IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*, Plaintiffs, v. LESLIE RUTLEDGE, in her official capacity as Attorney General of the State of Arkansas, *et al.*, Defendant.	Case No.: 4:19-cv-00449-KGB

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION[1]

The Arkansas Department of Health ("ADH") has released a new Directive on Resuming Elective Surgeries, effective April 27, 2020 (the "April 27 Directive").[2] The April 27 Directive supplements an earlier, April 3 Directive from ADH, and it allows patients to obtain care only if they (in addition to satisfying other requirements) "have at least one negative COVID-19 NAAT test within 48 hours prior to the beginning of the procedure." Although Plaintiffs and their patients have been working diligently to obtain tests and test results within the required window, many have been unable to do so because tests and testing resources are in short supply, especially for asymptomatic individuals, and results usually take more than 48 hours. Indeed,

[1] This motion refers to this Court's April 14, 2020 temporary restraining order as "Order." Additionally, Defendants' petition for a writ of mandamus is "Pet.," and Defendants' April 27 opposition to Plaintiffs' April 22 motion for an *ex parte* TRO is "Opposition" or "Opp." All emphasis is added, and all internal quotation marks and citations are omitted unless otherwise noted.

[2] Dkt. No. 169, Ex. A.

one of Plaintiffs' patients was recently tested *twice* and both times did not receive test results within the 48-hour window necessary to secure abortion care under the April 27 Directive.[3]

Although the April 27 Directive unduly burdens all women's access to the pre-viability abortion care that the Constitution guarantees, it works especially severe harm on women who are close to the legal limit for abortion in Arkansas (21 weeks, 6 days ("21.6 weeks") from the first day of their last menstrual period ("LMP")). Today, Friday, May 1, Plaintiff Little Rock Family Planning ("LRFP") is scheduled to provide care to three women in that category: They are at 20.6 weeks LMP (Jane Doe 4), 21.2 weeks LMP (Jane Doe 1), and 21.3 weeks LMP (Jane Doe 3) as of May 1. One (Jane Doe 1) has been entirely unable to obtain a COVID-19 test. As of this morning, the other two are waiting to see if they will receive test results within the mandated 48-hour window; the clinic at which one was tested has missed the 48-hour window for at least five of LRFP's other patients this week. As a result, at least one and potentially all three of these women will be entirely denied access to pre-viability abortion care in Arkansas, unless this Court orders immediate, injunctive relief, as explained briefly below:

- LRFP patient Jane Doe 1 is the mother of a 5-year-old and a 7-month-old. She had secured a new job as a dental receptionist until she lost it due to the ongoing pandemic. Because of her limited financial resources, she had to wait to seek abortion care until she received her tax refund. Following the April 27 Directive, she unsuccessfully sought to be tested for COVID-19. ***As of Friday, May 1, 2020, she is 21.2 weeks LMP pregnant***.[4]

- LRFP patient Jane Doe 3 is the mother of a 2-year-old; she is also raising her 11-year-old brother following their mother's death in September 2019. She lost her job because of the current pandemic. She sought a COVID-19 test on April 29 at the University of Arkansas for Medical Sciences ("UAMS"), but UAMS refused to test her because they are only testing patients undergoing elective-surgery procedures in their hospital. Although she was subsequently tested at another

[3] Doe 2 Decl. ¶¶ 4–6 (Ex. 2 to this motion).

[4] *See generally* Doe 1 Decl. (Ex. 1 to this motion).

clinic in Arkansas, it could not guarantee test results within 48 hours. ***As of May 1, she is 21.3 weeks pregnant***.[5]

- LRFP patient Jane Doe 4 has two children under six, one of whom has autism and is non-verbal. Jane Doe 4 had her hours scaled back severely because of the current pandemic. Although she asked a doctor to tie her tubes after she realized she could not handle a third child, her doctor refused. After she became pregnant again, she sought to comply with the April 27 Directive by asking UAMS for a COVID-19 test. She was told she is ineligible because she is asymptomatic and is not having a procedure done at UAMS. She then asked for a test at another clinic. Although that clinic ultimately tested her, it said results would likely take five to seven days. ***As of May 1, she is 20.6 weeks LMP***.[6]

The Eighth Circuit's mandamus opinion last month addressed only whether the April 3 Directive was facially unconstitutional as applied to all patients, and specifically left open the possibility that that injunctive relief would be proper for patients who would otherwise be pushed past the legal limit for abortion in Arkansas. *See In re Rutledge*, 2020 WL 1933122 (8th Cir. Apr. 22, 2020). Even the Fifth Circuit—in an opinion heavily relied on by the *Rutledge* court—upheld injunctive relief for patients similarly situated in Texas. *See In re Abbott*, 2020 WL 1844644, at *2 (5th Cir. Apr. 10, 2020). Indeed, ***no court*** has allowed an executive order issued during the COVID-19 pandemic to be enforced against patients who would lose their right to legal abortion altogether.

Plaintiffs respectfully request immediate, *ex parte* relief for these three patients, followed by TRO briefing and preliminary-injunction proceedings for all other women similarly situated, because there are other patients on LRFP's schedule who will likewise soon be at or near the legal limit for care. *Ex parte* relief is particularly appropriate here because of the time-sensitive circumstances presented by the three Jane Does and because the Court already has the benefit of Defendants' position regarding the April 27 Directive's modification to the April 3 Directive.

[5] *See generally* Doe 3 Decl. (Ex. 3 to this motion).

[6] *See generally* Doe 4 Decl. (Ex. 4 to this motion).

Indeed, Defendants substantially addressed the issues presented by this motion for emergency relief in an April 27 opposition brief. *See* Dkt. 168. To the extent that the Court permits Defendants to oppose this motion with regard to these three women, Plaintiffs ask that this Court set a weekend briefing schedule to ensure a decision in time for these three women to receive care.[7]

STATEMENT OF FACTS

A. Abortion Is Critical, Time-Sensitive Health Care.

Patients seek abortion for a wide range of personal and complex reasons.[8] Most people who have abortions already have at least one child, and many have decided they cannot parent another at this stage of their lives.[9] Some patients have abortions because they conclude that it is not the right time to become a parent, they wish to pursue their education or career, or they lack financial resources or partner or familial support or stability.[10] Other patients seek abortions because existing medical conditions put them at greater-than-average risk of medical

[7] Plaintiffs could not seek this urgently needed relief through either of their two other pending motions: One seeks relief on behalf of a broader category of patients (*see* Dkt. 134). For the other, briefing and evidentiary submissions has been stayed, such that Plaintiffs have no mechanism to seek immediate relief for their patients based on (among other things) declarations by the Jane Does who will imminently lose the ability to obtain *any* abortion care in Arkansas (*see* Dkt. 164; *see also* Dkt. 170). Plaintiffs are cognizant of the Court's resources and do not intend to burden the Court with unnecessary motion practice. The rapidly changing landscape of Arkansas's efforts to restrict abortion care during the pandemic has required Plaintiffs to initiate multiple motion sequences, but they intend to examine in short order whether any of the pending motions could be withdrawn in view of this motion.

[8] Williams Decl. ¶ 10 (Dkt. 134-2); Cathey Decl. ¶¶ 28–29 (Dkt. 134-3).

[9] Williams Decl. ¶ 10.

[10] Williams Decl. ¶ 10; Cathey Decl. ¶ 29.

complications, because they are in abusive relationships, or because they are pregnant as a result of rape or sexual assault.[11]

Abortions are typically provided in Arkansas using one of two methods: medication abortion or surgical abortion.[12] Consistent with Arkansas law, LRFP provides (i) medication abortion up to ten weeks (seventy days) LMP, and (ii) surgical abortion up to 21.6 weeks LMP.[13] Both methods are a safe and effective means of terminating a pregnancy, although some patients have medical or other circumstances that make surgical abortion more appropriate for them.[14]

Despite its name, "surgical" abortion involves no incision or general anesthesia.[15] There are two types of surgical abortion. The first is aspiration abortion, in which gentle suction is used to safely empty the contents of the uterus.[16] The procedure usually takes approximately 5 to 10 minutes. Beginning at approximately 14 weeks LMP, and most relevant here, abortions generally require a still-very-safe but more-complex procedure known as dilation and evacuation, or "D&E" abortion, which requires more procedure and recovery time than the aspiration procedure.[17] A D&E is usually a one-day procedure, but as pregnancy progresses, it becomes a two-day procedure because patients must come into LRFP the day before to begin the

[11] Williams Decl. ¶ 10; Cathey Decl. ¶ 29.

[12] Williams Decl. ¶ 11; Cathey Decl. ¶¶ 25–26.

[13] Williams Decl. ¶¶ 12–13.

[14] Williams Decl. ¶¶ 11, 16; Cathey Decl. ¶ 27.

[15] Williams Decl. ¶ 13; Cathey Decl. ¶ 26.

[16] Williams Decl. ¶ 13; Cathey Decl. ¶ 26.

[17] Williams Decl. ¶ 13.

process of dilating their cervix.[18] A D&E requires more skill and time, and the cost of abortion care increases with the progression of a pregnancy.[19]

B. Abortion Is Extremely Safe, But Risks Increase When It Is Delayed.

As this Court recently found, abortion in Arkansas (and in the nation as a whole) "is one of the safest medical procedures available." *Little Rock Family Planning v. Rutledge*, 397 F. Supp. 3d 1213, 1279 (E.D. Ark. 2019); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016).[20] In particular, major complications—defined as complications requiring hospital admission, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases.[21] Moreover, as this Court found, "legal abortion is significantly safer for a woman than carrying a pregnancy to term and giving birth." *Id.*[22]

In the rare instances when complications from abortion do occur, they can usually be managed in an outpatient-clinic setting, either at the time of the procedure or during a follow-up visit. *Id.* at 1278–79 ("[C]omplications rarely require hospital admission").[23] "Since January 2017, LRFP" has a "rate of 0.07% for complications requiring hospital transfers." *Id.* at 1281.

Surgical abortion requires minimal personal protective equipment ("PPE").[24] For the state-mandated ultrasound before every abortion, LRFP uses only non-sterile gloves.[25] For surgical abortions, the physician uses sterile gloves (one pair per procedure) and a surgical mask

[18] Williams Decl. ¶¶ 13, 22.

[19] Williams Decl. ¶¶ 13, 19, 22.

[20] *See also* Williams Decl. ¶ 9; Cathey Decl. ¶¶ 13–14.

[21] Cathey Decl. ¶ 23; *see also* Williams Decl. ¶ 9.

[22] *See also* Williams Decl. ¶ 9; Cathey Decl. ¶ 13.

[23] *See also* Williams Decl. ¶ 9; Cathey Decl. ¶ 14.

[24] Williams Decl. ¶¶ 18, 27–28; *see* Cathey Decl. ¶ 43.

[25] Williams Decl. ¶ 18.

(worn throughout the day); the assistant uses only a surgical mask (also worn throughout the day) and gloves.[26] When necessary, LRFP uses reusable gowns and eyewear.[27]

Patients denied abortion care face serious consequences, "including greater likelihood of living in poverty, staying in abusive relationships, and experiencing mental health issues"[28] as well as "lifelong consequences for her educational attainment, her career, and her own economic well-being."[29] Some patients who cannot access abortion care immediately may seek to end their pregnancies outside the medical setting, which may lead to complications—and those complications may ultimately be life-threatening.[30]

C. LRFP's Initial Response to COVID-19.

On March 11, 2020, Governor Asa Hutchinson issued Executive Order 20-03, declaring a state of emergency in Arkansas due to the outbreak of the COVID-19 virus.[31] Ten days later, on March 21, 2020, ADH issued a public statement (the "March 21 Guidance") recommending that health care facilities and clinicians "prioritize urgent and emergency visits and procedures now and for the coming several weeks."[32] The letter's stated goals were to "preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and

[26] Williams Decl. ¶ 18.

[27] Williams Decl. ¶ 18.

[28] Cathey Decl. ¶64.

[29] Stuebe Decl. ¶ 28 (Dkt. 160-1).

[30] Stuebe Decl. ¶ 29(f).

[31] Executive Order to Declare an Emergency, As Authorized by Ark. Code Ann. § 12-75-114, and Order the Arkansas Department of Health to Take Action to Prevent the Spread of COVID-19, as Authorized by Ark. Code. Ann. § 20-7-110, EO 20-03 (March 11, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-03.__1.pdf.

[32] Dkt. 134-4.

expand available hospital capacity during the COVID-19 pandemic."[33] The ADH stated that "[p]rocedures … that can be safely postponed shall be rescheduled to an appropriate future date." The ADH's guidance also provided specific exemptions for "small rural hospitals under 60 beds," and clarified that procedures should proceed if there is risk of "progression of staging of a disease or condition if surgery is not performed."[34] The ADH reiterated this guidance in another letter issued on March 30, 2020.[35]

In the meantime, beginning in mid-March, LRFP began to implement measures to protect its patients and staff.[36] LRFP determined that it would cease providing basic gynecological care—i.e., pap smears, STD testing, and contraceptive counseling and services—and that, where possible and permitted by law, prescriptions would be administered over the phone.[37] LRFP also began performing enhanced telephonic and in-person screening of patients for COVID-19 symptoms, and staggering patient-appointment times to reduce the number of patients at the facility at any given time, minimizing possibilities for exposure.[38]

LRFP expanded on and formalized these precautions in its April 2, 2020 COVID-19 Response Protocol (the "LRFP Protocol"). That protocol sets forth detailed information about (1) postponement of LRFP services for which delay would not risk harm to the patient (i.e., certain gynecological care); (2) screening patients for symptoms of infection, both telephonically and on site; (3) staggering appointment times to minimize in-person contact and shorten the time

[33] *Id.*

[34] *Id.*

[35] Dkt. 134-5.

[36] Williams Decl. ¶ 25.

[37] Williams Decl. ¶ 25.

[38] Williams Decl. ¶ 25.

patients spend in the clinic; (4) spacing individuals at least 6 feet apart in waiting areas to comply with the State's and CDC's "social distancing" guidelines; (5) limiting visitors and support people by requiring that they sit in cars or return home until patients are ready to be picked up; (6) performing temperature checks on all individuals entering the building (including staff); and (7) enhancing infection-control protocols with frequent clinic sanitization and patient-etiquette education.[39] Given these changes, no more than 6 to 8 patients are in LRFP's waiting room at any given time, and once patients are checked in for care, they are in individual treatment rooms except for the time they spend in recovery, during which they are at least 6 feet apart.[40]

The LRFP Protocol also states that "LRFP is aware of the PPE shortage our healthcare system is currently facing," and "is committed to using only the PPE that is necessary to protect [its] patients and staff."[41] LRFP is self-sustaining in terms of PPE for the next several months, and has not availed itself of any PPE offered by the State's medical society.[42] LRFP has no intention of using any state PPE stockpiles or resources, and is prepared to switch to cloth/reusable masks should it become necessary.[43] Care at LRFP does not require the use of N-95 masks, the PPE that appears to be in shortest supply in battling the COVID-19 pandemic.[44] Likewise, because all LRFP's procedures are performed in its own outpatient facility, LRFP is not using any hospital resources that may be needed for COVID-19 response—no hospital staff

[39] Dkt. 134-6.

[40] Williams Decl. ¶ 26.

[41] Dkt. 134-6.

[42] Williams Decl. ¶ 27.

[43] Williams Decl. ¶ 27.

[44] Williams Decl. ¶ 28.

or supplies, no hospital beds (let alone ICU beds), and no ventilators.[45] LRFP is strictly adhering to its Protocol.[46]

D. Further State Action Against LRFP And Its Patients.

On April 3, 2020, the ADH issued a Directive reiterating the goals and instructions from the ADH's March 21 Guidance (the "April 3 Directive").[47] The April 3 Directive, like the March 21 Guidance before it, was not intended to stop the provision of medical care in the State; rather, it again stated that "[p]rocedures . . . that can be safely postponed shall be rescheduled to a future date."[48] It further stated that "urgent" care and "care designated as an exception . . . will continue," including situations in which "there is a risk of . . . progression of staging of a . . . condition if surgery is not performed."[49]

On April 4, 2020, Governor Hutchinson issued Executive Order 20-13, declaring "the entire state an emergency disaster area," and prohibiting "gatherings of more than ten (10) people in any confined indoor or outdoor space" "until further notice."[50] The Governor declined, however, to issue a stay-home order to all Arkansas residents, and continued to permit "gatherings of ten (10) or more people in . . . parks, trails, athletic fields and courts, parking lots, golf courses, and driving ranges where social distancing of at least six (6) feet can be easily

[45] Williams Decl. ¶ 28.

[46] Williams Decl. ¶ 29.

[47] Dkt. 134-7.

[48] *Id.*

[49] *Id.*

[50] Executive Order to Amend Executive Order 20-03 Regarding the Public Health Emergency Concerning COVID-19 for the Purpose of Imposing Further Restrictions to Prevent the Spread of COVID-19, EO 20-13, § 2(a) (Apr. 4, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-13._.pdf.

maintained."[51] The Order also does "not apply to businesses, manufacturers, construction companies, places of worship, the Arkansas General Assembly, municipal or county governing bodies, or the judiciary," though those entities were also advised to maintain appropriate social-distancing practices.[52] Finally, the Order stated that "pursuant to Ark. Code Ann. § 20-7-101, violation of a directive from the Secretary of Health during this public health emergency is a misdemeanor offense, and upon conviction thereof is punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment not exceeding one (1) month, or both."[53]

Although Defendants repeatedly assured LRFP it was acting consistently with the April 3 Directive, ADH inspectors hand-delivered a cease-and-desist order (the "C&D Order") to LRFP on the morning of April 10.[54] The C&D Order asserted that LRFP was "in violation of the April 3, 2020 Arkansas Department of Health Directive on Elective Surgeries."[55] The C&D Order stated that the April 3 Directive "mandates the postponement of all procedures that are not immediately medically necessary during the COVID-19 emergency," and thus, according to ADH, the "prohibition applies to surgical abortions that are not immediately necessary to protect the life or health of the patient."[56] The C&D Order ordered LRFP to "immediately cease and desist the performance of surgical abortions, except where immediately necessary to protect the

[51] *Id.* § 2(b).

[52] *Id.* § 2(c).

[53] *Id.* § 13.

[54] Dkt. 134-1.

[55] *Id.*

[56] *Id.*

life or health of the patient."[57] The C&D Order also stated that "[a]ny further violations of the April 3 Directive will result in an immediate suspension of [LRFP's] license."[58] On April 10, LRFP was scheduled to provide surgical-abortion care to 8 patients whom LRFP had to turn away, including one patient at 17 weeks LMP.[59]

The Governor recently confirmed Arkansas's abundance of available hospital beds and health care workers,[60] and Arkansas acknowledged in its Eighth Circuit filings "that it will have sufficient medical equipment to weather the crisis." Pet. 4. Arkansas has also relaxed telemedicine rules for every medical treatment except abortion; consequently, the state-mandated informed-consent process must still occur in-person 72 hours before any abortion procedure.[61]

E. Medical Experts Have Determined That Abortion Remains Critical, Time-Sensitive Health Care That Should Not Be Delayed During the Pandemic.

Widely respected national medical organizations have concluded that abortion is a time-sensitive, urgent form of health care that even the COVID-19 pandemic should not delay:

- ACOG, the American Board of Obstetrics & Gynecology, the American Association of Gynecologic Laparoscopists, the American Gynecological & Obstetrical Society, the American Society for Reproductive Medicine, the Society for Academic Specialists in General Obstetrics and Gynecology, the Society of Family Planning, and the Society for Maternal-Fetal Medicine issued a joint statement on "Abortion Access During the COVID-19 Outbreak" providing that "[t]o the extent … hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19

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[57] *Id.*

[58] *Id.*

[59] Williams Decl. ¶ 38.

[60] *Arkansas Gov. Asa Hutchinson on Why He Hasn't Issued a Stay-at-Home Order*, PBS (Apr. 8, 2020), https://www.pbs.org/newshour/show/arkansas-gov-asa-hutchinson-on-why-he-hasnt-issued-a-stay-at-home-order; *see* Veronica Stracqualursi, *Arkansas Governor Defends No Stay-at-Home Statewide Order as 'Successful,'* CNN (Apr. 12, 2020) https://www.cnn.com/2020/04/12/politics/arkansas-governor-no-stay-at-home-order-coronavirus-cnntv/index.html.

[61] Dkt. 134-11.

pandemic, abortion should not be categorized as such a procedure."[62] Abortion, these expert medical organizations concluded, "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[63]

- The American Medical Association ("AMA")—the country's largest medical organization and one of its foremost authorities on medical and public-health matters—concurs. The AMA's March 30, 2020 Statement on Government Interference in Reproductive Health Care disapproves of efforts "to ban or dramatically limit women's reproductive health care" during the COVID-19 outbreak by "labeling procedures as 'non-urgent.'"[64]

- On April 4, 2020, the World Health Organization ("WHO") issued a similar statement concluding that "[a]bortion is considered an essential service during the coronavirus pandemic" and that "services related to reproductive health are considered to be part of essential services during the COVID-19 outbreak."[65]

- The Ambulatory Surgery Center Association's and the American College of Surgeons recommend that consideration of whether a surgery should appropriately be delayed during the pandemic must account for risk to the patient, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."[66]

At least 19 States and the District of Columbia have similarly concluded that abortion is an essential aspect of women's healthcare that should continue despite the challenges posed by COVID-19.[67] As one large group of States explained in an amicus brief, "because abortions cannot readily be postponed for weeks or months, and also effectuate the constitutional right to choose to terminate a pregnancy prior to fetal viability, abortions are on a different footing from

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[62] Dkt. 134-12.

[63] *Id.*

[64] Dkt. 134-13.

[65] Dkt. 134-14.

[66] Dkt. 134-15.

[67] *See* Amicus Br. for New York et al. in Support of Respondents, *In re Rutledge*, No. 20-1791 (8th Cir.) [hereinafter "States Amicus Br."]; Dkt. 134-16 ("The order provides that it shall not be interpreted in any way to limit access to family planning services, including termination of pregnancies.").

the types of medical services that can be considered 'nonessential.'"[68]

F. The Eighth Circuit's Decision.

Relying on Plaintiffs' preliminary evidence, including the evidence cited above, this Court previously issued a TRO enjoining Arkansas from enforcing the C&D Order to bar surgical abortions. *See* Order 1. It also scheduled a preliminary-injunction hearing for April 24.

On the morning of April 22, the Eighth Circuit issued a writ of mandamus vacating the TRO. According to the Eighth Circuit, the C&D Order was valid because it had a "'real or substantial relation' to the public health crisis" and was not "'beyond all question, a plain, palpable invasion' of the right to abortion." *See In re Rutledge*, 2020 WL 1933122, at *5 (8th Cir. Apr. 22, 2020) (quoting *Jacobson*, 197 U.S. at 31). In the Eighth Circuit's view, the C&D Order "effectuate[d]" Arkansas's "interest in conserving PPE resources and limiting social contact among patients, healthcare providers, and other staff," and was a "legally valid response to the circumstances confronted by the Governor and the state health officials." *Id*. The court of appeals believed that scrutinizing "the State's policy determinations in how best to combat COVID-19" to determine whether banning surgical abortions *actually* conserved PPE and enhanced social distancing was inappropriate because it would allow courts to "usurp the functions of another branch of government." *Id.* at *6. The Eighth Circuit instructed this Court to vacate its TRO, which this Court did. *See* Dkt. 154.

The Eighth Circuit did not specifically consider the propriety of injunctive relief for women who would otherwise be pushed past the legal limit for abortion in Arkansas. *See Rutledge*, 2020 WL 1933122, at *8. Even the Fifth Circuit—in an opinion heavily relied on by

[68] States Amicus Br. 4.

the *Rutledge* decision—allowed injunctive relief for women similarly situated in Texas. *See In re Abbott*, 800 F. App'x 293, at *2 (5th Cir. 2020).

G. Plaintiffs Seek Further Relief.

On April 22—the same day that the Eighth Circuit issued its decision—Plaintiffs sought an *ex parte* TRO to allow women who would be pushed past the legal limit for abortion in Arkansas by the time the C&D Order was lifted. Along with their motion, Plaintiffs submitted evidence showing that a least six such women were already on LRFP's schedule.[69]

Also on April 22, Governor Hutchinson and ADH's Dr. Nathaniel Smith announced that ADH would release a new directive. During the press conference—and despite Defendants' statement to this Court as recently as Tuesday, April 21 that a ban on surgical abortions is necessary in view of PPE-related "concern[s]," Dkt. 153—the Governor stated that Arkansas now feels "comfortable" with its PPE supply.[70] And—again, contrary to Defendants' statements that surgical abortion care must be banned in view of an urgent need to reduce social contacts, Dkt. 153—the Governor also announced that restaurants would be able to resume dine-in service on May 11.[71]

On April 23, Plaintiffs filed a status report, Dkt. 166, asking the Court to cancel the April 24 preliminary-injunction hearing. Plaintiffs explained that "Plaintiffs do not want to waste the time and resources of the Court, parties, or witnesses by taking live testimony at the evidentiary

[69] Williams Third Supp. Decl. ¶ 6 (Dkt. 164-2).

[70] *See*, *e.g.*, John Moritz, *State Cases at 2,276; Hospitals to Resume Elective Surgeries*, Arkansas Democrat Gazette (Apr. 22, 2020), https://www.arkansasonline.com/news/2020/apr/22/watch-live-gov-state-health-officials-give-130-pm-/.

[71] Gov. Asa Hutchinson, *Press Release: Limited Dine-in Restaurant Service May Resume May 11, Governor Announces* (Apr. 29, 2020), https://governor.arkansas.gov/news-media/press-releases/limited-dine-in-restaurant-service-may-resume-may-11-governor-announces.

hearing scheduled for" April 24 "that could be mooted with a matter of days by the new, April 27 Directive." Dkt. 166, at 3. Plaintiffs expressly reserved their rights to pursue their pending requests for injunctive relief, including through an evidentiary hearing, and reiterated their request for "emergency relief with regard to the April 3 Directive for patients who will be pushed past the legal limit for abortion care in Arkansas." *Id.*

After Defendants informally contacted the Court to acquiesce in Plaintiffs' request to cancel the April 24 preliminary-injunction hearing, the Court canceled the hearing. *See* Dkt. 167, at 2. The Court also extended the Defendants' time to respond to Plaintiffs' April 22 motion for an *ex parte* TRO until April 27. *Id.*

H. Arkansas Issues the April 27 Directive.

On April 27, Defendants opposed Plaintiffs' motion for injunctive relief. Defendants argued that the Eighth Circuit had already rejected Plaintiffs' arguments and that Plaintiffs' request for an *ex parte* TRO was mooted by the April 27 Directive.[72] The April 27 Directive supplements the April 3 Directive, and it allows individuals to obtain pre-viability, surgical abortion care only if they satisfy certain criteria. Although Plaintiffs can satisfy most of those criteria, the April 27 also imposes a requirement that is much more difficult to satisfy—namely, that a COVID-19 asymptomatic patient "must have at least one negative COVID-10 NAAT test within 48 hours prior to the beginning of the procedure."[73]

Under the current landscape of COVID-19 testing, a 48-hour turnaround for results is possible only with what is commonly referred to as "rapid" testing.[74] Rapid testing is available

[72] Dkt. No. 169, Ex. A.

[73] Dkt. No. 169, Ex. A.

[74] Stuebe Supp. Decl. ¶ 6 (Ex. 6 to this motion).

through a limited number of biopharmaceutical companies (*e.g.*, Abbot Laboratories and Mesa Biotech).[75] The Arkansas Hospital Association has specifically questioned Arkansas's ability to meet testing demand, noting "ongoing scarcity of test kits and other supplies."[76] An ADH representative similarly acknowledged in a statement to the press that "[r]ight now, we don't have the capacity to test everyone."[77] Indeed, there is a nationwide shortage of COVID-19 tests.[78]

I. Forcing Women To Continue Their Pregnancies During the Pandemic Is Harming Patients.

Every day that a woman remains pregnant against her will, she experiences the significant emotional and physical consequences of continuing pregnancy. The physical consequences include preeclampsia, gestational diabetes, high blood pressure, worsening autoimmune conditions, nausea, and vomiting.[79] Emergency room visits occur for approximately half of pregnant patients, with 23% visiting the emergency room twice or more due to complications and 49% doing so at least once.[80] Even in uncomplicated pregnancies, frequent prenatal medical visits and testing is required.[81] All entail frequent contact with providers, and thus increased risk of contracting COVID-19.

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[75] Stuebe Supp. Decl. ¶ 6.

[76] Associated Press, *Group Casts Doubt on Arkansas Supplies as Virus Tests Spike*, Texarkana Gazette (Apr. 25, 2020), https://www.texarkanagazette.com/news/arkansas/story/2020/apr/25/group-casts-doubt-arkansas-supplies-virus-tests-spike/825412/.

[77] Melissa Zygowicz, *Getting Tested for Coronavirus in Arkansas: What You Need to Know*, THV11 (Apr. 23, 2020), https://www.thv11.com/article/news/health/coronavirus/getting-tested-for-coronavirus-in-arkansas/91-67855eb9-4fb8-4308-8d92-1bc310c71b17.

[78] Stuebe Supp. Decl. ¶ 14.

[79] Cathey Decl. ¶¶ 18–20.

[80] Stuebe Decl. ¶¶ 28–29.

[81] Cathey Decl. ¶ 44.

Continued pregnancy also requires regular appointments with ultrasounds and laboratory testing,[82] which also require significant contacts with providers.[83] Every pregnancy carries a 15 to 20 percent risk of miscarriage, which often occurs in the first trimester; in approximately half of miscarriages, medical attention, often at a hospital, is required.[84] Additionally, pregnant patients who exhibit signs of COVID-19—many of which, such as shortness of breath, are common to pregnant women—are instructed to immediately seek care at an emergency room.[85]

If a woman is forced to give birth against her will, she will likely endure a considerable labor period; additionally, one-third of pregnancies result in caesarean section, a major abdominal surgery.[86] Throughout labor, delivery, and recovery, patients use hospital beds and are in close contact with large numbers of people.[87]

Unwilling pregnancy also carries significant emotional consequences: She is at greater risk of suffering from anxiety and loss of self-esteem.[88] Jane Doe 1 in particular is at significant risk for a recurrence of post-partum depression.[89] Jane Doe 4 has been "so stressed out these last couple months," is "physically and mentally exhausted," and has "been crying every day because" she is being forced to carry her pregnancy against her will.[90] Jane Does 1 and 3 are

[82] Stuebe Decl. ¶ 29(b).

[83] Cathey Decl. ¶ 44.

[84] Cathey Decl. ¶ 23; Stuebe Decl. ¶ 29(b).

[85] Cathey Decl. ¶¶ 46-47.

[86] Cathey Decl. ¶¶ 50, 21.

[87] Cathey Decl. ¶ 54.

[88] Stuebe Decl. ¶ 27.

[89] Doe 1 Decl. ¶ 12; Doe 3 Decl. ¶ 9.

[90] Doe 4 Decl. ¶ 15.

experiencing significant physical pain and discomfort in connection with their pregnancies.[91] And a woman who is forced to carry her pregnancy to term against her will suffers "lifelong consequences for her education attainment, her career, and her own economic well-being."[92] Indeed, as Jane Doe 1 explains, she "do[es]n't know what [she is] going to do if [she] cannot get an abortion"; she is not currently working because of the pandemic and has two other children to raise—they are "just barely getting by now as it is."[93] Jane Doe 4 echoes that if she "can't get the care [she] need[s], [her] life and [her] family's life will be irrevocably changed despite doing everything in [her] power to get the care [she] need[s]."[94]

J. Plaintiffs' Patients' Unsuccessful Efforts to Obtain Testing.

Since the State's announcement of the new Directive on April 24, LRFP's clinic director has been working diligently to help Plaintiffs' patients obtain COVID-19 tests.[95] She has contacted over 15 different locations—including hospitals, urgent-care facilities, clinics, diagnostic centers, and private laboratories—in and around Little Rock, but has been unable to identify a location that is (i) willing to test asymptomatic patients, and (ii) able to reliably turnaround results within 48 hours.[96] A majority of the locations contacted would not test asymptomatic patients at all, and others could not commit to turning around results within 48 hours.[97]

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[91] Doe 1 Decl. ¶ 14.

[92] Stuebe Decl. ¶ 27.

[93] Doe 1 Decl. ¶¶ 10, 11.

[94] Doe 4 Decl. ¶ 15.

[95] Williams Fourth Supp. Decl. ¶ 7 (Ex. 5 to this motion).

[96] Williams Fourth Supp. Decl. ¶ 7.

[97] Williams Fourth Supp. Decl. ¶ 7.

Since the April 27 Directive became effective, LRFP has had to turn away 8 patients scheduled to receive surgical abortion care due to their inability to receive a COVID-19 test and/or obtain test results within 48 hours of the beginning of their procedure.[98]

Each individual woman identified above has tried unsuccessfully to obtain a test and/or test results:

- Jane Doe 1 first tried to get tested in Louisiana, but it is only open on Tuesdays and Thursdays, and it had to stop testing early on Tuesday, April 28 because it ran out of tests.[99] On April 29, she drove four hours to UAMS, but UAMS told her she was not eligible for a test because she had no COVID-19 symptoms and was not scheduled for surgery at UAMS.[100] By the time she left UAMS, it was too late in the day to get a test at any other clinic in the Little Rock area.[101] And April 29 was the last day for her to obtain a test 48 hours ahead of her May 1 appointment at LRFP.[102]

- On April 29, Jane Doe 3 tried to get tested at UAMS, but was told she did meet its testing requirements.[103] Although she found a clinic in Little Rock that would test her, that clinic could not guarantee results within 48 hours—even though she would need results within 48 hours to be able to access any form of pre-viability abortion care in Arkansas.[104]

- On April 29, Jane Doe 4 drove ten hours round-trip to try to get a test at UAMS.[105] UAMS refused to test her, saying that it would not test people who were asymptomatic unless they were having procedures done at UAMS.[106] Doe 4 next went to another clinic, which agreed to test her for COVID-19 after initially refusing to do so.[107] But it informed her that "there was virtually no chance [the

[98] Williams Fourth Supp. Decl. ¶ 9.

[99] Doe 1 Decl. ¶ 7.

[100] Doe 1 Decl. ¶ 8.

[101] Doe 1 Decl. ¶ 8.

[102] Doe 1 Decl. ¶ 9.

[103] Doe 3 Decl. ¶ 6.

[104] Doe 3 Decl. ¶¶ 6, 9.

[105] Doe 4 Decl. ¶ 12.

[106] Doe 4 Decl. ¶ 12.

[107] Doe 4 Decl. ¶ 13.

> results] would be back within 48 hours" because they "usually take[] five to seven days."[108]

Other LRFP patients have similarly been unable to satisfy the April 27 Directive's testing requirement. For example, Jane Doe 2 was able to secure a COVID-19 test on April 26, but she has yet to receive the results of that test.[109] As a result, she had to cancel her April 28 appointment at LRFP and reschedule it for April 30.[110] She was again tested for COVID-19 on April 28, but she similarly has not received the results of that test.[111] She accordingly had to cancel her April 30 appointment at LRFP, too.[112] LRFP has numerous other women on its schedule who are approaching the 21.6-weeks-LMP legal limit for abortion care in the State.[113]

K. Arkansas's Plans to Lift Restrictions on Other Businesses.

The State's promulgation of a testing requirement for people seeking pre-viability, surgical abortions is inconsistent with its plan to open certain businesses without testing requirements. ADH announced on April 29 that restaurants could reopen for dine-in service on May 11.[114] Restaurants are not limited to serving individuals who have tested negative for COVID-19, nor are they required to test their employees.[115] Similarly, gyms, fitness centers,

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[108] Doe 4 Decl. ¶ 14.

[109] Doe 2 Decl. ¶ 4.

[110] Doe 2 Decl. ¶ 5.

[111] Doe 2 Decl. ¶ 6.

[112] Doe 2 Decl. ¶ 6.

[113] Williams Fourth Supp. Decl. ¶ 10.

[114] Ark. Dep't of Health, *Directive on Resuming Restaurant Dine-in Operations* (Apr. 29, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Resume_Restaurant_Dine_In_May_11_directive_FINAL.pdf.

[115] Ark. Dep't of Health, *Directive on Resuming Restaurant Dine-in Operations* (Apr. 29, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Resume_Restaurant_Dine_In_May_11_directive_FINAL.pdf.

athletic clubs, and weight rooms are allowed to reopen May 4, and there is no expectation that staff or patrons be tested.[116] Indeed, there is no general expectation that asymptomatic individuals will be tested anywhere outside the context of the April 27 Directive. According to Governor Hutchinson, the number of individuals tested "depends upon who is symptomatic out there and whether they feel the need to be tested."[117]

In contrast, the April 27 Directive has no apparent expiration date. The Directive was issued under ADH's general authority, outlined in Arkansas Code Sections 20-7-109 and -110. Although Defendants may argue that the April 27 Directive is time-limited because Arkansas limits the duration of states of emergency in Arkansas Code Section 12-75-107, nothing in Sections 20-7-109 or -110 references Section 12-75-107 or mentions emergencies at all. Rather, Arkansas Code Sections 20-7-109 and 20-7-110 simply "confer[] on the State Board of Health" the power "to make all necessary and reasonable rules of a general nature" on several specific topics. Ark. Code § 20-7-109.

L. The April 27 Directive Leaves Women with No Good Options.

The April 27 Directive exacerbates the already-significant obstacles that women seeking abortion care in Arkansas face. Its testing requirement necessarily requires her to delay her care by *at least* two days, even in the best case scenario. *See supra* p.15.

Delaying abortion care across the board for a COVID-19 test is especially unwarranted in

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[116] Ark. Dep't of Health, *Directive for Gym, Fitness Center, Athletic Club, and Weight Room Reopening* (Apr. 30, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/GymFitnessCenterResumeDraft4.29.20.pdf.

[117] *See* Governor of Arkansas Asa Hutchinson Press Conference, YouTube (Apr. 23, 2020), https://www.youtube.com/watch?v=q334YKr9h3M; Haleigh Schmidt, *Gov. Announces Plans to Reopen State Parks*, 5 News (Apr. 28, 2020), https://www.5newsonline.com/article/news/community/gov-announces-plans-to-reopen-state-parks/527-2f98623d-d16a-440b-b5fe-986de52c2f1c.

view of Arkansas's otherwise permissive approach to letting individuals mix and mingle in restaurants and gyms without negative COVID tests, *see supra* pp.20–21, and because the tests are often ineffective.[118] Several reports have called into question the accuracy of COVID-19 rapid tests.[119] Clinical pathologists and lab scientists at the Cleveland Clinic, for example, said a common rapid testing system, developed by Abbott Laboratories, produce high levels of false negatives.[120] The Cleveland Clinic study found that the rapid testing system produced a false-negative rate of 14.8 percent.[121]

The Directive's rapid-testing requirement not only is a substantial barrier to pre-viability abortion care in itself, but also compounds pre-existing barriers to such care in Arkansas. Arkansas has yet to waive or transition to telemedicine the requirement that women seeking abortion care receive State-mandated informed-consent information in-person at LRFP at least 72 hours before their procedure.[122] When the April 27 Directive is combined with the in-person 72-hour consent requirement, a woman seeking an abortion must therefore visit *both* LRFP and a rapid-testing site at specific intervals before the procedure—LRFP to receive the State-mandated informed-consent information (72 hours before the procedure), and testing site for the rapid test (within 48 hours of the procedure).[123] This two-visit pre-procedure requirement is unique to the

[118] Stuebe Supp. Decl. ¶ 13.

[119] Stuebe Supp. Decl. ¶ 13.

[120] Stuebe Supp. Decl. ¶ 13.

[121] Stuebe Supp. Decl. ¶ 13; *Study Raises Questions About False Negatives From Quick COVID-19 Test*, NPR (Apr. 21, 2020), https://www.npr.org/sections/health-shots/2020/04/21/838794281/study-raises-questions-about-false-negatives-from-quick-covid-19-test.

[122] Stuebe Supp. Decl. ¶ 16.

[123] Stuebe Supp. Decl. ¶ 16.

surgical abortion context and very challenging from a resource and logistics perspective.[124] In contrast to many other "elective" procedures, surgical abortion care is available in Arkansas only at LRFP in Little Rock, a nearly 400-mile roundtrip drive from other areas of the State.[125] Because many of LRFP's patients are low income or in poverty, they struggle to overcome the logistical and economic barriers to care in the absence of the new Directive.[126] The new Directive only amplifies those barriers, and it does so when LRFP's patients are already uncommonly stressed and strapped for financial resources given the current pandemic.

Patients' lived experiences confirm the immediacy of these concerns. As Jane Doe 1 explains, she cannot provide for her two existing children if she has another child; she has lost her job and her apartment is in her boyfriend's name.[127] If they break up, she will not be able to afford an apartment and raise three children alone.[128] She also suffered from post-partum depression after the birth of her second child; if she were forced to carry another pregnancy to term, she worries her mental health would suffer and she would not be able to find another job or take care of her two children.[129]

Jane Doe 3's story is similar: She has lost her job because of the current pandemic, and is already caring for her 2-year-old daughter and 11-year-old brother.[130] She has experienced significant health problems during her pregnancy, and it has limited her ability to pursue a new

[124] Williams Fourth Supp. Decl. ¶ 10.

[125] Stuebe Supp. Decl. ¶ 16.

[126] Stuebe Supp. Decl. ¶ 16.

[127] Doe 1 Decl. ¶ 11.

[128] Doe 1 Decl. ¶ 11.

[129] Doe 1 Decl. ¶¶ 12, 14.

[130] Doe 3 Decl. ¶ 5.

job.[131] She does not know how she will manage to care for an additional child if she is forced to carry her pregnancy to term against her will.[132]

Jane Doe 4 was likewise "spread far too thin—both emotionally and financially"—even before she found out she was pregnant.[133] She has two children under six; the older child has autism and needs a lot of attention from her.[134] Her other child is a toddler.[135] If she had another child, she "simply do[es]n't know how [she] would tend to all their needs."[136] The current pandemic has also endangered her family financially.[137] Her work has been severely scaled back to the point that she is working only about 10 hours per week.[138] Even if a full-time job became available to her again, she does not think she could take it because she has no one to watch her children while schools and daycares are shut down.[139] She is "distraught" by her inability to obtain abortion care; without it, her "life and [her] family's life will be irrevocably changed."[140]

Women who will be pushed past the legal limit for abortion in Arkansas before they can comply with the April 27 Directive have no good options: The next-nearest clinic providing surgical abortions beyond 21.6 weeks LMP is in Granite City, Illinois, which is a more-than-700-mile roundtrip drive from Little Rock and is in a State with a far higher incidence of COVID-19.

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[131] Doe 3 Decl. ¶ 9.

[132] Doe 3 Decl. ¶ 10.

[133] Doe 4 Decl. ¶ 3.

[134] Doe 4 Decl. ¶ 3.

[135] Doe 4 Decl. ¶ 3.

[136] Doe 4 Decl. ¶ 3.

[137] Doe 4 Decl. ¶ 5.

[138] Doe 4 Decl. ¶ 5.

[139] Doe 4 Decl. ¶ 5.

[140] Doe 4 Decl. ¶ 15.

(Illinois has reported 52,918 confirmed cases of COVID-19 and 2,355 deaths,[141] whereas Arkansas has 3,255 reported cases and 49 deaths.[142]) And there is no guarantee that the clinic in Granite City will have the capacity to treat additional women.

Moreover, many of LFRP's patients will not be able to make the trip at all. For example, Jane Doe 1 has already spent between $200 and $300 in gas and medical expenses trying to obtain abortion care in Arkansas; she does not have the money necessary to travel to Illinois, stay in a hotel, and pay someone to watch her children.[143] Jane Doe 2 similarly cannot afford to travel to Illinois or another state to get abortion care because she does not have reliable transportation, overnight child care for her three children, or money to travel.[144] She also worries that if she takes additional time off to pursue abortion care, she could lose her job.[145]

Women who cannot afford to travel outside Arkansas to obtain abortion care will be forced to carry to term against their will or seek to terminate their pregnancy outside the medical system.[146] And those who pursue self-managed abortions may cause "infections in the uterus which can lead to further complications and may ultimately be life-threatening."[147] Indeed, the ADH's Directives will indisputably preclude the women specifically identified in this motion

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[141] *See* Ill. Dep't of Pub. Health, Coronavirus Disease 2019 (COVID-19), https://www.dph.illinois.gov/covid19 (visited Apr. 30, 2020).

[142] *See* Ark. Dep't of Health, COVID-19, https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus (visited Apr. 30, 2020); Ark. Dep't of Health, Number of COVID-19 Associated Deaths by County of Residence (Apr. 26, 2020), https://www.healthy.arkansas.gov/images/uploads/Death_Map_By_County_20200426_1000.png .

[143] Doe 1 Decl. ¶ 13.

[144] Doe 2 Decl. ¶ 13.

[145] Doe 2 Decl. ¶ 11.

[146] Williams Decl. ¶¶ 46–48; Cathey Decl. ¶¶ 63, 67.

[147] Stuebe Decl. ¶ 29(e).

from securing *any* pre-viability abortion care in Arkansas, unless this Court immediately intervenes.

ARGUMENT

Plaintiffs seek a preliminary injunction to prevent Defendants from enforcing the April 3 and 27 Directives as applied to Does 1, 3, and 4, and any other woman seeking surgical abortion care who has attempted but been unable to access a COVID-19 NAAT test and result within the mandated 48-hour window who would be beyond the legal limit for abortion care (21.6 weeks LMP) by the date that Directive is lifted. Without immediate relief, all these women will suffer imminent and irreparable injury because they will be denied *all* access to pre-viability abortion care in Arkansas that is guaranteed by the Constitution and that is necessary to prevent serious harm. As explained more below, the four factors that this Court considers in deciding whether to grant preliminary injunctive relief all tip heavily in Plaintiffs' favor: the (1) probability that the movant will succeed on the merits; (2) threat of irreparable harm to the movant; (3) balance of equities; and (4) public interest. *See Grasso Enters., LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1036 n.2 (8th Cir. 2016).

Plaintiffs are likely to succeed on the merits of their claim that the Directive, as applied to the group of women identified above, directly contravenes decades of binding Supreme Court precedent and is unjustified by the current crisis. The Directive is an outright ban on pre-viability abortion for these women, and it imposes extreme burdens on them with no countervailing benefits. *See, e.g.*, *Edwards v. Beck*, 786 F.3d 113, 1117 (8th Cir. 2015) (explaining that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."); *Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d. 1213, 1322 (E.D. Ark. 2019) (preliminarily enjoining prohibition on pre-

viability abortions). Moreover, the balance of hardships weighs decisively in Plaintiffs' favor, and the public interest would be served by blocking the enforcement of the unconstitutional and harmful Directive. This Court should grant Plaintiffs' request for injunctive relief.

I. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR SUBSTANTIVE DUE PROCESS CLAIM.

For women who cannot obtain access to COVID-19 NAAT testing within 48-hours of their procedures, the Directive entirely bars them from exercising their constitutional right to receive pre-viability abortion care in Arkansas. That renders it flatly unconstitutional under almost half a century's worth of binding precedent. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 163–65 (1973); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846 (1992) (plurality op.) (reaffirming *Roe*'s "central principle" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion"); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) ("a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability"). And that constitutional harm alone is reason enough for this Court to conclude that Plaintiffs are likely to succeed on the merits of their challenge.

Even applying the undue-burden standard, Plaintiffs are likely to succeed because the burdens of the Directive far outweigh its purported benefits. Under the undue-burden test, a regulation of abortion that "has the effect of placing a substantial obstacle in the path of a woman's choice" even "while furthering [a] valid state interest," "cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health*, 136 S. Ct. at 2309 (alteration in original) (quoting *Casey*, 505 U.S. at 877). The test "requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2298. As detailed below, nothing about the pandemic justifies denying women access to pre-viability abortion care, and the burdens of doing so are extreme.

A. The Directive Imposes Extreme Burdens on Women Seeking Pre-Viability Abortion Care.

As mentioned above, women face significant barriers to accessing COVID-19 NAAT testing and results within 48 hours of their procedures. Such a quick turnaround for results is only possible through rapid testing, which is available via a limited number of providers.[148] Although Plaintiffs have tried to identify additional, reliable access to rapid testing for their patients, they have been unable to do so.[149] And even if they are tested, the experience of Jane Does 2, 3, and 4 shows there is no guarantee women will obtain results within the 48-hour period necessary for them to have access to abortion care. *See supra* pp.19–20. Consequently, the Directives deny many women—including the women specifically identified above—*any* access to pre-viability abortion care in Arkansas, in direct contravention of the Constitution.

The burdens associated with that denial are significant. The women who will be pushed past the legal limit for abortion in Arkansas before they can comply with the April 27 Directive will be forced to carry their pregnancies to term—with all the increased risks that entails, especially during a pandemic, *see supra* pp.16–18. Even now, Jane Does 1 and 3 are experiencing significant physical pain and discomfort in connection with their pregnancies.[150] If they are unable to access abortion care immediately, Jane Does 1, 3, and 4 will need prenatal care, be at increased risk of miscarriage and complications, and then face the physically demanding events of childbirth and delivery. *See supra* pp.16–17. And they will receive that care regardless that whether or not they have COVID-19 or have been tested for COVID-19.

[148] Stuebe Suppl. Decl. ¶ 6.

[149] Stuebe Suppl. Decl. ¶ 9.

[150] Doe 1 Decl. ¶ 14.

Being forced to remain pregnant against their wills also subjects Jane Does 1, 3, and 4 to considerable emotional harm, including anxiety and loss of self-esteem.[151] Jane Doe 1 in particular is at significant risk for a recurrence of post-partum depression.[152] She "do[es]n't know what [she is] going to do if [she] cannot get an abortion"; she is not currently working because of the pandemic and has two other children to raise—they are "just barely getting by now as it is."[153] Jane Doe 4 echoes that if she "can't get the care [she] need[s], [her] life and [her] family's life will be irrevocably changed despite doing everything in [her] power to get the care [she] need[s]."[154] And Jane Doe 4 reports that she has been "so stressed out these last couple months," is "physically and mentally exhausted," and has "been crying every day because" she is being forced to carry her pregnancy against her will.[155] Jane Doe 3 similarly says that being forced to remain pregnant against her will has caused her significant "stress" and "worry[] about supporting [her] family," and that the experience "has been a major financial and emotional burden on" her.[156]

Although these women could to try to terminate their pregnancies outside the medical system, that entails significant increased risks, too.[157] And while some women may seek an abortion outside of Arkansas, the closest option for care beyond 16.6 weeks LMP is in Granite City, Illinois, a *700-mile* round-trip to a clinic that might not even have capacity to see the

[151] Stuebe Decl. ¶ 27.

[152] Doe 1 Decl. ¶ 12; Doe 3 Decl. ¶ 9.

[153] Doe 1 Decl. ¶¶ 10, 11.

[154] Doe 4 Decl. ¶ 15.

[155] Doe 4 Decl. ¶ 15.

[156] Doe 2 Decl. ¶¶ 8, 9.

[157] Stuebe Decl. ¶ 29(f).

patient.[158] Moreover, many women (including Jane Does 1 and 2) cannot afford to travel there. *See supra* p.25. And as this Court previously noted, Order 15–16, a state may not justify abortion restrictions by pointing to out-of-state options. *See*, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (holding that "the burden" of a State's "obligation" to protect citizens' constitutional rights" can be performed only where its laws operate, that is, within its own jurisdiction . . . the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do"); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014) ("[A] state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights," including abortion rights).

B. The Directive Has Few, If Any, Benefits.

The April 27 Directive's testing requirement—the only part of that Directive Plaintiffs cannot satisfy—has few, if any, benefits. To begin, there is ***certainly*** no material benefit to requiring the ***three*** individuals (Jane Does 1, 3, and 4) to comply with the April 27 Directive's testing requirement before they can obtain abortion care. They are all asymptomatic, and they have been taking precautions against contracting COVID-19. *See supra* p.30.

Nor does the Directive more generally serve the two interests Arkansas identified in opposing Plaintiffs' prior TRO motion: conserving PPE and preventing the spread of COVID-19 in Arkansas. Opp. 13. As to PPE, LRFP has all the PPE it needs and has no plans to use State PPE resources.[159] Order 14. Moreover, providing abortion care to someone who has a negative COVID-19 test requires just as much PPE as seeing an asymptomatic patient who hasn't been

[158] Stuebe Decl. ¶ 29(d).

[159] Williams Decl. ¶ 27.

able to secure a test. Indeed, conditioning a patient's abortion on obtaining a negative test requires the use of ***more*** PPE: As the Jane Does' lived experiences illustrate, attempting to secure the necessary results within 48 hours of a procedure requires patients to secure at least one, and sometimes more, actual tests, *see supra* pp.19–20—all of which require PPE to administer. And forcing a woman to continue her pregnancy will require the use of far more PPE for routine prenatal care, care for complications, and ultimately labor and delivery. *See supra* pp.16–17. By contrast, surgical abortions are performed in outpatient facilities and do not require use of ventilators or hospital beds, and hospitalizations resulting from abortion-related complications are extremely rare—much rarer than hospital visits from complications of pregnancy.[160] In addition, Arkansas has repeatedly confirmed that it has a wealth of PPE: the Governor recently acknowledged Arkansas' abundance of available hospital beds and health care workers,[161] and Defendants similarly acknowledged in its Eighth Circuit filings "that it will have sufficient medical equipment to weather the crisis," Pet. 4.

The April 27 Directive's testing requirement, especially as applied to Jane Does 1, 3, and 4, does not further the State's interest in preventing the spread of COVID-19 either. Again, none of the Jane Does have any COVID-19 symptoms, and all are taking precautions to protect against transmission.[162] Further, by forcing women to seek tests in place after place (as Jane Does 3 and 4 did, *see supra* pp.19–20), the testing requirement ***reduces*** social distancing and ***increases*** the

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[160] Stuebe Decl. ¶ 26.

[161] *Arkansas Gov. Asa Hutchinson on Why He Hasn't Issued a Stay-at-Home Order*, PBS (Apr. 8, 2020), https://www.pbs.org/newshour/show/arkansas-gov-asa-hutchinson-on-why-he-hasnt-issued-a-stay-at-home-order; *see* Veronica Stracqualursi, *Arkansas Governor Defends No Stay-at-Home Statewide Order as 'Successful,'* CNN (Apr. 12, 2020) https://www.cnn.com/2020/04/12/politics/arkansas-governor-no-stay-at-home-order-coronavirus-cnntv/index.html.

[162] Doe 1 Decl. ¶ 2; Doe 2 Decl. ¶ 7; Doe 3 Decl. ¶ 3; Doe 4 Decl. ¶ 11.

likelihood of spreading the virus. Forcing women to pursue testing at a number of sites is especially unwarranted given that the rapid COVID-19 testing required by the April 27 Directive is of only limited accuracy. *See supra* p.22.

Moreover, LRFP already practices social distancing in accordance with Arkansas's and the CDC's recommendations.[163] Order 9. Although patients will briefly come in close contact with the LRFP clinicians who are providing medical care, health care providers are trained on how to properly wash their hands, safely perform surgeries, and wear masks correctly.[164] And because individuals in Arkansas are otherwise permitted to mingle and touch surfaces at places like restaurants and gyms (not to mention receive treatment from a dentist for a cracked tooth)—all without advance COVID screening—the April 27 Directive's bar on surgical abortion care is all but certain to not improve or protect public health.

Because the April 27 Directive does not serve Arkansas's interests, it necessarily cannot outweigh the burdens on patients' constitutional rights. *Cf. Chandler v. Miller*, 520 U.S. 305, 319, 323 (1997) (holding unconstitutional Georgia law requiring candidates for political office to take a urinalysis drug test because, while it was "relatively noninvasive," it did not advance any state interests); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating de minimis poll tax, notwithstanding States' wide latitude to regulate the electoral process, because it conferred no legitimate benefit); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) (holding law unconstitutional because "the First Amendment cannot

[163] Williams Decl. ¶ 26 (Dkt. 134-2).

[164] Stuebe Decl. ¶ 26.

be encroached upon for naught" and "something . . . outweighs nothing every time" (alteration in original)).

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The burdens on the women who would be pushed past the point of viability before they can comply with the Directives undoubtedly outweigh the nominal benefits of that Directive to the State, and Plaintiffs have established that they are likely to succeed on the merits of their claim that the Directive violates the substantive due process rights of their patients. *See Casey*, 505 U.S. at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."); *see also Whole Woman's Health*, 136 S. Ct. at 2309.

C. Even Under *Jacobson v. Massachusetts*, Immediate Injunctive Relief Is Required.

Arkansas may argue that this case is resolved by the Eighth Circuit's mandamus opinion. It is not. The Eighth Circuit addressed only whether the April 3 Directive was facially unconstitutional as applied to all patients, and it specifically left open the possibility that that injunctive relief would be proper for patients who would otherwise be pushed past the legal limit for abortion in Arkansas. *See Rutledge*, 2020 WL 1933122, at *8. And even the Fifth Circuit—in an opinion heavily relied on by the *Rutledge* decision, *see id.* at *3, 5, 7—upheld injunctive relief for patients similarly situated in Texas. *See Abbott*, 800 F. App'x 293, at *2. Indeed, no court has allowed an executive order issued during the COVID-19 crisis to be enforced against patients who would lose their right to legal abortion in the state. *See Adams & Boyle, P.C. v. Slatery*, 2020 WL 1982210 (6th Cir. Apr. 24, 2020); *Robinson v. Attorney General*, 2020 WL 1952370 (11th Cir. Apr. 23, 2020); *Preterm-Cleveland v. Attorney General of Ohio*, 2020 WL

1957173 (S.D. Ohio Apr. 23, 2020); *S. Wind Women's Ctr. LLC v. Stitt*, 2020 WL 1932900 (W.D. Okla. Apr. 20, 2020).

To the extent Arkansas argues that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), compels a different result, *see* Opp. 11, it is wrong. *Jacobson* is best read for the unremarkable proposition that states may pass measures to "safeguard the public health and the public safety." 197 U.S. at 25. The Supreme Court issued *Jacobson* the same year as *Lochner v. New York*, 198 U.S. 45 (1905), at a time when courts were called on to address whether particular enactments were "within the police power of the state." *Id.* at 57. *Jacobson* thus reaffirmed a proposition courts today take for granted: if a state law has a "real, substantial relation" to public health or safety, "courts will not strike it down upon grounds *merely of public policy or expediency*." *Cal. Reduction Co. v. Sanitary Reduction Works of S.F.*, 199 U.S. 306, 318–19 (1905) (citing *Jacobson*).

At the same time, *Jacobson* made clear that a state's police powers—even during an epidemic—are subject "to the condition that *no rule* prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. To be sure, *Jacobson* observed that the "liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id*. at 26. But even then, *Jacobson* "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease," *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990), the same as courts do today for all forced or non-consensual medical treatments. *Id.*

The Supreme Court's abortion jurisprudence already accounts for the need to balance State interests against a woman's right to abortion, just as *Jacobson* instructs. In fact, *Roe*

expressly cited *Jacobson* when recognizing that the right to abortion "must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. 113, 154 (1973). The Court then performed the required balancing and concluded, categorically, that a "State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 858 (citing *Roe* and *Jacobson*). Likewise, the Court has held that "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice" must fail. *Id.* at 877.

That is not to say that the State's interest in combatting an epidemic is irrelevant. Rather, it is accounted for in the undue-burden test, which "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2310. In considering the "benefits" of state law, a court might appropriately consider the emergency nature of a regulation, or whether the "burden imposed on abortion access is 'undue.'" *Id.* And, as explained above, the Directive fails this balancing test because its burdens are extreme, while its benefits are non-existent.

In any event, Plaintiffs prevail under *Jacobson*. This Court previously applied *Jacobson* and found—correctly—that Plaintiffs prevailed because the State's earlier ban flunked each of *Jacobson*'s three prongs. *See* Order 16–17. Although the Eighth Circuit faulted the Court for not performing a more extensive *Jacobson* analysis in its Order, *see Rutledge*, 2020 WL 1933122, at *5, it did not consider whether *Jacobson* could ever justify a State's *complete* denial of pre-viability abortion care, as application of the April 27 Directive to the identified LRFP patients would do. And the evidence shows that, as applied to those women, the April 27 Directive is beyond question a violation of the constitutional right to access pre-viability abortion

care; it is not justified by the necessities of the case; nor does it bear a substantial relation to Arkansas' purported public-health interests in implementing it. *See supra* Part I.A–B.

This evidence controls, not "[u]ncritical deference to" state officials' "factual findings." *Whole Woman's Health*, 136 S. Ct. at 2310. Even *Jacobson* upheld a smallpox-vaccination requirement only upon observing that "[t]he matured opinions of medical men everywhere" agreed the vaccine was safe. 197 U.S. at 37; *see id.* at 28 (courts are "compel[led] . . . to interfere for the protection of [] persons" where state officers, "under the guise of exerting a police power, . . . violated rights secured by the Constitution"). Here, expert opinion shows that the Directive is unsafe for women and counterproductive in the fight against COVID-19.[165] Indeed, Dr. Stuebe expressly confirms that, *especially* during a pandemic, abortions are "essential" health care "because a delay in abortion care imposes a number of risks and burdens on patients"—which they may be less able to remedy during pandemic conditions—"without any benefit to public health."[166]

Moreover, the April 27 Directive—beyond question—violates the constitutional rights of Arkansas women who would be pushed past the legal limit for abortion care in Arkansas before that Directive is lifted. Even in the Fifth Circuit's view, which heavily influenced the Eighth Circuit's opinion, *Jacobson* must be applied in conjunction with the standard that governs the right the State has infringed—which, in the context of abortion, is supplied by *Casey* and its progeny. *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (faulting district court for failing to apply *Jacobson* and *Casey* together).

[165] Stuebe Supp. Decl. ¶ 7.

[166] Stuebe Decl. ¶ 31.

II. PLAINTIFFS' PATIENTS WILL SUFFER IRREPARABLE HARM IF THE BAN IS ENFORCED.

Plaintiffs' patients are suffering and will continue to suffer serious and irreparable harm in the absence of a preliminary injunction. *First*, Defendants' actions will *entirely* prevent the group of Arkansas women identified above from exercising their fundamental constitutional right to access pre-viability abortion care. "It is well-settled that the inability to exercise a constitutional right constitutes irreparable harm." *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1068 (E.D. Ark. 2017) ("*Jegley II*"); *see also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (Plaintiffs' showing of interference "with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury"); *M.B. v. Corsi*, 2018 WL 5504178, at *5 (W.D. Mo. Oct. 29, 2018) ("A threat to a constitutional right is generally presumed to constitute irreparable harm."); *Hughbanks v. Dooley*, 788 F. Supp. 2d 988, 998 (D.S.D. 2011) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (quoting 11A Charles Alan Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995))); *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

Second, forcing patients to forgo abortion care and remain pregnant against their will inflicts serious physical, emotional, and psychological consequences that constitute irreparable harm.[167] Some women will be forced to give birth; others may attempt to terminate their pregnancies outside the medical system. Some may travel across state lines, if they are even able

[167] Williams Decl. ¶¶ 22, 41–45, 49. *See also* Dkt. 134-12 (stating that the "consequences of being unable to obtain an abortion profoundly impact a person's life, health, and well-being").

to incur the additional expenses and increased likelihood of exposure to the virus that entails. *See supra* pp.24–25; *see also, e.g.*, *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (finding irreparable harm where "patients could face a delay" in obtaining abortion care). As the Supreme Court has said, "the abortion decision is one that simply cannot be postponed." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). That the State would inflict these irreparable harms on the LRFP patients identified above in the midst of a global pandemic, putting them at greater risk of contracting COVID-19, only underscores the need for injunctive relief. *See Roe*, 410 U.S. at 153 ("The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (explaining that the "disruption or denial of . . . patients' health care cannot be undone after a trial on the merits"); *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013); *Roe v. Crawford*, 396 F. Supp. 2d 1041, 1044 (W.D. Mo. 2005) (holding delay in abortion is irreparable injury due to "medical, financial, and psychological risks" associated with it), *stay of preliminary injunction denied*, 546 U.S. 959 (2005).

III. THE BALANCE OF HARMS AND PUBLIC INTEREST SUPPORT INJUNCTIVE RELIEF.

When considering the balance of harms, "[a]t base," the question is "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Plaintiffs' patients will suffer numerous irreparable harms without an injunction. If Plaintiffs' request for injunctive relief is denied, patients will be "effectively forced against

their will to remain pregnant until they give birth." *Planned Parenthood Minn., N. Dakota, S. Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1077 (D.S.D. 2011).

On the other side of the scale, Defendants will realize *no* benefits from enforcing the April 27 Directive as to the LRFP patients who would be pushed past the legal limit for abortion care in Arkansas by the time that Directive is lifted. That is particularly true given that Plaintiffs are entirely self-sustaining in terms of PPE resources and have implemented strict social-distancing practices and protocols that diminish the risk of infection at the clinic. *See supra* pp.7–9.

In this setting, injunctive relief is supported by the balance of harms and the public interest. "The Eighth Circuit has stated that 'whether the grant of a preliminary injunction furthers the public interest . . . is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.'" *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1322–23 (E.D. Ark. 2019) (citing *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008), *appeal filed*, No. 19-2690 (8th Cir.)). That is precisely the case here: The public has no interest in the enforcement of the unconstitutional Directive. *See Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1 F. Supp. 2d 958, 964 (S.D. Iowa 1998) (public interest is served by enjoining unconstitutional statute because "[t]he protection of constitutional rights clearly outweighs any interest the State may have in promoting the interests of the fetus with a statute that is unconstitutional"); *see also, e.g.*, *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015) ("[W]hen a constitutional violation is likely…the public interest militates in favor of injunctive relief because it is always in the public interest to prevent

violation of a party's constitutional rights."). Accordingly, granting Plaintiffs' request for injunctive relief serves the public interest.

CONCLUSION

For these reasons, this Court should immediately grant Plaintiffs' motion for an *ex parte* TRO as to the three women identified above, and then set TRO briefing and preliminary-injunction proceedings for all women similarly situated, to enjoin Defendants and their officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, from enforcing the April 3 and 27 Directives against women who would be pushed past the legal limit for abortion care in Arkansas before they can satisfy the Directive's requirements.

Dated: May 1, 2020

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** Motion for admission pro hac vice granted*

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