife's increased patronage and market share as a result of fewer abortions is purely speculative. The Court cannot conclude that these speculative injuries are concrete, particularized, actual or imminent.

NuLife's reputation argument likewise fails. NuLife argues that the Court's decision "brands [NuLife's] information on harms associated with abortions as false and misleading." (Filing No. 71 at 10.) NuLife mischaracterizes the Court's conclusions. In its Order of July 14, 2010, the Court stated that "Plaintiffs have presented substantial evidence that the disclosures mandated by LB 594, if applied literally, will require medical providers to give untruthful, misleading and irrelevant information to patients." (Filing No. 53 at 31.) Neither LB 594 nor the Court's reasoning suggests that this information has any connection with the information given by NuLife to its customers. Therefore, NuLife does not suffer reputational injury.

B. Timeliness of Motion to Intervene

Even if an inquiry as to standing were inapplicable to this case, NuLife has not shown that the Court must permit intervention as a matter of right. Rule 24 requires that a party seeking intervention as a matter of right, upon timely motion, establish that it has a recognized interest in the subject matter of the litigation that may be impaired by the disposition of the case and that will not be protected adequately by the existing parties. *See* Fed. R. Civ. P. 24(a). Several factors contribute to a district court's determination of timeliness including "(1) how far the litigation had progressed at the time of the motion for intervention, (2) the prospective intervenor's prior

knowledge of the pending action, (3) the reason for the delay in seeking intervention, and (4) the likelihood of prejudice to the parties in the action." *United States v. Ritchie Special Credit Inv., Ltd.*, — F.3d —, No. 09-2528, 2010 WL 3431828, at *6 (Sept. 2, 2010) (internal citations and quotations omitted).

Each of these factors suggests that NuLife's Motion is untimely. NuLife argues that the litigation has not progressed substantively. Though NuLife's Motion to Intervene for a Limited Purpose was filed relatively soon after the Court's Order of July 14, 2010, the present motion was filed nearly a month after the Court entered final judgment. The Eighth Circuit has stated that "[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *United States v. Assoc. Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir. 1976). Even though the litigation is only a few months old, it is terminated procedurally. NuLife has not made a strong showing justifying its delay in requesting intervention before judgment had been entered.

NuLife also fails to justify its delay in light of its knowledge of the case. NuLife cites *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), for the proposition that motions to intervene, filed within the time for giving notice of appeal, are timely. NuLife's argument is misplaced. In *United Airlines*, the Supreme Court stated that "as soon as it became clear to the respondent that [her interests would not be protected], she promptly moved to intervene to protect those interests." *Id.* at 394. As early as its first motion to intervene, NuLife claimed the State Defendants "do not share [NuLife's] interest in the

Court's labeling [NuLife's] mission as false and misleading." (Filing No. 56 at 16, filed on August 13, 2010.) Further, NuLife argues that the State Defendants inadequately protected NuLife's interests by "failing even to put on any evidence in response to [Planned Parenthood's] evidence." (*Id*.) Without commenting on the validity of these concerns, the Court notes that the facts giving rise to any such concerns were clear to NuLife at the time the Court entered its Order of July 14, 2010, and when the Court denied NuLife's motion to intervene on August 17, 2010. NuLife did not move promptly to intervene when it allegedly discovered that its interests would not be protected and it has not shown good cause for its delay.

Finally, the named parties would be prejudiced by NuLife's intervention. The parties stipulated to entry of a final judgment and injunctive relief consistent with the Court's Preliminary Injunction. The Court approved the stipulation and entered judgment consistent with the parties' agreement. (Filing No. 64). Should NuLife's intervention be permitted, the parties would be forced to litigate a case that they agree should be terminated, and prejudice to the parties would result. Accordingly, the Court concludes that each of the stated factors suggests that NuLife's motion is untimely.

II. Discretionary Intervention

Permissive intervention under Rule 24(b) is wholly discretionary with the district court. *South Dakota ex ref. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003). "The principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *Id*. For

the reasons already discussed, the Court concludes that the parties would be prejudiced by permitting intervention, and the Court will not permit intervention under Rule 24(b).

III. Motion to Reconsider

Because the Court will deny NuLife's Motion to Intervene, it need not address the Motion for Reconsideration and it will be denied as moot.

Accordingly,

IT IS ORDERED:

1. The Motion for Leave to Intervene (Filing No. 70) filed by Nebraskans United for Life d/b/a NuLife Pregnancy Resource Center is denied; and

2. The Motion for Leave to Intervene (Filing No. 73) is denied as moot.

DATED this 4th day of November, 2010.

BY THE COURT:

s/ Laurie Smith Camp
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3298

PLANNED PARENTHOOD OF THE HEARTLAND AND
DR. JILL L. MEADOWS
Appellees

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY, *et al.*
Appellees

v.

COALITION ON ABORTION AND BREAST CANCER, *et al*.
NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS
NULIFE PREGNANCY RESOURCE CENTER
Appellant

Eagle Forum Education and Legal Defense Fund and
Thomas More Law Center Amici
on Behalf of Appellant

Appeal from U.S. District Court for the
District of Nebraska – Lincoln
(4:10-cv-03122-LSC)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 03, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX F

LEGISLATIVE BILL 594

Approved by the Governor April 13, 2010

Introduced by Dierks, 40; McCoy, 39; Pirsch, 4.

FOR AN ACT relating to abortion; to amend sections 28-325, 28-340, and 38-2021, Reissue Revised Statutes of Nebraska, and sections 28-101, 28-326, 28-327, 28-327.01, 28-327.03, and 28-327.04, Revised Statutes Supplement, 2009; to state and restate legislative findings and declarations; to define and redefine terms; to change provisions relating to voluntary and informed consent to an abortion; to prohibit waivers, provide additional remedies, provide requirements for certain civil actions, provide burdens of proof, provide for tolling statute of limitations, and restrict applicability to criminal and disciplinary actions; to require information regarding certain service agencies to be made available on the Internet; to harmonize provisions; to provide severability; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 28-101, Revised Statutes Supplement, 2009, is amended to read:

28-101 Sections 28-101 to 28-1356 and <u>sections 5 to 11 of this act</u> shall be known and may be cited as the Nebraska Criminal Code.

Sec. 2. Section 28-325, Reissue Revised Statutes of Nebraska, is amended to read:

28-325 The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States

Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 and sections 5 to 11 of this act are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but are rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; ~~and~~

(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education~~;~~.

(6) That the existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women;

(7) That clarifying the minimum standard of care for preabortion screening and counseling in

statute is a practical means of protecting the well-being of women and may better ensure that abortion doctors are sufficiently aware of each patient's risk profile so they may give each patient a well-informed medical opinion regarding her unique case; and

(8) That providing right to redress against nonphysicians who perform illegal abortions or encourage self-abortions is an important means of protecting women's health.

Sec. 3. Section 28-326, Revised Statutes Supplement, 2009, is amended to read:

28-326 For purposes of sections 28-325 to 28-345 and sections 5 to 11 of this act, unless the context otherwise requires:

(1) Abortion means the use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child, and which causes the premature termination of the pregnancy;

(2) Complications associated with abortion means any adverse physical, psychological, or emotional reaction that is reported in a peer-reviewed journal to be statistically associated with abortion such that there is less than a five percent probability ($P < .05$) that the result is due to chance;

(3) Conception means fecundation of the ovum by the spermatozoa;

(4) Emergency situation means that condition which, on the basis of the physician's good faith clinical judgment, co complicates the medical condition of

a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function

~~(2)~~ (5) Hospital means those institutions licensed by the Department of Health and Human Services pursuant to the Health Care Facility Licensure Act;

(6) Negligible risk means a risk that a reasonable person would consider to be immaterial to a decision to undergo an elective medical procedure;

(7) Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child;

~~(3)~~ (8) Physician means any person licensed to practice medicine in this state as provided in the Uniform Credentialing Act;

~~(4)~~ (9) Pregnant means that condition of a woman who has unborn human life within her as the result of conception;

~~(5) Conception means the fecundation of the ovum by the spermatozoa;~~

(10) Probable gestational age of the unborn child means what will with reasonable probability, in

the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed;

(11) Risk factor associated with abortion means any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications associated with abortion such that there is less than a five probability ($P < .05$) that such statistical association is due to chance. Such information on risk factors shall have been published in any peer-reviewed journals indexed by the United States National Library of Medicine's search services (PubMed or MEDLINE) or in any journal included in the Thomson Reuters Scientific Master Journal List not less than twelve months prior to the day preabortion screening was provided;

(12) Self-induced abortion means any abortion or menstrual extraction attempted or completed by a pregnant woman on her own body;

(13) Ultrasound means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor an unborn child;

~~(6)~~ (14) Viability means that stage of human development when the unborn child is potentially able to live more than merely momentarily outside the womb of the mother by natural or artificial means; and

~~(7) Emergency situation means that condition which, on the basis of the physician's good faith clinical judgment, co complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her~~

~~death or for which a delay will create serious risk of substantial impairment of a major bodily function~~

~~(8) Probable gestational age of the unborn child means what will with reasonable probability, in the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed;~~

~~(9) Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child;~~

~~(10)~~ (15) Woman means any female human being whether or not she has reached the age of majority.~~; and~~

~~(11) Ultrasound means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor an unborn child;~~

Sec. 4. Section 28-327, Revised Statutes Supplement, 2009, is amended to read:

28-327 No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed. Except in the case of an emergency situation, consent to an abortion is voluntary and informed only if:

(1) The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by a physician assistant or registered nurse licensed under the Uniform Credentialing Act who is an agent of either physician, at least twenty-four hours before the abortion:

(a) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, perforated uterus, danger to subsequent pregnancies, and infertility;

(b) The probable gestational age of the unborn child at the time the abortion is to be performed;

(c) The medical risks associated with carrying her child to term; and

(d) That she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.

The person providing the information specified in this subdivision to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referral; and informed consent. The physician or the physician's agent may provide this information by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied by the patient and whatever other relevant

information is reasonably available to the physician or the physician's agent;

(2) The woman is informed by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either physician, at least twenty-four hours before the abortion:

(a) The name of the physician who will perform the abortion;

(b) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(c) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion;

(d) That she has the right to review the printed materials described in section 28-327.01. The physician or his or her agent shall orally inform the woman that the materials have been provided by the Department of Health and Human Services and that they describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to review the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee. The physician and his or her agent may disassociate themselves from the materials and may comment or refrain from commenting on them as they choose; and

(e) That she has the right to request a comprehensive list, compiled by the Department of

Health and Human Services, of health care providers, facilities, and clinics that offer to have ultrasounds performed by a person at least as qualified as a registered nurse licensed under the Uniform Credentialing Act, including and specifying those that offer to perform such ultrasounds free of charge. The list shall be arranged geographically and shall include the name, address, hours of operation, and telephone number of each entity. If requested by the woman, the physician who is to perform the abortion, the referring physician, or his or her agent shall provide such a list as compiled by the department;

(3) If an ultrasound is used prior to the performance of an abortion, the physician who is to perform the abortion, the referring physician, or a physician assistant or registered nurse licensed under the Uniform Credentialing Act who is an agent of either physician, or any qualified agent of either physician, shall:

(a) Perform an ultrasound of the woman's unborn child of a quality consistent with standard medical practice in the community at least one hour prior to the performance of the abortion;

(b) Simultaneously display the ultrasound images so that the woman may choose to view the ultrasound images or not view the ultrasound images. The woman shall be informed that the ultrasound images will be displayed so that she is able to view them. Nothing in this subdivision shall be construed to require the woman to view the displayed ultrasound images; and

(c) If the woman requests information about the displayed ultrasound image, her questions shall be answered. If she requests a detailed, simul-

taneous, medical description of the ultrasound image, one shall be provided that includes the dimensions of the unborn child, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable;

(4) At least one hour prior to the performance of an Abortion, a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act has:

(a) Evaluated the pregnant woman to identify if the pregnant woman had the perception of feeling pressured or coerced into seeking or consenting to an Abortion;

(b) Evaluated the pregnant woman to identify the presence of any risk factors associated with abortion;

(c) Informed the pregnant woman and the physician who is to perform the Abortion of the results of the evaluation in writing. The written evaluation shall include, at a minimum, a checklist identifying both the positive and negative results of the evaluation for each risk factor associated with abortion and both the licensed person's written certification and the woman's written certification that the pregnant woman was informed of the risk factors associated with abortion as discussed; and

(d) Retained a copy of the written evaluation results in the pregnant woman's permanent record;

(5) If any risk factors associated with abortion were identified, the pregnant woman was informed of the following in such manner and detail that a

reasonable person would consider material to a decision of undergoing an elective medical procedure:

(a) Each complication associated with each identified risk factor; and

(b) Any quantifiable risk rates whenever such relevant data exists;

(6) The physician performing the Abortion has formed a reasonable medical judgment, documented in the permanent record, that:

(a) The preponderance of statistically validated medical studies demonstrates that the physical, psychological, and familial risks associated with Abortion for patients with risk factors similar to the patient's risk factors are negligible risks;

(b) Continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated by induced abortion; or

(c) Continuance of the pregnancy would involve less risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated by an induced abortion;

~~(4)~~ (7) The woman certifies in writing, prior to the abortion, that:

(a) The information described in subdivisions (1) and (2)(a), (b), and (c) of this section has been furnished her;

(b) She has been informed of her right to review the information referred to in subdivision (2)(d) of this section; and

(c) The requirements of subdivision (3) of this section have been performed if an ultrasound is

performed prior to the performance of the abortion; and

~~(5)~~ (8) Prior to the performance of the Abortion, the physician who is to perform the abortion or his or her agent receives a copy of the written certification prescribed by subdivision ~~(4)~~ (7) of this section. The physician or his or her agent shall retain a copy of the signed certification form in the woman's medical record.

Sec. 5. Any waiver of the evaluations and notices provided for in subdivision (4) of section 28-327 is void and unenforceable.

Sec. 6. In addition to whatever remedies are available under the common or statutory laws of this state, the intentional, knowing, or negligent failure to comply with the requirements of section 28-327 shall provide a basis for the following damages:

(1) The award of reasonable costs and attorney's fees; and

(2) A recovery for the pregnant woman for the wrongful death of her unborn child under section 30-809 upon proving by a preponderance of evidence that the physician knew or should have known that the pregnant woman's consent was either not fully informed or not fully voluntary pursuant to section 28-327.

Sec. 7. Any action for civil remedies based on a failure to comply with the requirements of section 28-327 shall be commenced in accordance with section 25-222 or 44-2828.

Sec. 8. If a physician performed an abortion on a pregnant woman who is a minor without providing the information required in section 28-327 to the

pregnant woman's parent or legal guardian, then the physician bears the burden of proving that the pregnant woman was capable of independently evaluating the information given to her.

Sec. 9. Except in the case of an emergency situation, if a pregnant woman is provided with the information required by section 28-327 less than twenty-four hours before her scheduled abortion, the physician shall bear the burden of proving that the pregnant woman had sufficient reflection time, given her age, maturity, emotional state, and mental capacity, to comprehend and consider such information.

Sec. 10. In a civil action involving section 28-327, the following shall apply:

(1) In determining the liability of the physician and the validity of the consent of a pregnant woman, the failure to comply with the requirements of section 28-327 shall create a rebuttable presumption that the pregnant woman would not have undergone the recommended abortion had section 28-327 been complied with by the physician;

(2) The absence of physical injury shall not preclude an award of noneconomic damages including pain, suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or companionship, loss of consortium, injury to reputation, or humiliation associated with the abortion;

(3) The fact that a physician does not perform elective abortions or has not performed elective abortions in the past shall not automatically disqualify such physician from being an expert witness. A licensed obstetrician or family practitioner who regularly assists pregnant women in resolving medical matters related to pregnancy may be qualified to

testify as an expert on the screening, counseling, management, and treatment of pregnancies;

(4) Any physician advertising services in this state shall be deemed to be transacting business in this state pursuant to section 25-536 and shall be subject to the provisions of section 28-327;

(5) It shall be an affirmative defense to an allegation of inadequate disclosure under the requirements of section 28-327 that the defendant omitted the contested information because statistically validated surveys of the general population of women of reproductive age, conducted within the three years before or after the contested abortion, demonstrate that less than five percent of women would consider the contested information to be relevant to an abortion decision; and

(6) In addition to the other remedies available under the common or statutory law of this state, a woman or her survivors shall have a cause of action for reckless endangerment against any person, other than a physician or pharmacist licensed under the Uniform Credentialing Act, who attempts or completes an abortion on the pregnant woman or aids or abets the commission of a self-induced abortion. Proof of injury shall not be required to recover an award, including reasonable costs and attorney's fees, for wrongful death under this subdivision.

Sec. 11. (1) In the event that any portion of section 28-327 is enjoined and subsequently upheld, the statute of limitations for filing a civil suit under section 28-327 shall be tolled during the period for which the injunction is pending and for two years thereafter.

(2) Nothing in section 28-327 shall be construed as defining a standard of care for any medical procedure other than an induced abortion.

(3) A violation of subdivision (4), (5), or (6) of section 28-327 shall not provide grounds for any criminal action or disciplinary action against or revocation of a license to practice medicine and surgery pursuant to the Uniform Credentialing Act.

Sec. 12. Section 28-327.01, Revised Statutes Supplement, 2009, is amended to read:

28-327.01 (1) The Department of Health and Human Services shall cause to be published the following easily comprehensible printed materials:

(a) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies and agencies and services for prevention of unintended pregnancies, which materials shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers and addresses in which such agencies may be contacted or printed materials including a toll-free, twenty-four-hour-a-day telephone number which may be called to orally obtain such a list and description of agencies in the locality of the caller and of the services they offer;

(b) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including pictures or drawings representing the development of unborn

children at the two-week gestational increments, and any relevant information on the possibility of the unborn child's survival. Any such pictures or drawings shall contain the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The materials shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion, the medical risks commonly associated with abortion, and the medical risks commonly associated with carrying a child to term; and

(c) A comprehensive list of health care providers, facilities, and clinics that offer to have ultrasounds performed by a person at least as qualified as a registered nurse licensed under the Uniform Credentialing Act, including and specifying those that offer to perform such ultrasounds free of charge. The list shall be arranged geographically and shall include the name, address, hours of operation, and telephone number of each entity.

(2) The printed materials shall be printed in a typeface large enough to be clearly legible.

(3) The printed materials required under this section shall be available from the department upon the request by any person, facility, or hospital for an amount equal to the cost incurred by the department to publish the materials.

(4) The Department of Health and Human Services shall make available on its Internet web site a printable publication of geographically indexed materials designed to inform the woman of public and private agencies with services available to assist a woman with mental health concerns, following a risk factor evaluation. Such services shall include, but not be limited to, outpatient and crisis intervention services and crisis hotlines. The materials shall include a comprehensive list of the agencies available, a description of the services offered, and a description of the manner in which such agencies may be contacted, including addresses and telephone numbers of such agencies, as well as a toll-free, twenty-four-hour-a-day telephone number to be provided by the department which may be called to orally obtain the names of the agencies and the services they provide in the locality of the woman. The department shall update the publication as necessary.

Sec. 13. Section 28-327.03, Revised Statutes Supplement, 2009, is amended to read:

28-327.03 No civil liability for failure to comply with subdivision (2)(d) of section 28-327 or that portion of subdivision ~~(4)~~ (7) of such section requiring a written certification that the woman has been informed of her right to review the information referred to in subdivision (2)(d) of such section may be imposed unless the Department of Health and Human Services has published and made available the printed materials at the time the physician or his or her agent is required to inform the woman of her right to review them.

Sec. 14. Section 28-327.04, Revised Statutes Supplement, 2009, is amended to read:

28-327.04 Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of ~~such~~ ~~section~~ subdivision (1), (2), (3), (7), or (8) of section 28-327 shall be prima facie evidence of professional negligence. The written certification prescribed by subdivision ~~(4)~~ certifications prescribed by subdivisions (4) and (7) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either physician. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

Sec. 15. Section 28-340, Reissue Revised Statutes of Nebraska, is amended to read:

28-340 Any person whose employment or position has been in any way altered, impaired, or terminated in violation of sections 28-325 to 28-345 and sections 5 to 11 of this act may sue in the district court for all consequential damages, lost wages,

reasonable attorney's fees incurred, and the cost of litigation.

Sec. 16. Section 38-2021, Reissue Revised Statutes of Nebraska, is amended to read:

38-2021 Unprofessional conduct means any departure from or failure to conform to the standards of acceptable and prevailing practice of medicine and surgery or the ethics of the profession, regardless of whether a person, patient, or entity is injured, or conduct that is likely to deceive or defraud the public or is detrimental to the public interest, including, but not limited to:

(1) Performance by a physician of an abortion as defined in subdivision (1) of section 28-326 under circumstances when he or she will not be available for a period of at least forty-eight hours for postoperative care unless such postoperative care is delegated to and accepted by another physician;

(2) Performing an abortion upon a minor without having satisfied the notice requirements of sections 71-6901 to 71-6908; and

(3) The intentional and knowing performance of a partial-birth abortion as defined in subdivision ~~(9)~~ (7) of section 28-326, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Sec. 17. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 18. Original sections 28-325, 28-340, and 38-2021, Reissue Revised Statutes of Nebraska, and sections 28-101, 28-326, 28-327, 28-327.01, 28-327.03, and 28-327.04, Revised Statutes Supplement, 2009, are repealed.