IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LOUIS JERRY EDWARDS, M.D., on behalf of himself and his patients, ET AL.	*	
Plaintiffs	*	
	*	NO: 4:13CV00224 SWW
V.	*	
JOSEPH M. BECK, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacities, ET AL.	*	
Defendants	*	

ORDER

Plaintiffs Louis Jerry Edwards and Tom Tvedten, physicians who provide services at Little Rock Family Planning Services, Inc., bring this action under 42 U.S.C. § 1983 against members of the Arkansas State Medical Board (the "Board"), sued in their official capacities. Plaintiffs challenge the constitutionality of Arkansas Act 301 of the 2013 Regular Session of the 89th General Assembly of Arkansas, titled the Arkansas Human Heartbeat Protection Act ("Act 301" or "Act."), and they seek declaratory and injunctive relief to prevent its enforcement. Before the Court is Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (ECF Nos. 16, 17) and Plaintiffs' response in opposition (ECF No. 30). After careful consideration, and for reasons that follow, the motion to dismiss is denied.

I. Background

Act 301 amends Arkansas law governing abortions, and it will become effective on August 16, 2013.[1] *See* Act 301, § 1 (to be codified at Ark. Code Ann. §§ 20-16-1301 through 1307). Arkansas law prohibits the abortion of a "viable fetus," unless necessary to preserve the life or health of the woman or the pregnancy is the result of rape or incest. *See* Ark. Code Ann. 20-16-705. Currently, Arkansas law defines a "viable fetus" as "a fetus which can live outside of the womb," Ark. Code Ann. § 20-16-702(3), and provides that "a fetus shall be presumed not to be viable prior to the end of the twenty-fifth week of pregnancy." Ark. Code Ann.
§ 20-16-703. Act 301, however, defines "viability" as "a medical condition that begins with a detectible heartbeat." Act 301, § 20-16-1302(8).

Act 301 governs the conduct of physicians authorized to perform abortions, and a violation of the Act will result in the revocation of the offender's medical license. *See id.*,
§ 20-16-1304. Unless a pregnancy is the result of rape or incest, or an abortion is performed to save the life of the mother or in response to a medical emergency, Act 301 prohibits an abortion when a fetal heartbeat is detected and the fetus has reached a gestational period of twelve weeks. *See id.*, § 20-16-1304(a).

The Act provides that in all cases, when a woman seeks an abortion, the physician must perform

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[1] The Arkansas Constitution provides that the people have ninety days after adjournment of a legislative session to file a referendum petition and that a legislative act will not become effective during that period. *See* Ark. Const. amend. 7; *see also Fulkerson v. Refunding Bd. of Arkansas*, 201 Ark. 957, 147 S.W.2d 980 (1941). However, if a legislative act is necessary for the "preservation of the public peace, health and safety that a measure shall become effective without delay, and such necessity shall be stated" in the act, the act becomes effective immediately and remains in effect until there is an adverse vote upon referral. *See* Ark. Const. amend. 7.

Because Act 301 contains no emergency clause and no specified effective date, it will become effective on the ninety-first day after adjournment *sine die* of the 2013 General Assembly, which is May 17, 2013. *See* House Concurrent Resolution 1003, 89th General Assembly, Reg. Session, § (e). The ninety-first day after May 17, 2013 is August 16, 2013.

an ultrasound test to determine whether the fetus possesses a detectible heartbeat. *See id.*, § 20-16-1303(a)-(b)(1). If a heartbeat is detected, the physician must inform the pregnant woman in writing (1) that the fetus she is carrying possesses a heartbeat; (2) the statistical probability of bringing the unborn individual to term based on the gestational age; and (3) that an abortion is prohibited if a heartbeat is detected and the gestational period is twelve weeks or more. *See id.*, § 20-16-1303(d). Additionally, the Act provides that the pregnant woman shall sign a form acknowledging that she has received the foregoing information. *See id.*,
§ 20-16-1303(e). Act 301 assigns the defendant Board several duties, including the tasks of adopting rules for fetal heartbeat testing and determining violations of the Act.

Plaintiffs seek a declaratory judgment that Act 301 violates the Fourteenth Amendment of the United States Constitution, and they ask the Court to enjoin enforcement of the Act by way of preliminary and permanent injunctive relief.

II. Standard of Review

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all facts alleged in the complaint are assumed to be true. *Doe v. Northwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997). The complaint should be reviewed in the light most favorable to the plaintiff, *McMorrow v. Little*, 109 F.3d 432, 434 (8th Cir. 1997), and should not be dismissed if there are pled "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). A complaint cannot, however, simply leave open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery. *Id.* at 1968. Rather, the facts set forth in the complaint must be sufficient to nudge the claims "across the line from the conceivable to plausible." *Id*. at 1974.

III. Analysis

The State argues that Plaintiffs cannot demonstrate that they have standing to bring this lawsuit because they are free to provide abortion care to their patients without regard to the Act until August 16,

2013, when the Act takes effect. Defendants also argue that Act 301 is constitutional.

Standing

Article III of the United States Constitution limits the judicial power of the federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–60, 112 S.Ct. 2130 (1992). The "irreducible constitutional minimum of standing" has three elements:

> First, the would-be litigant must have suffered an 'injury in fact'; that is, an 'invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical....' Second, the would-be litigant must establish a causal connection between the alleged injury and the conduct being challenged. Third, he must show that the injury is likely to be redressed by a favorable decision.

Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996)(citing *Lujan,* 504 U.S. at 560-561, 112 S. Ct. at 2136 (1992)).

The party invoking federal jurisdiction bears the burden of establishing the foregoing elements, and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."[2] *Lujan,* 504 U.S. at 561, 112 S. Ct. at 2136 (1992)(citations omitted).

Defendants argue that Plaintiffs have failed to demonstrate an injury-in-fact because there is no

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[2]In *Lujan,* the Court detailed a plaintiff's burden to show standing at successive stages of a litigation:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136-2137 (1992).

evidence that Act 301 has been enforced against them, and the alleged injury is "speculative and conjectural." ECF No. 17, at 9-10. In *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (1973), physicians challenged a state law that proscribed abortions unless performed by a licensed physician who, based on his or her best clinical judgment, found that the pregnancy resulted in rape, the fetus would be born with a serious defect, or continuing the pregnancy would endanger the woman's life. The *Bolton* Court found that the plaintiff physicians "who [were] Georgia-licensed doctors consulted by pregnant women, . . . present[ed] a justiciable controversy and [did] have standing despite the fact that the record [did] not disclose that any one of them [had] been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." *Bolton*, 410 U.S. at 188, 93 S.Ct. at 745. The court explained: "The physician [was] the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions." *Id*. Accordingly, the court determined that the physicians had standing and "assert[ed] a sufficiently direct threat of personal detriment [and that] [t]hey should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id*.

Like the statute challenged in *Bolton*, Act 301 directly regulates the conduct of physicians authorized to perform abortions under Arkansas law. Any such physician who performs an abortion "with the specific intent of causing or abetting the termination of the life of an unborn individual whose heartbeat has been detected . . . and is twelve (12) weeks or greater gestation" is subject to license revocation. Act 301, § 20-16-1303. Plaintiffs allege and submit declarations stating that the services they provide include "abortion care at and after 12 weeks of pregnancy." ECF No. 1, ¶¶ 7-8; ECF No. 5 (Attach. Decl.). Plaintiffs further allege that absent an injunction enjoining enforcement of Act 301, they will have no choice but to turn away patients who are in need of abortion services. According to Plaintiffs, Act 301 presents them with an untenable choice: "to face license revocation for continuing to provide abortion care in accordance with their best medical judgment, or to stop providing the critical

care their patients seek." ECF No. , ¶ 19 (Compl.).

The Court finds that Plaintiffs have alleged facts demonstrating that Act 301 presents a direct threat of personal injury to them, sufficient to establish an injury-in-fact as required for Article III standing. Although the statute in *Bolton* threatened criminal prosecution, the risk or threat of medical license revocation is sufficient to establish the invasion of a legally protectable interest.

Defendants contend that Plaintiffs' challenge is premature because they have not been subjected to any licensure action under Act 301. The ripeness doctrine, which flows both from Article III's "cases and controversies" limitations and prudential considerations, is aimed at preventing federal courts, through premature adjudication, from entangling themselves in abstract disagreements. *See Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 863 (8th Cir. 2006). However, "[a] plaintiff does not have to 'await consummation of threatened injury' before bringing a declaratory judgment action." *South Dakota Min. Ass'n, Inc. v. Lawrence County* 155 F.3d 1005, 1008 (8th Cir. 1998)(quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301 (1979)). The Court finds at this pleading stage, Plaintiffs have demonstrated a realistic danger of sustaining a direct injury as a result of Act 301's operation or enforcement, and they have presented a justiciable controversy that is ripe for review. Additionally, although the State does not address the causation and redressability elements of Article III standing, the Court finds that they are satisfied in this case. There is no question that the threatened harm is traceable to the Board's enforcement of the Act and that the declaratory and injunctive relief sought would redress the asserted injuries.

The Court further finds that Plaintiffs have alleged facts sufficient to demonstrate that they have standing to assert the rights of their patients.[3] Although a plaintiff may not ordinarily claim standing to

[3]The State argues that Plaintiffs' claim to standing and ripeness is analogous to the companion claims asserted by in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), by a married couple that asserted they would want to terminate any future pregnancy. The Supreme Court held that the couple lacked standing based merely on a claim that the wife might become pregnant in the future. *See Roe v. Wade*, 410 U.S. at 128-29. The Court disagrees that this case

assert the rights of a third party, the Supreme Court has held that it is generally acceptable for physicians to assert their patients' constitutional right to have access to legal abortions. *See Singleton v. Wulff*, 428 U.S. 106, 114–18, 96 S. Ct. 2868, 2875-2876 (1976). Given the intimate, fiduciary relationship between a physician and a patient, and the fact that a patient's right to choose an abortion is inextricably tied to the ability of the physician to provide abortion services, as a prudential matter, third-party standing is justified. *See id*. Also, a patient's ability to assert her own right is hindered by obstacles. A woman may desire to "protect the very privacy of her decision from the publicity of a court suit." *Singleton*, 428 U.S. at 117, 96 S.Ct. at 2876. Another obstacle is the "imminent mootness" of an individual woman's claim: "Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost . . . . " *Id*.

The State argues that any privacy concern can be addressed by the use of pseudonyms, to protect the anonymity of a pregnant woman. But the State fails to address the mootness obstacle, which is particularly relevant in this case given that Act 301 prohibits an abortion after twelve weeks, if a fetal heartbeat is detected. In sum, the Court finds that Plaintiffs have standing to challenge Act 301 on the basis that it imposes an undue burden on their patients' right to choose.

Constitutional Challenge

The State contends that Act 301 is not subject to constitutional challenge because it "does not prohibit all abortions at any point prior to viability" and "allows for abortions in all pre-viability cases up to the point of both twelve weeks' gestational age and the detection of a fetal heartbeat." ECF No. 17, at 19. According to the State, because Act 301 only limits "*some* pre-viability abortions" it is not subject to

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presents facts analogous to those alleged in the companion complaint in *Roe*. Furthermore, the Eighth Circuit has noted '"the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases.'" *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1075 (8th Cir.1988), *rev'd on other grounds*, 492 U.S. 490, 109 S.Ct. 3040 (1989)(quoting *Margaret v. Edwards*, 794 F.2d 994, 997 (5th Cir.1986)(comparing *Roe v. Wade*, 410 U.S. 113, 123-29, 93 S.Ct. 705, 711-15 *with Doe v. Bolton*, 410 U.S. 179, 187-89, 93 S. Ct. 739, 745-46 (1973)).

constitutional challenge. ECF No. 17, at 20.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992), the Supreme Court reaffirmed the fundamental holdings of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973)--including the standard that the line between a woman's interest in control over her destiny and body and the state's interest in promoting the life or potential life of the unborn is drawn at viability–"the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection . . . . " *Casey*, 505 U.S. at 870, 112 S.Ct. at 2817 (citing *Roe v. Wade*, 410 U.S., at 163, 93 S.Ct., at 731). The *Casey* Court noted that although the line of viability may come earlier with advances in neonatal care, the attainment of viability continues to serve as the critical factor.

Plaintiffs allege that, with certain narrow exceptions, Act 301 bans all abortions beginning at twelve weeks gestation, which they assert is a pre-viability point in a pregnancy. Plaintiffs further allege that at the twelve-week mark, a fetus has a detectible heartbeat but is still months away from the point of viability, and in Arkansas, twenty percent of abortions take place at or after twelve weeks. Accepting these allegations as true, as the Court must do at this juncture, the Court finds that Plaintiffs have alleged facts sufficient to state a claim that the provision of Act 301 that prohibits abortions at twelve weeks gestation when a fetal heartbeat is detected impermissibly infringes a woman's Fourteenth Amendment right to chose to terminate a pregnancy before viability. *See Casey*, 505 U.S. at 845-846, 112 S.Ct. at 2804 (1992)(holding that an abortion law is unconstitutional on its face if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion").

IV.

For the reasons stated, Defendants' motion to dismiss (ECF No. 16) is DENIED.

IT IS SO ORDERED THIS 15th DAY OF MAY, 2013.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE