IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SOUTH WIND WOMEN'S CENTER LLC, d/b/a TRUST WOMEN OKLAHOMA CITY, on behalf of itself, its physicians and staff, and its patients, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-20-277-G
J. KEVIN STITT in his official capacity as Governor of Oklahoma, et al.,	)	
Defendants.	)	

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On March 13, 2020, the President declared a national emergency as a result of the novel coronavirus disease called COVID-19. Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), https://bit.ly/33UHSON.

2. The COVID-19 pandemic is a serious public health crisis. Every American, including each medical provider, has an obligation to make needed changes to combat it. To that end, healthcare providers—including the abortion providers who commenced this action—have changed their practices over the last two months to conserve personal protective equipment ("PPE") and to reduce the risk of COVID-19 transmission. Most governors have issued Executive Orders that recommend or require that physicians

exercise their medical judgment to determine which procedures should go forward and which can be postponed without risk to the patient.

PRELIMINARY INJUNCTION

3. Upon careful consideration of the evidence and argument submitted by the parties, the Court makes the following findings of fact:

I. Executive Order and Press Release

4. On March 15, 2020, Oklahoma Governor J. Kevin Stitt issued the first of several executive orders to address the COVID-19 pandemic, which declared a state of emergency throughout Oklahoma. Initial Executive Order 2020-07 at 1, https://bit.ly/39AnZOh.

5. On March 24, 2020, Governor Stitt amended this order for a fourth time to mandate that: "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020." Fourth Am. Exec. Order 2020-07 ¶ 18, Compl. Ex. 1, ECF No. 1-1 ("Executive Order").

6. The Executive Order does not define the terms "elective surgery" or "minor medical procedure." *See* Executive Order ¶ 18. The determinations of what constitutes an "elective surgery" or "minor medical procedure" are left to the discretion of medical providers. Dana Stone, M.D. Decl. ("Stone Decl.") ¶¶ 10, 36-39, ECF No. 84-4.

7. At a press conference held on March 24, 2020, the day the Executive Order was amended, Governor Stitt explained that Paragraph 18 of the Executive Order was included to reduce the use of hospital beds and to preserve and replenish the state's supply

of PPE, such as respirators, for healthcare providers. At the same press conference, when asked if Paragraph 18 of the Executive Order applied to abortion, Governor Stitt responded that he and his team "ha[d] not gotten into the details yet." A video of this press conference is available at https://bit.ly/39AjlzO.

8. The Executive Order does not refer to abortion care. The Executive Order also does not purport to limit the administration of any medications, let alone the medications used for medication abortions. *See* Executive Order ¶ 18.

9. The Executive Order also mandates the closure of certain non-essential businesses. *See* Executive Order ¶ 20. The next day, Governor Stitt published a memorandum clarifying that healthcare providers are "critical infrastructure" exempt from this mandate. *See* Office of the Gov. J. Kevin Stitt, Executive Memorandum 2020-01 (Mar. 25, 2020), Julie Burkhart Suppl. Decl. ("Burkhart Suppl. Decl.") Ex. 2-4, ECF. No 84-2. Other exempt businesses include dry cleaners, sporting goods stores, pet grooming, liquor stores, and marijuana dispensaries. *See* Burkhart Suppl. Decl. ¶ 11; Okla. Dep't of Commerce, Essential Industries List (revised Apr. 2, 2020), Burkhart Supp. Decl. Ex. 2-3 ("Essential Industries List").

10. On March 27, 2020, Governor Stitt issued a press release (the "Press Release") that purported to clarify the Executive Order. Press Release (March 27, 2020) (ECF No. 1-2), https://bit.ly/2JssTlM. The Press Release declared that the Executive Order suspended "any type of abortion services*"* as defined by Oklahoma law except in a "medical emergency" as defined by Oklahoma law or as "otherwise necessary to prevent serious health risks to the unborn child's mother." *Id.*

11. Because Oklahoma law defines "abortion services" to include abortions accomplished through the administering of medications, the Press Release expanded the prohibitions of the Executive Order beyond "elective surgeries" and "minor medical procedures" to medication abortions. Okla. Stat. Ann. tit. 63 § 1-730.A1.

12. Oklahoma's statutory definition of "medical emergency" in the case of abortion covers only abortions needed to avert the patient's "death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy." Okla. Stat. Ann. tit. 63 § 1-738.1A. The Press Release's exception for abortions "necessary to prevent serious health risks" references no statutory definition. In any case, the Press Release does not grant a safe harbor if the State later disagrees with a physician's good faith medical determination that an exception applied.

13. The State presented no evidence that any Oklahoma health official or medical professional recommended the policy with respect to abortion services that is set forth in the Press Release. While the Oklahoma Secretary of Health Jerome Loughridge recommended to Governor Stitt that he "temporarily delay elective surgeries and minor medical procedures," he does not claim involvement with the Press Release or indicate that he recommended Governor Stitt extend the Executive Order to all abortion services. *See* Declaration of Secretary Jerome Loughridge, ("Loughridge Decl.") ¶ 14, ECF No. 54-1.

14. The Executive Order states that it is issued pursuant to the Oklahoma Emergency Management Act ("OEM") of 2003. Executive Order at 1. Under Section 683.8 of the OEM, the Governor has the authority to "[m]ake, amend, and rescind the necessary orders and rules to carry out the provisions of the [OEM] within the limits of

authority conferred upon the Governor herein, with due consideration of the emergency management plans of the federal government." Okla. Stat. Ann. tit 63 § 683.8.

15. On March 27, 2020, Oklahoma's Attorney General, Defendant Michael Hunter, stated that violation of the Executive Order is a misdemeanor. Washington, Destiny, *AG Hunter Says Violation of Gov. Stitt's Executive Order Can Result in a Misdemeanor*, (March 27, 2020), Ezra U. Cukor Decl. ("Cukor Decl."), Ex. 7-2, ECF No. 84-7. This statement suggests that the State considers the Executive Order to be an order of the Oklahoma Department of Emergency Management (OEM). Oklahoma law provides that willful violation of an OEM order is a misdemeanor punishable by imprisonment for up to six months, fines up to $3,000, or both. Each day of violation is a separate offense. Okla. Stat. Ann. tit. 63 § 683.23

16. After the issuance of the Press Release, abortion services in Oklahoma immediately ground to a halt. Larry A. Burns, D.O. Decl. ("Burns Decl.") ¶ 7, ECF No. 16-5; Julie Burkhart Decl. ("Burkhart Decl.") ¶ 14, ECF No. 16-6; Brandon Hill, PhD ("Hill Decl.") ¶ 16, ECF No. 16-7.

17. In the statement issued March 27, 2020, Governor Stitt stated that COVID-19 had already "increased demand for hospital beds and created a shortage of personal protective equipment (PPE) needed to protect health care professionals and stop transmission of the virus." Press Release. These were the only reasons cited in the Press Release for extending the Executive Order to all abortion services.

18. Several days later, the Governor tweeted an update that the situation already had improved: "We are up to an 11-day supply of PPE on hand and we're expecting more

big orders to come in this week!" Governor J. Kevin Stitt (@GovStitt), Twitter (Mar. 30, 2020, 2:00 PM), https://bit.ly/2VaQQ7u.

19. On April 1, 2020, the Executive Order's mandatory postponement of elective surgeries and minor medical procedures was extended by more than three weeks to April 30, 2020. Seventh Amended Executive Order 2020-07, ECF No. 38-1., *available* at https://bit.ly/3bPnqRY.

20. Public health experts believe that it is unlikely that the COVID-19 pandemic will end soon. Joshua Sharfstein, M.D. Decl. ("Sharfstein Decl.") ¶ 14, ECF No. 86; Mary Travis Bassett, M.D. Decl. ("Bassett Decl.") ¶ 5, ECF No. 87. The most recent data show that the rate of infection in Oklahoma is not diminishing, confirming that the need for restrictive measures will likely continue beyond April 30, 2020. *See* Okla. Dept. of Health, *COVID-19 Resources: Current Situation* (Apr. 12, 2020), https://bit.ly/3dLtpJB. At a telephonic hearing held on April 3, 2020, counsel for Defendants acknowledged that the Executive Order was likely to be extended again.

21. On April 7, 2020, Governor Stitt and Gino Demarco, who Governor Stitt identified as the State's PPE "czar," stated in a press briefing that Oklahoma has "plenty of personal protective equipment." Matt Trotter, *COVID-19 Response: Stitt 'Cautiously Optimistic' Curve is Flattening, Oklahoma Has 'Plenty' PPE*, Public Radio Tulsa, Accessed 4/8/2020, Cukor Decl. Ex. 7-2 ("Trotter"). At that briefing, Mr. Demarco also disclosed that the State had amassed about 900,000 face masks, 110,000 respirators, and 120,000 gowns, and that more were on their way. Governor Stitt stated that Oklahoma has 5,000 available hospital beds and 2,000 ventilators. Caleb Califano, *Governor Stitt Gives*

Update On Personal Protective Equipment In Okla., News 9, Accessed 4/9/2020, Cukor Decl. Ex. 7-3 ("Califano").

II. Plaintiffs' Constitutional Claim and Request for Relief

22. This is a constitutional challenge under 42 U.S.C. § 1983 to Oklahoma Governor J. Kevin Stitt's March 24, 2020 Executive Order, as expanded by the Press Release to apply to abortion services.

23. Plaintiffs allege that, as applied to abortion services, the Executive Order and Press Release have the effect of banning nearly all pre-viability abortions in violation of Oklahomans' constitutional rights to abortion access. Plaintiffs also allege that the postponement of all abortion services for *five weeks* (and likely longer) constitutes an unconstitutional "undue burden" on abortion access. Complaint ("Compl.") ¶ 66.

24. Accordingly, Plaintiffs bring a cause of action for the violation of their patients' rights to privacy, liberty, bodily integrity and autonomy as guaranteed by the Fourteenth Amendment, through the ban of essentially all abortion, except in rare circumstances, by the Executive Order and Press Release. *Id*.

25. Plaintiffs also bring a cause of action for the constitutional violation of their right to equal protection guaranteed by the Fourteenth Amendment to the U.S. Constitution because the Executive Order and Press Release selectively burden patients' fundamental right to abortion without justification and single out abortion providers and their patients for differential treatment from providers of other medical services and their patients. Compl. ¶ 69.

26. Plaintiffs ask this Court to issue a preliminary injunction, and ultimately a permanent injunction, restraining Defendants and their employees, agents, attorneys, successors, and all others acting in concert or participating with them, from enforcing Governor J. Keven Stitt's Executive Order, as amended by the Seventh Amended Executive Order No 2020-07 of April 1, 2020 and the March 27, 2020 Press Release against Oklahoma abortion providers, clinics, and their staff. Compl. at 27.

27. Plaintiffs further ask this Court to ultimately enter a judgment declaring that the Executive Order and Press Release, including future iterations or extensions, as applied to previability abortion, violates the Fourteenth Amendment to the U.S. Constitution; and to award Plaintiffs their attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and to grant such other and further relief as the Court deems just and proper. Compl. at 27.

III. Procedural History

28. Plaintiffs South Wind Women's Center LLC d/b/a Trust Women Oklahoma City, Larry A. Burns, D.O, and Comprehensive Health of Planned Parenthood Great Plains, Inc. filed their Complaint on March 30, 2020, and their Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction ("Pls. Mot.") on March 31, 2020. ECF Nos. 1, 16. Plaintiffs sought to temporarily restrain and preliminarily enjoin the Executive Order as extended by the Press Release to apply to previability abortion care.

29. The Defendants, various Oklahoma officials sued in their official capacities, submitted a Response to Plaintiffs' Motion for TRO and Preliminary Injunction ("Defs.' Resp.") on April 2, 2020. ECF No. 54.

30. On April 3, 2020, the Court held a telephonic hearing with the parties on Plaintiffs' motion requesting a TRO. *See* ECF No. 79. On April 6, 2020, the Court granted the TRO in part. The Court's Order mandated that:

> "Defendants and their employees, agents, attorneys, successors, and all others acting in concert or participating with them are temporarily restrained from enforcing Governor J. Kevin Stitt's Seventh Amended Executive Order No. 2020-07 of April 1, 2020, and the March 27, 2020 Press Release against Oklahoma abortion providers, clinics, and their staff, to the following extent:
>
> 1. The prohibition on surgical abortions may not be enforced with respect to any patient who will lose her right to lawfully obtain an abortion in Oklahoma on or before the date of expiration of the Executive Order; and
>
> 2. The prohibition on medication abortions may not be enforced."
> TRO at 13, ECF No. 70.

31. The TRO remains in effect until April 20, 2020 at 11:59 p.m. Plaintiffs' motion for a preliminary injunction was held in abeyance. TRO at 13.

32. On April 6, 2020, Defendants filed a motion requesting leave to file supplemental evidence in the form of three additional witness declarations to support their Response in Opposition to Plaintiffs' Motion for TRO and/or Preliminary Injunction. The Court granted Defendants' motion on April 7, 2020, and Defendants filed their supplemental evidence on April 8, 2020. ECF Nos. 80, 82. Plaintiffs filed their reply declarations and memorandum of law in further support of their Motion for Preliminary Injunction ("Pls. Reply") on April 10, 2020. ECF No. 84.

33. On April 7, 2020, Defendants filed a Notice of Interlocutory Appeal of the TRO. ECF No. 77. Additionally, on April 7, 2020, Defendants filed two motions in the

Court of Appeals: one to expedite the appeal and another to stay the TRO. *South Wind Women's Center, et al v. Stitt, et al*, Case No. 20-6045, Doc No. 010110330615 and Doc. No. 010110330612. On April 9 and 10, 2020, Plaintiffs filed responses opposing expedition and the emergency stay on the ground, among others, that the Court of Appeals lacked appellate jurisdiction. *South Wind Women's Center, et al v. Stitt, et al*, Case No. 20-6045, Doc. No. 010110331145 and Doc. No. 010110331793.

34. On April 13, 2020. the Court of Appeals dismissed Defendants' appeal for lack of jurisdiction and denied Defendants' emergency stay motion as moot. *South Wind Women's Center, et al v. Stitt, et al*, Case No. 20-6045, Doc. No. 01011333196.

FINDINGS OF FACT

I. Parties

A. Plaintiffs

35. Plaintiffs are three of four healthcare providers in Oklahoma that offer abortion services, including medication and procedural abortions. Plaintiffs sue on behalf of their patients in addition to themselves, their physicians and staff.

36. Plaintiff South Wind Women's Center LLC, d/b/a Trust Women Oklahoma City ("Trust Women") is a healthcare facility in Oklahoma City, Oklahoma that provides reproductive healthcare. Burkhart Decl. ¶¶ 1-2. Trust Women's Oklahoma City clinic is an abortion facility licensed by the Oklahoma State Department of Health and offers

medication abortion up to 11 weeks from the patient's last menstrual period ("LMP")[1] and procedural abortion up to 21.6 weeks LMP. *Id.;* Burkhart Suppl. Decl. ¶ 7.

37. Plaintiff Larry A. Burns, D.O., is a physician licensed to practice medicine in Oklahoma since 1973. Burns Decl. ¶ 3. Dr. Burns operates a clinic in Norman, Oklahoma that is licensed as an abortion facility by the Oklahoma State Department of Health and provides medication abortions through 10 weeks LMP and procedural abortions through 14 weeks LMP. *Id.* ¶ 11.

38. Plaintiff Comprehensive Health of Planned Parenthood Great Plains, Inc. ("Planned Parenthood") operates a health center in Oklahoma City that provides comprehensive reproductive health care services, including medication abortion up to 11 weeks and procedural abortion up to 18 weeks. Hill Decl. ¶¶ 2, 8.

B. Defendants

39. Defendants are several Oklahoma officials sued in their official capacities. J. Kevin Stitt is the Governor of Oklahoma and issued the Executive Order pursuant to Section 2 of Article VI of the Oklahoma Constitution and the Oklahoma Emergency Management Act of 2003, Okla. Stat. Ann. tit. 63 § 683.8. Executive Order at 1.

40. Defendant Michael Hunter is the Attorney General of Oklahoma and the "chief law officer of the state." Okla. Stat. Ann. tit. 74 § 18. The Attorney General has asserted authority to prosecute violations of the Executive Order. *See* Cukor Decl. Ex. 7-1.

[1] Pregnancy is commonly measured from the first day of a pregnant person's last menstrual period ("LMP"). A full-term pregnancy has a duration of approximately forty weeks LMP. Gillian Schivone, M.D. Decl. ("Schivone Decl.") ¶ 11, ECF No. 16-4.

41. Defendant David Prater is the District Attorney for Oklahoma County and is responsible for prosecuting criminal matters within Oklahoma County. Okla. Stat. Ann. tit. 19 § 215.4.

42. Defendant Greg Mashburn is the District Attorney for Cleveland County and is responsible for prosecuting criminal matters occurring within Cleveland County. Okla. Stat. Ann. tit. 19 § 215.4.

43. Defendant Gary Cox is the Oklahoma Commissioner of Health and oversees the Oklahoma State Board of Health, which licenses abortion facilities. Okla. Admin. Code. § 310:600-7-3.

44. Defendant Mark Gower is the Director of the OEM and responsible for coordinating state agencies and departments to implement the Executive Order. Executive Order at 8. OEM is authorized to refer violations of its orders to the Oklahoma Attorney General for civil enforcement. Okla. Stat. Ann. tit. 63 § 683.23(A).

II. Plaintiffs' Experts

45. Gillian Schivone, M.D. is an expert in obstetrics and gynecology, including abortion care. Schivone Decl. ¶ 1. She is a board certified obstetrician gynecologist and has a Master of Science degree in epidemiology and clinical research from Stanford University. *Id.* ¶¶ 1-2. Dr. Schivone is on the faculty of Washington University School of Medicine in St. Louis in the Department of Obstetrics and Gynecology and is an attending physician at one of its affiliated hospitals. *Id.* ¶ 4. Dr. Schivone has also served as an abortion provider for Trust Women Oklahoma City since 2017. *Id.* ¶ 3. Dr. Schivone has

published articles and lectured on gynecological care, including contraception and abortion. *Id.*; Gillian Schivone Curriculum Vitae, Schivone Decl. Ex. 1, ECF No. 16-4.

46. Mark Nichols, M.D. is an expert in obstetrics and gynecology, including abortion care. Mark Nichols, M.D. Decl. ("Nichols Decl.") ¶ 1, ECF No. 84-1. Dr. Nichols is a board certified obstetrician and gynecologist. *Id.* He is on the faculty of Oregon Health & Sciences University, where he has trained over 200 Obstetrics and Gynecology medical residents and fellows. He also served as the Medical Director of Planned Parenthood Columbia Willamette for nearly 20 years. *Id.*; Mark Nichols Curriculum Vitae, Nichols Decl. Ex. 1-1 at 1, 20, ECF No. 84-1. Dr. Nichols has published approximately 70 peer-reviewed articles on numerous aspects of obstetric and gynecological care, including abortion. *Id.* at 3-8. He has provided the full range of gynecological and obstetric care, including abortion, prenatal, and labor and delivery care, to thousands of patients. Nichols Decl. ¶ 1.

47. Dana Stone, M.D. is an expert in obstetrics and gynecology. Stone Decl. ¶ 1. Dr. Stone is a board certified obstetrician and gynecologist who has been practicing in Oklahoma for approximately 25 years. *Id.* ¶ 3. She maintains a private practice through which she provides a range of obstetric and gynecological care. *Id.* ¶ 2. She also provides on call service for inpatient obstetrical care, gynecology consults, and emergency room coverage at Lakeside Women's hospital. *Id.*

48. Mary Travis Bassett, M.D., M.P.H. is an expert in public health. Bassett Decl. ¶¶ 1-4. Dr. Bassett is the Director of the François-Xavier Bagnoud ("FXB") Center for Health and Human Rights at Harvard University, and the FXB Professor of the Practice

of Health and Human Rights at the Harvard School of Public Health. *Id.* ¶ 1. She is also a member of the National Academies of Sciences, Engineering, and Medicine Standing Committee on Emerging Infectious Diseases and 21st Century Health Threats, which was established to inform the government on critical science and policy issues related to emerging infectious diseases and is currently focused on COVID-19. *Id*. ¶ 4. Dr. Bassett served as the Commissioner of the New York City Department of Health and Mental Hygiene from 2014-2018. *Id.* ¶ 2. In that role, she led New York City's response to the Ebola pandemic, as well as to large outbreaks of Legionnaires' disease and Zika. She has published numerous journal articles and, more recently several newspaper perspectives on the COVID-19 pandemic. *Id* ¶ 4.

49. Joshua Sharfstein, M.D. is an expert in public health. Sharfstein Decl. ¶¶ 1-5. Dr. Sharfstein is a Professor of the Practice in Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health. *Id.* ¶¶ 1, 4. He previously served as Secretary of the Maryland Department of Health and Mental Hygiene (including during the Ebola pandemic in 2014), the Acting Commissioner and then the Principal Deputy Commissioner of the U.S. Food and Drug Administration (including during the H1N1 Flu pandemic of 2009), and Commissioner of Health for the City of Baltimore. *Id* ¶ 3. He is an elected member of the National Institute of Medicine and National Academy of Public Administration. *Id.* Dr. Sharfstein's teaching, research, and writing includes public health crisis and response. *Id.* ¶ 4. He has closely followed and authored several articles about the COVID-19 pandemic. *Id* ¶ 5.

III. Abortion in Oklahoma

50. Legal abortion is an extremely safe and common form of health care. As the United States Supreme Court held in *Whole Woman's Health v. Hellerstedt*, abortion "has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." 136 S. Ct. 2292, 2302 (2016); *see also* Schivone Decl. ¶ 19. Approximately one in four women in the United States will obtain an abortion by age forty-five. *Id.* ¶ 12.

51. Leading medical professional organizations, including the American College of Obstetricians and Gynecologists ("ACOG") and the American Medical Association ("AMA") have advised states not to categorize abortion as health care "that can be delayed during the COVID-19 pandemic" given its critical nature for patients, even if those states are requiring postponement of non-time-sensitive health care during the crisis. ACOG, *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak, Nichols Decl. Ex. 1-5 ("*Joint Statement*"); Br. of ACOG, et al. as Amici Curiae Opp. Pet. Writ Mandamus at 3–4, 10, *In re Greg Abbott*, No. 20-50264 (5th Cir. Apr. 2, 2020), Nichols Decl. Ex. 1-3 ("ACOG Br. I"); *see also* Br. of ACOG, et al. as Amici Curiae Supp. Pls.' Opp'n Stay Mot. at 3–6, *South Wind Women's Center LLC v. Stitt*, No. 20-6045 (10th Cir. Apr. 10, 2020) ("ACOG Br. II").

52. That is so because "[t]here is a broad medical consensus that abortion is essential health care" that cannot be delayed. ACOG Br. I at 4; *see also id.* at 10.

Moreover, "[t]here is no evidence that prohibiting abortions during the pandemic will mitigate PPE shortages or promote public health and safety." *Id.* at 4.

53. Abortions in Oklahoma can be performed up to 22 weeks from the first day of a patient's last menstrual period ("LMP").[2] Okla. Stat. Ann. tit. 63 § 1-745.5. There are two main methods of abortion: medication abortion and procedural abortion. Schivone Decl. ¶ 13. According to data published by the Oklahoma State Department of Health, approximately 5,014 people obtained a medication or procedural abortion in Oklahoma in 2018. Okla. State Dep't Health, *Abortion Surveillance in Oklahoma 2002-2018 Summary Report* at 19 (June 2019), Burkhart Suppl. Decl. Ex. 2-1 ("Abortion Surveillance").

54. Medication abortion is available only early in pregnancy, up to 11 weeks LMP. Burkhart Suppl. Decl. ¶ 7; Hill Decl. ¶ 8. It involves a combination of two pills taken orally: mifepristone and misoprostol. Schivone Decl. ¶ 14. The patient takes the mifepristone in the healthcare facility and later takes the misoprostol at a location of her choosing, most often at home, after which the contents of the pregnancy are expelled similar to a miscarriage. *Id.*

55. Procedural abortion is sometimes referred to as "surgical abortion" but it involves no incision or general anesthesia. Schivone Decl. ¶ 15. Most often in a procedural abortion, the clinician dilates the patients' cervix and uses gentle suction from a narrow, flexible tube to empty the contents of the uterus. *Id.* ¶ 16. After 14 to 15 weeks LMP,

[2]Okla. Stat. Ann. tit. 63 § 1-745.5 prohibits abortion beginning at 20 weeks "postfertilization age," which is "calculated from the fertilization of the human ovum." 63 Okla. Stat. Ann. tit. 63 § 1-745.2. Twenty weeks post fertilization is equivalent to 22 weeks LMP. Schivone Decl. ¶ 18 n. 2.

clinicians generally use instruments to complete the procedure. *Id* ¶ 17. Further in the second trimester, the clinician may begin cervical dilation the day before the procedure, requiring two days of clinical care instead of one. *Id.*

56. Both medication abortion and procedural abortion are safe and effective methods of terminating a pregnancy. Schivone Decl. ¶¶ 19–20; ACOG Br. I at 6–9. For some patients, however, one method is medically indicated over the other. Schivone Decl. ¶ 31; Nichols Decl. ¶ 21. For example, a medication abortion may be contraindicated for one patient, while procedural abortion may be contraindicated for another, due to a range of factors, including other medicines the patient may be taking, pre-existing medical conditions, or her physical health and anatomy. Schivone Decl. ¶ 31; Nichols Decl. ¶ 21, Ex. 1-6. Between 2002 and 2018, more than 65% of abortions in Oklahoma were procedural abortions. *Abortion Surveillance* at 6.

57. Leading medical authorities, including the ACOG, the AMA, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Osteopathic Association have concluded that legal abortion is one of the safest medical procedures in the United States. ACOG Br. II at 4–5; *see also* ACOG Br. I at 6. The National Academies of Sciences, Engineering, and Medicine—which are chartered by Congress to provide independent, objective analysis of the nation's complex scientific problems and public policies—have determined that medication and procedural abortions rarely result in complications and do so at rates of no more than a fraction of a percent. Nat'l Acads. Scis. Eng'r & Med., The Safety and Quality of Abortion Care in the United

States at 77–78 (2018), Nichols Decl. Ex. 1-4 ("Nat'l Acads. Report"); *see also* Schivone Decl. ¶ 19–20.

58. Major complications from abortion by any method are extremely rare and occur in less than one-quarter of one percent (0.23%) of cases. Schivone Decl. ¶ 20. More specifically, major complications arise in just 0.31% of medication abortion cases (making medication abortion safer than aspirin, Tylenol, and Viagra); 0.16% of first-trimester procedural abortion cases; and 0.41% of second-trimester procedural abortion cases. *Id.* Abortion-related emergency room visits constitute just 0.01% of all emergency room visits in the United States. *Id*. ¶ 20; Nichols Decl. ¶ 54. Moreover, only a fraction of a percent of abortions result in emergency room visits at which the patient receives a diagnosis or treatment for an abortion related complication. Nichols Decl. ¶¶ 54, 64–65; Ushma Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion* at 7, Obstetrics & Gynecology (2015), Nichols Decl. Ex. 1-7 ("Upadhyay 2015").

59. Consistent with these findings, Plaintiffs' patients almost never experience complications that require hospital transfer. Burkhart Decl. ¶ 31; Burns Decl. ¶ 20; Hill Decl. ¶ 11. Nearly all complications can be managed in an outpatient setting. Schivone Decl. ¶ 20; Nichols Decl. ¶¶ 64–65.

60. Defendants claim that the complication rate for abortion is "unknown," Defs.' Resp., at 11, and they submitted a declaration from Dr. Donna Harrison who opines, among other things, that published studies on the safety of abortion "likely . . . understat[e] complications due to widespread inadequacies in reporting." Declaration Donna Harrison, M.D. ("Harrison Decl.") ¶ 13, ECF No. 54-7. Dr. Harrison further opines that medication

abortion "actually exposes women to greater risk of serious complications than surgical abortions." *Id.* ¶ 15.

61. The Court finds that Defendants' claims regarding the safety of abortion are contrary to the views of leading medical authorities based upon published scientific literature. Nichols Decl. ¶¶ 60-69, Ex. 1-4; Schivone Decl. ¶ 19. As for Dr. Harrison, a federal district court previously determined that Dr. Harrison's opinions "lack scientific support," are "based on unsubstantiated concerns," and are "generally at odds with solid medical evidence." *MKB Management Corp. v Burdick*, No. 09-2011-CV-02205, 2013 WL 9885391, at *7 (N.D. Dist. July 15, 2013). Another court found that Dr. Harrison's views regarding medication abortion "must be rejected" because they contradict the factual underpinnings of the U.S. Supreme Court's most recent abortion ruling. Planned *Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-CV-00784-KGB, 2018 WL 3816925, at *42 (E.D. Ark. July 2, 2018), *vacated*, No. 4:15-CV-00784-KGB, 2018 WL 9944527 (E.D. Ark. Nov. 9, 2018), and *appeal dismissed sub nom. Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, No. 18-2463, 2018 WL 9944528 (8th Cir. Nov. 9, 2018). The Court similarly finds that Dr. Harrison's opinions are entitled to no weight.

62. Defendants also submitted a declaration from Dr. Michael Valley who opines that abortion can result in a variety of complications. Declaration of Michael Valley, M.D. ¶¶ 3–5, ECF No. 54-4. Dr. Valley does not acknowledge, let alone dispute, that such

complications are rare. Nichols Decl. ¶¶ 60–69, Ex. 1-4. The Court finds that Dr. Valley's opinions regarding the complications of abortion are unhelpful and entitled to no weight.[3]

63. In any event, abortion is markedly safer than the only alternative, which is carrying a pregnancy to term. *See infra* ¶ 74.

64. Women who continue their pregnancies are also far more likely than those who have abortions to require emergency room visits or hospital care. Nichols Decl. ¶¶ 51, 66; Schivone Decl. ¶ 21. Among pregnant women, one-fifth will visit an emergency room at least once during their pregnancy, and a significant percentage (29%) of those patients will do so more than once. Nichols Decl. ¶ 51. Miscarriage, which is common early in pregnancy (it ends approximately 10% of pregnancies in the first trimester and 1–5% of pregnancies between 13–19 weeks LMP) leads to significant numbers of emergency room visits. *Id.* In sharp contrast, abortion care results in an emergency room visit and abortion related treatment or diagnosis in less than 0.87 % of cases. Nichols Decl. ¶ 54.

65. Whether COVID-19 presents greater risk to pregnant women has not conclusively been determined, but the CDC has cautioned that pregnant women experience changes in their bodies that increase the risk of infections generally, and in the past, they

[3] Another of Oklahoma's declarants, Dr. Robert L. Marier, has testified previously in support of other abortion restrictions, but a federal district court found that Dr. Marier's credibility was "diminished by his bias" against safe and legal abortion, which he maintains "should be outlawed in the United States." *June Medical Servs. LLC v. Kliebert*, 250 F. Supp 3d 22, 61 ¶¶ 200-02 (M.D. La. April 26, 2017) *reversed sub nom. June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted, June Med. Servs. v. Gee*, 140 S. Ct. 35. Notably, Dr. Valley is also on record that abortion should not be allowed, even "in the case of rape" or when a "woman's health is at risk." *See* Declaration of Ezra Cukor, Ex. 7-5, (sworn testimony of Dr. Valley in the matter of *Nova Health Systems v. Hunter*, No. CV-2015-1838 (Okla. Dist. Ct. Sept. 28, 2017).

have had a higher risk of severe illness from viruses in the same family as COVID-19. *See*, CDC, *Pregnancy and Breastfeeding FAQs, Information about Coronavirus Disease 2019* (last reviewed Apr. 3, 2020), Nichols Decl. Exhibit 1-8 ("*Pregnancy and Breastfeeding FAQs*").

66. As a result, ACOG and the Society for Maternal Fetal Medicine have issued guidance for assessing and managing pregnant patients with suspected or confirmed COVID-19, which recommends that pregnant patients be referred to the emergency room if they show signs of infection such as difficulty breathing, dizziness, or vomiting. Nichols Decl. ¶ 52. In contrast, the CDC recommends that the general public (i.e., people who are not pregnant) and experiencing COVID-19 symptoms stay at home and only visit the hospital if their symptoms are severe. Nichols Decl. ¶ 53.

67. Access to abortion in Oklahoma is more limited than in other states. Outpatient abortion facilities are scarce because they are subject to onerous regulations and licensing requirements that do not apply to other healthcare providers. Burkhart Decl. ¶ 7; Okla. Admin. Code §§ 310:600. Together, Plaintiffs operate three of the four remaining abortion clinics in the entire state of Oklahoma. Burkhart Decl. ¶ 8; Burns Decl. ¶¶ 4, 29; Hill Decl. ¶ 1.

68. Oklahoma has restricted abortion access in many other ways. Oklahomans cannot obtain abortion care at public hospitals except in cases of rape, incest, or a life-threatening situation. *See* Okla. Stat. Ann. tit. 63 § 1-741.1(A). Abortion cannot be covered by public health insurance or insurance purchased on the state exchange, except in similarly narrow circumstances. Okla. Stat. Ann. tit. 63 § 1-741.1 (public insurance);

Okla. Stat. Ann. tit. 63 § 1-741.3 (health insurance exchange). Patients seeking abortion care are subject to a mandatory 72-hour waiting period. Okla. Stat. Ann. tit. 63 § 1-738.2(B). And telemedicine, which is used safely in other states to provide medication abortions, cannot lawfully be used in Oklahoma to provide abortion care. *See* Okla. Stat. Ann. tit. 63 § 1-729.1.

69. These restrictions alone and combined with logistical obstacles, such as the need to gather resources to pay for the procedure and related costs as well as to manage conflicting occupational or family commitments, can be significant barriers to accessing abortion care. Burns Decl. ¶ 29; Burkhart Decl. ¶ 9. The COVID-19 pandemic exacerbates these burdens. Burns Decl. ¶ 30; Burkhart Decl. ¶ 37.

IV. Impact of the Executive Order and Press Release

A. Harms to Patients Who Will Be Prevented from Accessing Legal Abortion

70. Abortion is illegal beyond 22 weeks LMP in Oklahoma, except in narrow circumstances. Okla. Stat. Ann. tit. 63 § 1-745.5. Accordingly, patients who are delayed past 21.6 weeks LMP because of the Executive Order and Press Release will be banned completely from obtaining an abortion in the state. Before the Court entered the TRO, Plaintiff Trust Women Oklahoma City was forced to turn away more than 10 patients who would have been entirely prevented from accessing legal abortion in Oklahoma because the Executive Order and Press Release would have forced them to delay their abortions beyond the state's legal limit. Burkhart Suppl. Decl. ¶ 4. Data published by Oklahoma's Department of Health also confirm that each year some women obtain abortions in

Oklahoma for whom a delay of a few weeks would mean that legal abortion is no longer an option. Burkhart Suppl. Decl. ¶ 6.

71. People who are denied a wanted abortion are subject to multiple harms, including physical and psychological harms, increased financial insecurity, potential job loss or delaying education, and inability to leave an abusive relationship. Schivone Decl. ¶¶ 21–22, 24; Nichols Decl. ¶¶ 12, 29. As ACOG and other major medical organizations have made clear, "[t]he consequences of being unable to obtain an abortion profoundly impact a person's life, health, and well-being." Schivone Decl. at ¶ 24 (citing *Joint Statement*).

72. In terms of physical harms, carrying a pregnancy to term imposes substantially more medical risks than obtaining a legal abortion, especially in Oklahoma. Schivone Decl. ¶ 21; Nichols Decl. ¶ 66. According to the CDC, 144 in 10,000 women who gave birth in a hospital in the United States in 2014 experienced unexpected outcomes of labor and delivery that resulted in significant short- or long-term consequences. Schivone Decl. ¶ 21. Complications such as hemorrhage, infection, and injury to other organs are all far more likely to occur with a full-term pregnancy than with an abortion. Nichols Decl. ¶ 66. This is because pregnancies ending in abortion are substantially shorter than those ending in childbirth and thus entail less time for pregnancy-related problems to occur or progress. *Id.* Certain dangerous pregnancy-related complications such as pregnancy-induced hypertension and placental abnormalities manifest themselves in late pregnancy; early abortion avoids these hazards. *Id.*

73. Further, forcing a woman to carry to term through delivery means imposing a substantial risk that she will require major surgery. Nichols Decl. ¶ 58. About 30% of deliveries in the United States require a cesarean section ("C-section"). *Id.* A C-section is an invasive, major abdominal surgery with an inpatient recovery period of two to four days. *Id*.

74. Finally, the risk of death associated with childbirth is approximately 14 times that associated with abortion in the United States as a whole. Schivone Decl. ¶ 21. The maternal mortality rate in Oklahoma is even higher than the national average. *Id*.

75. Additionally, forcing someone to remain pregnant during the COVID-19 pandemic exposes them to even more potential physical harms. Instead of being permitted to end a pregnancy, patients will be required to have more contacts with the health system, thereby increasing their potential exposure to COVID-19. Schivone Decl. ¶ 37; Nichols Decl. ¶¶ 51–55, 57–58. These additional contacts include more office visits for prenatal care, as well as trips to the emergency room and ultimately labor and delivery in the hospital, requiring a hospital stay of at least 1-2 days if there are no complications. *Id.*

76. Whether COVID-19 presents greater risk to pregnant women has not conclusively been determined, but the CDC has cautioned that "[p]regnant women experience changes in their bodies that may increase their risk of some infections and "[p]regnant people have had a higher risk of severe illness when infected with viruses from the same family as COVID-19 and other viral respiratory infections, such as influenza." *Pregnancy and Breastfeeding FAQs.*

77. Being denied a wanted abortion can also have adverse consequences for a patient's mental health. Schivone Decl. ¶ 30. This may be especially true in the case of patients who are pregnant as a result of rape or incest, who are in violent or abusive relationships, or who have received a diagnosis of a fetal anomaly. *Id.* Indeed, remaining pregnant against one's will is a unique form of psychological harm. Nichols Decl. ¶ 29.

78. Some patients end a pregnancy because they conclude it is not the right time to become a parent or have additional children (a majority of women having abortions in the United States already have at least one child). Schivone Decl. ¶ 22 n. 10; *see also* . Burkhart Suppl. Decl., Ex. 2-1 at 9 (data showing most women who have had abortions in Oklahoma previously gave birth). Other patients lack necessary financial resources or a sufficient level of partner or familial support or stability. Schivone Decl. ¶ 22. That financial strain is all the more apparent if one considers that the vast majority—approximately 75%—of abortion patients nationwide are poor or have low incomes. Schivone Decl. ¶ 22 n. 11. All these considerations may be heightened during the current COVID-19 pandemic. Schivone Decl. ¶ 22.

79. Some pregnant people, faced with these realties, may attempt to self-manage an abortion. Nichols Decl. ¶ 29. Because some of the methods people resort to in order to self-manage an abortion are unsafe, this can expose them to the potential for far greater harm than if they had been able to access an abortion at Plaintiffs' clinics. *Id.* ¶ 29; ACOG Br. at 12–14; ACOG Br. II at 8–9 (explaining that some women anxious to end their pregnancies may resort to unsafe methods to induce abortion).

B. Harms to Patients Seeking Medication Abortion.

80. Patients who are delayed beyond 11 weeks LMP will have more limited medical options because medication abortion is not available in Oklahoma after that time. Burkhart Suppl. Decl. ¶ 7; Burns Decl. ¶ 11; Hill Decl. ¶ 8. Plaintiffs routinely see patients for whom a delay of even a week or two would push them beyond the point when they can provide them medication abortion. Schivone Decl. ¶ 31; Hill Suppl. Decl. ¶ 10. Between March 27, 2020 and April 6, 2020, when this Court issued the TRO, Plaintiffs had to turn away several patients who would have been pushed beyond the gestational limit for medication abortion on or before April 30, 2020. Burkhart Suppl. Decl. ¶ 7.

81. Patients who are denied access to medication abortion face unique harms, in addition to all the harms of delaying abortion generally, which are discussed above. Medication abortion is more medically advisable for some patients who have conditions that are contraindicated for procedural abortion. Schivone Decl. ¶ 31. In addition, some patients—for example, patients who are survivors of sexual abuse—may prefer medication abortion over a procedure that requires inserting tubing or instruments into the vagina. *Id.* Similarly, some patients may need to conceal the pregnancy from an abusive or controlling partner or others who would disapprove or shame them and having a medication abortion makes that more possible for multiple reasons. Nichols Decl. ¶¶ 28–29.

82. Preventing a patient from obtaining a medication abortion will also increase the chance that the patient will require sedation if that patient ultimately obtains a procedural abortion. Nichols Decl. ¶ 28; Burkhart Suppl. Decl. ¶ 16; Hill Suppl. Decl. ¶ 12. If sedation is used, it is routine to require that another person accompany the patient

to the clinic so that they can drive the patient home following the procedure. Nichols Decl. ¶ 28. In light of COVID-19, this risks exposing an additional person to the virus. *Id.* And, for patients who wish to conceal their pregnancy, the requirement that someone accompany them for abortion care can be particularly challenging. *Id.*

83. Finally, some patients prefer the convenience and privacy of completing a medication abortion at home or the place of their choosing. Schivone Decl. ¶ 31. Like other factors that patients consider in making the best decisions for themselves in facing an unplanned pregnancy, this may be particularly true during the COVID-19 crisis. Schivone Decl. ¶ 22.

C. Harms to Patients Seeking Procedural Abortions.

84. At the TRO stage, the Court did not enjoin Defendants from enforcing the Executive Order and Press Release against women who require or choose a procedural abortion, but who will not be pushed beyond Oklahoma's legal limit on abortion by April 30, 2020. *See supra* at ¶ 30. Having considered the additional evidence submitted, the Court finds that imposing such delay on people seeking procedural abortion imposes a range of harms, including unnecessary health risks, more limited and burdensome medical options, physical and psychological harms, and yet undetermined risks in the event of COVID-19 infection. Nichols Dec. ¶ 12.

85. First, for some patients early in pregnancy, medication abortion may not be appropriate. Nichols Dec. ¶ 21. For instance, some patients may have an allergy to the medications or a pre-existing medical condition that makes a suction abortion procedure comparatively safer for them. *Id.*

86. Second, while it remains low throughout pregnancy, the risk of a serious complication from abortion increases with weeks of gestation. Schivone Decl. ¶ 28. Accordingly, forcing people to obtain an abortion later in pregnancy imposes increased health risks. *Id.*; *see also* Nichols Decl. ¶¶ 25–26; Nat'l Acads. Report at 77–78, 162–63.

87. Third, the ongoing health risks to women of remaining pregnant also increase over the course of a pregnancy. Nichols Decl. ¶¶ 23–24, 29–30. Even an uncomplicated pregnancy stresses a person's body, affecting every system, including causing hormonal changes that make many pregnant people feel short of breath. *Id.* at ¶ 23. More serious risks of pregnancy include gestational diabetes, gestational hypertension-related conditions such as preeclampsia, hyperemesis gravidarum (which causes severe pregnancy-related nausea and vomiting), and venous thromboembolism (a condition in which blood clots form that can be life-threatening). *Id.* at ¶¶ 23–24. Further, delaying access to abortion care increases the risk that patients may contract COVID-19 while they are still pregnant. *Id.* at ¶¶ 13–15, 51–52, 55; *see also* Schivone Decl. ¶ 29.

88. Individuals also experience emotional harm from being forced to carry a pregnancy for weeks, despite desiring an abortion far earlier. Nichols Decl. ¶ 29. For example, people with ongoing pregnancies may struggle to conceal their condition from abusive partners or family members and must deal with the stress and anxiety of not knowing when—or if—they will be able to obtain an abortion. *Id.* Some people who are delayed in accessing abortion care may also resort to unsafe methods to induce abortion. *Id.*, ACOG Br. I at 12–14; ACOG Br. II at 8–9.

89. Delay can be especially upsetting to patients who need a procedural abortion to end a wanted pregnancy due to lethal or severe fetal anomalies, including anomalies that can be detected by tests that are performed between 11 and 16 weeks LMP. Nichols Decl. ¶ 30. These abnormalities can range from mild to incompatible with life and impact a pregnant person's decision about whether to continue her pregnancy. *Id.* Delay also can be particularly upsetting for patients who are pregnant as the result of rape or incest. Schivone Decl. ¶ 30.

90. Fourth, requiring patients to delay abortion care by several weeks, if not more, necessarily leads patients to require more invasive, time-consuming, and expensive abortions. Nichols Decl. ¶¶ 25–28; Schivone Decl. ¶ 32; Burkhart Supp. Decl. ¶¶ 15–18; Hill Suppl. Decl. ¶¶ 12–13. For example, patients who are delayed beyond approximately 14 weeks LMP in Oklahoma will be required to have a D&E procedure instead of an aspiration procedure. Schivone Decl. ¶ 32; Nichols Decl. ¶ 26. Because D&E uses additional instruments, it is comparatively more complex than an aspiration abortion. Nichols Decl. ¶ 26. Additionally, there can be more bleeding with procedures performed later in pregnancy as compared to procedures performed in the first trimester. *Id.* Further, a patient delayed past approximately 18 weeks LMP may be required to have a two-day D&E procedure, as opposed to a one-day procedure, because additional dilation of the cervix is required at this stage of pregnancy. *Id.* at ¶ 27; Schivone Decl. ¶ 32. An abortion procedure in the second trimester is also more likely to involve sedation, which can carry its own risks, and requires that another person accompany the

patient to the clinic to drive the patient home following the procedure. Burkhart Suppl. Decl. ¶ 16; Nichols Decl. ¶ 28.

91. Procedural abortions performed later in pregnancy also cost significantly more, which for abortion patients—many of whom are poor or low-income and must pay out of pocket—may put abortion entirely beyond their reach. Burkhart Decl. ¶¶ 9, 21; Burkhart Suppl. Decl. ¶¶ 17–18; Hill Suppl. Decl. ¶ 12.

D. Harms to Patients Compelled to Travel Out of State.

92. Rather than risk being forced to carry a pregnancy through delivery or face delays of many weeks or potentially months before they can access care, some patients in Oklahoma will travel to other states to obtain abortion. Schivone Decl. ¶ 34; Nichols Decl. ¶ 22; *see also* ACOG Br. II at 11. The record reflects that Oklahoma patients already traveled to other states in the time period before the Court entered the TRO. Burkhart Suppl. Decl. ¶¶ 9–10; Hill Suppl. Decl. ¶ 7. If abortion services are shutdown as a result of the Executive Order and Press Release and women are forced to travel out of state, "[t]he average (median) one-way driving distance to an abortion clinic for a woman of reproductive age in Oklahoma would increase from 14 miles to 155 miles (or 1,007% longer)." Sharfstein Decl. ¶ 11.[4]

[4] That some women will travel long distances and cross state borders to access abortion services when their state deprives them of this right is not a new phenomenon. Decl. Mary Travis Bassett, M.D., M.P.H. ("Bassett Decl.") ¶ 8 (discussing that before *Roe* women traveled from across the country to New York where abortion was legal to have an abortion), ECF No. 84-6. In the midst of the current pandemic crisis, it is "truly frightening" that some women will have no other option than to undertake this travel, absent an injunction. Bassett Decl. ¶ 8.

93. Long-distance travel during the COVID-19 pandemic carries significant health risks because patients may be exposed to the virus at numerous points along the way. Schivone Decl. ¶ 34; Sharfstein Decl. ¶ 11; Bassett Decl. ¶¶ 7–8. Such travel presents risk to the patient as well as members of her family and community in Oklahoma who may be exposed to the virus when the patient returns home. *Id.*

94. Out of state travel to obtain an abortion will require a woman to overcome a number of barriers. Many women face difficulty in gathering the resources to pay for the abortion and related costs, especially because abortion is rarely covered by health insurance and thus must be paid out of pocket. Burkhart Decl. ¶ 9; Burkhart Suppl. Decl. ¶ 18; Hill Suppl. Decl. ¶ 12. Abortion patients also face obstacles arranging and paying for transportation, as well as managing conflicting occupational and family schedules. *See* Burns Decl. ¶ 29; Burkhart Decl. ¶ 9; Burkhart Suppl. Decl. ¶ 16; Hill Suppl. Decl. ¶ 13. Long-distance travel for abortion services is especially difficult for low-income women, because it involves finding childcare, taking time off work, and covering the cost of gas or other transportation expenses, including a potential hotel stay. ACOG Br. I at 11–12. And victims of domestic violence must overcome exceptional hurdles to obtain an abortion without their abusers' knowledge. Burkhart Suppl. Decl. ¶ 16; Nichols Decl. ¶ 29.

95. During COVID-19 such travel is even more difficult, if not impossible, especially for those who face increased economic uncertainty from lost wages and the need to care for children who are at home. *See* Burns Decl. ¶ 30; Burkhart Decl. ¶ 37; Hill Suppl. Decl. ¶ 13. Low-income women, who represent approximately 75% of abortion patients, Schivone Decl. ¶ 22, n. 11, will be disproportionately impacted by delays or inability to

obtain care in the state. Women who cannot surmount the obstacles discussed above will be forced to remain pregnant against their will.

V. Enforcing the Executive Order Against Abortion Services Does Not Further the State's Asserted Interests

96. In this litigation, Defendants have asserted that applying the Executive Order to all abortion services furthers the State's interests in preventing "(1) close interpersonal contact, (2) depletion of medical PPE, and (3) activities that will increase the use of hospital beds, staff, and other resources." TRO 6, 10. The latter two purposes were expressed in the Press Release, but the first was not. The evidence shows that the Executive Order and Press Release do not meaningfully advance any of these interests. Defendants' evidence also fails to account for the important fact that a person who cannot obtain an abortion remains pregnant, and will require more interpersonal contact, PPE, and hospital resources to access pregnancy-related care, to have a delayed abortion, or ultimately to undergo labor and delivery.

A. Interpersonal Contact

97. Plaintiffs are committed to doing their part to protect patients and staff during the pandemic. Even before the Executive Order, Plaintiffs undertook extensive precautions to reduce the possibility of COVID-19 infection among patients and staff.

98. For example, Plaintiffs have reduced the volume of patients at their facilities by curtailing their non-abortion services or moving them to telemedicine. Burkhart Decl. ¶ 25; Hill Decl. ¶ 13. All patients are screened before or upon entry for COVID-19 symptoms and, in accordance with social distancing guidelines, waiting rooms have been

modified to afford more space, and patients are given the option to wait in their cars until a clinician is ready to see them. Burns Decl. ¶¶ 14–15; Burkhart Decl. ¶¶ 24, 27; Hill Decl. ¶¶ 13-14. Except for minors, patients can no longer be accompanied by someone else. Burns Decl. ¶ 15; Burkhart Decl.¶ 24; Hill Decl. ¶ 13. Strict "social distancing" is enforced once patients are inside. Burns Decl. ¶ 15; Burkhart Decl. ¶¶ 26, 27; Hill Decl. ¶ 14. Hard surfaces are sanitized between patients. Burns Decl. ¶ 16; Burkhart Decl. ¶ 28; Hill Decl. ¶ 13. And masks are worn by staff. Burns Decl. ¶ 23; Burkhart Decl. ¶ 35; Hill Suppl. Decl. ¶ 18.

99. The measures Plaintiffs instituted to prevent the spread of COVID-19 are in keeping with guidance from the CDC and other leading medical organizations. Hill Suppl. Decl. ¶ 16; Burns Decl. ¶ 13; Burkhart Decl. ¶ 23. They are also comparable to the measures instituted at other outpatient medical practices in Oklahoma. Stone Decl. ¶ 29. Defendants have presented no evidence showing that the interpersonal contacts necessary for abortion care present greater risks than those at other outpatient healthcare facilities that continue to operate during the pandemic.

100. Oklahoma also has yet to impose more stringent social distancing measures recommended by leading public health authorities, which are reducing the number of coronavirus infections in other states. Sharfstein Decl. ¶ 15. Moreover, Defendants have presented no evidence showing that the interpersonal contacts necessary for abortion care present greater risks than those at other businesses that are exempt from the Executive Order, such as liquor stores, marijuana dispensaries, sporting goods stores, and bookstores. Burkhart Suppl. Decl. ¶ 11; Burkhart Suppl. Decl., Ex. 2-3.

101. Delaying procedural abortions also ultimately leads to more in-person visits because many patients only find out that they require a procedural abortion when they are in the clinic and testing reveals they are ineligible for a mediation abortion. Hill Suppl. Decl. ¶ 14. Because these patients cannot receive a procedural abortion under the Executive Order and Press Release, they will be forced to leave and come back again for a second in-person appointment. *Id.*

102. Meanwhile, patients forced to remain pregnant as a result of the Executive Order and Press Release will require healthcare that will ultimately entail as many or more interpersonal contacts with healthcare providers. Nichols Decl. ¶ 13; Stone Decl. ¶ 28.

103. Oklahoma encourages pregnant people to obtain prenatal care and emphasizes the importance of prenatal care for the health of the pregnant person and the fetus. Nichols Decl. ¶ 37; Stone Decl. ¶ 26.

104. Even in an uncomplicated pregnancy, medical authorities recommend that pregnant women see a physician multiple times in the first 22 weeks of pregnancy. Nichols Decl. ¶ 36; Stone Decl. ¶ 12. Some of these appointments can be consolidated or potentially moved to telemedicine during the COVID-19 pandemic, but even in the current crisis, medical authorities recommend at minimum that pregnant women obtain in-person care from a physician at 11-13 weeks LMP and again at 18-22 weeks LMP to obtain ultrasounds, blood work, and genetic tests necessary to ensure the woman's health and screen for fetal abnormalities. Nichols Decl. ¶ 46, 49; Stone Decl. ¶¶ 23–25. Some pregnant patients require more, or different, prenatal care, if there is a complication or the patient is high risk. Nichols Decl. ¶ 44; Stone Decl. ¶ 19.

B. Medical PPE

105. Recent statements by Oklahoma officials make clear that prohibiting abortion services is not necessary to address the State's asserted goal of conserving personal protective equipment. *See* Trotter. Specifically, on April 7, 2020, Oklahoma's PPE "czar" publicly stated that Oklahoma "has plenty of personal protective equipment on hand for health care workers," including "more than four million pairs of gloves, 120 thousand gowns, 900 thousand surgical masks, and around 110 thousand respirators." Trotter; Califano. Oklahoma also has more shipments of PPE on the way. Trotter.

106. Defendants have not shown that the minimal PPE used by Plaintiffs in providing abortion care would make a meaningful dent on the State's stockpiles. Schivone Decl. ¶ 35; Hill Decl. ¶ 9.

107. The PPE in shortest supply is N95 respirators, the specialized masks designed to block at least 95% of very small test particles, and those are not consumed in any material way to provide abortion care in Oklahoma. Dr. Burns and Planned Parenthood do not use N95 respirators. Burns Decl. ¶ 24; Hill Decl. ¶ 9. And, as of two weeks ago, Trust Women had only a residual supply of approximately fifty N95 respirators, which it is using sparingly. Burkhart Decl. ¶ 35.

108. Clinicians providing medication abortions typically use only one pair of non-sterile gloves to perform the ultrasound and no other PPE. Burns Decl. ¶ 23; Burkhart Decl. ¶ 33; Hill Suppl. Decl. ¶ 17. Procedural abortions also are performed using minimal PPE, typically including only gloves, shoe covers, reusable protective eyewear or a face shield, and sometimes a surgical mask and gown. Burns Decl. ¶ 23; Burkhart Decl. ¶ 34;

Hill Decl. ¶ 10. While staff at Plaintiffs' clinics have begun wearing masks to minimize the potential for viral transmission, the amounts of PPE used to provide abortion care, even now, are exceedingly small relative to the PPE that a hospital or even an outpatient ambulatory surgical center might use. Schivone Decl. ¶ 35; Burkhart Decl. ¶ 36.

109. Delaying abortions also leads to more PPE consumption because, while the amount used for any procedural abortion is minimal, a D&E requires more PPE than an aspiration abortion, and a two-day D&E requires more PPE than a one-day procedure. Burkhart Suppl. Decl. ¶ 16; Nichols Decl. ¶ 32.

110. As discussed *supra* ¶¶ 74–76, 103–04, if patients continue pregnancies rather than having abortions, they will need prenatal care in the first and second trimesters, and this prenatal care requires PPE comparable to, if not greater than, abortion services. Stone Decl. ¶ 28; Nichols Decl. ¶ 13.

111. Clinicians wear one pair of disposable gloves for each prenatal test and ultrasound. Nichols Decl. ¶¶ 39, 48; Stone Decl. ¶ 27. In light of COVID-19, clinicians also wear surgical masks. Stone Decl. ¶ 27; Nichols Decl. ¶ 48.

112. Should the pandemic last a year to 18 months, labor and delivery require significant amounts of PPE, particularly given the number of medical staff involved in even uncomplicated deliveries, when the patient spends 24 to 48 hours in the hospital interacting with numerous hospital personnel. Nichols Decl. ¶ 57; Stone Decl. ¶ 35.[5] Patients who

[5] For a vaginal delivery, there will be at least 3-4 hospital personnel wearing PPE such as surgical gowns, masks, and gloves. Nichols Decl. ¶ 57; Stone Decl. ¶¶ 32–33. For a cesarean section, a major abdominal surgery, 5-6 personnel will be wearing PPE. Nichols

have C-Sections stay in the hospital for up to four days. Nichols Decl. ¶ 58; Stone Decl. ¶ 35.

C. Hospitals Beds and Other Resources

113. On April 7, 2020, Governor Stitt held a press conference regarding the State's efforts to combat the COVID-19 pandemic and publicly stated that Oklahoma has 5,000 available hospital beds and 2000 ventilators, which puts the State "in a good spot." Cukor Decl., Ex. 7-3. Governor Stitt subsequently announced that Oklahoma has more hospital beds than will be necessary to treat COVID-19 patients, "even if [Oklahoma is] faced with the worst-case scenario." Okla. Gov. Kevin Stitt, *Press Release: Governor's Solution Task Force Announce Hospital Surge Plan for COVID-19* (Apr. 10, 2020), https://bit.ly/2VcPMAp.

114. Both medication and procedural abortion carry a low risk of complications and a very low risk that hospitalization is necessary to treat a complication. Nichols Decl. ¶ 61; Schivone Decl. ¶¶ 19-20.

115. Almost all complications associated with medication abortion, or with abortion procedures especially prior to 22 weeks LMP, can be safely and appropriately managed in an outpatient, clinic setting—i.e., do not require hospitalization.[6] Nichols

Decl. ¶ 58; Stone Decl. ¶¶ 32–33. For deliveries for patients with confirmed or suspected COVID-19 infection, all personnel wear full PPE, including N95 respirators. Nichols Decl. ¶ 59; Stone Decl. ¶ 34.

[6] For example, most cases of hemorrhage are managed in the clinic setting with uterotonics, medications that cause uterine contractions and reduce bleeding. Likewise, most cases of cervical laceration are managed in the clinic setting either with cauterizing medications or by suturing the laceration. And cases of incomplete abortion are generally managed in the clinic through repeat aspiration and medications. Nichols Decl. ¶ 64.

Decl. ¶ 64; Schivone Decl. ¶ 20. Abortion-related ER visits make up only 0.01% of all ER visits, and only 0.87% of abortions result in an emergency room visit at which the patient receives a diagnosis, treatment, or diagnosis and treatment for an abortion-related reason. Nichols Decl. ¶¶ 54, 65; Schivone Decl. ¶ 20; Upadhyay 2015 at 177.

116. None of the Plaintiffs performs abortions at a hospital, and their patients rarely experience complications that require hospital transfer. Burkhart Decl. ¶ 31 ("Trust Women Oklahoma City solely provides outpatient care, so we do not have hospital beds. We almost never send patients to the hospital."); Burns Decl. ¶ 20 ("In my 46 years as an abortion provider, I have transferred only one patient from the clinic to a hospital, and I did so only in an abundance of caution."); Hill Decl. ¶ 11 (Planned Parenthood "has never had occasion to transfer a patient from the health center to a hospital.").

CONCLUSIONS OF LAW

I. Standing

1. Plaintiffs have standing to assert their patients' constitutional rights to abortion access. The Supreme Court has repeatedly held that abortion providers have third-party standing on behalf of their patients, particularly where, as here, the challenged restriction operates directly on clinics and physicians. *See, e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Singleton v. Wulff*, 428 U.S. 106, 108 (1976) (plurality op.). The Tenth Circuit adheres to these precedents, which are binding on this court. *See e.g.*, *Planned Parenthood of Rocky Mountains Servs. v. Owens*, 287 F.3d 910 (10th Cir. 2002).

II. Standard for Preliminary Injunction

2. A movant seeking preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the injunction; and (4) the injunction would not be adverse to the public interest." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001).

3. Defendants contend that Plaintiffs must satisfy a "heightened standard" because the requested preliminary injunction would afford Plaintiffs "all the relief that [they] could recover at the conclusion of a full trial on the merits." *Fish v. Kobach*, 840 F.3d 710, 723–24 (10th Cir. 2016). Even assuming Defendants are correct, Plaintiffs have made a sufficiently strong showing to meet that standard. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797–98 (10th Cir. 2019).

III. Applicable Legal Standards

4. The government has authority to "safeguard the public health and the public safety" in an emergency. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). But that power is not unfettered. Even during a crisis, courts must carefully guard against "unreasonable," "arbitrary," or "oppressive" exercises of the government's police power. *Id.* at 28, 38; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21(1866) (recognizing that fundamental rights remain steadfast, even during a crisis); *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, ECF No. 6 at 15 ("constitutional rights still exist" during the COVID-19 pandemic).

5. In *Jacobson*, the Supreme Court upheld a law requiring smallpox vaccination but recognized that, even when seeking to "protect the public health," a state violates the constitution when its actions (1) "go beyond the necessity of the case," (2) result in "a plain, palpable invasion of rights secured by the fundamental law," or (3) have "no real or substantial relation to" the state's public health goals. 197 U.S. at 28, 31. Thus, under *Jacobson*, a court must determine whether a state's action abrogates "particular rights secured by the fundamental law." *Id.* at 31. And a court should also consider whether rights are infringed because the state's action lacks a "real or substantial relation" to the state's professed goal or "go[es] beyond the necessity" of the situation. *Id.* at 28, 31.

6. The police power also cannot be exercised with an "unequal hand." *Jew Ho v. Williamson*, 103 F. 10, 23 (C.C.N.D. Cal. 1900) (holding that quarantine of Chinese residents "cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the fourteenth amendment"); *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894) (exercise of police power may not be "unduly oppressive" and may not "impose unusual and unnecessary restrictions upon lawful occupations").

7. The right at issue here is access to abortion. The Supreme Court has established that the Fourteenth Amendment to the U.S. Constitution shields a woman's right of access to abortion. *See Roe v. Wade*, 410 U.S. 113 (1973). The "central holding of *Roe v. Wade*" is that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to

terminate her pregnancy prior to viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality op.). Since *Roe*, the Supreme Court has repeatedly held that no state interest is sufficient to ban previability abortion access. *Id.*; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (viability is "the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health"); *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007).

8. Federal circuit courts have uniformly struck down previability bans on abortion as incompatible with *Roe*. *See, e.g., Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (invalidating ban on abortions at six weeks); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268-69 (5th Cir. 2019) (invalidating ban on abortions starting at fifteen weeks); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772-73 (8th Cir. 2015) (invalidating ban on abortions after six weeks), *cert denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117-19 (8th Cir. 2015) (invalidating ban on abortions after twelve weeks), *cert denied*, 136 S. Ct. 895 (2016); *Isaacson v. Home*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (invalidating ban on abortions starting at twenty weeks), cert denied, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117-18 (10th Cir. 1996) (a statute banning abortions after twenty weeks "impose[d] an unconstitutional undue burden on [a patient's] right to choose under Casey"), *cert denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (invalidating ban on all abortions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-1369, 1371-1372 (9th Cir. 1992) (ban on all abortions), *cert. denied*, 506 U.S. 1011 (1992).

9. The fundamental right to choose whether and when to bear a child under the U.S. Constitution also shields a woman from any "undue burden" caused by state regulation. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) ("[T]he standard that this Court laid out in *Casey* . . . asks courts to consider whether any burden imposed on abortion access is 'undue.'"). In applying the undue burden test, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* A state's mere assertions that a restriction confers benefits is insufficient. Courts have an "independent constitutional duty" to determine the "existence or nonexistence of benefits" based upon the evidence. *Id.* at 2309–10.

10. Defendants essentially concede that the Executive Order and Press Release infringe the fundamental right to abortion access but argue that *Jacobson* gives government blanket authority to restrict individual liberty during a pandemic. *Jacobson* has never been interpreted in that manner. Modern constitutional law treats *Jacobson* as having "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). Moreover, the Supreme Court in *Casey* characterized *Jacobson* as "recognizing limits on government power" and cited *Jacobson* in support of its holding that "a State's interest in the protection of life falls short of justifying a plenary override of individual liberty claims." *Casey*, 505 U.S. at 857.

11. The Court in *Jacobson* found that the plaintiffs' interest in not being vaccinated did not invade a fundamental constitutional right. With respect to abortion, however, the Supreme Court has repeatedly recognized that the Constitution protects the

right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

12. Defendants also claim that courts lack authority to review its efforts to combat a public health emergency. To the contrary, even "under the pressing exigencies of crisis," the Supreme Court has held that courts must resist the "temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963). Of course, in a public health emergency, states may draw upon their police powers to protect the public and eliminate the threat. But a state's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton*, 152 U.S. at 137. As the Supreme Court and the Tenth Circuit have emphasized: "'To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . .' require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Anaya v. Crossroads Managed Care Sys*., 195 F.3d 584, 591 (10th Cir. 1999) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962) (quoting *Lawton*, 152 U.S. at 137)).

13. In other words, even when a state has legitimate public health aims, courts must weigh "the nature of the menace against which it will protect, the magnitude of the curtailment of individual rights affected and the availability and effectiveness of other less drastic protective measures." *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1214 (D. Kan. 1992) (citing *Goldblatt*, 369 U.S. at 594-95). *Jacobson r*ecognized this as well. As the Supreme Court explained, a state has "an acknowledged power" to protect "against an epidemic," but if a state exercises that power in an "oppressive," or "arbitrary or unreasonable manner," the circumstances may "authorize or compel the courts to interfere for the protection" of individuals' constitutional rights. *Jacobson*, 197 U.S. at 28, 38. Indeed, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id*. at 31; *see id.* at 38 ("interference of the courts" is necessary "to prevent wrong and oppression").

IV. Likelihood of Success on the Merits

14. The Court has considered the potential for success of Plaintiffs' claims under both *Jacobsen*'s standard for permissible state action to further public health, *Roe*'s prohibition against previability abortion bans, and *Casey*'s undue burden analysis. Plaintiffs have established a substantial likelihood of success on the merits.

A. Patients Who Will Be Prevented From Accessing Legal Abortion

15. As this Court found at the TRO stage, the Executive Order and Press Release would effectively deny some Oklahomans their right to access legal abortion. TRO 9–10. Defendants acknowledged during the April 3, 2020 hearing on the TRO that a hypothetical patient whose pregnancy was 16 weeks postfertilization (18 weeks LMP) on March 24,

2020 would, on April 30, 2020, lie beyond Oklahoma's gestational limit for legal abortion in the state.

16. Defendants claim this is a speculative concern. During the brief period between March 27 and April 4, 2020 when the Executive and Press Release were in full effect, however, the evidence shows that Plaintiffs were forced to turn away at least 10 women who would have been pushed beyond Oklahoma's limit on or before April 30, 2020. *See* FOF ¶ 70.

17. Prohibiting pregnant women from obtaining an abortion until that patient will lose her right to lawfully obtain an abortion in Oklahoma is tantamount to a previability ban on abortion. This is plainly unconstitutional. As the Supreme Court has repeatedly reaffirmed, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007) (citing *Casey*, 505 U.S. at 879).

18. None of Oklahoma's asserted interests in reducing interpersonal contacts, conserving PPE, and preserving hospitals beds can justify the complete denial of patients' Fourteenth Amendment right to abortion access. *Casey*, 505 U.S. at 846, 871 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion. . . .); *Roe*, 410 U.S. 163–65.

19. Every court that has reviewed a COVID-19 executive order that prohibits abortions has enjoined application of the order to require a patient to delay her abortion to the point that she would be unable to obtain one. *In re Abbott*, No. 20-50296, 2020 WL 1844644 at *2 (5th Cir. Apr. 10, 2020) (granting temporary administrative stay of TRO

"EXCEPT that part of the TRO applying to "any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—" upon the executive order's expiration); *Preterm-Cleveland v. Attorney General of Ohio*, No. 20-3365, 2020 WL 1673310, at *2 (6th Cir. Apr. 6, 2020) (denying stay of TRO in part because the TRO properly prohibited enforcement of a COVID-19 Executive Order that would, inter alia, prohibit a patient from "exercise[ing] her Fourteenth Amendment right to a pre-viability abortion"); *Robinson v. Marshall*, 2:19-cv-365-MHT, 2020 WL 1847128 at *6, 13 (M.D. Ala. Apr. 12, 2020).

20. Even if the effect of the Executive Order and Press Release on women pushed beyond Oklahoma's legal limit were considered a restriction rather than an outright ban on abortion, the severe harms to such women are an unconstitutional "undue burden" because they clearly outweigh any nominal benefit to the State's asserted interests. The evidence shows that the harms to women who are denied access to legal abortion include physical and psychological harms, increased financial insecurity, including potential job loss or delaying education, and inability to leave an abusive relationship. *See* FOF ¶¶ 71-79.

21. Defendants' police powers to confront the COVID-19 pandemic cannot justify the "plain, palpable invasion of rights" that would result from prohibiting women from obtaining an abortion in Oklahoma until legal abortion is no longer an option for them. *Jacobson*, 197 U.S. at 31.

22. Plaintiffs have demonstrated a likelihood of success on their claim that enforcement of the Executive Order and Press Release with respect to any patient who will

lose her right to lawfully obtain an abortion in Oklahoma on or before the date of expiration of the Executive Order is unconstitutional.

B. Patients Seeking Medication Abortion

23. The Court also found at the TRO stage that Plaintiffs are likely to succeed on the merits of their claim that the Executive Order and Press Release constitute an unconstitutional undue burden on patients seeking medication abortion, and that enforcement of the Executive Order and Press Release against such patients would be an invalid exercise of the State's police powers. TRO 10–11.

24. Medication abortion is time-sensitive because it is only available to patients in early stages of pregnancy. In Oklahoma, medication abortion is offered to patients only up to 11 weeks LMP. *See* FOF ¶ 80.

25. Medication abortion is a safe method of terminating a pregnancy with oral medication. The evidence shows that medication abortion is medically preferable for patients with certain medical conditions. Medication abortion also offers advantages to survivors of sexual abuse who may prefer medication over a procedure that requires inserting tubing or instruments into the vagina. *See* FOF ¶ 25, 81.

26. As a result, patients who are denied access to medication abortion, or pushed beyond the point when medication abortion is no longer available, are burdened in multiple ways. In addition to being deprived medical care that may be medically or otherwise preferable, patients must instead have a procedural abortion. Procedural abortions are more invasive, may require sedation, and are not as easily concealed from others, such as an abusive partner. *See* FOF ¶¶ 81-82.

27. Courts across the country have recognized the burdens that stem from making medication abortion unavailable. *See Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (holding that a law restricting the availability of medication abortion burdened patients, including those who preferred medication abortion over the surgical alternative and would have to incur increased logistical burdens to obtain an abortion); *W. Alabama Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1263 (M.D. Ala. 2017), *aff'd sub nom. W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018) (finding that restrictions on access to medication abortion burden women in abusive relationships who must conceal their pregnancies from abusers); *W. Alabama Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1331 (M.D. Ala. 2016) ("where a battered woman attempts to conceal her pregnancy from her abuser through a medication abortion, she must do so in the first ten weeks of pregnancy or risk having her abuser learn of her abortion.").

28. On the other side of the ledger, the benefits to the State from prohibiting medication abortion, if any, are slight. While medication abortion requires an in-person visit to the clinic, patients who are forced to remain pregnant are likely to require healthcare, including prenatal care. Even in the short-term, according to recommended guidelines, pregnant patients will need to make at least two in-person visits to a clinician before 22 weeks LMP for evaluation and testing, including ultrasounds, blood tests, and genetic tests, that are important to ensure the woman's health and her pregnancy. *See* FOF ¶¶ 102-104.

29. Medication abortion requires very little PPE. The evidence shows that medication abortion typically requires only one pair of non-sterile gloves, which are used to perform the ultrasound. The health care required by women who are forced to remain pregnant is likely to consume comparable amounts of PPE, if not more. *See* FOF ¶¶ 108-110.

30. Medication abortion also is unlikely to impose demands on hospitals. The record shows that the rate of major complications (i.e., complications that might require treatment at a hospital) for medication abortion is exceptionally low, a fraction of one percent. Plaintiffs confirm that they rarely, if ever, transfer patients to a hospital. *See* FOF ¶ 59, 116.

31. The Court finds that the burdens to patients who are denied medication abortion outweigh the benefits to the State's asserted interests in minimizing interpersonal contacts, conserving PPE, and preserving hospital resources. As a result, enforcement of the Executive Order and Press Release against patients seeking medication abortion constitutes an unconstitutional "undue burden" on the right to abortion access.

32. The disconnect between the means employed by the State and the benefits achieved also renders the prohibition on medication abortion invalid under *Jacobson*, 197 U.S. at 31. Enforcement of the Executive Order and Press Release against patients seeking medication abortion results in a "plane, palpable invasion of rights," "[go]es beyond the necessity of the case," and has "no real or substantial relation to the protection of the public health and the public safety." *Id.*

C. Patients Seeking Procedural Abortions

33. At the TRO stage, the Court found that Plaintiffs had not demonstrated a likelihood of success on the merits of their claim that enforcement of the Executive Order and Press Release against patients seeking procedural abortions is unconstitutional, provided those patients would be able to access legal abortion when the Executive Order expires on April 30, 2020. TRO 8–9. The more fulsome record now before the Court compels a different conclusion.

34. Leading medical authorities have concluded that abortion care is time-sensitive and should not be delayed, even during the COVID-19 pandemic. *See* FOF ¶¶ 51-52. A primary reason for this is because, while legal abortion is safe, the risks of complications increase as pregnancy progresses. These increased health risks associated with prolonged pregnancy are particularly concerning during the COVID-19 epidemic. *See* FOF ¶¶ 75-76, 86-87.

35. In addition to imposing unnecessary health risks, Plaintiffs have demonstrated that patients who are prevented from timely accessing procedural abortions suffer numerous other burdens. Delayed patients obviously remain pregnant, and prolonged pregnancy exacts a substantial physical and mental toll. This is especially true for patients with high-risk pregnancies, pre-existing conditions, or in the event a patient receives a diagnosis of a fetal anomaly. *See* FOF ¶¶ 71-79, 84-89.

36. Patients whose access to procedural abortions is delayed may also have more limited medical options available to them. Patients delayed beyond approximately 14 to 15 weeks may no longer be candidates for an aspiration procedure, leaving a more complex

and invasive D&E procedure as their only option. Patients who are further delayed beyond approximately 18 weeks LMP may have to undergo a two-day D&E rather a one-day procedure. Procedural abortions performed later in pregnancy also cost significantly more, which may put abortion beyond reach for poor and low-income patients. *See* FOF ¶¶ 90-92.

37. Considering the experience of a patient early in pregnancy helps to demonstrate the impact of requiring delays for those seeking a procedural abortion in Oklahoma. For example, a patient who was 10 weeks LMP on March 27 would have been able to have a medication abortion or a suction aspiration abortion procedure but for Press Release issued that day. By the time of the Court's TRO, this patient would have been 11 weeks and 3 days LMP and ineligible for medication abortion. If the Executive Order expires as scheduled on April 30, she will be approximately 15 weeks LMP. At that point, she will have been forced to remain pregnant an additional 5 weeks and experience all the harms discussed above. Even if she were able to access abortion immediately, without further delay, she will not be able to have a medication abortion, and her only option will likely be a D & E.[7]

38. To avoid these burdens, some patients likely will be compelled to travel to other states to obtain a procedural abortion, as demonstrated by the fact that numerous

[7] If the Executive Order is extended an additional month, this same patient will be forced to continue her pregnancy until at least May 30, when she will be approximately 19 weeks LMP. By that time, she will have been forced to remain pregnant for an additional 9 weeks. If she is able to access abortion immediately, she will have a D&E procedure, which will likely take place over two days, and carry incrementally increased health risks, as well as additional cost, time and related stress on the patient and her family. The patient will experience all these harms on top of the emotional and physical strain of being pregnant for an additional two months during a pandemic.

patients had already done so before this Court issued its TRO. Such long-distance travel is an added burden, and it increases the risk that patients may be exposed to COVID-19 and return to Oklahoma with the virus. *See* FOF ¶¶ 92-95.

39. Numerous courts have recognized that women are harmed when access to procedural abortions is delayed. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 918 (7th Cir. 2015) (affirming injunction of law that would delay women in obtaining abortions, causing some "to forgo first-trimester abortions and instead get second-trimester ones, which are more expensive and present greater health risks"); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1326–27 (11th Cir. 2018) (affirming injunction against an abortion restriction that would delay women in obtaining abortions, increasing patients' medical risk and "the costs of travel and lodging").

40. These burdens on Oklahoma patients' rights to abortion access are "undue" because forcing patients to delay procedural abortions for weeks, if not longer, does not meaningfully advance the State's asserted interests in enforcing the Executive Order.

41. Procedural abortions are either one or two day procedures. While interpersonal contact is required, the State has exempted a variety of healthcare and other services that involve comparable in-person contacts, and Plaintiffs have undertaken measures to mitigate the risk of viral transmission. Moreover, if forced to remain pregnant, patients are likely to require other healthcare services, including prenatal care, that require as many in-person contacts with healthcare providers, if not more. *See* FOF ¶¶ 97-104.

42. Procedural abortions require minimal PPE, especially when it comes to aspiration abortion. Delaying procedural abortions nevertheless consumes more PPE

because a D&E requires more PPE than an aspiration abortion, and a two-day D&E requires more PPE than a one-day procedure. *See* FOF ¶¶ 109-112.

43. Procedural abortions also are unlikely to burden hospitals. At the TRO stage, the Court found that medication abortions carry less risk than procedural abortions. TRO 10. Evidence shows that the rate of serious complications associated with procedural abortions is also exceptionally low, and patients very rarely require ER visits or hospital admissions as a result of procedural abortions. *See* FOF ¶¶ 56-59, 114-116.

44. Meanwhile, patients who are forced to remain pregnant as a result of delayed abortion access are likely to require as much or more hospital care. *See* FOF ¶¶ 63-66. As another federal district court recently observed, "a delayed abortion does not erase even the patient's short-term need for medical care." *Robinson v. Marshall,* 2:19-cv-365, 2020 WL 1847128, at *11 (M.D. Al. Apr. 12, 2020).

45. Even early in pregnancy, pregnant women—especially those with high-risk pregnancies—can have complications that require emergency room and hospital visits. Women also frequently go to the hospital after a miscarriage, which are not uncommon. Hospital visits are even more likely during the COVID-19 epidemic because, unlike other patients, medical authorities recommend that pregnant women who show signs of infection go to the hospital for evaluation. *See* FOF ¶¶ 63-66.

46. Based upon the evidence presented, the Court finds that the burdens associated with forcing patients to delay their procedural abortions outweigh the benefits to the State's asserted interests. As such, enforcing the Executive Order and Press Release

against patients seeking procedural abortions is an unconstitutional undue burden, even if a patient could still obtain an abortion in Oklahoma after April 30, 2020.

47. The Court further finds that the deference given to the State at the TRO stage regarding the steps necessary to stop the spread of COVID-19 and ration resources needed to treat infected patients is unwarranted. The evidence shows that enforcing the Executive Order and Press Release against patients seeking procedural abortions does not meaningfully advance the State's asserted interests. This disconnect between the means chosen by the State and the lack of benefits achieved indicates that the prohibition on procedural abortions is improper under *Jacobson* as well. Enforcement of the Executive Order and Press Release against patients seeking procedural abortions results in a "plane, palpable invasion of rights," "[go]es beyond the necessity of the case," and has "no real or substantial relation to the protection of the public health and the public safety." *Jacobson*, 197 U.S. at 31.

V. Irreparable Harm

48. Plaintiffs have demonstrated irreparable harm absent entry of injunctive relief because their patients will be substantially delayed in or prevented from exercising their right to abortion access. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1263 (10th Cir. 2016) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Without injunctive relief, Plaintiffs will be forced to close their doors and turn away patients, resulting in immediate and irreparable harm for which no adequate remedy at law exists.

49. In the short period of time between the Press Release and the Court's TRO Order, Plaintiff Trust Women Oklahoma City had to turn away at least 10 patients who would have been pushed beyond the legal limit for abortions in Oklahoma (i.e., 22 weeks LMP) under the Executive Order. FOF ¶ 70. Faced with a law that prohibits any woman from making the ultimate decision to terminate her pregnancy before viability in violation of *Roe* and *Casey*, courts have uniformly found irreparable harm to be established. *See* COL ¶ 8.

50. In addition, the Executive Order imposes an unprecedented nearly *five* week delay, from the time the Press Release was issued on March 27 to April 30 (assuming the Order is not extended). No court has ever sanctioned a "delay" of this nature, which for all the reasons discussed above is found to impose an unconstitutional undue burden on Oklahomans seeking to have an abortion, and therefore constitutes irreparable harm. *See, e.g., Free the Nipple-Fort Collins*, 916 F.3d at 805.

51. The evidence also shows that forcing patients to delay abortion care and prolong pregnancy against their will inflicts a substantial physical toll, exposes patients to numerous unnecessary health risks, and requires patients to have more complex, invasive and expensive procedures. *See* FOF ¶¶ 84-91. This too constitutes irreparable harm. *See e.g., Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795-96 (7th Cir. 2013) (finding plaintiff abortion providers face irreparable harm where abortion restrictions would close two and a half abortion clinics in state (out of four) and impose weeks of delay to obtain an abortion, which "can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal"); *Planned Parenthood of*

Idaho v. Wasden, 376 F. Supp. 2d 1012, 1021-22 (D. Idaho 2005) (finding irreparable harm where "provisions of the Act, in combination with certain circumstances, will likely threaten the health of minors seeking abortions").

52. Further, "[a] plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video Satellite*, 269 F.3d at 1156. Here, "[a] disruption or denial of these patients' health care cannot be undone after a trial on the merits." *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (internal quotation marks omitted); *see also Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1058 (M.D. Ala. 2019) ("Invasions of privacy . . . [can]not be compensated for by monetary damages." (citations omitted)).

53. Finally, courts in Ohio, Alabama, and Texas have found irreparable injury where Plaintiffs established that they were likely to succeed in demonstrating a similar COVID-19 Executive Order was unconstitutional. *See Robinson*, 2020 WL 1847128, at *15 (holding similar Alabama executive order would "permanently prevent or impose plainly undue burdens upon abortions for some women, denying those women their fundamental right to privacy," which "constitutes 'irreparable injury'" (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990))); *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY, 2020 WL 1815587 at *6 (W.D. Tex. Apr. 9, 2020) (granting TRO against Texas executive order, finding "Plaintiffs and their patients will suffer irreparable harm"), *stayed in part sub nom. In re Abbott*, No. 20-50296, 2020 WL 1844644, at *2 (5th Cir. Apr. 10,

2020) (per curiam) (staying TRO except as to abortions for women who would be past the legal limit for an abortion in Texas if forced to wait for EO to expire), *amended by In re Abbott*, No. 20-50296, slip op. at 5 (5th Cir. Apr. 13, 2020) (per curium) (denying Texas' motion for an emergency stay as it applies to the provision of medication abortions); *Preterm Cleveland, v. Att'y Gen. of Ohio*, No. 1:19-cv-00360, slip op. at 7 (S.D. Ohio Mar. 30, 2020) (finding enforcement of Ohio executive order would inflict irreparable harm); *Preterm Cleveland, v. Att'y Gen. of Ohio*, No. 1:19-cv-00360, ECF No. 63 (S.D. Ohio Apr. 10, 2020) (extending TRO until district court rules on pending motion for preliminary injunction).

VI. Balance of Hardship and Public Interest

54. Given the nature of the State's interest in issuing the Executive Order and Press Release, namely the protection of public health, the final two considerations for a preliminary injunction are merged.

55. Here, the balance of hardships tips heavily in Plaintiffs' favor. No one disputes that the State is facing a public health crisis, but the evidence demonstrates that enforcing the Executive Order as to abortion services will provide little to no benefits to the State's goals in addressing this crisis. FOF Sec. V. Abortion services, which are provided at outpatient clinics, use minimal PPE, and medication abortion uses hardly any PPE. Meanwhile, recent statements made by State officials that Oklahoma has "plenty of personal protective equipment" and more on the way further undermine the need to ban and delay abortions to achieve the State's goals. FOF ¶ 105.

56. On the other side of the balance, Oklahomans seeking time sensitive abortion care will experience significant harms from being forced to continue an unwanted pregnancy in the midst of a pandemic, which will ultimately force patients to obtain *more* health care, undertake risky out-of-state travel (rather than stay at home), and/or take desperate, unsafe measures to end their pregnancy—all of which *increases* the chances that patients will end up taxing an already over-burdened health care system. FOF Sec. IV.

57. Finally, "[the State] does not have an interest in enforcing a law that is likely constitutionally infirm." *U.S. Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). For the same reasons, allowing the State to ban abortion and impose unprecedented delays is not in the public's interest.

VII. No Bond Is Required

58. It is well-settled that courts have discretion to waive the Rule 65 bond requirement. *See e.g.*, *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (affirming district court's waiver of bond requirement); *SizeWise Rentals, Inc. v. Mediq/PRN Life Support Servs., Inc.*, No. 00–3051, 2000 WL 797338, at *7 (10th Cir. 2000); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (affirming the district court's decision not to award damages under Rule 65(c) where "plaintiffs raised legitimate environmental concerns having a high public interest and litigated in good faith"). Here, the relief sought will result in no monetary loss by Defendants, and three federal courts that have enjoined enforcement of COVID-19 executive orders against abortion providers have deemed a bond unnecessary. *Abbott*,

2020 WL 1815587 at *7; *Preterm-Cleveland*, No. 1:19-cv-00360, slip op. at 8; *Robinson*, 2020 WL 1847128, at *16. The Court, therefore, waives the bond requirement.

VIII. Conclusion

59. Plaintiffs Motion for a Preliminary Injunction, which the Court previously HELD IN ABEYANCE, is granted. Specifically, it is hereby ORDERED that Defendants and their employees, agents, attorneys, successors, and all others acting in concert or participating with them are PRELIMINARY ENJOINED from enforcing Governor J. Keven Stitt's Seventh Amended Executive Order No 2020-07 of April 1, 2020 and the March 27, 2020 Press Release against Oklahoma abortion providers, clinics, and their staff. It is further ordered that the security requirement of Federal Rule of Civil Procedure 65(c) is waived.

Respectfully submitted this 14th day of April, 2020.

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