

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

PRETERM-CLEVELAND, INC., <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i> ,	:	Judge Barrett
	:	
Defendants.	:	

**MOTION FOR AND BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Preterm-Cleveland (“Preterm”), Planned Parenthood Southwest Ohio Region (“PPSWO”), Sharon Liner, M.D., Planned Parenthood of Greater Ohio (“PPGOH”), Women’s Med Group Professional Corporation (“WMGPC”), and Northeast Ohio Women’s Center (“NEOWC”) (“Plaintiffs”) move for a temporary restraining order, followed by a preliminary injunction, to enjoin Defendants from enforcing the Ohio Department of Health (“ODH”) Director’s Order for the Management of Non-essential Surgeries and Procedures Throughout Ohio (“Director’s Order”) (attached as Ex. B to Proposed Suppl. Complaint (“Suppl. Compl.”)) in a way that would ban surgical abortion.¹

As the American College of Obstetricians and Gynecologists (“ACOG”) has recognized, abortion care is essential because it cannot be delayed without risking the health and safety of the patient.² Accordingly, Plaintiffs’ provision of this care is entirely consistent with the Director’s

¹ ODH, *RE: Director’s Order for the Management of Non-essential Surgeries and Procedures throughout Ohio* (Mar. 17, 2020), <https://tinyurl.com/woxkyhw>.

² ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

Order, under which a “non-essential” surgery or procedure is a “procedure that can be delayed without undue risk to the current or future health of a patient.” Director’s Order at 4. Consistent with the plain language of this Order, Plaintiffs—like all healthcare providers—are doing their part to reduce the spread of COVID-19 and preserve personal protective equipment (“PPE”), such as gloves and masks, by stopping all non-essential procedures and reducing the use of PPE as much as possible during surgical abortions and other essential medical procedures that they continue to provide.

Despite Plaintiffs’ compliance with the Order and in response to unidentified complainants,³ on March 20 and 21, 2020, Attorney General Dave Yost sent letters to PPSWO, Preterm, and Women’s Med Center Dayton (“WMCD”) (a licensed ambulatory surgical facility (“ASF”) owned by WMGPC) ordering the clinics “to immediately stop performing non-essential and elective surgical abortions” or ODH “will take all appropriate measures.” Declaration of Sharon Liner, M.D. (“Liner Decl.”), Ex. F; Declaration of Chrisse France (“France Decl.”), Ex. B; Declaration of W.M. Haskell, M.D. (“Haskell Decl.”), Ex. B. At a press conference on March 26, ODH Director Dr. Amy Acton said that ODH had “listened to the AG” and began to investigate “violations [of the Order] across the state,” including at abortion clinics.⁴ At that same press conference, Governor Mike DeWine identified only life-saving abortions as falling within the

³ Though ODH would not tell Plaintiffs the source of the complaints, evidence suggest they came from anti-abortion activists. Liner Decl. ¶ 17; France Decl. ¶ 17; Haskell Decl. ¶ 20.

⁴ Gov. Mike DeWine Corona Virus Update March 26, 2020, *available at* <https://www.ideastream.org/gov-mike-dewine-coronavirus-update-march-26-2020>.

Order’s parameters.⁵ That same day, the Attorney General again threatened “quick enforcement action” against clinics that continue to provide surgical abortion care.⁶

On March 26 and 27, ODH sent inspectors to Preterm, WMCD, and PPSWO to investigate those clinics’ compliance with the Director’s Order. Liner Decl. ¶ 17; France Decl. ¶ 14; Haskell Decl. ¶¶ 20, 23. After two days of inspections, the inspectors left without telling the facilities whether they had found violations of the Director’s Order or any other regulation—a distinct break with established ODH practice and procedure—and instead said their superiors would make that determination at an unspecified later date. Liner Decl. ¶ 20; France Decl. ¶ 20; Haskell Decl. ¶ 23.

Plaintiffs need urgent relief from this Court. Without any clear guidance from the ODH and in light of the statements of the Director, Governor, and Attorney General and the actions of ODH, Plaintiffs and their physicians credibly fear being immediately shut down and prosecuted if they continue to provide surgical abortions.⁷ Liner Decl. ¶ 41; France Decl. ¶ 22; Haskell Decl. ¶ 24; Declaration of Adarsh Krishen (“Krishen Decl.”) Decl. ¶ 20; Declaration of David Burkons, M.D. (“Burkons Decl.”) ¶ 20. In the absence of an injunction, the enforcement of the Director’s Order to ban surgical abortion—the only abortion method available for all patients who are over 10 weeks pregnant and the only method available to some patients at any point in pregnancy, Plaintiffs’ patients would be denied their right to access safe and legal previability abortion, in

⁵ *Id.* The Governor did not say if he believed surgical abortion would be allowed under other circumstance such as if continued pregnancy posed serious but not life-threatening risks to a patient’s health.

⁶ Attorney General Yost press release March 26, 2020, Liner Decl. Ex. G (General Yost is “the prosecutor” and ODH is the “police officer” and his office “stands ready to play our role and pursue legal action on behalf of [ODH].”).

⁷ Although only PPSWO, WMCD, and Preterm have received letters and been inspected at this time, PPGOH and NEOWC are also subject to the Director’s Order, adopted policies identical to the ones in place at the clinics that received letters, and intend to perform surgical abortions in compliance with the Order, thus PPGOH and NEOWC also need relief.

violation of nearly five decades of Supreme Court precedent that categorically prohibits states from banning abortion before viability, and is, therefore, unconstitutional. Some of these patients will be forced to carry pregnancies to term against their will and at risk to their health amidst a health system overburdened by responding to COVID-19. Accordingly, Plaintiffs seek to restrain and preliminarily enjoin Defendants their officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them from enforcing or complying with any interpretation of the Director's Order that would prohibit surgical abortion procedures.

STATEMENT OF FACTS

A. Director's Order

In March 2020, the United States and Ohio both declared a state of emergency related to the COVID-19 pandemic. *See* Director's Order at 3; Ohio Exec. Order 2020-01D;⁸ Proclamation No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020). The virus has reached every State in the country, including approximately 1653 confirmed cases in Ohio and 29 deaths as of the time of filing.⁹ Federal and state officials and medical professionals expect a surge of infections in the coming months that will test the limits of the health care system,¹⁰ which is already facing a shortage of PPE, particularly N95 masks.¹¹

⁸ Available at <https://tinyurl.com/ud789de>.

⁹ CDC, *Cases in U.S.* (last updated Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>; ODH, *COVID-19*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/> (last visited Mar. 30, 2020).

¹⁰ *Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States*, CDC (last updated Feb. 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html>.

¹¹ Andrew Jacobs, Matt Richtel & Mike Baker, *'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire*, N.Y. Times (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

In light of this new reality, on March 17, 2020, Director Acton issued an order barring all “non-essential surgeries and procedures” beginning at 5 p.m. on March 18, 2020. Director’s Order at 4.¹² The Order states that its purpose is to “preserv[e] personal protective equipment (PPE) and critical hospital capacity and resources within Ohio.” *Id.* Although the Order does not define PPE, Plaintiffs understand that term to refer, for example, to surgical masks, gloves, protective eyewear, gowns, and shoe covers, which are commonly used in surgical procedures, including surgical abortions. Liner Decl. ¶ 6; France Decl. ¶ 8; Krishen Decl. ¶ 10; Haskell Decl. ¶ 10; Burkons Decl. ¶ 10.

The Director’s Order defines a “non-essential surgery” as “a procedure that can be delayed without undue risk to the current or future health of a patient,” and lists “[e]xamples of criteria to consider,” including whether there is a “threat to the patient’s life if surgery or [the] procedure is not performed,” a “[t]hreat of permanent dysfunction of an extremity or organ system,” a “risk of metastasis or progression of staging,” or a “risk of rapidly worsening to severe symptoms (time sensitive).” Director’s Order at 4.

The Director’s Order remains in effect until the state of emergency declared by the Ohio governor no longer exists or ODH rescinds or modifies the order. *Id.* Federal officials and medical professionals expect the pandemic to last for a year or eighteen months.¹³ The current shortage of PPE is expected to continue for the next three or four months.¹⁴ The Order requires that “[e]ach

¹² The Director’s Order cites as its authority section 3701.13, which allows ODH to “make special or standing orders or rules for preventing the spread of contagious or infectious diseases.” Ohio. Rev. Code § 3701.13.

¹³ Denise Grady, *Not His First Epidemic: Dr. Anthony Fauci Sticks to the Facts*, N.Y. Times (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/health/fauci-coronavirus.html>.

¹⁴ Ctrs. for Disease Control & Prevention, *Healthcare Supply of Personal Protective Equipment* (last updated Mar. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/healthcare-supply-ppe.html>.

hospital and outpatient surgery or procedure provider shall establish an internal governance structure to ensure” compliance with the Order, permitting individual medical institutions to use their medical judgment whether a particular procedure is essential. Director’s Order at 4.¹⁵ If a facility or physician fails to comply, ODH may petition for injunctive or other relief (Ohio Rev. Code § 3701.57), revoke the facility’s ASF license (Ohio Rev. Code § 3702.32(D)), refer for criminal prosecution (Ohio Rev. Code §§ 3701.352 and 3701.99), and/or refer to the State Medical Board for discipline (Ohio Rev. Code § 4731.22(B)(12)).

B. Abortion in Ohio

According to the latest data from ODH, 55.7% of Ohio abortions in 2018 occurred before nine weeks gestational age, while 44.3% occurred at or after nine weeks.¹⁶ More than 56% of abortions in the state were surgical abortions.¹⁷

Clinical abortions are typically performed using one of two methods: medication abortion or surgical abortion. Liner Decl. ¶ 22. Both methods are equally effective in terminating a pregnancy. *Id.* Complications from both medication and surgical abortion are rare, and when they occur, they can usually be managed in an outpatient clinic setting, either at the time of the abortion or in a follow-up visit. *Id.* Major complications—defined as complications requiring hospital admission, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases: in 0.31% of medication abortion cases, in 0.16% of first-trimester surgical

¹⁵ Ohio State Postponing Elective Surgeries, Procedures, Beginning March 19, Ohio State News (March 17, 2020), available at <https://news.osu.edu/ohio-state-postponing-elective-surgeries-procedures-beginning-march-19/>

¹⁶ John Paulson & Donna L. Smith, ODH, Induced Abortions in Ohio 24 (2019), <https://tinyurl.com/ufxuqpw>.

¹⁷ *Id.* at 23.

abortion cases, and in 0.41% of surgical cases in the second trimester or later. *Id.* Abortion-related emergency room visits constitute just 0.01% of all emergency room visits in the United States. *Id.*

Medication abortion involves a combination of two pills: mifepristone and misoprostol. *Id.* at ¶ 23. The patient takes the first medication in the health center and then, typically twenty-four to forty-eight hours later, takes the second medication at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. *Id.* Surgical abortion is not what is commonly understood to be “surgery”; it involves no incision. *Id.* at ¶ 26. Rather, surgical instruments and/or gentle suction are used to safely empty the contents of the uterus. *Id.* For some patients, medication abortion is contraindicated or other factors counsel in favor of a surgical abortion. *Id.* at ¶ 27. For example, patients may be allergic to the medications or have other medical conditions that makes surgical abortion more appropriate. *Id.* Consistent with Ohio law, Plaintiffs provide medication abortion up to ten weeks (through seventy days) after the patient’s last menstrual period (“LMP”) and surgical abortion up to fifteen weeks and six days, nineteen weeks and six days, or twenty-one weeks and six days LMP.¹⁸ France Decl. ¶ 5; Liner Decl. ¶ 24; Krishen Decl. ¶ 6; Haskell Decl. ¶ 7; Burkons Decl. ¶ 6.

Surgical abortion requires minimal use of PPE. Liner Decl. ¶ 7. In a typical procedure, clinicians use gloves, a surgical mask, protective eyewear, disposable and/or washable gowns, and hair and shoe covers. *Id.* France Decl. ¶ 8; Krishen Decl. ¶ 10; Haskell Decl. ¶ 10; Burkons Decl.

¹⁸ Although medication abortion is safe and effective through eleven weeks LMP, Ohio law restricts this method to the regimen listed on federally approved label, which is ten weeks LMP. Ohio Rev. Code § 2919.123; *see* FDA, *Mifeprex (mifepristone) Information* (last updated Feb. 5, 2018), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>. Ohio law prohibits abortions after twenty weeks “post-fertilization age,” which is twenty-two weeks LMP. Ohio Rev. Code § 2919.201; *see* Liner Decl. ¶ 31 n.9.

¶ 10.¹⁹ The masks that Plaintiffs use for abortions are not N95 masks, the PPE that appears to be in shortest supply in battling the COVID-19 pandemic in Ohio and around the country.²⁰ Liner Decl. ¶ 35; France Decl. ¶ 8; Krishen Decl. ¶ 11; Haskell Decl. ¶ 10; Burkons Decl. ¶ 11. During the COVID-19 crisis, Plaintiffs have taken additional steps to conserve PPE whenever appropriate and consistent with CDC guidance.²¹ Even before ODH's Order, Plaintiffs were limiting the already small number of individuals present during a surgical abortion and postponing other non-essential visits that may require PPE. Liner Decl. ¶ 38; France Decl. ¶¶ 8, 11, 12; Krishen Decl. ¶¶ 13–14; Haskell Decl. ¶¶ 13–14; Burkons Decl. ¶ 13–14. Further, when a patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method. Liner Decl. ¶ 16; France Decl. ¶ 15; Krishen Decl. ¶ 17; Haskell Decl. ¶ 18; Burkons Decl. ¶ 17. Medication abortion uses less PPE than surgical abortion as the process of handing patients a pill requires no PPE at all. Liner Decl. ¶ 7.

Individuals seek abortion for a multitude of personal and complex reasons; all of which might be compounded by the current pandemic. By way of example, some patients have abortions because they conclude that it is not the right time to become a parent or have additional children, they desire to pursue their education or career, or they lack the financial resources or level of partner or familial support or stability they would want before having a child or additional children. Liner Decl. ¶ 30. Other patients seek abortions because existing medical conditions put them at

¹⁹ Gloves are needed for any ultrasound, laboratory exam, and cleaning. France Decl. ¶ 9; Liner Decl. ¶ 7; Krishen Decl. ¶ 10; Haskell Decl. ¶ 11; Burkons Decl. ¶ 10. Plaintiffs that provide care for patients for whom there is a concern for COVID19 or other respiratory disease provide masks to those patients in accordance with CDC guidance. Liner Decl. ¶ 7; Krishen Decl. ¶ 10.

²¹ *Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States*, CDC (last updated Feb. 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html>.

greater than average risk of medical complications. *Id.* Indeed, while much is unknown about COVID-19, including whether it can pass to the pregnancy or complicate pregnancy, some pregnant patients may be exposed to additional health risks from the disease. ACOG has warned that “pregnant women are known to be at greater risk of severe morbidity and mortality from other respiratory infections such as influenza and SARS-CoV. As such, pregnant women should be considered an at-risk population for COVID-19.”²²

The window during which a patient can obtain an abortion in Ohio is limited. Pregnancy is usually approximately forty weeks in duration, Liner Decl. ¶ 31, and Ohio prohibits abortion after twenty-two weeks LMP, Ohio Rev. Code § 2919.201. Although abortion is a very safe medical procedure, the health risks associated with it increase as pregnancy progresses. Liner Decl. ¶ 32.²³ As ACOG and other well-respected medical professional organizations have observed, abortion “is an essential component of comprehensive health care” and “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”²⁴ For these reasons, abortion is *not* “a procedure that can be delayed without undue risk to the current or future health of a patient.” Liner Decl. ¶ 11 (quoting Director’s Order at 4). Indeed, delay increases the “risk of rapidly worsening to severe symptoms,” making the procedure “time sensitive.” *Id.* (quoting Director’s Order at 4).

²² ACOG, *Practice Advisory - Novel Coronavirus 2019 (COVID-19)* (last updated Mar. 13, 2020), <https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019>; *see also* Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women* (last updated Mar. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html>.

²³ Nat’l Acads. of Scis. Eng’g & Med., *The Safety & Quality of Abortion Care in the United States* 77–78, 162–63 (2018).

²⁴ ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Liner Decl. ¶ 33. Patients need to schedule an appointment, gather the resources to pay for the abortion and related costs,²⁵ and arrange transportation to a clinic, time off of work, and possibly childcare during appointments. *Id.* Ohio legal restrictions further increase burdens on patients trying to obtain care by mandating that all patients make two in-person trips at least twenty-four hours apart to a health center in order to obtain abortion care and requiring minor patients to obtain written consent from a parent or a judicial order before they can receive care. Ohio Rev. Code §§ 2317.56, 2919.121; *cf. Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 799–800 (S.D. Ohio 2019) (Barrett, J.) (finding host of “logistical obstacles to obtaining abortion care”). During the COVID-19 pandemic, patients must navigate these barriers against the backdrop of job insecurity, minimal public transit availability, and limited childcare assistance due to mandatory social distancing and shelter in place orders.²⁶ Indeed, jobless claims

²⁵ Ohio prohibits public insurance, including Medicaid, and insurance purchased on the state health exchange from covering abortion services except in the very limited circumstances where a patient’s life is at risk, or where the pregnancy is a result of rape or incest that has been reported to law enforcement. Ohio Rev. Code §§ 9.04, 3901.87; Ohio Admin. Code § 5160-17-01.

²⁶ ODH, *Director’s Stay At Home Order* (Mar. 22, 2020), <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf>; ODH, *Governor DeWine Announces School Closures* (Mar. 12, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-announces-school-closures>; ODH, *Governor DeWine Orders Ohio Bars & Restaurants to Close* (Mar. 15, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-orders-ohio-bars-restaurants-to-close>; ODH, *Governor DeWine Announces Additional Temporary Business Closures* (Mar. 18, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-announces-additional-temporary-business-closures>; Ohio Exec. Order 2020-04D; *see also* White House, *The President’s Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Rebecca Shabad, *Fauci Predicts Americans Will Likely Need to Stay Home for at Least Several More Weeks*, NBC News (Mar. 20, 2020) <https://www.nbcnews.com/politics/donald-trump/fauci-predicts-americans-will-likely-need-stay-home-least-several-n1164701>.

are soaring due to the virus.²⁷ All of these factors can result in delay in obtaining care which, in turn, results in higher financial and emotional costs to the patient.

C. Plaintiffs' Implementation of the Director's Order

Plaintiffs promptly adopted policies to comply with the Director's Order.²⁸ Liner Decl. ¶ 8; France Decl. ¶ 13; Krishen Decl. ¶ 15; Haskell Decl. ¶ 15; Burkons Decl. ¶ 15. Each policy forbids the performance of "non-essential surgeries and procedures that utilize PPE" until the end of Ohio's declared emergency or the Director's Order is modified or rescinded. Liner Decl. ¶ 8 France Decl., Ex. C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B. In accordance with the determination of the governing body for each abortion facility, each Plaintiff determined that "surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the [Director's] Order," because "a delay in a surgical abortion will negatively affect patient health and safety." Liner Decl. ¶ 11 France Decl., Ex. C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B. Each pointed to the plain terms of the Director's Order, which states that "a surgery is essential if it cannot 'be delayed without undue risk to the current or future health of a patient' and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging." Liner Decl. ¶ 9; France Decl., Ex. C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B. Plaintiffs' policies recognize that because "[p]regnancy has a duration of approximately forty weeks [LMP] and abortions are banned in Ohio beginning at 22

²⁷ Scott Noll, *As Ohio Unemployment Soars, Some People Are Missing Out on Benefits*, News 5 Cleveland (Mar. 19, 2020), <https://www.news5cleveland.com/news/local-news/as-ohio-unemployment-soars-some-people-are-missing-out-on-benefits>.

²⁸ Plaintiff Dr. Liner did not adopt such a policy because she is an individual (and not a hospital or ASF); however, as medical director of Plaintiff PPSWO, she was responsible for adoption of its implementing policy.

weeks LMP, . . . the timeframe for a patient to obtain an abortion is limited,” and that “while abortion is an extremely safe medical procedure, . . . it cannot be delayed without increasing the risk to the health of the patient.” Liner Decl. ¶ 10(a); France Decl., Ex. C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B. After Preterm, WMCD and PPSWO received letters from the Attorney General’s office threatening enforcement if they did not comply with the Director’s Order, and after further communication with the Attorney General’s office, Plaintiffs amended their policies to reflect that “physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order” and that “physicians shall rely on the Director’s Order” to make that case-by-case determination. Liner Decl. ¶ 13; France Decl. ¶ 15; Krishen Decl. ¶¶ 16–17; Haskell Decl. ¶ 17; Burkons Decl. ¶¶ 16–17. Because Plaintiffs always determine the appropriate course of care for any patient on a case-by-case basis, this amendment did not result in any change to Plaintiffs’ provision of care. Liner Decl. ¶ 14; France Decl. ¶ 15; Krishen Decl. ¶¶ 16–17; Haskell Decl. ¶ 17; Burkons Decl. ¶ 16–17.

Plaintiffs’ determination that abortion is an essential surgery is supported by ACOG, the American Board of Obstetrics & Gynecology, the American Association of Gynecologic Laparoscopists, the American Gynecological & Obstetrical Society, the American Society for Reproductive Medicine, the Society for Academic Specialists in General Obstetrics and Gynecology, the Society of Family Planning, and the Society for Maternal-Fetal Medicine. These trusted national medical organizations issued a joint statement on “Abortion Access During the COVID-19 Outbreak,” which provides that “[t]o the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure” because it “is an essential component of

comprehensive health care” and “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”²⁹ Liner Decl. ¶ 10(b) & Ex. D; France Decl., Ex. C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B.

Plaintiffs also relied on the Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” which concurred with the American College of Surgeons’ recommendation that consideration of whether delay of a surgery during the pandemic is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”³⁰ Liner Decl. ¶ 10(c) & Ex. E; France Decl., Exhibit C; Krishen Decl., Ex. B; Haskell Decl., Ex. C; Burkons Decl., Ex. B.

In addition, to complying with the Director’s Order, Plaintiffs are committed to following all recommendations in an effort to “flatten the curve,” protect patients and staff, and minimize the use of PPE. Liner Decl. ¶¶ 6, 39; France Decl. ¶ 10; Krishen Decl. ¶ 12; Haskell Decl. ¶ 12; Burkons Decl. ¶ 12. For example, Plaintiffs have reduced the number of people allowed in their facilities, as well as in procedure rooms and changed the flow of patients to ensure recommended social-distancing, and they screen patients and staff for COVID-19 symptoms. Liner Decl. ¶ 39; France Decl. ¶¶ 11–12; Krishen Decl. ¶¶ 13–14; Haskell Decl. ¶¶ 13–14; Burkons Decl. ¶¶ 13–14.

²⁹ ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

³⁰ Ambulatory Surgery Ctr. Ass’n, *COVID-19: Guidance for ASCs on Necessary Surgeries* (last updated Mar. 19, 2020), <https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-guidance> (quoting Am. Coll. of Surgeons, *COVID-19: Recommendations for Management of Elective Surgical Procedures* (Mar. 13, 2020), <https://www.facs.org/about-acsc/covid-19/information-for-surgeons/elective-surgery>).

D. Banning Surgical Abortion Will Cause Irreparable Harm

As described above, without any clear guidance from the ODH and in light of the statements of the Director, Governor, and Attorney General and the actions of ODH, Plaintiffs and their physicians credibly fear being immediately shut down and prosecuted, *see supra* pgs. 2–3. Such enforcement will deprive Plaintiffs’ patients of their constitutional right to terminate pregnancy and cause them constitutional, physical, and emotional harm, all of which are irreparable. *See* Liner Decl. ¶¶ 42, 45. Without access to Plaintiffs’ services, patient care will be delayed and, in some cases, denied altogether. *See* Liner Decl. ¶ 46; France Decl. ¶ 22; Krishen Decl. ¶¶ 20–21; Haskell Decl. ¶ 24; Burkons Decl. ¶¶ 20–21. Moreover, because pregnant patients will remain users of the healthcare system as long as they are pregnant, banning surgical abortion will result in minimal, if any, conservation of PPE, Liner Decl. ¶ 37, and may, in fact, result in increased use of PPE, *see infra* pg. 20–21. The State has no justification for imposing these harms on Plaintiffs’ patients, particularly absent an overriding benefit.

ARGUMENT

Plaintiffs seek a temporary restraining order, and thereafter, a preliminary injunction, to prevent the Director’s Order from inflicting harm on Plaintiffs’ patients by banning them from accessing previability abortion in Ohio. In ruling on such a motion, the Court considers four factors, all of which weigh heavily in Plaintiffs’ favor: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause a substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.” *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012)).

As discussed below, Plaintiffs are entitled to injunctive relief because enforcing the Director's Order to ban abortion directly contravenes decades of binding Supreme Court precedent holding that a state may not ban abortion before the point of viability, and thus Plaintiffs will succeed on the merits. Additionally, enforcement of the Director's Order to ban surgical abortion will inflict severe and irreparable harm on Plaintiffs' patients; the balance of hardships weighs decisively in Plaintiffs' favor; and the public interest would be served by blocking the enforcement of the unconstitutional and harmful order with respect to abortions. This Court therefore should grant injunctive relief.

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

Plaintiffs are certain to succeed on the merits of their claim that applying the Director's Order to ban surgical abortion violates Plaintiffs' patients' liberty rights under the Fourteenth Amendment by banning abortion before viability. Nearly five decades ago, the Supreme Court struck down as unconstitutional a state criminal abortion statute proscribing all abortions except those performed to save the life of the pregnant person. *Roe v. Wade*, 410 U.S. 113, 166 (1973). Specifically, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects the right to choose abortion, *id.* at 153–54, and prior to viability, a state has *no interest* sufficient to justify a ban on abortion, *id.* at 163–65. Rather, a state may proscribe abortion only *after* viability, and even then, it must allow abortion where necessary to preserve the life or health of the patient. *Id.* at 163–64.

The Supreme Court has repeatedly adhered to this core holding. For example, more than twenty-five years ago, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe*'s “central principle” that “[b]efore viability, the State's interests are not strong enough to support a prohibition on abortion.” 505 U.S. 833, 846, 871 (1992); *id.* at 871 (asserting

that any state interest is “insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions”). Although a plurality in *Casey* announced an “undue burden” standard, under which “a provision of law [restricting previability abortion] is invalid[] if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion,” 505 U.S. at 878 (plurality opinion), it emphasized:

Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

Id. at 879; *see also id.* at 846 (“*Roe*’s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability.”). *Roe*’s central principle has been repeatedly reaffirmed by the Court, including as recently as 2016. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Unsurprisingly, attempts to ban abortion prior to viability have been uniformly rejected by the courts. *See, e.g., MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (ban on abortions after six weeks); *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016) (ban on abortions after twelve weeks); *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019) (ban on abortions starting at fifteen weeks); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (ban on abortions starting at twenty weeks); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (ban on abortions starting at twenty-two weeks); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (ban on all abortions); *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992) (ban on all abortions); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (ban on abortions starting at

twenty weeks); *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky. 2019) (ban on a second-trimester abortion method); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *1 (W.D. Ky. Mar. 15, 2019) (ban on abortions after six weeks); *see also Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (striking down a ban on a second-trimester abortion method because it would “inhibit[] the vast majority of second trimester abortions” and “would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion”).

In 2019, several states passed previability abortion bans, and in each place where a ban restricted access to abortion, courts have blocked it from taking effect. *See, e.g., Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (ban on nearly all abortions); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 410 F. Supp. 3d 1327 (N.D. Ga. 2019) (ban on abortions after six weeks); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631 (W.D. Mo. 2019), *modified*, 408 F. Supp. 3d 1049 (W.D. Mo. 2019) (ban on abortions after various weeks); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (ban on abortions after eighteen weeks); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020) (ban on abortions after six weeks); Order Granting Stipulated Preliminary Injunction as to State Defendants, *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Apr. 18, 2019), ECF No. 34 (ban on abortions after eighteen weeks).

Indeed, that includes a previous order in this case, where this Court preliminarily enjoined Ohio's 2019 ban on abortion after six weeks, *see Preterm-Cleveland*, 394 F. Supp. 3d at 796, and follows other cases in which this Court has enjoined recent attempts by the Ohio legislature to ban previability abortions. *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848 (S.D.

Ohio 2019) (Barrett, J.) (partially preliminarily enjoining a ban on a second-trimester abortion method); *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 748 (S.D. Ohio 2018) (Black, J.) (preliminarily enjoining Ohio’s ban on abortion when one of the patient’s reasons is an indication of Down syndrome, because “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability” (quoting *Casey*, 505 U.S. at 879)), *aff’d*, 940 F.3d 318 (6th Cir. 2019), *reh’g en banc granted, opinion vacated*, 944 F.3d 630 (6th Cir. 2019).

Defendants’ actions, unless enjoined, threaten to ban all abortions in Ohio starting at ten weeks LMP and even earlier among patients for whom medication abortion is not appropriate. *Cf. Jackson Women’s Health*, 945 F.3d at 271 (holding that challenged law was a previability *ban* on abortion and not a *regulation* on abortion because it “peg[ged] the availability of abortions to a specific gestational age that undisputedly prevents the abortions of some non-viable fetuses”). As such, it is a ban on previability abortions, which contravenes decades of Supreme Court precedent, including *Roe*.

Because Defendants’ actions will operate as a previability abortion ban, this Court need not look further; however, even if the Court were to apply the undue-burden test from *Casey*, Plaintiffs would certainly succeed on the merits. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Casey*, 505 U.S. at 877. A restriction that, “while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice 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). As the Supreme Court has held, “*Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer.” *Id.* at 2298.

Here, the burdens could not be greater. Applying the Director's Order to ban surgical abortion would ban abortion entirely for patients with pregnancies beyond ten weeks LMP and those with earlier pregnancies for whom medication abortion is not appropriate. Thus, the Director's Order is not just a substantial obstacle to obtaining an abortion, it will operate as a *complete* one. The Order could remain in effect for months, which would push many patients past the legal limit for abortion in Ohio. Moreover, even if some patients affected by the Order are able to obtain an abortion after it is lifted, they will still suffer increased risk to their health as a result of the delay in access to care. Liner Decl. ¶ 43. Thus, the enforcement of the Director's Order in a way that bans surgical abortion undoubtedly harms individuals seeking abortion.³¹

These exceedingly harmful burdens cannot be outweighed by either of the two interests the State asserts here: preserving hospital capacity and PPE. Plaintiffs share those interests, but a ban on surgical abortions does not serve either one. As to the first interest, legal abortion is safe, and complications associated with abortion—including those requiring hospital care—are exceedingly rare. Liner Decl. ¶ 22; *see also Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315. Nearly all abortions in Ohio are provided in outpatient facilities, such as Plaintiffs' ASFs, not hospitals.³² Thus, Plaintiffs' provision of abortion would not deplete hospital capacity. As to preserving PPE, as described above, *see supra* 8, surgical abortion uses minimal PPE and providers are already

³¹ Even before ten weeks, the burdens that the Director's Order places on patients for whom surgical abortion is medically indicated or the only appropriate option are severe. *Cf. Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 514 (6th Cir. 2006) (affirming preliminary injunction against abortion restriction on medication abortion that contained no health exception in light of evidence that medication abortion was relatively safer for some patients than surgical abortion).

³² John Paulson & Donna L. Smith, ODH, Induced Abortions in Ohio 22 (2019) <https://tinyurl.com/ufxuqpw> (82 of over 20,000 abortions were performed in a hospital).

taking all appropriate steps to conserve PPE whenever possible. As such, banning surgical abortion does little to preserve PPE.

Notably, Plaintiffs could make further progress in preserving PPE and reduce overall contagion risks during the pandemic, but for the medically unnecessary abortion restrictions in Ohio law that limit Plaintiffs' ability to adapt to this crisis. For example, Ohio could eliminate its requirements that patients make an extra in person visit to the health center and physicians determine the presence fetal heart tone 24 hour prior to the abortion, or allow patients who can safely utilize medication abortion through eleven weeks to do so. Such changes could reduce the opportunity for the virus to spread and further minimize the need for PPE.

Indeed, far from being necessary to address the COVID-19 crisis, applying the Order to ban surgical abortion is unlikely to save any PPE and may well exacerbate the COVID-19 crisis. Patients who are prevented from obtaining abortion care must still seek medical care to maintain their health and well-being. Liner Decl. ¶ 37. Thus, pregnant patients will require care from providers using PPE whether the pregnancy is terminated or not. *Id.*³³ Moreover, given the vagueness of "elective" and "nonessential" in this context, patients who are facing serious health risks because of continued pregnancy may be delayed in accessing care because patients and providers are uncertain as to whether these risks rise to the level of making the abortion "essential." *See supra* 2–3 & n.5 (reflecting Governor Dewine's narrow interpretation of essential). Such patients could ultimately require *more* invasive care (with attendant use of PPE) or even hospital-based care. at ¶ 46. Finally, in the event that this crisis continues for months—as it is expected to do—Defendants' actions will result in people being forced to give birth against their will. This

³³ Those patients who are able to obtain care out of state will face increased risk of exposure to the virus because of this travel and providers treating those patients will still be using PPE in any case.

will necessitate not just the use of PPE, but also the use of hospital beds, which are also in short supply during this crisis. *Id.*

The benefit of reducing the use of PPE in one segment of the healthcare system cannot possibly outweigh the burdens here, where abortion care is time-sensitive, where delay increases the risk to the patient's health, and where barring abortion (but not any other essential surgery or procedure) would have only a minimal negligible and temporary effect on the availability of PPE, if any, and have no effect on the PPE in shortest supply (the N95 mask). Plaintiffs therefore have established that they are likely to succeed on the merits of their claim that the Director's Order, as applied to ban surgical abortion, violates the substantive due process rights of their patients.

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

Plaintiffs' patients will suffer serious and irreparable harm in the absence of a temporary restraining order and preliminary injunction. Unless enjoined, Defendants' actions will prevent Ohioans from exercising their fundamental constitutional right to terminate a pregnancy. The Sixth Circuit has long made clear that if "a constitutional right is being threatened or impaired, *a finding of irreparable injury is mandated.*" *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 455 (6th Cir. 2003) (emphasis added) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Mich. State A. Phillip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed." (internal citations omitted)); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (same); *see also Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("[T]he loss of constitutional rights for even a minimal amount of time constitutes irreparable harm."). Because Defendants' actions with respect to the Director's Order impair Plaintiffs' patients' rights guaranteed by the Fourteenth Amendment to the United States Constitution, they necessarily inflict irreparable harm and should

be enjoined. *See Preterm-Cleveland*, 394 F. Supp. 3d at 803 (determining that Ohio’s six-week abortion ban “would, per se, inflict irreparable harm” if enforced).

Moreover, Plaintiffs’ patients will be prohibited from obtaining a desired abortion, which can result in physical, emotional, and psychological harms, all of which are irreparable. Liner Decl. ¶ 42–46.³⁴ As many medical professional organizations, including ACOG, have concluded, abortion is “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”³⁵ *See* Ohio Rev. Code § 2919.201 (prohibiting abortions after twenty-two weeks LMP). Forcing patients to forgo abortion care and remain pregnant against their will inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. *See e.g., Elrod*, 427 U.S. at 373–74; *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013). Likewise, a delay in obtaining abortion care causes irreparable harm by “result[ing] in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal.” *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 896 F.3d 809, 832 (7th Cir. 2018) (quoting *Van Hollen*, 738 F.3d at 796); *see also, e.g., Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (finding irreparable harm where “patients could face a delay” in obtaining abortion care); *Doe v. Barron*, 92 F. Supp. 2d 694, 696–97 (S.D. Ohio 1999) (same). This “disruption or denial of . . . patients’ health care cannot be undone after a trial on the merits.” *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (internal

³⁴ *See also* ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>. (the “consequences of being unable to obtain an abortion profoundly impact a person’s life, health, and well-being”).

³⁵ *Id.*

quotation marks omitted), *cert. denied sub nom. Andersen v. Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638 (Mem.) (2018).

In sum, applying the Director’s Order to ban surgical abortion will cause irreparable injury to Plaintiffs’ patients and should therefore be enjoined while this litigation proceeds.

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

Plaintiffs’ patients will suffer numerous irreparable harms without an injunction, and Plaintiffs’ requested relief will simply preserve “the status quo that has been in place for more than 40 years since *Roe* was decided, and some 25 years since *Casey* followed.” *Preterm-Cleveland*, 394 F. Supp. 3d at 803. In addition, given the indeterminate length of the Director’s Order, some of Plaintiffs’ patients will be forced to forgo an abortion entirely and carry an unwanted pregnancy to term. As the Sixth Circuit has made clear, “[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party’s constitutional rights.” *Am. Civil Liberties Union Fund of Mich.*, 796 F.3d at 649 (alternations in original) (quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010)); *accord Mich. State*, 833 F.3d at 669 (same); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012) (“[T]he public interest is promoted by the robust enforcement of constitutional rights”); *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (same).

Moreover, as set forth more fully above, the benefits of a negligible potential reduction in the use of some PPE (and not the most limited PPE), if any, by abortion providers does not, ultimately, result in any net saving of PPE and—more importantly—is outweighed by the harm of eliminating abortion access. This is especially true here, where Defendants are attempting to ban abortion in the midst of a pandemic that may increase the risks of continuing a pregnancy and thus

may ultimately further tax the already overburdened health care system. Particularly where, as here, Plaintiffs are already taking steps—in line with those required of other medical professionals who continue to provide essential health care and CDC guidance—to preserve PPE as much as possible, *see supra* 8, injunctive relief is supported by the balance of harms and the public interest.

IV. A BOND IS NOT NECESSARY IN THIS CASE.

This Court should waive the Federal Rule of Civil Procedure 65(c) bond requirement. The Sixth Circuit has long held “that the district court possesses discretion over whether to require the posting of security.” *Appalachian Reg’l Healthcare, Inc. v. Coventry Health & Life Insurance Co.*, 714 F.3d 424, 431 (6th Cir. 2013) (emphasis omitted) (quoting *Molton Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995)); *see also Molton Co.*, 55 F.3d at 1176 (affirming district court decision to require no bond because of “the strength of [the plaintiff’s] case and the strong public interest involved”); *Preterm-Cleveland*, 394 F. Supp. 3d at 804 (waiving bond). This Court should use its discretion to waive the bond requirement here, where the relief sought will result in no monetary loss to Defendants.

CONCLUSION

For these reasons, this Court should grant Plaintiffs’ motion for a temporary restraining order and/or preliminary injunction to enjoin Defendants from applying the Director’s Order to prohibit surgical abortions.

Dated: March 30, 2020

Respectfully Submitted,

/s/ B. Jessie Hill

B. Jessie Hill #0074770

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Certificate of Compliance with SDOH Local Rule 65.1

Trial Attorney for Plaintiffs has served Counsel for Defendants with a copy of the Motion to Supplement the Complaint, Proposed Supplemental Complaint, Motion for Preliminary Injunction and/or Temporary Restraining Order, along with the attached Declarations via email of this Motion and that service has been accomplished.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Preterm-Cleveland, et al.	:	Case No. 1:19-cv-360
	:	
Plaintiff,	:	Judge: Michael R. Barrett
v.	:	
	:	
David Yost, et al.	:	
	:	
Defendants.	:	

**DECLARATION OF SHARON A. LINER, M.D., IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

I, Sharon A. Liner, M.D., declare as follows:

1. I am a board-certified family physician with 16 years of experience in women's health. I am licensed to practice medicine in the state of Ohio. I earned a B.S. in Medical Technology from Michigan State University and graduated from medical school at Michigan State University, College of Human Medicine. I completed my residency in Family Medicine at the University of Cincinnati.
2. I am the Medical Director of Planned Parenthood Southwest Ohio Region (PPSWO). I am also PPSWO's Director of Surgical Services, a position I have held for nearly 15 years. I have worked as a physician for PPSWO since 2004, providing reproductive health care to patients. PPSWO operates a licensed ambulatory surgical facility in Cincinnati, Ohio.
3. In my current roles as the Director of Surgical Services and Medical Director at PPSWO, I oversee all medical services provided at PPSWO, including supervision of the physicians and clinicians who provide that care, including abortion. I also am responsible for developing PPSWO's policies and procedures.

4. Since 2002, I have provided abortions in outpatient settings. In my current practice, I provide medication abortions up to 70 days (or 10 weeks) of pregnancy as measured from the first day of the woman's last menstrual period (LMP) and surgical abortions through 21 weeks 6 days LMP.

5. A true and correct copy of my curriculum vitae is attached as Exhibit A.

Director's Order and Attorney General's Enforcement Threats

6. On March 17, 2020, the Director of the Ohio Department of Health, Dr. Amy Acton, issued an order barring all "non-essential surgeries and procedures" beginning at 5 p.m. on March 18, 2020. ("Director's Order" at 4, Exhibit B). The Director's Order states that its purpose is to "preserv[e] personal protective equipment (PPE) and critical hospital capacity and resources within Ohio." *Id.* Although the order does not define PPE, I understand that term to refer to, for example, surgical masks, gloves, protective eyewear, gowns, and hair and shoe covers, which are commonly used in surgical procedures, including surgical abortions. In order to comply with the Director's Order, PPSWO is committed to following all recommendations in an effort to "flatten the curve," protect patients and staff, and maximize the availability of PPE.

7. Neither method of abortion requires extensive PPE. Medication abortion uses less PPE than surgical abortion. The process of handing patients a pill requires no PPE. Surgical abortion requires the minimal use of some or all of the following PPE: one pair of non-sterile gloves, a surgical mask, protective eyewear that can be reprocessed according to CDC guidelines, disposable and washable gowns.¹ For an ultrasound or laboratory exam, including one that accompanies medication or surgical abortion, we use only non-sterile gloves.

¹ Per CDC guidance, Plaintiffs provide patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask.

8. As required by the Director's Order, PPSWO promptly adopted a policy to implement the Director's Order, which went into effect March 18, 2020 before 5:00 p.m.² PPSWO's policy forbids the performance of "non-essential surgeries and procedures that utilize PPE" until the end of Ohio's declared emergency or the Director's Order is modified or rescinded. PPSWO's policy also requires staff to make every effort to preserve PPE during essential surgeries and procedures, including by limiting the number of individuals present who would require PPE. A true and accurate copy of PPSWO's policy is attached as Exhibit C.³

9. The policy requires PPSWO physicians to determine whether a "surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the [Director's] Order." In making that determination, the policy directs physicians to consider the plain terms of the Director's Order, which states that "a surgery is essential if it cannot 'be delayed without undue risk to the current or future health of a patient' and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging."

10. In addition, the policy advised physicians to consider other important factors in making that determination, including:

- a. Because "[p]regnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP," and that "while abortion is an extremely safe medical procedure, . . . it cannot be delayed without increasing the risk to the health of the patient." (citing

² As an individual Plaintiff, I did not personally adopt such a policy, but as medical director of Plaintiff PPSWO, I am responsible for PPSWO adopting and implementing this policy. I have seen all Plaintiffs' policies and they are identical to PPSWO's.

³ Exhibit C includes PPSWO's original and revised policies.

Nat'l Acads. of Scis. Eng'g & Med., *The Safety & Quality of Abortion Care in the United States* 77–78, 162–63 (2018)).

- b. the views of the American College of Obstetricians and Gynecologists (“ACOG”), the American Board of Obstetrics & Gynecology, the American Association of Gynecologic Laparoscopists, the American Gynecological & Obstetrical Society, the American Society for Reproductive Medicine, the Society for Academic Specialists in General Obstetrics and Gynecology, the Society of Family Planning, and the Society for Maternal–Fetal Medicine, which stated that to “the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure’ because it ‘is an essential component of comprehensive health care’ and ‘a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.” (Exhibit D).
- c. the Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” dated March 19, 2020, which concurred with the American College of Surgeons’ recommendation that consideration of whether delay of a surgery during the pandemic is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.” (Exhibit E).

11. Abortion is *not* “a procedure that can be delayed without undue risk to the current or future health of a patient.” (quoting Director’s Order, Ex. B at 4). Delay increases the “risk of rapidly worsening to severe symptoms,” making the procedure “time sensitive.” (quoting Director’s Order, Ex. B at 4). PPSWO determined, with the ASF’s governing body’s approval, that “surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the [Director’s] Order,” because “a delay in a surgical abortion will negatively affect patient health and safety.” (Ex. C p. 7).

12. Beginning with the opening of business on March 19, 2020, PPSWO implemented the policy, stopped performing all non-essential procedures, reduced as much as possible the use of PPE, and continued to emphasize that we are to act consistent with the Director’s Order.

13. On March 20, 2020, PPSWO received a letter via email from the Ohio Attorney General, stating “[o]n behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions.” The letter also cautions that “[i]f you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures.” A true and correct copy of the Attorney General’s Letter is attached as Exhibit F.

14. PPSWO responded to the Attorney General by confirming its compliance with the Director’s Order, revising its policy to make clear that physicians would determine on a case-by-case basis whether a surgical abortion or other procedure constitutes an essential surgery or procedure, and offering to share the revised policy. Because PPSWO’s physicians always determine the appropriate course of care for any patient on a case-by-case basis, this amendment

did not result in any change to PPSWO's provision of care. PPSWO implemented the revised policy on March 24, which was the first surgery day after receiving the Attorney General's Letter. If a physician determines a surgical abortion or other procedure is essential, the physician documents that determination in the patient's chart.

15. PPSWO has made other changes to minimize the use of PPE and minimize risk of exposure to COVID-19 such as extending refill prescriptions without patients coming in, reducing the number of persons in the surgery center, excluding visitors with patients unless medically required (or a parent accompanying a minor), excluding visitors who are at risk of transmitting COVID-19 after screening, maximizing telehealth services, and not offering patients surgical abortions when medication abortions are available (under 70 days of pregnancy) and are not medically contraindicated.

16. When a PPSWO patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method.

ODH Investigation of Compliance

17. PPSWO did not receive any further communication from the Attorney General. On March 26, 2020, two ODH inspectors arrived at PPSWO for an unannounced inspection of a complaint, seeking information regarding PPSWO's compliance with the Director's Order. PPSWO fully cooperated with the inspection. Although the ODH inspectors would not tell PPSWO the source of the complaint, news reporting suggests the complaint came from anti-abortion activists.⁴

⁴ <https://www.fox19.com/2020/03/23/ohio-abortion-providers-ordered-stop-amid-covid-outbreak/>

18. While the first day of the inspection was still ongoing, Governor DeWine announced in a press conference that an essential abortion would be one that “is done to save someone’s life.”⁵ At the same conference, Director Acton said that ODH had “listened to the AG” and began to investigate “violations [of the Order] across the state,” including at abortion clinics.

19. That same day, Attorney General Yost issued a press release vowing to “take quick enforcement action” once ODH’s investigation was completed.⁶

20. The two inspectors returned on March 27, 2020 to continue their investigation. After two days of inspections, the inspectors left without telling PPSWO whether or not they had found violations of the Director’s Order or any other regulation. This was a break with established ODH practice and procedure of informing PPSWO of the inspection results before leaving. The inspectors said their superiors would make that determination at an unspecified later date and ODH would notify PPSWO of the findings.

21. Applying the Director’s Order to ban surgical abortion indefinitely, by considering surgical abortion “non-essential,” singles out patients seeking abortion to bear a far heavier burden than any other patients in need of a time-sensitive surgery or procedure whose delay could have devastating, long-lasting effects on health and well-being. Such enforcement of the Director’s Order amounts to a de facto ban on abortion for all patients who are more than ten weeks pregnant (when medication abortion, an alternative to surgical abortion for some but not all patients, is no longer available), and a ban on abortion at even earlier gestational points among patients for whom medication abortion cannot appropriately be used.

⁵ <https://www.ideastream.org/gov-mike-dewine-coronavirus-update-march-26-2020>
Starting at 54:00.

⁶ Attorney General Yost press release is attached as Exhibit G.

PPSWO's Provision of Abortion

22. Legal abortion is one of the safest medical procedures in the United States.⁷ There are two main methods of abortion: medication abortion and surgical abortion. Both methods are effective in terminating a pregnancy.⁸ Complications from both medication and surgical abortion are exceedingly rare, and when they occur they can usually be managed in an outpatient clinic setting, either at the time of the abortion or in a follow-up visit. Major complications—defined as complications requiring hospital admission, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases: in 0.31% of medication abortion cases, in 0.16% of first-trimester surgical abortion cases, and in 0.41% of surgical cases in the second trimester or later.⁹ Abortion-related emergency room visits constitute just 0.01% of all emergency room visits in the United States.¹⁰

23. Medication abortion involves a combination of two pills: mifepristone and misoprostol.¹¹ The patient takes the first medication in the health center and then, typically twenty-four to forty-eight hours later, takes the second medication at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage.

24. Current medical evidence demonstrates that medication abortion is safe and effective through eleven weeks of pregnancy as measured from the first day of a pregnant patient's

⁷ Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States 77–78, 162–63 (2018).

⁸ Luu Doan Ireland et al., Medical Compared With Surgical Abortion for Effective Pregnancy Termination in the First Trimester, 126 *Obstetrics & Gynecol.* 22 (2015).

⁹ Ushma Upadhyay, et al., Incidence of Emergency Department Visits and Complications After Abortion, 125 *Obstetrics & Gynecol.* 175 (2015).

¹⁰ Ushma Upadhyay, et al., Abortion-related Emergency Room Visits in the United States: An Analysis of a National Emergency Room Sample, 16(1) *BMC Med.* 1, 1 (2018).

¹¹ Nat'l Acads., *supra* note 7, at 51.

last menstrual period (“LMP”). However, Ohio law (Ohio Rev. Code § 2919.123) restricts the first drug used in medication abortion to use as described in the federally approved label, which is for pregnancies less than ten weeks. See FDA, Mifeprex (mifepristone) Information (last updated Feb. 5, 2018), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>. Accordingly, although PPSWO would provide medication abortion up to eleven weeks LMP if it could legally do so, it currently cannot provide this method of abortion in Ohio beyond ten weeks LMP (through seventy days).

25. Ohio law also requires that medication abortion be preceded by an ultrasound at least twenty-four hours in advance, Ohio Rev. Code § 2919.193, .194, even though this step is not medically necessary in every case.

26. Surgical abortion is not what is commonly understood to be “surgery”; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Up to approximately fifteen weeks LMP, clinicians use the aspiration abortion technique, which involves dilating the natural opening of the cervix using medications and/or small, expandable rods, inserting a narrow, flexible tube into the uterus, and emptying the uterus through suction. This procedure typically takes five to ten minutes. To perform abortions after that gestational point in pregnancy, clinicians must dilate the cervix further and use instruments to empty the uterus, which is called the dilation and evacuation (“D&E”) technique. Later in the second trimester, the clinician may begin cervical dilation the day before the procedure itself. PPSWO performs surgical abortion up to twenty-one weeks, six days LMP.

27. For some patients with pregnancies less than ten weeks LMP, medication abortion is not available because it is contraindicated or there are other factors that necessitate a surgical

abortion, such as where the patient has an allergy to the medications or other medical conditions, such as a bleeding disorder or low hemoglobin, that make surgical abortion relatively more safe.¹²

28. According to the latest data from ODH, 55.7% of Ohio abortions in 2018 occurred before nine weeks LMP, while 44.3% occurred at or after nine weeks. More than 56% of abortions in the state were surgical abortions.¹³

29. PPSWO has performed 124 medication abortions and 493 surgical abortions during the first two months on 2020; 389 of the surgical abortions were before 10 weeks LMP and 104 were 10 weeks or greater. In 2019 PPSWO performed 769 medication abortions and 2,561 surgical abortions; 1731 of the surgical abortions were before 10 weeks LMP and 830 were 10 weeks or greater.

30. Individuals seek abortion for a multitude of complicated and personal reasons, which may all be compounded by the current pandemic. By way of example, some patients have abortions because they conclude it is not the right time to become a parent or have additional children,¹⁴ they desire to pursue their education or career, or they lack the necessary financial resources or a sufficient level of partner or familial support or stability.¹⁵ Other patients seek

¹² Nat'l Acads., supra note 7, at 51–52.

¹³ https://odh.ohio.gov/wps/wcm/connect/gov/534ddb3a-febd-4e2a-99ee-90249240bcdd/VS-AbortionReport2018.pdf.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-534ddb3a-febd-4e2a-99ee-90249240bcdd-mS77yg-

¹⁴ Indeed, a majority of women having abortions in the United States already have at least one child. Guttmacher Inst., Induced Abortions in the United States 1 (2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf; see also Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, Guttmacher Inst., Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, at 6, 7 (2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

¹⁵ That strain is all the more apparent if one considers that the vast majority—approximately 75%—of abortion patients nationwide are poor or have low incomes. Guttmacher Inst., Induced Abortions in the United States 1, supra note 14.

abortions because continuing with the pregnancy could pose a greater risk to their health.¹⁶ Indeed, while much is unknown about COVID-19, including whether it can complicate pregnancy, some pregnant people may be exposed to additional health risks from the disease. ACOG has warned that “pregnant women are known to be at greater risk of severe morbidity and mortality from other respiratory infections such as influenza and SARS-CoV. As such, pregnant women should be considered an at-risk population for COVID-19.”¹⁷

31. The window during which a patient can obtain an abortion in Ohio is limited. Pregnancy is generally forty weeks in duration, but Ohio prohibits abortion after twenty-two LMP.¹⁸ See Ohio Rev. Code § 2919.201.¹⁹

32. Although abortion is a very safe medical procedure, the health risks associated with it increase with gestational age.²⁰ As ACOG and other well-respected medical professional organizations have observed, abortion “is an essential component of comprehensive health care”

¹⁶ M. Antonia Biggs et al., Understanding Why Women Seek Abortions in the US, 13 BMC Women’s Health 7 (2013).

¹⁷ Am. Coll. of Obstetricians & Gynecologists, Practice Advisory - Novel Coronavirus 2019 (COVID-19) (last updated Mar. 13, 2020), <https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019>; see also Ctrs. for Disease Control & Prevention, Information for Healthcare Providers: COVID-19 and Pregnant Women (last updated Mar. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html>.

¹⁸ In fact, Ohio prohibits abortion after approximately six weeks, but the Court has preliminarily enjoined that ban. See Ohio Rev. Code § 2919.195.

¹⁹ This provision prohibits an abortion “when the probable post-fertilization age of the unborn child is twenty weeks or greater.” *Id.* “Post-fertilization age” means “the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum,” *id.* § 2919.20(E), which is two weeks before a patient’s last menstrual period. Thus, twenty weeks post-fertilization age is twenty-two weeks LMP.

²⁰ Nat’l Acad., *supra* note 7, at 77–78, 162–63.

and “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”²¹

33. Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Patients will need to schedule an appointment, gather the resources to pay for the abortion and related costs,²² and arrange transportation to a clinic, time off of work (often unpaid, due to a lack of paid time off or sick leave), and possibly childcare during appointments.²³ Ohio law requires most patients to make these arrangements multiple times even though they could just as safely obtain care in one visit. Ohio Rev. Code § 2919.193, .194 (requiring the physician to determine whether there is a detectable fetal heartbeat, which is done by ultrasound, and if there is a detectable heartbeat, prohibiting an abortion for at least twenty-four hours). Delay results in higher financial and emotional costs to the patient. Minor patients, unless emancipated, must also obtain written consent from a parent or a judicial order before they can receive care. Ohio Rev. Code § 2919.12.

34. The COVID-19 pandemic has only exacerbated these burdens on patients seeking abortion care. It has limited public transit availability, caused layoffs and other work disruptions, shuttered schools and childcare facilities, and otherwise limited patients’ options for transportation

²¹ ACOG et al., Joint Statement on Abortion Access During the COVID-19 Outbreak (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

²² Ohio prohibits public insurance, including Medicaid, and insurance purchased on the state health exchange from covering abortion services except in the very limited circumstances where a patient’s physical health or life is at risk, or where the pregnancy is a result of rape or incest that has been reported to law enforcement. Ohio Rev. Code §§ 9.04, 3901.87; Ohio Admin. Code § 5160-17-01.

²³ Jerman et al., *supra* note 14; Sarah E. Baum et al., Women’s Experience Obtaining Abortion Care in Texas After Implementation of Restrictive Abortion Laws: A Qualitative Study, 11 PLoS One 1, 7–8, 11 (2016); Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh, & Ann M. Moore, Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States, 74 Contraception 334, 335 (2006).

and childcare support during a time of recommended social-distancing.²⁴ Indeed, jobless claims are soaring due to the virus.²⁵

35. PPSWO does not use or have in supply N-95 masks, the PPE that appears to be in shortest supply in battling the COVID-19 pandemic in Ohio and around the country. PPSWO uses disposable gowns, which again I understand to be the gowns subject to shortages at this time, only in dealing with patients who present with upper respiratory symptoms consistent with COVID-19 infection. In addition, disposable gowns are used during end-of-the day cleaning.

36. In order to reduce the use of PPE, the number of staff in the operating room is reduced to the surgeon and one assistant. PPSWO has eliminated all non-essential persons in all centers including volunteers, trainees, and doulas. PPSWO does not provide inpatient care, nor is it set up to do so.

37. Patients who are prevented from obtaining abortion care will still need medical care to maintain their health and well-being. Since pregnant patients will remain users of the healthcare system as long as they are pregnant, banning surgical abortion will result in minimal, if any, conservation of PPE. By comparison, even if a provider of prenatal care reduces such care during the COVID-19 outbreak, it will still involve use of masks, non-sterile gloves, and potentially other

²⁴ ODH, *Governor DeWine Announces School Closures* (Mar. 12, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-announces-school-closures>; ODH, *Governor DeWine Orders Ohio Bars & Restaurants to Close* (Mar. 15, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-orders-ohio-bars-restaurants-to-close>; ODH, *Governor DeWine Announces Additional Temporary Business Closures* (Mar. 18, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/governor-dewine-announces-additional-temporary-business-closures>; Ohio Exec. Order 2020-04D; *see also* White House, *The President's Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Rebecca Shabad, *Fauci Predicts Americans Will Likely Need to Stay Home for at Least Several More Weeks*, NBC News (Mar. 20, 2020) <https://www.nbcnews.com/politics/donald-trump/fauci-predicts-americans-will-likely-need-stay-home-least-several-n1164701>.

²⁵ Scott Noll, *As Ohio Unemployment Soars, Some People Are Missing Out on Benefits*, News 5 Cleveland (Mar. 19, 2020), <https://www.news5cleveland.com/news/local-news/as-ohio-unemployment-soars-some-people-are-missing-out-on-benefits>.

PPE during multiple visits.²⁶ A patient continuing a pregnancy will thus likely require more PPE than a patient presenting for abortion.²⁷ Furthermore, every time a pregnant patient presents to the hospital for evaluation prior to labor, which could happen multiple times, this will require the use of masks and sterile gloves. An actual birth could involve anywhere from seven to ten gowns, masks, and sterile gloves.

38. Since the COVID-19 outbreak, PPSWO has taken steps to preserve much-needed medical resources and help prevent the spread of COVID-19 in the communities where we offer services. PPSWO has been and continues to follow the CDC guidelines on PPE usage during the COVID-19 outbreak including: selectively cancelling elective and non-urgent procedures and appointments for which eye protection is typically used by staff; shifting eye protection usage from disposable to reprocessing devices such as face shields; implementing extended use of eye protection, facemasks and gowns.²⁸

39. Even before the Director's Order, for example, we had reduced our patient volume in family planning centers and are delaying very early gestation patients in the surgery center to minimize repeat visits and ensure that we comply with current social-distancing recommendations. We have also made dramatic changes to the flow of our patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever. Only those individuals who are thoroughly screened can proceed to the front desk to check in and

²⁶ ACOG, Examples of Alternate or Reduced Prenatal Care Schedules (Mar. 24, 2020), <https://www.acog.org/en/Clinical%20Information/Physician%20FAQs/-/media/287cefdb936e4cda99a683d3cd56dca1.ashx>.

²⁷ <https://www.nytimes.com/2020/03/26/us/coronavirus-pregnancy-maternal-health-system.html> (noting that induced labor actually requires patients to spend more time in the hospital)

²⁸ CDC guidelines can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html> and <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/eye-protection.html>. PPSWO does vary from these guidelines when requested to. For example, the ODH inspectors requested PPE, which was provided.

provide their phone number. Patients are then asked to wait in their cars, where a staff member will call them to do as much intake as possible by phone. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

40. PPSWO could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various the Ohio restrictions on abortion I mentioned above, including requirements forcing patients to make an extra, medically unnecessary trip to the health center; forcing patients to receive an ultrasound during that unnecessary trip; and restricting medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

Irreparable Harm Caused by the Director's Order

41. Without any clear guidance from the ODH, and in light of the statements of the Director, Governor, and Attorney General, as well as the actions of ODH, PPSWO and its physicians reasonably fear being immediately shut down and prosecuted.²⁹

42. If the Director's Order is enforced to prohibit nearly all surgical abortions, PPSWO will be forced to stop providing previability surgical abortions to patients. As a result, the Order would deprive PPSWO's patients of the freedom to make a very personal and nuanced decision in consultation with their families and preferred doctors. It would harm patients' physical, emotional, and financial wellbeing and the wellbeing of their families.

43. Moreover, even if some patients affected by the order are able to obtain an abortion after the order is lifted, they will have still suffered increased risks to their health caused

²⁹ Although only PPSWO, WMCD, and Preterm have received letters and been inspected at this time, PPGOH and NEOWC are also subject to the Director's Order, adopted policies identical to the ones in place at the clinics that received letters.

by the mandated delay in access to abortion care.³⁰ Even if each one of these patients were able to access abortion after the Governor's declared emergency ends (or the Director modifies or rescinds her order), many of the medication abortion patients would require surgical abortions instead (and correspondingly greater amounts of PPE), and some surgical abortion patients would require a comparatively more complicated surgical abortion method using the D&E technique. That technique requires more time in the clinic and a larger number of staff than aspiration abortion, another method of surgical abortion. Many will also face increased costs related to abortion, as abortion at later gestational points is more expensive and may require a two-day procedure, instead of one. These costs, in turn, will likely lead to additional delay and present an even greater hardship to vulnerable populations during the economic fallout of the COVID-19 pandemic. Moreover, because these patients would continue to be pregnant for a longer period of time, they would also be at increased risk of negative health outcomes if they are diagnosed with COVID-19.³¹ Other patients could be foreclosed from receiving an abortion altogether because the delay mandated by the order would extend their pregnancies beyond the legal gestational limit for abortion in Ohio.

44. Without access to PPSWO's abortion services and those of other Ohio abortion providers, some patients will be forced to travel hundreds of miles across state lines to try to access abortion care. Given the logistical hurdles of traveling out-of-state, particularly during the COVID-19 pandemic, these patients are likely to obtain abortions later than they would have had they accessed care from PPSWO, which necessarily entails greater risks (and potentially more PPE) than an earlier procedure. Efforts to travel are also likely to expose both patients and other

³⁰ Nat'l Acads., *supra* note 7, at 77–78, 162–63.

³¹ Ctrs. for Disease Control & Prevention, Information for Healthcare Providers: COVID-19 and Pregnant Women, *supra* note 17.


people to additional risk of contagion, and if they were able to obtain an abortion out of state, would end up using PPE in that out-of-state clinic.

45. For other patients, travel to another state will simply not be possible. As a result, these patients will be forced to carry unwanted pregnancies to term, resulting in a deprivation of their fundamental right to determine when and whether to have a child or to add to their existing families, as well as greater health and other risks to them and their children.

46. Defendants' actions threaten to delay abortion care for patients seeking abortions because of health problems until they need emergency care, or forces those patients to attempt to travel to other states to obtain that care. Absent an order from this Court, PPSWO's patients will be denied their right to access safe and legal previability abortion in Ohio, or be forced to carry pregnancies to term against their will.

47. PPSWO has 50 patients scheduled for surgical abortions in the week starting March 31, 2020.

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



Sharon Liner, M.D.

Executed March 29, 2020

EXHIBIT A

Sharon A. Liner

2314 Auburn Ave
Cincinnati, OH 45219
sliner@ppsw.org
513-824-7866

Education:

Michigan State University, East Lansing, Michigan 48824. B.S. - Medical Technology, May 1997.

Michigan State University, College of Human Medicine, East Lansing, Michigan 48824 - Doctor of Medicine, May 2001

University of Cincinnati, Family Medicine Residency, Cincinnati, Ohio 45211 - Family Medicine Board certified since 2004

Work Experience:

Laboratory Assistant, Vitamin A Research Laboratory, 229 G.M. Trout Bldg., Michigan State University, East Lansing, Michigan 48824 February 1995-May 1997.

Direct Care Worker, Harris Development Center, 1391 East Haslett Road, Williamston, MI, 48895 May 1997-January 1999.

Western Family Physicians, 2450 Kipling Ave Ste 108, Cincinnati, OH 45239. May 2004 to July 2004.

Women's Medical Center, 3219 Jefferson Ave., Cincinnati, OH 45220 June 2009 to June 2010.

Planned Parenthood, 2314 Auburn Ave. Cincinnati, OH 45219 July 2004 to present.
Medical Director of Surgical Services 2007-2018. Medical Director 2018-present.

Community Involvement:

Family Practice Clinic - Michigan State University May 1994-August 1994.

Lansing Area AIDS Network Holiday Gift Project December 1995 and 1996.

Michigan Capitol Medical Center Surgery Volunteer May 1995-August 1995.

Family Practice Clinic – Lansing January 1996-May 1996.

Cristo Rey Clinic – Lansing September 1997-12/97.

Immunization Clinic - E. Lansing November 1998-5/99.

Friendship Clinic - Lansing September 1997-5/99.

Sharon Liner
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Honors and Awards:

Outstanding Senior Award 1997.
1997 College of Human Medicine Health Professions Open Scholarship.
1999 Michael J. Ptasnik, MD and Family Scholarship.
Chief Resident Family Practice 2003-2004.
Family Medicine Residency OB Award 2004
Cincinnati Women's Political Caucus Outstanding Achievement Honoree 2011
Planned Parenthood Southwest Ohio Region Employee of the Year Award 2015

Activities and Organizations:

Honduras Trip Clinic Team Leader 2002.
American Academy of Family Physicians. August 1997-present.
Sycamore Community Band. September 2007 – present.

Skills:

Typing and some computer skills.
D & C/ D & E up to 22 weeks LMP
IUD insertion and removal
Implant insertion and removal
Basic biopsy including endometrial
Basic ultrasound for pregnancy dating and IUD placement
ACLS certified

EXHIBIT B



**Department
of Health**

Mike DeWine, Governor
Jon Husted, Lt. Governor

Amy Acton, M.D., MPH, Director

RE: Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" and for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio, **ORDER** the following:

1. Effective 5:00 p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.
2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
 - a. Threat to the patient's life if surgery or procedure is not performed;
 - b. Threat of permanent dysfunction of an extremity or organ system;
 - c. Risk of metastasis or progression of staging; or
 - d. Risk of rapidly worsening to severe symptoms (time sensitive)
3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.
4. Each hospital and outpatient surgery or procedure provider, whether public, private, or nonprofit, shall establish an internal governance structure to ensure the principles outlined above are followed.
5. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

This Order takes into consideration and is consistent with the Ohio Hospital Association's *Implementing Guidelines for the Management of Non-Essential Surgeries and Procedures Throughout Ohio* dated March 16, 2020.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person

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coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term

care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

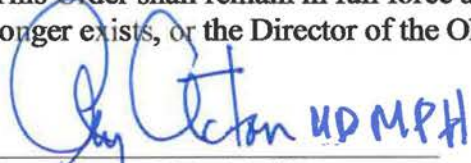
On March 15, 2020, the Ohio Department of Health issued a Director's Order closing polling stations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (50 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, upon guidance from the U.S. Surgeon General, American College of Surgeons and numerous other public health experts, I hereby **ORDER**, beginning at 5:00 p.m. Wednesday, March 18, 2020 all non-essential surgeries and procedures are cancelled. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include: threat to the patient's life if surgery or procedure is not performed; Threat of permanent dysfunction of an extremity or organ system; risk of metastasis or progression of staging; or risk of rapidly worsening to severe symptoms (time sensitive). Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required. Each hospital and outpatient surgery or procedure provider shall establish an internal governance structure to ensure the principles outlined above are followed. The Order is issued for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.


Amy Acton, MD, MPH
Director of Health

March 17, 2020

EXHIBIT C



Planned Parenthood Southwest Ohio Region

**PLANNED PARENTHOOD SOUTHWEST OHIO REGION POLICY
IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER
FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES
THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order") (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Planned Parenthood Southwest Ohio Region ("PPSWO") hereby establishes this policy in order to ensure compliance with ODH's Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. PPSWO physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. PPSWO physicians shall rely on the Director's Order and should consider the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.
 - b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

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IMPLEMENTED: MAR 2020

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d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All essential surgeries and procedures that are performed by PPSWO while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020

CREATED: MAR 2020
REVIEWED/REVISED: MAR 21, 2020
IMPLEMENTED: MAR 2020

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**Department
of Health**

Mike DeWine, Governor
Jon Husted, Lt. Governor

Amy Acton, M.D., MPH, Director

RE: Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" and for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio, **ORDER** the following:

1. Effective 5:00 p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.
2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
 - a. Threat to the patient's life if surgery or procedure is not performed;
 - b. Threat of permanent dysfunction of an extremity or organ system;
 - c. Risk of metastasis or progression of staging; or
 - d. Risk of rapidly worsening to severe symptoms (time sensitive)
3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.
4. Each hospital and outpatient surgery or procedure provider, whether public, private, or nonprofit, shall establish an internal governance structure to ensure the principles outlined above are followed.
5. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

This Order takes into consideration and is consistent with the Ohio Hospital Association's *Implementing Guidelines for the Management of Non-Essential Surgeries and Procedures Throughout Ohio* dated March 16, 2020.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person

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Columbus, Ohio 43215 U.S.A.

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coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term

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care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

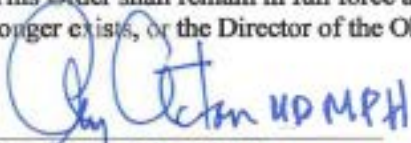
On March 15, 2020, the Ohio Department of Health issued a Director's Order closing polling stations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (50 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, upon guidance from the U.S. Surgeon General, American College of Surgeons and numerous other public health experts, I hereby **ORDER**, beginning at 5:00 p.m. Wednesday, March 18, 2020 all non-essential surgeries and procedures are cancelled. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include: threat to the patient's life if surgery or procedure is not performed; Threat of permanent dysfunction of an extremity or organ system; risk of metastasis or progression of staging; or risk of rapidly worsening to severe symptoms (time sensitive). Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required. Each hospital and outpatient surgery or procedure provider shall establish an internal governance structure to ensure the principles outlined above are followed. The Order is issued for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.



Amy Acton, MD, MPH
Director of Health

March 17, 2020

CREATED: MAR 2020
REVIEWED/REVISED: MAR 21, 2020
IMPLEMENTED: MAR 2020

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PPSWO'S POLICY IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order"). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." PPSWO hereby establishes this policy in order to ensure compliance with ODH's Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, PPSWO has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. PPSWO relies on the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - b. The recommendation of our Ambulatory Surgical Facility's Governing Body, which has determined that surgical abortions are essential surgical procedures.
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay

of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”

d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by PPSWO while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT D



Joint Statement on Elective Surgeries

March 16, 2020 - The American College of Obstetricians and Gynecologists joins the American Association of Gynecologic Laparoscopists, American Society for Reproductive Medicine, the American Urogynecologic Society, the Society of Family Planning, the Society of Gynecologic Surgeons, the Society for Maternal-Fetal Medicine, and the Society of Gynecologic Oncology in providing the following recommendations for obstetrician-gynecologists regarding the American College of Surgeons' statement on elective surgery and the U.S. Surgeon General's recommendation that hospitals suspend elective surgeries during the COVID-19 pandemic.

The COVID-19 pandemic is a public health crisis that requires the full attention and resources of our health care systems. The pandemic is and will create stress and pressure on health care systems throughout the country, especially in under-resourced areas. As hospital systems, clinics, and communities prepare to meet anticipated increases in demand for the care of people with COVID-19, strategies to mitigate spread of the virus and to maximize health care resources are evolving. Some health systems, at the guidance of the U.S. Centers for Disease Prevention and Control, are implementing plans to cancel elective and non-urgent procedures to expand hospitals' capacity to provide critical care.

While elective surgery can serve important roles in furthering patient wellbeing, we endorse the Surgeon General's statement regarding elective surgery. Surgical procedures performed by obstetrician-gynecologists are generally medically indicated procedures necessary for the furtherance of patient health and safety. In areas where COVID-19 is particularly prevalent or where there is particular stress on the health care system, it may be advantageous to identify and modify surgical scheduling, including for procedures that are medically indicated, when a patient's health and safety would not be harmed by such delay. Decisions should be made on a local-regional level, considering the risks and resources specific to each area.

Obstetric and gynecologic procedures for which a delay will negatively affect patient health and safety should not be delayed. This includes gynecologic procedures and procedures related to pregnancy for which delay would harm patient health. Obstetrician-gynecologists and other health care practitioners should be aware of the unintended impact that policies responding to COVID-19 may have, including limiting access to time-sensitive obstetric and gynecological procedures.

This is an unusual time with rapidly evolving circumstances, and we would expect recommendations to change. We encourage individual physicians to work closely with their hospital systems to ensure that patient's needs are being met and that time-sensitive procedures are not rendered inaccessible. Please consult the CDC's Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States.

EXHIBIT E

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COVID-19: Guidance for ASCs on Necessary Surgeries

Updated March 19, 2020

In response to government guidance that hospitals and ambulatory surgery centers postpone elective surgeries during the COVID-19 pandemic, the Ambulatory Surgery Center Association (ASCA) has consulted with clinical leaders to solicit recommendations on how and when facilities should proceed with cases that, for clinical reasons, should not be postponed. A surgery may be deemed urgent and necessary if the treating physician decides that a months-long delay would increase the likelihood of significantly worse morbidity or prognosis for the patient.

First and foremost, if a procedure can be safely postponed without additional significant risk to the patient, it should be delayed until after the pandemic. The current and ongoing efforts to isolate our population and create social distancing are essential steps in saving lives by shortening and ultimately ending the COVID-19 pandemic. The health and safety of patients, along with preventing the spread of COVID-19, must be our highest priority. We concur with the American College of Surgeons that "the risk to the patient should include an aggregate assessment of the real risk of proceeding and the real risk of delay, including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

Physicians should engage with patients and families to make care decisions that minimize potential risks to patients while ensuring they receive necessary care that cannot be safely delayed. Physicians should consider the potential of post-surgical complications that could place stress on the local hospital that may lack capacity for transfers. To that end, facilities should reach out to local hospitals to establish a line of communication that ensures coordination in managing care during the pandemic.

In addition, ASCs should develop explicit controls on how to manage the infection risks of all non-patient visitors (patient caregivers, vendors, contractors, etc.) who present themselves inside the facility and should strictly prohibit all non-essential visitors. Additional social distancing policies should be employed.

Examples of cases that might still need to proceed with surgery at this time include:

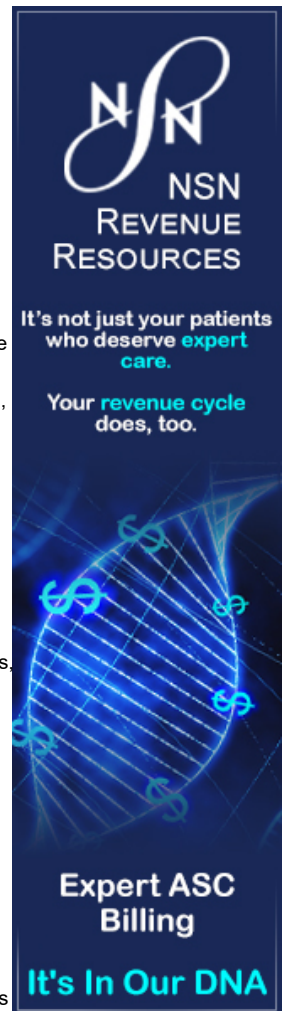
- Acute infection
- Acute trauma that would significantly worsen without surgery
- Potential malignancy
- Uncontrollable pain that would otherwise require a hospital admission
- A condition where prognosis would significantly worsen with a delay in treatment

Also, ambulatory surgery centers need to be prepared for the possibility that the pandemic may proceed to a point that strains the system such that hospitals will need to shift necessary surgeries to ASCs and/or ASCs and their resources will be required to serve the communities and the healthcare system in a different capacity. Additional guidance from regulatory agencies would govern those situations.

Finally, facilities need to recognize that the pandemic and its impact could create situations when ASCs may need to temporarily suspend services, such as:

- When a patient, staff or physician who has been in the ASC is suspected or subsequently diagnosed with COVID-19
- When there is a significant shortage of PPE (masks, gowns, gloves, etc.) that prevents safe practice of surgical cases

Clearly, this is an evolving situation and the coming days and weeks will present different challenges for healthcare facilities, such as ASCs, to grapple with as the COVID-19 pandemic runs its course. As they occur, the ambulatory surgery community will continue to work with federal, state and local health policy leaders to protect and preserve the health of the public during this crisis.





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EXHIBIT F



DAVE YOST
OHIO ATTORNEY GENERAL

Administration
Office 614-644-8901

March 20, 2020

Planned Parenthood of Southwest Ohio
Cincinnati Surgery Center
2314 Auburn Ave.
Cincinnati, OH 43219

Via Email - sbertuleit@ppsw.org

Re: March 17, 2020, Ohio Dept. of Health Order

Dear Planned Parenthood of Southwest Ohio,

On March 17, 2020, the Ohio Department of Health issued an order pursuant to the Department's powers under R.C. 3701.13. That order (attached) cancelled all non-essential or elective surgeries and procedures utilizing personal protective equipment ("PPE") as of 5:00 p.m. on March 18, 2020. The order was issued, in part, to preserve PPE for health care providers who are battling the COVID-19 pandemic that is spreading in our state and also to preserve critical hospital capacity and resources.

The Ohio Department of Health has received a complaint that your facility has been performing or continues to offer to perform surgical abortions, which necessarily involve the use of PPE. On behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions. Non-essential surgical abortions are those that can be delayed without undue risk to the current or future health of a patient. The Department of Health has outlined criteria to consider when determining whether a procedure is essential (see attached order). If you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures.

This is an unprecedented time in the state's history and everyone must do their part to help stop the spread of this disease. We look forward to receiving your confirmation that you and your facility are complying with the attached order. You may contact me by email at jonathan.fulkerson@ohioattorneygeneral.gov

Sincerely,

/s/ Jonathan Fulkerson

Jonathan Fulkerson
Deputy Attorney General

Exhibit F

EXHIBIT G

How May We Help You?



DAVE YOST
OHIO ATTORNEY GENERAL

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Statement from AG Yost regarding Enforcement of Ohio Department of Health’s Order to Preserve Personal Protective Equipment During a Pandemic Emergency

3/25/2020



(COLUMBUS, Ohio) – The following statement may be attributed to Ohio Attorney General Dave Yost:

“Establishing roles in a crisis is critical. In the current COVID-19 crisis, the Attorney General’s office plays a specific role. We are the prosecutor and the Ohio Department of Health is the police officer. My office will take quick enforcement action once an investigation is completed by the Department of Health, when facts to support a violation are determined, and a case is forwarded to my office. That is the standard protocol.

In Ohio, the Attorney General’s office lacks the extensive and explicit investigatory authority to independently take action with regard to this order. That authority lies with the Department of Health as the regulatory agency under Ohio Rev. Code 3701.04 and Ohio Admin. Code 3701-83-06. If the Department of Health determines through an investigation that Dr. Acton’s order was violated by any surgical facility in Ohio, my office stands ready to play our role and pursue legal action on behalf of the Ohio Department of Health.

Complaints regarding possible violations of Dr. Acton’s order should be filed with the Ohio Department of Health, as the department serves as the investigatory arm. In this instance, the attorney general plays the role of the prosecutor, not the cop.”

MEDIA CONTACT:
Bethany McCorkle: 614-466-1339



Individuals & Families

- Consumers
- Military & Veterans
- Seniors
- Tipster
- Victims

About AG

- Dave Yost
- Administration
- Public Records Access
- Regional Offices
- Service Divisions

Business & Economic Development

- Background Check
- Services for Bingo
- Collections
- Professional Solicitors & Fundraisers
- Services for Charities
- Services for Business

Services

- Webcheck Locations
- File a Consumer Complaint
- File a Charitable Complaint
- Charitable Registration
- Tobacco Enforcement

Law Enforcement

- BCI
- Concealed Carry
- Missing Persons
- Ohio Law Enforcement Gateway
- OOCIC
- OPOTA
- Unsolved Homicides

Training & Education

- Nonprofit Board Governance Webinars
- Ohio's Charitable Registration System Webinars
- OPOTA Courses
- Victim Service Provider Training

Legal Community

- Antitrust
- Ballot Initiatives
- Outside Counsel
- Prosecution
- Sunshine Laws

Media

- Events
- News Releases
- Newsletters
- Reports
- Videos

State & Local Government

- Formal Opinions
- Ohio School Threat Assessment Training
- Services for Schools

Career & Employee Resources

- AG Employee Portal
- AG Application Portal
- myOhio.gov
- Diversity & Inclusion
- Job Opportunities

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, INC., <i>et al.</i>,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i>,	:	Judge Barrett
	:	
Defendants.	:	

**DECLARATION OF CHRISSE FRANCE IN SUPPORT OF PLAINTIFFS’ MOTION
FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Chrisse France declares as follows:

1. I am the Executive Director of Preterm-Cleveland (“Preterm”), a nonprofit corporation organized under the laws of the State of Ohio, which is a plaintiff in this case. I have held this position since 1999.
2. As Executive Director, I am ultimately responsible for Preterm’s administrative, financial, and clinical operations. Thus, I am responsible for developing and implementing Preterm’s policies and procedures.
3. I submit this declaration in support of Plaintiffs’ motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Defendants from applying the Ohio Department of Health (“ODH”) Director’s March 17, 2020, order—barring all “non-essential” surgeries and medical procedures in Ohio during the COVID-19 outbreak—to ban most surgical abortions indefinitely.
4. The facts I state here are based on my experience, my review of Preterm’s business records, information obtained in the course of my duties at Preterm, and personal knowledge that

I have acquired through my service at Preterm. If called and sworn as a witness, I could and would testify competently thereto.

Preterm's Provision of Abortion Care

5. Preterm performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and surgical abortion through 21 weeks and 6 days LMP.

6. Preterm performed 4,592 total abortions in 2019, 1,470 of which were after 10 weeks LMP. So far this year, it has performed 839 total abortions through February 29, 2020, 253 of which were after 10 weeks LMP.

7. Preterm operates a facility licensed as an ambulatory surgical facility ("ASF") under Ohio law. *See* Ohio Rev. Code § 3703.30. It is located in Cleveland, Ohio. All abortions performed by Preterm take place in this facility.

8. Surgical abortions require minimal PPE. Preterm clinicians use surgical masks, reusable protective eyewear, gloves, and hair and shoe coverings during surgical abortions. Preterm does not use, and does not have in supply, any N95 masks. Preterm does not use or possess any sterile gloves or disposable protective eyewear. Only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.

9. For an ultrasound or laboratory exam, including one that accompanies abortion, our providers currently use non-sterile gloves.

Preterm's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

10. Preterm is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

11. Since the COVID-19 outbreak, in addition to complying with the Director's Order, Preterm has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the spread of COVID-19 in the communities where we offer services. In addition, although in normal times we welcome support people accompanying abortion patients, we have decided not to allow such companions (except those accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

12. We have also made changes to the flow of patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever.¹ Only those individuals whose screen is negative can proceed to the front desk to check in and provide their phone number. If patients answer yes to any screening questions, they are referred to their primary care provider or the Ohio Department of Health Hotline at 833-4-ASKODH before they can schedule their appointment. We have reconfigured our waiting areas to allow for social distancing, and where there is inadequate space, patients are asked to wait in their cars. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

13. After receiving the Director's Order, Preterm promptly adopted a policy to implement it and began to comply with it. A true and correct copy of Preterm's first policy is attached as Exhibit A.

14. On March 21, 2020, Preterm received a letter via email from the Ohio Attorney General, stating "[o]n behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions." The letter also cautions that "[i]f

¹ Similarly, all staff are screened daily for symptoms.

you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures.” A true and correct copy of the Attorney General’s Letter is attached as Exhibit B.

15. After receiving the Attorney General’s Letter, Preterm revised its policy to make clear that our “physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order.” Our “physicians shall rely on the Director’s Order” to make that case-by-case determination. When a patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method. Medication abortion uses less PPE than surgical abortion; indeed, the process of handing patients a pill requires no PPE. A true and correct copy of Preterm’s revised policy is attached as Exhibit C. The amended policy did not change the care we were providing under the Director’s Order.

16. Preterm could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various Ohio restrictions on abortion—such as Ohio’s requirements that force patients to make an extra, medically unnecessary trip to the health center, force patients to receive an ultrasound during that unnecessary trip, restrict medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

17. On March 26, 2020, two ODH inspectors arrived at Preterm for an unannounced inspection of a complaint, seeking information regarding Preterm’s compliance with the Director’s Order. Preterm fully cooperated with the inspection. Although the ODH inspectors

would not tell us the source of the complaint, reporting suggests they came from anti-abortion activists.²

18. While the first day of the inspection was still ongoing, Governor DeWine announced in a press conference that an essential abortion would be one that protected the life of the pregnant patient.³ At the same conference, Director Acton said that ODH had “listened to the AG” and began to investigate “violations [of the Order] across the state,” including at abortion clinics.

19. That same day, Attorney General Yost issued a press release vowing to “take quick enforcement action” once ODH’s investigation was completed.

20. The two inspectors returned on March 27, 2020 to continue their investigation. After two days of inspections, the inspectors left without telling Preterm whether or not they had found violations of the Director’s Order or any other regulation. This was a break with established ODH practice and procedure of informing Preterm of the inspection results before leaving. The inspectors said their superiors would make that determination at an unspecified later date and ODH would notify Preterm of the findings.

Harms Caused by the Director’s Order and ODH’s Threat of Enforcement

21. Based on the statements made by the ODH Director, the Governor, and the Attorney General, as well as the lack of clear guidance from ODH, regarding enforcement of the Director’s Order, Preterm reasonably fears that Defendants will “take all appropriate measures” against abortion providers.

² <https://www.fox19.com/2020/03/23/ohio-abortion-providers-ordered-stop-amid-covid-outbreak/https://myemail.constantcontact.com/Ohio-s-AG-Yost-s-Cease-and-Desist-Orders-ignored-by-Preterm-after-enforcement-fails-.html?soid=1102276802798&aid=zex7OI3QCU>

³ <https://www.ideastream.org/gov-mike-dewine-coronavirus-update-march-26-2020>
Starting at 54:00.

22. Without additional guidance from the ODH and in light of the statements of the Governor and Attorney General, I am concerned that Preterm could lose its license, and our physicians credibly fear being prosecuted if we continue to provide surgical abortions, which means some of our patients will have later abortions or be denied an abortion entirely.

23. Preterm has approximately 28 patients already scheduled for surgical abortions in the coming week at both of its health centers.

Executed this 30th day of March, 2020.

/s/ Chrisse France

Chrisse France

EXHIBIT A

**PRETERM'S POLICY IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S
MARCH 17, 2020, ORDER FOR THE MANAGEMENT OF NON-ESSENTIAL
SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order"). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Preterm hereby establishes this policy in order to ensure compliance with ODH's Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, Preterm has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. Preterm relies on the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - b. The recommendation of our Ambulatory Surgical Facility's Governing Body, which has determined that surgical abortions are essential surgical procedures.
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay

of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”


d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by Preterm while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.

 MD / MURREIDER, MD

Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT B



DAVE YOST
OHIO ATTORNEY GENERAL

Administration
Office 614-644-8901

March 21, 2020

Preterm
12000 Shaker Boulevard
Cleveland, OH 44120

Via Email - info@preterm.org

Re: March 17, 2020, Ohio Dept. of Health Order

Dear Preterm,

On March 17, 2020, the Ohio Department of Health issued an order pursuant to the Department's powers under R.C. 3701.13. That order (attached) cancelled all non-essential or elective surgeries and procedures utilizing personal protective equipment ("PPE") as of 5:00 p.m. on March 18, 2020. The order was issued, in part, to preserve PPE for health care providers who are battling the COVID-19 pandemic that is spreading in our state and also to preserve critical hospital capacity and resources.

The Ohio Department of Health has received a complaint that your facility has been performing or continues to offer to perform surgical abortions, which necessarily involve the use of PPE. On behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions. Non-essential surgical abortions are those that can be delayed without undue risk to the current or future health of a patient. The Department of Health has outlined criteria to consider when determining whether a procedure is essential (see attached order). If you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures.

This is an unprecedented time in the state's history and everyone must do their part to help stop the spread of this disease. We look forward to receiving your confirmation that you and your facility are complying with the attached order. You may contact me by email at jonathan.fulkerson@ohioattorneygeneral.gov

Sincerely,

/s/ Jonathan Fulkerson

Jonathan Fulkerson
Deputy Attorney General

EXHIBIT C

**PRETERM'S POLICY IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S
MARCH 17, 2020, ORDER FOR THE MANAGEMENT OF NON-ESSENTIAL
SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order") (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Preterm hereby establishes this policy in order to ensure compliance with ODH's Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Preterm physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. Preterm physicians shall rely on the Director's Order and should consider the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.
 - b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

d. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

3. All essential surgeries and procedures that are performed by PRETERM while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, INC., <i>et al.</i>,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i>,	:	Judge Barrett
	:	
Defendants.	:	

**DECLARATION OF ADARSH KRISHEN, M.D., M.M.M., IN SUPPORT OF
PLAINTIFFS’ MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Adarsh Krishen, M.D., M.M.M., declares as follows:

1. I am a board-certified physician with more than thirty years of experience in family medicine.
2. I am licensed to practice medicine in the state of Ohio. For three years, I have been the Chief Medical Officer of Planned Parenthood of Greater Ohio (“PPGOH”). I have also been a Clinical Professor of Family and Community Medicine at Northeast Ohio Medical University in Rootstown, Ohio, since 2013.
3. As PPGOH’s Chief Medical Officer, I supervise physicians and clinicians and provide direct reproductive health care to patients. I also manage the provision of all surgical abortion services at PPGOH, and I am responsible for developing PPGOH’s policies and procedures.
4. I submit this declaration in support of Plaintiffs’ motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Defendants from applying the Ohio Department of Health (“ODH”) Director’s March 17, 2020 order—barring all “non-

essential” surgeries and medical procedures in Ohio during the COVID-19 outbreak—to ban most surgical abortions indefinitely.

5. The facts I state here are based on my experience, my review of PPGOH’s business records, information obtained in the course of my duties at PPGOH, and personal knowledge that I have acquired through my service at PPGOH. If called and sworn as a witness, I could and would testify competently thereto.

PPGOH’s Provision of Abortion Care

6. PPGOH performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient’s last menstrual period (“LMP”), and surgical abortion through 19 weeks and 6 days LMP.

7. In 2019, PPGOH performed 4282 abortions. Of those, 1013 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion. Of the 3269 occurring before 10 weeks LMP, 1636 were done by medication abortion and the remaining 1633 by surgical abortion.

8. In January and February 2020, PPGOH performed 676 abortions. Of those, 212 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion. Of the 464 occurring before 10 weeks LMP, 305 were done by medication abortion and the remaining 159 by surgical abortion.

9. PPGOH operates two facilities licensed as ambulatory surgical facilities (“ASFs”) under Ohio law. *See* Ohio Rev. Code § 3703.30. They are located in Bedford Heights and East Columbus, Ohio. All abortions performed by PPGOH take place in these facilities.

10. Surgical abortion requires minimal PPE, particularly as compared to other surgical procedures. PPGOH clinicians use surgical masks, reusable protective eyewear, gloves, hair and

shoe coverings, and typically reusable gowns. Gloves are needed for any ultrasound, laboratory exam, and cleaning. Per CDC guidance, we provide patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask.

11. The masks that we use for abortions are not N95 masks. Only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.

PPGOH's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

12. PPGOH is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

13. Since the COVID-19 outbreak, in addition to complying with the Director's Order, PPGOH has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the spread of COVID-19 in the communities where we offer services. Even before the Director's Order, for example, we had excluded residents and medical students from observing or participating in surgeries, which reduced the number of individuals requiring PPE, and have taken other steps to preserve PPE, consistent with CDC guidance. In addition, although in normal times we welcome support people accompanying abortion patients, we have decided not to allow such companions (except parents accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

14. We have also made changes to the flow of patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever.¹ Only

¹ Similarly, all staff are screened daily for symptoms.

screened individuals can proceed to the front desk to check in and provide their phone number. We have reconfigured our waiting areas to allow for social-distancing, and where there is inadequate space, patients are asked to wait in their cars, where a staff member will call them to do as much intake as possible by phone. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

15. After receiving the Director's Order, PPGOH promptly adopted a policy to implement it and began to comply with it. A true and correct copy of first PPGOH's policy is attached as Exhibit A.

16. After Preterm, WMCD, and PPSWO received letters from the Attorney General's office threatening enforcement if they did not comply with the Director's Order, and after further communication with the Attorney General's office, PPGOH amended our policy, and continued to comply with the Director's Order. A true and correct copy of PPGOH's current policy is attached as Exhibit B. The amended policy did not change the care we were providing under the Director's Order.

17. As consistent with our policy and the Order, in providing care, our "physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order." Our "physicians shall rely on the Director's Order" to make that case-by-case determination. When a patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method. Medication abortion uses less PPE than surgical abortion; indeed, the process of handing patients a pill requires no PPE.

18. PPGOH could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various Ohio restrictions on abortion—such

as Ohio's requirements that force patients to make an extra, medically unnecessary trip to the health center, force patients to receive an ultrasound during that unnecessary trip, restrict medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

Harms Caused by the Director's Order and ODH's Threat of Enforcement

19. I am aware of cease and desist letters that other providers have received and inspections that have occurred. I am also aware of statements made by the ODH Director, the Governor, and the Attorney General. PPGOH reasonably fears that Defendants will "take all appropriate measures" against abortion providers.

20. Without additional guidance from the ODH and in light of the statements of the Governor and Attorney General, we are concerned that PPGOH could lose its license, and our physicians credibly fear being prosecuted if we continue to provide surgical abortions, which means some of our patients will have later abortions or be denied an abortion entirely.

21. PPGOH has many patients already scheduled for surgical abortions in the coming week at both of its health centers.

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

Executed this 30th day of March, 2020.



Adarsh Krishen, M.D., M.M.M.

EXHIBIT A

PLANNED PARENTHOOD OF GREATER OHIO'S POLICY IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order"). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Planned Parenthood of Greater Ohio hereby establishes this policy in order to ensure compliance with ODH's Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, Planned Parenthood of Greater Ohio has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. Planned Parenthood of Greater Ohio relies on the following considerations for making this decision:

- a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*

- b. The recommendation of our Ambulatory Surgical Facility Governing Body, which has determined that surgical abortions are essential surgical procedures.

- c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a


delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.” d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by Planned Parenthood of Greater Ohio while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Chief Medical Officer
Planned Parenthood of Greater Ohio

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT B

**PLANNED PARENTHOOD OF GREATER OHIO POLICY IMPLEMENTING OHIO
DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER FOR THE MANAGEMENT
OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order") (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Planned Parenthood of Greater Ohio ("PPGOH") hereby establishes this policy in order to ensure compliance with ODH's Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. PPGOH physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. PPGOH physicians shall rely on the Director's Order and should consider the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.
 - b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat'l Acad. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."


d. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

3. All essential surgeries and procedures that are performed by PPGOH while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, INC., <i>et al.</i>,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i>,	:	Judge Barrett
	:	
Defendants.	:	

**DECLARATION OF W.M. MARTIN HASKELL IN SUPPORT OF PLAINTIFFS’
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I, W.M. Martin Haskell, declare as follows:

1. I am the sole shareholder of Women’s Med Group Professional Corporation (WMGPC), which has owned and operated Women’s Med Center of Dayton (WMCD) in Kettering, Ohio since 1983. WMGPC was formerly Women’s Medical Professional Corporation.

2. I am a physician with over 40 years’ experience in women’s health. I have been a licensed physician in the state of Ohio since 1974.

3. I earned a B.A. from Ohio Wesleyan University in 1968 and a Doctorate of Medicine from the University of Alabama in 1972. I received five and one-half years of residency (post graduate) training in anesthesia, general surgery and family practice, completing my residency and passing my Board exam in family medicine in 1978.

4. I have been the Medical Director of WMCD since 1983. As Medical Director I supervise physicians and clinicians and provide direct reproductive health care to patients. I also supervise and manage the provision of all surgical abortion services at WMGPC facilities and am

responsible for developing WMGPC's policies and procedures. I provided abortions in an outpatient setting from 1978 until recently in 2019.

5. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Defendants from applying the Ohio Department of Health ("ODH") Director's March 17, 2020, order—barring all "non-essential" surgeries and medical procedures in Ohio during the COVID-19 outbreak—to ban most surgical abortions indefinitely.

6. The facts I state here are based on my experience, my review of WMGPC's business records, information obtained in the course of my duties at WMGPC and as medical director, and personal knowledge that I have acquired through my caring for patients seeking abortions for decades. If called and sworn as a witness, I could and would testify competently thereto.

WMCD's Provision of Abortion Care

7. WMCD performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and surgical abortion through 21 weeks and 6 days LMP.

8. WMCD performed 1893 surgical abortions in 2019, 838 of these surgical abortions were after 10 weeks LMP. So far this year, it has performed 353 surgical abortions through February 29, 2020, 170 of these surgical abortions were after 10 weeks LMP.

9. WMCD operates a facility licensed as an ambulatory surgical facility ("ASF") under Ohio law. *See* Ohio Rev. Code § 3703.30. It is located in Kettering, Ohio. All abortions performed by WMCD take place in this facility.

10. Surgical abortion require minimal use of PPE. WMCD physicians use surgical masks, reusable protective eyewear, non-sterile gloves, washable gowns, and foot coverings during surgical abortions. WMCD does not use, and does not have in supply, any N-95 masks. WMCD does not use or possess any disposable gowns, or disposable protective eyewear. Only a surgeon and one other person are present for surgical abortions and the fewest number of staff are physically present for preparation/recovery to even further minimize the use of PPE.

11. For an ultrasound or laboratory exam, including one that accompanies surgical abortions, our providers currently use non-sterile gloves.

WMCD's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

12. WMCD is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

13. Since the COVID-19 outbreak, before complying with the Director's Order, WMCD has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the spread of COVID-19 in the community where we offer services. Even before the Director's Order, for example, we encouraged patients to have medication abortions, and excluded residents and medical students from observing or participating in surgeries, which reduced the number of individuals requiring PPE. In addition, although in normal times we welcome support people accompanying abortion patients, we have decided not to allow such companions (except those accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

14. We have also made changes to the flow of patient care. Before patients may enter WMCD, we screen them for COVID-19 symptoms, including by checking for fever.¹ Only those individuals whose screen negative can proceed to the front desk to check in and provide their phone number. Patients who screen positive are asked to return to their car and are rescheduled to the end of the day. We have reconfigured our waiting areas to allow for social distancing.

15. After receiving the Director's Order, WMGPC promptly adopted a policy to implement it and began to comply with it the next day. A true and correct copy of WMGPC's first policy is attached as Exhibit A.²

16. On Friday evening, March 20, 2020, WMCD received a letter via email from the Ohio Attorney General, stating "[o]n behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions." The letter also cautions that "[i]f you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures." A true and correct copy of the Attorney General's Letter is attached as Exhibit B.

17. After receiving the Attorney General's Letter, WMGPC revised its policy to make clear that our "physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order." Our "physicians shall rely on the Director's Order" to make that case-by-case determination. A true and correct copy of WMGPC's revised policy is attached as Exhibit C.

¹ Similarly, all staff are screened daily for symptoms.

² WMCD policies have attached the Director's Order. I have attached hereto the policies without the Order attached.

18. When a WMCD patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method due to a medical contraindication for medication abortion. Medication abortion uses less PPE than surgical abortion.

19. WMGPC could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various Ohio restrictions on abortion—such as Ohio’s requirements that force patients to make an extra, medically unnecessary trip to the health center, force patients to receive an ultrasound during that unnecessary trip, restrict medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

20. On March 26, 2020, two ODH inspectors arrived at WMCD for an unannounced inspection of a complaint, seeking information regarding WMCD’s compliance with the Director’s Order. WMCD fully cooperated with the inspection. Although the ODH inspectors would not tell WMCD the source of the complaint, evidence suggest they came from anti-abortion activists.³

21. While the first day of the inspection was still on-going, Governor DeWine announced in a press conference that an essential abortion would be one that protected the life of the pregnant patient.⁴ At the same conference, Director Acton said that ODH had “listened to the AG” and began to investigate “violations [of the Order] across the state,” including at abortion clinics.

³ <https://www.fox19.com/2020/03/23/ohio-abortion-providers-ordered-stop-amid-covid-outbreak/>

⁴ <https://www.ideastream.org/gov-mike-dewine-coronavirus-update-march-26-2020>

Starting at 54:00.

22. That same day, Attorney General Yost issued a press release vowing to “take quick enforcement action” once ODH’s investigation was completed.

23. The two inspectors returned on March 27, 2020 to continue their investigation. After two days of inspections, the inspectors left without telling WMCD or me whether or not they had found violations of the Director’s Order or any other regulation. This was a break with established ODH practice and procedure of informing WMCD of the inspection results before leaving. The inspectors said their superiors would make that determination at an unspecified later date and ODH would notify WMCD of their findings.

Harms Caused by the Director’s Order and ODH’s Threat of Enforcement

23. Based on the statements made by the ODH Director, the Governor, and the Attorney General, as well as the lack of clear guidance from ODH, regarding enforcement of the Director’s Order, WMGPC, its physicians, and me as Medical Director, reasonably fear that Defendants will “take all appropriate measures” against abortion providers.

24. Without additional guidance from the ODH and in light of the statements of the Governor and Attorney General, I am concerned that WMCD could lose its license, and our physicians credibly fear being prosecuted if they continue to provide surgical abortions, which means some of our patients will have later abortions or be denied an abortion entirely.

25. WMCD has many patients already scheduled for surgical abortions in the coming week at both of its health centers.

Executed this 29th day of March, 2020.



W.M. Martin Haskell

EXHIBIT A

**WOMEN'S MED GROUP PROFESSIONAL CORPORATION POLICY
IMPLEMENTING OHIO DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER
FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES
THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order"). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Women's Med Group Professional Group ("WMGPC") hereby establishes this policy in order to ensure compliance with ODH's Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, WMGPC has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. WMGPC relies on the following considerations for making this decision:

a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat'l Acad. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*

b. The recommendation of our Ambulatory Surgical Facility's Governing Body, which has determined that surgical abortions are essential surgical procedures.

c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is

an essential component of comprehensive health care” and “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”

d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by WMGPC while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT B



DAVE YOST
OHIO ATTORNEY GENERAL

Administration
Office 614-644-8901

March 20, 2020

Women's Med Center
1401 Stroop Rd.
Dayton, OH 45429

Via email - martyh@fortemgt.com

Re: March 17, 2020, Ohio Dept. of Health Order

Dear Women's Med Center,

On March 17, 2020, the Ohio Department of Health issued an order pursuant to the Department's powers under R.C. 3701.13. That order (attached) cancelled all non-essential or elective surgeries and procedures utilizing personal protective equipment ("PPE") as of 5:00 p.m. on March 18, 2020. The order was issued, in part, to preserve PPE for health care providers who are battling the COVID-19 pandemic that is spreading in our state and also to preserve critical hospital capacity and resources.

The Ohio Department of Health has received a complaint that your facility has been performing or continues to offer to perform surgical abortions, which necessarily involve the use of PPE. On behalf of the Department, you and your facility are ordered to immediately stop performing non-essential and elective surgical abortions. Non-essential surgical abortions are those that can be delayed without undue risk to the current or future health of a patient. The Department of Health has outlined criteria to consider when determining whether a procedure is essential (see attached order). If you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health will take all appropriate measures.

This is an unprecedented time in the state's history and everyone must do their part to help stop the spread of this disease. We look forward to receiving your confirmation that you and your facility are complying with the attached order. You may contact me by email at jonathan.fulkerson@ohioattorneygeneral.gov.

Sincerely,

/s/ Jonathan Fulkerson

Jonathan Fulkerson
Deputy Attorney General

EXHIBIT C

**WOMEN’S MED GROUP PROFESSIONAL CORPORATION POLICY
IMPLEMENTING OHIO DEPARTMENT OF HEALTH’S MARCH 17, 2020, ORDER
FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES
THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio (“Order”) (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment (“PPE”) to cease at 5:00 p.m. on March 18, 2020 “for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio.” Women’s Med Group Professional Group (“WMGPC”) hereby establishes this policy in order to ensure compliance with ODH’s Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. WMGPC physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. WMGPC physicians shall rely on the Director’s Order and should consider the following considerations for making this decision:

a. The Order states that a surgery is essential if it cannot “be delayed without undue risk to the current or future health of a patient” and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.

b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman’s last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat’l Acads. of Scis. Eng’g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*

c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to “the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure” because it “is an essential component of comprehensive health care” and “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”

d. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

3. All essential surgeries and procedures that are performed by WMGPC while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.



Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, INC., <i>et al.</i>,	:	
	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
v.	:	
	:	
DAVID YOST, <i>et al.</i>,	:	Judge Barrett
	:	
Defendants.	:	

**DECLARATION OF DAVID BURKONS, M.D., IN SUPPORT OF PLAINTIFFS’
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

David Burkons, M.D., declares as follows:

1. I am a board-certified obstetrician-gynecologist. I received my M.D. degree from the University of Michigan in 1973.
2. I am licensed to practice medicine in the state of Ohio. In 2014, I founded the Northeast Ohio Women’s Center (NEOWC), where I serve as Medical Director. Prior to starting NEOWC, I was in private practice with University Hospitals in Cleveland, and I also served as Medical Director of Preterm for approximately ten years.
3. As NEOWC’s Medical Director, I supervise physicians and clinicians and provide direct reproductive health care to patients. I also manage the provision of all surgical abortion services at NEOWC, and I am responsible for developing NEOWC’s policies and procedures.
4. I submit this declaration in support of Plaintiffs’ motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Defendants from applying the Ohio Department of Health (“ODH”) Director’s March 17, 2020, order—barring all “non-

essential” surgeries and medical procedures in Ohio during the COVID-19 outbreak—to ban most surgical abortions indefinitely.

5. The facts I state here are based on my experience, my review of NEOWC’s business records, information obtained in the course of my duties at NEOWC, and personal knowledge that I have acquired through my service at NEOWC. If called and sworn as a witness, I could and would testify competently thereto.

NEOWC’s Provision of Abortion Care

6. NEOWC performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient’s last menstrual period (“LMP”), and surgical abortion through 15 weeks and 6 days LMP.

7. In 2019, NEOWC performed 1901 abortions. Of those, 540 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion.

8. In January and February 2020, NEOWC performed 223 abortions. Of those, 142 occurred beyond 10 weeks LMP, and were therefore necessarily performed as surgical abortion.

9. NEOWC operates two facilities, one of which is licensed as an ambulatory surgical facility (“ASF”) under Ohio law. *See* Ohio Rev. Code § 3703.30. The ASF is located in Cuyahoga Falls, Ohio. NEOWC’s other facility is located in Shaker Heights, Ohio, and only medication abortion is performed there. All abortions performed by NEOWC take place in these two facilities.

10. Surgical abortion requires minimal PPE. NEOWC clinicians use surgical masks, reusable protective eyewear, nonsterile gloves, and typically reusable gowns. Non-sterile gloves are needed for any ultrasound, laboratory exam, and cleaning.

11. NEOWC does not have or use any N95 masks. Only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.

NEOWC's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

12. NEOWC is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

13. Since the COVID-19 outbreak, in addition to complying with the Director's Order, NEOWC has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the spread of COVID-19 in the communities where we offer services. For example, although in normal times we welcome support people accompanying abortion patients, we have decided not to allow such companions (except those accompanying minors) to enter our health centers in order to reduce the overall number of people exposed to one another.

14. We have also made changes to the flow of patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever.¹ Only screened individuals whose screen is negative can proceed to the front desk to check in. If a patient shows symptoms of COVID-19, we refer them to their primary care physician and ask them to come back after they have been cleared. We have reconfigured our waiting areas to allow for social distancing, and where there is inadequate space, patients are asked to wait in their cars. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

15. After receiving the Director's Order, NEOWC promptly adopted a policy to implement the Director's Order, and is providing care in compliance with that policy. A true and correct copy of NEOWC's policy is attached as Exhibit A.

¹ Similarly, all staff are screened daily for symptoms.

16. After Preterm, WMCD, and PPSWO received letters from the Attorney General's office threatening enforcement if they did not comply with the Director's Order, and after further communication with the Attorney General's office, NEOWC amended our policy, and continued to comply with the Director's Order. A true and correct copy of NEOWC's current policy is attached as Exhibit B. The amended policy did not change the care we were providing under the Director's Order.

17. As consistent with our policy and the Order, in providing care, our "physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order." Our "physicians shall rely on the Director's Order" to make that case-by-case determination. When a patient is eligible for both surgical and medication abortion, patients are provided a medication abortion, unless surgical abortion is the more appropriate method. Medication abortion uses less PPE than surgical abortion; indeed, the process of handing patients a pill requires no PPE.

18. NEOWC could make further progress in preserving PPE (as well as reducing overall contagion risks during the pandemic) were it not for various Ohio restrictions on abortion—such as Ohio's requirements that force patients to make an extra, medically unnecessary trip to the health center, force patients to receive an ultrasound during that unnecessary trip, restrict medication abortion to ten weeks LMP (even though it can safely be used up to eleven weeks LMP).

Harms Caused by the Director's Order and ODH's Threat of Enforcement

19. I am aware of the cease and desist letters that other providers have received and inspections that have occurred. I am also aware of statements made by the ODH Director, the Governor, and the Attorney General. NEOWC reasonably fears that Defendants will “take all appropriate measures” against abortion providers.

20. Without additional guidance from the ODH and in light of the statements of the Governor and Attorney General, I am concerned that NEOWC could lose its license, and NEOWC’s physicians credibly fear being prosecuted if we continue to provide surgical abortions, which means some of our patients will have later abortions or be denied an abortion entirely.

21. NEOWC has several patients already scheduled for surgical abortions in the coming week.

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

Executed this 29th day of March, 2020.

/s/ David Burkons, M.D.
David Burkons, M.D.

EXHIBIT A

**NORTHEAST OHIO WOMEN’S CENTER’S POLICY IMPLEMENTING OHIO
DEPARTMENT OF HEALTH’S MARCH 17, 2020, ORDER FOR THE MANAGEMENT
OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio (“Order”). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment (“PPE”) to cease at 5:00 p.m. on March 18, 2020 “for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio.” Northeast Ohio Women’s Center hereby establishes this policy in order to ensure compliance with ODH’s Order.

As of March 18, 2020, at 5:00 p.m., the following policies and procedures will become effective:

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Since a delay in a surgical abortion will negatively affect patient health and safety, Northeast Ohio Women’s Center has determined that surgical abortion constitutes an essential surgery and may continue to be provided under the terms of the Order. Northeast Ohio Women’s Center relies on the following considerations for making this decision:

a. The Order states that a surgery is essential if it cannot “be delayed without undue risk to the current or future health of a patient” and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman’s last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. Thus, the timeframe for a patient to obtain an abortion is limited. In addition, while abortion is an extremely safe medical procedure, it is time-sensitive, because it cannot be delayed without increasing the risk to the health of the patient. *See, e.g., Nat’l Acads. of Scis. Eng’g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*

b. The recommendation of our Ambulatory Surgical Facility’s Governing Body, which has determined that surgical abortions are essential surgical procedures.

c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to “the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure” because it “is an essential component of comprehensive health care” and “a time-sensitive service for which a delay

of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.”

d. The Ambulatory Surgery Center Association’s “COVID-19: Guidance for ASCs for Necessary Surgery,” issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, “including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.”

3. All surgeries and essential procedures that are performed by Northeast Ohio Women’s Center while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.

/s/ David Burkons, M.D.
Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

EXHIBIT B

**NORTHEAST OHIO WOMEN'S CENTER'S POLICY IMPLEMENTING OHIO
DEPARTMENT OF HEALTH'S MARCH 17, 2020, ORDER FOR THE MANAGEMENT
OF NON-ESSENTIAL SURGERIES AND PROCEDURES THROUGHOUT OHIO**

The Director of the Ohio Department of Health issued an Order for the Management of non-essential Surgeries and Procedures throughout Ohio ("Order") (see attached Order). ODH has ordered all non-essential or elective surgeries and procedures that utilize personal protective equipment ("PPE") to cease at 5:00 p.m. on March 18, 2020 "for the purpose of preventing the spread of contagious and infectious diseases and of preserving PPE and critical hospital capacity and resources in Ohio." Northeast Ohio Women's Center hereby establishes this policy in order to ensure compliance with ODH's Order.

1. No non-essential surgeries and procedures that utilize PPE will be performed.
2. Northeast Ohio Women's Center physicians will determine on a case-by-case basis whether a surgical abortion or procedure constitutes an essential surgery or procedure that may continue to be provided under the terms of the Order. Northeast Ohio Women's Center physicians shall rely on the Director's Order and should consider the following considerations for making this decision:
 - a. The Order states that a surgery is essential if it cannot "be delayed without undue risk to the current or future health of a patient" and includes, as examples of criteria to consider, the risk to the patient of rapidly worsening to severe symptoms that make the surgery time sensitive, as well as a progression of staging.
 - b. Pregnancy has a duration of approximately forty weeks as measured from the first day of the woman's last menstrual period (LMP) and abortions are banned in Ohio beginning at 22 weeks LMP. Ohio Rev. Code § 2919.201. In addition, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g., Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018).*
 - c. The Joint Statement by the American College of Obstetricians and Gynecologists (ACOG), the American Board of Obstetrics & Gynecology, et al., on Abortion Access During the COVID-19 Outbreak, issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

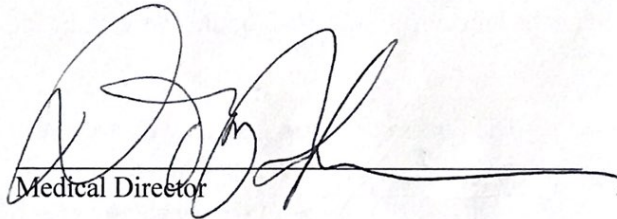
d. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6-8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

3. All essential surgeries and procedures that are performed by Northeast Ohio Women's Center while the Order is in effect will proceed as follows:

a. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

b. Every effort will be made to preserve PPE.

4. This policy, like the underlying Order, shall remain in effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order.


Medical Director

Approved by Governing Body: March 18, 2020

Date implemented: March 18, 2020

Date Revised: March 21, 2020

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

PRETERM-CLEVELAND, INC.,
et al.,

Plaintiffs,

V.

DAVID YOST, *et al.*,

Defendants.

Case No. 1:19-cv-00360

Judge Michael R. Barrett

PROPOSED TEMPORARY RESTRAINING ORDER

Upon consideration of the Plaintiffs’ motion for a temporary restraining and/or preliminary injunction and the response of Defendants to Plaintiffs’ motion for a temporary restraining order and/or preliminary injunction, this Court has found and concluded for the specific reasons required under Federal Rule of Civil Procedure 65(d) that Plaintiffs have shown (1) a likelihood of success on the merits of their claim, (2) that they will suffer irreparable harm if an injunction is not issued, and (3) that the balance of harm and the public interest weigh in favor of granting the temporary restraining order and/or preliminary injunction. Specifically, Plaintiffs have shown a likelihood of success on their claim that Ohio Health Director’s March 17, 2020 order entitled: “RE: Director’s Order for the Management of Non-essential Surgeries and Procedures throughout Ohio” (“Director’s Order”), as applied to surgical abortion procedures, is an unconstitutional deprivation of Plaintiffs’ patients’ Fourteenth Amendment right to substantive due process because it bans previability abortions.

THEREFORE, it is hereby ORDERED that the motion is GRANTED and Defendants
Director Acton, Attorney General Yost, Hamilton County Prosecutor Joseph Deters, Franklin

County Prosecutor Ronald O'Brien, Cuyahoga County Prosecutor Michael C. O'Malley, and Summit County Prosecutor Sherri Bevan Walsh; their officers, agents, servants, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order are TEMPORARILY RESTRAINED from enforcing the Director's Order until _____, _____, 2020.

Plaintiffs shall not be required to post bond. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995).

IT IS SO ORDERED.

Date: _____

HON. MICHAEL R. BARRETT
DISTRICT COURT JUDGE