IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Eva Lathrop, M.D., Carrie Cwiak, M.D., Lisa Haddad, M.D., Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NO. _____
NATHAN DEAL, Governor of the State of Georgia, in his official capacity, and his successors in office; SAM OLENS, Attorney General of the State of Georgia, in his official capacity, and his successors in office; PAUL HOWARD, District Attorney for Fulton County, in his official capacity, and his successors in office; ROBERT JAMES, District Attorney for DeKalb County, in his official capacity, and his successors in office; BRENDA FITZGERALD, Commissioner of the Georgia Department of Public Health, in her official capacity, and her successors in office; WILLIAM BUTLER, RICHARD WEIL, JOHN ANTALIS, GILBERT CHANDLER, DANIEL DELOACH, ALEXANDER GROSS, ALICE HOUSE, KATHY KEMLE, MARION LEE, JANE MCGARITY, DAVID RETTERBUSH, WILLIAM SIGHTLER, WENDY TROYER, CHARLES WHITE, Officers and Members of the Georgia Composite Medical Board, in their official capacities, and their successors in office; and LASHARN HUGHES, Executive Director of the Georgia Composite Medical Board, in her official capacity, and her successors in office, Defendants.	)	

VERIFIED COMPLAINT

I.
PRELIMINARY STATEMENT

1. This action challenges O.C.G.A. §§ 16-12-140, 16-12-141, 31-9B-1, 31-9B-2, and 31-9B-3, as set forth in House Bill 954 ("the Act"), a copy of which is attached hereto as Exhibit A, under the state constitutional rights to privacy and equal protection insofar as the Act restricts the right to obtain pre-viability abortion care and allows district attorneys unrestricted access to abortion patients' medical records. Plaintiffs bring this action under the Georgia Constitution and seek declaratory and injunctive relief.

2. The Act, which bans nearly all pre-viability abortions after 20 weeks post-fertilization, infringes on the fundamental right of a woman to decide whether and when to bear a child, as guaranteed by the broad right to privacy found in the Georgia Constitution. Furthermore, with only a narrow exception for medical emergencies, the Act unconstitutionally endangers women's health. Finally, the Act uses vague terms and appears to grant District Attorneys unfettered access to the private medical files of abortion patients in violation of state constitutional rights to due process, privacy, and equal protection. The Act should therefore be declared unconstitutional and its enforcement enjoined insofar as it violates the Georgia Constitution.

II.
JURISDICTION AND VENUE

3. This action arises under the authority vested in this Court by virtue of O.C.G.A. §§ 9-4-2, 9-4-3, 9-5-1, and the Georgia Constitution. Venue is proper in this Court pursuant to O.C.G.A. § 9-10-30.

III.
PARTIES

A. Plaintiffs:

4. Plaintiff Eva Lathrop, M.D., is a board-certified obstetrician and gynecologist, licensed to practice in Georgia. In addition to teaching residents, she provides her patients with labor and delivery care and comprehensive, general gynecological care, including: well-woman visits; complex contraceptive care; and abortion care, including, each year, a limited number of pre-viability abortions at and after 20 weeks at the Emory University Hospital, in DeKalb County and at the Fulton-DeKalb Hospital, d/b/a Grady Memorial Hospital, in Fulton County. Dr. Lathrop sues as an individual on behalf of herself and her patients seeking pre-viability abortion care at and after 20 weeks, and does not sue in her capacity as an employee or representative of Emory University or any other organization.

5. Plaintiff Carrie Cwiak, M.D., is a board-certified obstetrician and gynecologist licensed to practice in Georgia. In addition to teaching residents, she provides her patients with labor and delivery care and comprehensive, general

gynecological care, including: well-woman visits; complex contraceptive care; and abortion care, including, each year, a limited number of pre-viability abortions at and after 20 weeks at the Emory University Hospital, in DeKalb County and at the Fulton-DeKalb Hospital, d/b/a Grady Memorial Hospital, in Fulton County. Dr. Cwiak sues as an individual on behalf of herself and her patients seeking pre-viability abortion care at and after 20 weeks, and does not sue in her capacity as an employee or representative of Emory University or any other organization.

6. Plaintiff Lisa Haddad, M.D., is a board-certified obstetrician and gynecologist licensed to practice in Georgia. In addition to teaching residents, she provides her patients with labor and delivery care and comprehensive, general gynecological care, including: well-woman visits; complex contraceptive care; and abortion care, including, each year, a limited number of pre-viability abortions at and after 20 weeks at the Emory University Hospital, in DeKalb County and at the Fulton-DeKalb Hospital, d/b/a Grady Memorial Hospital, in Fulton County. Dr. Haddad sues as an individual on behalf of herself and her patients seeking pre-viability abortion care at and after 20 weeks, and does not sue in her capacity as an employee or representative of Emory University or any other organization.

B. Defendants:

7. Defendant Nathan Deal is the Governor of Georgia, located at 206 Washington Street Southwest, Atlanta, Georgia, 30334. According to the Georgia

Constitution, "[t]he chief executive powers" are "vested in the Governor," Ga. Const. art. 5 § 2, ¶ 1, and "[t]he Governor shall take care that the laws are faithfully executed," id. at ¶ 2. Under Georgia law, the Governor "shall provide for the defense of any action . . . the result of which is of interest to the state because of any claim inconsistent with the state's sovereignty, jurisdiction, or rights." O.C.G.A. § 45-12-26. As such, Defendant Deal is responsible for the enforcement of the Act. Defendant Deal is sued in his official capacity, as are his successors in office.

8. Defendant Samuel S. Olens is the Attorney General of Georgia, located at 40 Capitol Square Southwest, Atlanta, Georgia, 30334. According to the Georgia Constitution, the Attorney General is "the legal advisor of the executive department" and "shall perform such . . . duties as shall be required by law." Ga. Const. art. 5, § 3, ¶ IV; see also O.C.G.A. § 45-15-3 (detailing Attorney General's powers and duties). As such, Defendant Olens is responsible for enforcement of the Act, and is an appropriate defendant in this case. Defendant Olens is sued in his official capacity, as are his successors in office.

9. Defendant Paul Howard is the District Attorney for Fulton County, located at 1590 Joseph E. Boone Boulevard Northwest, Atlanta, Georgia, 30314. District attorneys are authorized to draw up all indictments or presentments for grand juries and to prosecute all indictable offenses. O.C.G.A. § 15-18-6. District

attorneys also appear to have unrestricted access to medical records of abortion patients under O.C.G.A. § 16-12-141(d). Defendant Howard is sued in his official capacity, as are his successors in office.

10. Defendant Robert James is the District Attorney for DeKalb County, located at 556 North McDonough Street, Decatur, Georgia, 30030. District attorneys are authorized to draw up all indictments or presentments for grand juries and to prosecute all indictable offenses. O.C.G.A. § 15-18-6. District attorneys also appear to have unrestricted access to medical records of abortion patients under O.C.G.A. § 16-12-141(d). Defendant Howard is sued in his official capacity, as are his successors in office.

11. Defendant Brenda Fitzgerald is the Commissioner of the Georgia Department of Public Health ("DPH"), located at 2 Peachtree Street, Atlanta, Georgia, 30303. DPH is responsible for preparing the reporting forms required by O.C.G.A. § 31-9B-3 and is authorized to enforce the Act's reporting requirements via fines and court-imposed sanctions for civil contempt. O.C.G.A. § 31-9A-6(e). Defendant Fitzgerald is sued in her official capacity, as are her successors in office.

12. Defendant William Butler is Chairperson of, Defendant Richard Weil is Vice-Chairperson of, Defendants John Antalis, Gilbert Chandler, Daniel DeLoach, Alexander Gross, Alice House, Kathy Kemle, Marion Lee, Jane McGarity, David Retterbush, William Sightler, Wendy Troyer, and Charles White

are Members of, and Defendant LaSharn Hughes is Executive Director of the Georgia Composite Medical Board ("Board"), located at 2 Peachtree Street Northwest, Atlanta, Georgia, 30303. The Board is responsible for licensing physicians within the state of Georgia and has authority to discipline physicians who do not comply with the requirements of O.C.G.A. §31-9B. O.C.G.A. § 43-34-8. Defendant Officers, Members, and Executive Director of the Board are sued in their official capacity, as are their successors in office.

IV.
BACKGROUND

13. The Act, which is scheduled to take effect January 1, 2013, makes it a crime to provide abortion care if "the probable gestational age" of the fetus has been determined to be 20 weeks or later, unless the pregnancy has been diagnosed as "medically futile" or the woman is in a "medical emergency." O.C.G.A. § 16-12-141(c)(1).

14. The Act defines "probable gestational age" as the age of the fetus, "in reasonable medical judgment and with reasonable probability," at the time the abortion is to be performed, as measured from the date of fertilization. The Act thus bans abortion starting at 20 weeks post-fertilization. O.C.G.A. § 31-9B-1(a)(5).

15. The Act defines a "medically futile" pregnancy as existing where, "in reasonable medical judgment," the fetus has a "profound and irremediable

congenital or chromosomal anomaly that is incompatible with sustaining life after birth." O.C.G.A. § 31-9B-1(a)(3).

16. The Act defines a "medical emergency" as existing when an abortion is "necessary to avert the death of the pregnant woman or avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." O.C.G.A. § 16-12-141(c)(1)(A).

17. In the case of a "medical emergency," as defined by the Act, "the physician shall terminate the pregnancy in the manner which . . . provides the best opportunity for the unborn child to survive unless . . . termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function." O.C.G.A. § 16-12-141(c)(2).

18. The Act contains no exception for a woman pregnant as a result of rape or incest; for a woman who faces medical harm from a condition outside the statutory definition of "medical emergency"; or for a woman whose fetus has severe anomalies that fall outside the statutory definition of "medically futile pregnancy." O.C.G.A. § 16-12-141; O.C.G.A. § 31-9B-2.

19. The Act contains the legislative assertion that "[a]t least by 20 weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain." Exhibit A, § 1.

20. The Act requires that "[h]ospital or other licensed facility records shall be available to the district attorney of the judicial circuit in which the hospital or health facility is located." O.C.G.A. § 16-12-141(d).

21. The Act requires the Department of Public Health to promulgate regulations and reports relating to the reporting of, *inter alia*, abortions performed under the terms of the Act. O.C.G.A. § 31-9B-3.

22. A physician convicted of providing health care in violation of the Act "shall be punished by imprisonment for not less than one nor more than ten years." O.C.G.A. § 16-12-140(b).

23. Failure to comply with any requirement of the Act constitutes unprofessional conduct for purposes of medical licensing sanctions, including fines and/or license revocation. O.C.G.A. § 31-9B-2(b).

24. Failure to comply with the reporting requirements may result in additional fines and must also be reported to the Georgia Composite Medical Board for disciplinary action. O.C.G.A. §§ 31-9B-2, 31-9B-3, 31-9A-6, and 31-9A-6.1.

25. A physician may also be subject to civil remedies if a plaintiff can prove by clear and convincing evidence that the physician was negligent in determining gestational age. O.C.G.A. § 31-9A-6.1.

V.
FACTS

26. The Act bans, inter alia, pre-viability abortions.

27. With very narrow exceptions, the Act bans all abortions starting at 20 weeks, which is a pre-viability point in pregnancy – a point at which the fetus does not have a reasonable likelihood of sustained survival outside the woman.

28. Where a healthy woman is carrying a healthy, singleton fetus, viability generally occurs at 22 weeks post-fertilization. In many instances in which the woman is sick, the fetus is compromised in some way, and/or it is a multi-fetal pregnancy, the fetus does not become viable until later in pregnancy, if at all.

29. The vast majority of abortion care provided in the United States and in Georgia occurs in the first trimester of pregnancy. Only a small fraction of abortions occur at or after 20 weeks.

30. Women obtain abortions at or after 20 weeks for a variety of reasons, including that continuation of the pregnancy poses a threat to their health, that the fetus has been diagnosed with a medical condition or anomaly, or that they are losing the pregnancy ("miscarrying").

31. Women who seek abortion care to preserve their health do so either because the pregnancy exacerbates a pre-existing medical condition or because the pregnancy itself causes a medical threat.

32. In many instances, although the threat to the woman's health is serious, and may become more so over time, her condition does not meet the statutory definition of "medical emergency." Of these women, some decide to terminate the pregnancy before viability in order to reduce current or future risks to their health. Starting at 20 weeks, the Act would force such a woman to continue the pregnancy against her will until she gives birth, miscarries, or experiences a deterioration of her condition to the point that she does fall under the Act's narrow definition of "medical emergency." Limiting the reason that a woman may obtain a pre-viability abortion to narrowly defined medical emergencies thus places significant burdens on the health of some women seeking abortion care.

33. Other women with similar conditions attempt to continue the pregnancy, because they are willing to run the attendant risks in order to have a baby. Of those women, some succeed in giving birth to a child, while others ultimately decide that the risks of continued pregnancy have become too great, and the chances of having a baby too small. Under the Act, some women who would otherwise try to remain pregnant longer, in the hope of giving birth, may terminate before 20 weeks, in order not to lose the opportunity to do so if necessary to protect their health after 20 weeks, because of the Act's ban.

34. Many women obtain prenatal testing at approximately 16 to 18 weeks. Through this testing, some women learn that the fetus has a medical condition or

anomaly that may be incompatible with life; that is life-threatening; or that, while not life-threatening, will cause severe and debilitating lifelong disabilities. Some of these women will choose to terminate the pregnancy; regardless of their ultimate decision, they often need some period of time to consult with family, doctors, and other trusted individuals to reach their conclusion.

35. The Act's narrow definition of "medically futile" pregnancies will take the decision away from many such women. The definition does not include pregnancies in which the fetus has a severe but non-lethal anomaly, and it does not clearly encompass all instances in which an anomaly is life-threatening (as opposed to definitively lethal). Starting at 20 weeks, the Act may force these women to remain pregnant, whether they want to or not.

36. Just as with women facing health conditions, the Act will also rush women and families who have learned of a fetal anomaly to decide before 20 weeks whether to continue the pregnancy. Some women may terminate before 20 weeks, so as not to lose the ability to do so after 20 weeks, and of those some may have – given more time – decided to continue their pregnancies.

37. By prohibiting all abortions beginning at 20 weeks except those that come within the Act's narrow medical emergency or "futility" exceptions, the Act will harm Plaintiffs' patients by denying or delaying access to abortions, including

abortions they seek to preserve their health. Each of these harms constitutes irreparable harm to Plaintiffs' patients.

38. The Act presents physicians, including Plaintiffs, with an untenable choice: to face criminal prosecution and up to ten years imprisonment, as well as disciplinary and licensing sanctions, for continuing to provide abortion care in accordance with their best medical judgment or to stop providing the critical care their patients seek.

39. The Act provides district attorneys with apparently unrestricted access to the records of abortion patients. O.C.G.A. § 16-12-141(d).

40. On information and belief, district attorneys do not have the statutory right to access the medical records of any other patients without any sort of due process.

41. By stripping their medical records of the same level of privacy protections enjoyed by all other patients, the Act causes irreparable harm to Plaintiffs' patients.

VI.
FIRST CAUSE OF ACTION:
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO PRIVACY

42. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

43. By criminalizing and otherwise penalizing abortion care where the fetus has not reached the point of viability, the Act violates Plaintiffs' patients' right to privacy guaranteed by various provisions of the Georgia Constitution, including art. I, § 1, ¶ I (due process), ¶ III (freedom of conscience), and ¶ XXIX (inherent rights).

SECOND CAUSE OF ACTION:
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO PRIVACY

44. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

45. By allowing district attorneys to access patient medical records without due process protections, the Act violates Plaintiffs' patients' rights to privacy guaranteed by various provisions of the Georgia Constitution, including art. I, § 1, ¶ I (due process), ¶ III (freedom of conscience), and ¶ XXIX (inherent rights).

THIRD CAUSE OF ACTION:
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO EQUAL PROTECTION

46. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

47. By allowing district attorneys to access abortion patient medical records without due process protections, the Act violates Plaintiffs' patients' rights to equal protection as guaranteed by art. I, § I, ¶ II (equal protection) of the Georgia Constitution.

FOURTH CAUSE OF ACTION
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO PRIVACY

48. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

49. By criminalizing and otherwise penalizing previabilty abortion care even where continued pregnancy presents current or future threats to a woman's life or health, the Act violates Plaintiffs' patients' rights to privacy as guaranteed by various provisions of the Georgia Constitution, including art. I, § 1, ¶ I (due process), ¶ III (freedom of conscience), and ¶ XXIX (inherent rights).

FIFTH CAUSE OF ACTION:
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO PRIVACY

50. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

51. By requiring Plaintiffs to terminate the pre-viability pregnancies of critically ill women using the method most likely to result in a live birth, the Act violates Plaintiffs' patients' rights to privacy as guaranteed by various provisions of the Georgia Constitution, including art. I, § 1, ¶ I (due process), ¶ III (freedom of conscience), and ¶ XXIX (inherent rights).

SIXTH CAUSE OF ACTION:
FOR VIOLATIONS OF THE STATE
CONSTITUTIONAL RIGHT TO DUE PROCESS

52. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 41 inclusive.

53. By subjecting Plaintiffs to criminal prosecution and other penalties for violations of a statute that uses vague terms such as "medically futile pregnancy," the Act violates Plaintiffs' rights to due process of law as guaranteed by art. I, § 1, ¶ I (due process) of the Georgia Constitution.

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) declare that the Georgia Constitution protects a woman's fundamental right to reproductive privacy, including the right to obtain pre-viability abortion care;

(2) declare H.B. 954, to be codified at O.C.G.A. §§ 16-12-140, 16-12-141, 31-9B-1, 31-9B-2, and 31-9B-3, unconstitutional under the Georgia Constitution insofar as it restricts the right to obtain pre-viability abortion care;

(3) enjoin Defendants, their employees, agents, and successors in office from enforcing O.C.G.A. §§ 16-12-140, 16-12-141, 31-9B-1, 31-9B-2, and 31-9B-3 insofar as they unconstitutionally restrict the right to obtain pre-viability abortion care under the Georgia Constitution;

(4) enjoin Defendants Howard and James, their employees, agents, and successors in office from enforcing O.C.G.A. § 16-12-141(d) in violation of the right to privacy and equal protection under the Georgia Constitution;

(5) award Plaintiffs' costs and attorneys' fees; and

(6) grant Plaintiffs such other, further, and different relief as the Court may deem just and proper.

Dated: November 30, 2012

Respectfully submitted,

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* - motion for admission *pro hac vice* pending