No. 20-1791

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE LESLIE RUTLEDGE, in her official capacity as Attorney General of the State of Arkansas; LARRY JEGLEY, in his official capacity as Prosecuting Attorney of Pulaski County; MATT DURRETT, in his official capacity as Prosecuting Attorney of Washington County; SYLVIA D SIMON, M.D., in her official capacity as Chairman of Arkansas State Medical Board; ROBERT BREVING JR., M.D., VERYL D. HODGES, D.O., JOHN H. SCRIBNER, M.D., OMAR T. ATIQ. M.D., RHYS L. BRANMAN, M.D., RODNEY GRIFFIN, M.D., MARIE HOLDER, BRIAN T. HYATT, M.D., LARRY D. "BUDDY" LOVELL, TIMOTHY C. PADEN, M.D., DON R. PHILLIPS, M.D., WILLIAM L. RUTLEDGE, M.D., and DAVID L. STAGGS, M.D., in their official capacities as officers and members of the Arkansas State Medical Board; and NATHANIEL SMITH, M.D., M.P.H., in his official capacity as Director and State Health Officer of the Arkansas Department of Health,

Petitioners.

On Petition for a Writ of Mandamus from the United States District Court for the Eastern District of Arkansas
No. 4:19-cv-00449 KGB (Hon. Kristine G. Baker)

PLAINTIFFS' OPPOSITION TO MANDAMUS PETITION

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INTRODUCTION[1]

Mandamus is an extraordinary form of relief that is not warranted here, where there is no credible claim that the district court erred, that Arkansas lacks other avenues for relief, or that Arkansas will be harmed without this Court's immediate intervention. Allowing the district court's temporary restraining order ("TRO") to remain in place through the scheduled preliminary-injunction hearing ***this week*** will cost the State ***zero*** pieces of personal protective equipment ("PPE"). Yet Arkansas seeks to preclude essential surgical abortions during the pandemic while allowing other health care providers to exercise their professional judgment about what is best for their patients in this crisis. Given these undisputed facts, there is no credible claim that allowing abortions to proceed for a handful of days somehow fatally undermines Arkansas's efforts to fight the COVID-19 pandemic. In fact, allowing abortions to proceed instead of forcing patients to continue unwanted pregnancies will mitigate the current crisis by reducing the immediate and near-term need for PPE and improving social distancing—not to mention that it is the only constitutional option. This Court should deny Arkansas's petition.

[1] All emphasis is added and all internal quotations and citations are omitted. This brief refers to Arkansas's Petition for Mandamus Relief as "Pet." Its Stay Motion is "Mot." and its Reply in Support of that Motion is "Reply."

BACKGROUND

A. The Challenged State Action.

On April 3, the Arkansas Department of Health ("ADH") issued a Directive stating that elective-surgery "[p]rocedures . . . that can be safely postponed shall be rescheduled to an appropriate future date" (the "Directive"). Dkt. 134-7, at 2. On April 10, ADH hand-delivered a cease-and-desist order (the "C&D Order"), which requires Little Rock Family Planning ("LRFP") to "immediately cease and desist the performance of surgical abortions, except where immediately necessary to protect the life or health of the patient." Dkt. No. 134-2, at 31.

While the Directive is facially neutral and allows medical providers to exercise their judgment about whether a surgery can be "safely postponed," the C&D Order singles out surgical abortion. *Id.* Surgical abortion is the ***only*** medical procedure that Arkansas permits only if a physician determines that it is "immediately necessary" to protect the patient's life or health. *Compare* APP26, *with* APP25. Orthodontists may continue seeing patients to adjust their orthodontic wires and appliances, and dentists may treat patients who complain of cracked teeth.[2] Arkansas has also declined to issue a stay-home order and has allowed gatherings of any size in "parks, trails, athletic fields and courts, parking lots, golf courses, and driving ranges," and the continued operation of "businesses, manufacturers,

[2] TRO Ex. 10 (Dkt. 134-10).

construction companies, [and] places of worship."[3] The Governor recently confirmed an abundance of available hospital beds and health care workers,[4] and Arkansas acknowledges "that it will have sufficient medical equipment to weather the crisis." Pet. 4.

The C&D Order's duration is indefinite. The Directive and C&D Order were issued under ADH's general authority, Ark. Code §§ 20-7-109, 20-7-110, and they have no expiration date. Arkansas has already canceled school through the end of the year,[5] and the ADH Secretary predicts that Arkansas will not reach peak COVID-19-resource utilization until May 2, APP28. Accordingly, he admits that he "can't say with certainty" how long the C&D Order will be in place.[6]

As Arkansas's own declarations submitted in support of its petition concede, any violation of the C&D Order may result in the immediate suspension of LRFP's license. APP30. Additionally, the ADH may punish any violation of the Directive with monetary fines and up to one month in jail. *See* Ark. Code Ann. § 20-7-101.

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[3] Supp. Compl. Ex. C § 2(b), (c) (Dkt. 132-1).

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

[5] Ex. 9 (Dkt. 134-9).

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

Indeed, on April 4, Governor Hutchinson reiterated in Executive Order 20-13 that a violation of the Directive is a misdemeanor punishable by monetary fine and imprisonment. Dkt. No. 132-1, at 29-32. That Executive Order expires on May 11, but is subject to renewal. Mot. 10.

B. Abortion Care in Arkansas.

Consistent with Arkansas law, LRFP provides (1) medication abortion up to ten weeks, as measured from the first day of a woman's last menstrual period ("LMP"), and (2) surgical abortion up to 21.6 weeks LMP.[7] Not all patients less than 10 weeks LMP are eligible for medication abortion, including those with conditions like anemia.[8]

"Surgical" abortion involves no incision or general anesthesia.[9] There are two types: The first is aspiration abortion, in which gentle suction is used to safely empty the uterus in five to ten minutes.[10] Beginning around 14 weeks LMP, abortions generally require a still-very-safe but more-complex procedure known as dilation and evacuation, or "D&E" abortion, which requires more time than the aspiration procedure and entails greater risk.[11] A D&E is usually a one-day procedure, but as

[7] Williams ¶¶ 12-13 (Dkt. 134-2).

[8] Williams ¶ 16; Cathey ¶ 27 (Dkt. 134-3).

[9] Williams ¶ 13; Cathey ¶ 26.

[10] Williams ¶ 13; Cathey ¶ 26.

[11] Williams ¶ 13.

pregnancy progresses, it becomes a two-day procedure that requires more skill, procedure and recovery time, and expense.[12]

Abortion is extremely safe—much safer than carrying a pregnancy to term. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016).[13] In particular, major complications—defined as complications requiring hospital admission, surgery, or blood transfusion—occur in only ***0.23%*** of all abortion cases.[14]

Although abortion is very safe, the associated health risks increase each week that pregnancy progresses.[15] *See infra* pp.10-11. Indeed, the factor most predictive of abortion-related mortality in the United States is gestational age.[16] But pregnancy is much riskier than abortion, and the risks associated with pregnancy also increase as the length of gestation increases. *See infra* pp.10-11.

Even before the current pandemic, Arkansas heavily circumscribed access to abortion. Arkansas mandates that all patients visit the clinic at least 72 hours before their abortions to receive state-mandated information, *see* Ark. Code § 20-16-1703, and prohibits abortion after 21.6 weeks LMP (20 weeks' gestation), *id.* § 20-16-

[12] Williams ¶¶ 13, 22.

[13] Williams ¶ 9; Cathey ¶¶ 13-14.

[14] Cathey ¶ 14; Williams ¶ 9.

[15] Williams ¶ 22; Cathey ¶¶ 33–34, 65, 67–68.

[16] Cathey ¶ 33.

1405. Women also face a host of logistical and financial obstacles that can delay access to abortion care.[17]

C. LRFP Adopted Extensive Measures in Response to COVID-19.

LRFP began to implement measures to protect its patients and staff from COVID-19 beginning in mid-March.[18] LRFP expanded on and formalized these precautions in its April 2 COVID-19 Response Protocol, which provides for patient screening and severely limits the number of people in LRFP at any given time to ensure that LRFP complies with the CDC's and Arkansas's social-distancing recommendations.[19] As for PPE, surgical abortion requires little:[20] the physician uses sterile gloves and a surgical mask (worn throughout the day); and the assistant uses only a surgical mask (also worn throughout the day) and gloves.[21] LRFP is ***entirely self-sustaining*** in terms of PPE, and has no intention of utilizing any State resources.[22] Likewise, because all LRFP's procedures are performed in its outpatient facility, LRFP is not using any hospital resources that may be needed for Arkansas's COVID-19 response.[23]

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[17] Williams ¶¶ 19-21, 46-47; Cathey ¶ 30.

[18] Williams ¶ 25.

[19] Ex. 6 (Dkt. 134-6).

[20] Williams ¶¶ 18, 27-28; Cathey ¶ 43.

[21] Williams ¶ 18.

[22] Williams ¶ 27.

[23] Williams ¶ 28.

The continued provision of abortion care during the pandemic is consistent with the recommendations of respected national medical organizations. Organizations like the American College of Obstetricians & Gynecologists ("ACOG"), the American Medical Association, and the World Health Organization have unanimously rejected efforts "to ban or dramatically limit women's reproductive health care" during the COVID-19 outbreak."[24] And a large group of States explains that their own experiences show Arkansas is "wrong in claiming that responding effectively to the current crisis requires banning all surgical abortions."[25] Moreover, Arkansas's "characterization of the ban as prohibiting only 'elective' procedures (Pet. 26) fails to recognize how the time-sensitive nature of abortion care distinguishes that care from services that can be postponed without patient harm during the current public health crisis."[26]

D. Delaying Abortion Care Harms Patients and Arkansas's Healthcare System.

Patients seeking abortion care in Arkansas now must navigate the pre-existing barriers to care against a formidable backdrop of COVID-19-related job insecurity, limited public-transit options, and limited childcare assistance.[27] Many are unable

[24] Ex. 13 (Dkt. 134-13); Exs. 12, 14-15 (Dkt. 134-12, 134-14, 134-15); *see generally* ACOG Amicus Br.

[25] New York et al. Amicus Br. 1 [hereinafter "NY Amicus"].

[26] NY Amicus 8.

[27] Williams ¶ 46.

to obtain care before 10 weeks LMP and are thus ineligible to obtain a medication abortion. ***All*** these patients, including 12 in the week of April 13 alone, are indefinitely barred from obtaining an abortion under the C&D Order.[28]

Forecasting further out to May 11—the ***earliest*** possible date Arkansas says the Executive Order could be lifted—81 of Plaintiffs' patients have surgical care as their only option for abortion.[29] Even if all could immediately obtain surgical care on May 11, serious harm would be imposed on ***all*** 81 patients. At least eight will be pushed beyond the legal limit for abortion. In fact, during the week of April 20 alone, Plaintiffs are scheduled to provide care to at least six women who would be pushed past the legal limit for abortion care in Arkansas if forced to wait until May 11 (or longer), and two cannot receive care in Arkansas after this week.[30] At least 73 other women whose care would be delayed would be forced to undergo a medical procedure with greater risks, costs, and other burdens: Forty-seven would require a D&E instead of an aspiration abortion, and 26 would require a two-day procedure instead of a one-day procedure (totaling three visits to the clinic in light of the State's mandatory 72-hour waiting requirement—and directly undermining the social-distancing concern that purportedly animates the C&D Order).[31] The extent of the

[28] Williams ¶ 40.

[29] Supp. App. 2 ¶ 5.

[30] Supp. App. 5 ¶¶ 3-4.

[31] Supp. App. 2 ¶ 7.

harm would be even more significant than the above numbers suggest because, even if the restrictions were lifted on May 11, LRFP would not be able to immediately treat all the women who would need care after waiting for at least three weeks, given the clinic's capacity constraints.[32]

Going outside Arkansas is no solution. A state may not justify abortion restrictions by pointing to out-of-state options. *E.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (holding that "the burden" of a State's "obligation" to protect citizens' constitutional rights" can be performed only where its laws operate, that is, within its own jurisdiction . . . the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do"); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014) ("[A] state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights," including abortion rights). In any event, the next-nearest clinic providing surgical abortions up to 21.6 weeks LMP is in Granite City, Illinois, which—assuming it has capacity to help Arkansas women—is a ***more-than-700-mile*** roundtrip drive from Little Rock into a State with a far higher incidence of COVID-19.[33]

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[32] Williams ¶ 48; Cathey ¶ 70.

[33] *See* Ill. Dep't of Pub. Health, Coronavirus Disease 2019 (COVID-19), https://www.dph.illinois.gov/covid19 (visited Apr. 10, 2020); Ark. Dep't of Health, COVID-19, https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus (visited Apr. 10, 2020).

As the medical-organization amici explain in their brief: "Delays in receiving care can compromise patients' health," including by pushing them to attempt self-administered abortions or to travel to other states during a pandemic.[34] "Abortion" is a medical procedure that "should be performed as early as possible."[35] Every day that a woman remains pregnant against her will, she experiences emotional and physical consequences.[36] Every day, her risk of contracting the COVID-19 virus—which jeopardizes her ability to visit a clinic and receive time-sensitive care—also increases.[37] In addition, the longer a woman is forced to remain pregnant, the heavier a burden she places on the health care system, the more interactions she must have with a variety of clinicians and staff, and the more PPE her care requires.[38] In addition to routine prenatal appointments, pregnant patients often have multiple contacts with providers, including in the first 20 weeks of pregnancy.[39] Every pregnancy carries a 15 to 20 percent risk of miscarriage, which often occurs in the first trimester; in approximately half of miscarriages, medical attention, often at a hospital, is required.[40] Additionally, pregnant patients who exhibit signs of COVID-

[34] ACOG Amicus Br. 9.

[35] ACOG Amicus Br. 9.

[36] Cathey ¶ 15-23; Williams ¶ 22.

[37] Williams ¶ 49; Cathey ¶ 69.

[38] Williams ¶ 49; Cathey ¶¶ 44-45.

[39] Cathey ¶ 44.

[40] Cathey ¶ 23.

19—many of which, such as shortness of breath, are common to pregnant women—are instructed to immediately seek care at an emergency room.[41]

If a woman is forced to give birth against her will, she will require still more PPE and close social contacts. Virtually all births in Arkansas occur in hospitals, and pregnant patients typically present at a hospital one or more times prior to actual delivery.[42] An uncomplicated, vaginal birth is attended by at least four clinicians, over a considerable labor period, with significant use of PPE, and one-third of pregnancies result in caesarean section, a major abdominal surgery.[43] Throughout labor, delivery, and recovery, patients use hospital beds and are in close contact with large numbers of people.[44]

E. District Court Proceedings

Plaintiffs previously challenged three Acts that obstruct access to pre-viability abortion care in Arkansas: one banning virtually all abortions after 18 weeks LMP; one prohibiting physicians from providing abortions based on women's reasons for seeking care; and one prohibiting physicians other than board-certified or -eligible obstetricians/gynecologists from providing care. *See* Dkt. 1. Together, these laws would have virtually eliminated access to pre-viability abortion care in Arkansas,

[41] Cathey ¶¶ 46-47.

[42] Cathey ¶ 49.

[43] Cathey ¶¶ 50, 21.

[44] Cathey ¶ 54.

with no offsetting health or safety benefits. *See* Dkt. 4.

Plaintiffs' earlier challenge and their new allegations involve overlapping plaintiffs, defendants, witnesses, and causes of action. APP4-5. They also rely on many of the same operative facts, including facts relating to the (1) abortion procedures typically provided in Arkansas and their safety; (2) importance of abortion as part of women's health care; (3) significant obstacles patients face in accessing abortion care in Arkansas, and (4) risks to women's health and wellbeing when they are unable to access abortion care. APP5. Because Federal Rule of Civil Procedure 15(d) expressly authorizes supplementation of a complaint based on later events, Plaintiffs moved to supplement their earlier complaint to challenge Arkansas's latest effort to restrict access to abortion care. The district court granted that motion, explaining that the initial and "supplemental complaint's claims will involve facts, issues, and witnesses common to the underlying litigation," and noting that efficiencies would be realized from allowing the claims to proceed together because "neither the discovery period nor other pre-trial district-court proceedings have commenced" on the earlier claims. APP5.

Turning to the substance of Plaintiffs' supplemental complaint, the district court correctly found, based on the preliminary evidence, that Plaintiffs were entitled to a TRO because they "are likely to prevail on the merits of their substantive due process claim." APP17. The district found that the C&D Order prohibits nearly all

pre-viability abortions and is therefore unconstitutional; moreover, the C&D Order fails the undue-burden test because it bars all surgical abortion care while failing to conserve PPE, reduce hospital demand, or improve social distancing. APP11-16. As the district court explained, this conclusion "is consistent with the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)," which "upheld the authority of Massachusetts to enforce a compulsory vaccination law during a smallpox outbreak." APP16. After all, *Jacobson* made plain that state infringement on constitutional rights during a crisis is impermissible to the extent it effectuates "a plain, palpable invasion of rights secured by the fundamental law" or lacks a "real or substantial relation to" the State's purpose in enacting it, and the C&D Order fails under both metrics. APP16 (quoting *Jacobson*, 197 U.S. at 31).

The district court's TRO is set to expire on April 28 (14 days after it issued). The district court said it would "reconsider [the TRO] upon the submission of [Arkansas's] written arguments," APP22, and it scheduled a preliminary-injunction hearing for April 24. But Arkansas instead ran straight to this Court to seek extraordinary relief.

STATEMENT OF THE ISSUE

Is mandamus unwarranted where (1) the district court correctly concluded, based on uncontroverted evidence and decades of controlling Supreme Court precedent, that Plaintiffs are entitled to a TRO because they are likely to prevail on

their substantive due process challenge, (2) Arkansas has other avenues for relief, and (3) this Court's immediate intervention will not improve Arkansas's PPE supplies or social-distancing measures, but will inflict irreparable harm on Arkansas women seeking constitutionally guaranteed, pre-viability abortion care?[45]

ARGUMENT

Mandamus is a "drastic and extraordinary remedy," justified only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). "[T]hree conditions must be satisfied before it may issue." *Id.* *First*, the party seeking mandamus must "have no other adequate means to attain the relief he desires." *Id.* *Second*, "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 381. *Third*, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id*. Because Arkansas is a far cry from satisfying these demanding standards, this Court should reject its petition.

I. ARKANSAS HAD NOT DEMONSTRATED A CLEAR AND INDISPUTABLE ENTITLEMENT TO RELIEF.

Bans on pre-viability abortion are *per se* invalid, *Planned Parenthood of Se.*

[45] Although Arkansas says it seeks dismissal of the supplemental complaint, its list of issues presented by its petition omits that claim entirely. Pet. 3.

Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion), and abortion regulations that have "the effect of placing a substantial obstacle in the path of a woman's choice" even "while furthering [a] valid state interest," "cannot be considered a permissible means of serving its legitimate ends," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877). Under this test, the C&D Order is flatly unconstitutional because, as long as it remains in effect, it eliminates abortion for ***all*** women after 10 weeks LMP and for whom medication abortion is inappropriate, substantially impairing women's health and constitutional rights, without any offsetting benefits.

The State largely ignores women's constitutional right to access pre-viability abortion and argues instead that *Jacobson* trumps that right during a pandemic. Pet. 14-19. Not so. *Jacobson* stands for the unremarkable proposition that states have police powers, and it long predates the development of current due process jurisprudence (or even heightened scrutiny for infringement of constitutional rights). But even if *Jacobson* applies, its test favors Plaintiffs, not Arkansas: *Jacobson* confirms that, even during emergencies, state action is subject to constitutional constraint and must bear a reasonable and substantial relation to the state's purported ends. Moreover, it confirms that ***medical expertise*** determines the medical risk inherent in state infringement on bodily integrity. Because the district court correctly found that the C&D Order is unjustifiable even under *Jacobson*, this Court

should deny Arkansas's petition.

A. The District Court Correctly Held That the C&D Order Is an Unconstitutional Restriction on Access to Pre-Viability Abortion.

Arkansas concedes that the C&D Order requires LRFP to "stop performing" pre-viability abortions. Pet. 7. Under binding Supreme Court precedent, this alone renders the C&D Order unconstitutional. *Casey*, 505 U.S. at 871 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion.").

Even if the undue-burden standard applies, the analysis leads to the same result. Under that standard, abortion regulations that have "the effect of placing a substantial obstacle in the path of a woman's choice" even "while furthering [a] valid state interest," "cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877). This test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.*

As the district court found, APP13-16, the COVID-19 pandemic does not justify banning surgical abortion, and the burdens of doing so are extreme. Banning surgical abortion does not advance the State's interests: As a threshold matter, Arkansas does not even try to explain how stopping the provision of abortion care at LRFP—***which practices social distancing and has all the PPE it needs and no plans to utilize State resources***, *supra* p.6—could have ***any*** impact on the State's preparedness for COVID-19. Nor could it: Abortions require far less PPE, fewer

contacts with medical providers, and less medical resources than forcing patients to continue pregnancies over both the immediate- ***and*** short-term. *Supra* pp.10-11; *contra* Pet. 6-7. In the immediate term, continued pregnancy requires regular appointments with ultrasounds and laboratory testing, which requires relatively substantial PPE.[46] Early pregnancies often result in hospitalizations resulting from complications, and do so at a much greater rate than abortions.[47] Over the slightly longer term, childbirth also requires significantly more PPE and hospital resources than abortion. *See supra* p.11.

On the other side of the ledger, the delay caused by the C&D Order amplifies existing challenges in accessing abortion care, poses severe health risks, and renders abortions unavailable for many women. *See supra* pp.5-6, 10-11. Based on LRFP's schedule for this week alone, the C&D Order would bar six women from having an abortion in Arkansas at all because they will soon be past the legal limit. All the other women on LRFP's current schedule would likewise suffer significant harm if the TRO were lifted: At least 47 would be pushed from an aspiration abortion to a more complex, time-intensive, and expensive D&E. *Supra* p.8. And at least 26 would have to make an additional trip to the clinic—which undermines Arkansas's interest in enforcing social distancing. *Id.* These figures are all based solely on

[46] NY Amicus 3-4.

[47] NY Amicus 4-5.

gestational age. The real number of women that the C&D Order would preclude from accessing care would be higher because the cost of an abortion increases substantially as a pregnancy progresses; delay will make the care completely inaccessible for many of LFRP's low-income patients.[48] And given the severe capacity problems that that will arise if LFRP is forced to delay all surgical care to until (at least) May 11, it will not be able to timely see all patients who need care.[49]

As this Court and the Supreme Court have recognized, all these burdens are undue and unconstitutional—not only if they completely preclude abortion care. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2302, 2313-14, 2318 (three-week wait time caused by state restriction constituted an undue burden); *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957 (8th Cir. 2017) (similar). The district court accordingly correctly found that the C&D Order "in a large fraction of the cases in which" it "is relevant," "will operate as a substantial obstacle to a woman's choice to undergo an abortion." APP15; *see Jegley*, 864 F.3d at 958, 960 n.9. Indeed, the district court found that these harms will be felt by "virtually all" LRFP's patients who need surgical abortions (the only people for whom the C&D Order is relevant). APP11, 15; *see* APP19.[50]

[48] Supp. App. 2-3, ¶ 8.

[49] Williams ¶¶ 22, 48.

[50] *See* Supp. App. 2 ¶¶ 5-7.

To the extent that Arkansas believes more was required (Pet. 27), it is wrong. This Court "do[es] not require the district court to calculate the exact number of women unduly burdened by" the challenged state action because "the 'large fraction' standard is in some ways more conceptual than mathematical." *Jegley*, 864 F.3d at 960; *see Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) (same). Neither *Casey* nor *Whole Woman's Health* calculated a specific percentage of women unduly burdened. In fact, *Whole Woman's Health* ordered facial relief, 136 S. Ct. at 2307, 2320, notwithstanding the district court's express finding that it was "impossible to divine exactly how many women in Texas" would be burdened, *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014).[51] The district court's conclusion that the C&D Order will burden "virtually all" the women for whom it is relevant is thus a "large fraction" by any measure. APP11, 15. In fact, ***no*** court has allowed a ban on surgical abortions like Arkansas's to stand—a fact that confirms mandamus relief would be inappropriate here. *See, e.g.*, *Robinson v. Marshall*, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020); *S. Wind Women's Ctr. LLC v. Stitt*, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020). Indeed, just last Friday,

[51] Even if Plaintiffs are not entitled to facial relief, they are entitled to as-applied relief, which does not require them to prove that the C&D Order will burden a large fraction of women to whom it is relevant. *See Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 757 n.7 (8th Cir. 2013) (large-fraction analysis is relevant to *facial* challenge). This is not a "concession" that Plaintiffs can prevail only under an as-applied standard, *contra* Reply 11, but an argument in the alternative.

a Tennessee court issued a TRO to enjoin enforcement of an Executive Order that threatened criminal and other penalties for providing surgical abortion care during the pandemic because it "create[d] an undue burden on the right of women in Tennessee to choose to have a pre-viability abortion." TRO 8, *Adams & Boyle P.C. v. Slattery*, 3:15-cv-00705-BAF (M.D. Tenn. Apr. 17, 2020) (Dkt No. 244).

B. *Jacobson* Does Not Compel A Different Result.

1. Jacobson *does not clearly and indisputably displace controlling Supreme Court precedent*

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

At the same time, *Jacobson* made clear that a state's police powers—even during an epidemic—are subject "to the condition that *no rule* prescribed by a state

. . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. To be sure, *Jacobson* observed that the "liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id*. at 26. But even then, *Jacobson* "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease," *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990), the same as courts do today for all forced or non-consensual medical treatments. *Id.*

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

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

2. *The Fifth Circuit misread* Jacobson.

The Fifth Circuit incorrectly read *Jacobson* to give State's far greater latitude to dispense with constitutional rights. In its view, when faced with an epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *In re Abbott*, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (quoting *Jacobson*, 197 U.S. at 31) ("*Abbott I*"). No other court, including this one, has ever read *Jacobson* that way. *See, e.g.*, *Women's Kansas City St. Andrew Soc'y v. Kansas City*, 58 F.2d 593, 598-99 (8th Cir. 1932) (citing *Jacobson* for proposition that "police power of the state must stop when it encroaches on the protection accorded the citizen by the Federal Constitution"); *Pre-Term Cleveland v. Att'y Gen. of Ohio*, 2020 WL 1673310 (6th Cir. Apr. 6, 2020) (applying undue

burden test and declining to stay TRO enjoining enforcement of COVID-19 emergency order against certain abortions); *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, at *8 (W.D. Ky. Apr. 11, 2020) ("[E]ven under *Jacobson*, constitutional rights still exist."). That the Fifth Circuit stands alone in its reading of *Jacobson* confirms mandamus is inappropriate because, at the very least, Arkansas's entitlement to relief is not "clear and indisputable," *Cheney*, 542 U.S. at 381. Moreover, the Fifth Circuit's reasoning would mean a state could invade any constitutional right—including the right to practice one's chosen religion, to free speech, and to bear arms—as long as the invasion was not "beyond all question" unconstitutional.

Nor does the Fifth Circuit's view have any basis in *Jacobson* itself. *Jacobson* held that state action would be invalid if it failed to satisfy ***any one of three*** requirements: (1) if it was "beyond question" in conflict with "fundamental law," ***or*** (2) if it had "no real or substantial relation to the protection of the public health and the public safety," ***or*** (3) if it was not "justified by the necessities of the case." 197 U.S. at 28, 31. The century-plus of precedent following *Jacobson* has made clear that many rights—including the right to pre-viability abortion—are "secured by the fundamental law" of our nation. 197 U.S. at 31. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007) (tracing this development).

Even under *Jacobson*, violation of such rights is "beyond question" unconstitutional. 197 U.S. at 31.

3. *The District Court correctly held Plaintiffs prevail under* Jacobson.

In any event, the district court applied *Jacobson* and found—correctly—that Plaintiffs prevailed because the C&D Order flunks each of *Jacobson*'s three prongs. *See* APP16-17. The C&D Order is beyond question a violation of women's constitutional right to access pre-viability abortion care; it is not justified by the necessities of the case; nor does it bear a substantial relation to Arkansas's purported public-health interests in implementing it (preserving PPE and enforcing social distancing). Abortion care requires minimal PPE, far less than continued pregnancy (and much less childbirth). Moreover, LRFP is wholly self-sustaining in terms of PPE, has no intent to use the State's stockpile, and is following Arkansas's social-distancing recommendations. *See supra* p.6; APP14-18.

Arkansas never disputes these facts. Instead, it criticizes the district court for donning a "public-health-official hat" by noting the "'risk of contracting COVID-19' if Arkansas women must travel to an out-of-state abortion clinic." Pet. 11 (quoting APP16). But Arkansas does not actually dispute this risk. Likewise, the State repeatedly criticizes the district court for its finding that the C&D Order will increase the use of hospital resources. *See* Pet. 9-10, 27-28. But it has never once—not in its Directives, not in the C&D Order, not in any briefing before this Court,

and not in the Declaration submitted by the ADH Secretary purportedly in support of the State's writ—expressly claimed (much less provided evidence showing) that abortion strains Arkansas's health care system.

Nor could it, given the contrary record evidence. This evidence controls, not "[u]ncritical deference to" state officials' "factual findings." *Whole Woman's Health*, 136 S. Ct. at 2310. Even *Jacobson* upheld a smallpox-vaccination requirement only upon observing that "[t]he matured opinions of medical men everywhere" agreed the vaccine was safe. 197 U.S. at 37; *see id.* at 28 (courts are "compel[led] . . . to interfere for the protection of [] persons" where state officers, "under the guise of exerting a police power, . . . violated rights secured by the Constitution"). Here, the medical consensus shows that the C&D Order is unsafe for women and counterproductive in the fight against COVID-19. *See supra* pp.7-11 (citing medical-organizations amicus brief).

Moreover, the C&D Order—beyond question—violates the right of Arkansas women to access pre-viability abortion. Even in the Fifth Circuit's view, *Jacobson* must be applied in conjunction with the standard that governs the right the State has infringed—which, in the context of abortion, is supplied by *Casey* and its progeny. *Abbott I*, 2020 WL 1685929, at *1 (faulting district court for failing to apply *Jacobson* and *Casey* together). Under those cases, the district court correctly found that a regulation that would seriously hinder women's ability to access abortion,

while providing little if any benefit was without question a "plain, palpable invasion" of their fundamental rights. APP16-17 (quoting *Jacobson*, 197 U.S. at 31).

The district court's decision is also readily distinguishable from the one the Fifth Circuit considered in *Abbott*. The *Abbott* district court's initial TRO neither analyzed Texas's COVID-19 abortion ban under the undue-burden standard nor addressed the State's argument concerning *Jacobson*. *Abbott I,* 2020 WL 1685929, at *1 (stating district court "ignored" *Jacobson* and "failed to apply *Casey's* undue-burden analysis"). Here, by contrast, the district court explained at length why Plaintiffs are likely to prevail under the undue-burden standard, as well as why "its finding is consistent with" *Jacobson*. APP13-18. The Fifth Circuit therefore granted mandamus based on perceived errors that are wholly absent from the order on review. Contrary to Arkansas's assertion (Pet. 12-13), the district court also correctly distinguished *Abbott* on the basis that it involved a time-limited COVID-19 abortion ban: While the Governor's Executive Order could be lifted—at the earliest—on May 11, the C&D Order is indefinite. *See supra* p.3. Moreover, the Fifth Circuit has since issued another decision, affording mandamus relief only because the district court failed to follow the mandate of the Fifth Circuit's prior decision. *In re Abbott*, No. 20-50296, slip op at 13-16 (5th Cir. Apr. 20, 2020) ("*Abbott III*"); *see In re Abbott*, 2020 WL 1866010 (5th Cir. Apr. 13, 2020) ("*Abbott II*"). And even then, the Fifth Circuit left in place a TRO that allowed women close

to the legal limit in Texas to obtain abortion care. *Abbott III*, slip op. at 3.

C. Abortion Is A Constitutional Right.

Arkansas's remaining rhetoric generates more heat than light. It claims that the district court inappropriately rendered the right to access pre-viability abortion a "constitutional super-right." Pet. 18. But Arkansas—not Plaintiffs—has singled out abortion for special treatment. *See supra* pp.2-3. And the district court did not treat abortion rights as special, but instead applied the usual undue-burden framework to evaluate the constitutionality of the C&D Order. APP13-16. This is consistent with *Jacobson* and *Abbott*, *Abbott I*, 2020 WL 1685929, at *1 (instructing district court to apply *Jacobson* and *Casey* together), and the Supreme Court's repeated insistence that people continue to enjoy their other constitutional rights during crises, *see, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) (non-citizen detainees charged with terrorism-related offenses maintain their civil liberties, even during wartime); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-51 (1952) (Jackson, J., concurring) (explaining it would not be "wise" to "amend" Constitution by claiming existence of extraordinary emergency powers beyond provision explicitly allowing suspension of habeas corpus).

II. ARKANSAS HAS OTHER AVENUES FOR RELIEF.

Having made no attempt to obtain the relief it seeks in district court, Arkansas now argues that it has "no other adequate means" to attain relief other than through

the extraordinary remedy of mandamus. *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014). Arkansas is wrong. In the 24-plus hours between Plaintiffs' filing and the district court's TRO, Arkansas offered *no* response in the district court. And when the district court assured Arkansas that it would "reconsider" its TRO "upon the submission of [Arkansas's] written arguments," APP22, Arkansas refused that invitation, too. Indeed, Arkansas concedes that it forewent the opportunity to "first seek a stay from the district court"—the relief it now seeks from this Court. Mot. 1-2. Mandamus is not a vehicle for ordering district courts to grant relief that a party could have, but declined to, seek from the district court.

Moreover, before Arkansas asked this Court for extraordinary relief, the district court contacted the parties to schedule a preliminary-injunction hearing, which is now set for April 24. The district court also held a hearing on evidentiary matters on April 17. In other words, not only has Arkansas eschewed every opportunity to obtain relief in the district court, but the district court is—without the "drastic" remedy of this Court's intervention—moving as expeditiously as possible to evaluate the propriety of injunctive relief on a more complete record. *Cheney*, 542 U.S. at 380. And Arkansas can seek review of any preliminary-injunction ruling through the normal appellate process in a matter of days.

III. A WRIT WOULD SEVERELY BURDEN PLAINTIFFS WHILE FAILING TO ADVANCE ARKANSAS'S PURPORTED INTERESTS.

Even if Arkansas satisfied the first two requirements for a writ of mandamus (which it does not), a writ would still be "[in]appropriate under the circumstances," *Cheney*, 542 U.S. 381, because it would do nothing to advance Arkansas's claimed interests while inflicting irreparable harm on Plaintiffs.

As the district court found, the evidence demonstrates the C&D Order undermines—rather than promotes—the State's interests in social distancing and preserving PPE. *See supra* pp.12-13. In response, the State groundlessly suggests that the drain on PPE and reduced social distancing resulting from its Order are "less relevant" because they will be felt *after* the predicted peak of the crisis rather than "today." Reply 7. But the State ignores that (i) Plaintiffs are ***wholly self-sustaining*** with respect to PPE; (ii) Plaintiffs' continued provision of pre-viability abortion care has ***no*** impact on the State's current PPE resources, (iii) Plaintiffs are following Arkansas's social-distancing guidelines (and are better equipped to do so than the average citizens allowed to gather in retailers and public parks); and (iv) the near-term PPE use for women who are forced to continue pregnancies against their wills is much higher than for women who can access abortion care. *See supra* pp.6, 10-11.

Conversely, absent a TRO, Plaintiffs and their patients will suffer irreparable physical, emotional, psychological, and financial harms, with some women losing

their constitutional right to abortion altogether. *See supra* p.8. These harms will be felt by "virtually all" Plaintiffs' patients. APP11. And they will be felt most severely by those who will be pushed past the legal limit for abortion in Arkansas by the time the crisis passes, including six women scheduled to obtain abortion care from Plaintiffs this week. *See supra* p.8. This "disruption or denial of [Plaintiffs'] patients' abortion care cannot be undone after a trial on the merits." APP18.

IV. THE DISTRICT COURT PROPERLY ALLOWED PLAINTIFFS TO FILE A SUPPLEMENTAL COMPLAINT.

Arkansas's suggestion that the district court "clear[ly] and indisputabl[y]" lacked jurisdiction to grant Plaintiffs' motion for leave to file a supplemental complaint is beyond strained. *Cheney*, 542 U.S. at 381. Presently pending before this Court is a separate appeal from the district court's August 6, 2019 preliminary injunction enjoining three statutes that obstruct patients' access to abortion. *See supra* pp.11-12. According to Arkansas, because that appeal asks this Court to reverse the district court's order consolidating this case with another one, the district court somehow "lacked jurisdiction to act on LRFP's motion for leave to file a supplemental complaint." Pet. 32.

That is wrong for at least two reasons. *First*, as Arkansas's own authority explains, "[t]he filing of a notice of appeal . . . divests the district court of its control over *those aspects of the case involved in the appeal*." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). There is no relationship

between the district court's prior consolidation order and its decision to allow a supplemental complaint now. Arkansas suggests that the common thread is the general question whether the cases are properly before the district court. But by Arkansas's faulty logic, any appeal contending that a case was improperly consolidated would divest a district court of all jurisdiction over that case during the pendency of the appeal, even though it is black-letter law that an appeal does not "transfer[] jurisdiction over the entire case to the court of appeals." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

Second, Arkansas's prior appeal did not confer jurisdiction over the consolidation order to begin with. *See* Appellees' Mot. for Partial Dismissal 1-2, No. 19-2690 (Aug. 23, 2019). This Court may exercise jurisdiction over only final orders, 28 U.S.C. § 1291; Fed R. Civ. Proc. 54(b), and certain interlocutory and collateral orders, 28 U.S.C. § 1292, but the consolidation order is neither. As a result, the premise of Arkansas's jurisdictional argument—that the consolidation order is properly before this Court and divests the district court of the ability to allow the supplemental complaint—is incorrect. *See Griggs*, 459 U.S. at 58 (citing case law holding that "notice of appeal from unappealable order does not divest district court of jurisdiction"); *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999) ("To prevent parties from using frivolous appeals to delay or interrupt proceedings in the district court, that court does not normally lose

jurisdiction to proceed with the case when one party appeals a non-appealable order.").[52]

Nor did the district court err in allowing Plaintiffs' supplemental complaint. *See* Fed. R. Civ. Proc. 15(d). Rule 15 permits supplemental pleadings "to cover matters subsequently occurring but pertaining to the original cause." *United States v. Vorachek*, 563 F.2d 884, 886 (8th Cir. 1977). Whether to grant leave is committed to the "discretion of the court and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." 6A Charles Alan Wright, et al., Federal Practice and Procedure § 1504 (3d. ed. Apr. 2020 update) (footnotes omitted); *see Baker Grp., L.C. v. Burlington N. & Santa Fe Ry. Co.*, 228 F.3d 883, 886 (8th Cir. 2000) (Rule 15 is "permissive for the parties and discretionary for the court").

[52] Arkansas does not argue that the pending appeal of the district court's preliminary injunction divested the district court of jurisdiction, nor could it. "[T]he pendency of an interlocutory appeal from an order granting or denying a preliminary injunction does not wholly divest the District Court of jurisdiction over the entire case." *W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986); *see Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) (same). As such, a pending appeal from a preliminary injunction "d[oes] not divest the District Court of jurisdiction of [a] supplemental complaint," *Hamer v. Campbell*, 358 F.2d 215, 223 (5th Cir. 1966), or even to "proceed to determine the action on the merits," *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 791 (10th Cir. 2013).

Arkansas is wrong that the only relationship between the supplemental complaint and the initial complaint is the topic of abortion. Pet. 33. Two of the four Plaintiffs in the supplemental complaint are the same, as are all 18 Defendants. And the supplemental complaint raises many of the same factual issues as the initial complaint.[53] APP4-5; *see supra* pp.11-12. Indeed, it expressly incorporates large portions of the initial complaint's allegations.[54] Moreover, the new and old allegations share witnesses, including LRFP Clinic Director Lori Williams, Plaintiffs' expert Dr. Janet Cathey,[55] and Defendants' expert Dr. Kathi Aultman, APP32. The district court's existing familiarity with key legal and factual issues and witnesses is all the more important in the current, exigent circumstances. Further, Arkansas does not (and cannot) explain how the district court's Rule 15 decision prejudices Arkansas.

Nothing unusual happened below. Indeed, other courts have similarly granted leave to file supplemental complaints regarding COVID-19-related abortion restrictions in pending litigation about other unconstitutional limitations on abortion. *See Adams & Boyle*, 3:15-cv-00705-BAF, *supra* (Dkt No. 244); *Pre-Term Cleveland v. Att'y Gen. of Ohio*, Case No. 1:19-cv-00360-MRB (S.D. Ohio Mar. 30, 2020)

[53] *See* Dkt. 1; 132-1.

[54] Dkt. 132-1, ¶¶ 1, 3.

[55] Dkt. 2; 134-2; 134-3.

(Dkt. No. 43); *Robinson v. Marshall*, Case No. 2-19-cv-00365-MHT (M.D. Ala. Mar. 30, 2020) (Dkt. 78). The district court's decision to the do the same was not an abuse of discretion, let alone one grave enough to warrant mandamus relief.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of the plaintiff-appellees complies with (1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it was written in Times New Roman, 14-point font and (2) the type-volume limitations contained in Federal Rule of Appellate Procedure 21(d)(1), because it contains 7,775 words, excluding those parts of the brief excluded from the word count under Federal Rule of Appellate Procedure 32(f). In accordance with Eighth Circuit Rule 28A(h), I further certify that this brief has been scanned for viruses and is virus-free.

/s/ Kendall Turner
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically submitted with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit using the CM/ECF system on April 20, 2020. Service on all participants will be accomplished by the CM/ECF system. A paper copy will be served on participants in the case by U.S. Mail, postage prepaid, within five days of the Court's notice that the brief has been reviewed and filed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LITTLE ROCK FAMILY PLANNING SERVICES et al., Plaintiffs-Appellees, v. LESLIE RUTLEDGE, et al., Defendants-Appellants.	No. 20-1791

DECLARATION OF LORI WILLIAMS, M.S.N, A.P.R.N., IN OPPOSITION TO STAY OF TEMPORARY RESTRAINING ORDER AND PETITION FOR MANDAMUS

I, Lori Williams, M.S.N., A.P.R.N., declare under 28 U.S.C. § 1746 and penalty of perjury that the following is true and correct:

1. I am a nurse practitioner and the Clinical Director of Plaintiff Little Rock Family Planning Services ("LRFP").

2. I submitted a Declaration in Support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, executed on April 12, 2020. I now provide this additional declaration in opposition to the State's motions for a stay and an administrative stay of the temporary restraining order issued on April 14, 2020, and its petition for mandamus. I reaffirm and incorporate my earlier declaration by reference.

3. The cease and desist order that the Arkansas Department of Health ("ADH") served on LRFP on August 10, 2020, (C&D Order) has no expiration date and is of indefinite duration.

4. I understand that Defendants have pointed to the fact that the Governor's Executive Order March 11, 2020, generally declaring the COVID-19 emergency in this state,

expires on May 11, 2020, unless renewed. I have looked at our current patient schedule in light of Defendants' focus on May 11.

5. As of today, LRFP has scheduled abortion appointments through May 1, 2020, and it is likely that additional women will schedule care between today and May 1, 2020 in the coming weeks. LRFP's current schedule through May 1 includes at least 81 patients who will be past 10.0 weeks LMP at the time of their appointments, and thus will not be candidates for medication abortion.

6. Among those 81, a delay of care until May 11, 2020, would impose especially serious harm on each. Each would be forced to continue a pregnancy, with attendant greater medical risks as each week passes, during the COVID-19 pandemic and with uncertainty as to whether abortion will (in fact) be available as of May 11. Moreover, for each patient, the gestational age of their pregnancy is such that they will all be pushed by May 11 to more complex procedures or completely beyond the legal limit in Arkansas.

7. Specifically, assuming that these 81 patients could obtain care on May 11, 47 patients would have to undergo a D&E procedure, rather than the aspiration abortion currently scheduled. Another 26 patients, already getting a D&E, would be pushed from a one-day procedure to a two-day D&E. And the other 8 patients among the 81 would be pushed past 21.6 weeks and thus be unable to access any abortion in Arkansas, even if surgical abortions could resume on May 11.

8. Even if surgical abortions could resume at LRFP on May 11, and we could attempt to reschedule the 73 patients not yet beyond Arkansas's legal limit, however, all those procedures obviously could not be provided immediately and on a single day. As I explained in my prior declaration, LRFP can typically provide care to only approximately 20-25 patients in a

given day. In addition, patients' financial, personal, and logistical constraints—all exacerbated in recent weeks by the COVID-19 pandemic—would also make it extremely difficult to accomplish abortion care before the Arkansas legal limit for many.

9. In short, even if the C&D Order were withdrawn by ADH as of May 11, when the Governor's Executive Order may expire (if not renewed), it would have serious consequences, above and beyond the medical-risk and psychological harms of delay itself, for every single one of our patients that is coming for abortion care after 10 weeks LMP. Each patient would be forced to undergo a more complex, later procedure, and some would be unable to secure abortion in Arkansas at all.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of April, 2020.

Lori Williams, M.S.N., A.P.R.N.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

LITTLE ROCK FAMILY PLANNING SERVICES et al., Plaintiffs-Appellees, v. LESLIE RUTLEDGE, et al., Defendants-Appellants.	No. 20-1791

SUPPLEMENTAL DECLARATION OF LORI WILLIAMS, M.S.N, A.P.R.N., IN OPPOSITION TO PETITION FOR MANDAMUS

I, Lori Williams, M.S.N., A.P.R.N., declare under 28 U.S.C. § 1746 and penalty of perjury that the following is true and correct:

1. I am a nurse practitioner and the Clinical Director of Plaintiff Little Rock Family Planning Services ("LRFP").

2. I submitted a Declaration in Opposition to Defendant-Appellants' Motion for a Stay of the Temporary Restraining Order and Petition for Mandamus, executed on April 16, 2020. I now provide this supplemental declaration, and reaffirm and incorporate my earlier declaration by reference.

3. LRFP is currently scheduled to see, during the week of April 20, 2020 alone, at least six women who are more than 19 weeks LMP. Of those, two women are more than 20 weeks LMP, and two women are more than 21 weeks LMP.

4. All six of these patients would be pushed past the legal limit for abortion care in Arkansas if forced to wait until May 11 (or longer), and two cannot receive care in Arkansas after this week.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of April, 2020.

Lori Williams, M.S.N., A.P.R.N.