UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMERICAN CIVIL LIBERTIES UNION OF KANSAS AND WESTERN MISSOURI, Plaintiff, v. SANDY PRAEGER, Kansas Insurance Commissioner, in her official capacity, Defendant.	No. 11-CV-2462 WEB/KGG

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In a flurry of anti-abortion activity, the Kansas legislature passed, and Governor Brownback signed, House Bill 2075 ("the Act") into law. The Act targets one type of medical care – abortion – and prohibits insurance companies from offering comprehensive coverage to their customers that includes that medical service. The effect is far reaching: Thousands of women across the state will lose coverage for abortion that they currently have. By virtue of the Act, comprehensive insurance plans will no longer be permitted to cover an abortion for a woman with an unintended pregnancy, for a woman whose pregnancy causes her serious medical harm, for a woman carrying a fetus with a fatal anomaly, or for a woman who is pregnant as a result of rape or incest.

By singling out abortion and banning insurance companies from including coverage for that care in comprehensive policies, the State has violated the constitutional rights of Plaintiff's members who will lose (or have lost) abortion coverage in their

comprehensive health insurance policies. Indeed, the Act is but another example of laws passed this year by the Kansas legislature with the impermissible purpose of trying to make it more difficult for women to obtain abortion care. Forcing women to pay out of pocket for abortion care for a medical service that was previously covered by their insurance plan is no different than requiring women to pay a tax to access abortion care. Moreover, the Act fails even rational basis review because it serves no legitimate state interest. The Act also sets up an insurance scheme that discriminates against women. The State allows men to purchase comprehensive coverage for all of their health needs, including sex-specific health care such as prostate cancer screening and treatment, but the State prohibits women from doing so. Accordingly, Plaintiff is likely to succeed on the merits of its claim, and the other preliminary injunction factors also militate in favor of issuing a preliminary injunction here.

FACTS

The Act was passed this legislative session along with several other anti-reproductive health bills after Governor Brownback called on the legislature to work toward eliminating abortion access. Tim Carpenter, *Brownback Signs Major Abortion Bills*, Topeka-Capital Journal (Apr. 12, 2011), http://cjonline.com/legislature/2011-04-12/brownback-signs-major-abortion-bills. Indeed, heeding the Governor's call, the legislature passed a series of extreme and unconstitutional laws that target abortion, including a law passed for the "improper, discriminatory purpose" of preventing Planned Parenthood from receiving federal family planning money because of its association with abortion care, *see Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, No. 11-2357-JTM, 2011 WL 3250720, at *15 (D. Kan. Aug. 1, 2011) (preliminarily enjoining H.B.

2014, 84th Leg. (Kan. 2011)); onerous licensing and inspection requirements designed to shut down the State's three abortion clinics, *see* S.B. 36, 84th Leg. (Kan. 2011); an unconstitutional pre-viability ban on abortions after twenty weeks, *see* H.B. 2218, 84th Leg. (Kan. 2011); and the Act at issue here.

The Act took effect on July 1, 2011, and affects all health care plans issued or renewed after that date. It applies to all policies that are delivered within or outside of the state, or used within the state by an individual who resides or is employed in the state. Act §§ 8(a), 9.

The Act requires all health insurance policies – including all group and individual plans, health maintenance organization plans, etc. – to "exclude coverage for elective abortions, unless the procedure is necessary to preserve the life of the" woman. *Id*. § 8(a). It defines "elective abortion" as pregnancy termination "for any reason other than to prevent the death" of the woman, "or to remove a dead fetus." *Id*. at (c). Thus, under the terms of the Act, insurance companies must exclude coverage for virtually all abortions, including an abortion for a woman who is not ready to parent; an abortion for a woman who believes that having another child will take away critical emotional and financial resources from the children she already has; an abortion for a woman who aspires to finish her education or to get a better job that will help her family live a better life; and an abortion for a woman whose partner does not want a child. It bars coverage for a woman who decides to have an abortion because she is pregnant as a result of rape or incest, because her partner is abusive, or because her fetus has a condition that is incompatible with life. It also bars coverage for abortion where the procedure is necessary because she has one of the myriad of medical conditions that can seriously

compromise a woman's health during pregnancy. *See* Declaration of David L. Eisenberg, M.D., M.P.H., ("Eisenberg Decl.") at ¶¶ 9-22 (detailing serious health conditions - renal disease, heart disease, hypertension, diabetes, sickle cell disease - which can cause serious and irreversible damage to a pregnant woman's health if she does not end the pregnancy) (attached as Ex. A). In some instances, a woman may experience a miscarriage while the fetus is living but has no chance of survival, and the Act's bar on abortion coverage prevents insurers from covering necessary care in that situation. *See id.* at ¶ 8.

Thus, as a result of the Act, women, including Plaintiff's members, have lost and others will lose their comprehensive abortion coverage under all of these circumstances. *See* Declaration of Holly Weatherford ("Weatherford Decl.") at ¶¶ 3-4 (attached as Ex. B). The Act does permit insurance companies to sell abortion coverage through an "optional rider," Act § 8 (a), but that rider must be paid for by an additional premium, which "shall be calculated so that it fully covers the estimated cost of covering elective abortions per enrollee as determined on an average actuarial basis." *Id*. Moreover, some insurance companies will not offer riders to some or all of their customers. Weatherford Decl. at ¶ 3. Moreover, even if riders are available for purchase, if a woman obtains her insurance through her employer, she is subject to the whims of her employer's decision to purchase the rider for its employees. Furthermore, even if riders are available, women may not purchase them because they do not anticipate needing an abortion.

The lack of insurance coverage for abortion will make the procedure more difficult for some women to afford. The cost of a clinic-based abortion ranges from $470 early in pregnancy to $1500 later on. Eisenberg Decl. at ¶ 28. Hospital-based abortions

cost significantly more, and can cost thousands of dollars. *Id.* Abortions necessary to preserve the woman's health, or because of a fatal fetal anomaly, often occur later in pregnancy and often in hospitals, making them the most expensive. *Id.* at ¶¶ 26, 28.

Notably, the State of Kansas has targeted women for differential treatment when purchasing insurance. The State permits men to purchase comprehensive coverage for all of their health needs, including gender-specific needs such as prostate cancer treatment, but the State prohibits women from purchasing insurance coverage for their comprehensive health care needs.

ARGUMENT

Plaintiff meets the four-prong test for issuing a preliminary injunction under Fed. R. Civ. P. 65. As discussed further below, Plaintiff has shown that: (1) its members will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would further the public interest; and (4) there is a substantial likelihood of success on the merits. *See, e.g., Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citations omitted). Accordingly, this Court should grant Plaintiff's request for a preliminary injunction.

I. Plaintiff Is Substantially Likely To Prevail on the Merits of Its Claims.

A. The Act Is Unconstitutional Because Its Purpose Is To Unduly Burden Women's Access To Abortion Care.

The Act's purpose is to make it more difficult for women to obtain and pay for abortion care. As the Supreme Court, the Tenth Circuit, and numerous other appellate courts have held, laws – like the Kansas Act – whose sole purpose is to make it more difficult for women to exercise their constitutional right to abortion are unconstitutional.

The Supreme Court has long emphasized that "the Constitution's guarantees of fundamental individual liberty . . . protect[] . . . the woman's right to choose" to have an abortion. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (citing *Roe v. Wade*, 410 U.S. 113 (1973)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). Thus, a law restricting abortion is unconstitutional if *either* the legislature's purpose *or* the law's effect is to impose an undue burden on a woman's right to obtain abortion care. *See Casey*, 505 U.S. at 877; *accord Jane L. v. Bangerter*, 102 F.3d 1112, 1117 n.5 (10th Cir. 1996) (emphasizing that courts must consider not only the effect, but the purpose, of a statute restricting abortion). As the Court explained, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Applying these principles, courts have made clear that under *Casey*'s purpose prong, "a state may not take action simply to make it more difficult for a woman to obtain an abortion." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 607 (6th Cir. 2006) (quotation marks, brackets, and citation omitted); *accord Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 461 (6th Cir. 1999); *Assocs. in Obstetrics & Gynecology v. Upper Merion Twp.*, 270 F. Supp. 2d 633, 657 (E.D. Pa. 2003) ("[S]tate action intended to burden the right to abortions constitutes a violation of substantive due process."). Indeed, "[w]here a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right." *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (citation omitted) (striking down state law that subjected abortion clinic to more rigorous permit application requirements than had

been applied to functionally identical medical clinics that did not provide abortion services).

Proof of an invalid legislative objective "may be gleaned . . . from the structure of the legislation" itself, *Jane L.*, 102 F.3d at 1116, or by "examin[ing] the language and requirements of the challenged statute." *Okpalobi v. Foster*, 190 F.3d 337, 356 (5th Cir. 1999), *vacated in part on other grounds by* 244 F.3d 405 (5th Cir. 2001). Here, the language and requirements of the Act make unmistakably clear that its purpose is simply, and impermissibly, "to make abortions more difficult." *Atchison*, 126 F.3d at 1049. The Act singles out one health care service—abortion—and bans insurance companies from providing coverage for it, and it alone, in their general health insurance policies. By direct operation of the Act, women, including some of Plaintiff's members, whose health insurance presently provides (or provided) coverage for abortions will lose (or have lost) their coverage. The Act's purpose is self-evident from its terms and from its singular focus on excising abortion, and only abortion, from general insurance coverage: It is directed exclusively at making it more difficult for women to obtain and pay for abortion care. *See Nat'l Educ. Ass'n of R.I. v. Garrahy*, 598 F. Supp. 1374, 1384-85 & n.11 (D.R.I. 1984), *aff'd*, 779 F.2d 790 (1st Cir. 1986) (holding that a law similar to the Act would impose an "affirmative obstacle" to abortion by imposing upon women the "financial consequences" of paying out of pocket for the procedure or paying for a rider) (quotation marks and citation omitted); *accord Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 303 (3d Cir. 1984) (striking down similar ban on abortion coverage).[1] Indeed, the Act is no different from a law that would require

[1] *But see Coe v. Melahn*, 958 F.2d 223, 225-26 (8th Cir. 1992) (denying summary judgment in challenge to Missouri abortion insurance ban because material facts existed as to whether the effect of the law would be

women to pay a tax to obtain an abortion. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down poll tax under equal protection clause because it infringed on right to vote).

Moreover, the purpose behind the Act—to inhibit a woman's ability to pay for and access abortion care—is likewise clear from the legislative and political context from which it emerged. Governor Brownback has made clear that his goal is to inhibit, and ultimately eliminate, abortion access. Lauding the legislative "challenges [to] *Roe* [*v. Wade*] . . . abounding across the country," the Governor called upon the legislature to deliver "major pro-life legislation" in 2011. Tim Carpenter, *Brownback Signs Major Abortion Bills*, Topeka-Capital Journal (Apr. 12, 2011), http://cjonline.com/legislature/2011-04-12/brownback-signs-major-abortion-bills. Over and over again in the last year, the legislature heeded the Governor's call, passing a series of extreme and unconstitutional antiabortion bills in rapid succession. Within a matter of months, the State passed a law preventing Planned Parenthood from receiving federal family planning money because the organization provides abortions, *see* H.B. 2014, 84th Leg. (Kan. 2011). As this Court held in preliminarily enjoining the law, "the *purpose* of the statute was to *single out, punish, and exclude* Planned Parenthood, the only historical Kansas subgrantee which provides or associates with a provider of abortion services, from receiving any further Title X subgrants." *Planned Parenthood of Kan. and Mid-Mo.,* 2011 WL 3250720, at *15 (emphasis added). The State imposed onerous licensing and inspection requirements targeted at abortion providers and designed to shut down all three abortion clinics in the state, *see* S.B. 36, 84th Leg. (Kan. 2011), which have likewise

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to create an undue burden). Here, however, Plaintiff's claim focuses on the Act's unlawful *purpose*, not its effect, and thus *Coe* has no bearing on Plaintiff's claims.

been enjoined, *Hodes & Nauser v. Moser*, No. 11-2365-CM (D. Kan. 2011). It imposed a pre-viability ban on abortions after twenty weeks, *see* H.B. 2218, 84th Leg. (Kan. 2011). And it passed the Act at issue here. The Act is part and parcel of this legislative onslaught on women's constitutional right to abortion.[2]

The legislative purpose behind the Act—to make it more difficult for women to pay for and obtain abortion care—is further evidenced by the fact that a ban on insurance coverage does not in any way advance any of the state interests that the Supreme Court has considered valid in the context of laws regulating abortion. *Casey*, 505 U.S. at 877. The Court has recognized two primary interests as legitimate bases for regulating a woman's right to abortion—the state's interest in potential life, and its interest in protecting the woman's health.[3] *Id.* at 877, 878. Neither can justify the Act.

First, the Act's restrictions on insurance coverage cannot be justified by the state's "interest in potential life." *Casey*, 505 U.S. at 877. While the Supreme Court has stated that the government has an interest in potential life, *see id.*, it has likewise made clear that this interest does not provide legislators *carte blanche* to inhibit abortion access in any manner in the name of potential life. Instead, the Court held in *Casey* that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* It is for precisely this reason that

[2] Moreover, these new restrictions were passed in the context of a state that already heavily restricts abortion. *See*, *e.g.*, Kan. Stat. Ann. §§ 65-6704, 65-6705 (requiring parental notice for abortion on a minor and requiring that minors receive pre- and post-abortion counseling); Kan. Stat. Ann. § 65-6709 (requiring abortion providers to comply with counseling and informed consent requirements, and requiring providers to give patients the option of viewing an ultrasound and listening to a heart monitor prior to the procedure). Abortion providers in Kansas have also been targeted for unfounded investigations by the State. *See, e.g.*, *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo. v. Kline*, 197 P.3d 370 (Kan. 2008).

[3] The Court has also invoked the government's interest in protecting the integrity of the medical profession in the context of abortion regulations. *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). That interest is completely unrelated to the Act.

laws requiring that women be given information about an abortion procedure and its alternatives have been held constitutional, *see id.* at 882-83, whereas abortion restrictions without any attendant benefit to the patient's health or decisionmaking are unconstitutional because they "serve[] no purpose other than to make abortions more difficult," *Atchinson*, 126 F.3d at 1049; *accord Okpalobi*, 190 F.3d at 356-57.

The Act falls squarely into the latter category. It is inarguably intended to make abortions more difficult to obtain by banning insurance companies from providing coverage for abortion in general health insurance policies, *see Garrahy*, 598 F. Supp. at 1384-85, but it does absolutely nothing to ensure that a woman's decision to have an abortion is well-informed. In other words, the Act is directed at "hinder[ing]" a woman's ability to obtain an abortion but is not in any way "calculated to inform the woman's free choice," *Casey*, 505 U.S. at 877—it is all burden and no benefit. Indeed, were the state's interest in potential life sufficient to justify the Act, the state could just as well ban all abortions in the name of protecting potential life.

Second, denying women insurance coverage for abortion undermines, rather than advances, the State's interest in protecting women's health. *See Casey*, 505 U.S. at 878. The Act takes away coverage for abortions that are necessary to protect a woman's health, including women with pregnancy-related health complications like preeclampsia and gestational diabetes and women with underlying health conditions (like heart disease, lupus, diabetes, hypertension, epilepsy, and sickle-cell disease) that are exacerbated by pregnancy. Eisenberg Decl. at ¶¶ 9-22. As the declaration from Dr. Eisenberg attests, without an abortion, women with these conditions risk a range of serious medical complications if they do not terminate their pregnancies, including organ failure, lifetime

disabilities, and loss of future fertility. *See, e.g., id.* at ¶¶ 10-11. In addition, as one court explained when confronted with a similar ban on insurance coverage for abortion, the loss of insurance coverage can only be expected to create "medically unnecessary delay in securing an abortion," which would "operate to the detriment of women's health." *Garrahy*, 598 F. Supp. at 1378; *cf. Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1300 (10th Cir. 2006) (explaining that "the longer a [woman] has to wait to obtain an abortion, the more expensive—and, more importantly, less safe—the procedure becomes"); *see also* Eisenberg Decl. at ¶ 29. Thus, far from protecting women's health, the Act endangers it.

Because the Act does not serve a valid government interest, but rather simply puts obstacles in the path of women seeking abortions it is, *ipso facto*, unconstitutional. *See Stenberg*, 530 U.S. at 952 (Ginsburg, J., concurring) (where "'a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue'" (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting))); *cf. Aleman v. Glickman*, 217 F.3d 1191, 1204 n.10 (9th Cir. 2000) ("a statute whose only purpose is to hinder [a fundamental] right . . . would not be supported by a legitimate government purpose" (citing *Casey*, 505 U.S. at 877)). In sum, it is clear from the Act's text and legislative context, and from the fact that the Act does not serve a valid governmental interest, that the Act serves no purpose but to make abortions more difficult. This unconstitutional purpose renders the Act invalid and it should be enjoined. *See Atchinson*, 126 F.3d at 1049.

B. The Act Fails Even Rational Basis Review Under the Fourteenth Amendment.

Because it was passed for an impermissible purpose, the Act fails even a rational basis review under the Equal Protection Clause. Under this "conventional and venerable" standard, a law must be struck down as unconstitutional unless it "bear[s] a rational relationship to a *legitimate governmental purpose*." *Romer v. Evans*, 517 U.S. 620, 635 (1996) (emphasis added); *see also United States v. Angelos*, 433 F.3d 738, 754 (10th Cir. 2006). As the Supreme Court has explained "'[i]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634-35 (quoting *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

That is precisely the case here. As discussed *supra*, the Act was passed simply to make it more difficult for women to pay for and obtain abortions, and cannot conceivably be thought to inform a woman's decision or to protect her health. The Act thus lacks a legitimate purpose and should be enjoined on this basis as well. *See id.*, 517 U.S. at 634-35 (holding that law that was designed to make it more difficult for gays and lesbians to obtain and protect their legal and political rights lacked a proper legislative purpose and therefore failed the Equal Protection Clause's rational basis test); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that law that required special use permit for homes for the mentally retarded violated the Equal Protection Clause because it was passed for the illegitimate purpose of discriminating against the mentally retarded); *Moreno*, 413 U.S. at 534-35 (holding that law passed for the purpose of

discriminating against hippies violated the Equal Protection Clause under the rational basis test).[4]

C. The Act Unconstitutionally Discriminates Based on Sex.

By virtue of the Act, Kansas men are permitted to buy comprehensive insurance plans that cover all of their potential medical expenses, but Kansas women are prohibited from doing the same. The Act is thus a classic example of a violation of the Equal Protection Clause's guarantee that "all persons similarly situated should be treated alike." *KT & G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114, 1136-37 (10th Cir. 2008) (emphasis omitted), and should be enjoined.

As the Supreme Court has instructed:

> 'Inherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex . . . Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 320 (1977) (*per curiam*), to "promot[e] equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, *see Goesaert*, 335 U.S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.

United States v. Virginia, 518 U.S. 515, 533-34 (1996). By prohibiting the sale of comprehensive health insurance plans for women but not for men, the Act violates this basic principle. Women, the same as men, seek affordable and comprehensive health insurance coverage to insure against the costs of both foreseeable and unforeseeable health conditions. Because of the Act, however, men can comprehensively insure for all of their medical needs, but women cannot. The law thus treats women differently than

[4] Cases related to the public funding of abortion, such as *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), are inapposite. In those cases, the state asserted an interest in ensuring that public funds were used only to promote childbirth. There is no similar state interest at play here: Plaintiff seeks a preliminary injunction as to the Act's effects on private insurance, purchased with private dollars.

men, and creates legal and economic discrepancies based on sex. *See Automobile Workers v. Johnson Controls, Inc.,* 499 U.S. 187, 197 (1991) (holding that a corporate policy restricting the employment opportunities of women (and not men) because of their childbearing capacity, regardless of whether they were actually pregnant, discriminated on the basis of sex); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 & n.7 (W.D. Wash. 2001) (holding that employer policy of refusing to cover prescription contraceptives facially discriminated on the basis of sex).

To be clear, the Act discriminates not just against women who seek abortion care, but rather against *all* women because virtually *any* woman – whether because of an unintended pregnancy, rape, a serious health problem, or a multitude of other reasons, could potentially need the care and must purchase coverage ahead of time to insure herself for the costs. *See* Eisenberg Decl. at ¶ 4 (noting that 1 in 3 women will have an abortion in her lifetime). Indeed, the law constitutes impermissible discrimination against women the same way as a law that singled out a health care service that only men need – such as treatment for prostate cancer – and prohibited insurance companies from including coverage for that service would discriminate against men. In such a scenario, it would make no difference that (fortunately) most men will never need treatment for prostate cancer. Rather, the law would affect all men, because no man knows whether he will need the care, and the only way to insure that one has coverage for medical costs is to buy insurance ahead of time.

Indeed, the sponsor of the Act recognized that the Act affects *all* women. In explaining why even victims of rape and women with high-risk pregnancies should be unable to rely upon general health insurance policies to cover abortions, Representative

Pete DeGraaf, the Act's sponsor, stated that women should "plan ahead," and buy a rider, likening the matter to having a spare tire on one's car. *See Kansas Backs Bill Restricting Abortion Coverage*, Associated Press, May 13, 2011, *available at* http://www.mcphersonsentinel.com/newsnow/x1058165813/Kansas-backs-bill-restricting-abortion-coverage.[5]

Where, as here, the State uses "gender-based classifications," as a basis for differential treatment of similarly situated groups, such classifications will only survive an equal protection challenge if there is an "exceedingly persuasive justification" for those measures; that is, if the government can show that the challenged classification serves an "important governmental interest" and is substantially related to achieving that interest. *Virginia,* 518 U.S. at 532-33 (internal citations and quotation marks omitted); *see also Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Com'n*, 889 F.2d 929, 932 (10th Cir. 1989) ("We subject 'quasi-suspect' classifications based on characteristics beyond an individual's control, such as gender, illegitimacy, and alienage, to intermediate review, and will uphold the law only if it is substantially related to an important or substantial state interest."). Moreover, the state's objective must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. The State plainly cannot make this showing. For all of the reasons discussed above in Part I.A., *supra*, there is no legitimate, let alone important, objective furthered by the Act. It should therefore be enjoined.

[5] Thus, *Geduldig v. Aiello*, 417 U.S. 484 (1974), is not to the contrary. In *Geduldig*, the Court held that California's failure to include pregnancy and childbirth among the class of disabilities for which state employees could receive benefits did not constitute impermissible sex discrimination. The Court reasoned that by preventing women who bear children from obtaining benefits, the program did not discriminate between men and women, but rather divided state employees into two classes – pregnant women and non-pregnant persons (male and female). That is not the case here. As explained above, because the nature of health insurance is to insure, in advance, for care that one may or may not need in the future, the Kansas Act affects all women.

II. Plaintiff's Members Will Suffer Irreparable Injury Absent an Injunction.

The Supreme Court, the Tenth Circuit, and this Court have stated that a violation of constitutional rights – even temporarily – amounts to irreparable injury for purposes of entitlement to a preliminary injunction. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005); *Planned Parenthood of Kan. and Mid-Mo.*, 2011 WL 3250720, at *16. This includes the loss of the constitutional right to privacy and equal protection. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief"); *Planned Parenthood of Minnnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (plaintiff's showing of interference "with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury"); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (in gender discrimination case, the court held that "[a] deprivation of a constitutional right is, itself, irreparable harm")

Here, Plaintiff's members' constitutional rights will be lost absent an injunction. For example, some members have already lost insurance coverage, and another member is set to lose coverage October 1, 2011. *See* Weatherford Decl. at ¶ 4. Accordingly, all members who are losing coverage will be irreparably harmed.

III. The Balance of Harm Tips Decidedly in Plaintiff's Favor.

The issuance of a temporary injunction poses little, if any, likelihood of irreparable harm to Defendant. Defendant has no valid interest in enforcing an

unconstitutional law. *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]hreatened injury to [constitutional rights] outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." (citation omitted)).

Moreover, an injunction would merely serve to maintain the status quo. This is particularly important here where insurance companies are in the process of changing their policies to comply with the law. If an injunction issues now, it is far less burdensome on insurance companies to maintain the status quo, rather than allowing the Act to continue to take effect, forcing companies to remove abortion from comprehensive insurance coverage, and then asking insurance companies to reverse course if Plaintiff is successful on the merits in the long run.

On the other side of the equation, the denial of an injunction would deprive Plaintiff's members of their constitutional rights as discussed above. Thus, the harm to Plaintiff's members exceeds any harm to Defendants resulting from the issuance of a temporary injunction.

IV. Granting Preliminary Injunctive Relief Serves the Public Interest.

Finally, granting an injunction in this case will serve the public interest. The public interest is served by an injunction that protects constitutional rights. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (government "does not have an interest in enforcing a law that is likely constitutionally infirm"); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1292 (D. Kan. 1990) (public interest furthered by injunction that protected women's access to reproductive health care). Here, the public interest, including the interests of the

thousands of women in Kansas who will lose their abortion insurance coverage, will be furthered by the injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

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**Pro hac vice* to be filed

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2011, I caused a copy of Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction to be served on the following, both by electronic mail and by first class mail:

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Dated: August 16, 2011 ___s/Stephen Douglas Bonney_____