IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, Plaintiff, vs. 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.	4:10-cv-3122 **BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

COME NOW the Defendants; Dave Heineman in his official capacity as Governor of Nebraska; Jon Bruning, in his official capacity as Nebraska Attorney General; Kerry Winterer, in his official capacity as Chief Executive Officer of Nebraska Department of Health and Human Services, Dr. Joann Schaefer, in her official capacity as Director of the Division of Public Health of Nebraska Department of Health and Human Services, Crystal Higgins, in her official capacity as President of Nebraska Board of Nursing, and Brenda Bergman-Evans, in her official capacity as President of Nebraska Board of Advanced Practice Registered Nurses, through counsel, and hereby request that this

Court enter an Order denying Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. 2) for the reasons contained herein.

INTRODUCTION

On June 28, 2010, Plaintiff brought suit, pursuant to 42 U.S.C. §1983, facially attacking the constitutionality of the State of Nebraska's Women's Health Protection Act, ("the Act" or "LB 594"), which was adopted on April 13, 2010 and goes into effect on July 15, 2010. The Act amends existing statutes, in particular Neb. Rev. Stat. §28-327, which prohibits the performance of an abortion except under circumstances of voluntary and informed consent of the woman upon whom the abortion is to be performed. In adopting the Act, the Legislature specifically found:

> [t]hat 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 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.

LB 594, §§2(6)-(7). The Act goes on to provide a civil redress against any doctor who performs an abortion on a woman, but fails to identify and discuss material risks and complications associated with her contemplated abortion sufficient to enable the woman to give informed consent prior to the abortion. LB 594, §§6-10. Nothing within LB 594 provides 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." LB 594, §11(3).

Plaintiff's Motion for Preliminary Injunction should be denied because Plaintiff lacks standing to challenge the constitutionality of LB 594. Furthermore, Plaintiff has

failed to establish that it is likely to succeed on the merits of its cause of action, that it will suffer irreparable harm without the injunction, or that the balance of harm suffered by Plaintiff or the public interest weigh in favor of its position. Accordingly, Defendants respectfully request that the Court deny Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF.

A grant of preliminary injunctive relief is within the discretion of the Court. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114, n.8 (8th Cir. 1981) (en banc) (*citing Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 866 (8th Cir. 1977); *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976)). At the base of the Court's determination is "whether the balance of equities so favors the [Plaintiff] that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase*, 640 F.2d at 113 (footnote omitted) (citing *Chicago, B. & Q.R.R. v. Chicago Great Western R.R.*, 190 F.2d 361, 363 (8th Cir. 1951)).

> Whether a preliminary injunction should issue involves consideration of:
> (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.

Dataphase, 640 F.2d at 113. The Court performs the role of balancing each of the foregoing equities, with no single factor being determinative in the analysis. *See*, *Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 977 (8th Cir. 2005) ("A district court abuses its discretion if its findings of fact do not evidence the

considerations that must undergird a preliminary injunction.").

The United States Supreme Court has found a "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867 (1997). "The party seeking injunctive relief bears the burden of proving these factors." *CDI Energy Serv., Inc. v. West River Pumps, Inc.*, 567 F.3d 398, 402 (8th Cir. 2009) (quoting *Lankforld v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006). However, an attempt to preliminarily enjoin a duly enacted statute requires Plaintiff to satisfy a more rigorous standard for determining the likelihood of success on the merits of their case:

> Where a party seeks to enjoin preliminarily the implementation of a duly enacted statute – as is the case here – district courts must make 'a threshold finding that a party is likely to prevail on the merits'…The Court reasoned that by re-emphasizing 'this more rigorous standard for determining a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis.'…In such cases, it is only after finding a party is likely to prevail on the merits that a district court should weigh the other *Dataphase* factors…

Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-733 (8th Cir. 2008)). As the Court must make a threshold determination of whether Plaintiff is likely to prevail on the merits, this analysis begins with an assessment of Plaintiff's likelihood of success on the merits.

A. Plaintiff Cannot Prove a Likelihood of Success on the Merits.

Plaintiff is not entitled to an injunction unless it can make a prima facie showing that it has a likelihood of success on the merits of its claims. "[A]n injunction cannot issue if there is no chance of success on the merits, and must be dissolved if the district

court's findings of fact do not support the conclusion that there is a threat of irreparable harm." *Mid-America Real Estate Co.*, 406 F.3d at 972 (citations omitted). Because Plaintiff cannot prove that its claims would succeed on the merits, its Motion for Preliminary Injunction and Temporary Restraining Order should be denied.

1. Plaintiff's Claims Are Barred by the Eleventh Amendment.

Plaintiff is unlikely to succeed on the merits of its claims because, under the Eleventh Amendment, Defendants enjoy immunity from Plaintiff's claims. In *Ex parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 452-453 (1908), the Supreme Court 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.*

Nothing under LB 594 authorizes any of the Defendants to take any action against a licensed practitioner for failure to comply with its provisions. Instead, the role of Defendants in enforcing LB 594 is specifically excluded: "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." LB 594, §11(3). LB 594 provides a standard of care for informed consent prior to a physician providing an abortion procedure. The statute provides a *private right of action* for the patient and prohibits any criminal or civil enforcement action by any state office or official, including the Governor, Attorney General, or any licensing and credentialing board or agency including the Department of Health and Human Services, the Nebraska Board of Nursing, and Nebraska Board of Advanced Practice Registered Nurses. Because Defendants have no connection to

enforcement of LB 594, Defendants are entitled to Eleventh Amendment immunity and Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order should be denied.

In *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), abortion providers sued Louisiana's Governor and Attorney General challenging a statute that made abortion providers liable to patients in tort for any damage caused by an abortion. At the district court level, the state was enjoined from enforcing the law. On appeal, the Fifth Circuit addressed whether the suit was barred by the Eleventh Amendment. Initially, the three judge panel upheld the injunction because the defendants fit within the *Ex parte Young* exception. However, the Fifth Circuit granted a rehearing en banc and reversed.

In the Fifth Circuit's en banc opinion, the court discussed the *Ex parte Young* requirement that the sued official have "'some connection with the enforcement of the act' or to be 'specifically charged with the duty to enforce the statute' and be threatening to exercise that duty." *Id.* at 414-415 (quoting *Ex parte Young*, 209 U.S. at 157, 28 S. Ct. at 452-453). "The Young principle teaches that it is not merely the general duty to see that the laws of the state are implemented that substantiates the required 'connection,' but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." 244 F.3d at 416. The Fifth Circuit found no particular duty set forth in Louisiana law specifically charging the Governor or Attorney General with enforcement of the challenged statute or any actual conduct or action by those defendants to enforce the statute and concluded that the defendants therefore enjoyed Eleventh Amendment immunity. *Id.* at 424.

Defendants' Eleventh Amendment Immunity in the present case is even stronger

than that of the *Okpalobi* defendants. Where the *Okpalobi* court was unable to find a duty or law requiring enforcement of the Louisiana statute, LB 594 contains a section that clearly proscribes any Defendant from taking any action to enforce the statute. "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." LB 594, §11(3).

In *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005), the Eighth Circuit addressed Eleventh Amendment immunity and the *Young* doctrine. This case stemmed from the challenge to a Missouri informed consent statute that provided both criminal and license revocation for failure to comply. The statute placed criminal enforcement in the hands of local prosecutors. However the Plaintiffs named the Missouri Attorney General as a defendant. The Eighth Circuit found that Eleventh Amendment Immunity and *Young* applied:

> Under Missouri law, the Attorney General is authorized to aid prosecutors when so directed by the Governor, and to sign indictments "when so directed by the trial court." Mo. Rev. Stat. § 27.030. At this stage of the proceedings, we agree with the district court that this statutory authority creates a sufficient connection with the enforcement of § 188.039 to make the Attorney General a potentially proper party for injunctive relief, in which case he would be within the scope of the Ex parte Young exception to Eleventh Amendment immunity. However, as neither the Governor nor any state trial court has directed the Attorney General to take action to enforce § 188.039, Planned Parenthood has shown no threat of irreparable injury by the Attorney General. Thus, extending the grant of preliminary injunctive relief to this defendant in his official capacity looks very much like the impermissible grant of federal court relief against the State of Missouri.

428 F.3d at 1145.

The facts in the present case present an even stronger argument in favor of

Eleventh Amendment immunity because unlike the Missouri law, there is no criminal or licensure revocation sanction permitted under LB 594, and Defendants have no authority to enforce LB 594, which creates only a private right of action for patients.

Under both the Eleventh Amendment and the *Young* analysis and its progeny, Defendants enjoy immunity because LB 594 prohibits Defendants from having any connection with enforcement of the Act. As Defendants enjoy Eleventh Amendment Immunity, Plaintiff is unlikely to prevail on the merits of its claims and its Motion for Preliminary Injunction and Temporary Restraining Order should be denied and the case dismissed.

2. Plaintiff Lacks Standing to Bring Its Claims.

Even if Plaintiff's claims are not barred by the Eleventh Amendment, Plaintiff is unlikely to succeed on the merits because Plaintiff does not have Article III standing to bring these claims. Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975). The party seeking to invoke the federal court's jurisdiction, the Plaintiff in this case, bears the burden of pleading and proof on each step of the standing analysis. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992).

In order to establish standing, Plaintiff must establish that it has "suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Hazeltine I*, 340 F.3d 583, 591 (8th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, (1992)). Plaintiff's injury must also be traceable to the defendant's conduct and it must be likely,

rather than merely speculative, that a favorable decision will remedy the injury caused to the plaintiff. *Id.* These three elements, injury, causation, and redressability, are the "irreducible constitutional minimum of standing." *Lugan*, 504 U.S. at 560, 112 S. Ct. at 2136.

In this case, Planned Parenthood cannot satisfy any of the three criteria. Plaintiff will not suffer an injury in fact by enforcement of LB 594 because it merely creates a private cause of action against physicians by patients who were not adequately informed of the risks and complications associated with abortion. In addition, Plaintiff lacks standing because there is no causal connection between Defendants and any injury alleged because none of Defendants are charged with enforcement of LB 594. Finally, a favorable decision enjoining Defendants' enforcement of LB 594 will not redress Plaintiff's alleged injuries, given that women will still be entitled to seek redress from the physicians for failure to obtain adequate informed consent prior to performance of an abortion.

a. Plaintiff Will Not Suffer an Injury In Fact by Enforcement of LB 594.

Because LB 594 only creates a cause of action for redress by patients against physicians who fail to adequately inform them of the risks and complications associated with their abortion, Planned Parenthood has not suffered an injury in fact. "Plaintiff Planned Parenthood is a not-for-profit corporation registered as a foreign corporation doing business in Nebraska." Doc. 1, ¶ 7. Plaintiff alleges that it will suffer irreparable harm by enforcement of LB 594 including, "significant licensing penalties, including revocation of Planned Parenthood's license to operate a health center and its staff's professional licenses; significant civil penalties, including damages for wrongful death

and professional negligence, costs, and attorneys' fees; substantial financial harm; and ongoing violations of its constitutional rights and those of its patients…" Doc. 1, ¶ 43. However, the cause of action set forth under LB 594 only applies to physicians, and the Act goes on to specifically preclude loss of licensure, so Plaintiff's actual injuries are indirect, at best. LB 594, §§6-10, 11(3).

While Plaintiff contracts with practitioners who provide abortion services at its clinics in Nebraska, LB 594 creates a civil remedy against *physicians* who perform abortions and fail to inform their patient of risks and complications associated with an abortion. LB 594, §§6-10. Physician is defined as "any person licensed to practice medicine in this state as provided in the Uniform Credentialing Act[.]" Neb. Rev. Stat. §28-326(8), as amended by LB 594, §3.

Plaintiff is not a "Physician" within the definition provided in Neb. Rev. Stat. §28-326(8), as amended by LB 594, §3, nor is Plaintiff subject to any criminal or disciplinary action or license revocation for violations of LB 594. It is the physician, and not the corporation contracting with the physician, who is affected by LB 594. It is the physician that has the obligation to ensure informed consent was obtained prior to carrying out an abortion procedure. It is the physician, and not the corporation contracting with the physician, who is liable to a patient in a civil action for wrongful death and other damages for failure to obtain informed consent consistent with the statutory standard of care provided by LB 594. The obligations are individual and personal to the physician and not to Plaintiff. As LB 594 creates no additional responsibilities or civil liability for Plaintiff, it faces no actual or imminent injury from the enactment of LB 594 and therefore, lacks standing to bring its claims.

Plaintiff purports to be suing "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." Doc. 1, ¶ 7. To the extent Plaintiff is allowed to bring suit on behalf of its physicians for purposes of LB 594, they still fail to establish suffering of an imminent injury in fact. In *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005), the Tenth Circuit found that abortion providers who challenged an Oklahoma statute that created civil liability for any subsequent medical costs for an abortion performed on a minor without parental consent or knowledge, had suffered a sufficient injury in fact. 416 F.3d at 1155. In that case, the abortion providers' injury in fact was based on the loss of business that would result from forcing minors to obtain in-person parental consent. *Id.* However, Plaintiff has not claimed loss of business as a possible injury resulting from enforcement of LB 594.

Plaintiff has claimed injury, on behalf of its physicians, from the potential threat of civil lawsuits. The *Nova Health Sys.* court rejected such injury as being insufficient to create standing. The court concluded:

> [Plaintiff's] mere possible future exposure to civil liability … is too remote to constitute an actual or imminent injury in fact. [Plaintiff] could only be subject to liability … if it performs an abortion on a minor without parental consent or knowledge, if that minor requires subsequent medical treatment because of that abortion, and if the minor does in fact obtain such treatment. Although such a chain of events would indeed be possible, any threat of this kind of injury is far from immediate.

Id. at 1155, n. 5. In a similar fashion, any possible future exposure Plaintiff or any physician providing abortion services faces under LB 594 is too remote to constitute actual or imminent injury in fact. Certainly, any physician who provides abortion

services could be subject to civil liability if they fail to satisfy LB 594's informed consent requirements, but the chain of events necessary for such liability is far from immediate.

Likewise, because Plaintiff's physicians are not subject to criminal prosecution, Plaintiff lacks standing to bring their claims even on behalf of its physicians. The United States Supreme Court has determined that *physicians* who perform abortions have standing to challenge a statute that may subject them to criminal prosecution. *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745 (1973); see also *Planned Parenthood Minn. v. Rounds*, 650 F. Supp. 2d 972, 984-985 (D.S.D. 2009) (Planned Parenthood had standing because actual physicians who intended to practice abortions in the future were named plaintiffs and were subject to criminal prosecution for failure to comply).

Plaintiff also cannot bring its First Amendment coerced speech claims on behalf of its physicians. Third parties lack standing to enforce the First Amendment free speech claims of others. *Osediacz v. City of Cranston*, 414 F.3d 136, 142-143 (1st Cir. 2005) (resident lacked standing to bring Free Speech Clause claim on behalf of other residents who allegedly were being subjected to prior restraint). In its Memorandum of Law in Support of Preliminary Injunction and Temporary Restraining Order, Doc. 4, Plaintiff fails to provide any case law supporting a third-party corporation's ability to bring suit on behalf of their contracted physicians' First Amendment Rights. If, for the sake of argument, there is any coerced speech by LB 594, the speaker being coerced is the physician providing abortion services and not Plaintiff. Thus, Plaintiff is attempting to bring a coerced speech claim on behalf of third parties and lacks standing to do so.

Finally, Plaintiff lacks standing to bring the suit "on behalf of its current and future patients seeking abortion services." Doc. 1, ¶ 7. Plaintiff's interest in this case is

specifically contrary to the interests of its patients to recover for inadequate care from the physician providing abortions, thereby depriving Plaintiff of the right to bring this action on behalf of its patients. Although ordinarily one may not claim standing to assert the rights of a third party, case law suggests that under certain limited circumstances physicians may bring a lawsuit on behalf of their patients asserting their patients' right to have access to abortion. *Singleton v. Wulff,* 428 U.S. 106, 114-118, 96 S. Ct. 2868, 2875-2876 (1976). However, LB 594 creates a private right of action for patients against their physicians, putting the interests of patients directly opposite of that of their physician and making the *Singleton* analysis inapplicable. LB 594 does nothing to inhibit a patient's right of access to abortion services, rather it provides patients a statutory mechanism for recovery when a practitioner fails to obtain their informed consent. Thus, physicians cannot adequately advocate the interests of their third party patients because the patients' interests are opposite.

Plaintiff and physicians who provide abortion services are not prohibited by either Article III standing or the Eleventh Amendment from *ever* challenging LB 594. If a patient brings an action in tort based on a physician's failure to meet the statutory standard of care provided for by LB 594, there is no question the physician could challenge the constitutionality of LB 594 as a defense to liability. Because Plaintiff has not alleged an injury in fact that is actual and imminent, it lacks standing to bring its claims.

b. Planned Parenthood Also Lacks Standing Because There Is No Causal Connection between Defendants and Any Injury Alleged, Nor Is There Redressability.

Not only has Plaintiff suffered no injury in fact, it also fails the subsequent two

elements of standing because there is no causal connection between any purported potential injury and Defendants' conduct, and a favorable decision against Defendants will provide no redressability because it is the patients, and not Defendants, who have the private right of action under LB 594.

Defendants' inability to enforce any provision of LB 594 is fatal to Plaintiff's standing to bring this case against Defendants and to this Court's jurisdiction. As the *Okpalobi* court noted, "[t]he requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." *Okpalobi*, 244 F.3d at 426. Because Defendants have no authority to enforce the provisions of LB 594, Plaintiff can show no causal connection between its claimed injuries and the actions of Defendants or that injunctive relief will provide any redressability for their purported injuries.

In addition, the Tenth Circuit's well reasoned holding in *Nova Health Sys.*, 416 F.3d at 1158, dismissing for lack of standing a suit challenging the constitutionality of a staute which created civil liability for abortion providers failing to obtain parental consent for a minor, addressed the causation element of standing and ruled that the plaintiff "failed to demonstrate that its injury was caused by 'the challenged action of the defendants, and not the result of the independent action of some third party not before the court.'" As to redressability, the Tenth Circuit found that a judgment against the state defendants would do nothing to redress the plaintiff's risk of liability under the civil tort statute because "there would still be a multitude of other prospective litigants who could potentially sue [plaintiff] under the act." *Id.* at 1159. Similarly, Defendants in the present case have undertaken no conduct causing injury to Plaintiff. Moreover, even if

Plaintiff's motion for a preliminary injunction and temporary restraining order against Defendants were granted, such order would not prohibit any potential plaintiff from bringing a suit under the LB 594.

Plaintiff fails all three criteria of the standing analysis. Without Article III standing, this Court lacks jurisdiction. Therefore, not only should Plaintiff's motion for a preliminary injunction and temporary restraining order be denied, but the case should be dismissed.

3. The Act Does Not Impose Impossible Requirements on Abortion Providers.

Plaintiff claims that the Act imposes "impossible requirements" on abortion providers, effectively banning abortions in violation of a woman's right to liberty and privacy under the Fourteenth Amendment. Doc. 1, ¶ 29.

In a facial challenge to the constitutionality of an abortion law, a court considers whether "the law will operate as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which it is relevant.'" *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 895, 112 S. Ct. 2791, 2830 (1992)). If so, the law is an undue burden and is invalid. *Id*. In support of its claim, Plaintiff generally argues that the definitions of "risk factor" and "complication" are too expansive and that the limitations on what literature should be consulted under the Act are not narrow enough for abortion providers to practically comply with. Doc. 4, pages 11-20. But under well-known standards of statutory construction, the Act can be construed to include meaningful limits that defeat Plaintiff's "impossibility" argument.

The long established plain language rule of statutory construction requires

examining the text of the statute as a whole by considering its context, object, and policy. *Nestle Purina Petcare Co. v. Comm'r*, 594 F.3d 968, 971 (8th Cir. 2010). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Williams v. Regency Fin. Corp.*, 309 F.3d 1045, 1048 (8th Cir. 2002).

While as a general matter an appellate court's interpretation must be governed by the statute's plain meaning, it is also a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute. *Taumby v. United States*, 902 F.2d 1362, 1364 (8th Cir. 1990) (quotation omitted); see also *Williams v. Regency Fin. Corp.*, 309 F.3d 1045, 1048 (8th Cir. 2002) (when the meaning of a statute is questionable, it should be given a sensible construction and construed to effectuate the underlying purposes of the law); *Echols v. Commissioner*, 61 F.2d 191, 193 (8th Cir. 1932) (all laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose … [t]here are few surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule).

The Act generally requires that a pregnant woman be evaluated for the presence of "any" risk factor and that she be informed of "each complication associated with each identified risk factor." LB 594, §§4(b), 5(a). In turn, "risk factor" is defined as "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." LB 594, §3(11).

Plaintiff claims that a literal reading of the Act includes no limits on what risk factors or complications must be covered by the Act. Plaintiff goes so far as to suggest that a literal reading of the Act will require it to inform patients of studies of risk factors conducted in Nigeria, Doc. 4, page 27, or risk factors that have been repudiated, Doc. 4, page 26, or risk factors identified in out of date or unreliable studies, Doc. 4, pages 28-29. But, as mentioned, all laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. *Echols v. Commissioner*, 61 F.2d 191, 193 (8th Cir. 1932).

This Court can apply a sensible construction to avoid the absurd consequences raised by Plaintiff and further the purpose of the Act. In adopting the Act, the Nebraska Legislature expressly found that "the existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women." LB 594, §1(6). The Legislature further found 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*." LB 594, §1(7) (emphasis supplied). Indeed, the state senator who sponsored the Act further indicated that doctors must tailor the preabortion screening to the woman they counsel. During floor debate of the Act, the senator stated "It is precisely the job and responsibility of doctors advocating any

medical treatment to know its risks and benefits and *to know when it should be recommended and when it should be avoided*." Floor Debate, LB 594, 101st Leg., 2nd Sess. 14 (April 7, 2010) (emphasis supplied).

Despite 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. As the sponsoring senator stated during debate, the Act "does not impose any requirements on abortion providers that are contrary to the standard of care for screening for which it applies to other medical procedures." Floor Debate, LB 594, 101st Leg., 2nd Sess. 19 (April 7, 2010). Under the traditional standard of care, informed consent is defined as "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities." Neb. Rev. Stat. §44-2816 (Reissue 2004) (defining "informed consent" for purposes of the Nebraska Hospital-Medical Liability Act). Thus, the traditional standard of care leaves room for medical professionals to use their professional judgment in informing patients of the attendant risks they face.

The Act's use of the word "any" when instructing abortion providers to evaluate women for the presence of "any risk factor" may appear expansive, as the vast majority of cases have construed the word, see e.g., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219, 128 S. Ct. 831 (2008), but the word "any" has been given a more restrictive meaning when the context of the statute requires. In the context of a statute defining disability as the "inability to engage in any substantial gainful activity," the Eighth Circuit

has said that "[t]he word 'any' in the statute must be read in the light of what is reasonably possible, not of what is conceivable." *Celebrezze v. Bolas*, 316 F.2d 498, 501 (8th Cir. 1963). In *EDF, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996), the court determined that a statute prohibiting the federal government from engaging in "any activity" that is likely to interfere with a State Implementation Plan should not be read literally: "any activity" did not include de minimis federal actions. *Id*., 82 F.3d at 466-467. Similarly, in *Frank E. Basil, Inc. v. Leidesdorf*, 713 F. Supp. 1194 (N.D. Ill 1989), the court interpreted a venue provision under the Securities Exchange Act. The provision established venue wherever "any act or transaction constituting a violation" occurred. But the court noted while the provision spoke "of 'any act or transaction' constituting a violation, it does not mean *any* act." 713 F. Supp. at 1196 (emphasis in original). Instead, the court interpreted the word "any" to include an element of materiality: the "act must be an act which represents more than an immaterial part of the allegedly illegal events." *Id*. See also *Commission on Human Rights & Opportunities v. Bd. of Educ.*, 855 A.2d 212, 238 (Conn. 2004) ("Although the word 'any' sometimes may, because of its context, mean 'some' or 'one' rather than 'all,' its meaning in a given statute depends on the context and subject matter of the law").

In the context of the Act, the word "any" may be construed to include only those risk factors and complications deemed by the abortion provider, in his or her professional judgment, to be material and relevant to a particular patient. Indeed, the Act itself recognizes that if any risk factors are identified when evaluating a woman, the woman must be informed of various items "in such a manner and detail that a *reasonable person* would consider *material* to a decision of undergoing an elective

medical procedure." LB 594, §5 (emphasis supplied).

It is the "settled policy" of courts to avoid an interpretation of a statute that "engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237 (1989); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 115 S. Ct. 464 (1994) (the Court presumes "that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions"); *United States v. Adler*, 590 F.3d 581, 583 (8th Cir. 2009) (when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter); *Yant v. City of Grand Island*, 279 Neb. 935, 939, ___ N.W.2d ___ (2010) (a statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality). When considered in light of the Legislature's expessed intent to ensure women are fully advised of the material risks to having an abortion, the Act's language can be construed so as to avoid any constitutional infirmities.

Plaintiff also argues that the volume of literature the Act would require it to review is "boundless" and "infinite." On the contrary, the Act places specific limits on the literature to be reviewed. In defining "risk factor," the Act limits risk factors to those "for which there is a statistical association with abortion such that there is less than a five percent probability ($P < .05$) that such statistical association is due to chance" and goes on to expressly state that "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." LB 594, §3(11). Thus, the Act places several express limits on the literature to be reviewed: (1) it must be a statistically-validated publication which confirms that the risk is not due to chance; and (2) it must be peer reviewed and be indexed by PubMed or MEDLINE, or (3) it must be included in Thomson Reuters Scientific Master Journal List at least twelve months before the preabortion screening. The boundaries are thus drawn and explicit. While the task of reviewing such literature may be time consuming and difficult, courts are clear that "[i]nconvenience, even severe inconvenience, is not an undue burden." *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999).

Further, in considering the volume of medical research to be considered by abortion providers in determining the risks and complications associated with abortions, the Nebraska Legislature heard evidence that the number of studies which would fall under the requirements of LB 594 is actually quite limited. Senator Dierks, the sponsor of LB 594, stated during floor debate that "between 1990 and 2007, an 18-year period, there were only 216 peer-reviewed studies published in issues related to abortion and mental health. That's only 12 studies per year. Surely it's not too much to ask abortion providers to read 12 studies per year." Floor Debate, LB 594, 101st Leg., 2nd Sess. 4 (April 7, 2010). Requiring abortion providers to be up-to-date on the latest risks and complications associated with abortions by requiring review of approximately twelve studies per year is certainly not an undue burden.

In *Gonzales v. Carhart*, 550 U.S. 124, 159, 127 S. Ct. 1610 (2007), the Supreme Court reaffirmed that "the State has an interest in ensuring so grave a choice [of having

an abortion] is well informed." To that end, the State has "a significant role to play in regulating the medical profession." *Id.*, 550 U.S. at 157. By merely requiring that abortion providers inform women of the risk factors and complications of an abortion, that State has not placed a substantial obstacle in the path of a women choosing to have an abortion. Plaintiff is unlikely to prevail on the merits of its argument.

4. The Act Is Not Unconstitutionally Vague in Violation of the Fourteenth Amendment Due Process Clause.

Plaintiff next contends that the Act violates the Fourteenth Amendment's Due Process Clause because it is unconstitutionally vague. The void for vagueness doctrine, which has been applied most frequently to penal statutes, arose as an aspect of Fourteenth Amendment due process in the context of criminal or penal statutes because it was considered unfair to punish persons for conduct for which they had no notice they could be subject to criminal sanctions. *San Fillippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984). The standards for evaluating vagueness were stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-110 (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. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

In evaluating a question of vagueness**,** a court ordinarily looks to the common understanding of the terms of a statute. *United States v. Fitzgerald,* 882 F.2d 397, 398

(9th Cir. 1989). However, if the statutory prohibition "involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which 'uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them.'" *Precious Metals Assocs., Inc. v. Commodity Futures Trading Commission,* 620 F.2d 900, 907 (1st Cir. 1980) (quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126 (1926)).

Plaintiff argues that it is forced to guess at the meaning of the Act's terms and requirements. But for the same reasons explained above, incorporated here, the Act can be construed in a manner to avoid any constitutional questions, including whether it is vague.

Two additional features of the Act provide a defense to any vagueness concerns, including arbitrary application. First, the Act provides that an abortion provider sued under the Act by a woman shall have an affirmative defense to the allegation of inadequate disclosure under the Act. LB 594, §10(5). Thus, when accused of failing to properly inform a woman of risk factors or complications, the abortion provider may present evidence that he or she "omitted the contested information because statistically validated surveys of the general population of women of reproductive age … demonstrate that less than five percent of women would consider the contested information to be relevant to an abortion decision." *Id*. Simply put, the abortion provider may present evidence that a particular risk factor or complication need not have been disclosed because other women in like circumstances would have found the information

to be irrelevant. Any vagueness concerns, including the precise boundaries of lawful and unlawful conduct, that exist at the time of the preabortion counseling can thus be resolved within the context of a civil trial for the tort of wrongful death.

Second, the Act includes a scienter requirement: it requires that a physician's failure to comply with its provisions be "intentional, knowing, or negligent." LB 594, § 6. While the Constitution does not mandate a scienter requirement, see *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1038, 118 S. Ct. 1347 (1998), the Supreme Court has recognized that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S. Ct. 675, 685 (1979); see also *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994). The specific scienter requirement established in the Act provides additional guidance with regard to the boundary between lawful and unlawful conduct; as a result, the Act is not unconstitutionally vague.

5. The Act Does Not Violate Plaintiff's First Amendment Rights because It Requires Only Truthful and Relevant Information Be Shared with Patients.

Plaintiff also claims that the Act requires it to share untruthful, misleading, and irrelevant information with patients in violation of its First Amendment rights. In *Casey*, the Supreme Court concluded that the Constitution permits "information about the nature of the procedure, *the attendant health risks and those of childbirth*, and the probable gestational age of the fetus." *Planned Parenthood v. Casey*, 505 U.S. at 882, 112 S. Ct. at 2823 (emphasis supplied). "[I]nformed consent provisions may … violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology." *City of Akron v. Akron Ctr. Of Reprod. Health, Inc.*, 462 U.S.

416, 472, n.16, 103 S. Ct. 2481 (1983) (O'Connor, J., dissenting).

In the present case, there is no dispute that the Act does not require an abortion provider to communicate an ideology; instead, the Act merely requires the disclosure of medical information bearing on the risks and complications involved in a woman's decision to have an abortion. Plaintiff argues that the Act, read literally, requires abortion providers to convey misleading, untruthful, and irrelevant information to patients. But as explained above and incorporated here, the Act can be construed in a manner that merely requires abortion providers to inform women of material and relevant risks and complications, in accordance with the abortion providers First Amendment rights. For all these reasons, Plaintiff is unlikely to prevail on the merits of its argument, and its request for a permanent injunction and temporary restraining order should be denied.

6. To the Extent LB 594, §10(4) Exceeds the Confines of the Commerce Clause, Such Language Should Be Severed, Allowing the Remainder of LB 594 to Go into Effect.

Defendants acknowledge that Commerce Clause jurisprudence, including the cases cited by Plaintiff in its brief, Doc. 4, pages 34-37, prohibits the enforcement of §10(4) of LB 594 to conduct that occurs outside of the state of Nebraska. However, even though §10(4) of LB 594 exceeds the limitations of the Commerce Clause by applying the Act to conduct outside of Nebraska, the United States Supreme Court has declared:

> when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. [The Court] prefer[s], for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, see *United States v. Raines*, 362 U.S. 17, 20-22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960), or to sever its problematic portions while leaving the remainder intact, *United States v. Booker*, 543 U.S. 220,

227-229, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

Ayotte v. Planned Parenthood, 546 U.S. 320, 328-29, 126 S. Ct. 961, 967, 163 L. Ed. 2d 812, 821 (2006).

Similarly, federal courts look to state law to determine the severability of a state statute. *Roach v. Stouffer*, 560 F.3d 860, 870 (8th Cir. 2009). In Nebraska, "several factors must be considered in determining whether an unconstitutional provision is severable from the remainder of the statute:

> (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act."

State ex rel. Stenberg v. Omaha Exposition & Racing, Inc., 263 Neb. 991, 997, 644 N.W.2d 563, 568-569 (2002).

Here, the five factors are easily met and allow this Court to sever §10(4) from the remainder of the Act. Severing §10(4) allows a workable plan, applicable to conduct that occurs within Nebraska, as the Legislature intended, to remain. In addition, the Act contains an express severability clause, indicating that "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." LB 594, §17. 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.

7. Plaintiff's Remaining Claims Have Been Abandoned.

Plaintiff also brought claims for relief under the Fourteenth Amendment's Equal Protection Clause, Doc. 1, ¶ 37, as well as under the right to liberty and privacy guaranteed by the Fourteenth Amendment, Doc. 1, ¶¶ 39, 41. However, Plaintiff failed to argue any of these claims in its *Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order*, Doc. 4. Thus, these claims should be deemed abandoned by Plaintiff and should not be considered by this Court. See NECivR 39.2(c) ("the judge may treat a party's failure to submit a brief or to discuss an issue in the brief submitted as an abandonment of that party's position on any issue not briefed or discussed.").

B. The Balance of Harm Heavily Favors the Defendants.

Plaintiff's Motion for Preliminary Injunction should also be denied because the balance of harm favors Defendants.

> In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Dataphase, 640 F.2d at 113. Thus, even if there is a chance that Plaintiff could be harmed by allowing LB 594 to go into effect, granting an injunction to enjoin enforcement of LB 594 poses a much greater harm to those women who are not adequately prescreened and informed as to any risks and complications associated with their decision to have an abortion.

Plaintiff's evidence of harm, should LB 594 go into effect, is based largely on exposure to liability for failure to adequately prescreen and inform any patient of the risks and complications associated with an abortion. However, issuance of the injunction will result in countless women suffering from a lifetime of physical, psychological, and emotional damages based on a decision to have an abortion, without explanation as to any risks and complications associated with the abortion and without legal redress against the physician who failed to ensure the woman had given informed consent prior to performing the abortion.

In Legislative Committee testimony, a woman testified as to her abortion experience and the profound, long-term effects it had on her life:

> …The next thing I can remember was being jolted back to consciousness when I heard and felt the abortionist's vacuum rip my baby from my body…I felt like every organ in my body was being ripped inside out from the suction. While the actual abortion took minutes, it was the beginning of flashbacks and physical reactions that continue to this day….This was the beginning of the denial and the severe depression that would plague me for years….I did not realize the full effects of this procedure on me physically, psychologically, emotionally, relationally or spiritually until several years later…. [I was] never informed …that my future pregnancies may be affected by my abortion procedure….

Judiciary Committee Hearing, LB 594, 101st Leg., 1st Sess. 67-68 (March 5, 2009). Testifying in support of LB 594, this woman 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." *Id.*

Enjoining enactment of LB 594 will continue to expose women to a lifetime of damages based on a physician's failure to ensure that a woman gave voluntary and informed consent for an abortion. Clearly, the balance of harm strongly favors

Defendants and Plaintiff has failed to meet the heavy burden required to justify the requested injunction.

C. Entry of a Preliminary Injunction Will Adversely Affect the Public Interest of the State of Nebraska.

In continuing its analysis as to whether to grant a preliminary injunction, the Court must also consider whether an injunction will adversely affect the public interest of the State of Nebraska. Again, the provision weighs in favor of denial of Plaintiff's Motion for Preliminary Injunction.

The State of Nebraska clearly supports the protection of the life of the unborn child whenever possible. Neb. Rev. Stat. §28-325(1). "[I]t 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…" Neb. Rev. Stat. §28-325(3). In adopting LB 594, the Nebraska Legislature specifically found

> [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), as revised by LB 594, §2.

Not only would issuance of an injunction prohibiting enforcement of LB 594 inhibit the immediate implementation of efforts to ensure women receive adequate preabortion screening and counseling, it would also significantly impair and compromise the health needs of women. As the protections afforded by LB 594 involve issues of significant public interest within the State of Nebraska, Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order should be denied.

D. Plaintiff Will Not Suffer Irreparable Harm Upon Denial of Injunctive Relief.

Although the Court performs the role of balancing the foregoing equities, "under any test the movant is required to show threat of irreparable harm. Thus, the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction." *Dataphase*, 640 F.2d at 114, n.9 (citations omitted). *Accord, Mid-America Real Estate Co.*, 406 F.3d 969, 972 (8th Cir. 2005) (concluding that preliminary injunction "must be dissolved if the district court's findings of fact do not support the conclusion that there is a threat of irreparable harm").

Here, Plaintiff simply cannot show that it would be irreparably harmed if the challenged legislation were allowed to take effect in accordance with its terms. Plaintiff claims that it will suffer irreparable harm for three reasons. First, Plaintiff contends that compliance with the Act will force it to cease providing abortion services in Nebraska because literal compliance with the Act's requirements is impossible. Doc. 4, p. 37). In support of this position, Plaintiff cites to a litany of cases in which deprivation of a woman's right to choose an abortion is irreparable harm. *See e.g., Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977). However, Plaintiff's reliance on such case law is misplaced because, as more fully detailed above, nothing in LB 594 prohibits or in any way limits a woman from choosing to obtain an abortion. LB 594 simply requires that sufficient prescreening be conducted to inform a woman of any risks and complications associated with an abortion in an effort to ensure that the woman's choice is based on informed consent.

Plaintiff next argues that engaging in efforts to comply with LB 594 will expose Plaintiff to liability for "quasi-criminal penalties" and that such exposure constitutes

irreparable harm. Doc. 4, p. 38. While Defendants do not dispute the line of cases which recognize that civil and administrative penalties can constitute irreparable harm, LB 594 creates no such exposure and therefore such case law is not controlling in the case at hand. LB 594 merely creates a means for recovery for any woman who obtains an abortion from a physician who failed to comply with the informed consent provisions detailed in Neb. Rev. Stat. §28-327. Such exposure to redress for a physician that did not adequately explain to his or her patient all the material risks and complications associated with an abortion is appropriate and insufficient to support the conclusion that Plaintiff, who are not physicians, will be irreparably harmed.

Finally, Plaintiff claims several of its constitutional rights will be deprived. Doc. 4, p. 39-40. But as argued in detail above, the challenged provisions in this case violate no constitutional rights of Plaintiff. Allowing this legislation to go into effect pending the resolution of this case on the merits will not irreparably harm Plaintiff as it merely requires physicians to ensure informed consent is obtained from all women who choose to have an abortion. As Plaintiff's abstract claim of financial harm is outweighed by the harm to women who are not provided sufficient information to give informed consent, this Court should deny Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order.

CONCLUSION

Based on the above and forgoing, Defendants respectfully request this Court deny Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. 2) in its entirety.

Dated this 9th day of July, 2010.

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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and forgoing Brief in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the Plaintiff's attorneys of record on this 9th day of July, 2010.

*s/Katherine J. Spohn*____
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