IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES and THOMAS TVEDTEN, M.D., on behalf of themselves and their patients,

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION

Case No. 4:20-cv-00470-BSM

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. During the COVID-19 pandemic, Governor Asa Hutchinson did not order Arkansas citizens to stay home. Many retailers remained open for business. To the extent businesses were closed, most will be back open in a matter of days. Gyms and fitness centers are re-opening May 4, 2020. Body artists, barber shops, and spas may re-open May 6. Restaurants are slated to commence dine-in service on May 11. According to the Governor, many hospitals are "empty," and there is no shortage of the medical professionals on whom we all gratefully depend to fight COVID-19 on the frontlines. Manufacturing and places of worship remain open, and seemingly all physicians around the State other than abortion providers are free to exercise their professional judgment to provide patients with care that they determine cannot be safely postponed. Indeed, throughout this crisis, orthodontists in Arkansas remained free to schedule visits to adjust wires on patients' braces, and dentists continued to see patients who complain of a cracked tooth.

2. Leading medical organizations, including the American Medical Association, the American College of Obstetricians and Gynecologists, and the World Health Organization have stated that abortion is urgent care that should not be denied during the COVID-19 crisis. Indeed, in a joint statement, leading medical organizations explained that 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."

3. Nevertheless—and unsurprisingly—the State opportunistically seeks to leverage the instant public-health crisis to continue its unrelenting campaign—which included no fewer than 12 abortion-specific restrictions in 2019 alone—to prevent women from exercising their Constitutionally protected right to access pre-viability abortion care in Arkansas. *See Roe v.*

Wade, 410 U.S. 113, 163–65 (1973). This time, Arkansas seeks to restrict the right to access surgical-abortion care, by overriding physicians' good-faith medical judgment that abortion is urgent and cannot be safely postponed, and conditioning care on patients' ability to obtain a negative COVID-19 test result within 48 hours of their procedure (the "COVID-19 Abortion Ban" or the "Ban"). Surgical abortion is the only type of care available to women who are more than 10 weeks pregnant, as measured from the date of their last menstrual period ("LMP"), and the only medically appropriate method available to some women at any point in pregnancy.

4. Over the last three weeks, Arkansas has put women seeking surgical abortion care in this State on a roller coaster of changing conditions that threatens their physical and emotional well-being—and yet does ***nothing*** to aid Arkansas's fight against the COVID-19 pandemic:

a. On April 3, the Arkansas Department of Health ("ADH") issued a Directive limiting the elective-surgery procedures that could proceed during the pandemic to (among others) those that cannot "be safely postponed." Even though abortion care is urgent, ADH then hand delivered to Plaintiff Little Rock Family Planning Services ("LRFP") an April 10 cease-and-desist order that required the immediate cessation of all surgical abortions except those "immediately necessary to protect the life or health of the patient" (the "C&D Order"). Patients in the LRFP waiting room that morning—all of whom had previously been to the clinic to receive State-mandated information at least three days earlier—were suddenly sent home, distraught, and without the care they needed. When Plaintiffs immediately initiated a litigation, Defendants responded on April 21 that the C&D Order was necessary in view of "concern[s]" relating to personal protective equipment ("PPE") and an urgent need to reduce social contacts. *See* Dkt. 9. The ***very next day***, however, the State announced that it was "comfortable" with its PPE supply after all, and would soon be reopening gyms and restaurants. These announcements

did nothing to help LRFP and its patients: ADH continued to require LRFP to turn away women seeking surgical-abortion care.

b. On April 27, the ADH announced a new Directive under which surgical abortion care could proceed if a patient obtains a negative COVID-19 test within 48 hours of her procedure. LRFP and its patients have since turned the region upside down searching for rapid and reliable COVID-19 testing for asymptomatic patients. Unsurprisingly, given the nationwide shortage of COVID-19 tests—indeed, the New York Times reported on May 1 that even the physician who treats United States senators is unable to secure tests for asymptomatic lawmakers[1]—LRFP and its patients have been unable to comply with the testing requirement. Since April 27, LRFP has turned away more than 50 patients, ***including women who have been pushed past the legal limit for abortion care in this State and denied outright their Constitutional right to pre-viability abortion care***.

5. Unless this Court grants Plaintiffs the relief they seek, the COVID-19 Abortion Ban will require Plaintiffs to continue turning away women seeking time-sensitive and urgent abortion care. As a result, many women will be forced to delay their access to abortion (thereby—needlessly—increasing the risk to their health and well-being). In particular, some will be pushed to a more complex and lengthier procedure; others whose pregnancies progress to 18 weeks LMP will be forced to make an additional trip to the clinic (assuming the clinic has capacity to see them when surgical abortion care resumes without a testing requirement); and still others will be pushed past the point in pregnancy where abortion is legal in Arkansas (21.6 weeks LMP). Some of the women who are barred from obtaining care under the COVID-19 Abortion Ban may try to travel in the middle of a pandemic to the next-nearest clinic currently

[1] *See* Sheryl Gay Stolberg, et al., *Capitol Lacks Tests for Returning Senators While White House Tests Many in Trump's Circle*, THE NEW YORK TIMES, *available at* https://www.nytimes.com/2020/05/01/us/politics/coronavirus-testing-senate-white-house.html.

providing surgical abortions, which for many women will be in Granite City, Illinois—a ***700-mile*** roundtrip drive from Little Rock into a State reporting far higher numbers of COVID-19 infections. This travel will not only impose enormous logistical and financial burdens, but also increase patients' risk of exposure to COVID-19 and the risk of infection for other Arkansas residents upon their return. But many of LFRP's patients—a substantial portion of which are poor or low-income—will be unable to make this journey, and will be forced to carry to term and have a child against their will.

6. Accordingly, to protect themselves and their patients from these constitutional violations and to avoid irreparable harm, Plaintiffs seek declaratory and injunctive relief to prevent enforcement of the COVID-19 Abortion Ban.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(a)(3).

8. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

9. Venue is appropriate under 28 U.S.C § 1391(b), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occur in this judicial district and the majority of the Defendants, who are sued in their official capacity, carry out their official duties at offices located in this district.

PLAINTIFFS

10. Plaintiff LRFP is a professional limited liability corporation that is licensed to do business in Arkansas. It has provided high quality reproductive health care in Arkansas since 1973. LRFP offers miscarriage care and basic gynecological care, including pap smears,

sexually-transmitted-disease testing, contraceptive counseling and services, and abortion services. It operates a clinic in Little Rock that provides both medication and surgical abortion care. LRFP provides abortion care to the point in pregnancy allowed under Arkansas law, offering medication abortions up to 10 weeks LMP and surgical abortions until 21.6 weeks LMP, a point in pregnancy at which a fetus is never viable. LRFP is the only clinic in the State that provides surgical abortions. LRFP brings this action on behalf of itself, its patients, and the physicians and staff it employs to provide services to its patients.

11. Plaintiff Thomas Tvetden, M.D., is a physician licensed to practice medicine in Arkansas and is the part owner and Medical Director of LRFP. He has provided medical care in Arkansas for more than four decades, and abortion care for more than three decades. He currently provides medication abortion up to 10 weeks LMP and surgical abortion up to 21.6 weeks LMP. Dr. Tvedten sues on his own behalf and on behalf of his patients.

DEFENDANTS

12. Defendant Leslie Rutledge is the Attorney General of Arkansas. She is responsible for bringing an action for injunctive relief against any abortion provider who purposely, knowingly, or recklessly violates the COVID-19 Abortion Ban, so as to prevent the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of the COVID-19 Abortion Ban. She and her agents and successors are sued in their official capacities.

13. Defendant Larry Jegley is the Prosecuting Attorney for Pulaski County, located at 224 South Spring Street, Little Rock, AR 72201. Prosecuting attorneys "shall commence and prosecute all criminal actions in which the state or any county in his district may be concerned." Ark. Code § 16-21-103 (2019). Defendant Jegley is therefore responsible for criminal

enforcement of the COVID-19 Abortion Ban in Pulaski County. Plaintiff LRFP's health center is located in Pulaski County. Defendant Jegley and his agents and successors are sued in their official capacities.

14. Defendant Sylvia D. Simon, M.D. is Chair of the Arkansas State Medical Board. Defendants Robert Breving Jr., M.D., Veryl D. Hodges, D.O., John H. Scribner, M.D., Omar T. Atiq, M.D., Rhys L. Branman, M.D., Rodney Griffin, M.D., Mrs. Marie Holder, Brian T. Hyatt, M.D., Mr. Larry D. "Buddy" Lovell, Timothy C. Paden, M.D., Don R. Phillips, M.D., William L. Rutledge, M.D., and David L. Staggs, M.D. are members of the Arkansas State Medical Board. The State Medical Board is responsible for licensing medical professionals under Arkansas law. *See* Ark. Code § 17-95-410 (2019). The Board and its members are responsible for imposing licensing penalties under COVID-19 Abortion Ban and imposing licensing penalties for unprofessional conduct, which includes violation of and criminal conviction under orders such as the COVID-19 Abortion Ban. *See* Ark. Code § 17-95-409(a)(2)(A), (D) (2019). Defendants and their successors in office are sued in their official capacity.

15. Defendant Nathanial Smith, M.D., M.P.H., is the Director and State Health Officer of the Arkansas Department of Health, the agency charged with enforcing the COVID-19 Abortion Ban. Defendant Smith is sued in his official capacity.

FACTUAL ALLEGATIONS

Abortion Care in Arkansas

16. Legal abortion is common; approximately one in four women in this country will have an abortion by age forty-five.

17. Patients seek abortion for a wide range of personal and complex reasons that are closely tied to each individual's values, culture and religion, health and reproductive history,

family situation and support system, educational or career goals, and resources and financial stability. Most people who have abortions already have at least one child, and many have decided they cannot parent another at this stage of their lives. In fact, a majority of women having abortions in the United States already have at least one child, and among 2017 abortion patients in Arkansas, approximately 65% had one or more previous live births. These women may already be struggling to adequately provide for their existing children and may be concerned about their ability to make ends meet if they add another child to their family. Indeed, the vast majority—approximately 75%—of abortion patients are poor or low-income. Poverty is a significant problem in Arkansas, the country's fifth-poorest state.

18. Other patients have abortions because they conclude that it is not the right time to become a parent, they wish to pursue their education or career, or they lack the desired financial resources or level of partner or familial support or stability. Still others seek abortions because existing medical conditions put them at greater-than-average risk of medical complications, because they are in abusive relationships, or because they are pregnant as a result of rape or sexual assault.

19. Abortions are typically provided in Arkansas using one of two methods: medication abortion or surgical abortion. Consistent with Arkansas law, LRFP provides (i) medication abortion up to ten weeks (seventy days) LMP, and (ii) surgical abortion up to 21.6 weeks LMP. Both methods are a safe and effective means of terminating a pregnancy. In states across the country, such as Colorado, Illinois, and Montana, a variety of medical providers, including midwives, nurse practitioners, and physician assistants, may legally provide both medication and surgical abortion.

20. Medication abortion involves taking a combination of two pills, mifepristone and

misoprostol, after which the patient expels the contents of the pregnancy in a manner similar to a miscarriage. Not all patients, even those who go to LRFP before 10 weeks LMP, are eligible for medication abortion. For some patients, like those with anemia, medication abortion is contraindicated. In fact, a variety of medical conditions can push women toward surgical abortion rather than medication abortion.

21. Despite its name, "surgical" abortion involves no incision or general anesthesia. There are two types of surgical abortion. The first is aspiration abortion, in which gentle suction is used to safely empty the contents of the uterus. The procedure usually takes approximately 5 to 10 minutes. Beginning at approximately 14 weeks LMP, abortions generally require a still-very-safe but more-complex procedure known as dilation and evacuation, or "D&E" abortion, which requires more procedure and recovery time than the aspiration procedure. Most D&Es are one-day procedures, but as pregnancy progresses past 18 weeks, it becomes a two-day procedure because patients must come into LRFP the day before the procedure to begin the process of dilating their cervix. A D&E requires more skill and time, and the cost of abortion care increases with the progression of a pregnancy.

22. Surgical abortion is extremely safe. Its mortality rates are lower than those of colonoscopies, adult tonsillectomies, and childbirth. As another court in this district recently found, abortion in Arkansas (and in the nation as a whole) "is one of the safest medical procedures available." *Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d 1213, 1279 (E.D. Ark. 2019). In particular, 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. *Id.* Moreover, "legal abortion is significantly safer for a woman

than carrying a pregnancy to term and giving birth." *Id.* When complications do arise, they may be handled safely and effectively either on an outpatient basis or (where necessary) via a referral.

23. In 2019, LRFP provided approximately 1,950 abortions. Of those, approximately 225 were medication abortions and 1,727 were surgical abortions. From January through March 2020, LRFP provided 526 abortions, of which 478 were surgical procedures.

24. Surgical abortion requires minimal personal protective equipment ("PPE"). For the State-mandated ultrasound before every abortion, LRFP uses only non-sterile gloves. For surgical abortions, the physician uses sterile gloves (one pair per procedure) and a surgical mask (worn throughout the day); the assistant uses only a surgical mask (also worn throughout the day) and gloves. When necessary, LRFP uses reusable gowns and eyewear.

25. Although abortion is a very safe procedure, the associated health risks increase as pregnancy progresses. Delay may worsen any maternal health conditions that predate the pregnancy or result from the pregnancy. Each week of delay in accessing abortion increases the patient's risk of mortality by 38%. Advancing gestational age is the single strongest determinant of mortality. Delay can likewise push a patient from an aspiration abortion to a more complex and longer D&E or from a one-day procedure to a two-day procedure. And delay can push a patient beyond the point at which abortion is available in the State (i.e., 21.6 weeks LMP), thereby giving rise to a risk that she will attempt to terminate her pregnancy outside the medical system or be forced to carry to term against her will.

26. LRFP's patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Some patients may not discover they are pregnant until later in their pregnancies, while others may experience difficulties navigating the medical system, including finding a provider and scheduling an appointment. Many of

LRFP's patients are struggling financially, and need time to gather the resources to pay for the procedure and related costs. They must also figure out transportation to the clinic, arrange for time off work (which is often unpaid, because many patients lack paid time off or sick leave), and, for many of those patients who are mothers already, arrange childcare. Arkansas's existing legal restrictions increase the challenges facing women who seek care in the State, too. For example, Arkansas law mandates that all patients visit the clinic in-person at least 72 hours before their abortion to receive State-mandated information. *See* Ark. Code § 20-16-1703.

27. As a pregnancy progresses, the cost of care rises substantially due to the increased time and skill required for the procedure. While LRFP does everything it can to help its patients secure the care they need, patients can get caught in a vicious cycle of delaying care until they can raise the money to obtain it, by which point the price may have further increased.

Arkansas Already Extensively Regulates Abortion

28. Extensive regulations relating to abortion care are also currently enforced. For example:

a. Any woman seeking an abortion must be evaluated via a medical history, a physical examination, counseling, and laboratory tests. *See* Ark. Admin. Code. 007.05.2-8.

b. Facilities providing abortions must have various medical tools available to assist in the event of complications. *See id.*

c. Arkansas regulations require abortion facilities to have a certain number of qualified personnel available to provide direct patient care. *See id.* 007.05.2-7.

d. Arkansas abortion facilities must also satisfy a variety of ongoing obligations to educate staff about best practices and to assess their own services. *See id.* 007.05.1-10, 2-5, 2-6(G), 2-7(D).

29. In recent years, Arkansas has engaged in a targeted campaign to restrict access to abortion care. It enacted more than 25 laws obstructing and interfering with women's access to abortion care in the State,[2] including at least 12 enacted in 2019 alone.[3]

LRFP's Initial Response to COVID-19

30. On March 11, 2020, Governor Asa Hutchinson issued Executive Order 20-03, declaring a state of emergency in Arkansas due to the outbreak of the COVID-19 virus. Ten days later, on March 21, 2020, ADH issued a public statement (the "March 21 Guidance") recommending that health care facilities and clinicians "prioritize urgent and emergency visits and

[2] *See, e.g.*, 2018 Ark. Act 234, § 19 (prohibiting expenditure of state funds for abortion referrals in public schools and for abortion services); 2018 Ark. Act 243, § 24 (same); 2018 Ark. Act 244, § 25 (same); ARK. CODE ANN. §§ 20-16-1801 to 1807 (2019) (banning most common method of second-trimester abortion); *id*. § 20-16-1801 (requiring physicians to delay a woman's abortion while they request and wait for a woman's medical records); *id*. § 20-16-108(a)(1) (requiring disclosure of abortion and preservation of fetal tissue for abortion patients under the age of 17); *id*. §§ 20-17-801, 802 (imposing burdensome and confusing requirements regarding disposal of fetal tissue); *id*. § 20-9-302 (mandating the imposition of extreme penalties, such as license revocation, for violation of the many requirements imposed on abortion providers); *id*. §§ 20-16-801 to 817 (mandating parental consent for a minor's abortion); *id.* § 20-16-1504 (banning off-label use of abortion inducing drugs, and requiring any facility providing medication abortion to "have a signed contract with a physician who agrees to handle complications" who has "active admitting privileges and gynecological/surgical privileges at a hospital designated to handle any emergencies associated with the use or ingestion of the abortion-inducing drug"); *id.* § 20-16-1703 (mandating 48-hour delay before an abortion and two, in-person trips to facility); *id.* § 20-16-1602 (banning public funding to any individual or entity that provides, counsels in favor of, or refers for abortion); *id.* §§ 20-16-1301 to 1307 (banning abortion at 12 weeks, requiring abdominal ultrasound to detect fetal cardiac activity, and mandating disclosure of cardiac activity if present) (ban at 12 weeks struck down by *Edwards v. Beck,* 786 F.3d 1113 (8th Cir. 2015)); *id.* §§ 20-16-1401 to 1410 (banning abortion after 20 weeks post-fertilization); *id.* § 23-79-156 (banning abortion coverage in state insurance exchange plans).

[3] *See*, *e.g.*, ARK. CODE ANN. § 20-16-605 (2019) (imposing additional abortion-related reporting requirements on physicians and facilities); *id.* § 5-61-301 to 304 (asking the Supreme Court to overturn *Roe v. Wade* and providing that, upon reversal, state law will prohibit abortions except to save the life of a pregnant woman); *id.* § 20-9-203(b)(1) (imposing additional requirements on abortion facilities); *id.* § 20-16-604, -811, -1109 (imposing additional reporting requirements and penalties on doctors providing abortions); *id.* § 20-16-1703, -1706 (extending waiting period between doctor providing required disclosures to woman seeking abortion and provision of abortion from 48 to 72 hours, and increasing information doctor must provide); *id.* § 20-16-1703(b)(9), -1704(b)(6) (imposing additional disclosure requirements on doctors providing abortion-inducing drugs); 2019 Ark. Act 877, § 23 (prohibiting expenditure of state funds for abortion referrals in public schools and for abortion services); 2019 Ark. Act 752, § 18 (same); 2019 Ark. Act 727, § 24 (same).

procedures now and for the coming several weeks."[4] The letter's stated goals were to "preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic." The ADH stated that "[p]rocedures … that can be safely postponed shall be rescheduled to an appropriate future date." The ADH's guidance also provided specific exemptions for "small rural hospitals under 60 beds," and clarified that procedures should proceed if there is risk of "progression of staging of a disease or condition if surgery is not performed." The ADH reiterated this guidance in another letter issued on March 30, 2020.

31. In the meantime, beginning in mid-March, LRFP began to implement measures to protect its patients and staff, following guidance from national medical organizations. LRFP determined that it would cease providing basic gynecological care—i.e., pap smears, STD testing, and contraceptive counseling and services—and that, where possible and permitted by law, prescriptions would be administered over the phone. LRFP also began performing enhanced telephonic and in-person screening of patients for COVID-19 symptoms, and staggering patient appointment times to reduce the number of patients at the facility at any given time, minimizing possibilities for exposure.

32. LRFP expanded on and formalized these precautions in its April 2, 2020 COVID-19 Response Protocol (the "LRFP Protocol"). That protocol sets forth detailed information about (1) postponement of LRFP services for which delay would not risk harm to the patient (i.e., certain gynecological care); (2) screening patients for symptoms of infection, both telephonically and on site; (3) staggering appointment times in order to minimize in-person contact and shorten the time patients spend in the clinic; (4) spacing individuals at least 6 feet apart in waiting areas to comply

[4] Ex. A.

with the State's and CDC's "social distancing" guidelines; (5) limiting visitors and support people by requiring that they sit in cars or return home until patients are ready to be picked up; (6) performing temperature checks on all individuals entering the building (including staff); and (7) enhancing infection control protocols with frequent clinic sanitization and education of patient etiquette.

33. Given these changes, no more than 6 to 8 patients are in LRFP's waiting room at any given time, and once patients are checked in for care, they are in individual treatment rooms except for the time they spend in recovery, during which they are at least 6 feet apart.

34. The LRFP Protocol also states that "LRFP is aware of the PPE shortage our healthcare system is currently facing," and "is committed to using only the PPE that is necessary to protect [its] patients and staff."

35. LRFP is self-sustaining in terms of PPE for the next several months, and has not availed itself of any PPE offered by the State's medical society.

36. LRFP has no intention of utilizing any State PPE stockpiles or resources, and is prepared to switch to cloth/reusable masks should it become necessary.

37. At LRFP, the use of N-95 masks, the PPE that appears to be in shortest supply in battling the COVID-19 pandemic, is limited to two staff members who self-sourced their masks and have underlying conditions or live with someone who does.

38. Likewise, because all LRFP's procedures are performed in its own outpatient facility, LRFP is not using any hospital resources that may be needed for COVID-19 response—no hospital staff or supplies, no hospital beds (let alone ICU beds), and no ventilators.

39. LRFP is strictly adhering to its Protocol.

Continued State Action Against LRFP And Its Patients

40. On April 1, 2020, representatives from the ADH twice called LRFP to inquire about what the clinic was doing to reduce non-essential services, preserve PPE, and protect against the spread of COVID-19. On both occasions, LRFP summarized the practices outlined in the LRFP Protocol discussed above. At no point during either conversation did the ADH representatives suggest that LRFP was not complying with the State's elective-surgery guidance.

41. On April 3, 2020, the ADH issued a Directive reiterating the goals and instructions from the ADH's March 21 Guidance (the "April 3 Directive").[5] The April 3 Directive, like the March 21 Guidance before it, was not intended to stop the provision of medical care in the State; rather, it again stated that only "[p]rocedures . . . that can be safely postponed shall be rescheduled to a future date." It further stated that "urgent" care and "care designated as an exception . . . will continue," with the latter "exception" category including situations in which "there is a risk of . . . progression of staging of a . . . condition if surgery is not performed." Small rural hospitals with fewer than 60 beds and critical access hospitals are exempted from the Directive.

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

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[5] Ex. B.

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

43. On April 4, 2020, Governor Hutchinson issued Executive Order 20-13, declaring "the entire state an emergency disaster area," and prohibited "gatherings of more than ten (10) people in any confined indoor or outdoor space . . . until further notice."[7] The Governor declined, however, to issue a stay-home order to all Arkansas residents, and continued to permit "gatherings of ten (10) or more people in . . . parks, trails, athletic fields and courts, parking lots, golf courses, and driving ranges where social distancing of at least six (6) feet can be easily maintained." The Order also does "not apply to businesses, manufacturers, construction companies, places of worship, the Arkansas General Assembly, municipal or county governing bodies, or the judiciary," though those entities were also advised to maintain appropriate social-distancing practices. Finally, the Order stated that "pursuant to Ark. Code Ann. § 20-7-101, violation of a directive from the Secretary of Health during this public health emergency is a misdemeanor offense, and upon conviction thereof is punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment not exceeding one (1) month, or both." Executive Order 20-13 is scheduled to expire on May 11, 2020, but may be extended.

44. Protestors appear at LRFP nearly every day that it provides abortion care, including during the pandemic. After the issuance of the April 3 Directive, the harassment and intimidation from on-site protestors—who recklessly fail to exercise proper social distancing—significantly increased. They summoned police to the clinic twice. Since the start of COVID-19 concerns, social-media complaints against the clinic have likewise increased, including some specifically requesting action by the Governor and state legislators to stop the provision of abortion care. For example, on March 29, 2020, state senator Trent Garner announced in a tweet

[7] Ex. C.

that he had "asked the Governor to [ban abortions] in Arkansas …. We shouldn't expose women to the risk of the Wuhan COVID-19 virus for an unnecessary elective procedure, and we could save the unborn babies."[8]

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

46. On April 8, 2020, the Governor gave an interview to PBS during which he discussed Arkansas's "targeted" approach to managing risks relating to COVID-19.[9] When asked whether he thinks "that by not requiring or ordering people to stay home, unless they have to be out, is not putting other people at risk," the Governor responded "No." He elaborated that "as long as they do what they're supposed to do, which is social distance, wear a mask when you're out, this accomplishes the purpose." The Governor further said that currently in the State, there are "a lot of hospitals that are empty right now and health care workers that are empty," presumably meaning that they are available to provide care.

47. On April 9, the Governor and Dr. Smith were asked at a press conference if "elective surgery" is still permitted in the State, and Dr. Smith responded that judgments at surgical centers would be left primarily to the providers.[10] At no point during the conference did the Governor or Dr. Smith suggest that surgical abortion care is not permissible under the April 3 Directive.

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[8] Ex. D.

[9] Ex. E (*available at* https://www.pbs.org/newshour/show/arkansas-gov-asa-hutchinson-on-why-he-hasnt-issued-a-stay-at-home-order.).

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

48. Then, on the morning of April 10, ADH inspectors hand delivered a cease-and-desist order to LRFP (the "C&D Order").[11] It acknowledged that the April 7 inspection "did not reveal any deficiencies with respect to the rules for abortion facilities in Arkansas," but asserted that LRFP was "in violation of the April 3, 2020 Arkansas Department of Health Directive on Elective Surgeries." The C&D Order stated that the April 3 Directive "mandates the postponement of all procedures that are not immediately medically necessary during the COVID-19 emergency," and thus, according to ADH, the "prohibition applies to surgical abortions that are not immediately necessary to protect the life or health of the patient." The C&D Order ordered LRFP to "immediately cease and desist the performance of surgical abortions, except where immediately necessary to protect the life or health of the patient." The C&D Order thus rewrote the terms of the April 3 Directive for LRFP alone. The C&D Order also stated that "[a]ny further violations of the April 3 Directive will result in an immediate suspension of [LRFP's] license." On April 10, LRFP was scheduled to provide surgical-abortion care to 8 patients whom LRFP had to turn away, including one patient at 17 weeks LMP.

49. Later on April 10, the Governor and Dr. Smith held a press conference regarding COVID-19. Consistent with Governor Hutchinson's decision that same week to close Arkansas's public schools for the remainder of the school year, Dr. Smith admitted that he "can't say with certainty" how long the C&D Order against LRFP will be in place.[12] When a reporter pressed a question regarding whether the C&D Order means that "some of [the women who would otherwise visit LRFP] are going to have a baby," the Governor deflected and avoided the critical inquiry by instead asking, "[i]s there a remote [i.e., telephonic] question"?

[11] Ex. F.

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

50. Meanwhile, a range of medical services continued at facilities around the State. To take just one example, the ADH has expressly permitted orthodontists to continue seeing patients to adjust their orthodontic wires and appliances, and dentists may treat patients whom complain of a cracked tooth.[13] And Arkansas has relaxed telemedicine rules for every medical treatment except abortion—indeed, even the pre-abortion-care, state-mandated informed-consent process must still occur in-person.

51. On April 23, ADH issued a new directive effective April 27 (the "April 27 Directive"), that modifies the April 3 Directive.[14] The April 27 Directive mandates seven "requirements for the resumption of elective procedures." Among other requirements, "[f]or an asymptomatic patient to be a candidate for a procedure, he/she must have at least one negative COVID-19 NAAT test within 48 hours prior to the beginning of the procedure." The April 27 Directive again exempts rural hospitals and critical access hospitals from its requirements.

52. On April 24, Plaintiffs asked ADH to confirm that ADH has withdrawn its C&D Order to LRFP, which provided that no surgical abortion care could occur unless "immediately necessary to protect the life or health of the patient."[15] ADH did not respond.

53. On April 29, ADH Chief Physician Specialist Dr. James Bledsoe hosted a teleconference with medical providers around the State regarding the April 27 Directive. During the teleconference, Dr. Bledsoe was unable to identify any clinic, facility, or laboratory that can consistently provide COVID-19 testing within a 48-hour turnaround.

54. On April 30, Governor Hutchinson and Defendant Smith held a press conference during which Dr. Smith stated that the State has established a relationship with American

[13] Ex. G.

[14] Ex. L.

[15] Ex. M.

Esoteric Laboratories ("AEL") in Memphis, Tennessee, under which AEL has purportedly agreed to provide 1,000 COVID-19 tests a day for Arkansas medical providers with a guaranteed 24-30 hour turnaround.[16] ADH has also stated publicly that it is available to assist providers in accessing rapid testing for their patients.

55. On April 30, LRFP contacted AEL and inquired as to COVID-19 testing availability.[17] AEL told LRFP that it cannot guarantee a 48-hour turnaround for COVID-19 testing results.[18] LRFP contacted ADH for assistance establishing a relationship with AEL, but has received no response.[19]

56. In addition to AEL, LRFP has contacted more than 15 hospitals, urgent-care facilities, clinics, diagnostic centers, and private laboratories in and around Little Rock, Arkansas, but has not identified a location that is (i) willing to test asymptomatic patients, and (ii) able to reliably turnaround results within 48 hours. During the week of April 27, LRFP turned away more than 50 patients who sought care at the clinic, including 14 who attempted but were unable to obtain COVID-19 testing results within 48 hours of their procedure.[20]

Medical Experts Have Determined That Abortion Care Remains Critical And Time-Sensitive, Even During The COVID-19 Pandemic

57. The continued provision of abortion care, alongside measures to protect patients and the public, is consistent with recommendations from leading medical organizations.

a. The American College of Obstetricians and Gynecologists ("ACOG"), the American Board of Obstetrics & Gynecology, the American Association of Gynecologic

[16] Channel for Gov. Asa Hutchinson, *Governor Hutchinson Provides COVID-19 Update*, YouTube (Apr. 30, 2020), https://www.youtube.com/watch?reload=9&v=M6dby_zfIOY.
[17] Ex. N ¶ 4.
[18] *Id*.
[19] *Id.* ¶ 5.
[20] *Id.* ¶ 6.

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 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."[21]

b. The Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery" concurs 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."[22]

c. The American Medical Association ("AMA")—the country's largest medical organization and one of its foremost authorities on medical and public health matters—concurs with this conclusion. The AMA's March 30, 2020 *Statement on Government Interference in Reproductive Health Care* disapproves of efforts "to ban or dramatically limit women's reproductive health care" during the COVID-19 outbreak by "labeling procedures as 'non-

[21] Ex. H (*available at* https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.).

[22] Ex. I (*available at* https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-guidance.).

urgent.'"[23]

d. On April 4, 2020, the World Health Organization ("WHO") issued a similar statement concluding that "[a]bortion is considered an essential service during the coronavirus pandemic" and that "services related to reproductive health are considered to be part of essential services during the COVID-19 outbreak."[24]

There Is Little, If Any, Benefit To Requiring COVID-19 Testing Before Surgical Abortion Care at LRFP

58. Requiring surgical abortion patients to obtain a negative COVID-19 test within 48 hours of their procedure results in little, if any, benefit to Arkansas's fight against COVID-19.

a. As a threshold matter, the efficacy of the existing tests is questionable. Clinical pathologists and laboratory scientists at the Cleveland Clinic, for example, said that a common rapid-testing system developed by Abbott Laboratories produces high levels of false negatives.[25]

b. There is also a nationwide shortage of COVID-19 tests.[26] Deploying the limited supply for asymptomatic patients seeking surgical abortion care at an out-patient facility where measures are already underway to reduce the risk of COVID-19 transmission is unnecessary and a waste of resources.

c. Moreover, providing abortion care to someone who has a negative COVID-19 test requires just as much PPE as seeing an asymptomatic patient who hasn't been able to secure a test. In fact, conditioning a patient's abortion on obtaining a negative test requires the use of more PPE: Attempting to secure the necessary results within 48 hours of a procedure requires

[23] Ex. J (*available at* https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproductive-health-care.).

[24] Ex. K (a summary of the WHO's statement is accessible at https://dailycaller.com /2020/04/04/who-abortion-essential-coronavirus-covid-19/.).

[25] Ex. O ¶ 13.

[26] *Id.* ¶ 14.

patients to secure at least one, and sometimes more, actual tests—all of which require PPE to administer. Likewise, the testing requirement means more trips outside the home and more interactions with medical providers than abortion care otherwise would entail.

Forcing Women To Continue Their Pregnancies Amid COVID-19 Is Harming Patients And Arkansas's Health Care System

59. The COVID-19 pandemic has exacerbated the already-significant obstacles that women seeking abortion care in Arkansas face. Many women are unable to seek care at LRFP before 10 weeks LMP or have disqualifying medical conditions that make them ineligible to obtain a medication abortion.

60. Unless the Court enjoins the COVID-19 Abortion Ban, some women will be completely deprived of their ability to get an abortion at all and will be forced to have a child against their will. Other women will, at best, unnecessarily face the risks of continued pregnancy, and the increased and wholly unnecessary risks associated with delayed abortion care. Some will be pushed to the more complex and lengthier procedure necessary after approximately 13 weeks LMP; others whose pregnancies are pushed past 18 weeks LMP will be required to make an additional visit to the clinic to obtain the care they need. All that assumes, however, that these women will be able to obtain care when the COVID-19 Abortion Ban is lifted; LRFP has limited staff and capacity, and likely will not be able to treat all the women who would need near-term care after waiting and being delayed for weeks—if not months. And given that the public-health crisis is expected to last weeks if not months longer, many others will be pushed past the point at which they can obtain an abortion in Arkansas at all.

61. For women who are unable to access care in the State, there are no good options: The next-nearest clinic providing surgical abortions is in Memphis, Tennessee (a more than 600-mile roundtrip drive from Fayetteville, Arkansas), but that clinic provides care only up to 19.6

weeks LMP. Some women will thus be forced to travel to Granite City, Illinois, which is not only a more-than-700-mile roundtrip drive from Little Rock, but it is in a state with a far higher incidence of COVID-19. (Illinois has reported 58,505 cases of COVID-19 and 2,559 deaths, whereas Arkansas has 3,372 reported cases and 72 deaths). And there is no guarantee that the clinic in Granite City will have the capacity to treat women who would have otherwise obtained care in Arkansas.

62. Even if women obtain treatment outside Arkansas, they do so only at a heightened risk of contracting COVID-19 and carrying it back to this State.

63. Many of LRFP's patients will not even be able to make the trip and will instead be forced to carry to term against their will or seek to terminate their pregnancy outside the medical system.

64. Every day that a woman remains pregnant against her will, she not only experiences the emotional and physical consequences detailed above, but also risks contracting the COVID-19 virus, thereby further jeopardizing her ability to visit a clinic and receive time-sensitive care. In addition, the longer a woman remains pregnant—and especially if forced to carry a pregnancy to term—the heavier burden she places on the health care system, the more interactions she must have with a variety of clinicians and staff, and the much greater use of PPE her care requires. There is a 15 to 20 percent risk of miscarriage present in every pregnancy. Complications from miscarriage include infection, hemorrhage, and even death. In about half of miscarriages, women will seek medical attention. Even an uncomplicated pregnancy typically requires a minimum of one prenatal appointment per month, along with additional appointments to complete laboratory tests and ultrasounds. And for a complicated or high-risk pregnancy, the number of visits frequently doubles. Moreover, pregnant women commonly experience

shortness of breath, vomiting, and other symptoms that are also common symptoms of COVID-19 and are advised to seek prompt medical attention for these conditions; appropriate medical care for pregnant patients during the COVID-19 pandemic is therefore even more complicated, and will frequently lead to the isolation and hospitalization—with PPE use—of pregnant patients who could have the infection.

65. Virtually all births in Arkansas occur in hospitals, and pregnant patients typically present at a hospital one or more times prior to actual delivery. An uncomplicated birth is attended by at least four clinicians, over a considerable labor period, with significant use of PPE. A complicated birth involves 6-7 providers with even more PPE. One-third of pregnancies result in caesarean section, a major abdominal surgery. And after giving birth, patients remain in the hospital for multiple days. Throughout labor, delivery, and recovery, patients are having repeated close contact with large numbers of people in the hospital and taking up hospital beds. Even with this extensive health care before and during delivery, Arkansas has one of the highest rates of maternal mortality in the country.

66. Banning surgical abortion is thus flatly contradictory to Arkansas's stated objectives in issuing ADH's elective-surgery guidance: Banning abortion does not preserve PPE, but rather increases the overall need for it. And it does not reduce, but rather exacerbates, contact with other individuals and burden on the healthcare system. That Arkansas has continued to allow a variety of non-essential activities to continue during the pandemic—including significant retail activity, leisure time on golf courses and driving ranges, exercise at gyms (beginning May 4), small-group fairs and festivals, and healthcare of any kind at rural hospitals—while banning or severely restricting surgical abortion under the pretext that abortion is a non-urgent healthcare service reveals the COVID-19 Abortion Ban for what it is: part of the

State's long-running campaign to severely restrict or outright eliminate women's ability to access constitutionally guaranteed health care.

67. Indeed, ADH's Directives Regarding Elective Surgeries, together with Executive Order 20-13 and its enforcement actions (including frequent inspections of LRFP), and the C&D Order, have and are continuing to bar patients from obtaining the pre-viability abortion care to which they are entitled. For example:

a. During the week of April 14, 2020, LRFP had 12 patients on its schedule who were who were not candidates for a medication abortion and were barred by the C&D Order.

b. On April 16, 2020, LRFP had at least 8 patients on its schedule who would be pushed past the legal limit for abortion care in Arkansas, if they do not obtain care before May 11, 2020, and were barred by the C&D Order.

c. During the week of April 27, 2020, LRFP had to turn away more than 50 women who sought surgical abortion care, including 14 who attempted and were unable to obtain a COVID-19 test and result within 48 hours of their abortion, as the April 27 Directive now requires.

d. On Friday, May 1, 2020, LRFP was scheduled to provide care to three women who were within days of the legal limit for abortion care in Arkansas: (i) one who was 20.6 weeks LMP, (ii) one who was 21.2 weeks LMP, and (iii) one who was 21.3 weeks LMP. Despite their best efforts, none of them were able to obtain a COVID-19 test and result within 48 hours of their abortion, as the April 27 Directive requires. None were able to obtain care at LRFP. LRFP is scheduled to provide care during the week of May 4 to at least two women who are at least 19 weeks LMP.

68. LRFP faces further enforcement orders, as well as civil and criminal liability from

Defendants, unless it complies with the ADH Directives and thereby deprives its patients of access to abortion care. Thus, the patients referenced above and other patients who seek care from LRFP will be pushed past the legal limit, and others will be delayed such that they need a more complex and expensive procedure, should LRFP be able to provide them care at some point in the future. The COVID-19 Abortion Ban is not only denying and delaying access to abortion, but also putting patients through fruitless and stressful searches for COVID-19 testing. The untenable testing requirement and the effective ban on surgical abortion care also push women to attempt to travel to other states and then return to Arkansas. Absent an injunction from this Court, all of these harms will continue. Absent an injunction from this Court, Defendants may seek to hold the Plaintiffs civilly or criminally liable for their provision of surgical abortion care to patients during the COVID-19 state of emergency. Absent an injunction from this Court, Defendants may also seek to revoke or suspend Plaintiffs' licenses.

SUPPLEMENTAL CLAIMS FOR RELIEF

COUNT I

(Substantive Due Process)

69. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 68 of this Complaint.

70. Because the COVID-19 Abortion Ban imposes a ban or severe restriction on access to abortion prior to viability, completely denying some patients care because it pushes them past the legal limit, severely delaying others, and forcing patients to attempt to secure unavailable rapid testing—and imposes significant burdens on women seeking abortion in Arkansas with minimal or no medical or safety benefit—the Ban violates Plaintiffs' patients' right to privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

COUNT II

(Equal Protection)

71. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 68 of this Complaint.

72. The COVID-19 Abortion Ban violates Plaintiffs' and their patients' right to equal protection of the laws, guaranteed by the Fourteenth Amendment to the U.S. Constitution, by treating abortion providers and patients seeking abortion differently than other health care providers and patients, without adequate justification.

COUNT III

(Unconstitutional Vagueness)

73. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 68 of this Complaint.

74. The COVID-19 Abortion Ban is unconstitutionally vague because it fails to give fair notice of the conduct prohibited, in violation of the Due Process Clause of the Fourteen Amendment. It is impossible to determine what specific medical procedures the Arkansas Health Department's April 3 and April 27 Directives on Elective Surgeries prohibits clinicians from providing their patients. Because of the lack of precise standards to judge compliance, Defendants will be free to interpret these provisions in a discriminatory and inconsistent basis.

INJUNCTIVE RELIEF

75. If the COVID-19 Abortion Ban continues to be enforced, Plaintiffs and their patients will be subject to irreparable harm for which no adequate remedy at law exists.

76. Enforcement of the COVID-19 Abortion Ban will continue to cause irreparable harm by threatening Plaintiffs and their staff with substantial criminal penalties for providing

abortion services and risk that their licenses will be suspended or revoked; and by substantially burdening—or preventing altogether—Plaintiffs' patients' access to abortion in Arkansas.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

A. To immediately issue preliminary and permanent injunctive relief, restraining Defendants, their employees, agents, successors in office, and anyone acting in concert with them, from enforcing the COVID-19 Abortion Ban and from denying patients in Arkansas access to surgical abortion care, especially those who will be unable to access care before the legal limit for abortion care in the State.

B. To enter a judgment declaring that the COVID-19 Abortion Ban violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;

C. To enter a judgment declaring that the COVID-19 Abortion Ban violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

D. To enter a judgment declaring that the COVID-19 Abortion Ban is unconstitutionally vague; and

E. To grant such other and further relief as the Court deems just and proper.

Dated: May 3, 2020

Respectfully submitted,

Leah Godesky*
Christopher Burke*
Attorney for Plaintiffs
O'Melveny and Myers LLP
Times Square Tower
7 Times Square
New York, New York 10036
lgodesky@omm.com
Tel: (212) 326-2254
Fax: (212) 326-2061

Kendall Turner*
Ashley Robertson*
Maya Zagayer*
Attorneys for Plaintiffs
O'Melveny and Myers LLP
1625 Eye St. NW
Washington, DC 20006
(202) 383-5300
kendallturner@omm.com

Attorneys for Plaintiffs

Ruth E. Harlow*
American Civil Liberties Union Foundation
125 Broad St, 18th Floor
New York, NY 10001
mburrows@aclu.org
tcamp@aclu.org
(212) 549-2633

Attorneys for Plaintiffs

** Motion for admission pro hac vice granted*

Bettina Brownstein (AR Bar No. 85019)
Bettina E. Brownstein Law Firm
904 West 2nd Street, Suite 2
Little Rock, AR 72201
(501) 920-1764 – Telephone
E-Mail: bettinabrownstein@gmail.com

Brooke-Augusta Ware (AR Bar No. 2004091)
Mann & Kemp, PLLC
221 West Second Street, Suite 408
Little Rock, Arkansas 72201
brooke@mannkemp.com

(501) 222-7330

On Behalf of the Arkansas Civil Liberties Union Foundation, Inc.

Attorney for Plaintiffs

VERIFICATION

I, Lori Williams, hereby verify and declare under 28 U.S.C. § 1746 and penalty of perjury that the following is true and correct: (1) I am the Clinical Director of Plaintiff Little Rock Family Planning Services ("LRFP"), (2) I have read the foregoing verified First Supplemental Complaint and know its contents, and (3) the matters therein are true to my own knowledge and belief.

The sources of my knowledge and belief are (1) my participation in this litigation, (2) my years of work as a nurse and LRFP's Clinical Director, (3) information learned from publicly available literature relating to abortion care, and (4) information learned from public reports regarding Arkansas's response to the COVID-19 pandemic.

Dated: May 3rd, 2020

Lori Williams APRN

Lori Williams
LRFP Clinical Director

EXHIBIT A

Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Secretary of Health

March 21, 2020

In view of the uncertainty and increase in cases of COVID -19 there are increasing concerns of hospital beds availability as well as staff capabilities in hospitals statewide. For this reason, the Arkansas Department of Health is recommending that elective surgery be postponed statewide. The Centers for Disease Control and Prevention (CDC) recommends that healthcare facilities and clinicians should prioritize urgent and emergency visits and procedures now and for the coming several weeks. The following actions can preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic.

- Procedures, testing, and office visits that can be safely postponed should be rescheduled to an appropriate future date.
- Routine dental and eyecare visits should be postponed.
- Emergent, urgent and time-sensitive care will continue.

Small rural hospitals under 60 beds and critical access hospitals, though strongly advised to follow this guidance to maximize resources, are excluded from this guidance.

Exceptions to this guidance should be made in the following circumstances:

- If there is a threat to the patient's life if the procedure is not performed.
- If there is a threat of permanent dysfunction of an extremity or organ system if the surgery is not done.
- If there is a risk of metastasis or progression of staging of a disease or condition if surgery is not performed.
- If there is a risk that the patient's condition will rapidly deteriorate if surgery is not done, and there is a threat to life, or to an extremity or organ system, or of permanent dysfunction or disability.

https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/index.html

EXHIBIT B

Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Secretary of Health

April 3, 2020
ADH Directive on Elective Surgeries

The Secretary of Health, in consultation with the Governor, has sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout Arkansas, as necessary and appropriate to control disease in the state of Arkansas as authorized by Ark. Code Ann. §20-7-109--110. Based on available scientific evidence, it is necessary and appropriate to take further action to ensure that COVID-19 remains controlled and that residents and visitors in Arkansas remain safe.

Throughout February and March of 2020, the Centers for Disease Control and Prevention (CDC) and the Arkansas Department of Health (ADH) recommended that healthcare facilities and clinicians prioritize urgent and emergency visits and procedures for the coming several weeks. Please see CDC Health Care Facilities Guidance and ADH Health Facilities Guidance.

On March 30, 2020, a guidance letter was sent to all health facilities, including ambulatory surgery centers and abortion facilities. Please see ADH Guidance Letter. In view of the continued uncertainty and increase in cases of COVID-19, there are increasing concerns of staff and medical supplies capabilities in hospitals statewide. The following mandatory actions can preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic.

- Procedures, testing, and office visits that can be safely postponed shall be rescheduled to an appropriate future date.
- Routine dental and eye care visits shall be postponed.
- Emergent, urgent and care designated as an exception below will continue.
- Small rural hospitals under 60 beds and critical access hospitals, though strongly advised to follow this directive to maximize resources, are excluded from this directive.

Exceptions to this directive should be made in the following circumstances:

- If there is a threat to the patient's life if the procedure is not performed.
- If there is a threat of permanent dysfunction of an extremity or organ system if the surgery is not done.
- If there is a risk of metastasis or progression of staging of a disease or condition if surgery is not performed.
- If there is a risk that the patient's condition will rapidly deteriorate if surgery is not done, and there is a threat to life or an extremity or organ system or a threat of permanent dysfunction or disability.

EXHIBIT C

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

TO ALL TO WHOM THESE PRESENTS COME – GREETINGS: EO 20 - 13

EXECUTIVE ORDER TO AMEND EXECUTIVE ORDER 20-03 REGARDING THE PUBLIC HEALTH EMERGENCY CONCERNING COVID-19 FOR THE PURPOSE OF IMPOSING FURTHER RESTRICTIONS TO PREVENT THE SPREAD OF COVID-19

WHEREAS: An outbreak of coronavirus disease 2019 (COVID-19) has spread throughout the world resulting in a global pandemic; and

WHEREAS: On March 11, 2020, by Executive Order 20-03, an emergency was declared in the state as a result of COVID-19, and that emergency is on-going; and

WHEREAS: COVID-19 continues to spread throughout the United States and Arkansas; and

WHEREAS: In response to COVID-19, significant measures have been taken by Executive Order and Directives by the Secretary of Health to limit person-to-person contact, restrict gatherings, and suspend businesses that require significant person-to-person interaction; and

WHEREAS: On March 26, 2020, by Executive Order 20-10, amending Executive Order 20-03, I declared the entire State of Arkansas a disaster area in which ingress and egress to and from, the movement of persons within, and the occupancy of premises therein, may be controlled, pursuant to Ark. Code Ann. § 12-75-114(e)(7); and

WHEREAS: Pursuant to Act 96 of 1913, Ark. Code Ann. §§ 20-7-101 et seq., and the rules promulgated therefore, the Secretary of Health has the authority to impose such quarantine restrictions and regulations upon commerce and travel by railway, common carriers or any other means, and upon all individuals as in his judgment may be necessary to prevent the introduction of communicable disease into the State, or from one place to another within the State; and

WHEREAS: On March 26, 2020, in conjunction with a directive issued by the Secretary of Health, Executive Order 20-10, amending Executive Order 20-03, imposed restrictions on gatherings of ten (10) or more people to limit the spread of COVID-19; and

WHEREAS: Executive Order 20-10 exempted certain entities from the restrictions on gathering; and

WHEREAS: I, as Governor, in consultation with the Secretary of Health, have determined that more actions must be taken to protect the people of the State of Arkansas from COVID-19; and

WHEREAS: All Arkansas citizens must observe proper social distancing, and the Department of Health has issued a directive on proper social distancing protocols for businesses, manufacturers, construction companies, and places of worship; and

WHEREAS: The State of Arkansas prides itself on being a destination for out-of-state guests who travel here to enjoy all that our state has to offer; however, during this health emergency, all resources must be maintained and

preserved to the greatest extent possible for the health and safety of Arkansas citizens; and

WHEREAS: The Secretary of Health has directed that occupancy of commercial lodgings and short-term rentals shall be limited to authorized guests as set forth in the Secretary's directive; and

WHEREAS: Executive Order 20-03 established that no quarantine regulations of commerce or travel shall be instituted or operated by any place, city, town or county against another place, city, town, or county in this or in any other state except by authority of the Secretary of Health; and

WHEREAS: Reasonable city or county curfews and closures of city or county owned parks and facilities, to prevent the spread of COVID-19, shall not be interpreted as a quarantine regulation of commerce or travel, as long as, they are consistent with this order; and

NOW, THEREFORE, I, Asa Hutchinson, Governor of the State of Arkansas, acting under the authority vested in me by Ark. Code Ann. §§ 12-75-101, *et seq.*, do hereby amend Executive Order 20-03 declaring an emergency in the State of Arkansas. The entire state is impacted by COVID-19, and I am declaring the entire state an emergency disaster area. In conjunction with the Directive of the Secretary of Health, I am ordering the following, effective as of 12:01 a.m. on April 6, 2020 until further notice:

(1) The Directives of this order shall supersede the directives of Executive Order 20-10; and

(2) All public and private gatherings of any number of people occurring outside a single household or living unit are subject to the following directives and exceptions:
   a. Due to the high risk of community spread of COVID-19, gatherings of more than ten (10) people in any confined indoor or outdoor space are prohibited until further notice. Gatherings subject to this directive include, without limitation, community, civic, public, leisure, commercial, or sporting events, concerts, conferences, conventions, fundraisers, parades, fairs, and festivals; and

   b. This directive does not apply to gatherings of ten (10) or more people in unenclosed, outdoor spaces such as parks, trails, athletic fields and courts, parking lots, golf courses, and driving ranges where social distancing of at least six (6) feet can be easily maintained; and

   c. This directive does not apply to businesses, manufacturers, construction companies, places of worship, the Arkansas General Assembly, municipal or county governing bodies, or the judiciary; however, these entities are advised to limit person-to-person contact, maintain appropriate social distancing of at least six (6) feet, and adhere to the social distancing protocols mandated by this order; and

   d. The Secretary of Health reserves the right to exercise his authority to prevent the spread of disease in this State if, in his judgment, any of the excluded entities are operating in a manner that is a risk to public health;

(3) All businesses, manufacturers, construction companies, and places of worship shall implement the following social distancing protocols:
   a. Limit the number of people who can enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six-foot distance from one another;
   b. If lines form at a facility (inside or outside), facilities shall mark off six-foot increments at a minimum, establishing where individuals should stand to maintain adequate social distancing;
   c. Provide hand sanitizer, soap and water, or effective disinfectant at or near the entrance of the facility and in other appropriate areas for use by the public and employees, and in locations where there is high-frequency employee interaction with members of the public;
   d. Retail businesses shall provide contactless payment systems or provide for disinfecting all payment portals, pens, and styluses after each use;
   e. Regularly disinfect any high-touch surfaces;
   f. Post a sign at the entrance of the facility informing all employees, customers, and congregants that they should: avoid entering the facility if they have a cough or fever; maintain a minimum six-foot distance from one another; sneeze and cough into one's elbow; not shake hands or engage in any unnecessary physical contact;

(4) Commercial lodgings and short-term rentals, including, but not limited to, hotels, motels, and vacation rentals, shall only permit occupancy for the following authorized guests:
   a. Healthcare professionals;
   b. First responders;
   c. Law enforcement;
   d. State or Federal employees on official business;
   e. National Guard Members on active duty;
   f. Airline crew members;
   g. Patients of hospitals and their families;
   h. Journalists;
   i. Persons unable to return to their home due to COVID-19 travel restrictions;
   j. Arkansas citizens unable to return to their home due to exigent circumstances, such as fire, flood, tornado, or other disaster;
   k. Persons in need of shelter due to domestic violence or homelessness;
   l. Employees of hotels, motels, or other service providers/contractors of a hotel or motel; and
   m. Persons away from their home due to work or work-related travel;

(5) K-12 schools and extracurricular activities, including athletic events and practices, will remain closed for on-site instruction until such time as the Governor and Secretary of Education deem appropriate;
(6) State government employees will continue to conduct business through both remote work and on-site work. On-site government work will be limited to employees that are critical to the necessary function of government during a public health emergency and are required to report to work on site;
(7) Bars, Clubs, and Restaurants shall remain closed for dine-in purposes and remain open for takeaway and delivery only;
(8) Gyms (including fitness centers/clubs, fitness classes, and group fitness studios) and indoor entertainment venues, such as bowling alleys, trampoline parks, and indoor amusement centers, shall remain closed to nonessential functions;
(9) Casinos shall remain closed;

(10) Barbers, Body Art Establishments, Body Art Schools, Cosmetology Establishments and Massage Therapy Clinics/Spas, and Medical Spas shall remain closed;

(11) The directives of the Arkansas Department of Health issued on March 13, 2020, regarding long term health facilities shall remain in effect for the duration of this order;

(12) Cities and counties taking reasonable measures to prevent the spread of COVID-19 by imposing curfews and closing city or county owned parks and facilities shall not be interpreted as a quarantine regulation of commerce or travel. Curfews should not prevent citizens of any age from traveling to and from work, acquiring food or essential goods and services, walking pets, or acquiring exercise outdoors while maintaining social distance of at least six (6) feet;

(13) Executive Orders of the Governor issued pursuant Ark. Code Ann. §§ 12-75-101, *et seq.*, have the force and effect of law. Additionally, pursuant to Ark. Code Ann. § 20-7-101, violation of a directive from the Secretary of Health during this public health emergency is a misdemeanor offense, and upon conviction thereof is punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment not exceeding one (1) month, or both. All law enforcement officers within this state shall enforce the directives of this order and those of the Secretary of Health to preserve the health and safety of all Arkansans during this emergency.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed this 4th day of April, in the year of our Lord 2020.

GREAT SEAL OF THE STATE OF ARKANSAS

Asa Hutchinson, Governor

EXHIBIT D

Trent Garner For Senate
@Garner4Senate

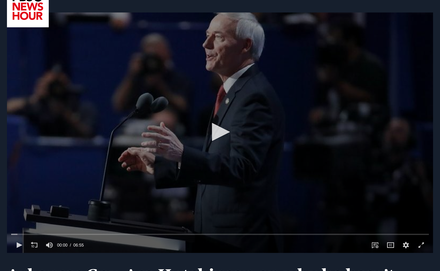
I asked the Governor to do this in Arkansas last week. We shouldn't expose women to the risk of the Wuhan COVID-19 virus for an unnecessary elective procedure, and we could save the unborn babies lives. #arpx #arleg #ARNews lifenews.com/2020/03/27/okl…

Oklahoma Gov Orders Abortion Businesses…
Add Oklahoma to the list of states where the governor has made it clear that abortion businesses must stop kiling babies in abortions
lifenews.com

♡ 8 9:28 AM - Mar 29, 2020

See Trent Garner For Senate's other Tweets

EXHIBIT E



Arkansas Gov. Asa Hutchinson on why he hasn't issued a stay-at-home order

Apr 6, 2020 6:48 PM EDT

Transcript Audio

Arkansas is one of only five U.S. states without a stay-at-home order in place despite the coronavirus pandemic. Its number of confirmed COVID-19 cases passed 1,000 on Wednesday. Gov. Asa Hutchinson joins Judy Woodruff to discuss his state's "very targeted response" to the illness, why he thinks Arkansas residents are effectively social distancing already and the effort to secure more PPE.

Read the Full Transcript

Judy Woodruff:

For states across the country battling coronavirus, grim reminders of the pandemic's toll come every day.

In Arkansas, one of just five states with no stay-at-home order in place, the number of confirmed positive COVID-19 cases crossed 1,000 today.

Republican Governor Asa Hutchinson joins me now from Little Rock.

Governor Hutchinson, thank you very much for joining us.

As we just said, over 1,000 confirmed cases today. How is — how are you doing? How is the state managing all this?

Governor Asa Hutchinson:

We're working hard.

And thanks, Judy, for the opportunity to talk about some of the things we're doing in Arkansas.

We have a very targeted response to this. We have closed schools. We have closed bars and restaurants, tattoo parlors, barber shops, hair salons, and down the list, a very targeted approach to it, in addition, enforcing social distancing.

And I have set the example of wearing masks whenever you can't social distance. We go in stores, probably three-fourths of people have masks on. And that's the kind of effort we're making in slowing the spread. And it's having success.

Yes, we went to over 1,000 cases today. But, as you can see, we — all the projections show that we're beating the projections, we're flattening that curve. And our hospitalization rate is one of the lowest, particularly in our region.

And so, whenever we're having this kind of success, we will measure to see what more we need to do. If we need to do more, we will. But, right now, we are pouring everything we have into this effort.

Judy Woodruff:

As we said, you are one of the handful of states that still has not issued a stay-at-home order to your residents of, what, three-some-million people.

Among others, Dr. Anthony Fauci of NIH has said he thinks all states should do that. We know a number of other experts have said that.

Why did you decide not to?

Governor Asa Hutchinson:

Well, Dr Fauci, since he made that statement, has talked to some of the governors that have not issued a shelter-in-place, and said, you're doing things that are complementary to what we need to be done.

He was very happy with the path. And he made that comment the other day nationally, whenever he was asked. I think they're starting to realize what we're doing is successful and supports that national effort.

You asked about a shelter-at-home. If we did that tomorrow, or I did it today in Arkansas, you always exempt essential services, which means that 700,000 Arkansans would get up tomorrow morning and go to work. They would go to the grocery store. They would go out for exercise, which is permitted in all the states.

As I have pointed out, in — Washington state has a shelter-in-place, but the marijuana shops are open. You can still go get your marijuana. So, the exemptions override the rule.

We want to do things that actually work and make a difference. And our social distancing, our wearing masks is what is working in Arkansas.

Judy Woodruff:

So, you don't think that by not requiring or ordering people to stay home, unless they have to be out, is not putting other people at risk?

Governor Asa Hutchinson:

No.

I think that, as long as they do what they're supposed to do, which is social distance, wear a mask when you're out, this accomplishes the purpose, without doing something that really doesn't make a difference, which is acting like you're going to be doing something with a shelter-in-place, when, in fact, everybody can still go out.

People are using their own good judgment. The elderly are staying at home. If you're not needed to be out, they're not going out. And so — and we're doing enforcement efforts.

So, this idea that, just because you don't have a technical shelter-in-place order in place, that you're not doing enough, please look at the data, please look at what we're accomplishing, and we're doing as well or better than many of the neighbors that have those shelter-in-place orders in place.

Judy Woodruff:

And just very quickly, when a mayor of a — someone overseeing a local jurisdiction, as the mayor of Little Rock said they would like to go further where they are, you have said no.

Why?

Governor Asa Hutchinson:

Well, we want to have a statewide policy.

And I have given the mayors, the local jurisdictions authority for limited curfews, or — and to close certain city or county facilities that might be problematic, if people are not following the restrictions on public gatherings.

So, we have enforcement tools in place. We're working together. But it should be a statewide policy whenever we're impacting commerce.

Judy Woodruff:

Governor, are you getting what you need in order to treat the people who come down with the coronavirus in Arkansas?

Governor Asa Hutchinson:

Well, like I said, we have 80 hospitalizations.

We have over 8,000 — about 8,000 available beds. And we have eliminated our elective surgery. And so you can see that we have a lot of hospitals that are empty right now and health care workers that are empty.

But we have about 80 hospitalizations. We're watching it very closely. Our concern is the protective equipment for our health care workers. We have about exhausted the federal stockpile that came to us. And so we're on the market trying to bring it in.

The challenge is getting flights and cargo to deliver those supplies to us from places like China, where we're making the acquisition. So, we have invested $75 million in Arkansas to buy that protective equipment. We hope that arrives soon.

Judy Woodruff:

And, finally, your — those who are out of work, Arkansans who are out of work, small businesses that have had to close down temporarily, how confident are you that these folks are going to get the assistance that they need?

Governor Asa Hutchinson:

Well, I believe they will get the assistance.

The federal money is starting to flow. There will still be some delay, because once the federal paycheck hits the state, we have to actually build a system in order to deliver some of the proceeds from the paycheck protection act.

And we — so, we have got to do a lot of work there. The money for the unemployed is starting to flow. We have processed about 100 — over 100,000 claims to date. And they're starting to get those benefits.

So, the money is flowing. Some of that is going to be a little bit longer. And the money for the larger businesses to keep the employees working and on the payroll, that money is starting to be available through our banks as well.

Judy Woodruff:

Governor Asa Hutchinson of Arkansas, we wish you the very best with all of this.

Thank you very much.

Governor Asa Hutchinson:

Thank you, Judy.

Watch the Full Episode

PBS NewsHour from Apr 08, 2020

More From This Episode

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EXHIBIT F

Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Secretary of Health

April 10, 2020

Little Rock Family Planning
4 Office Park Dr.
Little Rock, AR 72211

RE: Healthcare Facility Complaint Survey
Conducted April 7, 2020

Dear Administrator:

We recently completed an unannounced investigation of your facility following the receipt of a complaint. The investigation was conducted on April 7, 2020, by personnel from Health Facility Services and included a review of medical records and facility staff interviews.

That investigation did not reveal any deficiencies with respect to the rules for abortion facilities in Arkansas.

However, your facility is in violation of the April 3, 2020 Arkansas Department of Health Directive on Elective Surgeries. That directive was posted on the ADH's website on April 3, 2020, and a copy was mailed to your facility on Monday, April 6, 2020. The April 3 Directive mandates the postponement of all procedures that are not immediately medically necessary during the COVID-19 emergency. That prohibition applies to surgical abortions that are not immediately necessary to protect the life or health of the patient.

Your facility was found to be performing surgical abortions that are not immediately necessary to protect the life or health of the patient, and your facility is therefore in violation of the April 3 Directive. Your facility is required to postpone such procedures until after the COVID-19 emergency has ended and the April 3 Directive is withdrawn.

Accordingly, your facility is ordered to immediately cease and desist the performance of surgical abortions, except where immediately necessary to protect the life or health of the patient. Any further violations of the April 3 Directive will result in an immediate suspension of your facility's license.

Sincerely,

Becky Bennett

Becky Bennett
Section Chief, Health Facility Services

EXHIBIT G

Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Secretary of Health

To: Arkansas Dentists
From: Dr. Nate Smith, Secretary of Health
Date: March 23, 2020
Regarding: Directive to Dentists to suspend non-emergent dental care

The Secretary of Health, in consultation with the Governor, has sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout Arkansas, as necessary and appropriate to control disease in the state of Arkansas as authorized by Ark. Code Ann. §20-7-109—110. Based on available scientific evidence, it is necessary and appropriate to take further action to ensure that COVID-19 remains controlled and that residents and visitors in Arkansas remain safe.

The Secretary of Health, as of March 23, 2020, directs and mandates that all dental practitioners follow the recommendation of the Arkansas State Board of Dental Examiners and the American Dental Association that only urgent and emergent dental care take place, and that **non-emergent dental care be suspended** until further notice. This directive and mandate is subject to change as the COVID-19 pandemic progresses.

Urgent dental care treatments, which should be treated as minimally invasively as possible, include the following:

- Severe dental pain from pulpal inflammation.
- Pericoronitis or third-molar pain.
- Surgical postoperative osteitis or dry socket dressing changes.
- Abscess or localized bacterial infection resulting in localized pain and swelling.
- Tooth fracture resulting in pain or causing soft tissue trauma.
- Dental trauma with avulsion/luxation.
- Dental treatment cementation if the temporary restoration is lost, broken or causing gingival irritation.

Other emergency dental care includes extensive caries or defective restorations causing pain; suture removal; denture adjustments on radiation/oncology patients; denture adjustments or repairs when function impeded; replacing temporary filling on endo access openings in patients experiencing pain; and snipping or adjustments of an orthodontic wire or appliances piercing or ulcerating the oral mucosa.

EXHIBIT H

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Clinical | Mar 18, 2020

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Joint Statement on Abortion Access During the COVID-19 Outbreak

The American College of Obstetricians and Gynecologists and the American Board of Obstetrics & Gynecology, together with 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, released the following statement:

"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 CDC, are implementing plans to cancel elective and non-urgent procedures to expand hospitals' capacity to provide critical care.

"While most abortion care is delivered in outpatient settings, in some cases care may be delivered in hospital-based settings or surgical facilities. 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. Abortion is an essential component of comprehensive health care. It is also a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible. The consequences of being unable to obtain an abortion profoundly impact a person's life, health, and well-being.

"The American College of Obstetricians and Gynecologists and the American Board of Obstetrics & Gynecology, together with 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, do not support COVID-19 responses that cancel or delay abortion procedures. Community-based and hospital-based clinicians should consider collaboration to ensure abortion access is not compromised during this time."

Topics: Coronavirus | COVID-19 | Delivery of health care | Health services accessibility | Induced abortion | Medical societies | Obstetric surgical procedures | Organizations | Virus diseases | Women's health services

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Mar 16, 2020

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Mar 6, 2020

ACOG Statement on "Virginity Testing"
Nov 7, 2019

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EXHIBIT I

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.

EXHIBIT J

AMA STATEMENTS

AMA statement on government interference in reproductive health care

MAR 30, 2020

Statement attributed To:
Patrice A. Harris, M.D., M.A.
President, American Medical Association

"While many physicians and health care workers are on the front lines in the COVID-19 pandemic, it is unfortunate that elected officials in some states are exploiting this moment to ban or dramatically limit women's reproductive health care, labeling procedures as 'non-urgent.'

"The AMA will always defend shared decision making and open conversations between patients and physicians, and fight government intrusion in medical care. At this critical moment and every moment, physicians – not politicians – should be the ones deciding which procedures are urgent-emergent and need to be performed, and which ones can wait, in partnership with our patients."

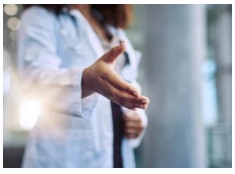
Media Contact:

AMA Media & Editorial
ph: (312) 464-4430
media@ama-assn.org

About the American Medical Association

The American Medical Association is the physicians' powerful ally in patient care. As the only medical association that convenes 190+ state and specialty medical societies and other critical stakeholders, the AMA represents physicians with a unified voice to all key players in health care. The AMA leverages its strength by removing the obstacles that interfere with patient care, leading the charge to prevent chronic disease and confront public health crises and, driving the future of medicine to tackle the biggest challenges in health care.

AMA Press Center | Coronavirus (COVID-19) | Female Population Care



PHYSICIAN HEALTH

COVID-19 front line: Mount Sinai keeps physician well-being in focus

PUBLIC HEALTH

COVID-19: Rebalancing your staff workload to meet care needs

PHYSICIAN RETIREMENT

Retired doctors hear COVID-19 battle call, look for ways to help

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EXHIBIT K

POLITICS

World Health Organization: Abortion Is 'Essential' During Coronavirus Pandemic

(Photo by FABRICE COFFRINI/AFP via Getty Images)

DAILY CALLER NEWS FOUNDATION

MARY MARGARET OLOHAN
SOCIAL ISSUES REPORTER

April 04, 2020
2:02 PM ET

FONT SIZE:

Abortion is considered an essential service during the coronavirus pandemic, the World Health Organization said in a statement Saturday.

The WHO said in its statement to the Daily Caller News Foundation that "services related to reproductive health are considered to be part of essential services during the COVID-19 outbreak."

"Women's choices and rights to sexual and reproductive health care should be respected, irrespective of whether or not she has a suspected or confirmed COVID-19 infection," WHO said in the statement. (**RELATED: Top WHO Official Tedros Adhanom Ghebreyesus Won Election With China's Help. Now He's Running Interference For China On Coronavirus**)

The statement also said that "sexual and reproductive health care is integral to universal health coverage and achieving the right to health."

World Health Organization (WHO) Director-General Tedros Adhanom Ghebreyesus on March 6, 2020, in Geneva. (FABRICE COFFRINI/AFP via Getty Images)

"This includes contraception, quality health care during and after pregnancy and childbirth, and safe abortion to the full extent of the law," the organization added, noting that the WHO provides both global technology and policy guidance to WHO members "on the use of contraception to prevent unintended pregnancy, safe abortion, and treatment of complications from unsafe abortion."

Governors and health departments across the United States have issued decisions on whether or not abortions are considered essential services. Texas, Ohio, Oklahoma, Indiana and Iowa as well as the governor of Mississippi declared abortions non-essential and banned these procedures to preserve PPE for fighting coronavirus. (**RELATED: WHO Official Defends China, Says Everyone Is 'Over-Focused' On Regime's Coronavirus Numbers**)

Meanwhile, Massachusetts, Michigan, Minnesota, Indiana, New Jersey, Illinois, Oregon, Hawaii and Virginia — all states that have banned elective medical procedures — deemed abortions essential during the outbreak.

There have been 1,172,692 cases of the coronavirus worldwide as of Saturday afternoon, and 62,823 people have died from the virus.

Tags : coronavirus roe v wade who

MARY MARGARET OLOHAN

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EXHIBIT L

Arkansas Department of Health

4815 West Markham Street • Little Rock, Arkansas 72205-3867 • Telephone (501) 661-2000
Governor Asa Hutchinson
Nathaniel Smith, MD, MPH, Secretary of Health

Effective April 27, 2020

Directive on Resuming Elective Procedures

The Secretary of Health, in consultation with the Governor, has sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout Arkansas, as necessary and appropriate to control disease in the state of Arkansas as authorized by Ark. Code Ann. §20-7-109--110. Based on available scientific evidence, it is necessary and appropriate to take further action to ensure that COVID-19 remains controlled and that residents and visitors in Arkansas remain safe.

On April 3, 2020, the Secretary of Health, in consultation with Governor Asa Hutchinson, issued a directive that elective procedures in the state would cease. The directive went into detail regarding considerations and exemptions. The Arkansas Department of Health (ADH) has developed requirements for the resumption of elective procedures, so that surgical facilities could perform elective procedures based on a decrease in COVID-19 cases and hospitalizations.

This directive emphasizes the need for facilities to understand their capabilities (e.g., beds, testing, ORs) as well as potential constraints (e.g. workforce, supply chain), while watching for possible subsequent waves of the virus, which may require a return to prior restrictions. Elective procedures shall be limited as follows:

1. Only outpatients with no plans for overnight stay.
2. An American Society of Anesthesiologists rating of I or II. If they are a II-rating, their disease process should be well controlled.
3. No contact with known COVID-19 patients during the past 14 days.
4. Patients must be asymptomatic for COVID-19 per ADH guidelines.
5. Start with a small initial volume of cases and increase incrementally as PPE availability and number of statewide occurrences dictate.
6. Each institution must have an ample supply of PPE for resuming elective procedures while maintaining a reserve should there be a resurgence of the virus. The acquisition of PPE is a matter for each institution to address and is not the responsibility of ADH.
7. For an asymptomatic patient to be a candidate for a procedure, he/she must have at least one negative COVID-19 NAAT test within 48 hours prior to the beginning of the procedure.

These requirements pertain to all elective procedures, including dental, eye, nasopharyngeal, chest surgery, and colonoscopy. Small rural hospitals under 60 beds and critical access hospitals, though strongly advised to follow this directive to maximize resources and minimize risk, are excluded from this directive. The April 3, 2020 directive's exemptions for medically necessary procedures to preserve a patient's life or health also remain in effect.

This directive was developed with input from the Arkansas Chapter of the American College of Surgeons.

EXHIBIT M

Bettina E. Brownstein
904 W. Second St, Suite 2
Little Rock, Arkansas 72201
Tel: (501) 920-1764
E-mail: bettinabrownstein@gmail.com
April 24, 2020

VIA EMAIL

Re: ADH directives, effective dates April 3 and April 27, 2020, and April 10, 2020 ADH Cease & Desist Order.

Laura Shue, Esq.
General Counsel
Arkansas Dept. of Health
4815 W. Markham St.
Little Rock, AR 72205

Dear Laura:

I represent Little Rock Family Planning ("LRFP"). In that capacity, I write to request confirmation by 9 a.m. on April 27, 2020 from the Arkansas Dept. of Health that the Cease & Desist Order issued to Little Rock Family Planning ("LRFP") on April 10, 2020, is no longer in effect, in light of the April 27, 2020, modifications to ADH's April 3, 2020 directive. To that end, please confirm that LRFP may resume providing: (1) surgical abortions within the limitations set forth in the April 27, 2020, directive, as well as (2) any surgical abortions that may be permissible under the April 3, 2020 directive.

Thank you for your attention to this matter.

Cordially,

Bettina E. Brownstein

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES et al., Plaintiffs, v. LESLIE RUTLEDGE, et al., Defendants.	CIVIL ACTION Case No. 4:20-cv-00470-BSM

DECLARATION OF LORI WILLIAMS, M.S.N, A.P.R.N., IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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

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

2. I submit this Declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction.

3. I explained in the April 29, 2020 declaration that I submitted in this litigation (Dkt. 21-5) that since the State's announcement of the April 27 Directive on April 24, 2020, I have contacted more than 15 hospitals, urgent care facilities, diagnostic centers, and private laboratories in and around Little Rock, Arkansas about obtaining rapid and reliable COVID-19 testing for my patients.

4. On April 30, 2020, I saw the Governor and Dr. Nathaniel Smith of the Arkansas Department of Health ("ADH") announce during a press conference that American Esoteric

Laboratories (AEL) in Memphis, Tennessee has agreed to provide COVID-19 tests for asymptomatic patients with a 24-30 hour turnaround. I contacted AEL that same day, and a representative from AEL informed me that asymptomatic patients are able to self-schedule appointments for COVID-19 testing, provided they have a letter from a physician confirming a scheduled surgery. The representative also stated, however, that AEL's turnaround time for test results ranges from one to three days, and that AEL could not guarantee results within 48 hours.

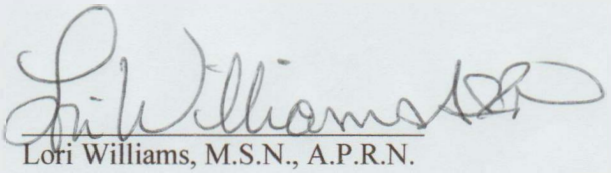
5. On May 1, 2020, I e-mailed ADH.coronaVirus@arkansas.gov to inquire whether the Arkansas Department of Health can assist in facilitating a relationship with AEL that guarantees the turnaround time stated by the Governor and Dr. Smith during the press conference, or if ADH has any other suggestions for compliance with the April 27 Directive. A copy of my e-mail is attached as **Exhibit 1**. I have not yet received a response.

6. Since the April 27 Directive took effect, LRFP has turned away more than 50 patients who sought surgical abortion care in view of the Directive's testing requirements, including 14 patients who attempted but were unable to obtain a COVID-19 test result within 48 hours of their procedure.

7. LRFP is scheduled to provide care this week to at least 2 women who are more than 19 weeks past their last menstrual period ("LMP").

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

Executed this 2nd day of May, 2020.



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

EXHIBIT 1

From: Lori Williams <lorilrfps@sbcglobal.net>
Sent: Friday, May 1, 2020 4:38 PM
To: ADH.coronaVirus@arkansas.gov
Subject: Covid-19 testing

I am reaching out to discuss the difficulties we are having in obtaining COVID-19 testing for our patients within the 48 hours required under the April 27 Directive. After the Governor and Dr. Smith announced during yesterday's press conference that American Esoteric Laboratories in Memphis has committed to guaranteeing a 24-30 hour turnaround for Arkansas patients, I contacted AEL. They told me yesterday that their stated turnaround time is 1-3 days, and they cannot commit to anything faster. Please let me know if you can assist in facilitating a relationship with AEL that guarantees the turnaround time stated by the Governor and Dr. Smith, or if you have any additional suggestions regarding how to comply with this directive.

Lori Williams MSN/APRN
Clinic Director
Little Rock Family Planning Services

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES et al., Plaintiffs, v. LESLIE RUTLEDGE, et al., Defendants.	CIVIL ACTION Case No. 4:19-cv-00449-KGB

DECLARATION OF ALISON STUEBE, M.D., M.Sc., F.A.C.O.G., IN SUPPORT OF PLAINTIFFS' MOTION FOR AN EX PARTE TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I, Alison Stuebe, M.D., M.Sc., F.A.C.O.G., pursuant to 28 U.S.C. §1746, declare under penalty of perjury that the following is true and correct:

1. I am a board-certified maternal-fetal medicine specialist ("MFM") and obstetrician-gynecologist ("OBGYN"). I am also trained in epidemiology, and am familiar with the trajectory of epidemics and the public health measures that are most effective for managing them.

2. I submit this Declaration in Support of Plaintiffs' May 1, 2020 Motion for a Temporary Restraining Order and/or Preliminary Injunction.

3. I submitted a Declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, executed on April 21, 2020 (Dkt. 160-1) (the "April 21 Declaration"). I now provide this supplemental declaration, and reaffirm and incorporate my earlier declarations by reference.

The ADH's April 27, 2020 Directive

4. I have reviewed the Arkansas Department of Health ("ADH") April 27 Directive (the "April 27 Directive"), that modifies ADH's April 3 Directive.[1]

5. The April 27 Directive includes seven requirements for the resumption of elective procedures that had been barred by the April 3 Directive, including that a patient (1) "be asymptomatic for COVID-19 per ADH guidelines," (2) "have at least one negative COVID-19 NAAT test within 48 hours prior to the beginning of the procedure." The April 27 Directive exempts rural hospitals and critical access hospitals from its requirements, as did the April 3 Directive, and does not apply to the urgent care already permitted under the April 3 requirements.

6. Under the current landscape of COVID-19 testing, a 48-hour turnaround for results is possible only with what is commonly referred to as "rapid" testing. Rapid testing is available through a limited number of biopharmaceutical companies (*e.g.*, Abbot Laboratories, and Mesa Biotech).

The April 27 Directive's Impact On LRFP's Patients And Public Health

7. Enforcement of the April 27 Directive to surgical abortions will negatively affect LRFP's patients and the public-health system.

8. *First*, as I previously explained, surgical abortion care is time-sensitive, urgent, and cannot be safely postponed. *See* April 21 Declaration ¶ 23. Surgical abortion care, therefore, does not belong in the April 27 Directive's category of "elective" procedures in the first place, and any delay or added hurdle imposed in an effort to obtain testing is medically

[1] Directive on Resuming Elective Procedures from the Arkansas Department of Health (April 27, 2020) *accessible at* https://www.healthy.arkansas.gov/images/uploads/pdf/ResumeElectiveSurgeryDirectiveFINAL4.23.20.pdf.

inappropriate.

9. *Second*, the harms that arise when women are denied access to or delayed in accessing surgical abortion care are substantially greater than the potential public-health benefits of limiting the accessibility of surgical abortion to patients who are able to get negative tests for COVID-19 within 48 hours of their procedure. Under certain circumstances, delaying a procedure that is non-urgent and can be safely postponed (like a hip replacement or a screening colonoscopy) until a patient can take a rapid COVID-19 test within 48 hours of the procedure would be appropriate as one public health tool (though one with significant limitations that I explain below). But for time-sensitive care like surgical abortion, that care should occur when the patient needs it and based on her specific clinical considerations.

10. In addition, the April 27 Directive assumes the ready availability of rapid testing for LRFP patients. I understand based on Lori Williams's April 30, 2020 Declaration that LRFP has been unable to identify reliable access to rapid testing for its patients. If no rapid testing is available, application of the April 27 Directive to surgical abortion care will delay a woman's ability to receive an abortion, perhaps indefinitely. For all of the reasons described in my earlier declaration, this will have several negative public-health consequences. *See* April 21 Declaration ¶ 29.

11. Moreover, I understand based on information provided in Lori Williams's April 12, 2020 Declaration that LRFP has created and is strictly adhering to a COVID-19 Response Protocol (the "LRFP Protocol"). That protocol sets forth detailed information about (1) postponement of LRFP services for which delay would not risk harm to the patient (i.e., certain gynecological care); (2) screening patients for symptoms of infection, both telephonically and on site; (3) staggering appointment times in order to minimize in-person contact and shorten the time

patients spend in the clinic; (4) spacing individuals at least 6 feet apart in waiting areas to comply with the State's and CDC's "social distancing" guidelines; (5) limiting visitors and support people by requiring that they sit in cars or return home until patients are ready to be picked up; (6) performing temperature checks on all individuals entering the building (including staff); and (7) enhancing infection control protocols with frequent clinic sanitization and education of patient etiquette. In light of the measures that LRFP has implemented through the LRFP Protocol, which identify symptomatic patients and significantly reduce the possibility of in-clinic transmission of COVID-19, the public-health benefits of mandating pre-procedure testing for patients who are asymptomatic for COVID-19 are very small, and pale in comparison to the benefits of letting a woman access essential healthcare at LRFP.

12. The small benefit of pre-procedure testing for asymptomatic patients is reflected in ADH's decision not to require it of rural hospitals or critical access hospitals, where "elective" surgical procedures continue to occur without any limitation.

13. The small public health benefit is especially true given that development of rapid COVID-19 tests is ongoing, and the efficacy of the existing tests are questionable. Several reports have called into question the accuracy of COVID-19 rapid tests.[2] Clinical pathologists

[2] Rachana Pradhan, *Abbott's Fast COVID Test Poses Safety Issues, Lab Workers Say*, Kaiser Health News (Apr. 23, 2020), https://khn.org/news/abbotts-fast-covid-test-poses-safety-issues-lab-workers-say/ ("The Abbott tests have had several other hiccups. For example, the Food and Drug Administration this month said Abbott would revise its instructions after one method for preserving specimens — known as viral transport media — caused inaccurate results because patient samples were too diluted."); Curt Devine and Drew Griffin, *Abbott's rapid tests can produce false negatives under certain conditions*, *the company says*, CNN (Apr. 22, 2020), https://www.cnn.com/2020/04/21/health/abbott-laboratories-coronavirus-rapid-test/index.html ("Clinical pathologists and lab scientists at the Cleveland Clinic said the Abbott system has produced higher false negatives than other devices they tested."); Kristen Brown, *False Negatives Raise Doctors' Doubts About Coronavirus Tests*, Bloomberg (Apr. 11, 2020), https://www.bloomberg.com/news/articles/2020-04-11/false-negative-coronavirus-test-results-raise-doctors-doubts ("False-negative results from coronavirus tests are becoming an increasing concern, say doctors trying to diagnose patients and get a grip on the outbreak, as a surprising number of people show up with obvious symptoms only to be told by the tests that they don't have the disease."); Lydia DePillis and Caroline Chen, *Coronavirus Tests Are Being Fast-Tracked by the FDA, but It's Unclear How Accurate They Are*, ProPublica (Apr. 10, 2020), https://www.propublica.org/article/coronavirus-tests-are-being-fast-tracked-by-the-fda-but-its-unclear-

and lab scientists at the Cleveland Clinic, for example, said a common rapid testing system, developed by Abbott Laboratories, produce high levels of false negatives. The Cleveland Clinic study found that the rapid testing system produced a false-negative rate of 14.8 percent.[3]

14. Furthermore, there is a nationwide shortage of COVID-19 tests. Deploying the limited supply for use on an asymptomatic patient population seeking surgical abortion care at an out-patient facility where stringent measures are already in place to reduce transmission risks is unnecessary and a waste of limited and important resources.

15. *Third*, the April 27 Directive denies abortion care for any patients who are exhibiting symptoms of COVID-19. But, in certain circumstances, it may be reasonable to provide abortion care for certain women, even if they exhibit symptoms of COVID-19. Whether to provide individualized care to these women should be an individualized assessment, based on a specific patient's needs, balanced against any health risks.

16. *Fourth*, the April 27 Directive's rapid-testing requirement creates an additional level of restriction for abortion care compared to other surgeries that the State has characterized as "elective," because Arkansas has yet to waive or transition to telemedicine the requirement that women seeking abortion care receive State-mandated informed-consent information in-person at LRFP, at least 72 hours before their procedure. When the April 27 Directive is combined with the in-person 72-hour consent requirement, a woman seeking an abortion must therefore visit *both* LRFP and a rapid-testing site at specific intervals before the procedure—LRFP to receive the State-mandated informed-consent information (72 hours before the

how-accurate-they-are ("Dr. Yukari Manabe, associate director of Global Health Research and Innovation at Johns Hopkins Medicine, estimates that 10% to 25% of test results are false negatives.").

[3] *Study Raises Questions About False Negatives From Quick COVID-19 Test*, NPR (Apr. 21, 2020), https://www.npr.org/sections/health-shots/2020/04/21/838794281/study-raises-questions-about-false-negatives-from-quick-covid-19-test.

procedure), and testing site for the rapid test (within 48 hours of the procedure). This two-visit pre-procedure requirement is unique to the abortion context and very challenging from a resource and logistics perspective. In contrast to many other "elective" surgical procedures, surgical abortion care is available in Arkansas only at LRFP in Little Rock, which, to the best of my knowledge, can be a nearly 400-mile roundtrip drive from other areas of the State. Ms. Williams explained in her April 12, 2020 Declaration that even before the pandemic, her patients—many of whom are low income or in poverty—struggled to overcome the logistical and economic barriers to care. The additional testing requirement therefore puts even more logistical and financial stress on women seeking abortions, as there is a tremendous amount of coordination needed to correctly time and accomplish the two requirements. Additionally, patients must necessarily come into contact with the healthcare system (72 hours before the procedure) before they undergo the rapid test (within 48 hours of the procedure)—this itself defeats the purpose of the testing requirement.

17. *Fifth,* the April 27 Directive will likely increase stress on the public-health system. As I described in my earlier declaration, once a woman is pregnant, it is a progressive condition, and therefore inevitable that she will have contact with medical providers. *See* April 21 Declaration ¶¶ 29, 31. If women are denied access to abortion and thus forced to continue their pregnancies under the April 27 Directive, most will come in contact with the broader healthcare system through miscarriage management, prenatal care, medical care necessitated by any complications that arise during pregnancy, and/or labor and delivery. *See* April 21 Declaration ¶ 29. Because this kind of care is exempted from the Directives, women will receive care for labor and delivery without regard to whether they test positive for COVID-19, including potentially at hospitals staffed with COVID-19 first responders. By preventing women

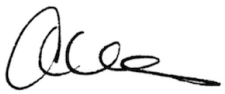
with undesired pregnancies from accessing abortion care, the April 27 Directive will redirect women to the public healthcare system for labor and delivery care that cannot be deferred, in contrast with non-urgent, routine procedures, such as a screening colonoscopy or orthopedic procedures.

* * * * *

18. In sum, abortion care is urgent care. Clinicians, in consultation with their patients, remain in the best position to accomplish that care in a timely way, with any medical testing and pre-procedure steps appropriate to the particular patient. Public health surveillance efforts of limited benefit are not appropriately used to deny or interfere with women's access to abortion. Clinicians can use their professional judgment to weigh individual patients' medical needs against any health risks—including risks related to COVID-19 infection. In the context of abortion care, the April 27 Directive removes the ability of health-care providers to make their own judgments about essential, time-sensitive patient needs The marginal public health benefits of the April 27 Directive, when applied to abortion care, are significantly outweighed by the Directive's burdens and negative consequences.

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

Executed this 30th day of April, 2020.



Alison Stuebe, M.D., M.Sc., F.A.C.O.G.