

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

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FemHealth USA, Inc., d/b/a carafem, on behalf of itself, its physicians, and its patients,	)	
	)	
	)	
	)	
Plaintiff,	)	Civil Action No. <u>3:19-cv-01141</u>
	)	
v.	)	Judge: Eli J. Richardson
	)	
City of Mount Juliet; Kenny Martin, City Manager of Mount Juliet, in his official capacity; James Hambrick, Chief of Police of Mount Juliet, in his official capacity, Jennifer Hamblen, Zoning Administrator of Mount Juliet, in her official capacity,	)	
	)	
	)	
Defendants.	)	
	)	

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S  
MOTION FOR A PRELIMINARY INJUNCTION**

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## I. INTRODUCTION

Plaintiff FemHealth USA, Inc., d/b/a carafem (hereinafter, “carafem”), on behalf of itself, its physicians and staff, and its patients, seeks a preliminary injunction to stop enforcement of Ordinance 2019-16 (the “Ordinance”), which had the clear purpose and effect of targeting carafem, the only abortion clinic within the city limits of Mt. Juliet, Tennessee, and preventing it from performing surgical abortions for patients in need of such treatment.

The Ordinance, introduced just days after carafem’s opening, amended the city’s zoning restrictions to effectively preclude any provider of surgical abortions from operating in Mt. Juliet. In a statement to local news, City Commissioner Ray Justice made the purpose behind the Ordinance clear: “The members of the commission I have talked to are 100 percent behind shutting this abomination down. . . . This is not Mt. Juliet. This is not us.”<sup>1</sup> As set forth in detail below, other officials made similar public statements demonstrating the Ordinance’s singular purpose of blocking access to abortion. The Ordinance does not protect the health, safety, or welfare of Mt. Juliet citizens or carafem patients, and serves no legitimate governmental interest. It simply prohibits carafem from providing surgical abortions, in turn making it difficult or impossible for Tennesseans to access abortion. Absent the relief requested in this motion, carafem and its patients will continue to suffer irreparable harm from this violation of their due process rights and the denial of carafem’s patients’ constitutionally-protected right to abortion.

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<sup>1</sup> Andy Humbles, *Mt. Juliet elected officials, religious leaders vow to fight new abortion clinic in city*, NASHVILLE TENNESSEAN (March 1, 2019, 5:03PM), <https://www.tennessean.com/story/news/local/wilson/2019/03/01/mt-juliet-abortion-provider-carafem-resistance-city-church/3029532002/>.

## II. STATEMENT OF FACTS

### A. Carafem Opens Its Doors in Mt. Juliet

Carafem is a 501(c)(3) nonprofit organization that provides women’s reproductive health services. *See* the attached Declaration of Melissa Grant (“Grant Decl.”), ¶ 2. Carafem operates a network of health centers, including one located in Mt. Juliet, that provide information and low-cost options for people seeking abortion care, as well as most methods of birth control and testing for sexually-transmitted infections. *Id.* In addition to its Mt. Juliet location, carafem has clinics located in Atlanta, Georgia; Washington, D.C.; and Chicago, Illinois. *Id.*

In the months before it opened the Mt. Juliet clinic, carafem regularly saw women<sup>2</sup> from Tennessee travel to its Atlanta, Georgia facility for abortion services. *Id.*, ¶ 4. This is because access to abortion services is limited in Tennessee and in the Nashville metropolitan area in particular. *Id.*, ¶ 3. Before the Mt. Juliet clinic opened, there was just one abortion clinic in the area—a Planned Parenthood health center in Nashville. *Id.*<sup>3</sup> As carafem learned in 2018, this clinic cannot meet the needs of all individuals seeking abortion. *Id.*, ¶ 4. Indeed, the Planned Parenthood-Nashville clinic was unable to offer abortion services at all for several months in early 2019. *Id.*, ¶ 3. Even when abortion services were available, it could not meet the needs of all patients seeking abortion care, with patients waiting weeks for an appointment. *Id.*, ¶¶ 28-30. Many of these patients were forced to travel elsewhere for abortion services, including to carafem’s clinic in Atlanta. *Id.*, ¶¶ 26-28.

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<sup>2</sup> Carafem uses “woman” or “women” in this memorandum as a short-hand term for people who are or may become pregnant, but notes that people of all gender identities, including gender non-conforming people and transgender men, may also become pregnant and seek abortion services and thus also suffer irreparable harm as a result of the Ordinance.

<sup>3</sup> Another Nashville clinic that had previously provided abortion services, The Women’s Center, closed in 2018. Grant Decl., ¶ 3.



To better serve these patients, carafem decided to open a new facility in the Nashville metropolitan area. *Id.*, ¶ 5. Carafem identified a location for its new facility in a commercial area of Mt. Juliet, in the Providence Medical Pavilion, which leases medical office space to several health care providers and specialists. *Id.*, ¶¶ 6-7. The Providence Medical Pavilion houses several other medical clinics in addition to carafem, including: The Allergy, Asthma and Sinus Center; Alberto Cadeno, OB/GYN; Comprehensive Pain Specialists; Oxford Orthodontics; Premier Radiology; Providence Surgery Center; Results Physiotherapy; Tennessee Maternal Fetal Medicine; Vanderbilt Neurosurgery; and Vanderbilt Orthopaedics. *Id.*, ¶ 7. Providence Medical Pavilion is located in a commercial interchange (“CI”) zoning district. *See* the attached Declaration of Heather M. Schneider (“Schneider Decl.”), Ex. 1. Under Mt. Juliet’s Land Development Code (the “Development Code”), “professional services, medical” is a permitted use in CI districts. According to Development Code, Art. III, § 3-103.3 (12), “[p]rofessional services, medical” includes various types of physicians’ offices and clinics, dental offices, optometrists, and outpatient medical service facilities.

Carafem’s Mt. Juliet location opened on March 1, 2019, providing medication abortion to women up to 10 weeks from their last menstrual period (“LMP”), as well as birth control options and emergency contraception. Grant Decl., ¶ 9. Within 48 hours of opening, carafem was completely booked for the next 30 days. *Id.* While carafem offered medication abortion services after the Mt. Juliet clinic opened, it planned to expand its services to include a second form of abortion, aspiration abortion, shortly thereafter, to meet the needs of its patients. *Id.*, ¶ 10.

In the first trimester of pregnancy, there are two abortion methods: medication abortion and aspiration abortion. *See* the attached Declaration of Aileen Gariepy, M.D., M.P.H., M.H.S. (“Gariepy Decl.”), ¶ 16. For a medication abortion, the patient ingests two pills and passes the

pregnancy at home. *Id.* The second method, aspiration abortion—a type of surgical abortion—is the most common method of first-trimester abortion, involving the use of gentle suction to empty the contents of the uterus.<sup>4</sup> *Id.*, ¶ 17. Aspiration abortion generally takes less than ten minutes to complete and is among the safest procedures in modern medicine—far safer than numerous other medical procedures also commonly performed in an outpatient setting. *Id.*, ¶¶ 17, 25-27. While both first-trimester abortion methods are common and extremely safe, not all patients are candidates for medication abortion. *Id.*, ¶ 20. Medication abortion is only available through 11 weeks LMP, while aspiration abortion can be provided up to approximately 15 weeks. *Id.*, ¶ 19. Moreover, medication abortion is not suitable for patients who have an intrauterine device; have certain medical conditions, including bleeding disorders; take a blood thinner or certain steroid medications; or have an allergy to the medications used. *Id.*, ¶ 20. Moreover, because medication abortion requires the patient to pass the pregnancy at home over the course of several hours, patients with caregiving responsibilities at home may not be suitable candidates for medication abortion and may require aspiration abortion instead. *Id.* ¶¶ 22-23.

In a February 28, 2019 press release, carafem publicly announced its plans to provide aspiration abortion services in the coming months.<sup>5</sup>

#### **B. Carafem Faced Immediate Opposition from Mt. Juliet Politicians**

Immediately after carafem’s opening, numerous Mt. Juliet officials made public statements expressing their opposition to carafem’s opening and explicitly stating that they

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<sup>4</sup> Aspiration abortion is also known as “vacuum aspiration,” “suction curettage,” “dilation and curettage,” and “D&C”—these are all synonyms for the same procedure. *See* Gariepy Decl., ¶ 17, n.13.

<sup>5</sup> *carafem Opens Doors in the Nashville, Tennessee Area*, carafem website, (February 28, 2019), <https://carafem.org/carafem-opens-doors-nashville-tennessee-area/>.

would act to prevent carafem from providing abortion services. City Commissioner Brian Abston, in remarks published in *The Tennessean* on March 1, 2019, said: “I was disgusted to hear they plan to open in my district and my town. . . . If there is anything we can legally do to keep them from opening in Mt. Juliet we will do it.”<sup>6</sup> Commissioner Abston provided a similar statement to *The Wilson Post*, a county newspaper: “I realize they have rights, but my constituents and I don’t want it here. I am pro-life so I will take any action possible within the law to make sure it’s not here.”<sup>7</sup>

Similarly, in a Facebook posting on March 1, 2019, Commissioner Ray Justice also stated that the Mt. Juliet Board of Commissioners would pursue ways to close carafem’s clinic:

The City of Mt. Juliet did not approve an abortion clinic in our city! . . . We are pursuing every possible legal option to stop this ‘organization’ from being in Mt. Juliet. To a man, our city commission is Christian Conservative and will not just ‘let this happen’ without fighting.

Schneider Decl., Ex. 2. Commissioner and Vice Mayor James Maness, sharing his opposition to carafem’s opening, stated on his official website: “I am pro-life. The taking of innocent life is called murder. Abortion is not a matter of choice, it’s a matter of life and how we value life.” *Id.*, Ex. 3. Mayor Ed Hagerty also reportedly voiced his opposition to carafem in an open letter to supporters that was later published in the blog Left-Handed Conservative, stating: “I too am pro-life. . . . I am guessing most if not all on this email feel the same. Candidly, I am embarrassed and disgusted that this happened on my watch. If I had the power to stop it, I would

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<sup>6</sup> Andy Humbles, *Mt. Juliet elected officials, religious leaders vow to fight new abortion clinic in city*, NASHVILLE TENNESSEAN (March 1, 2019, 5:03PM), <https://www.tennessean.com/story/news/local/wilson/2019/03/01/mt-juliet-abortion-provider-carafem-resistance-city-church/3029532002/>.

<sup>7</sup> Laurie Everett, *MJ moves to stop abortion clinic*, THE WILSON POST, March 6, 2019), [https://www.wilsonpost.com/community/mj-moves-to-stop-abortion-clinic/article\\_3748b5ca-3fd5-11e9-acee-bba608f35793.html](https://www.wilsonpost.com/community/mj-moves-to-stop-abortion-clinic/article_3748b5ca-3fd5-11e9-acee-bba608f35793.html).

have done so.”<sup>8</sup>

Consistent with these public statements, the Mt. Juliet Board of Commissioners announced a special meeting for Sunday, March 3, 2019, two days after carafem’s opening. Schneider Decl., Ex. 4. The only item on the agenda for the special meeting was the first reading of the Ordinance: an amendment to the zoning ordinances that effectively prohibited the provision of surgical abortion services anywhere within the city. *Id.* At the March 3, 2019 special meeting, all four members of the Board voted in favor of the Ordinance. A video recording of the meeting posted on the Mt. Juliet website shows the entire meeting lasted less than five minutes.<sup>9</sup> After review and approval by the Mt. Juliet Planning Commission on March 21, 2019, the Board approved the Ordinance on April 8, 2019.<sup>10</sup> Schneider Decl., Exs. 5, 6. At each of these meetings, officials made no statements regarding the purpose or intent of the Ordinance apart from the self-evident purpose of blocking access to abortion, heard no public comments or evidence regarding any benefits that would be promoted by the Ordinance, and introduced no other testimony or other evidence that supported the passage of the Ordinance.

### **C. Ordinance 2019-16: A Ban on Surgical Abortion Clinics in Mt. Juliet**

The Ordinance modified Mt. Juliet’s zoning code to ban all surgical abortion clinics in Mt. Juliet. The Ordinance amended Part B of the Unified Development Code of the City of Mt. Juliet, including by amending Articles 2-103.3, Definition, Commercial Activities; 3-102(C),

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<sup>8</sup> Lefty, *Under cover of darkness*, LEFT-HANDED CONSERVATIVE (March 4, 2019), <http://lefthandedconservative.wordpress.com/2019/03/04/under-cover-of-darkness/>.

<sup>9</sup> Video of City of Mt. Juliet Board of Commissioners Special Meeting, March 3, 2019, <http://mtjulietcitytn.igmp2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1834>.

<sup>10</sup> Video of City of Mt. Juliet Board of Commissioners Regular Meeting, April 8, 2019, <http://mtjulietcitytn.igmp2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1826>.

Listing of Activity Types for Commercial Activities; 3-103.3, Commercial Activities-Class and Types; 3-104.7, Provisions Applicable to Commercial Activities; Table 7-102A, Permitted and Conditional Uses and Structures Allowable within Industrial Districts to include Surgical Abortion Clinics. Schneider Decl., Ex. 6. The Ordinance amends Section 2-103.3 of the Development Code to define Surgical Abortion Clinic as:

any entity, place or building in which surgical activity is primarily conducted or aimed toward terminating pregnancy, otherwise known as abortion as defined at Tenn. Code Ann. § 39-15-201.

*Id.* The Ordinance limits Surgical Abortion Clinics to be a permitted use with supplemental provisions (“SUP”) in industrial zones I-G and I-S. *Id.*, Table 7-102A. A SUP is defined in Section 7-102.3 as:

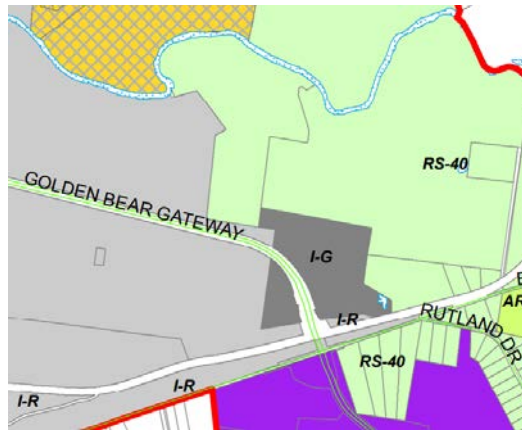
A use permitted with supplemental provisions is an activity, use or structure which is permitted subject to a finding by the Zoning Administrator that the specific standards indicated for the use in question have been met. Only those uses and structures so indicated in table 7-102A, may be allowed within the districts indicated.

Development Code, Sec. 7-102.3. The Ordinance further restricts where Surgical Abortion Clinics may be located by amending Section 3-104.7 to state that no such clinic:

shall be located within 1,000 feet (measured property line to property line) of any church, public or private school ground, college campus, public park or recreation facility, public library, child care facilities, or a lot zoned residentially or devoted primarily to residential use.

Schneider Decl., Ex. 6.

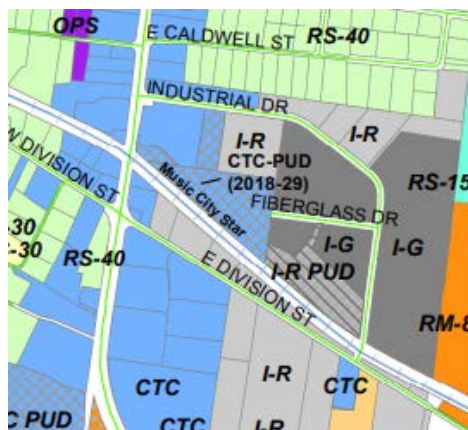
Because of the specific restrictions set forth in the Ordinance, there is no land in Mt. Juliet where a Surgical Abortion Clinic may be located. First, there is no land in Mt. Juliet zoned I-S. Schneider Decl., Ex. 7. There are only two areas in Mt. Juliet currently zoned I-G. The first I-G zone is located near the intersection of Golden Bear Gateway and East Division Street:



**Figure 1. Excerpt of Mt. Juliet Zoning Map**

However, most of this I-G zone is surrounded by land zoned for RS-40, Single Family Residential use. Because of the restrictions in Section 3-104.7, namely, that any clinic must be at least 1000 feet from a lot zoned for residential use, a Surgical Abortion Clinic could not be located in this I-G district.<sup>11</sup>

The second I-G zoned district is located near the Main Street District, around Industrial Drive and East Division Street, shown in dark gray in the zoning map below in Figure 2:



**Figure 2. Excerpt of Mt. Juliet Zoning Map.**

<sup>11</sup> Further, this I-G zone is a vacant plot of land. *Even if* a surgical abortion clinic could open in this area, it would be cost-prohibitive to conduct ground-up construction. Grant Decl. ¶ 17.

There are several businesses located within this area, including Flexible Metal Products; Brittle Kettle; Battery Shop; Irving Materials, Inc.; Nashville Ready Mix; and Mt. Juliet Tae Kwon Do, Inc. However, The Fellowship Ministries, Mt. Juliet, a church, is located adjacent to this area, and the surrounding land is zoned for residential use. Because the Ordinance prohibits a Surgical Abortion Clinic from operating within 1,000 feet from any church or any lots zoned for residential use, a clinic cannot be located in this I-G district. Thus, in purpose and effect, the Ordinance is a complete ban on surgical abortion clinics within the city limits of Mt. Juliet.<sup>12</sup>

**D. The Ordinance Is Irreparably Harming Carafem's Patients**

The Ordinance has irreparably harmed carafem's patients, and will continue to do so each and every day it remains in effect. Since the Ordinance was enacted, carafem has been forced to turn away women seeking aspiration abortion services who are not eligible for medication abortion, including all women past 11 weeks of pregnancy and those with contraindications to medication abortion. *See* Grant Decl. ¶¶ 25-27.

Denying these women access to time-sensitive medical care causes them irreparable injury. There is just one other abortion clinic in the Nashville metropolitan area, but its limited capacity means that women seeking aspiration abortion at minimum incur a lengthy wait time of 2-3 weeks or greater, and some are unable to get an appointment at all. *Id.*, ¶¶ 28-32. While abortion is a very safe procedure, such unwanted delay subjects patients to increased medical risks. *See* Gariepy Decl., ¶ 34. Women unable to obtain abortions in the Nashville area face the prospect of traveling hundreds of miles round-trip to the next-closest clinics—and doing so twice

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<sup>12</sup> After the passage of the Ordinance, carafem explored legal options short of litigation, including seeking consent from Mt. Juliet to be grandfathered in under the previous zoning ordinances. Mt. Juliet rejected those efforts. Grant Decl., ¶ 19.

(or securing lodging for a multiple-night stay) if the clinic is in a state like Tennessee that mandates multiple in-person visits to the clinic at least 48 hours apart. *See* the attached Declaration of Sheila Katz (“Katz Decl.”) ¶ 28; *see also* Tenn. Code Ann. § 39-15-202(a)-(h). Many women seeking carafem’s services are low-income, Grant Decl. ¶ 24, and for many poor women struggling to make ends meet, financial and logistical challenges make such travel difficult or impossible, and, at minimum, result in delayed access to care. Katz Decl. ¶ 29. In short, the Ordinance deprives women of their constitutional right to abortion, and will continue to cause irreparable injury absent relief from this Court.

### **III. ARGUMENT**

#### **A. Legal Standard for a Preliminary Injunction**

Carafem readily satisfies all requirements to obtain preliminary injunctive relief. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *accord City of Pontiac Retired Emps. Ass’n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014).

“When a party seeks a preliminary injunction on the basis of a potential constitutional violation, ‘the likelihood of success on the merits often will be the determinative factor.’” *Schimmel*, 751 F.3d at 430 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). Indeed, “[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed.” *Obama for Am.*, 697 F.3d at 436 (citing *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003)). “Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its



enjoinment.” *Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001). “Moreover, ‘it is always in the public interest to prevent violation of a party’s constitutional rights.’” *Id.* (quoting *G&V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Each requirement is satisfied here.

## **B. Carafem Is Likely to Succeed on the Merits**

The Ordinance is unconstitutional under decades of Supreme Court precedent, and carafem is substantially likely to prevail on the merits of each of its claims.

### **1. Carafem Is Likely to Prevail on Its Undue Burden Claims**

First, carafem is overwhelmingly likely to prevail on its claim that the purpose and effect of the Ordinance are to unduly burden its patients’ constitutionally protected right to abortion. “Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.” *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 846 (1992) (quoting U.S. Const. amend. XIV, § 1). This constitutionally protected liberty includes the “right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 851 (quoting *Eisenstadt v. Baird*, 430 U.S. at 453). Indeed, as the Supreme Court explained: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Id.* at 851.

As such, women have the constitutionally-protected right to choose to have an abortion before viability of the fetus without undue burdens from the state. “[T]here ‘exists’ an ‘undue burden’ on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the ‘*purpose or effect*’ of the provision ‘*is to place a substantial*

*obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (quoting *Casey*, 505 U.S. at 878) (emphases in original). As the Supreme Court clarified in *Whole Woman’s Health*, the undue burden test entails a balancing analysis, in which the court must “weigh[] the asserted benefits against the burdens.” *Id.* at 2310. Here, both the purpose and effect of the Ordinance are to unduly burden Tennessee women seeking a surgical abortion without any countervailing benefit, and the Ordinance is thus constitutionally invalid.

a. *The Purpose of the Ordinance Was to Unduly Burden Tennessee Women Seeking Surgical Abortions*

As the Sixth Circuit has made clear, a law with the purpose of “mak[ing] it more difficult . . . to obtain an abortion” is constitutionally invalid. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 461 (6th Cir. 1999); accord *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997). “A purposeful state effort to undermine a constitutionally protected liberty interest is incompatible with the Constitution. *Casey* prohibits state actions that ‘serve no purpose other than to make abortions more difficult.’” *Whole Woman’s Health Alliance v. Hill*, 937 F.3d 864, 877 (7th Cir. 2019) (quoting *Casey*, 505 U.S. at 901). Indeed, courts are required to “scrutinize the reasons given for a state action,” as well as “the evidence provided by the state supporting its action.” *Id.* “If the evidence does not support the state’s proffered reason, or it reveals instead an impermissible reason, the state law cannot stand.” *Id.*

The Ordinance’s purpose is to undermine the constitutional right to abortion; it is difficult to envision a legislative history more baldly indicative of a purposeful effort to target abortion with no permissible state interest. As the contemporaneous statements of the officials who enacted the Ordinance make clear, its sole purpose is to block access to abortion in Mt. Juliet.

Indeed, the day after carafem announced its intentions to provide surgical abortions at its Mt. Juliet clinic, city commissioners announced their intention “to stop this ‘organization’ from being in Mt. Juliet.” *See* Section II.B, *supra* (summarizing numerous comparable statements). These public statements by those responsible for the Ordinance make plain that its purpose is “to undermine a constitutionally protected liberty interest,” *Hill*, 937 F.3d at 877, and are analogous to those which have been deemed evidence of improper purpose to restrict abortion access in other cases. *See, e.g., Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1032, 1043–44 (D. Neb. 2010) (relying on statements by legislators expressing contempt for *Roe v. Wade*). Indeed, as discussed above, just days after carafem opened, the Board held a special meeting, which lasted less than five minutes, to rubber stamp the Ordinance.

The Ordinance’s “operation in practice confirms [its] purpose.” *United States v. Windsor*, 570 U.S. 744, 746 (2013); *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (“the effect of a law in its real operation is strong evidence of its object”). As discussed above, the Ordinance limits abortion clinics to areas in Mt. Juliet zoned I-S and I-G—but there is no land in the city zoned I-S, and the Ordinance’s restriction on proximity to residential areas and churches renders any land zoned I-G off-limits for the provision of surgical abortion. There is no location in Mt. Juliet in which a surgical abortion clinic would be permitted, which is the very intent of the Ordinance.

Moreover, there is no constitutionally tolerable justification for this severe restriction in the Ordinance’s legislative history or its operation; indeed, there is no justification at all. The Board did not make any legislative findings, identify any legitimate purpose, or enter, hear, or consider any evidence that the Ordinance would promote health, safety, or welfare, or serve any interest other than “stop[ping]” the provision of abortion. *See* Section II.B, *supra*. Under these

circumstances, no basis advanced by Defendants can now justify the undue burden placed on Tennessee women by the Ordinance. *W. Side Women's Servs., Inc. v. City of Cleveland, Ohio*, 573 F. Supp. 504, 521 (N.D. Ohio 1983) (“WSWS”) (internal citations omitted) (rejecting justifications advanced by city for zoning ordinance barring provision of abortions). Indeed, courts have found that the “lack of any demonstrable medical benefit” of a law was relevant evidence that it had the improper purpose of restricting access to abortion. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 790 (7th Cir. 2013); *see also W. Ala. Women's Ctr. v. Miller*, No. 15-cv-497-MHT, 2017 WL 4843230, at \*8 n.9 (M.D. Ala. Oct. 26, 2017) (“[l]egislative purpose may be inferred from the extent to which the statute actually furthers, or fails to further, the purported state interests”). Because the Ordinance serves no purpose but to restrict abortion access, it “burdens a constitutional right” with no “constitutionally permissible reason,” and is invalid. *Hill*, 937 F.3d at 877; *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 337 (5th Cir. 1981) (city’s alleged justification for zoning decision targeting abortion providers was “simply too vague and unsubstantiated by the record to justify the burdens imposed on the constitutional right of privacy”).

b. *The Effect of the Ordinance Is to Unduly Burden Tennessee Women, Particularly Low-Income Women, Seeking Abortions*

Even if the Ordinance were not unconstitutional on the basis of its impermissible purpose alone—which it manifestly is—it is unconstitutional because its effect is to unduly burden abortion access. To determine whether a restriction on abortion has the effect of imposing an undue burden, the Court must assess whether the Ordinance confers “benefits sufficient to justify the burdens upon access” it imposes under a balancing analysis. *Hellerstedt*, 136 S. Ct. at 2300. The more attenuated the purported benefits of a state action, “the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.” *Planned Parenthood of*

*Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013); *see also Hellerstedt*, 136 S. Ct. at 2318; *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912-13 (9th Cir. 2014).

On the state-justification side of the ledger, Mt. Juliet has not identified and cannot now identify *any* legitimate state interest that is advanced by the Ordinance. Rather, the legislative record is completely devoid of any basis for the law’s extremely restrictive requirements. The justification is beyond “feeble[ ]”—it is nonexistent, save for the constitutionally impermissible purpose of undermining the right to abortion itself. *Van Hollen*, 738 F.3d at 798. Under these circumstances, where the Ordinance imposes “obstacles confronting women seeking abortions in [Mt. Juliet] without providing any benefit to women’s health capable of withstanding any meaningful scrutiny . . . [it is] unconstitutional on [its] face.” *Hellerstedt*, 136 S. Ct. at 2319.

In contrast, the burdens placed on Tennessee women seeking abortion by the Ordinance are substantial. The Ordinance’s ban on surgical abortion in Mt. Juliet is unduly burdensome to all patients seeking such procedures. *See, e.g., Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007) (a law with the effect of prohibiting any of “the most common pre-viability abortion methods,” including “suction curettage,”—*i.e.*, aspiration abortion—“creates an unconstitutional undue burden in violation of *Casey*”); *accord Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999) (en banc) (“Prohibiting any one of” the “principal methods of performing abortions”—including “suction curettage”—“would conflict with the right of abortion recognized by cases such as *Casey*.”), *vacated on other grounds*, 530 U.S. 1271.

The availability of medication abortion does not mitigate these burdens. Many patients are not eligible for medication abortion, including those after 11 weeks, patients with intrauterine devices, and those with numerous common medical conditions. Gariepy Decl., ¶ 20. As a result of the Ordinance, carafem has been forced to turn such patients away. Grant Decl., ¶¶ 26-27.

Nor does the existence of Planned Parenthood in Nashville relieve the burden on carafem's patients. In December 2018, Planned Parenthood stopped offering any abortion services at that location, reportedly due to staffing difficulties. *See* Grant Decl., ¶¶ 3-4. Although abortion services resumed at that location in March 2019, availability is intermittent, and at best there are lengthy wait times of two to three weeks for abortion services due to capacity constraints. Grant Decl., ¶¶ 28-33. These wait times were discussed at length in recent litigation involving Planned Parenthood-Nashville; the testimony indicated that patients seeking to schedule an abortion at the clinic would have to wait one to three weeks for their first visit and an additional two to six days for the second appointment if they were having a medication abortion, or over a week for the additional second appointment if they were having a surgical abortion. Schneider Decl., Ex. 8, Trial Transcript Vol. 2, at 97:1-24, *Adams & Boyle P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Sep. 24, 2019). For some patients, that delay would be as long as six weeks from the initial request to the scheduling of the abortion. *Id.* As the Supreme Court made clear in *Hellerstedt*, subjecting patients to such delays as they attempt to “get abortions in crammed-to-capacity” clinics is unduly burdensome—particularly where the law creating those conditions is without legitimate justification. 136 S. Ct. at 2318 (emphasizing unconstitutional burden of “3-week wait times”).

Due to capacity constraints and wait times at Planned Parenthood-Nashville, patients are faced with the prospect of traveling hundreds of miles round-trip to obtain surgical abortion services at another clinic. Indeed, during the period in which Planned Parenthood stopped providing abortion services in Nashville, carafem saw a significant increase in the number of clients making the long, burdensome journey from Tennessee to carafem's Atlanta facility to seek abortion care. Grant Decl., ¶¶ 3-4. This travel requirement is burdensome for anyone, but

particularly for low-income women, who are disproportionately likely to be seeking abortion services. Katz Decl., ¶ 29; *see also* Gariepy Decl., ¶¶ 31-35.

Forcing patients to undertake lengthy travel to access abortion imposes severe—and, in some cases, insurmountable—burdens. *See, e.g., Hellerstedt*, 136 S. Ct. at 2313 (“increased driving distances” can create an undue burden); *Planned Parenthood SE, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1355-56 (M.D. Ala. 2014) (as a result of increase in travel distance to access abortion, “[a] significant number of [affected] women would be prevented from obtaining an abortion; others would be delayed in obtaining abortions, exposing them to greater risks of complications; and even the women who are able to obtain abortions would suffer significant harms in terms of time, financial cost, and invasion of privacy”). Due to the Ordinance, Nashville area women face the prospect of traveling to other abortion providers and incurring burdensome expenses, including expenses associated with transportation and lodging.

As the declaration of Dr. Sheila Katz, an expert in women’s poverty, makes clear, for poor and low-income women, the inter-city travel that would be required to seek an abortion would delay numerous women in seeking an abortion, and prevent others from being able to obtain an abortion altogether. Katz Decl., ¶¶ 29-30.<sup>13</sup> As explained by Judge Posner, while “a 90-mile trip is no big deal for persons who own a car or can afford an Amtrak or Greyhound ticket,” for patients living in poverty, the costs of travel and lodging to access an abortion in another city “may be prohibitively expensive.” *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015). Three-quarters of women seeking abortions already

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<sup>13</sup> *See Planned Parenthood SE, Inc. v. Strange*, 33 F. Supp. 3d 1381, 1395 (M.D. Ala. 2014) (finding Dr. Katz’s “testimony to be credible and helpful in understanding the effects of the law on women seeking abortions”).

struggle to meet their basic needs including housing, food, and transportation. Katz Decl., ¶ 26. Travel to seek abortion services exacerbates their hardships, especially for women who do not have access to a private vehicle to travel to an abortion clinic, who cannot afford gas, or who cannot afford overnight lodging in another city. *Id.* ¶¶ 31-42. Indeed, Tennessee law requires women to make at least two separate trips to a clinic, which compounds these travel burdens; the added time, expense and lost income from a *second* trip heightens those challenges and may in some cases simply render abortion services inaccessible to many. *Id.*, ¶¶ 28-29, 34. And, since abortion costs increase as the pregnancy advances, delayed access to abortion only compounds the burden on women forced to undergo lengthy, expensive travel. *Id.*, ¶ 50.

Courts have repeatedly struck down zoning decisions targeting abortion providers, even—unlike here—where clinics could open elsewhere in city limits. *WSWS*, 573 F. Supp. at 517–18 (“an ordinance which interferes with a woman’s exercise of her fundamental right is not safe from constitutional challenge merely because it is limited in its geographical scope”); *Deerfield*, 661 F.2d at 336 (undue burden despite evidence “that other abortion facilities are located in ‘nearby’ communities” because “immediate impact [of city action] ... [was] to forestall the availability of abortion facilities in Deerfield Beach for an indefinite period of time”); *P.L.S. Partners, Women’s Med. Ctr. Of R.I., Inc. v. City of Cranston*, 696 F. Supp. 788, 796 (D. R.I. 1988) (irrelevant that clinic “could have located . . . in several other zones”).

“Constitutional guarantees are not to be found on a map, isolated geographically, honored there, ignored here. . . . The question is not whether the activity may be engaged in elsewhere, but whether it was constitutional to restrict it in the manner chosen by the defendants.” *Id.* (internal quotation and citation omitted). Here, because the Ordinance has both the impermissible purpose and effect of imposing an undue burden on abortion access, that fundamental inquiry



must be answered in the negative. The Ordinance places an undue burden on abortion rights, and carafem has proven a substantial likelihood of success on its due process claims.

2. Carafem Is Likely to Succeed on the Merits of Its Equal Protection Claim

Carafem is also overwhelmingly likely to prove the elements of a successful Equal Protection claim. “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Clause “safeguards against the disparate treatment of similarly situated individuals as a result of government action that either burdens a fundamental right, targets a suspect class, or has no rational basis.” *Paterek v. Vill. of Armada, Mich.*, 801 F.3d 630, 649 (6th Cir. 2015) (quotation omitted).

Regardless of the level of scrutiny applied to the Ordinance,<sup>14</sup> it violates the Equal Protection Clause and is unconstitutional. A plaintiff may demonstrate that a state action lacks a rational basis “either by negating every conceivable basis which might support the government action, or by showing that the challenged action was motivated by animus or ill-will.”

*TriHealth, Inc. v. Bd. of Comm’rs, Hamilton Cty.*, Ohio, 430 F.3d 783, 788 (6th Cir. 2005).

“[T]he desire to impede a politically unpopular group is not a legitimate state interest,” *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1360 (6th Cir. 1992), and “state action based on [ ] animus alone violates the Equal Protection Clause.” *Stemler v. City of Florence*, 126 F.3d 856,

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<sup>14</sup> Both the Supreme Court and the Sixth Circuit have recognized that abortion is a fundamental right, warranting strict scrutiny where the government discriminates on the basis of that right. See *Casey*, 505 U.S. at 871; *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002) (“When a statute regulates certain ‘fundamental rights’ (e.g., voting or abortion) . . . the statute is subject to ‘strict scrutiny.’”). However, carafem has demonstrated an overwhelming likelihood of success on its Equal Protection claim even under a rational basis analysis.

873-74 (6th Cir. 1997); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996).

There is no legitimate basis for the Ordinance, which improperly distinguishes between surgical abortions—by effectively banning them from the city limits of Mt. Juliet—and numerous comparable medical procedures. Notably, the Supreme Court has recognized that “abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals.” *Hellerstedt*, 136 S. Ct. at 2315 (summarizing record evidence). With nothing but opposition to abortion purporting to justify this discriminatory treatment, the Ordinance denies carafem equal protection under the law and is unconstitutional.

a. *The Ordinance Codifies Disparate Treatment of Abortion Providers from Comparable Medical Practitioners*

While the Ordinance effectively prevents practitioners from offering surgical abortion procedures anywhere within the city limits of Mt. Juliet, comparable and even more invasive procedures are performed in the very same building as carafem’s Mt. Juliet Office. Indeed, the Providence Medical Pavilion, where carafem is located, houses several other facilities that perform a variety of outpatient surgical procedures, including those performed under general anesthesia.<sup>15</sup> Courts, including the Supreme Court, have long held that providers of outpatient surgery are similarly situated to abortion clinics. *See Hellerstedt*, 136 S. Ct. at 2315 (provision imposed heightened requirement on abortion providers “that simply is not based on differences between abortion and other surgical procedures”); *WSWS*, 573 F. Supp. at 520, 523 (no basis for ordinance to distinguish between “abortion services and other medical procedures”); *Deerfield*, 661 F.2d at 337 (record was “void of any legitimate basis” for distinguishing abortion clinic

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<sup>15</sup> *See About Your Surgery*, PROVIDENCE SURGERY CENTER, <http://providenceasc.com/about-your-surgery>.

“from other medical facilities”); *see also P.L.S. Partners*, 696 F. Supp. at 797–98 (abortion procedures constituted “minor surgery” that could be performed in outpatient settings).

b. *The Disparate Treatment of Abortion Providers is Unconstitutional*

“There is no question that abortion has been singled out for special treatment by the city of [Mt. Juliet]. . . . Absent a compelling reason for treating abortion differently . . . the special treatment conflicts with the guarantees of equal protection.” *P.L.S. Partners*, 696 F. Supp. at 798. Here, the city has failed to identify any “compelling reason” for the Ordinance—or any legitimate basis whatsoever. The Board neither introduced nor heard *any* evidence suggesting the Ordinance would serve any particular purpose before passing it, nor did it describe any ends, apart from reducing the availability of abortion, it sought to achieve. On these facts, *carafem* has a strong likelihood of success in proving the Ordinance unconstitutional. *Bannum*, 958 F.2d at 1360 (overturning zoning ordinance where “[t]he city was able to present the district court with no evidence supporting its” proffered reasons for the action); *WSWS*, 573 F. Supp. at 521-22.

The “rational relationship standard is not met when the classification relied upon by the legislative authority is ‘so attenuated as to render the distinction arbitrary or irrational.’” *Bannum*, 958 F.2d at 1361 (quoting *Cleburne*, 473 U.S. at 446). Rather, to justify a disparate treatment, “some data reflecting the extent of the [alleged] danger must exist.” *Id.* No such data exists. For instance, defendants cannot overcome the requirements of equal protection by claiming, *post hoc*, that the Ordinance is related to patient health or safety. In fact, surgical abortions are exceedingly safe, with far fewer complication risks than medical procedures unregulated by the Ordinance—including numerous outpatient medical procedures commonly performed in doctors’ offices such as colonoscopies, wisdom tooth extraction, and tonsillectomy. *Gariepy Decl.*, ¶ 28. The Supreme Court has recognized that “[v]acuum aspiration is considered

particularly safe,” *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000), and in *Hellerstedt* found “well supported” the district court’s finding that a statute requiring heightened standards for abortion care were unnecessary and did not benefit patients. 136 S. Ct. at 2315. Moreover, by barring surgical abortions, the Ordinance *undermines* patient health and safety by requiring at least some women to carry pregnancies to term, subjecting them to increased medical risk; “[n]ationwide, childbirth is 14 times more likely than abortion to result in death.” *Id.* See also Gariepy Decl., ¶ 33. As a result, the Ordinance makes reproductive health less safe for the women of metropolitan Nashville by denying them access to legal abortion services. *Id.*, ¶¶ 33-34.

Finally, the Ordinance also violates the Equal Protection clause because the record demonstrates it was motivated by anti-abortion ill-will; that is, by “animus toward the class it affects.” *Romer*, 517 U.S. at 632. The statements of Mt. Juliet politicians discussed above make clear that the introduction and passage of the Ordinance was motivated by their acknowledged “disgust” for abortion—not any legitimate interest of the municipality—and those statements provide relevant evidence that it lacks any rational basis. See *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) (statements made by decision-makers may constitute relevant evidence of discriminatory intent in an equal protection challenge).

In short, no belatedly articulated rationale can justify the Ordinance. Carafem has shown a strong likelihood of success on its equal protection claim.

3. Carafem Is Likely to Succeed on the Merits of Its Claim of Arbitrary Zoning in Violation of the United States and Tennessee Constitutions

“A zoning ordinance is unconstitutional as violative of substantive due process if it is arbitrary, capricious or not rationally related to a legitimate public purpose.” *Consol. Waste Sys., LLC v. Metro. Gov’t of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3CV, 2005 WL 1541860, at \*5 (Tenn. Ct. App. June 30, 2005). Moreover, if a zoning ordinance bars an entire

category of legitimate business, the burden is on the “zoning authority to establish that [the] total exclusion is for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants” of the municipality. *Robertson Cty., Tenn. v. Browning-Ferris Indus. of Tenn., Inc.*, 799 S.W.2d 662, 666 (Tenn Ct. App. 1990).

The Ordinance at issue here effectively bans providers of surgical abortions from the city of Mt. Juliet. Furthermore, there is no legitimate government basis for such exclusion, nor can Defendants meet their burden to identify one. Under these circumstances, the Ordinance violates carafem’s substantive due process rights. *See Consol. Waste*, 2005 WL 1541860, at \*33-34 (affirming that zoning ordinances were “arbitrary and capricious” where they applied only to one type of landfill and not to other landfills or industrial uses “which pose essentially the same threats” and where defendants had “articulated no rational reason” for the restriction).

### **C. The Ordinance Is Irreparably Harming Carafem and Its Patients**

A finding of irreparable harm is warranted when a party suffers an injury that is not fully compensable by money damages. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). The violation of due process and equal protection rights for carafem and its patients, and the denial of carafem’s patients’ constitutionally-protected right to abortion, necessarily constitute ongoing, irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury.”); *Obama for Am.*, 697 F.3d at 436 (“When constitutional rights are threatened or impaired, irreparable injury is presumed.”); *Deerfield Med. Ctr.*, 661 F.2d at 338 (“[T]he right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief.”).

The Ordinance is inflicting ongoing, irreparable harm to carafem’s patients, as it forces carafem to turn away patients seeking constitutionally protected, time-sensitive medical care.

Grant Decl. ¶¶ 25-27.<sup>16</sup> Due to capacity constraints at the only other abortion clinic in the Nashville area, the Ordinance *at minimum* subjects carafem's potential patients to weeks-long delays in their ability to obtain an abortion. *Id.* ¶¶ 28-33. Although abortion is safe throughout pregnancy, its risks increase with gestational age; by delaying access to abortion, the Ordinance imposes additional costs and health risks on women who would otherwise be able to obtain abortions earlier in pregnancy. Gariepy Decl., ¶ 32. That unquestionably constitutes irreparable harm. *See Van Hollen*, 738 F.3d at 796 (finding irreparable harm where “[p]atients will be subjected to weeks of delay ... and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal”); *Harris v. Bd. of Supervisors L.A. Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (finding irreparable harm based on increased likelihood of medical complications resulting from delayed medical care).

Such delays are a best-case scenario. Some patients are unable to secure an appointment at Planned Parenthood at all, including when that clinic is unable to provide abortion services. Grant Decl., ¶¶ 28-29. These patients face hundreds of miles of travel to access abortion services, which renders abortion inaccessible for many of carafem's low-income patients, and subject other patients to substantial delay. Katz Decl. ¶¶ 29-30. Those harms are irreparable. *See Preterm–Cleveland v. Himes*, 294 F. Supp. 3d 746, 757 (S.D. Ohio 2018) (“That Plaintiffs’ patients will have to either travel out of state to obtain the care to which they are constitutionally entitled, or otherwise carry a child to term against their wishes, establishes that they will incur an irreparable injury.”); *Planned Parenthood SE, Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1289 (M.D.

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<sup>16</sup> The Ordinance harms carafem as well as its patients. Carafem secured office space specifically for the purpose of providing surgical abortion care, and is barred from using the space for this purpose. Grant Decl., ¶¶ 8, 18.

Ala. 2013) (irreparable harm where “the increase in the burden of travel will be so great that [some women] will not obtain an abortion at all” and others would experience “delay”).

In short, each and every day the Ordinance remains in effect, it has a deleterious impact on the health and constitutional rights of Tennessee women.

**D. The Balance of Equities Weighs Strongly in Carafem’s Favor and a Preliminary Injunction Would Serve the Public Interest**

The balance of equities strongly favors carafem in this case because Defendants would suffer no harm if this Court were to enjoin Defendants from enforcing the Ordinance. Neither the city nor the public have an interest in the enforcement of unconstitutional laws. *Planned Parenthood Ass’n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (the “public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional”); *see also Deerfield*, 661 F.2d at 338-39 (no public interest in state actions that “interfere with the exercise of fundamental rights,” including the right to abortion). Moreover, any harm to Defendants would clearly be outweighed by the inability of women to exercise their constitutional right to abortion, as described above. *See Van Hollen*, 738 F.3d at 795.

**IV. A BOND IS NOT NECESSARY IN THIS CASE**

Finally, this Court should exercise its discretion and waive the Fed. R. Civ. P. 65(c) bond requirement, because the relief sought will result in no monetary loss for Defendants. *See Appalachian Reg’l Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F.3d 424, 431-32 (6th Cir. 2013) (bond estimates loss associated with compliance of preliminary injunction).

**V. CONCLUSION**

For the reasons set forth above, carafem respectfully requests that the Court enter a preliminary injunction that prohibits Defendants, their agents, and their successors in office from enforcing the Ordinance while this case is pending.

Respectfully submitted,

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Thomas H. Castelli, BPR#024849  
Legal Director  
ACLU Foundation of Tennessee  
P.O. Box 120160  
Nashville, TN 37212  
Tel.: 615-320-7142  
[tcastelli@aclu-tn.org](mailto:tcastelli@aclu-tn.org)

Andrew D. Beck\*  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
125 Broad Street  
New York, NY 10004  
Tel.: 212-549-2633  
[abeck@aclu.org](mailto:abeck@aclu.org)

Elizabeth P. Gray\*  
Heather M. Schneider\*  
Tara L. Thieme\*  
Vanessa Richardson\*  
Devon W. Edwards\*  
Sruti Swaminathan\*  
WILLKIE FARR & GALLAGHER LLP  
787 Seventh Avenue  
New York, NY 10019-6099  
[hschneider@willkie.com](mailto:hschneider@willkie.com)  
(212) 728-8187  
(212) 728-9187 *Facsimile*

*\* Pro hac vice motions forthcoming*

*Attorneys for carafem*



### **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Motion for Preliminary Injunction will be served on all defendants identified below contemporaneously with the Summons and Complaint via hand delivery:

City of Mt. Julietc/o Kenny Martin  
City Manager  
Mt. Juliet City Hall  
2425 N Mt. Juliet Road  
Mt. Juliet, TN 37122

Kenny Martin  
City Manager  
Mt. Juliet City Hall  
2425 N Mt. Juliet Road  
Mt. Juliet, TN 37122

James Hambrick  
Chief of Police  
Mt. Juliet Police Department  
1019 Charlie Daniels Parkway  
Mt. Juliet, TN 37122

Jennifer Hamblen  
Planning Director  
Mt. Juliet City Hall  
2425 N Mt. Juliet Road  
Mt. Juliet, TN 37122

/s/Thomas H. Castelli  
Thomas H. Castelli