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]

On April 14, 2020, this Court issued a temporary restraining order (the "Order") enjoining Arkansas from enforcing Executive Order 20-03 (the "Executive Order"), a directive ("Directive") and a cease-and-desist order ("C&D Order") (together, the "COVID-19 Abortion Ban" or the "Ban") from Arkansas's Department of Health ("ADH") that would ban all surgical abortion care. *See* Order 1. Surgical abortion care is the only form of abortion care available after 10 weeks from the first date of a woman's last menstrual period ("LMP")—which is indisputably a pre-viability point in pregnancy. This Court issued the Order based on Plaintiffs' preliminary evidence, finding that Plaintiffs were "likely to prevail on the merits of their substantive due process claim." Order 17. Specifically, this Court found that the Ban prohibits nearly all pre-viability abortions and is therefore unconstitutional, and that the Ban also fails the

[1] This motion refers to this Court's April 14, 2020 temporary restraining order as "Order." Additionally, the Eighth Circuit's April 22, 2020 opinion granting a writ of mandamus is "Op.," and Defendants' petition for a writ of mandamus is "Pet." All emphasis is added, and all internal quotation marks and citations are omitted unless otherwise noted.

undue-burden test because it bars all surgical abortion care while failing to conserve PPE, reduce hospital demand, or improve social distancing. Order 11–16. As this Court explained, this conclusion "is consistent with the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)," which "upheld the authority of Massachusetts to enforce a compulsory vaccination law during a smallpox outbreak." Order 16. After all, *Jacobson* made plain that state infringement on constitutional rights during a crisis is impermissible to the extent it effectuates "a plain, palpable invasion of rights secured by the fundamental law" or lacks a "real or substantial relation to" the State's purpose in enacting it, and the Ban fails under both metrics. Order 16 (quoting *Jacobson*, 197 U.S. at 31).

On April 22, the Eighth Circuit vacated the Order, holding that this Court "failed to meaningfully apply the Supreme Court's framework for reviewing constitutional challenges to state actions taken in response to a public health crisis," which is set forth in *Jacobson*. Op. 13. The Eighth Circuit also held that this Court's prior undue-burden analysis of the Ban was "perfunctory," an "abuse[] of discretion," and "usurped the functions of the state government by second-guessing the State's policy choices in responding to the COVID-19 pandemic." Op. 19. The Eighth Circuit's decision prevents *any* surgical abortion from proceeding in Arkansas, even if women would be completely unable to obtain abortion care before May 11—the earliest date the Executive Order might be lifted.

No other court has upheld a complete ban on surgical abortion. Even the Fifth Circuit in *In re Abbott*, 2020 WL 1844644 (5th Cir. Apr. 11, 2020), allowed women close to the legal limit to obtain abortions during the pandemic. *Id.* at *2. It did so because those women would be barred *entirely* from obtaining abortion care if they were unable to do so immediately. *See id.*

Plaintiffs accordingly move this Court for a new *ex parte* TRO that would allow women who would be pushed past the legal limit for abortion in Arkansas to obtain that care immediately.

STATEMENT OF FACTS

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

Patients seek abortion for a wide range of personal and complex reasons.[2] 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.[3] 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.[4] Other patients seek abortions because existing medical conditions put them at greater-than-average risk of medical complications, because they are in abusive relationships, or because they are pregnant as a result of rape or sexual assault.[5]

Abortions are typically provided in Arkansas using one of two methods: medication abortion or surgical abortion.[6] Consistent with Arkansas law, Plaintiff Little Rock Family Planning ("LRFP") provides (i) medication abortion up to ten weeks (seventy days) LMP, and (ii) surgical abortion up to twenty-one weeks and six days LMP.[7] Both methods are a safe and

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

[3] Williams Decl. ¶ 10.

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

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

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

[7] Williams Decl. ¶¶ 12–13.

effective means of terminating a pregnancy, although some patients have medical or other circumstances that make surgical abortion more appropriate for them.[8]

Despite its name, "surgical" abortion involves no incision or general anesthesia.[9] 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.[10] 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.[11] 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 process of dilating their cervix.[12] A D&E requires more skill and time, and the cost of abortion care increases with the progression of a pregnancy.[13]

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).[14] In particular, major complications—defined as complications requiring

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

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

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

[11] Williams Decl. ¶ 13.

[12] Williams Decl. ¶¶ 13, 22.

[13] Williams Decl. ¶¶ 13, 19, 22.

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

hospital admission, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases.[15] Moreover, as this Court found, "legal abortion is significantly safer for a woman than carrying a pregnancy to term and giving birth." *Id.*[16]

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").[17] "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").[18] For the state-mandated ultrasound before every abortion, LRFP uses only non-sterile gloves.[19] For surgical abortions, the physician uses sterile gloves (one pair per procedure) and a surgical mask (worn throughout the day); the assistant uses only a surgical mask (also worn throughout the day) and gloves.[20] When necessary, LRFP uses reusable gowns and eyewear.[21]

Patients denied abortion care face serious consequences, "including greater likelihood of living in poverty, staying in abusive relationships, and experiencing mental health issues"[22] as well as "lifelong consequences for her educational attainment, her career, and her own economic well-being."[23] Some patients who cannot access abortion care immediately may seek to end

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

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

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

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

[19] Williams Decl. ¶ 18.

[20] Williams Decl. ¶ 18.

[21] Williams Decl. ¶ 18.

[22] Cathey Decl. ¶64.

[23] Steube Decl. ¶ 28 (Dkt. 160-1).

their pregnancies outside the medical setting, which may lead to complications—and those complications may ultimately be life-threatening.[24]

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.[25] 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."[26] The letter's stated goals were to "preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic."[27] 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."[28] The ADH reiterated this guidance in another letter issued on March 30, 2020.[29]

In the meantime, beginning in mid-March, LRFP began to implement measures to protect

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[24] Steube Decl. ¶ 29(f).

[25] 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.

[26] Dkt. 134-4.

[27] *Id.*

[28] *Id.*

[29] Dkt. 134-5.

its patients and staff.[30] 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.[31] 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.[32]

LRFP expanded on and formalized these precautions in its April 2, 2010 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 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.[33] 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

[30] Williams Decl. ¶ 25.

[31] Williams Decl. ¶ 25.

[32] Williams Decl. ¶ 25.

[33] Dkt. 134-6.

apart.[34]

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."[35] 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.[36] 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.[37] 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.[38] 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 or supplies, no hospital beds (let alone ICU beds), and no ventilators.[39] LRFP is strictly adhering to its Protocol.[40]

D. Further State Action Against LRFP And Its Patients.

On April 1, 2020, representatives from the ADH called LRFP twice to inquire about what the clinic was doing to reduce non-essential services, preserve PPE, and protect against the spread of COVID-19.[41] On both occasions, LRFP summarized the practices outlined in the

[34] Williams Decl. ¶ 26.

[35] Dkt. 134-6.

[36] Williams Decl. ¶ 27.

[37] Williams Decl. ¶ 27.

[38] Williams Decl. ¶ 28.

[39] Williams Decl. ¶ 28.

[40] Williams Decl. ¶ 29.

[41] Williams Decl. ¶ 30.

LRFP Protocol discussed above.[42] At no point during either conversation did the ADH representatives suggest that LRFP was not complying with the State's elective-surgery guidance.[43]

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").[44] 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."[45] 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."[46]

When Governor Hutchinson was asked about the April 3 Directive during an April 6, 2020 press conference, Defendant State Health Director Dr. Nathaniel Smith explained that it is "not intended to replace a physician's judgment," and reiterated that the April 3 Directive encompasses only procedures that can "be safely deferred."[47] At no point during the conference did the Governor or Dr. Smith suggest that surgical abortion was impermissible under the April 3 Directive.[48]

On April 4, 2020, Governor Hutchinson issued Executive Order 20-13, declaring "the

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[42] Williams Decl. ¶ 30.

[43] Williams Decl. ¶ 30.

[44] Dkt. 134-7.

[45] *Id.*

[46] *Id.*

[47] Channel for Gov. Asa Hutchinson, *Governor Hutchinson Provides COVID-19 Update*, YouTube (Apr. 6, 2020), https://www.youtube.com/watch?v=KS2Kb4V8U3I.

[48] Williams Decl. ¶ 31.

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."[49] 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 maintained."[50] 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.[51] 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."[52]

Protestors appear at LRFP nearly every day that it provides abortion care.[53] Between April 4 and 10, 2020, however, the harassment and intimidation from on-site protestors—who recklessly fail to exercise proper social distancing—significantly increased.[54] They summoned

[49] 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.

[50] *Id.* § 2(b).

[51] *Id.* § 2(c).

[52] *Id.* § 13.

[53] Williams Decl. ¶ 33.

[54] Williams Decl. ¶ 33.

police to the clinic twice.[55] Since the start of COVID-19 concerns, social-media complaints against the clinic have likewise increased, including some specifically requesting action by the Governor and state legislators to stop the provision of abortion care. For example, on March 29, 2020, State Senator Trent Garner announced in a tweet that he had "asked the Governor to [ban abortions] in Arkansas …. We shouldn't expose women to the risk of the Wuhan COVID-19 virus for an unnecessary elective procedure, and we could save the unborn babies."[56]

On April 7, ADH inspectors performed an unannounced in-person inspection at LRFP.[57] At no point during the inspection, which occurred on a day during which both surgical and medication abortions were provided, did the ADH representatives suggest that LRFP was not complying with the State's April 3 Directive.[58]

On April 8, 2020, the Governor gave an interview to PBS during which he discussed Arkansas's "targeted" approach to managing risks relating to COVID-19.[59] When asked whether he thinks "that by not requiring or ordering people to stay home, unless they have to be out, is not putting other people at risk," the Governor responded "No."[60] He elaborated that "as long as they do what they're supposed to do, which is social distance, wear a mask when you're out, this

[55] Williams Decl. ¶ 33.

[56] Dkt. 134-8.

[57] Williams Decl. ¶ 34.

[58] Williams Decl. ¶ 34.

[59] *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 also 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.

[60] *Id.*

accomplishes the purpose."[61] The Governor further said that currently in the State, there are "a lot of hospitals that are empty right now and health care workers that are empty,"[62] presumably meaning that health care workers are available to provide care.

On April 9, the Governor and Dr. Smith were asked at a press conference if "elective surgery" is still permitted in the State, and Dr. Smith responded that judgments at surgical centers would be left primarily to the providers.[63] At no point during the conference did the Governor or Dr. Smith suggest that surgical abortion care is not permissible under the April 3 Directive.[64]

Then, on the morning of April 10, ADH inspectors hand delivered the C&D Order to LRFP.[65] It acknowledged that the April 7 inspection "did not reveal any deficiencies with respect to the rules for abortion facilities in Arkansas," but asserted that LRFP was "in violation of the April 3, 2020 Arkansas Department of Health Directive on Elective Surgeries."[66] 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."[67] The C&D Order ordered LRFP to "immediately cease and desist the performance of surgical abortions, except where immediately necessary to protect

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[61] *Id.*

[62] *Id.*

[63] Channel for Gov. Asa Hutchinson, *Governor Hutchinson Provides COVID-19 Update*, YouTube (Apr. 9, 2020), https://www.youtube.com/watch?v=Kg-qMqmycAM.

[64] *Id.*

[65] Dkt. 134-1.

[66] *Id.*

[67] *Id.*

the life or health of the patient."[68] 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."[69] 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.[70]

The Directive and the Ban were issued under ADH's general authority, Ark. Code §§ 20-7-109, 20-7-110, and they have no expiration date. And while Arkansas may take the position that the Directive and Ban are time-limited because Arkansas limits the duration of states of emergency in Arkansas Code Section 12-75-107, nothing in Arkansas Code Section 20-7-109 or Section 20-7-110 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.

Later on April 10, the Governor and Dr. Smith held a press conference regarding COVID-19.[71] Consistent with Governor Hutchinson's decision that same week to close Arkansas's public schools for the remainder of the school year,[72] Dr. Smith admitted that he "can't say with certainty" how long the C&D Order against LRFP will be in place.[73] When a reporter pressed a question regarding whether the C&D Order means that "some of [the women

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[68] *Id.*

[69] *Id.*

[70] Williams Decl. ¶ 38.

[71] Channel for Gov. Asa Hutchinson, *Governor Hutchinson Provides COVID-19 Update*, YouTube (Apr. 10, 2020), https://www.youtube.com/watch?v=X2v1SIesdyc.

[72] Dkt. 134-9.

[73] Channel for Gov. Asa Hutchinson, *Governor Hutchinson Provides COVID-19 Update*, YouTube (Apr. 10, 2020), https://www.youtube.com/watch?v=X2v1SIesdyc.

who would otherwise visit LRFP] are going to have a baby," the Governor deflected and avoided the critical inquiry by instead asking, "[i]s there a remote [i.e., telephonic] question"?[74] The Governor recently confirmed Arkansas's abundance of available hospital beds and health care workers,[75] and Arkansas acknowledged in its Eighth Circuit filings "that it will have sufficient medical equipment to weather the crisis." Pet. 4.

Meanwhile, a range of medical services continue at facilities around the State. To take just one example, the ADH has expressly permitted orthodontists to continue seeing patients to adjust their orthodontic wires and appliances, and dentists may treat patients whom complain of a cracked tooth.[76] Acupuncturists and chiropractors are free to continue to exercise their medical judgment about what care is urgent or emergent.[77] And Arkansas has relaxed telemedicine rules for every medical treatment except abortion—indeed, even the pre-abortion-care, state-mandated informed-consent process must still occur in-person.[78]

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

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[74] *Id.*

[75] *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-cntv/index.html.

[76] Dkt. 134-10.

[77] Dkts. 160-32, 160-39.

[78] Dkt. 134-11.

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 pandemic, abortion should not be categorized as such a procedure."[79] 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."[80]

- 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.'"[81]

- 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."[82]

- 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."[83]

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.[84] As one large group of States explained in an amicus brief, "because abortions

[79] Dkt. 134-12.

[80] *Id.*

[81] Dkt. 134-13.

[82] Dkt. 134-14.

[83] Dkt. 134-15.

[84] *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.").

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 the types of medical services that can be considered 'nonessential.'"[85]

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

The COVID-19 pandemic has exacerbated the already-significant obstacles that women seeking abortion care in Arkansas face. Every day that a woman remains pregnant against her will, she not only experiences the emotional and physical consequences of continuing pregnancy, but also risks contracting the COVID-19 virus, thereby further jeopardizing her ability to visit a clinic and receive time-sensitive care.[86] In addition, the longer a woman remains pregnant—and especially if forced to carry a pregnancy to term—the heavier burden she places on the health care system, the more interactions she must have with a variety of clinicians and staff, and the much greater use of PPE her care requires.[87]

Patients' lived experiences confirm the immediacy of these concerns. As one anonymous woman who sought abortion care in Arkansas recently said, "I don't know what I would have done if [LRFP] hadn't been able to provide surgical abortions."[88] She decided to have an abortion because her husband had a history of physically and emotionally abusing her, and she was "afraid that the abuse would continue throughout [her] pregnancy" and would eventually affect her baby.[89] She explained that because she was more than ten weeks into her pregnancy,

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[85] States Amicus Br. 4.

[86] Williams Decl. ¶ 49; Cathey Decl. ¶ 69.

[87] Williams Decl. ¶ 49; Cathey Decl. ¶¶ 44–45.

[88] Doe Decl. ¶ 9 (Dkt. 160-4).

[89] Doe Decl. ¶ 5.

she could not obtain a medication abortion.[90] Because the schools at which she had contracts to teach had closed due to COVID-19, she did not have the money to make the 1,000-mile roundtrip to Atlanta, Georgia to receive abortion services.[91] Instead, the Ban forced her to consider borrowing money and "sell[ing] [her] clothes over the internet," without any certainty that she would have been able to raise enough funds.[92] Even if she were eventually able to make the trip to Atlanta, she feared that she might contract COVID-19 in the process, especially in light of the greater incidence of the virus in Georgia compared to Arkansas.[93]

Women who cannot obtain abortion care in Arkansas will have no good options: The next-nearest clinic providing surgical abortions is in Shreveport, Louisiana (a more than 600-mile roundtrip drive from Fayetteville, Arkansas), but that clinic provides care only up to 16.6 weeks LMP and is subject to continuing threats of closure.[94] Many women will thus be forced to travel to Granite City, Illinois, which is not only a more-than-700-mile roundtrip drive from Little Rock, but it—like Shreveport—is in a State with a far higher incidence of COVID-19. (Illinois has reported 17,887 cases of COVID-19 and 596 deaths,[95] whereas Arkansas has 1,171

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[90] Doe Decl. ¶ 2.

[91] Doe Decl. ¶¶ 3, 7. As this Court previously found, Order 15–16, going outside Arkansas is no solution. 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).

[92] Doe Decl. ¶ 7.

[93] Doe Decl. ¶ 8.

[94] Williams Decl. ¶ 47.

[95] *See* Ill. Dep't of Pub. Health, Coronavirus Disease 2019 (COVID-19), https://www.dph.illinois.gov/covid19 (visited Apr. 10, 2020).

reported cases and 23 deaths[96]). And there is no guarantee that the clinic in Granite City will have the capacity to treat women who would have otherwise obtained care in Arkansas. Thus, even if women obtain treatment outside Arkansas, they do so only at heightened risk of contracting COVID-19 and carrying it back to this State.

Many of LFRP's patients will not even be able to make the trip and will instead be forced to carry to term against their will or seek to terminate their pregnancy outside the medical system.[97] Such self-managed abortions may "lead to infections in the uterus which can lead to further complications and may ultimately be life-threatening."[98]

G. Forcing Women to Continue Their Pregnancies During the Pandemic Undermines Arkansas's Efforts to Fight the Pandemic.

Abortions require far less PPE, fewer contacts with medical providers, and less medical resources than forcing patients to continue pregnancies over both the immediate- ***and*** short-term. In the immediate term, complications from pregnancy frequently necessitate medical care, including from 10 weeks to 21.6 weeks LMP. The most severe forms of preeclampsia and gestational diabetes occur then.[99] High blood pressure, worsening autoimmune conditions, and nausea and vomiting also commonly require medical attention.[100] Emergency room visits occur for approximately half of pregnant patients, with 23% visiting the emergency room twice or

[96] *See* Ark. Dep't of Health, COVID-19, https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus (visited Apr. 10, 2020).

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

[98] Steube Decl. ¶ 29(e).

[99] Cathey Decl. ¶ 20.

[100] Cathey Decl. ¶¶ 18–20.

more due to complications and 49% doing so at least once.[101] Even in uncomplicated pregnancies, frequent prenatal medical visits and testing is required.[102]

Continued pregnancy also requires regular appointments with ultrasounds and laboratory testing, which requires relatively substantial PPE.[103] In addition to routine prenatal appointments, pregnant patients often have multiple contacts with providers, including in the first 20 weeks of pregnancy.[104] 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.[105] 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.[106]

If a woman is forced to give birth against her will, she will require still more PPE, close social contacts, and hospital resources. Virtually all births in Arkansas occur in hospitals.[107] Even an uncomplicated, vaginal birth is attended by at least four clinicians, over a considerable labor period, with significant use of PPE, and one-third of pregnancies result in caesarean section, a major abdominal surgery.[108] Throughout labor, delivery, and recovery, patients use hospital beds and are in close contact with large numbers of people.[109]

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[101] Stuebe Decl. ¶¶ 28–29.

[102] Cathey Decl. ¶ 44.

[103] Stuebe Decl. ¶ 29(b).

[104] Cathey Decl. ¶ 44.

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

[106] Cathey Decl. ¶¶ 46-47.

[107] Cathey Decl. ¶ 49.

[108] Cathey Decl. ¶¶ 50, 21.

[109] Cathey Decl. ¶ 54.

Conversely, 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, including in patients before 21.6 weeks LMP.[110] 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.[111] Arkansas has chosen to allow businesses and manufacturers, for example, to continue to operate, *see supra* p.10—but unlike health care professionals, the individuals who manage those facilities and the individuals permitted to visit them do not have years of training and experience with sterile technique, and are thus less likely to be compliant with transmission precautions than the medical staff at LRFP.[112]

H. The Eighth Circuit's Decision Precludes Many Women from Accessing Any Abortion Care in Arkansas.

Relying on Plaintiffs' preliminary evidence, including the evidence cited above, this Court previously enjoined Arkansas from enforcing the Ban to bar surgical abortions. *See* Order 1. But on the morning of April 22, the Eighth Circuit vacated that Order, finding that this Court had not properly applied the relevant precedent. According to the Eighth Circuit, the Ban is valid as long has it has a "'real or substantial relation' to the public health crisis" or is "'beyond all question, a plain, palpable invasion' of the right to abortion." Op. 14 (quoting *Jacobson*, 197 U.S. at 31). And, in the Eighth Circuit's view, the Ban "effectuate[s]" Arkansas's "interest in conserving PPE resources and limiting social contact among patients, healthcare providers, and

[110] Stuebe Decl. ¶ 26.

[111] Stuebe Decl. ¶ 26.

[112] Stuebe Decl. ¶ 26.

other staff," and is a "legally valid response to the circumstances confronted by the Governor and the state health officials." Op. 15. 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* conserves PPE and enhances social distancing was inappropriate because it would allow courts to "usurp the functions of another branch of government." Op. 16.

The Eighth Circuit instructed this Court to vacate its Order, which this Court has now done. *See* Dkt. 154. As a result, *no* women in Arkansas may obtain surgical abortion care. Even women who would be beyond the legal limit for abortion in Arkansas by May 11—the *earliest* that Executive Order might be lifted—cannot obtain abortion care. There are a least six such women already on LRFP's schedule through May 11, including two who are scheduled to begin a two-day procedure tomorrow, April 23, 2020.[113] Without immediate injunctive relief, they will be wholly barred from obtaining pre-viability abortions in Arkansas and will be forced to carry their pregnancies to term against their wills, seek care outside Arkansas, or attempt a self-managed abortion. To prevent those irreparable harms, Plaintiffs ask this Court to grant an *ex parte* temporary restraining order enjoining Defendants from enforcing a prohibition on surgical abortions against patients who would be beyond the legal limit for abortion care (21.6 weeks LMP) by May 11. To account for the very-real possibility that the Executive Order will be extended, the temporary restraining order should state that it applies with equal force to any new, substituted Executive Order expiration date.

ARGUMENT

Plaintiffs seek an *ex parte* TRO, and thereafter a preliminary injunction, to prevent Defendants from enforcing the Ban as applied to individuals who would be beyond the legal

[113] Williams Third Supp. Decl. ¶ 6 (Ex. 2 to this Motion).

limit for abortion care (21.6 weeks LMP) by May 11 (or any subsequent date to which the Executive Order is extended). Without immediate relief, those individuals will suffer imminent and irreparable injury because they will be denied the health care to which they have a right under the Constitution and that is necessary to protect themselves from serious harm. As explained in Plaintiffs' motion and verified First Supplemental Complaint, the requirements for an *ex parte* TRO have been met because (1) Plaintiffs and their patients will suffer irreparable harm if relief is not immediately granted to preserve the status quo before Defendants have an opportunity to be heard, and (2) Plaintiffs have tried to resolve this matter without litigation and have expressly informed Defendants that Plaintiffs would seek emergency relief if the matter could not otherwise be resolved. *See* Fed. R. Civ. Proc. 65(b).[114] And as explained more below, the four facts that this Court considers in deciding whether to grant a TRO and subsequent 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 Ban, as applied to women who would be past the legal limit for abortion care in Arkansas by the time the Ban is lifted, directly contravene decades of binding Supreme Court precedent and is unjustified by the current crisis. The Ban is an impermissible ban on pre-viability abortion as applied to these women, and it imposes extreme burdens on these women with no countervailing benefits. And all these women will be wholly denied access to pre-viability abortion care in Arkansas, and that is immediate, irreparable harm under any definition. *See, e.g.*, *Tempur-Pedic Int'l, Inc. v. Waste*

[114] Godesky Decl. ¶ 3 (Ex. 1 to this Motion).

to Charity, Inc., 2007 WL 535041, at *1 (W.D. Ark. Feb. 16, 2007) (granting ex parte TRO to prevent "incalculable and irreparable injury to [plaintiff's] reputation and good will as well as the harm done to the public"); Order, *Robinson v. Marshall*, No. 2:19-cv-365 (M.D. Ala. Mar. 30, 2020) (Dkt. No. 83) (granting request for *ex parte* TRO to enjoin enforcement of ban on abortion). Finally, 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 Ban. This Court should grant Plaintiffs' request for injunctive relief.

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

A. The COVID-10 Abortion Ban Is Unconstitutional Because It Bans Pre-Viability Abortions.

For nearly five decades, the Supreme Court has been clear that a State may not ban pre-viability abortion. *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"). The Supreme Court has repeatedly reaffirmed *Roe*'s central holding, most recently in 2016. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). This Court, too, recently said that the law is clear that "prohibitions on abortions pre-viability . . . are *per se* unconstitutional under binding Supreme Court precedent." *Little Rock Family Planning Servs.*, 397 F. Supp. 3d at 1266. And the Eighth Circuit struck down a law banning abortion after 12 weeks of pregnancy, explaining that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (quoting *Casey*, 505 U.S. at 879).[115]

[115] *See also, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (ban on abortions after six weeks); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 271-73 (5th

That precedent applies with full force here. Unless enjoined, the Ban, as applied to women who will be past the legal limit for abortion in Arkansas by the time the Ban is lifted, entirely bars them from obtaining pre-viability abortions. As such, it is flatly unconstitutional under decades of Supreme Court precedent, including *Roe*. This Court should grant an *ex parte* TRO (and then a preliminary injunction) because Plaintiffs are certain to prevail on the merits of their challenge to the Ban.

B. Even If the Undue-Burden Test Applies to the COVID-19 Ban, Plaintiffs Are Likely To Prevail.

Defendants may argue that because of the current crisis, the Court should apply the undue-burden test to evaluate the Ban's constitutionality. *Cf. In re Abbott*, 2020 WL 1685929, at *1 (5th Cir. Apr. 7, 2020) (holding that "*Casey*'s undue-burden analysis" applied to COVID-19 regulation of abortion). Even if the undue-burden standard applies, Plaintiffs are likely to succeed because the burdens of the Ban 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

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Cir. 2019) (ban on abortions starting at fifteen weeks); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (ban on abortions starting at twenty weeks); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (ban on abortions starting at twenty weeks); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (ban on all abortions with exceptions); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (ban on all abortions); *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (ban on nearly all abortions); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 410 F. Supp. 3d 1327 (N.D. Ga. 2019) (ban on abortions after six weeks); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631 (W.D. Mo. 2019), *modified*, 408 F. Supp. 3d 1049 (W.D. Mo. 2019) (ban on abortions after various weeks); *Preterm-Cleveland*, 394 F. Supp. 3d at 796 (enjoining ban on abortion at six weeks); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020) (ban on abortions after six weeks); Order Granting Stipulated Preliminary Injunction as to State Defendants, *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Apr. 18, 2019), Dkt. No. 34 (ban on abortions after eighteen weeks); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (ban on abortions starting at twenty weeks).

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). This 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 all access to pre-viability abortion care, and the burdens of doing so are extreme.

1. *The burdens arising from enforcement of the Ban as to women who will be past the legal limit for abortion care are substantial.*

As to burdens, the Ban—as applied to women who would be pushed past the legal limit for abortion care during the COVID-19 pandemic—entirely precludes access to abortion. The harm of that result is impossible to overstate: Women will be forced to carry their pregnancies to term against their wills. *See supra* p.18; *see also Casey*, 505 U.S. at 852 ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."). They will be forced to endure the health risks and other burdens of both pregnancy and childbirth, *see supra* pp.18–19, 4–5, and then they will then have unwanted children. To avoid that outcome, women may try to terminate their pregnancies outside the medical system. *See supra* p.18. Doing so increases the possibility of complications, which would require women to use hospital resources and engage with a number of social contacts.[116]

Women might also try to seek abortion care outside Arkansas. But as this Court previously found, 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

[116] Stuebe Decl. ¶ 29(f).

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). And in any event, the closest option for care for any woman who will be past the point of viability by the time the Ban is lifted is Illinois, a *700-mile* round-trip to a clinic that might not even have capacity to see her. *See supra* pp.17–18.

In short, a woman who would be past the legal limit for abortion by the time the Ban is lifted has no good options. Because the Ban not only burdens but entirely eliminates her ability to access pre-viability abortion care in Arkansas, the Ban's burdens are extreme under any view of the facts and the law.

2. The COVID-19 Abortion Ban has few, if any, benefits.

On the other side of the ledger, the Ban has few, if any, benefits. Because Defendants' actions do not serve these interests, they 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 be

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

With regard to PPE, LRFP is wholly self-sustaining and has no plans to utilize the State's PPE stockpile. *See supra* p.8. Nor is the COVID-19 Abortion Ban necessary to address social-distancing concerns: LRFP has already implemented a strict protocol that keeps patients at least 6 feet apart from one another during the entirety of their clinic visit. *See supra* pp.7–8. As to hospital capacity, legal abortion is exceptionally safe and almost never requires hospitalization. *See Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315; *see also supra* pp.3–5. And because all LRFP's procedures are performed in its own outpatient facility, it is not using any hospital resources that may be needed for COVID-19 response—no hospital staff or supplies, no hospital beds (let alone ICU beds), and no ventilators. *See supra* pp.8, 20.

Indeed, abortions *reduce* rather than exacerbate burdens on Arkansas's health care system. Every day that a woman remains pregnant against her will, she not only experiences the emotional and physical consequences detailed above, but also risks contracting the COVID-19 virus, thereby jeopardizing her ability to visit a clinic and receive time-sensitive care. *See supra* p.16. In addition, the longer a woman remains pregnant—and especially if forced to carry a pregnancy to term—the heavier of a burden she places on an already-strained healthcare system and the State's PPE resources. *See supra* pp.18–20.

* * * * * *

Plaintiffs have thus established that they are likely to succeed on the merits of their claim that the COVID-19 Abortion Ban violates the substantive due process rights of their patients as applied to patients who will be past the legal limit for abortion in Arkansas by the time the Ban is lifted. *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. *Jacobson v. Massachusetts* Does Not Require a Different Result.

The State may argue that *Jacobson* compels a different result, but this Court previously applied *Jacobson* and found—correctly—that the COVID-19 Ban flunks *Jacobson*'s test. *See* Order 16–17. Although the Eighth Circuit faulted this Court for not performing a more extensive *Jacobson* analysis, Op. 14, the present posture affords an opportunity to do so.

As the Eighth Circuit reads *Jacobson*[117]:

> [A] state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive.

See id. at 13–14 (quoting *In re Abbott*, 2020 WL 1685929, at *7). Even under this test, the Court may strike down a State regulation if it is *either* (1) "beyond all question" an invasion of the right to abortion; *or* (2) bears no "real or substantial relation to public health." *Id.* at 16–17. It may also invalidate regulations that are "pretextual," *id.* at 13–14, including where there is record evidence that the State has "exploit[ed] the present crisis as a pretext to target abortion

[117] While Plaintiffs recognize this Court is bound by the Eighth Circuit's mandamus order, they preserve their disagreement with the Court of Appeals' interpretation of *Jacobson*. *Jacobson* does not give States broad latitude to dispense with constitutional right, even during an emergency. On the contrary, *Jacobson* confirms that "*no rule* prescribed by a state . . . shall contravene the Constitution of the United States." *Id.* at 25. And while *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 Supreme Court has already accounted for the balancing *Jacobson* requires in the abortion context. *See Casey*, 505 U.S. at 858 (citing *Roe* and *Jacobson*). *Jacobson* thus does nothing to displace the precedent—including *Roe*, *Casey*, and *Whole Women's Health*—that postdates it.

providers," *see id.* at 16 n.6. Finally, the Court may evaluate whether the legislation includes "basic exceptions for extreme cases." *Id.* at 14.

The COVID-19 Abortion Ban fails by any measure. *First*, for all the reasons previously described, *see supra* Part I.A–B, the Ban is "beyond all question" a violation of women's fundamental right to abortion. Even in the Eighth Circuit's view, *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. *See* Op. 17 (evaluating whether the State had banned pre-viability abortion or whether it had "impose[d] upon this right an undue burden"). Under those cases, this Court correctly found that a regulation that would seriously hinder women's ability to access abortion, while providing little if any benefit, was without question a "plain, palpable invasion" of their fundamental rights. Order 16–17 (quoting *Jacobson*, 197 U.S. at 31).

While the Eighth Circuit disagreed "[o]n the record before the district court," *see* Op. 17, the record has changed since this Court entered its *ex parte* TRO more than a week ago. Plaintiffs have explained in even more detail how the COVID-19 Abortion Ban substantially burdens Arkansas women, even if—against indications to the contrary—it expires on May 11. This includes new evidence from Dr. Alison Stuebe—an obstetrician-gynecologist and board-certified maternal-fetal medicine specialist with a background in epidemiology— who confirms that when a patient is denied an appointment for an abortion, she is committed to potential lifelong consequences, including a greater risk of a complicated pregnancy, greater risk of anxiety and loss of self-esteem, and consequences for her educational attainment, her career, and her economic well-being.[118] Likewise, Plaintiffs have provided more details on the number of

[118] Stuebe Decl. ¶ 27.

women who will be pushed passed the legal limit for abortion. *See supra* p.21. It should at least be beyond any question that the Ban is an undue burden as applied to those women.

Second, the Ban does not bear a substantial relation to Arkansas's purported public-health interests in implementing it (preserving PPE and enforcing social distancing). Plaintiffs do not question that the State has a "legitimate interests in protecting or promoting the public's health and safety during the COVID-19 panic." *See* Op. 15. But even under an extremely deferential review, *all* the record evidence shows that postponing surgical abortion care will only undermine that interest: Abortion care requires minimal PPE (far less than continued pregnancy); LRFP is fully self-sustaining in terms of PPE and has no intention of drawing on the State's stockpile; and the clinic is following Arkansas's social-distancing recommendations. *See supra* p.8; Order 14–18. And while the Eighth Circuit thought otherwise "[o]n the record before" it, Op. 15, Plaintiffs' additional record evidence explains how—even in the immediate term—continued pregnancy requires regular appointments with ultrasounds and laboratory testing, draining the State of these critical PPE resources. *See supra* pp.18–20. Indeed, Dr. Steube expressly confirms that, *especially* during a pandemic, abortions are "essential" health care, and denying access "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."[119]

For its part, the State does contests that the Ban will increase the use of hospital resources or need for PPE. In fact, it has never once—not in its Directives, not in the cease-and-desist order, not in any briefing before this Court or the Eighth Circuit, and not in the declarations submitted with its Opposition—expressly claimed (much less provided evidence showing) that abortion strains Arkansas's health care system. The State's failure to provide *any* evidence

[119] Steube Decl. ¶ 31.

supporting its claim is particularly glaring in a preliminary-injunction posture, where the State has had the time and opportunity to produce at least some evidence to support its proffered reason. While this Court cannot "encroach upon the State's policy determinations in how best to combat COVID-19," Op. 16, it also cannot give the State unbridled authority to enact "arbitrary" or "pretextual" regulations, *see id.* at 13–14. Because the State has provided *no* argument or evidence that the Ban serves its stated purpose, there is no explanation for the Ban *except* that it is arbitrary and pretextual.[120]

Even the Fifth Circuit recently enjoined enforcement of a similar Texas ban on abortion as to patients "who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020." *In re Abbott*, No. 20-50296, 2020 WL 1911216, at *18 (5th Cir. Apr. 20, 2020). Arkansas, no less than Texas, cannot possibly justify the COVID-19 Abortion Ban where it would entirely prohibit a woman from exercising her pre-viability right to abortion.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM.

The COVID-19 Abortion Ban treats abortion providers differently than other businesses and healthcare providers, and it treats patients seeking abortions differently than other patients. That differential treatment is not justified by any legitimate governmental interest. Plaintiffs are therefore also likely to succeed on the merits of their claim that the Ban violates the Equal Protection Clause. In fact, the Ban's imposition of unnecessary restrictions on abortion providers and patients fails equal protection review under any level of scrutiny.

[120] The pretextual nature of the COVID-19 Abortion Ban is all the more evident after considering the State's disparate treatment of Plaintiffs and other medical providers. *See infra* Part II.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 970 (8th Cir. 2015). "Generally, a law will survive . . . scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). "Some particularly invidious distinctions are subject to more rigorous scrutiny." *Zobel*, 457 U.S. at 60.

Where government action discriminates on the basis of a fundamental right, such as the right to access pre-viability abortion care, equal-protection analysis requires strict scrutiny. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n.3 (1976) (noting classifications burdening fundamental rights are reviewed under strict scrutiny); *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002) ("When a statute regulates certain 'fundamental rights' (*e.g.* voting or abortion) . . . the statute is subject to 'strict scrutiny.'"). As the Supreme Court recently noted in adjudicating the undue-burden claim in *Whole Woman's Health*, it would be "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue." 136 S. Ct. at 2309–10. Such heightened equal protection review requires close tailoring to extremely weighty state interests. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The COVID-19 Abortion Ban cannot withstand any heightened equal protection scrutiny. It singles out patients seeking abortion care (and abortion providers) for unique regulation, even though doing so undermines rather than advances the State's interests in combatting the current pandemic. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 791 (7th

Cir. 2013) (noting equal protection problem when State regulates abortion care in manner different than other medical care without medical justification). Arkansas has allowed other patients to obtain medical services under the terms of the earlier ADH guidance, which allows "healthcare facilities and clinicians" to determine themselves what constitutes "urgent and emergency visits and procedures" and to continue to provide that care. *See supra* p.14. Patients of dentists and orthodontists are free to schedule appointments to address cracked teeth and wiring on braces. *See supra* p.14. The State has also allowed most businesses to remain open as long as they observe social-distancing practices. *See supra* p.10. And it has specifically allowed golf course and driving ranges to remain open, parades of ten or fewer people, and fairs and festivals of fewer than ten people. *See supra* p.10. That Defendants would assert that some people seeking abortions should be precluded entirely from exercising their constitutional rights, but golf games and retail therapy can proceed unchecked, only underscores the credible fear that patients seeking abortion care and their doctors are being singled out based on hostility to abortion rather than a need to further a state interest legitimately. *Cf. The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (such underinclusiveness undercuts legitimacy of asserted governmental interest).

And while LRFP has determined—consistent with the determinations of the AMA, ACOG, and the WHO—that abortion is a time-sensitive, urgent form of health care that cannot be delayed without placing a patient at risk of suffering serious and/or irreparable harm, *see supra* pp.14–15, the Ban precludes Plaintiffs' patients from obtaining surgical abortion care during the pandemic. Patients of other health care providers have not been singled out in the same manner, nor are their health care providers prevented from exercising their best medical judgment to determine whether and what healthcare must proceed during the pandemic. This

differential treatment, which affects a fundamental constitutional right, flatly violates the guarantees of the Equal Protection Clause. *See, e.g.*, *Schimel*, 806 F.3d at 914 (reasoning that State's "indifferen[ce] to complications of any other outpatient procedures, even when they are far more likely to produce complications than abortions" undermines its interest); *Van Hollen*, 738 F.3d at 790 (explaining that "[a]n issue of equal protection of the laws is lurking in this case" because "the state seems indifferent to complications from non-hospital procedures other than surgical abortion (especially other gynecological procedures), even when they are more likely to produce complications," such as colonoscopies).

The Ban cannot even withstand rational basis review. It treats abortion providers and patients "differently . . . than similarly situated persons." *Stevenson*, 800 F.3d at 972. Providers of comparable procedures are not precluded from exercising their best medical judgment about what care is emergent or urgent and thus may be provided during the current pandemic. That differential treatment violates Plaintiffs' and their patients' equal protection rights. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (holding that law that on its face imposes a "special disability" on one group alone violates equal protection guarantee).

Moreover, as detailed above, the COVID-19 Abortion Ban does not advance any legitimate state interest. *See supra* Parts I.B.2, C. As the Supreme Court has explained, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Cleburne*, 473 U.S. at 448 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983) ("An intent to discriminate is not a legitimate state interest."). In fact, the Supreme

Court has specifically cautioned against laws that single out abortion facilities for differential treatment. *See Whole Woman's Health*, 136 S. Ct. at 2315 (finding no legitimate safety reason for singling out abortion facilities because "abortions taking place in an abortion facility are safe—indeed safer than numerous procedures that take place outside hospitals").

Although rational-basis review does not "require a perfect or exact fit between the means used and the ends sought," *Walker v. Hartford Life & Accident Ins. Co.*, 831 F.3d 968, 978–79 (8th Cir. 2016), it is "not toothless," *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City*, 742 F.3d 807, 810 (8th Cir. 2013). Instead, equal protection review requires, at a minimum, that a statute's discriminatory line-drawing be rationally related to a legitimate state interest. Here, there is simply no plausible policy reason for singling out abortion providers and patients for more stringent restrictions during the pandemic. Indeed, the Ban does not advance the State's purported interests *at all*; much less does treating abortion providers and patients more strictly than other health care workers and patients. Plaintiffs are accordingly likely to prevail on the merits of their claim that the COVID-19 Abortion Ban violates the Equal Protection Clause. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 188 F. Supp. 3d v684, 693–94 (S.D. Ohio 2016) (granting preliminary injunction and finding plaintiffs likely to succeed on equal protection challenge to state funding law that singled out abortion for different treatment); *Planned Parenthood of Kan. v. Lyskowski*, 2015 WL 9463198 (W.D. Mo. Dec. 28, 2015) (granting preliminary injunction upon finding plaintiff likely to succeed on claim that state agency violated Equal Protection Clause by treating abortion facility more harshly than others in ambulatory-surgical-center licensing process); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 921–25 (S.D. Ind. 2013) (granting

preliminary injunction and finding plaintiffs likely to succeed on equal protection challenge to requirement that abortion clinics, but not physician's offices, meet physical plant requirements).

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

Plaintiffs' patients are and will continue to suffer serious and irreparable harm in the absence of an *ex parte* TRO and preliminary injunction. *First*, Defendants' actions will prevent Arkansas women from exercising their fundamental constitutional right to access pre-viability abortion care and it will treat abortion providers and patients differently than other healthcare providers and patients. "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 alone constitute

irreparable harm.[121] 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, incurring additional expenses and increasing the likelihood of exposure to the virus. *See supra* pp.17–18; *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 Arkansas women 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).

IV. 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

[121] 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").

(8th Cir. 1981). Plaintiffs' patients will suffer numerous irreparable harms without an injunction, and Plaintiffs' requested relief will simply preserve the status quo as it exists now. If Plaintiffs' request for injunctive relief is denied, their 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 COVID-19 Abortion Ban. 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.7–8. And the provision of abortion care to women who would be past the legal limit for abortion by the time the Ban is lifted reduces rather than increases the use of hospital resources needed to fight COVID-19. *See supra* pp.18–20.

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 Ban. *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.

V. A BOND IS NOT NECESSARY IN THIS CASE.

This Court should waive the Federal Rule of Civil Procedure 65(c) bond requirement. Where plaintiffs are "serving a public interest in acting to protect [important] constitutional rights related to abortion," and the governmental defendants "will not be harmed by the order to preserve the status quo," courts have exercised their discretion to waive the security requirement. *Jegley II*, 267 F. Supp. 3d at 1111; *see also Evenstad v. City of W. St. Paul*, 306 F. Supp. 3d 1086, 1102 (D. Minn. 2018) (waiving bond requirement where plaintiff was "seek[ing] to vindicate an important constitutional right"). In fact, this Court recently declined to require Plaintiffs to provide security upon grant of a preliminary injunction barring Arkansas from enforcing two bans and one regulation of abortion that would have eliminated the overwhelming majority of abortion care in Arkansas. *See* Order 20; *Little Rock Family Planning*, 397 F. Supp. 3d at 1323.

This Court should use its discretion to waive the bond requirement here, where injunctive relief will result in no monetary loss to Defendants. Moreover, Plaintiffs are health care providers dedicated to serving low-income and underserved communities,[122] and a bond would strain their already-limited resources. *See Richland/Wilkin Joint Powers Auth. v. U.S. Army*

[122] *See* Williams Decl. ¶ 19.

Corps of Eng'rs, 826 F.3d 1030, 1043 (8th Cir. 2016) (affirming district court's waiver of bond requirement "based on its evaluation of public interest").

CONCLUSION

For these reasons, this Court should grant Plaintiffs' motion for an *ex parte* TRO and/or preliminary injunction to enjoin Defendants and their officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, from enforcing a prohibition on surgical abortions against patients who would be beyond the legal limit for abortion care (21.6 weeks LMP) by May 11. If the Executive Order is extended to a later date, the temporary restraining order should state that it applies with equal force to any new, substituted Executive Order expiration date.

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Respectfully submitted,

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** Motion for admission pro hac vice granted*

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