

**BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI**

REPRODUCTIVE HEALTH SERVICES OF
PLANNED PARENTHOOD OF THE ST. LOUIS
REGION
4251 Forest Park Avenue
St. Louis, MO 63018 (314/531-7526)

Petitioner,

v.

MISSOURI DEPARTMENT OF HEALTH AND
SENIOR SERVICES
Randall W. Williams, M.D., Director
912 Wildwood, P.O. Box 570
Jefferson City, MO 65102 (573/751-6400),

Respondent.

FILED

June 25, 2019

ADMINISTRATIVE
HEARING COMMISSION

AHC No. 19-0879

MOTION FOR STAY

Pursuant to section 208.156.9, RSMo. and 1 CSR 15-3.320, Petitioner Reproductive Health Services of Planned Parenthood of St. Louis Region (“Planned Parenthood”) moves the Commission for an Order staying Respondent’s decision to deny Petitioner a renewal of its abortion facility license to preserve the status quo and prevent irreparable harm to Petitioner and the women of Missouri.

In support of its motion, Planned Parenthood states the following:

1. For over two decades, Petitioner Planned Parenthood has provided high-quality reproductive health care—including safe, legal abortion care—at its health center in St. Louis. During that time, Planned Parenthood has been licensed by the state of Missouri following inspections and a reasonable process to resolve any concerns.

2. Respondent has now taken a different course and Respondent's actions as set forth herein and in Petitioner's Complaint will shut down the last abortion provider in the state of Missouri without justification and in a manner that is arbitrary, capricious, unreasonable, unlawful, and *ultra vires*.

3. Without a stay of Respondent's decision to deny Petitioner a license renewal, Petitioner, its staff, its patients, and its contracted physicians will all be irreparably harmed, as will the 1.1 million Missouri women of reproductive age who, despite their constitutional right to obtain a pre-viability abortion, will no longer have access to abortion care anywhere in the state.

4. As noted in further detail below, the Circuit Court of St. Louis, Missouri has extended a pre-existing preliminary injunction until **Friday, June 28, 2019** to allow time for Petitioner to seek a stay before this Commission.

5. Because of the short time-frame given, and because of the nature of the irreparable harm that will be suffered not only by Petitioner, but by the women of Missouri, if a stay is not granted, Petitioner is *not* requesting a hearing, but rather respectfully requests the Commission decision on this Motion prior to 5:00 PM on Friday, June 28.

6. A stay would preserve the status quo until the Commission has the benefit of full briefing and consideration of the issues. Should Respondent wish to dissolve the stay thereafter, it may move to do so and a hearing may be held at that time, pursuant to 1 CSR 15-3.320(7). Issuing a quick stay and then holding a dissolution hearing (if necessary) is the most equitable way to proceed.

BACKGROUND

7. Until the instant license renewal application, Petitioner has routinely applied for and received annual license renewals, as required in order to operate under Missouri's various statutory and regulatory requirements. These renewals have followed the regular process of an inspection followed by a process to address any alleged deficiencies noted by the inspection.

8. In March of 2019, the Missouri Department of Health and Senior Services ("DHSS") conducted an inspection as part of Petitioner's routine license renewal process, as Petitioner's existing license was set to expire on May 31, 2019.

9. Thereafter, as described below, DHSS began issuing Petitioner a series of deficiency notices based on new interpretations of existing regulations—interpretations at odds with DHSS's previous understanding of the same requirements over the course of many years, *See* Compl., Ex. A (*Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, et. al.* ("Planned Parenthood v. Parson"), 1922-CC02395, Verified Pet.) ¶¶ 58–59, 64, 66–67, 72, 75, 77–80, 84. Respondent also began demanding that Petitioner produce for interviews individuals not employed by Planned Parenthood—including resident physicians who have not provided care at Planned Parenthood since last year—despite lacking any authority to compel such questioning and despite that Planned Parenthood made available for interviews these physicians' supervising physicians, Planned Parenthood's co-Medical Director and incoming Chief Medical Officer. *Id.* ¶¶ 64, 70.

10. Planned Parenthood went to extreme lengths to comply with DHSS's new and shifting demands, and successfully resolved *all* of DHSS's alleged deficiencies. *See* Compl., Ex. C (*Planned Parenthood v. Parson*, Order, June 10, 2019 ("PI Order")) (recognizing there were no outstanding deficiencies).

11. Nevertheless, DHSS *still* refused to act on Petitioner’s license on the grounds that various physicians not in Planned Parenthood’s employ (including resident physician trainees who had not provided services at Planned Parenthood since fall of last year) would not sit for formal, audio-recorded interviews of a type that Petitioner has never seen before. *See infra* ¶¶ 58–66.

12. Once it became clear that Respondent was not going to grant Petitioner’s license renewal application by the May 31, 2019 expiration date, Petitioner filed suit in the Circuit Court of St. Louis, Missouri, 22nd Judicial District on May 28, 2019. *See* Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.).

13. After the grant of both a temporary restraining order and preliminary injunction, discussed in more detail below, the Circuit Court ordered Respondent to make a decision on Petitioner’s license renewal application by June 21, 2019. *See* Compl., Ex. C (PI Order).

14. Thereafter, on June 14, 2019, Respondent provided Petitioner with a sixty-two-page Statement of Deficiencies, rehashing subjects previously raised by Respondent and as to many of which Respondent had already accepted Petitioner’s Plans of Corrections, and making vague allegations regarding individual instances of patient care (including e.g., recitations of patient medical charts, citations to journal articles from the 1970s, and commentary that reflects misunderstandings of the basics of female anatomy)—which do not appear to constitute deficiencies and for which it is unclear how a facility could offer proposed corrective action. *See* Compl., Ex. F (Respondent’s cover letter to its Statement of Deficiencies).¹

¹ Petitioner requests the ability to file the Statement of Deficiencies before the Commission under seal, as it includes protected health information of patients. During the Circuit Court proceedings, Judge Stelzer sealed the document at Petitioner’s request, and a motion by Respondents to unseal the document was denied as moot. For these reasons and because the Statement of Deficiencies and Plan of Corrections contain detailed and identifying information about individual patients’ abortion care and medical situations, the statement should be sealed before the Commission.

15. Respondent gave Petitioner three business days to respond, which Petitioner did to the best of its ability. *See* Compl., Ex. E (Petitioner’s cover letter to its Plan of Correction).

16. On June 21, 2019, Petitioner received a letter from DHSS denying its application for a license renewal. *See* Compl., Ex. G (“Denial Notice”).

17. On June 24, 2019, the Circuit Court dismissed the Petition before it, noting:

THEREFORE, it is Ordered and Decreed that the Preliminary Injunction entered on June 10, 2019 is extended in part. Petitioner’s license shall not expire and shall remain in effect until June 28, 2019 at 5 p.m. in order to allow Petitioner to seek review and injunctive relief from the Administrative Hearing Commission.

Planned Parenthood v. Parson, Order at 2, June 24, 2019 (emphasis added).

18. Petitioner now seeks that relief before this Commission.

A STAY IS WARRANTED

19. Under 1 CSR 15.3-320, “the commission may stay or suspend any action of an administrative agency pending the commission’s findings and determination in the cause.” 1 CSR 15-3.320(1); *see also* § 621.035, RSMo. The movant’s motion must include “[f]acts showing why the commission should grant the stay.” 1 CSR 15-3.320(1)(B)(4). Missouri courts consider the following factors when considering whether to stay an administrative order:

(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

State ex rel. Dir. of Revenue, State of Mo. v. Gabbert, 925 S.W.2d 838, 839–40 (Mo. banc 1996) (quoting *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987)).

(1) Likelihood of Success on the Merits

20. Planned Parenthood is likely to succeed on the merits that it is entitled to a license renewal.

21. Petitioner affirmatively states that its renewal application was complete and that all of the applicable requirements for licensure have been met.

22. Respondent's actions throughout the investigation and license renewal process, up to and including its denial of Petitioner's license renewal, have been arbitrary, capricious, unreasonable, unlawful, and not based on substantial evidence.

23. Respondent moreover lacks the statutory or regulatory authority to deny Petitioner's license renewal application on the grounds stated.

24. For example, as discussed in more detail below, Respondent repeatedly states that a ground for denying Petitioner a license renewal is that physicians have refused to sit for interviews. Compl. Ex. G (Denial Notice) at 2.

25. Notwithstanding that some of the physicians DHSS sought to interview have not provided care at Planned Parenthood since fall of last year and Planned Parenthood has no power to compel them to sit for interviews, Respondent is not even authorized to compel physician interviews by statute or to impose discipline for lack of cooperation (a power the legislature could have provided DHSS if it had intended the agency to have such power, as it has done for other licensing bodies, *see infra* ¶¶ 58-66).

A. *Respondent's Reliance on its Continually Changing Interpretations of Relevant Statutes and Regulations is Arbitrary, Capricious, Unreasonable, and Unlawful*

26. Throughout this process, DHSS has continually shifted the goalpost, changing its interpretations of relevant requirements such that, no matter how hard Petitioner has sought to comply, DHSS continues to allege new deficiencies.

27. For example, DHSS cited Planned Parenthood for providing a pelvic exam just before an abortion, rather than on the day of the state-mandated informed consent visit at least seventy-two hours earlier.

28. The relevant regulation (19 CSR 30-30.060(2)(D)) does not include this requirement and DHSS has never previously indicated any concerns with Planned Parenthood's practice, of which DHSS was well aware, of providing a pelvic exam directly prior to a surgical abortion. Indeed, for the over two decades Planned Parenthood has provided abortion care at its St. Louis facility, DHSS had never raised an issue with Planned Parenthood performing the pelvic exam on the day of the procedure.

29. There is no medical reason to perform a pelvic exam seventy-two hours prior to an abortion, particularly because it *is* sound medical practice to provide a pelvic exam directly prior to a surgical abortion, meaning that DHSS's new interpretation required *two* pelvic exams prior to an abortion, without any medical justification whatsoever.

30. Planned Parenthood explained multiple times that DHSS's decision to require a pelvic exam on the informed consent day was medically and ethically inappropriate and would be traumatic for patients, and asked DHSS to reconsider, but DHSS refused and made clear that it would not renew Planned Parenthood's abortion facility license until Planned Parenthood agreed to comply. *See* Compl. Exs. A-B² (Plan of Correction, noting it would be ethically inappropriate and traumatic to require unnecessary pelvic exams), A-G (May 20, 2019 letter from DHSS insisting on the unnecessary pelvic exam).

² In the interest of completeness, Petitioner is attaching all exhibits to the *Planned Parenthood v. Parson* Verified Petition (Compl. Ex. A) hereto, with Exhibit A to the Verified Petition referenced as "Compl. Ex. A-A" and so forth, to avoid confusion with multiple lettered Exhibits.

31. That DHSS had no sound rationale for its new interpretation is evidenced by the fact that, following a media outcry after Planned Parenthood informed the agency that it could no longer in good conscience perform an unnecessary pelvic exam on patients, DHSS changed course, announcing that it would issue a new emergency regulation stating that a pelvic exam during the informed-consent day, at least seventy-two hours prior to an abortion, need not be administered where “in the clinical judgment of that physician [] such pelvic examination is not medically indicated at such time for that individual patient.” Compl., Ex. G (Denial Notice) at 2.

32. Thus, only after requiring patients to receive medically unnecessary and invasive pelvic examinations for weeks (at the cost of significant patient trauma, especially for survivors of sexual violence, among others), did DHSS admit that its requirement was unnecessary. Because DHSS has now once again reversed course, this claimed deficiency is no longer part of the basis for DHSS’s license denial. *Id.*

33. Similarly, after DHSS’s March inspection, DHSS expressed a new, previously uncommunicated and unsupported interpretation of Section 188.027.6, RSMo., which requires that the same physician who provides state-mandated information on the consent day, seventy-two hours prior to an abortion, must perform the abortion.

34. Previously, DHSS stated in prior litigation that where “a medical resident [] works with a teaching physician to perform an abortion” and thus “there are two or more physicians who are substantially involved in performing or inducing an abortion, any one of those physicians may satisfy section 188.027.6 by providing informed consent.” Def.’s Suggestions in Opp’n to Pl.’s Mot. for TRO at 22, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, Case No. 17176-CV24109 (“*PPGP v. Hawley*”), Circuit Court of Jackson County, Missouri, (Oct. 16, 2017); *see also* Judgment/Order Decision at 6, *PPGP v. Hawley* (noting that Respondents’ position

is a “reasonable interpretation” of Section 188.027.6, RSMo., and that “it would also follow that when multiple doctors are involved in the continuum of care before, during, and after a procedure that any one of those physicians could provide the required information.”).

35. Yet now, faced with Planned Parenthood’s license renewal application, DHSS reversed course and determined that having an attending physician provide the informed consent and, thereafter, having a resident physician or fellow provide the abortion under that same attending’s supervision was insufficient to satisfy section 188.027.6’s requirements. Instead, DHSS re-interpreted the statute to require each physician to be “actively” involved in performing or inducing the abortion, which DHSS apparently interprets to require that the attending provide hands-on care to the patient (despite that it is undesirable from a patient care perspective to have multiple physicians providing hands-on care during a short procedure). *See* Compl., Ex. A-I (*Planned Parenthood v. Parson*, Verified Pet., Ex. I).

36. Even though DHSS’s new interpretation is not required by the regulation and provides no medical benefit to patients, in an effort to have its license renewed, Planned Parenthood again agreed to change its practices so that when any resident physician or fellow who is to provide abortion care to a patient, again under supervision of an attending physician, the resident and/or fellow will also provide the informed consent at least seventy-two hours earlier, with the attending physician present.

37. The Denial Notice accepts Petitioner’s corrective plan regarding the alleged same-physician issue when a resident or fellow provides some patient care (*see supra* ¶¶ 34–36). Thus, this claimed deficiency also is no longer part of the basis for DHSS’s license denial. *See* Compl. Ex. G (Denial Notice).

38. Petitioner has similarly been able to resolve Respondent's claimed concerns relating to the alleged failure to ensure the accuracy of medical records and certain communication with the contracted independent pathology lab. *Id.*

39. However, to the extent that Respondent's denial was grounded on its continuing demand to question certain non-employee physicians concerning any of DHSS's continually-shifting interpretations above, such grounds are arbitrary, capricious, unlawful and unreasonable.

40. Similarly, to the extent that DHSS's most recent Statement of Deficiency and/or denial of Planned Parenthood's license renewal application is grounded in any of the aforementioned continually-shifting interpretations above, such grounds and the denial are arbitrary, capricious, unlawful, and unreasonable.

41. Moreover, DHSS's continuous shifting of its interpretations is evidence that DHSS's entire course of conduct throughout this process, up to and including its denial, has been arbitrary, capricious, unreasonable, and unlawful.

42. At this stage, the basis for Respondent's license denial appears to relate either to (a) a small number of abortion complications that Respondent appears to suggest (without medical basis) constitute a basis for a deficiency, despite that Respondent has refused to clarify the nature of the deficiency it claims or what change from Petitioner could remedy it, as discussed below in Section B; and (b) the fact certain physicians not employed by Planned Parenthood and represented by independent counsel have declined to be interviewed, as discussed below in Section C. And as to each of these claimed deficiencies, Respondent has refused to engage in the corrective process required by statute, as set forth in Section D.

B. It Is Unclear What Deficiencies DHSS Claims Exists or How It Believes Petitioner Could Change Its Policies or Practices to Comply

43. Respondent's allegations of deficiencies, both in its various statements of deficiencies and its ultimate denial notice, are in many cases incomprehensible or so vague that a meaningful corrective plan is impossible, and are further factually baseless and not supported by medical science.

44. For example, DHSS repeatedly points to a small number of incidents of complications—well within the expected complications rate—and then simply implies that improper care must have been provided, without any evidence or even factually-supported allegations of wrongdoing.

45. Indeed, when Petitioner or Petitioner's co-Medical Director or incoming Chief Medical Officer have explained how the complication occurred (as complications occur in all areas of medicine), DHSS has simply rejected their explanations as insufficient without any rationale or basis in medical science.

46. At bottom, DHSS appears to believe its conclusory assertions of appropriate care are superior to that of the considered, evidence-based, and tested judgment of experienced, highly trained clinicians who are experts and specialists in the provision of abortion care and who are providing that care pursuant to nationally recognized standards and guidelines. And indeed, DHSS relied in large part on anti-abortion propaganda, literature from the '70s, and misrepresentations of fact.

47. For example, DHSS suggests that both the attending physician and the independent licensed and board-certified pathology lab with which Planned Parenthood contracts (as required by Missouri law) erred in identifying certain embryonic or fetal tissue for two patients who had a continuing pregnancy, although DHSS offered no evidence refuting those clinical and laboratory

findings and although continuing pregnancy is a known (though rare) complication of abortion that can be attributed to such factors as an undiagnosed twin pregnancy.

48. Most of DHSS's conclusory assertions, moreover, stem from a handful of rare, but known, complications from abortion, such as these two instances of continuing pregnancy. Although Planned Parenthood's complication rates are well within the rates published in the medical literature, DHSS exaggerates these few rare events to suggest a widespread problem at Planned Parenthood and demands a corrective plan to prevent one-hundred percent of all complications, which is unfeasible for any provider of any type of medical service and, indeed, is not expected of any other type of medical facility.

49. DHSS similarly concludes that a physician erred in identifying the correct uterine position of a patient (and contending such error contributed to the decision to change from a surgical to a medication abortion), although three physicians, including the attending physician, made consistent findings and although it is well accepted that a woman's uterus may change its relative position due to any number of factors that applied to this patient, including her position (i.e., how she's lying down), the progression of her pregnancy, and the taking of medication in connection with a medication abortion. Moreover, uterine position is not a contraindication to either medication or surgical abortion and there is no basis in medical science to believe that a pelvic exam could have shown that an attempted surgical abortion would not have been clinically preferable to that the patient instead of a medication abortion.

50. Given this and that most of the allegations DHSS raised are unsupported by fact and medicine, Planned Parenthood requested clarification as to the nature of the claimed deficiencies, which DHSS has refused to provide.

51. In many cases, DHSS's claimed deficiencies rely on mischaracterizations of facts. For example, DHSS cited Planned Parenthood for failing to file a post-abortion care report (as required by section 188.055.2, RSMo.) after a clinical decision was made to stop attempting a surgical abortion and instead provide the patient with a medication abortion, even though no complication report was appropriate because no surgical abortion procedure was performed and there was no complication.

52. As another example, DHSS cited Planned Parenthood for failing to promptly follow up with a patient, although DHSS omitted that (as is clear from the records Planned Parenthood provided to DHSS) Planned Parenthood had returned the patient's call within twenty minutes and provided her with an appointment.

53. And in a claimed deficiency that borders on ludicrous, DHSS cites Planned Parenthood for failing to file a post-abortion care report, although DHSS has a copy of the report, a copy of the report appears in the patient's medical record (a copy of which DHSS has), Planned Parenthood showed DHSS proof that Planned Parenthood mailed the report to DHSS, and DHSS has confirmation that it received the report. *See* Compl. Ex. G (Denial Notice) 4.

54. Denying Petitioner's license renewal application based on these vague, incomprehensible, conclusory, and baseless allegations, and without providing any clarification, is arbitrary and capricious.

55. Indeed, if DHSS believed that Planned Parenthood was truly providing inadequate care such that it presented an immediate and serious threat to patients' health and safety, it would have suspended services at Planned Parenthood pursuant to statute (Section 197.293.2, RSMo.), which it did not do nor could it have given that Planned Parenthood has always provided and continues to provide high-quality medical care to all its patients.

C. Respondent's Demand for Questioning Is Unreasonable and Ultra Vires

56. Shortly before Petitioner's license was due to expire, Respondent began demanding a series of sit-down, audio-recorded interviews, including with medical residents and fellows who are receiving training at Planned Parenthood through Washington University School of Medicine in St. Louis and its affiliated teaching hospital, Barnes Jewish Hospital. These include medical residents who had not provided services at Petitioner's clinic since the fall of 2018. *See* Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶¶ 64, 72–73, 75.

57. During the course of the preceding litigation, DHSS sought to subpoena these individuals to appear in court, which subpoenas were quashed, *see Planned Parenthood v. Parson*, Order, June 4, 2019 (“Order to Quash”), and then sealed, *see Planned Parenthood v. Parson*, Order, June 5, 2019 (“Order to Seal”).

58. These individuals are not Petitioner's employees and each declined, through independent counsel, to subject themselves to questioning. This is not surprising given that DHSS has already made clear its position that the policies under which these physicians provided care did not comply with DHSS's new interpretation of legal requirements (despite that the legal requirements themselves have not changed). *See supra* ¶¶ 34–36. Moreover, Missouri's abortion statutes include unique criminal penalties, which do not appear in similar statutes for other facilities, and Respondent had made clear that the results of these “interviews” might lead to referral for criminal prosecution or licensing penalties for the individual physicians. *See* Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶¶ 64–65, 69, 73, 84.

59. Moreover, DHSS has not articulated any actual areas where it believes that the care provided at Planned Parenthood was in any way deficient, rather simply stating that Planned

Parenthood patients experienced a small number of rare complications, even though such complications are at a rate well within the norm.

60. There is no reason to believe, and DHSS has made no serious arguments, that DHSS would learn anything new or relevant from interviewing these physicians, given that DHSS has already interviewed both Planned Parenthood's co-Medical Director and its incoming Chief Medical Officer, and has also been provided with the patient medical records and other information it requested. Nor has DHSS provided any reason why it is requesting formal, deposition-style recorded interviews of every physician involved in a patient's care, which it has never previously requested. *See Planned Parenthood v. Parson*, Reply Suggestions in Supp. of Pet'r's Mot. for TRO & Prelim. Inj., Ex. A (Decl. of David Eisenberg) ¶¶ 5–14, attached hereto as Ex. A

61. Petitioner has no means by which to compel individuals not employed by Planned Parenthood, particularly resident physicians who have not provided care at Planned Parenthood since fall of last year, to sit for questioning by DHSS.

62. Indeed, DHSS lacks the statutory authority to compel physicians to sit for interviews or to penalize a facility because physicians have not consented to sit for interviews.

63. Section 197.230.1, RSMo., grants general authority to the State to conduct investigations and inspections, but does not authorize it to compel testimony.

64. Had the General Assembly intended to confer such authority, it would have done so by statute. *See Bodenhausen v. Mo. Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. banc 1995) (state agencies “possess only those powers expressly conferred or necessarily implied by statute”); *cf. Angoff v. M & M Mgmt. Corp.*, 897 S.W.2d 649, 653 (Mo. Ct. App. 1995). Where the Legislature means to provide agencies with such power, it does so clearly and unequivocally. *See, e.g.*, §§ 334.100.2(4)(m)–(n) and 334.127, RSMo. (authorizing Board of

Registration for the Healing Arts to issue subpoenas and take licensure action for failure to comply); §§ 335.066.2(6)(h)–(i) and 335.097, RSMo. (Board of Nursing, same); §§ 340.264.2(4)(l)–(m) and 340.280, RSMo. (Veterinary Medical Board, same). Because the “legislature has elsewhere been fully capable of clearly articulating” this authority, it cannot be implied that the State possesses the power to compel interviews absent statutory language. *State v. Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc.*, 97 S.W.3d 54, 61 (Mo. Ct. App. 2002); *see also Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 32 (Mo. 1988) (recognizing “rule of statutory construction that ‘the express mention of one thing implies the exclusion of another’” (quoting *Harrison v. MFA Mut. Ins.*, 607 S.W.2d 137, 146 (Mo. banc 1980))).

D. Respondent Has Refused to Engage in the Corrective Process Required by Statute

65. Respondent has refused to engage in the normal corrective action process envisioned by Section 197.293, RSMo., seeking initially to simply refuse to act on Petitioner’s license renewal application at all until ordered to by a court.

66. Moreover, the vagueness of DHSS’s allegations, as discussed above, have deprived Planned Parenthood of the ability to understand the allegations against it and either show compliance or propose corrective action—a process DHSS is required by statute to engage in before it may deny a license. Section 197.293, RSMo. Planned Parenthood has requested clarification as to multiple claimed deficiencies, but DHSS has refused to provide it.

67. In its Denial Notice, DHSS stated its belief that following the progressive discipline process mandated by section 197.293, RSMo., would not be “fruitful,” and based on that belief, found that Planned Parenthood was not entitled to a license renewal under section 197.220, RSMo.

(2) **The Circuit Court of St. Louis Has Twice Found that Petitioner Would Suffer Irreparable Injury if Its License Were Allowed to Expire**

68. Simultaneously with the filing of its Petition in the Circuit Court of St. Louis, Petitioner also filed a motion for a temporary restraining order and preliminary injunction to prevent Petitioner's license from expiring. *See* Compl. Ex. B (*Planned Parenthood v. Parson*, Mot. for TRO & Prelim. Inj.).

69. After arguments, on May 31, 2019, the presiding judge, Hon. Michael F. Stelzer, granted the temporary restraining order, finding that Petitioner would suffer irreparable harm if its license were allowed to expire, noting:

Unless the Department of Health and Senior Services issues Petitioner a license in response to its application for license renewal, Petitioner's license will expire at midnight on May 31, 2019 and Petitioner will not be permitted to operate an abortion facility. At oral argument, counsel for Respondents stated that there was "no prospect that the Department would act" on Petitioner's application before the deadline.

Petitioner has demonstrated that immediate and irreparable injury will result if Petitioner's license is allowed to expire. Pursuant to Rule 92.02, the Court finds that a temporary restraining order is necessary to preserve the status quo and prevent irreparable injury to Petitioner pending disposition of the case on its merits.

THEREFORE, it is Ordered and Decreed that Petitioner Reproductive Health Services of Planned Parenthood of the St. Louis Region's Motion for a Temporary Restraining Order is GRANTED. Petitioner's license shall not expire and shall remain in effect until a ruling on Petitioner's request for preliminary injunction.

Compl., Ex. B (*Planned Parenthood v. Parson*, Order, May 31, 2019 ("TRO")) (emphasis added).

70. Thereafter, on June 10, 2019, Judge Stelzer granted a preliminary injunction, again finding that Petitioner would suffer irreparable injury if its license were permitted to expire:

The second factor in determining whether a preliminary injunction should issue is the threat of irreparable harm absent the injunction. Petitioner has demonstrated that **immediate injury will occur to its facility if Petitioner's license is allowed to expire.**

Compl., Ex. C (PI Order) (emphasis added).

71. Thereafter, as noted in more detail above, Judge Stelzer ordered DHSS to make a final licensing decision by June 21, 2019, after which DHSS issued a lengthy Statement of Deficiencies, Planned Parenthood provided a Plan of Corrections, and DHSS issued its denial notice.

72. After DHSS issued its denial, the Circuit Court dismissed the Petition before it, noting:

THEREFORE, it is Ordered and Decreed that the Preliminary Injunction entered on June 10, 2019 is extended in part. Petitioner's license shall not expire and shall remain in effect until June 28, 2019 at 5 p.m. in order to allow Petitioner to seek review and injunctive relief from the Administrative Hearing Commission.

Planned Parenthood v. Parson, June 24, 2019 Order at 2 (emphasis added), a copy of which is attached hereto as Ex. B.

73. Pursuant to Judge Stelzer's order, Petitioner now seeks review and injunctive relief—in the form of a stay of Respondent's denial of Planned Parenthood's license renewal application—before this Commission.

(3) Missouri Women Will Be Irreparably Harmed Without a Stay

74. Petitioner operates the only abortion facility in the entire state of Missouri. *See* Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶¶ 3–4; Ex. C (Decl. of Cathy Williams) ¶ 6.

75. Missouri has 1.1 million women of reproductive age who will have no access to abortion care anywhere in the state if a stay is not granted. *See* Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶ 6.

76. Approximately one in four women in the United States will have an abortion by the age of forty-five. See Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, Guttmacher Inst. (Oct. 2017), <https://www.guttmacher.org/article/2017/10/population-group-abortion-rates-and-lifetime-incidence-abortion-united-states-2008>.

77. Missouri law requires patients seeking an abortion to first meet with a physician seventy-two hours prior to the procedure to receive state-mandated information and counseling. See Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶ 35 (citing §§ 188.027.1, 188.039.2, RSMo.).

78. If a stay is not granted, many patients who have already received this information and begun their mandatory seventy-two-hour waiting period will no longer be able to obtain their scheduled abortion. Ex. C (Decl. of Cathy Williams) ¶ 8.

79. Because part of Planned Parenthood's mission is to provide high-quality comprehensive reproductive health care and education to medically underserved populations and low-income clients, many of Planned Parenthood's patients are low-income and do not have the means—and often cannot rearrange work or childcare to make the time—to travel out-of-state to obtain abortion services elsewhere. *Id.* ¶ 9.

80. Many of Planned Parenthood's patients are already terrified that they may not be able to obtain abortion care at Planned Parenthood due to Respondent's actions. *Id.* ¶ 10.

81. Given the intense media attention this case has received, if a stay is not granted, the general public will be aware that Planned Parenthood has had to suspend abortion services (even if only pending the outcome of proceedings before the Commission).

82. This interruption in service means that even if Planned Parenthood's license is ultimately renewed, patients will be confused as to whether they can come to Planned Parenthood for the care they need, forcing them to either forgo care entirely or travel out-of-state to obtain it. Thus, even a brief interruption in Planned Parenthood's ability to provide services will do real and lasting harm to Missouri women.

(4) Petitioner & Physicians Will Be Irreparably Harmed Without a Stay

83. Petitioner's provision of abortion care is a core component of its central mission to provide a full range of high-quality, evidence-based, and non-judgmental reproductive health care to the people of Missouri, particularly to medically underserved populations and patients with low incomes. *Id.* ¶¶ 4–5, 11.

84. Planned Parenthood provides care through highly trained and qualified physicians who have dedicated their careers to providing comprehensive reproductive health care, including abortion care, because they believe in making the full range of reproductive health care available to all their patients. *Id.* ¶ 12. Without a stay, these physicians will not be able to continue providing the high quality care at Planned Parenthood to which they have dedicated their lives. *Id.* ¶ 13.

85. Planned Parenthood and the Washington University School of Medicine in St. Louis participate in training programs in abortion and family planning. Obstetrics/Gynecology physician residents at Barnes Jewish Hospital who participate in a residency program accredited by the American Council for Graduate Medical Education ("ACGME") have the options to integrate family planning and abortion training into their overall Obstetrics/Gynecology residency training. The ACGME requires training or access to training in the provision of abortions. As part of this requirement, each obstetrics/gynecology resident has the option to participate in two

rotations at Planned Parenthood throughout their four-year residency so that they may obtain training in providing high-quality family planning care, including abortion care. *Id.* ¶ 14.

86. If Planned Parenthood's Motion for Stay is not granted, these residents will not be able to train at Planned Parenthood. And because Planned Parenthood is the only abortion provider in the state, and residents need a state-specific license to be able to provide care, this is a grave threat to their ability to fulfill a core component of their accredited training and residency program. *Id.* ¶ 15.

87. Planned Parenthood and the Washington University School of Medicine in St. Louis also host a Fellowship in Family Planning, which is a two-year post-graduate training program focused on advanced abortion and contraceptive care as well as research training. During the two years of their fellowship, Family Planning Fellows obtain high-quality training and provide high-quality supervised medical care at Planned Parenthood as well as the Washington University School of Medicine in St. Louis. *Id.* ¶ 16.

88. The Family Planning Fellowship is a highly competitive nationwide program, and fellows selected to work with Planned Parenthood and the Washington University School of Medicine in St. Louis move to St. Louis from around the country to participate. *Id.* ¶ 17.

89. Without a stay of Respondent's license renewal denial, these fellows will not be able to continue the requirements of their fellowship at Planned Parenthood and will not receive the high-quality training that was promised to them and, as a result, will be irreparably harmed. Moreover, Planned Parenthood is the only abortion facility in Missouri that they can complete this training, and because participation in this training requires a state-specific medical license, these fellows will at minimum be delayed in their ability to continue their fellowship elsewhere, if they are able to do so at all. *Id.* ¶ 18.

90. For all these reasons, Petitioner and its patients and physicians will be irreparably damaged by Respondent's actions absent a stay by the Commission.

(5) Balance of Harms Favors a Stay

91. Others will not be harmed by a stay maintaining the status quo that Planned Parenthood is able to provide safe and high-quality care as it has for decades. To the contrary, absent a stay, Petitioner's staff, patients, and contracted physicians will all be irreparably harmed, including the 1.1 million Missouri women of reproductive age who, despite their constitutional right to obtain a pre-viability abortion, will no longer have access to abortion care anywhere in the state.

(6) Public Interest Will Be Served by a Stay

92. Finally, the balance of equities also weighs heavily in favor of a stay.

93. Respondent will suffer no harm if Planned Parenthood's license continues uninterrupted.

94. Planned Parenthood and its patients, however, are at risk of losing access to abortion services in the state entirely. Compl., Ex. A (*Planned Parenthood v. Parson*, Verified Pet.) ¶ 6.

95. Moreover, the public interest will be served by injunctive relief, which will protect women's health and limit unauthorized and unfettered administrative overreach. *See, e.g., Mo. State Med. Ass'n v. State*, No. 07AC-CC00567, 2007 WL 6346841, (Mo. Cir. July 3, 2007) (“[B]alancing of the harms favors immediate injunctive relief, because a restraining order will not harm the State of Missouri and will actually further its interests in ensuring the health and safety of its citizens.”); *see also Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995) (public interest favored injunction against unconstitutional ordinance).

WHEREFORE, Petitioner respectfully requests that the Commission stay Respondent's decision denying Petitioner its license renewal application pending the Administrative Hearing Commission's review of Respondent's decision and any subsequent appeals, and for any other relief deemed just and proper.

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Respectfully submitted,

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** Pro hac vice motion forthcoming*