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, *et al.*,

Plaintiffs,

v.

J. KEVIN STITT, *in his official capacity as* Governor of Oklahoma, *et al.*,

Defendants.

Case No: 20-CV-277-G

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's Order, Doc. 83, Defendants submit the following proposed findings of fact and conclusions of law regarding Plaintiffs' Motion for a Preliminary Injunction, Doc. 16.

FINDINGS OF FACT

I. COVID-19

1. COVID-19 is a worldwide pandemic, a rapidly intensifying public health crisis that is expected to test the limits of our healthcare systems. Doc. 1, ¶¶ 4, 33, 64; Doc. 16 at 4.

2. The rate of infection for COVID-19 is skyrocketing, not diminishing. Doc. 16, at 7.

3. On March 13, 2020, the White House declared that COVID-19 is a national emergency. Doc. 1, ¶ 34.

4. On March 15, 2020, Oklahoma Governor Kevin Stitt declared a state of emergency "caused by the impending threat of COVID-19" in all 77 counties in Oklahoma. Doc. 1, ¶ 25.[1]

5. Confirmed cases of COVID-19 in the United States have increased from 188,547 to 584,073 since Plaintiffs filed their TRO motion on March 31, 2020.[2]

6. Since the Governor's executive order at issue in this case, confirmed cases of COVID-19 in Oklahoma have increased from 106 to 2,184.[3]

7. COVID-19 has killed 108 Oklahomans total, with the vast majority of those deaths occurring since Plaintiffs filed their TRO motion.[4] One model currently indicates Oklahoma could experience up to 1,000 deaths by early August 2020.[5]

8. The consensus public health response is that states must "flatten the curve," slowing the rate of new infections and preserving healthcare resources so that health services are not overwhelmed by the number of patients. Doc. 54-1, ¶¶ 3, 6, 7; Doc. 54-3, ¶ 4; Doc. 82-1, ¶ 5.[6]

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[1] *See also* Office of Okla. Gov. Kevin Stitt, Executive Order 2020-07 (March 15, 2020), https://www.sos.ok.gov/documents/executive/1913.pdf.
[2] Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (accessed Apr. 14, 2020).
[3] Okla. COVID-19 Timeline, https://coronavirus.health.ok.gov/ (accessed Apr. 14, 2020).
[4] *Id.*
[5] COVID-19 Projections: Oklahoma, Institute for Health Metrics and Evaluation (IHME), https://covid19.healthdata.org/united-states-of-america/oklahoma (accessed Apr. 14, 2020).
[6] *See also* Interview with Dr. Drew Harris of Thomas Jefferson University, NPR, Mar. 11, 2020, https://www.npr.org/2020/03/11/814603316/public-health-experts-encourage-social-distancing-to-flatten-the-curve-of-infect.

9. The state of Oklahoma must adopt short-term restrictions to impede viral spread and deletion of health resources in order to reduce the peak to a level our healthcare system can handle. Doc. 54-1 ¶¶ 3-8, 12; Doc. 54-2, ¶ 7; Doc. 54-3, ¶¶ 4-10; Doc. 54-4, ¶ 12; Doc. 54-6, ¶ 15; Doc. 54-8, ¶ 9; Doc. 82-1, ¶ 10.[7]

10. The state of Oklahoma will relax the temporary restrictions after the peak or surge passes. Doc. 54-1, ¶¶ 7, 14.

11. The peak is currently projected to take place in late April 2020.[8]

12. The length of time for the total pandemic and broad public vaccination is far longer than the length of time needed for the peak to pass. Doc. 54-4, ¶ 11.[9]

13. The primary concern of these restrictions is the month of April. Doc. 82-1 ¶¶ 4-6.

A. Executive Order

14. In mid-March, because of the threat of the COVID-19 pandemic, the Oklahoma Society of Anesthesiologists (OSA) and other physicians and medical groups began to issue public calls for the postponement of all elective medical procedures in Oklahoma,

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[7] *See also* Dan Mangan, *Fauci tells basketball star Stephen Curry US 'can start thinking about' getting back to normal when pandemic curve falls*, CNBC, Mar. 26, 2020, https://www.cnbc.com/2020/03/26/ coronavirus-response-fauci-says-return-to-normal-ways-off.html (comments from White House health advisor Dr. Anthony Fauci); IMHE, *supra* n.5.

[8] Nolan Clay, *Coronavirus in Oklahoma: Pandemic peak projected for April 21*, The Oklahoman (April 11, 2020), https://oklahoman.com/article/5659924/coronavirus-in-oklahoma-pandemic-peak-projected-for-april-21 (current Health Department projection: April 21); *see also* IMHE, *supra* n.5 (projected peak: April 30, 2020).

[9] *See also* IMHE, *supra* n.5.

among other drastic measures, both to flatten the exponential curve of the virus and to preserve vital medical resources that were quickly becoming unavailable. Doc. 54-3 ¶ 4.

15. A number of state and local hospitals implemented this policy internally, before any official order. Doc. 54-3, ¶ 4.

16. On March 22, the OSA placed full-page ads in the *Okahoman* and *Tulsa World* entitled "**Postpone Elective Surgeries Now!**" and arguing that this was necessary to preserve medical resources and limit community spread. Doc. 54-3, ¶ 5. The ads noted that the American Society of Anesthesiologists, the Anesthesia Patient Safety Foundation, the American College of Surgeons, the American Academy of Orthopedic Surgeons, and the Ambulatory Surgery Center Association also supported this postponement. Doc. 54-3 ¶ 5.

17. The OSA communicated this belief directly to Oklahoma Health Secretary Jerome Loughridge, pushing him strongly for a statewide postponement of elective procedures. Doc. 54-3, ¶ 6; Doc. 54-1, ¶ 14.

18. Hearing the same advice from health professionals across the State, Secretary Loughridge recommended to Oklahoma Governor Kevin Stitt that he temporarily delay all elective surgeries or minor medical procedures that could increase transmission of the virus or decrease the availability of medical resources like personal protective equipment (PPE) or hospital capacity. Doc. 54-1, ¶ 14.

19. Governor Stitt accepted this recommendation, and on March 24, 2020, he issued an Executive Order declaring that as part of the State of Oklahoma's "measures to protect all Oklahomans against" the threat of the coronavirus known as COVID-19 ("COVID-19"), "Oklahomans and medical providers in Oklahoma shall postpone all elective

surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020." Doc. 1, ¶¶ 1-2; Doc. 1-1, ¶ 18.

20. At a press conference on that same day, the Governor was asked by a reporter whether abortion was included in the order's definition of elective surgeries, and he responded that he had "not gotten into the granular detail" with his team yet.[10]

21. Physicians and medical personnel of various specialties, in Oklahoma and elsewhere, including some of those who petitioned the Governor for the EO in the first place, believe the Governor's EO should and does apply to all elective procedures, including elective abortion. Doc. 54-2, ¶¶ 7-8; 54-3, ¶ 12; Doc. 54-4, ¶ 12; Doc. 54-6, ¶ 15; Doc. 54-8, ¶ 9; Doc. 82-1, ¶¶ 10-11; Doc. 82-2, ¶ 13.

22. Nevertheless, after the Governor issued this EO, Plaintiff Planned Parenthood did not cease providing elective surgical or medication abortions. Doc. 84-3, ¶ 5.

23. Meanwhile, the Tulsa abortion clinic shut down temporarily around the same time as the Governor's EO. Doc. 82-2, ¶ 8.

24. That clinic currently states on its website that "we are very sad to announce that we must temporarily suspend services due to the spread of the COVID-19 virus, effective immediately through the end of April 2020. Please know that our mission at Tulsa Women's Clinic is to support women's right to choose. Unfortunately, given this unprecedented situation, we are unable to provide our services with the restrictions currently placed on us as well as to protect the health and safety of our patients and staff."[11]

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[10] Press Conference, 45:20-46:04, available at https://www.facebook.com/GovStitt/videos/347717132833192/.

[11] *See* Tulsa Women's Clinic, http://tulsawomensclinic.com/.

25. On March 26, the Mend Medical Clinic and Pregnancy Resource Center in Tulsa, which does not perform abortions, also shut its doors a few days after the Governor's order in order to protect its staff and clients from the increasing danger and risk of COVID-19, especially the risk from asymptomatic patients. Doc. 82-2, ¶ 8.

26. On March 27, the Governor issued a press release confirming that abortion is included in the EO unless it is a medical emergency defined in 63 O.S. § 1-738.1A or otherwise necessary to prevent serious health risks to the mother, and that the EO was necessary to preserve PPE and stop transmission of the virus. Doc. 1-2.

27. In that same press release, the Governor also confirmed that the EO includes routine dermatological, ophthalmological, and dental procedures, as well as most scheduled health care procedures such as orthopedic surgeries. Doc. 1-2.

28. Many important types of procedures have been postponed because of the Governor's EO, including total joint replacements, ear tubes, sinus surgeries, tonsils and adenoids, elective hysterectomies, tubal ligations, vasectomies, plastic surgery, circumcisions, cataracts, dental procedures, chronic pain procedures, elective spine surgeries for pain, routine colonoscopies, elective orthopedic surgeries, diagnostic procedures, and non-emergent general surgeries. Doc. 54-3 ¶ 11; Doc. 82-1, ¶ 11.

29. This is a significant sacrifice for patients, who have planned their finances and schedules around surgeries that are not being postponed, and some of whom have situations that are difficult to live with, such as cataracts, back pain, or chronic pain. Doc. 54-3, ¶ 11.

30. Moreover, this delay could lead to many of these postponed procedures having a poorer outcome later. Doc 82-1 ¶ 11.

31. On April 1, 2020, the Governor extended the postponement of elective surgeries and minor medical procedures until April 30, 2020. Doc. 38-1.

32. On April 2, 2020 the Governor also declared an emergency under the Catastrophic Health Emergency Powers Act, 63 O.S. § 6101-6804 for all 77 counties in Oklahoma. *See* https://www.sos.ok.gov/documents/executive/1927.pdf.

B. Reducing viral spread

33. The Gov. instituted the EO postponing elective surgeries in part to stop transmission of COVID-19. Doc. 1-2; Doc. 54-1, ¶¶ 7, 9; Doc. 54-3, ¶¶ 4-6, 10.

34. COVID-19 is a highly contagious disease, far more contagious (and deadly) than the flu; it lives on surfaces for days and can easily be passed through the air. Doc. 54-2, ¶¶ 3-4.

35. Up to one out of four persons with the COVID-19 virus will be asymptomatic; *i.e.* they will not show symptoms of COVID-19. Doc. 82-1, ¶ 6.

36. Thus, it is impossible to tell if a patient has or does not have COVID-19 from checking symptoms alone. Doc. 54-2, ¶ 3; Doc. 54-3, ¶ 10.

37. Thus, every patient needs to be treated as if he or she potentially has COVID-19. Doc. 54-2, ¶ 3; Doc. 54-3, ¶ 10; Doc. 54-6, ¶ ¶ 12-13; Doc. 54-8, ¶ 5.

38. In part because of asymptomatic patients, COVID-19 can spread in a medical setting despite the deploying of precautionary measures. Doc. 54-1, ¶ 9; Doc. 54-3, ¶¶ 4, 10; Doc. 54-6, ¶¶ 6-8, 11-15. Using extra PPE, for example, can reduce the risk of transmission, but it does not eliminate it. Doc. 54-6, ¶ 11.

39. The risk of viral spread alone was and is a sound basis during the COVID-19 pandemic for postponing all surgeries except for those that are immediately medically necessary rather than elective. Doc. 54-3, ¶¶ 4, 10; 54-6, ¶ 15.

40. For many of these same reasons, OBGYNs across the country are utilizing telemedicine and postponing, and/or delaying non-essential prenatal visits to avoid unnecessary travel and in-person risks. Doc. 54-4, ¶ 8; Doc. 54-8, ¶ 6; Doc. 82-2, ¶ 9; Doc. 84-1, ¶ 36; Doc. 84-4, ¶ 23.

41. Plaintiff Trust Women flies in doctors from out of state to perform abortions. Doc. 16-4 ¶ 4, 10.

42. Out-of-state women will travel to Oklahoma to seek abortions if elective procedures are not delayed. Doc. 16-5 ¶ 34; Doc. 16-6 ¶ 38; Doc. 84-2, ¶¶ 9-10.

43. Delaying the travel of patients and physicians to clinics for elective abortions will reduce the virus's spread by eliminating interpersonal contact between and among patients, staff, physicians, and others, during travel, intake, examination, procedure, and follow-up. *See supra* ¶¶ 33-42.

44. If abortion procedures are not delayed, all of these additional risks of potential new infections will compound hundreds or thousands of times. Doc. 1, Complaint ¶ 41 (4,500 abortions a year in Oklahoma); Doc. 16-5 ¶ 12 (25 to 40 abortions per week); Doc. 16-6 ¶ 15 (cancelled 164 abortion appointments); Doc. 16-7 ¶ 9 (322 abortions so far in 2020 at Planned Parenthood alone); Doc. 84-3, ¶ 10 (Planned Parenthood has over 145 abortion patients on its schedule through April).

45. This risk of viral spread is doubled with medication abortion, where sound medical practice requires an in-person follow-up visit, rather than a telemedicine, in order to confirm termination and manage known and potentially severe complications such as hemorrhaging. Doc. 54-7, ¶¶ 39-43.[12]

C. PPE Shortage and Preservation

46. The COVID-19 pandemic is testing the limits of Oklahoma's healthcare system, which is facing a shortage of PPE for healthcare providers. Doc. 16 at 4; Doc. 54-1, ¶¶ 10, 12; Doc. 54-2, ¶ 4; Doc. 54-3, ¶ 8; Doc. 54-8, ¶ 7; Doc. 82-1, ¶ 6.

47. The shortage is not uniform—some places have more PPE than others, whereas some have very little. Doc. 54-1, ¶¶ 10, 12 ("[s]ome facilities are still reporting 0 days of PPE on hand"); Doc. 54-2, ¶ 4; Doc. 54-3, ¶ 8; Doc. 54-8, ¶ 7 ("In the emergency room where I work, we are in desperate need of more PPE.").

48. Some hospitals have been asking for and receiving donations of PPE from the community and businesses. Doc. 54-3, ¶ 8; Doc. 82-1, ¶ 7.

49. Because of the shortage, various facilities, including emergency facilities focusing on pregnant women, are being forced to reuse PPE, which has a greater potential of spreading the virus and infecting physicians and patients. Doc. 54-2, ¶¶ 4-5; Doc. 54-3, ¶ 9; Doc. 54-8, ¶ 7; Doc. 82-1, ¶ 7.

50. During the COVID-19 pandemic, utilizing large amounts of PPE is critical to in-person health care because of asymptomatic patients and how easily the virus spreads. Doc.

[12] See Mifeprex (mifepristone) tablets Label, § 2.3, U.S. FOOD AND DRUG ADMIN., Mar. 2016, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

54-1, ¶ 9; Doc. 54-2 ¶¶ 4-7; Doc. 54-3 ¶¶ 7, 10; Doc. 54-4, ¶ 10; Doc. 54-6 ¶¶ 9-13; Doc. 54-8 ¶ 5; Doc. 82-2, ¶ 12.

51. Required PPE during this pandemic includes gloves, gowns, face/eye protections, N-95 masks, and surgical masks. Doc. 54-1, ¶ 8; Doc. 54-3, ¶ 7.

52. The Governor's EO was implemented in large part to mitigate the PPE shortage by decreasing the use of PPE throughout the state. Doc. 54-1, ¶¶ 12, 14; Doc. 54-2, ¶ 7; Doc. 54-3, ¶¶ 4-7; Doc. 54-8, ¶ 9.

53. The Governor's COVID-19 team estimated that the elective surgery postponement could preserve about 25 percent of PPE that would otherwise be used in the coming weeks. Doc. 54-1, ¶ 14.

54. Every elective abortion, surgical or medical, should diminish the statewide supply of PPE in a small but contributory way. Doc. 16 at 13, 15; Doc. 54-4, ¶ 9. This is especially so in a viral pandemic, when much more PPE than normal should be used in any medical situation. *See supra* ¶¶ 50-51; Doc. 54-4, ¶ 9.

55. In normal times, Oklahoma abortion clinics utilize at least some PPE when performing abortions. *See* Doc. 16 at 13-15 (citing Doc. 16-1, ¶ 35; Doc. 16-5, ¶ 23; Doc. 16-6, ¶¶ 33-35, Doc. 16-7, ¶ 9); *see also* Doc. 54-4 ¶ 9.

56. During this pandemic, this usage includes gloves, shoe covers, protective eyewear or a face shield, and sometimes a surgical mask and a gown. Doc. 16 at 14 (citing Doc. 16-5, ¶ 23; Doc. 16-6, ¶ 34; Doc. 16-7, ¶ 10).

57. For one of Plaintiffs' clinics, this usage includes N-95 respirator masks, which are in short supply and desperately needed. Doc. 16 at 14-15 (citing Doc. 16-6, ¶ 35).

58. After the COVID-19 pandemic escalated, several of Plaintiffs' clinics began to increase their use of PPE. Doc. 16 at 14 (citing Doc.16-5, ¶ 23; Doc. 16-6, ¶ 35).[13]

59. Even an ultrasound and bloodwork, as required for medication abortion, diminishes the supply of masks and gloves. Doc. 82-2 ¶ 12.

60. Moreover, medication abortions should not be undertaken without a physical examination to rule out potentially dangerous or deadly contraindications. Doc. 54-7, ¶¶ 30-31.

61. During a pandemic, a physical examination would also require PPE. *See supra* ¶ 50.

62. The best option to preserve PPE is to delay *all* elective procedures until after the peak impact on our healthcare system from COVID-19 has passed. Doc. 54-1 ¶¶ 9, 12, 14; Doc. 54-2, ¶ 7; Doc. 54-3, ¶¶ 4-7; Doc. 54-8, ¶ 9.

63. Plaintiffs' attempts to diminish their use of PPE are not a proper response to a pandemic because they address one of the goals of public health strategies (preserving PPE) while potentially worsening one of the other problems (viral spread). Doc. 54-3, ¶ 10; Doc. 54-4, ¶ 10; Doc. 54-6, ¶¶ 12-14; Doc. 82-2, ¶¶ 5-6, 12.

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[13] In Defendants' response to Plaintiffs' TRO motion, Defendants cited a request on social media by a Planned Parenthood affiliate in Pennsylvania for donations of PPE to Planned Parenthood. Doc. 54 at 26 n.48. Since calling that request to the Court's attention, Planned Parenthood has removed any record of that post from their social media page. However, its occurrence is documented in contemporaneous media accounts. *See, e.g.*, Mary Margaret Olohan, *Planned Parenthood Requests Donations Of PPE For Abortions During Coronavirus Pandemic*, DAILY CALLER, https://dailycaller.com/2020/03/26/planned-parenthood-protective-equipment-coronavirus-abortions/.

64. Prenatal care is unlikely to lead to more PPE use in the short-term than elective abortions because most prenatal visits can and are being temporarily postponed or done through telemedicine, because abortion involves more than a "minimal" amount of PPE by Plaintiffs' own description, and because normal pregnancy care does not require as much PPE as normal abortion care. Doc. 54-4, ¶¶ 7-11; Doc. 54-8, ¶ 6; *see also* Doc. 16, at 14; *supra* ¶ 40.

65. At a bare minimum, this point is debatable among OBGYNs, both locally and nationwide, as the evidence in this case has shown.

66. Delaying abortion procedures will lead to at least a small potential reduction in the use of some PPE in Oklahoma. Doc. 16, at 28 (Plaintiffs' TRO admission); Doc. 54-1, ¶¶ 12, 14; Doc. 54-2, ¶ 7; Doc. 54-3, ¶¶ 4-7; Doc. 54-8, ¶ 9.

67. Carving out exceptions to the Governor's EO would undermine and perhaps defeat this PPE-saving purpose, proving dangerous to our health care system; this is especially so for abortion, given that it is an elective procedure performed mostly on healthy women; other postponed elective procedures arguably cause greater inconvenience to sickly or injured patients, such as pacemaker implantation, gall bladder removal, or knee replacement. Doc. 54-2, ¶ 8; Doc. 82-1, ¶ 10; *see also* Doc. 54-3, ¶ 12; Doc. 54-3, ¶ 9; Doc. 82-2, ¶ 13. Abortions are mostly chosen for non-medical reasons, such as "conclud[ing] it is not the right time to become a parent or have additional children," furthering a "desire to pursue [an] education or career," a "lack [of] necessary financial resources" or a lack of "partner or familiar support or stability. Doc. 16-4 at ¶ 22; Doc. 16-6 at ¶ 12.

D. Decreasing demand on hospital resources

68. The Governor's EO was implemented in part to alleviate demand on other hospital resources such as capacity and available providers in anticipation of a surge of infections. Doc. 54-1, ¶¶ 13-14; Doc. 82-1, ¶¶ 4-5, 9.

69. Oklahoma abortion clinics do send some patients directly to the hospital with complications. Doc. 16, at 18 (citing Doc. 16-5, ¶ 20 & Doc. 16-6, ¶ 31); *see also* Doc. 54-7, ¶¶ 12-14; Doc.54-8, ¶ 8.

70. However, because patients are instructed to complete their medication abortions after they leave the clinic, Doc. 16-4, ¶ 14, most patients with major complications find their way to emergency rooms and hospitals more directly, rather than being transferred by their abortion provider. Doc. 54-8, ¶ 4, 8; *see also* Doc. 54-4 ¶ 5; Doc. 54-7, ¶¶ 12-14, 41, 47; *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016).

71. Studies show that the risk of hospitalization for medication abortion is between 3 and 5%; a major Australian review of nearly 7,000 abortions in 2010, for example, found that 3.3 percent of first-trimester medication abortion patients required emergency hospital treatment, in contrast to 2.2 percent of patients who underwent surgical abortions. And women receiving medical abortions were admitted to hospitals at a rate of 5.7 percent following the abortion. Doc. 54-7, ¶¶ 16-17, 19, 26-27.

72. Abortion increases the short-term risk that a pregnant woman will need hospitalization. Doc. 54-4, ¶ 4; Doc. 54-7, ¶¶ 10-18; Doc. 54-8 ¶ 8.

73. In Texas alone, at least 210 women are hospitalized after an abortion a year. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014).

74. The potential increased use of hospital resources in the long-term with carrying a pregnancy to term is consistent with the State's public health strategy because any such use would occur after the peak has passed. Doc. 54-4 ¶ 11.

75. The potential of further prenatal visits is also consistent with the public health strategy because such visits can be postponed or performed by telemedicine until the peak has passed. Doc. 54-4 ¶¶ 7-11; Doc. 54-8 ¶ 6; *see supra* ¶ 40.

II. ABORTION

A. Basics

76. Women may obtain a medication or surgical abortion. Doc. 54-4, ¶¶ 3-5; *Gonzales v. Carhart*, 550 U.S. 124, 134 (2007).

77. "Surgical" abortion is a term used almost universally throughout medical literature, in case law, and in Plaintiffs' own clinic practices. Doc. 54-4, ¶ 6; Doc. 16-4 at 6 n.4 (citing study on "surgical abortion"); Doc. 16-5, ¶ 4 (Plaintiff Dr. Burns' clinic is the "Abortion Surgery Center.").[14]

[14] *See also, e.g.*, *Abortion Information By State*, Planned Parenthood Great Plains Comprehensive Health, https://www. plannedparenthood.org/planned-parenthood-comprehensive-health-great-plains/abortion-information (accessed April 1, 2020) ("Surgical abortion is offered at Planned Parenthood Great Plains Comprehensive Health Center in Overland Park, Kansas and Oklahoma City, Oklahoma."); *Fees*, Abortion Surgery Center, http://www.abortionsurgerycenter. com/fees (accessed April 1, 2020) (listing a charge of $590 for "Surgical Abortion") Patient Care Services: Abortion, Trust Women Oklahoma City, https://trustwomen.org/clinics/oklahoma-city/patient-care-services/abortion (accessed April 1, 2020) ("Surgical abortion are performed in the clinic").

78. Both medication abortion and surgical abortion are medical procedures. Doc. 54-4, ¶¶ 3-5, 12; Doc. 54-7, ¶¶ 32, 37-39, 43-44.[15]

79. Abortion of either type is typically considered an "elective" or "non-therapeutic" procedure; indeed, it is widely known and championed as a "choice." Doc. 54-2, ¶¶ 7-8; Doc. 54-7, ¶ 12; Doc. 54-7, ¶¶ 38, 44, 48; Doc. 54-8, ¶¶ 6, 8-9; Doc. 82-1, ¶ 10; *see also* Doc. 16 at 18, 19, 20, 22 (repeatedly discussing "right to choose" or "a woman's choice.").[16]

B. Surgical Abortion

80. The most common procedure for a first-trimester surgical abortion is a suction or vacuum aspiration abortion. Doc. 54-4, ¶ 3; *Gonzalez*, 550 U.S. at 135.

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[15] *See also, e.g.,* Brief for Amici Curie American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Osteopathic Association, and American Academy of Pediatrics in Support of Petitioners, *Whole Woman's Health v. Cole*, 2016 WL 74948, at *11 & n. (Jan. 4, 2016) (U.S.) ("No designated procedure space is required for **medication abortions** because **the procedure** involves administering prescription pills that induce pregnancy termination, which then typically occurs at home. … The rate of major complications across **all abortion procedures, including medication and second-trimester abortions**, is similarly low." (emphasis added)).

[16] Entry for "Elective abortion: Pregnancy", Encyclopedia Britannica, https://www.britannica.com/science/elective-abortion ("An elective abortion is the interruption of a pregnancy before the 20th week of gestation at the woman's request for reasons other than maternal health or fetal disease. Most abortions in the United States are performed for this reason."); *see also, e.g.*, *Hellerstedt*, 136 S. Ct. at 2312 (2016) ("[T]he record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's **choice**.'" (emphasis added)); *Gonzales*, 550 U.S. 159 ("[I]t seems unexceptionable to conclude some women come to regret their **choice** to abort the infant life they once created and sustained." (emphasis added)); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 495 (1983) ("The American College of Obstetricians and Gynecologists (ACOG) does not recommend an examination by a pathologist in every case: 'In the situation of **elective** termination of pregnancy ...'"); *Beal v. Doe*, 432 U.S. 438 (1977) (utilizing "non-therapeutic"); *id.* (Brennan, J., dissenting) (deploying "elective" repeatedly); *Doe v. Bolton*, 410 U.S. 179, 194 n.13 (1973) (citing ACOG amicus brief, and a letter contained therein, which used phrase "**elective** abortions" (emphasis added)).

81. Risks of first-trimester surgical abortion include infection, hemorrhage, uterine perforation, and incomplete abortion resulting in retained portions of pregnancy. Doc. 54-4 ¶ 3.

82. The most common second-trimester surgical abortion procedure is the dilation and evacuation (D&E) procedure. Doc. 54-4, ¶ 4; *Gonzales*, 550 U.S. at 135.

83. During a D&E, the abortionist first dilates the cervix using drugs or instruments inserted into the cervix and, after sufficient dilation, places the woman under general anesthesia or conscious sedation. *Gonzales*, 550 U.S. at 135.

84. Often guided by ultrasound, the doctor will then use surgical instruments such as forceps to grab the fetus and remove it from the uterus. *Gonzales*, 550 U.S. at 135.

85. In a D&E, "the abortionist [uses] instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina." *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting).

86. He then "uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body." *Stenberg*, 530 U.S. at 958 (Kennedy, J., dissenting)).

87. As a result, "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb." *Stenberg*, 530 U.S. at 958-59 (2000) (Kennedy, J., dissenting).

88. Afterwards, "the abortionist is left with 'a tray full of pieces.'" *Stenberg*, 530 U.S. at 958-59 (Kennedy, J., dissenting).

89. The entire procedure must involve close interpersonal contact and, especially during the spread of a highly contagious virus, should require the use of extensive PPE. Doc. 54-3 ¶ 10; Doc. 54-4, ¶ 9; Doc. 54-6, ¶¶ 9-13; *see supra* ¶ 50.

90. Risks of a D&E include hemorrhage, infection, cervical laceration, uterine perforation, and death. Doc. 54-4, ¶ 4.

91. Such complications may increase the use of hospital services. *See supra* ¶¶ 68-75.

92. The complication rates from abortion are disputed, Doc. 54-7, ¶¶ 24-27, and materials cited by Plaintiffs indicate certain rates are unknown or wide-ranging.[17]

C. Medication abortion

93. Disputes aside, studies—including those cited by Plaintiffs—indicate that the risk of serious complications is greater for medication abortions than for surgical abortions at the same gestational age. Doc. 54-7 ¶¶ 15-18. The study Plaintiffs rely upon shows that the complication rate for medication abortion is between two and four times higher than surgical abortion in the same trimester. *Compare id.* at ¶¶ 18, 27 (discussing Upadhyay study) *with* Doc. 16-4, ¶ 20 (discussing same study).

94. The U.S. Food & Drug Administration (FDA) label for medication abortion warns that "[a]bout 85% of patients report at least one adverse reaction following administration of MIFEPREX and misoprostol, and many can be expected to report more than one such reaction." Doc. 54-7, ¶ 10.[18]

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[17] ACOG Practice Bulletin Number 135: Second Trimester Abortion, Obstetrics & Gynecology 121(6), at 1398 (2013) (complication rate for infection after D&E "has not been clearly defined in all studies" and reportedly ranges from 0.1 - 4%).

[18] FDA Mife. Label at 7, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

95. These reactions frequently include fever and vomiting, and can also include hemorrhage, infections, and pelvic inflammatory disease—not just minor side effects. Doc. 54-7, ¶ 10.[19]

96. The FDA also cautions in a prominent "black box" warning that, although they happen rarely, "[s]erious and sometimes fatal infections and bleeding" can occur after medication abortion. Doc. 54-7, ¶ 11.[20]

97. Because of "the risk of a serious complications" of medication abortion, the FDA has instituted a Risk Evaluation and Mitigation Strategy (REMS) for medication abortion. Doc. 54-4, ¶ 5; Doc. 54-7, ¶ 11.[21]

98. "[O]nly a few medications" with "serious safety concerns" require a REMS, according to the FDA. Doc. 54-7, ¶ 11.[22]

99. Studies show that the risk of incomplete abortion requiring a surgical follow-up is over 6%, and the risk of hospitalization is at least 3 and 5%. Doc. 54-7 ¶¶ 16-17, 19, 26.

100. These percentages are also understated because providers are not always required to report complications, follow-up is poor, and complications are often mistakenly recorded as a spontaneous miscarriage. Doc. 54-7 ¶¶ 13-14, 41-47.

101. Plaintiffs calculate a lower risk of complications in part by relying on studies that exclude certain ER visits, hemorrhaging, seizures, and even death from their major

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[19] FDA Mife. Label, *supra* at 7-8.
[20] FDA Mife. Label, *supra* at 1.
[21] FDA Mife. Label, *supra* at 1-2; FDA Warning Letter: Rablon (March 8, 2019) at 2, https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/rablon-1111111-03082019.
[22] FDA REMS at 1, https://www.fda.gov/drugs/drug-safety-and-availability/risk-evaluation-and-mitigation-strategies-rems.

complication rate. Doc. 54-7 ¶ 27; *see* Doc. 16-4 ¶ 20 (citing study). ER visits, hemorrhaging, and seizures can require hospitalization.

102. Plaintiffs believe legal abortion of any type, at any point in pregnancy, is extremely safe, and much safer than childbirth. Doc. 1, ¶¶ 18, 25, 26, 29; Doc. 16-4, ¶¶ 19, 21. Thus, if a woman's abortion is postponed from a first-trimester abortion to a second-trimester abortion, Plaintiffs believe she is going from an extremely safe procedure to another extremely safe procedure. Doc. 84-1, ¶ 25; Doc. 84-3, ¶ 12.

III. PLAINTIFFS' PRACTICES

102. Plaintiffs admit they "have an important role to play in minimizing spread of the virus and preserving medical supplies." Doc. 16 at 12.

103. Plaintiff Abortion Surgery Center performs medication abortions through 10 weeks last menstrual period ("LMP") and performs surgical abortions through 14 weeks LMP. Doc. 16-5 ¶ 11.

104. When this litigation started, Plaintiff Trust Women Oklahoma City performed medication abortions through 10 weeks LMP and performs surgical abortions through 21.6 weeks LMP. Doc. 16-6 ¶ 2.

105. As a result of this court's Temporary Restraining Order allowing medication abortions, Plaintiff Trust Women Oklahoma City has increased its provision of medication abortion to 11 weeks LMP. Doc. 84-2, ¶ 7 n.1.

106. Performing medication abortions up to 11 weeks LMP contradicts the FDA's recommended protocol for medication abortion. *See* FDA mifeprex label at 2,

https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (limiting use of medication abortion to 70 days gestation).

107. Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Planned Parenthood) performs medication abortions through 11 weeks LMP and performs surgical abortions through 18 weeks LMP. Doc. 16-7, ¶ 8. This also contradicts the FDA's current protocol. *See supra* ¶ 106.

108. Plaintiffs perform hundreds of abortions a month in Oklahoma. Doc. 1, ¶ 41 (4,500 abortions a year in Oklahoma); Doc. 16-5, ¶ 12 (25 to 40 abortions per week); Doc. 16-6, ¶ 15 (cancelled 164 abortion appointments); Doc. 16-7, ¶ 9 (322 abortions so far in 2020 at Planned Parenthood).

109. Plaintiffs use PPE for every abortion, including medication abortion, at least during examination, which involves ultrasound and bloodwork. Doc. 84-3, ¶ 17. Plaintiffs have also commenced using masks throughout the day to operate their abortion clinic. Doc. 84-3, ¶ 18.

110. As a result of this court's Temporary Restraining Order allowing medication abortions, Plaintiff Planned Parenthood has increased the rate of abortions performed at its clinic in Oklahoma. It has scheduled 145 abortions for the latter half of April, Doc. 84-3, ¶ 10, but it was only averaging approximately 107 abortions in an entire month before this litigation, Doc. 16-7 ¶ 9.

111. As such, unless Plaintiff Planned Parenthood is avoiding using PPE altogether, this Court's TRO has led to Plaintiff Planned Parenthood using much more PPE than usual

for medication abortion during the time when PPE is vital and in short supply across Oklahoma to deal with the emergency pandemic.

112. Plaintiffs tell their patients to complete a medication abortion after they leave the clinic. Doc. 16-4 at ¶ 14.

113. Plaintiffs are forcing their patients with COVID-19 symptoms to postpone their abortion, including medication abortions. Doc. 16 at 12-13. Plaintiffs are further forcing patients to delay their abortion through purposefully curtailing access to abortions in their clinic by reducing hours and appointments to "decrease patient volume." Doc. 16-7, ¶¶ 13-14.

CONCLUSIONS OF LAW

I. STANDARD FOR PRELIMINARY INJUNCTIONS

1. "Ordinarily, a movant seeking a 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 preliminary injunction; and (4) the injunction would not be adverse to the public interest." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001).

2. The movant bears the burden of proof on each of the factors. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003).

3. "Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001).

4. Harm that is speculative or hypothetical will not suffice; the harm must be both certain and great, not merely serious and substantial. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004).

5. Where a movant, as here, seeks injunctive relief "that afford[s] the movant all the relief that it could recover at the conclusion of a full trial on the merits," it seeks a disfavored injunction and must satisfy a heightened standard. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)).

6. Under this heightened standard, the movant must make a strong showing under both the likelihood of success on the merits and the balance of equities before an injunction can issue. *See id.*

7. Courts must be especially reluctant to exercise this equitable relief in time of crisis. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003).

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Standing

8. "[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

9. An exception to this rule applies where a party can prove two additional criteria: (1) "the party asserting the right has a 'close' relationship with the person who possesses the right," and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

10. Neither criteria for third-party standing is met here.

11. Plaintiffs have a conflict of interest with their patients because their economic interests favor continuing business as usual while patient safety interests favor decreasing the spread of COVID-19. Doc. 54 at 14.

12. Patients are not hindered from bringing their own suit. *See, e.g.*, *Doe v. Parson*, 368 F. Supp. 3d 1345, 1347 (E.D. Mo. 2019); *cf. Robinson v. Marshall*, No. 2:19cv365, Doc. No. 73, Ex. 3 (M.D. Al. Mar. 30, 2020) (abortion patient in Alabama claiming own rights in COVID-19 litigation).

13. Thus, Plaintiffs are unlikely to succeed because they lack standing to bring claims on behalf of their patients.

B. Legal Framework

1. *Jacobson*

14. Under the U.S. Constitution, the states retain the well-established police power to protect public health, safety, and welfare. U.S. CONST. amend. X; *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905).

15. Through the police power, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. at 25 (1905); *see also Banzhaf v. F.C.C.*, 405 F.2d 1082, 1097 (D.C. Cir. 1968).

16. Public health regulations may restrict Fourteenth Amendment liberty, including the liberty of movement (such as through a quarantine), the liberty of bodily integrity, and the freedom from unwanted medical treatment. *Jacobson*, 197 U.S. at 14, 25-26; *see also Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380 (1902) (upholding

quarantine); *Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015); *Reynolds v. McNichols*, 488 F.2d 1378, 1381-83 (10th Cir. 1973). *Hickox v. Christie*, 205 F. Supp. 3d 579, 585 (D.N.J. 2016).

17. Such regulations may cause permanent and total deprivation of individual liberty interests. *See id.*

18. Public health regulations may restrict interstate and foreign commerce despite Article I of the Constitution. *See Compagnie Francaise*, 186 U.S. at 387; *Rasmussen v. State of Id.*, 181 U.S. 198 (1901). The State's police power is also not restricted by the constitutional prohibition on uncompensated taking of property. *Lech v. Jackson*, 791 Fed. App'x 711, 717 (10th Cir. 2019), *cert. pet. filed* No. 19-1123 (U.S.).

19. Public health regulations may even restrict First Amendment freedoms. *See Banzhaf v. F.C.C.*, 405 F.2d 1082, 1097-1103 (D.C. Cir. 1968); *cf. also Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Benson v. Walker*, 274 F. 622 (4th Cir. 1921).

20. This police power over public health only increases during an emergency, as *"Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *In re Gregg Abbott et al.*, No. 20-50264, slip op. at 15 (5th Cir April 7, 2020).

21. The Supreme Court "ha[s] long recognized," for example, "that in times of imminent peril … the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v. Caltex*, 344 U.S. 149, 153-54 (1952); *see also Jacobson*, 197 U.S. at 29; *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704-05 (1897).

22. The standard of review of a state's action during an emergency is whether the states action is "unreasonable or arbitrary." *Jacobson*, 197 U.S. at 27.

23. Weighing the public health costs and benefits "is a determination for the legislature, not the individual objectors." *Phillips*, 775 F.3d at 542.

24. The plaintiff challenging a state's action during an emergency bears the burden of proof to show that "the means prescribed by the state … has no real or substantial relation to the protection of the public health and the public safety." *Jacobson*, 197 U.S. at 31.

25. The authority to decide "in the first instance" among many possible reasonable choices that which is best to protect the public health lies "primarily … in [the] wisdom" of the people's representatives. *Jacobson*, 197 U.S. at 28, 38.

26. Because "public health officials 'deal in terrible context [where] the consequences of mistaken indulgence can be irretrievable tragic,'" their determinations are "entitled to deference, absent a 'reliable showing of error.'" *Hickox*, 205 F.Supp.2d at 592 (quoting *U.S. ex rel. Siegel v. Shinnick*, 219 F.Supp. 789, 791 (E.D.N.Y. 1963)).

2. *Casey*

27. Abortion, like all other rights, is subject to the state police power to protect public health and safety. *See Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (*per curiam*); *Planned Parenthood v. Casey*, 505 U.S. 833, 852, 882 (1992). The "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure **maximum** safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973) (emphasis added).

28. Public health regulations may permissibly reduce abortion availability, cause delay, or otherwise make the right difficult to exercise. *Casey*, 505 U.S. at 866, 873.

29. Public health regulations may affect previability abortions. *Gonzales*, 550 U.S. at 146.

30. Viability is only relevant in abortion regulations when the state's sole justification is its interest in protecting fetal life. *Casey*, 505 U.S. at 860.

31. Public health regulations are only impermissible if the burden imposed outweighs the benefits to such an extent that it becomes "undue." *Casey*, 5050 U.S. at 874; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, 2313 (2016) (reaffirming *Casey* standard).

32. "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends," *Gonzalez*, 550 U.S. at 166-67; *see also Hellerstedt*, 136 S. Ct. at 2309 (reaffirming *Gonzalez*'s "deferential" review of legislative fact-finding). When acting in the legitimate realm of health and safety, "the States are granted substantial flexibility" in regulating abortion. *Casey*, 505 U.S. at 872.

33. Moreover, "the law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163.

3. *Intersection of Jacobson and Casey*

34. Abortion, like all other rights, may be reasonably restricted during a public health emergency. *In re Gregg Abbott et al.*, No. 20-50264, slip op. at 15 (5th Cir April 7, 2020).

35. The *Jacobson* framework applies to abortion. *Gonzales*, 550 U.S. at 163; *Casey*, 505 U.S. at 857; *Roe v. Wade*, 410 U.S. 113, 154 (1973).

36. Addressing a public health emergency is a compelling interest that allows state regulations on First Amendment rights to survive strict scrutiny. *See Banzhaf v. F.C.C.*, 405 F.2d 1082, 1097-1103 (D.C. Cir. 1968); *cf. also Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Benson v. Walker*, 274 F. 622 (4th Cir. 1921).

37. The undue burden test is less rigorous than strict scrutiny. *See, e.g.*, *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014).

38. Thus, because addressing a public health emergency is a compelling interest, it allows state regulations on abortion to survive the undue burden analysis.

39. In a public emergency, courts must defer to the reasonable choice of the elected representatives. *Union Dry Goods v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 374-75 (1919); *Louisiana v. Texas*, 176 U.S. 1, 13 (1900); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877); *Morgan Steamship Co. v. La. Board of Health*, 118 U.S. 455 (1886); *In re Gregg Abbott*, No. 20-50264, slip op. at 12-13; *United States v. Shinnick*, 219 F. Supp. 789, 790 (E.D.N.Y. 1963); *Hickox*, 205 F.Supp.3d at 592 (quoting *Siegel*, 219 F.Supp. at 791 (E.D.N.Y. 1963)); *see also Caltex*, 344 U.S. at 155 n.7 (recounting how authorities failed to act for fear of lawyers in London, and as a result "half that great city was burnt"). When there are competing interests, "the state [is] under the necessity of making a choice" and "[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon" that "which, in the judgment of the legislature, is of greater value to the public." *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

40. In sum, this Court is "empowered to decide only whether [the emergency EO] lacks a 'real or substantial relation' to the public health crisis or whether it is 'beyond all

question, a plain, palpable invasion' of the right to abortion." *In re Gregg Abbott*, slip op. at 16 (quoting *Jacobson*, 197 U.S. at 31). This is necessarily a deferential standard. *Id.* at 12-13.

4. *Facial Challenges to Abortion Regulations*

41. To succeed in a facial challenge to restrictions on abortion, Plaintiffs must demonstrate that the executive order is unlawful in "in a large fraction of relevant cases." *Gonzales*, 550 U.S. at 167-68.

42. It is not "within [courts'] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales*, 550 U.S. at 168.

43. Despite styling their lawsuit as an "as-applied" challenge, Plaintiffs have brought a facial challenge because they have sought to enjoin the Governor's Executive Order for all abortions in Oklahoma, whether or not they are even performed by Plaintiffs.

C. Plaintiffs are Unlikely to Succeed on the Merits

44. The public interest in minimizing the toll on human life from COVID-19 is of the highest order.

45. "The power to protect the public health lies at the heart of the states' police power." *Banzhaf*, 405 F.3d at 1096-97.

46. State actions to "flatten the curve" and ensure that our health care system can manage the virus's peak are legitimate uses of the State's police power to protect public health. *See* Findings of Fact, ¶¶ 8-30.

47. Legitimate state actions to protect public health include *cumulative* actions that affect a category of persons with minor individual contributions to the public health emergency. *Jacobson*, 197 U.S. at 37-38.

48. The benefit of emergency action during this great public health crisis is a compelling interest that justifies a temporary delay of access to elective procedures.

49. The benefit of emergency action during this great public health crisis is a compelling interest that justifies a temporary delay of access to elective abortion services.

50. The Executive Order only applies to elective abortions because of its exceptions for medical emergencies and serious health risks. *See supra* Proposed Findings of Fact ¶ 26.

51. A delay in abortion services is justified because of the state's compelling interest in protecting public health by preventing viral spread, limiting use of PPE, and preserving hospital resources. *See supra* Proposed Findings of Fact ¶¶ 33-75.

52. Abortion is treated like all other procedures, with no special exemptions due to some risk from delay. *See supra* Proposed Findings of Fact ¶¶ 27-30.

53. A delay that applies equally to all elective procedures is by definition not pretextually targeting any particular elective procedure. *Cf. Lawton v. Steele*, 152 U.S. 133, 137 (1894) (reviewing regulations that only affected certain classes of people for pretext).

54. For these reasons, it cannot be said that the challenged EO "lacks a 'real and substantial relation' to the public health crisis" nor is it "beyond question" that elective procedure postponement is outside the State's police power. *In re Gregg Abbott*, slip op. 16 (quoting *Jacobson*, 197 U.S. at 31). It is "obvious" that this "is a valid emergency response to the COVID-19 pandemic," *In re Gregg Abbott*, *supra*, slip op. at 16-18.

55. Having concluded that the elective procedure postponement is valid, including as applied to abortions, the Court will not venture to determine whether its benefits outweigh its burdens in every particular respect in the midst of an emergency. *In re Gregg Abbott*, slip op. at 2-3, 24-25 (court should not "substitute[] its own view of the efficacy of applying" the EO to particular abortions, "decid[ing] which measures are likely to be the most effective for the protection of the public against disease"); *Cf. also Caltex*, 154-44 & n.7. For any given elective procedure, of which there are hundreds or thousands, there are dozens of factors to weigh, each with their proponents arguing why theirs should go forward. And elective procedure postponement is but one of hundreds of difficult decisions Governors must make in managing this crisis, decisions that profoundly impact individual liberties, with a timeline measured in hours or days, not months or years. Requiring courts to reweigh every single aspect of each application of a generally-valid emergency measure will "practically strip" the State of its ability to protect its citizens during a crisis. *See Jacobson*, 197 U.S. at 37.

56. In the alternative, to the extent this Court will re-weigh the pros and cons of difficult decisions made by the State's elected leaders, it does so for three categories of abortions: surgical abortions, medication abortions, and abortions that could not be procured after the Executive Order expires.

57. A delay of surgical abortion is justified because of the extensive interpersonal contact, use of PPE, and risk of complications requiring hospitalization attendant to surgical abortions. *See supra* Proposed Findings of Fact ¶¶ 33-75, 80-92.

58. A delay of medication abortion is justified because of the risk of complications requiring hospitalization—a risk that is greater than the risk of complications from surgical

abortion at the same gestational age—as well as the interpersonal contact and PPE needed for the initial screening visit, physical examination, ultrasound, blood draw, and follow-up visit. *See supra* Proposed Findings of Fact ¶¶ 33-75, 93-101. Sparing use of PPE will only increase the risk that the virus will spread, including in non-surgical settings, especially because of asymptomatic carriers. *Id.* ¶¶ 34-39, 50, 63. Regardless of the precautions Plaintiffs claim to adhere to, Defendants are "not required … to take it on faith that [they will be] 100% compliant, or the measures 100% effective." *Hickox*, 205 F.Supp.3d at 585, 593. Further, medication abortions sometimes require surgical completion, compounding the need for close contact and PPE. *Supra* Findings of Fact ¶ 99.

59. Because medication abortions take place at a maximum of 11 weeks LMP, women seeking such abortions will likely remain eligible for legal elective abortion after the expiration of the Executive Order. An increase in surgical abortions later due to delay of medication abortions now is reasonably related to the state's public health strategy of postponing interpersonal contact, use of PPE, and use of hospital resources to a later time.

60. The postponement also validly includes those abortions that would be unavailable after the expiration of the challenged Executive Order. Precedent rejects the notion that an otherwise-valid public health measure to forestall an epidemic is unlawful solely because it may have the effect of altogether preventing the exercise of an individual liberty in a particular instance. *See Jacobson,* 197 U.S. at 14, 26; *see also Phillips*, 775 F.3d 538 (2d Cir. 2015); *Reynolds*, 488 F.2d at 1381-83.

61. A delay of all elective abortion services is especially justified in the case of the Plaintiff who requires interstate travel of its abortionist to perform services. *See supra* Findings of Fact ¶ 41.

62. The reasonableness of the postponement is further demonstrated by the fact that Plaintiffs themselves are turning away symptomatic abortion seekers, including for medication abortion, requiring them to postpone their abortion. *See supra* Findings of Fact ¶ 113. Because such a large quantity of those carrying and spreading SARS-CoV-2 are asymptomatic, *see supra* Findings of Fact ¶¶ 35-38, the State is not unreasonable in requiring all elective abortions to be delayed.

63. To the extent there is disputed evidence on these facts, including the risks posed by various abortion procedures, this Court will not reweigh the public health costs and benefits under the deferential standard of review. *See supra* Conclusions of Law ¶¶ 22-26, 32-33, 39-40; *Jacobson*, 197 U.S. at 30-31 (asking whether any error is "beyond question"); *In re Gregg Abbott*, slip op. at 2-3, 24-25 (court should not "substitute[] its own view of the efficacy of applying" the EO to particular abortions, "decid[ing] which measures are likely to be the most effective for the protection of the public against disease").

64. Allowing a special exception for abortion from a cumulative measure would swallow the rule because no individual contribution to the cumulative impact is significant in its own right. *See supra* Proposed Findings of Fact ¶ 67; *Jacobson*, 197 U.S. at 37-38.

65. Plaintiffs have also failed to demonstrate that a large fraction of relevant cases will be unable to legally obtain an abortion after the expiration of the Executive Order.

66. Accordingly, Plaintiffs are unlikely to succeed in demonstrating that the Executive Order advancing compelling state interests in protecting public health during an emergency was a violation of Fourteenth Amendment due process or equal protection.

III. EQUITABLE FACTORS

67. Plaintiffs' irreparable harm is the delayed exercise of a constitutional right. But precedent allows such delays. *Casey*, 505 U.S. at 866. Moreover, Plaintiffs claim that abortion is safe regardless of the time performed, Doc. at 16; *supra* Findings of Fact ¶ 102, so any marginal increase in risk posed by postponement is insignificant and does not weigh heavily for showing irreparable harm. And "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874.

68. Defendants' irreparable harm from any injunction is the undermining of their ability to manage a public health crisis.

69. The public interest is in avoiding the risk of exposure to SARS-CoV-2 to hundreds or thousands of Oklahomans, and the risks to our healthcare system of using more PPE and hospital resources for elective abortions and attendant complications.

70. The benefit to the public of permitting Oklahoma's strategy *before* and during the peak of COVID-19 cases outweighs any costs of increased interpersonal contact, additional use of PPE, or additional use of hospital resources *after* the peak has passed.

71. The risk created by the rejection of social distancing for elective abortions is significant given the hundreds of abortions that are likely to take place during the Executive Order's effective period. *Supra* Findings of Fact ¶¶ 108, 110.

72. Moreover, if elective abortions are permitted to go forward because of the small use of PPE in abortions as a share of the State's total supply, that logic could be used for allowing *every* elective procedure to go forward. Because this constitutes a 25% share of the State's PPE, *supra* Findings of Fact ¶ 53, the State's interest and the public interest weigh in favor of permitting the postponement.

73. Addressing a public health emergency and avoiding jeopardizing the lives of those infected or at risk of infection are compelling interests that outweigh any harm from delay in exercising a constitutional right because "the welfare and safety of an entire population" cannot be "subordinated to the notions of a single individual who chooses to remain a part of that population." *Jacobson*, 197 U.S. at 37-38; *see also id.* at 26-27 (Objectors are not free from "restraints to which every person is necessarily subject for the common good" to become "a law unto himself," abusing individual rights "regardless of the injury that may be done to others"). It is the "duty" of the people's elected representatives "to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few." *Jacobson*, 197 U.S. at 29. "[D]emocratically elected representatives . . . are in a better position than this Court to determine the public interests with respect to questions of social and economic policy." *Heideman*, 348 F.3d 1182, 1191 (10th Cir. 2003). Nothing in the Constitution requires the state

to prioritize ending fetal life above saving adult lives. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991).

CONCLUSION

Based on these proposed findings of fact and conclusions of law, Defendants respectfully request that this court deny a preliminary injunction.

Respectfully Submitted,

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