IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, Plaintiff, v. PATRICK MORRISEY, *et al*., Defendants.	Civil Action No. Hon.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The question before the Court is whether the state may exploit the pandemic to force people to remain pregnant, and even to give birth, against their will. Plaintiff is committed to minimizing the transmission of the virus and to preserving medical resources, but far from serving those purposes, the challenged action does the exact opposite. Halting abortion care does not halt patients' medical needs. Rather, because patients remain subject to the myriad and greater risks of being pregnant, their critical medical needs are ongoing—*not postponed*—and many of them will require urgent and emergent care, increasing demands on the health care system. Plaintiff seeks not a special exemption for abortion, but treatment consistent with other time-sensitive medical care that cannot be banned or delayed without causing irreparable harm. At the very least, applying the Order to medication abortions, which involve taking pills and no medical "procedure," is a clear case of overreach.

Plaintiff Women's Health Center of West Virginia ("WHC"), on behalf of itself, its staff, physicians, and patients, seeks a temporary restraining order ("TRO") and preliminary injunction

enjoining enforcement of Executive Order 16-20 (Mar. 31, 2020) ("the Order")[1] to the extent that it prohibits Plaintiff from providing abortion care when, in the physician's good-faith medical judgment, delaying the abortion would compromise the patient's long-term health or would prevent the patient from obtaining an abortion in West Virginia. As the American College of Obstetricians and Gynecologists ("ACOG") recently underscored, abortion care is an "essential" and "time-sensitive" service for which a delay of weeks, or even days, puts patients' health at risk.[2] Plaintiff seeks urgent relief because the challenged application of the Order violates its patients' constitutional rights, causes irreparable harm, and *undermines* the very safety interests the Order states as its goals.

The Order prohibits "elective medical procedures" in the name of "disrupt[ing] the spread of the virus" and "conserving limited medical personnel, personal protective equipment, and other … supplies." It indefinitely bars all procedures that "are not immediately medically necessary to preserve the patient's life or long-term health," with three exceptions. Those exceptions allow procedures that cannot be postponed without compromising long-term health or without becoming illegal, or that are religiously mandated. The Attorney General indicated that he views most if not all abortions as impermissible under the Order but has provided no additional guidance.

Accordingly, Plaintiff—the only outpatient abortion clinic in West Virginia—cancelled and is now denying all abortion appointments except for those patients who are on the cusp of

[1] Gov. Jim Justice, Executive Order No. 16-20 (Mar. 31, 2020), available at https://governor.wv.gov/Documents/EO%2016-20electiveprocedures.pdf, attached as Ex. A to Pl.'s Compl. for Declaratory & Injunctive Relief, filed herewith.

[2] ACOG *et al.*, *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak, attached as Ex. 2 to Decl. of Coy Flowers, MD, FACOG, which is itself attached as Ex. B hereto.

being unable to get the essential, time-sensitive care they seek. The effect, as explained below, is that although WHC has the capacity to see patients as early in pregnancy as they can come to the clinic, patients cannot get care in West Virginia for up to 6 weeks after they seek it (or for patients with certain medical conditions, up to 11 weeks). That is a ban on abortion during those pre-viability windows of pregnancy. Delay on that scale is also clearly an unconstitutional, undue burden on pre-viability abortion. Moreover, it is imposing immediate, irreparable harm: abortion is many times safer than continued pregnancy and childbirth, and although extremely safe, abortion carries greater risks as pregnancy advances.

Plaintiff took substantial steps before the Order to respond to the pandemic, following public health guidance. It has now had to significantly curtail care to comply with the Attorney General's application of the Order, with disastrous effects on patients, and to the *disservice* of public health given that forcing people to remain pregnant imposes more strain on health care resources. Absent urgent relief, for as long as the Order remains in effect, Plaintiff's patients will continue to face immediate, irreparable harms: *increased* need for medical care including hospital resources during the pandemic, increased risk of exposure, serious threat to their health, emotional and financial harm during the pandemic and economic recession, and constitutional injury. Accordingly, Plaintiff respectfully asks the Court to grant its motion.

STATEMENT OF FACTS

A. Abortion Care in West Virginia

By the age of 45, one in four women in this country has an abortion. Decl. of Coy Flowers, MD, FACOG, in Supp. of Pls.' Emergency Mot. for TRO and Prelim. Inj., attached hereto as Ex. B ("Flowers Decl.") ¶ 7. It is one of the safest medical procedures available, substantially safer than the alternative: The risk of death associated with childbirth is

approximately fourteen times higher than that associated with abortion, and complications related to continued pregnancy and childbirth are far more common than complications from abortions. *Id.* ¶¶ 7–8. In West Virginia, high rates of chronic conditions such as diabetes, hypertension, and obesity increase the risk of morbidity and mortality during pregnancy. *Id.* ¶ 8. Abortion-related emergency room visits constitute just 0.01% of all U.S. emergency room visits among women of reproductive age in the United States. *Id.* ¶ 7. Although abortion is very safe, the mortality risk associated with it increases as pregnancy advances, and by eight weeks, the risk increases 38% with each week of delay. *Id.* ¶ 24.

The two main methods of abortion—medication and procedural—are safe and effective. A medication abortion patient first takes one pill, and then another 24–48 hours later, typically at home, essentially causing an early miscarriage. *Id.* ¶ 9. This method, which is neither a "surgery" nor a "procedure," is available up to 11 weeks and 0 days since the last menstrual period ("11.0 weeks LMP"). Some patients have contraindications or relative contraindications for it, counseling in favor of procedural abortion.[3] *Id.* ¶¶ 9–10; Decl. of Katie Quinonez in Supp. of Pls.' Emergency Mot. for TRO and Prelim. Inj., attached hereto as Ex. C ("Quinonez Decl.") ¶ 7.

Procedural (sometimes called surgical) abortion is not what is commonly understood to be "surgery"—it involves no incision and WHC uses no general anesthesia. Flowers Decl. ¶ 11; Quinonez Decl. ¶ 7. In the first and early second trimester, these are suction curettage ("aspiration") procedures, using a suction curette to gently empty the uterus, typically in five to

[3] Contraindications for medication abortion include confirmed or suspected ectopic pregnancy, intrauterine device in place, current long-term systemic corticosteroid therapy, chronic adrenal failure, known coagulopathy or anticoagulant therapy, and intolerance or allergy to mifepristone. Most clinical trials also have excluded women with severe liver, renal or respiratory disease, or uncontrolled hypertension or cardiovascular disease (angina, valvular disease, arrhythmia, or cardiac failure). Patients are also not good candidates for medical abortion if they are unable to understand or adhere to care instructions, require quick completion of the abortion process, or are not available for follow-up contact or evaluation. Flowers Decl. ¶ 10.

ten minutes. Flowers Decl. ¶ 11; Quinonez Decl. ¶ 7. At WHC, all abortions use either medication or aspiration methods. *Id.* Quinonez Decl. ¶ 7. WHC provides aspiration abortions up to 16.0 weeks LMP. *Id.* In 2019, WHC performed 1,144 abortions: 466 medication abortion and 678 aspiration procedures. *Id.* ¶ 8. On Mondays, WHC provides only medication abortions; on Wednesdays and Thursdays, it provides medication and procedural abortions. *Id.* ¶ 7.

Nationally, later abortions generally use the dilation and evacuation ("D&E") method, in which clinicians dilate the cervix further and use instruments as well as suction to empty the uterus; it is often a two-day procedure. Flowers Decl. ¶ 11. West Virginia bans D&E and bans abortion at and after 22.0 weeks LMP. *See* W. Va. Code §§ 16-2O-1 & 16-2M-4.

Patients end a pregnancy for multiple reasons. Many speak of their careful consideration, and the extreme stress and burdens that inform their decision. Many lack financial and personal support to help raise a child, or an additional child, at that time in their lives, and are unable to add to the people they already support, including existing children (a majority already have at least one child), parents, and/or other family. Others have medical conditions that make pregnancy and childbirth particularly risky. Flowers Decl. ¶ 13; Quinonez Decl. ¶ 13.

Having made their decision, patients access abortion as quickly as they can, but many face great obstacles. Some discover they are pregnant only later in pregnancy. Many suffer delays because they lack money, transportation, and childcare. Flowers Decl. ¶ 14; Quinonez Decl. ¶ 14. Especially with a vehicle in poor condition, or no vehicle, having to travel many miles on the state's difficult road system greatly delays access to, or even prevents, abortion care. Flowers Decl. ¶ 14.b. Adolescents may delay because they fear discovery and familial retribution, sometimes violent. *Id*. Patients, especially if low-income, may have difficulty getting an (often unpaid) day off work. *Id*. As patients are delayed, the cost of the procedure goes up,

requiring patients to take time to raise funds to pay for later, more expensive, treatment. *Id.* ¶ 39; Quinonez Decl. ¶ 42. A large portion of WHC patients are struggling financially, 40% have Medicaid as their health insurance. Quinonez Decl. ¶ 14. These obstacles are even greater during the pandemic, which has cost patients their jobs; closed schools and thus eliminated school-hours childcare; and made it more difficult or risky to access the state's already limited public transportation. *Id.* ¶ 15; Flowers Decl. ¶ 15.

WHC is committed to doing its part to minimize the spread of COVID-19 and conserve medical resources. Before the Order, it took steps to achieve goals consistent with guidelines from the Centers for Disease Control and Prevention ("CDC") and the National Abortion Federation. It is offering only time-sensitive, medically necessary care, having cancelled all routine appointments, including annual gynecological exams. Quinonez Decl. ¶¶ 16–18. WHC has also reduced the number of abortion patients it sees per day from 20 to 14; excluded support people from accompanying patients into the clinic except for parents accompanying minors; suspended its program through which volunteer escorts support patients and protect their privacy as they enter the clinic, which is often, even during this crisis, surrounded by anti-abortion protestors; screened patients for COVID-19 symptoms by phone before making any appointment, and physically, including a temperature-check, at check-in; rearranged waiting room furniture to enforce social distancing; implemented CDC guidelines on when staff may return after experiencing any COVID-19 symptoms; increased the frequency of sanitation of high-touch areas; and posted signage on minimizing transmission. *Id.* ¶¶ 19–21.

B. The Challenged Order

The Governor issued the challenged Order on March 31, and it remains in effect

indefinitely, until he lifts it. There is no indication that he will do so soon,[4] and social distancing measures persist, including school closures until the fall, which the Governor announced only days ago.[5]

The Order "prohibit[s] elective medical procedures" for the stated purpose of protecting "public health … by further limiting the movement of persons and occupancy of premises … and by conserving limited medical personnel, personal protective equipment, and other … supplies in light of … treatment needs for COVID-19 patients." It bans

> all elective medical procedures … provided that patients will still have access to urgent, medically necessary procedures like those needed to preserve the patient's life or long-term health; and provided that this prohibition applies equally to all types of elective medical procedures performed in hospitals, offices, and clinics throughout the state.

Order at 2. It defines "'elective' … procedures" as those "that are not immediately medically necessary to preserve the patient's life or long-term health," but it excludes from that definition "procedures that cannot be postponed without compromising the patient's long-term health, procedures that cannot be performed consistent with other law at a later date, or procedures that

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[4] On April 20, the Governor issued Executive Order 28-20, amending the Order by allowing hospitals and ambulatory surgical centers ("ASCs") regulated by the West Virginia Office of Health Facility Licensure and Certification to submit a detailed plan, and ask that office for permission, to resume "more urgent elective medical procedures." Gov. Jim Justice, Executive Order No. 28-20 (Apr. 20, 2020), available at https://governor.wv.gov/Documents/2020%20Executive%20Orders/Executive-Order-April-20-2020-Elective-Surgeries.pdf. There is no explanation of what "more urgent elective medical procedures" means. In any event, WHC is not an ASC, and so is not eligible to submit a plan.

[5] Office of the Gov., *COVID-19 UPDATE: Gov. Justice announces West Virginia schools to remain closed for rest of academic year* (April 21, 2020), available at https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-announces-West-Virginia-schools-to-remain-closed-for-rest-of-academic-year.aspx; *see also, e.g.*, Gov. Jim Justice, Executive Order No. 18-20 (April 1, 2020), https://governor.wv.gov/Documents/2020%20Proclamations/EO%2018-20.pdf (primary election postponed from May 12 to June 9); Hoppy Kercheval, *How long will our patience last?*, West Virginia Metro News, Apr. 14, 2020, http://wvmetronews.com/2020/04/14/how-long-will-our-patience-last/ (Governor Justice asserting, despite some encouraging signs, "We're not where we need to be yet"); *id.* (West Virginia's "COVID-19 Czar," Dr. Clay Marsh, insisting that to ease restrictions, "We would like to see the number of positive cases go down for 14 days consistently").

are religiously mandated." *Id.* The Order does not further explain the three exceptions.

While the Order was the first executive order issued during the pandemic prohibiting some medical procedures, it was not the first time the state has spoken to this issue. While previous Department of Health and Human Resources ("DHHR") guidance explicitly stated that DHHR "relies upon licensed health care professionals … to exercise their best clinical judgment in the implementation" of restrictions, *see* DHHR, Emergency Recommendations for Health Care Providers (Mar. 26, 2020), the Order contains no such assurances. DHHR's Guidance does not bind the Attorney General or the Governor, who both have enforcement authority over the Order and have expressed hostility to abortion. Indeed, Attorney General Morrissey has signed on to several amicus briefs supporting state efforts to use the COVID-19 crisis to ban or restrict access to abortion.[6] And when asked at a press conference about the Order's impact on abortion, the Governor referred the question to the Attorney General.[7]

Based on the reasonable fear that state actors could use the Order to ban or severely restrict abortion, WHC, through counsel, sought assurance from Defendants Crouch, Challa, and Morrissey that the Order did not apply to prescribing and dispensing medications (and thus

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[6] *See e.g.,* Br. of 18 States as *Amici Curiae* in Supp. of Defs.' Emergency Mot. for Stay & Appeal, *Marshall v. Robinson*, No. 20-11401 (11th Cir. Apr. 20, 2020); Br. of 18 States as *Amici Curiae* in Supp. of Pet'rs' Pet. for Mandamus, *In re Rutledge*, No. 20-1791 (Entry ID No. 4903719) (8th Cir. Apr. 16, 2020); Br. of the States of Ala., Alaska, Ark., Idaho, Ind., Ky., La., Miss., Mo., Mont., Neb., Okla., S.C., S.D., Tenn., Tex., Utah, & W. Va. as *Amici Curiae* in Supp. of Appellants, *Preterm-Cleveland v. Yost*, No. 20-3365 (Doc. No. 20-1) (6th Cir. Apr. 3, 2020); Br. of the States of Ala., Ark., Idaho, Ind., Ky., La., Miss., Mo., Neb., Ohio, Okla., S.C., S.D., Tenn., Utah, & W. Va. as *Amici Curiae* in Supp. of Pet'rs' Emergency Mot. to Stay, *In re Abbott*, No. 20-50264 (Doc. No. 00515365774) (5th Cir. Mar. 31, 2020).

[7] Governor Jim Justice, *Gov. Justice holds press briefing on COVID-19 response - April 2, 2020*, YouTube (Apr. 2, 2020) at 44:01–44:17, https://www.youtube.com/watch?v=tLrYGT-efrs (Reporter: "Governor, can you speak to concerns that a ban on elective medical procedures was a backdoor way to limit access to abortions?" Governor Justice: "Well, I think our Attorney General needs to speak on that more than I."). Governor Justice has also identified himself with anti-abortion causes and supported increased regulation of abortion providers. *See e.g.*, Anthony Izaguirre, *Gov. Jim Justice signs 'born alive' abortion bill*, WHSV3, Mar. 2, 2020, https://www.whsv.com/content/news/Gov-Jim-Justice-to-sign-born-alive-abortion-bill-despite-questions-568402141.html.

performing no "procedure"), and did not ban abortion care which is both urgent and time-sensitive.[8] Decl. of Loree Stark in Supp. of Pls.' Emergency Mot. for TRO and Prelim. Inj., attached hereto as Ex. A ("Stark Decl.") ¶ 3, 7; Quinonez Decl. ¶¶ 23–24. The Attorney General replied that medication abortions are "procedures" under the Order, and that "no procedure is subject to a blanket exemption. Rather, one or more of the exceptions in the Order must be demonstrated on a case-by-case basis." Ltr. from Att'y Gen. Patrick Morrisey to Loree Stark (2, 2020), attached as Ex. 6 to Stark Decl, which is itself attached hereto as Ex. A.

WHC did not seek a "blanket exemption," but rather assurance that, when determining what patients could not be delayed, WHC clinicians could exercise their judgment to provide care under the Order on the same basis as clinicians providing other medical care. But given the hostile climate and the Attorney General's indications that, in his view, most if not all patients should be unable to obtain abortion care as long as the Order remains in effect, WHC had no choice but to adopt a very restrictive policy. Quinonez Decl. ¶¶ 26–27.

To ensure that it will not be subject to an enforcement action or other penalties, WHC is providing care only to patients who are at or near the legal limit for medication abortion in West Virginia and to patients whose long-term health would be compromised by losing their ability to obtain abortion in the state. *Id.* ¶ 28. In practice, this means WHC has provided abortion care only to (A) patients at or near 11.0 weeks LMP, after which medication abortions could no longer "be performed consistent with other law"[9] under the Order, and (B) to patients at or near

[8] Guidance from the DHHR defines "urgent" health care as "any health care service that, were it not provided, is at high risk of resulting in serious or irreparable harm, or both, to a patient if not provided within 24 hours to 30 days." DHHR, Emergency Recommendations for Health Care Providers (March 26, 2020), available at https://dhhr.wv.gov/COVID-19/Documents/Emergency-Recommendations_Health-Care-Providers.pdf. Abortion certainly fits into this category. *See* Flowers Decl. ¶ 24 (risks of abortion care increase every week the procedure is delayed).

[9] *See* W. Va. Code Ann. § 30-3-14(c)(13) (barring prescription of and "prescription drug … other than in … accordance with accepted medical standards").

16.0 weeks LMP, who would otherwise lose the ability to have any abortion in West Virginia, and thus clearly need "procedures that cannot be postponed without compromising the patient's long-term health" under the Order. Quinonez Decl. ¶¶ 29–31. Of the 49 patients WHC had scheduled for abortion in April before the Order, it had to cancel or reschedule 45, more than 90%. Quinonez Decl. ¶ 36. Of the 27 patients scheduled for abortion care the week of April 6, the clinic was able to provide care for only three patients, and the next week it was able to provide care for only six patients. *Id.* Based on the average number of abortion patients in April of 2017, 2018, and 2019, WHC would expect to provide abortion care to 105 patients this month; thus far it has seen nine. *Id.* ¶ 40. All patients seeking new appointments must either delay their care for up to 6 weeks, or, for patients with contraindications for medication abortion, up to 11 weeks, to fit in these restricted windows or be turned away entirely. *Id.* ¶ 32. If it does otherwise, WHC risks losing its license, its staff could face civil penalties, and its physicians could lose their licenses and face civil penalties. *See* W. Va. Code §§ 5-3-2, 7-4-1,16-5B-6, 30-3-14.

While WHC continues to provide abortions to the extent it can, it faces ongoing, targeted scrutiny. Last week, at the Governor's request, DHHR representatives phoned WHC to inquire how it was complying with the Order.[10] Quinonez Decl. ¶ 33. It is clear that the medical judgments of WHC's physicians will be subject to increased scrutiny. WHC is thus constrained to conform to an extremely narrow interpretation of the Order, under which it must turn away the vast majority of patients seeking time-sensitive abortion care. *Id.* ¶ 35.

[10] Attorney General Morrissey had singled out abortion providers for increased scrutiny before. In 2013, when there were still two abortion providers in the state, General Morrisey began an unprompted review of abortion regulations in which he demanded the clinics respond in writing to a list of questions about abortion regulations and medical procedures. *See* Sharona Coutts, *West Virginia AG Continues Quest for Abortion Restrictions, Despite Lack of Evidence*, Rewire News (Oct. 30, 2013), available at https://rewire.news/article/2013/10/30/west-virginia-ag-continues-quest-for-abortion-restrictions-despite-lack-of-evidence/.

C. The Impact of Halting Abortion

Abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible." Flowers Decl. ¶ 16 (quoting ACOG *et al*., *supra* n.2). That is why medical authorities advise, "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." *Id.* Other preeminent medical organizations agree. The World Health Organization ("WHO") emphasized that "services related to reproductive health," including "[a]bortion," are "essential services during the COVID-19 outbreak." *Id.* ¶ 17. The American Medical Association ("AMA")—the country's largest medical organization and one of its foremost medical and public health authorities—concurs. Its March 30, 2020, statement disapproves of state efforts "to ban or dramatically limit women's reproductive health care" during the COVID-19 outbreak by "labeling procedures as 'nonurgent.'" *Id.* ¶ 18.

The Order is halting care for weeks or in some cases months. *Id.* ¶ 5; Quinonez Decl.¶ 32. Delay on this scale greatly increases risks to patients, and bars others from receiving abortion care at all. The notion that this in any way minimizes COVID-19 transmission or preserves medical resources lacks any medical foundation. Flowers Decl. ¶ 28.

1. The Impact on Patients

From the onset of pregnancy, every patient is at risk of complications. Even an uncomplicated pregnancy challenges the patient's entire physiology and stresses most major organs. A pregnant patient's lungs must work harder to breathe, while the pregnancy puts pressure on the lungs, leaving many, if not most, patients feeling chronically out of breath.

Flowers Decl. ¶¶ 19–20. The heart pumps 30–50% more blood during pregnancy, which results in the kidneys becoming enlarged, and the liver produces more clotting factors, which in turn increases the risk of blood clots or thrombosis. *Id.* ¶ 22. Pregnant patients are very likely to experience gastrointestinal symptoms including nausea and vomiting, which in the most severe cases can result in dehydration that must be treated with IV fluids and medications. *Id.* ¶ 21. Patients who suffer from chronic conditions including asthma, diabetes, hypertension, gallbladder disease, immunological conditions, thyroid disease, lung disease, and diagnosed or undiagnosed cardiac conditions are more likely to experience complications. While some patients might be aware of their preexisting conditions, others (particularly those who have never been pregnant before) might not be aware of their preexisting conditions and may delay in seeking medical evaluation until the need for care is urgent or emergent. *Id.* ¶ 23. Pregnant patients also remain at risk for miscarriage throughout their pregnancy. *Id.* ¶ 35Seventeen percent of all pregnancies end in miscarriage and management usually requires medical evaluation and, frequently, hospital care. *Id.* All of these conditions can reach a level of severity that lead the patient to seek medical evaluation or urgent or emergency care. *Id.* ¶¶ 21–23 & 35.

While abortion is very safe, the associated risks increase as pregnancy advances. Accessing abortion as early in pregnancy as possible is the single most important factor for ensuring the safety of abortion. The risk of death associated with abortion, while extremely small, increase as pregnancy advances; by eight weeks, it increases 38% with each week of delay. *Id.* ¶ 24. The mortality risk at 14–17 weeks is more than eight times the risk at eight weeks or less. *Id.* Delaying an abortion by a week in the second trimester significantly increases the mortality risk. *Id.* The same is true for abortion complications: they are rare, but the risk of complication increases as pregnancy advances. *Id.* ¶ 25. Major complications—those requiring

hospital admissions, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortions; they occur twice as frequently in the second trimester as in the first. *Id.*

In addition to the medical risks associated with remaining pregnant and delaying abortions, delay also increases a patient's emotional, financial, and psychological stressors during an extremely stressful public health crisis. *Id.* ¶¶ 39–43; Quinonez Decl. ¶¶ 42. WHC patients have expressed extreme distress upon learning that they cannot access care for weeks, or in some cases, months, and this may be particularly dire for patients who lack social support or have underlying psychosocial conditions. Quinonez Decl. ¶ 36–37; Flowers Decl. ¶ 41. For those whose pregnancy results from sexual violence, being forced to carry an unwanted pregnancy for weeks is an unconscionable burden. Flowers ¶ 42. These patients' increasing pregnancy symptoms may also compromise their privacy. *Id.* ¶ 43. Because the cost of procedural abortion increases as pregnancy advances, those patients will face greater financial burdens to access care. *Id.* ¶ 39; Quinonez Decl. ¶ 42. Finally, because so many patients, especially those with low incomes, already have extreme difficultly accessing care, the operation of the Order is an added hurdle that patients will be unable to overcome. Flowers Decl. ¶ 44; Quinonez Decl. ¶ 44.

Even if the COVID-19 emergency ends sooner than expected, patients will have suffered greatly increased health risks and much added psychological distress from the additional weeks of pregnancy they were forced to endure. Flowers Decl. ¶ 45; Quinonez Decl. ¶ 41. Further, because WHC is the only abortion clinic in the state, patients will be delayed in obtaining care even after the Order is lifted because one clinic will simply not have the capacity to immediately meet the pent-up demand that accrued while the Order was in place. Quinonez Decl. ¶ 41; Flowers Decl. ¶ 45. Even if the Order were lifted in May, it would be impossible for WHC to provide care for all the patients who were delayed in April *and* all the patients needing new

appointments in May. Quinonez Decl. ¶ 41. With WHC's schedule reduced to allow for social distancing, it will be able to provide care to a maximum of 133 abortion patients in May 2020. *Id.* If April's abortion patients were forced to wait until May, WHC would expect a demand of approximately 200 patients needing care. *Id.* Many of them will be further along in pregnancy and thus face higher medical costs, and therefore greater burdens. *Id.*; Flowers Decl. ¶ 45. Additionally, a number of patients who would otherwise have received care in April will have to be referred out of state because they will, by then, be too far along to receive care at WHC. Quinonez Decl. ¶ 41.

Under the Order, the vast majority of patients seeking timely abortion care will be forced to travel out of state, if they have the resources to do so. Quinonez Decl. ¶¶ 42–43; Flowers Decl. ¶ 46. Travel is always a great burden, especially to patients with low incomes, and those burdens are heightened because of COVID-19. Flowers Decl. ¶ 46; Quinonez Decl. ¶ 43. Today, travel is harder, more expensive, takes longer, and entails the risk of exposure to the virus. Flowers Decl. ¶ 46; Quinonez Decl. ¶ 43. Travel will also delay care, pushing some patients past the point at which they can have an aspiration abortion. Flowers Decl. ¶ 46. If they can access care at all, they will have to have the more complicated D&E procedure. *Id.*

Those patients who are unable to travel out of state and unable to obtain care in the narrow windows that the Order allows will remain pregnant against their will and give birth, with all the risks that entails, or may seek to end their pregnancies outside the regulated medical setting, which presents further risks to the patient's health and can result in complications requiring urgent or emergent hospital care. Flowers Decl. ¶ 47; Quinonez Decl. ¶¶ 43–44.

2. The Impact on the Health Care System

Delaying or banning abortion will neither minimize COVID-19 transmission nor preserve

personal protective equipment ("PPE") and hospital resources. Medication and procedural abortions in West Virginia require minimal PPE and no hospital resources. Quinonez Decl. ¶¶ 10–12; Flowers Decl. ¶¶ 29–32. Further, patients delayed in obtaining abortion remain pregnant and subject to all the attendant risks described above. Medical evaluation and urgent and emergent care for pregnant women requires more PPE, more interaction between patients and health care providers, and more hospital resources than abortion. Moreover, the extreme delay the Order imposes will force some patients to carry to term simply because, given the logistical difficulties they face, especially during the pandemic, they cannot travel to the clinic during the precise, tiny windows the Order allows. Those who carry to term will use far greater PPE and hospital resources. Flowers Decl. ¶¶ 28–37.

The vast majority of abortions take place in the outpatient setting, and do not require a sterile field and or extensive PPE. *Id.* ¶ 29. An abortion at WHC requires a single in-person visit, and, consistent with current CDC guidelines, uses minimal PPE. Flowers Decl. ¶¶ 29–32; Quinonez Decl. ¶ 11. For procedural abortion, only a small number of staff are involved. Quinonez Decl. ¶ 11. WHC clinicians use surgical masks, gowns, reusable protective eyewear, gloves, and shoe coverings. *Id.* Only physicians use sterile gloves. *Id.* Gloves are changed between patients; all other PPE is reused unless soiled. *Id.* WHC does not use or have any N-95 masks, the PPE believed to be in shortest supply. *Id.* ¶ 10; Flowers Decl. ¶ 31. Medication abortion requires even less PPE. Quinonez Decl. ¶ 12; Flowers Decl. ¶¶ 29–32. Only two clinicians are involved in the administration of medication abortion and each uses only nonsterile gloves and masks. Quinonez Decl. ¶ 12. The gloves are changed between patients; the masks are reused unless soiled. *Id.*

Comparatively, patients with continuing pregnancies require significantly more

interaction with the health care system—well before they approach term. Flowers Decl. ¶¶ 19–23 & 32–33. Pregnant patients routinely go to the hospital for evaluation multiple times. Each time they do, they interact with hospital staff and increase the use of PPE. A substantial proportion of pregnant women seek emergency care at least once during their pregnancy. *Id.* ¶¶ 32–33. In one recent study, 49% visited the emergency department at least once, and 23% visited twice or more. *Id.* ¶ 33. Patients with comorbidities such as diabetes, hypertension and obesity—which West Virginians experience at increased rates—are more likely to present to the emergency department for urgent or non-urgent care. *Id.* Pregnant patients with severe symptoms consistent with COVID-19—including shortness of breath, which is an extremely common symptom of pregnancy—are advised to seek immediate care in the emergency department or an equivalent unit that treats pregnancy. *Id.* at ¶ 34. When these patients go to an emergency department, health care providers will use the appropriate amount of PPE *for a suspected COVID-19 patient*. *Id.* ¶ 34. Patients who miscarry require medical evaluation and often hospital care, and miscarriage becomes more complicated as pregnancy progresses. *Id.* at ¶ 35.

Of course, patients who carry to term and deliver will use extensive hospital resources and PPE. Pregnancy lasts 40 weeks LMP, and even an uncomplicated pregnancy generally requires at least one prenatal appointment per month, but patients whose pregnancies are complicated by preexisting conditions or are otherwise high-risk may require twice as many visits. Although the use of telemedicine visits is encouraged when possible during the COVID-19 pandemic, each in-person visit will likely require at least gloves and masks. During an actual birth, almost all of which occur in hospitals in West Virginia, multiple medical providers attend to the patient, each requiring multiple gowns, masks, and gloves. A patient who delivers remains in the hospital 24–48 hours for a vaginal birth and 72–96 hours for a caesarean section. Patients

with complicated or high-risk pregnancies may remain in the hospital longer—requiring even more PPE and hospital resources. *Id.* at ¶ 36.

ARGUMENT

STANDARD OF REVIEW

Plaintiff seeks a TRO and preliminary injunction to prevent ongoing, irreparable injury: halting pre-viability abortion except in the narrow windows near the point at which medication abortion and procedural abortion become unavailable, and preventing physicians from using their medical judgment to determine whether delaying the abortion would cause harm to a patient's long-term health. All four relevant factors weigh heavily in Plaintiff's favor: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent relief; (3) the balance of equities; and (4) the public interest. *See Winter v. Nat. Res. Dep't Cent.*, 555 U.S. 7, 20 (2008); *see also Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019). Plaintiff is likely to succeed on the merits because the Order as applied to halt pre-viability abortions directly contravenes decades of binding precedent, and *undermines* the health and safety interests it purports to serve. Moreover, injunctive relief will prevent severe and irreparable harm to Plaintiff's patients, is consistent with the balance of equities, and serves the public interest. Accordingly, this Court should grant Plaintiff's motion.

I. PLAINTIFF WILL SUCCEED ON THE MERITS OF ITS SUBSTANTIVE DUE PROCESS CLAIM

Under *Roe v. Wade*, 410 U.S. 113 (1973), the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a woman's right to choose abortion, *id.* at 153–54, and prior to viability, a state may not ban abortion, *id.* at 163–65; *see also, e.g.*, *Bryant v. Woodall*, 363 F. Supp. 3d 611, 628 (M.D.N.C. 2019) ("[A] state is never allowed to prohibit any swath of pre-viability abortions outright[.]"), *appeal docketed*, No. 19-1685 (4th Cir. June 26,

2019). Rather, a state may proscribe abortion only after viability, and even then, it must allow abortion where necessary to preserve the life or health of the patient. *Roe*, 410 U.S. at 163–64. Moreover, to evaluate abortion restrictions, as opposed to abortion bans, the Supreme Court developed the undue burden test first outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). As the Supreme Court held, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877; *see also Bryant*, 363 F. Supp. 3d at 630; *Daniel v. Underwood*, 102 F. Supp. 2d 680, 685 (S.D. W. Va. 2000); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 460 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000). A restriction that, "while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877). In other words, "*Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2298. As discussed below, the burdens of pushing patients further into their pregnancy—to the detriment of their health and possibly forcing them to carry to term—outweigh the purported benefits of the Order, and thus the Order imposes a substantial obstacle in the path of people seeking abortion.

Defendants may claim, relying on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), that the constitutionality of the Order should be evaluated under a deferential standard of review. But the Supreme Court in *Jacobson* repeatedly cautioned that while the state has authority to "safeguard the public health and the public safety," that authority is extended "only to the condition that no rule prescribed by a state, nor any regulation adopted by a local

governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Id.* at 25. In other words, *Jacobson* does not insulate a government's unconstitutional actions from court review during times of emergency. *See Robinson v. Att'y Gen.*, No. 20-11401, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020) ("But just as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency."). Indeed, the *Casey* Court cited *Jacobson* for the proposition that state interests cannot "justify[] any plenary override of individual liberty claims." 505 U.S. at 857.

Moreover, *Jacobson* did not articulate an independent, deferential standard for evaluating all constitutional violations in times of a pandemic. Instead, it stands for the basic premise that the state can exercise police power in an emergency, subject to constitutional limitations.[11] *See Robinson*, 2020 WL 1952370, at *55 (*Jacobson* "was not an absolute blank check for the exercise of governmental power."); *Preterm-Cleveland v. Att'y Gen. of Ohio*, 2020 WL 1957173, at *11 (S.D. Ohio Apr. 23, 2020) ("The State's emergency powers analysis found in *Jacobson* and the substantive-due-process analysis found in *Roe* and *Casey* should be applied together in light of the COVID-19 pandemic, the subject-matter of this case, and the holdings of those cases."). *Jacobson* was decided decades before the Court developed heightened standards of scrutiny for laws violating constitutional rights, *see United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938), as well as today's substantive due process law. To say that *Jacobson* was intended to bypass higher standards of scrutiny for violations of constitutional rights is

[11] *Jacobson* was decided in 1905, the same year as *Lochner v. New York*, 198 U.S. 45 (1905), at a time when courts were called on to address whether particular enactments were "within the police power of the state." *Id.* at 57. In today' jurisprudence, *Jacobson*'s holding is unremarkable, in that a state is assumed to have the power to enact laws for the public health that are reasonable and as limited by the Constitution.

anachronistic at best. Indeed, rather than affirming that *Jacobson* allowed the state to suspend the constitutional right to bodily integrity during a pandemic, the Supreme Court has since characterized *Jacobson* as "*balancing* an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (emphasis added).

Plaintiffs do not disagree that a state's unique interests during a time of emergency can be considered by the Court, but it must be done in the context of the existing framework for analyzing the constitutional right to abortion under existing abortion jurisprudence. As discussed below, that unique interest, preserving health care resources, should be considered and weighed within the *Roe* and *Casey* framework. And for the same reasons that the Order violates the *Casey* and *Whole Woman's Health* balancing test, it also violates the balancing dictated by *Jacobson*.[12] *See Robinson*, 2020 WL 1952370, at *6 (denying motion to stay preliminary injunction where district court "read[] these two lines of cases[, *i.e.*, *Casey* and *Jacobson*,] together"); *see also id.* at *8. Accordingly, Plaintiff is likely to succeed on the merits of its claim under any test.

A. As Applied, the Order Bans Pre-viability Abortion

The Supreme Court has repeatedly reaffirmed: at no point before viability may a state ban abortion. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2309; *Casey*, 505 U.S. at 846, 871; *Roe*, 410 U.S. at 153–54, 163–65. Following that rule, appellate courts have uniformly rejected attempts to ban pre-viability abortion.[13] Likewise, district courts uniformly blocked a wave of

[12] Even if this Court looked to *Jacobson* as frozen in time, and without the benefit of over 100 years of constitutional jurisprudence, the Order still falls because it "has no real or substantial relation to the protection of the public health and the public safety." *Jacobson*, 197 U.S. at 31. As discussed below, the Order, as interpreted to halt abortion, does not further the state's unique interest during this pandemic of preserving health care resources and goes "beyond what was reasonably required for the safety of the public," therefore "compel[ling] the courts to interfere." *Id.* at 28.

[13] *E.g.*, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) ("*Jackson III*") (ban

bans enacted in 2019.[14]

As applied, the Order violates this precedent. Although abortion is urgent and medically necessary care that cannot be delayed, Attorney General Morrissey's letter made clear that most if not all abortions are "prohibit[ed]" under the Order. *See* Ltr. from Patrick Morrisey to Loree Stark (2, 2020), attached as Ex. 6 to Stark Decl., which is itself attached hereto as Ex. A. Under the Order, a patient cannot access care unless at or near either the legal limit for medication abortion (11.0 weeks LMP) or the limit for obtaining any abortion (16.0 weeks LMP). The windows during which the Order is halting care are pre-viability periods in pregnancy: from four to ten weeks and from eleven to fifteen weeks. *See* Quinonez ¶ 32. The Order is thus unconstitutionally prohibiting the vast majority of abortion care.

B. As Applied, the Order Creates an Undue Burden

Even if this Court applies the undue burden test used to evaluate abortion restrictions (as opposed to bans on abortion), the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. The Order fails that test. As applied, the Order is unconstitutionally

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on abortions starting at six weeks); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) ("*Jackson II*") (ban at fifteen weeks); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (ban at six weeks), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015) (ban at twelve weeks), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (ban at twenty weeks), *cert. denied*, 571 U.S. 1127 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (same), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (ban on all abortions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992).

[14] *See, e.g.*, *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (ban on nearly all abortions); *SisterSong v.Women of Color Reprod. Justice Collective v. Kemp*, 410 F. Supp. 3d 1327 (N.D. Ga. 2019) (ban at six weeks); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631 (W.D. Mo. 2019), *modified*, 408 F. Supp. 3d 1049 (W.D. Mo. 2019) (ban on abortions at various weeks before viability); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (ban at eighteen weeks); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020) (ban at six weeks); Order Granting Stipulated Prelim. Inj. as to State Defs., *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Apr. 18, 2019), ECF No. 34 (ban at eighteen weeks)
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imposing inexcusable, dangerous delay on some patients, and simply blocking abortion altogether for others. *See Roe*, 410 U.S. at 153–54, 163–65. The Order's stated purpose, which WHC shares, is to limit virus transmission and conserve medical resources, but halting abortion as the Order is doing has the opposite effect. Thus, the burdens of the Order clearly outweigh its benefits.

Courts throughout the country have enjoined executive orders similar to the one challenged here, finding that the plaintiffs are likely to succeed on the merits of their claim that the orders unduly burden access to abortion. *See, e.g.*, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, slip op. (M.D. Tenn. Apr. 17, 2020), Dkt. No. 244 (granting preliminary injunction against Tennessee executive order that halted all procedural abortions), *administrative stay denied*, No. 20-5408 (6th Cir. Apr. 20, 2020); *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1932900 (W.D. Okla. Apr. 20, 2020) (preliminarily enjoining executive order as to most abortions effective immediately, and as to all abortions as of April 24), *appeal docketed*, No. 20-6055 (10th Cir. Apr. 21, 2020); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449-KGB, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020) (temporarily restraining application of executive order to all procedural abortions), *mandamus granted in part sub. nom. In re Rutledge*, __ F.3d __, 2020 WL 1933122 (8th Cir. Apr. 22, 2020); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1847128, at *8–9 (M.D. Ala. Apr. 12, 2020) (granting preliminary injunction to allow health care providers to make individualized determinations regarding provision of abortion care), *stay denied sub nom.*, *Robinson v. Att'y Gen.*, No. 20-11401, 2020 WL 1952370 (11th Cir. Apr. 23, 2020); *Preterm-Cleveland v.* Att*'y* Gen*. of Ohio*, No. 1:19-cv-360, 2020 WL 1932851 (S.D. Ohio Mar. 30, 2020) (granting TRO allowing providers to make case-by-case basis determinations regarding provision of abortion care), *stay*

denied and appeal dismissed, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020); *Preterm-Cleveland* 2020 WL 1957173, at *17(preliminarily enjoining enforcement of executive order in such a way as to prohibit abortion providers from making case-by-case determinations regarding patients' need for abortion services).[15]

Because the delay imposed by the Order imposes burdens without any countervailing benefits it should be enjoined.[16]

1. The Order Places a Severe Burden on Patients

By delaying abortion for weeks or months, the Order is undeniably increasing the medical risks to patients and imposing severe harm. The Supreme Court recently held that 3-week wait times for an appointment would impose a burden.[17] *See Whole Woman's Health*, 136 S. Ct. at 2318. Delay on this scale is unquestionably a substantial obstacle to pre-viability

[15] In *In re Abbott*, over a vigorous dissent, the Fifth Circuit issued an opinion granting a writ of mandamus concerning a now-expired Texas executive order. While recognizing that courts have a duty to weigh the benefits and burdens of abortion restrictions, the Fifth Circuit determined that the district court had, *inter alia*, failed to adequately consider the evidentiary record before it. *See In re Abbott*, __ F.3d __, 2020 WL 1911216, at *14 (5th Cir. Apr. 20, 2020). And the Eighth Circuit's divided decision two days ago, *In re Rutledge*, is an outlier in that it allowed *no* procedural abortions despite the challenged order's indeterminate end date, absent further district court findings. *See In re Rutledge*, 2020 WL 1933122, at *8. Moreover, other courts have rejected the Fifth and the Eighth Circuit's approach; indeed, after those circuits issued their decisions, the Eleventh Circuit denied a motion to stay the preliminary injunction issued in Alabama, *Marshall v. Robinson*, No. 20-11401 (11th Cir. Apr. 23, 2020), and the Ohio district court issued a preliminary injunction, *Pre-Term Cleveland*, 2020 WL 1957173.

[16] *See supra* 21 & n.13, 14*; see also*, *e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) (affirming injunction of abortion restriction that would subject patients "to weeks of delay" and noting that "delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal"); *Adams & Boyle P.C.*, No. 3:15-cv-00705, slip op. at 9 (in light of postponement and cancellation of abortion procedures, "the Court finds that, for purposes of seeking a preliminary injunction, plaintiffs have shown that [a COVID-19 health order] 'plac[es] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus'" (citing *Casey*, 505 U.S. at 877)).

[17] In *Casey*, the Supreme Court considered even a *24-hour* delay as a "close[] question," noting its "troubling" effects. 505 U.S. at 885–86. The Court upheld this waiting period because, and only because, it held that "we cannot say that the waiting period imposes a real health risk." *Id.* at 886. Here, the health risks are significant and indisputable.

abortion.[18]

While patients are denied abortion, they remain pregnant, with all the inherent risk that entails. As described above, *see* supra 12–13 even an uncomplicated pregnancy can lead to serious, sometimes dire, complications, and the risk is greatly increased for patients with preexisting conditions. Thus, well before birth—in the period immediately after they would otherwise have obtained abortion care—the Order forces people to remain pregnant and they will require medical care, some of it urgent and emergent, some of it hospital-based, and entailing the risk of COVID-19 exposure. Flowers Decl. ¶ 6. As described above, *see supra* 13–14, forcing patients to carry unwanted pregnancies also burdens them emotionally and psychologically, especially those who lack social support, have preexisting psychosocial conditions, need to keep their care private, and/or are pregnant as a result of sexual violence. Flowers Decl. ¶¶ 41–43.

Further, as described above, *supra* 13, while abortion is extremely safe, the risks increase markedly as pregnancy advances. Flowers Decl. ¶ 24. As leading medical associations have explained, 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."[19] The cost of abortion likewise increases as pregnancy advances, adding financial burden to the medical harm inherent in delay. Quinonez ¶ 41; *see also Preterm-Cleveland*, 2020 WL 1957173,

[18] *See e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2314—18 (longer wait times burden patients); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *McCormack v. Hiedeman*, 694 F.3d 1004, 1016-–17 (9th Cir. 2012); *Adams & Boyle P.C.*, *et al. v. Herbert Slaterly, et al.*, No. 3:15-cv-00705 (M.D. Tenn. April 17, 2020), ECF. No. 244, slip op. at 10), ECF244 at 10 "Delaying a woman's access to abortion even by a matter of days can result in her having to undergo a lengthier and more complex procedure that involves progressively greater health risks."); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1356-–60 (M.D. Ala. 2014); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020), at *8 ("[A] postponement of an abortion may cause serious harm, or a substantial risk of serious harm, to that woman's health … for at least some women, even a short delay can make an abortion (or the ongoing pregnancy) substantially riskier[.]").

[19] ACOG *et al*., *supra* n.2.

at *12(holding that "[a] delay in surgical abortion could cause a substantial risk of serious harm or serious harm to a patient's health because delaying surgical abortion increases risks associated with abortion").

Some patients who have the means seek to avoid the medical risks of continued pregnancy and delayed abortion by attempting to travel out of state, notwithstanding the risks of travel right now. Flowers Decl. ¶ 46; Quinonez Decl. ¶ 42. Among other burdens (including financial and emotional), this increased travel will jeopardize their health, both by increasing their risk of COVID-19 exposure and by delaying their abortion care even further while raising funds and organizing logistics. Flowers Decl. ¶ 46; Quinonez ¶ 42. Moreover, patients seeking out-of-state care may well be delayed to the point at which abortion is generally a *two*-day procedure, thus doubling the exposure risks and PPE needed. Flowers Decl. ¶ 46. Such travel also increases the likelihood that a patient who contracts COVID-19 elsewhere will bring it back into their home and into the state.

However, particularly during the pandemic—with incomes slashed, transportation limited, and childcare impossible to come by—many patients would be unable to travel to access care out of state. Quinonez Decl. ¶ 15; Flowers Decl. ¶ 15. Some will remain pregnant for weeks or months, until they can access care as close as possible to either 11.0 weeks or 16.0 weeks LMP in West Virginia, but, particularly in light of the pandemic, it will be extremely difficult if not impossible for some patients to make it to the clinic in the narrow time frames the Order allows abortion to occur. This is particularly true for many WHC patients who, as described above, *supra* 13–15, already face multiple barriers in accessing care. The additional barrier imposed by the Order will be insurmountable for some. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 833 (7th Cir. 2018) (18-hour

delay "places a large barrier to access" on women seeking abortions); *Robinson*, 2020 WL 1847128, at *7 ("It is abundantly clear, and the court now finds, that a delay [from April 12] until April 30 will pose a tremendous, and sometimes insurmountable, burden for many women"); *id.* at *10 ("medical restrictions [which] would amplify existing challenges, pose severe health risks, and render abortions functionally unavailable for at least some women" constitute "extensive burdens").

For those patients whom the Order will block altogether from obtaining an abortion,[20] the medical repercussions alone are profound. The risk of death associated with childbirth is approximately *fourteen times* greater than that associated with abortion, Flowers Decl. ¶ 8, and every pregnancy-related complication is more common among people giving birth than among those having abortions. *Id.* To avoid these results, patients may attempt to terminate their pregnancies outside the regulated medical setting, which—if the patient resorts to unsafe methods—will increase the likelihood of complications necessitating hospitalization. *Id.* ¶ 47. *Whole Woman's Health*, 136 S. Ct. at 2321 (Ginsburg, J., concurring) ("When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, faute de mieux, at great risk to their health and safety."). They will also suffer significant emotional, psychological and economic repercussions. *See* Flowers Decl. ¶ 41.

While many factors affect how each individual patient is burdened by the law, under the Order, Plaintiff's physicians are allowed to take only a very limited number of factors into account when assessing patients. *See supra* 10. Like all clinicians, WHC clinicians ought to be

[20] Additionally, the demand for services after the Order is lifted is likely to strain WHC's capacity, further delaying or blocking patient's access to care. Quinonez Decl. ¶ 41.

able to consider the panoply of relevant medical and life circumstances that inform the case-by-case determination of the patient's course of treatment. Those factors properly include those reported by the patient, such as her medical history, underlying health problems, whether she is facing domestic violence, and economic and logistical circumstances that would preclude her from travelling back to the clinic if delayed. But WHC clinicians fear that if they take into account the full panoply of factors in making their good-faith medical determination, they will be second-guessed by Defendants and face penalties.

Prohibiting physicians from using their medical judgment to assess patients' eligibility for the exceptions is not only in contrast to the DHHR's previous guidance, *see supra* 8, but it is also contrary to Supreme Court precedent. Indeed, the Supreme Court has repeatedly held that health care providers must have the discretion to use their medical judgment when interpreting laws that restrict access to abortion. For example, in *Doe v. Bolton*, 410 U.S. 179 (1973), the Court underscored the importance of affording physicians adequate discretion in exercising medical judgment in a vagueness challenge to a Georgia statute requiring that a physician's decision to perform an abortion must rest upon "his best clinical judgment." *Id.* at 191–92. The Court found it critical that that judgment "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id*. at 192; *see also Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976) (holding that, in the context of a statute that restricted abortion after viability, determining viability must be a matter for the judgment of the responsible attending physician, not politicians); *Colautti v. Franklin*, 439 U.S. 379, 396–97 (1979) (same). Courts that have preliminarily enjoined executive orders similar to the one challenged here have similarly held that the orders prohibited abortion providers from using their medical judgment to determine

whether delaying the abortion would harm patients' health. *See Preterm-Cleveland*, 2020 WL 1957173, at *16–*17 (holding that abortion providers must be afforded the same ability to use their medical judgment as any other health care provider); *Robinson*, 2020 WL 1847128, at *14 ("[T]o proceed with lawful abortions [under an order restricting abortions during the COVID-19 pandemic], providers must be *confident* that their exercise of reasonable medical judgment will not be met with unconstitutional or bad-faith prosecution") (emphasis in original).

2. The Order Undermines, Rather than Advances, the State's Interests

Whole Woman's Health dictates that the Court also assess the benefits the Order confers. *See* 136 S. Ct. at 2309. Halting abortion during the pandemic and economic crisis does not serve the Order's stated goals; it undermines them.

As explained above, patients who remain pregnant are at risk of serious complications that will require non-urgent, urgent, and emergent care. Flowers Decl. ¶¶ 20, 23 & 33. Treatment for pregnancy complications, which are frequent, will involve multiple trips to health care facilities, especially for high-risk patients. *Id.* ¶ 33. Indeed, pregnant patients frequently seek care in the emergency room, with 49% going at least once and 23%, twice or more. *Id.* Additionally, those the Order forces to remain pregnant run the risk of being among the 17% of pregnant patients who miscarry, which also requires medical care. *Id.* ¶ 35. Patients miscarrying frequently seek emergency room care—often multiple times—using PPE and hospital resources, and risking virus exposure. *Id.* Of course, patients forced to carry to term or to seek care outside the medical setting (possibly resorting to unsafe means) will have *increased* need for medical and hospital resources. *Id.* ¶ 47.

By contrast, allowing pregnant patients to obtain timely abortions on an outpatient basis will spare hospital resources, preserve PPE, minimize travel, and protect patient health, including

by reducing their risk of COVID-19 exposure. Legal abortion is very safe and complications associated with abortion—especially those requiring hospital care—are exceedingly rare. *Id.* ¶ 25; *see also Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315. Abortion necessitates minimal PPE. Flowers Decl. ¶ 29; Quinonez Decl. ¶ 11. WHC does not use any N-95 masks, the PPE which is believed to be in shortest supply. Quinonez Decl. ¶ 10; Flowers Decl. ¶ 31. Additionally, WHC has already taken significant measures to protect its patients and staff in accordance with national guidelines. Quinonez Decl. ¶¶ 19–21.

With respect to medication abortion specifically, any benefit is even more illusory because medication abortion requires even less PPE than procedural abortion and involves even less interaction between patient and clinician, *see* Quinonez Decl. ¶ 12; Flowers Decl. ¶ 30, as district courts examining attempts to restrict medication abortion through COVID-19 related executive orders have found. *See, e.g.*, *See Preterm-Cleveland*, 2020 WL 1957173, at *14 (holding that delaying abortion services until the legal limit will not conserve PPE); *Robinson*, 2020 WL 1847128, at *11 n.15("Indeed, the State Health Officer conceded that administering a medication abortion 'may not itself' require the use of PPE. He justified delaying medication abortions based on the risk of possible complications requiring a surgical abortion or emergency medical care. However, the rate of such complications is extremely low, a fact that [he] admitted he did not know when he made the decision that medication abortions should be postponed." (internal citations omitted)); *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2 (W.D. Okla. Apr. 6, 2020) ("Further, the Court concludes that the benefit to public health of the ban on medication abortions is minor and outweighed by the intrusion on Fourteenth Amendment rights caused by that ban."); *id.* at *3 (for "medication abortion," the "interpersonal contact and PPE" and "percentage of complications resulting in hospitalization"

are lower than for "surgical abortion"); *see also Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315 (complications associated with medication abortion, including those requiring hospital care, are exceedingly rare).

The irrationality of subjecting medication abortion to executive orders intended to delay non-essential medical *procedures* is self-evident. In fact, a number of states—including those currently attempting to apply their emergency orders to procedural abortions—have decided *not* to enforce those orders as to medication abortion. *See, e.g.*, *Little Rock Family Planning Servs.*, 2020 WL 1862830, at *2 (medication abortions permitted under Arkansas COVID-19 executive order); *Adams & Boyle P.C.*, No. 3:15-cv-00705, slip op. at 1, ECF No. 244 at 1 (same with respect to Tennessee COVID-19 executive order); *Preterm-Cleveland*, 2020 WL 1957173, at *5–6.).

3. The Burdens of the Challenged Action Clearly Outweigh the Benefits

The final step in the undue burden analysis "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. Here, enforcing the Order as applied to halt care—up to six weeks for most patients, and up to eleven weeks for patients with contraindications for medication abortion—enormous burdens, confers no benefits, and is plainly unconstitutional. WHC will thus succeed on the merits of its substantive due process claim.

II. PLAINTIFF'S PATIENTS WILL SUFFER IRREPARABLE HARM ABSENT THE REQUESTED RELIEF

Plaintiff's patients will suffer serious and irreparable harm absent the requested relief. First, significantly delaying or banning pre-viability abortions violates their constitutional rights, inflicting *per se* irreparable harm. *See, e.g.*, *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.") (citing *Elrod*

v. Burns, 427 U.S. 347, 373 (1976)); *Am. Fed'n of Teachers-W. Va., AFL-CIO v. Kanawha Cty. Bd. of Educ.*, 592 F. Supp. 2d 883, 905 (S.D. W. Va. 2009) (violation of "fundamental constitutional right … demonstrate[s] irreparable harm"). Forcing patients to remain pregnant inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. *See e.g.*, *Elrod*, 427 U.S. at 373–74; *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013).

Likewise, although abortion is extremely safe, Flowers Decl. ¶ 24, "an extended delay in obtaining an abortion can cause irreparable harm by resulting in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal." *Planned Parenthood of Ind. & Ky.*, 896 F.3d at 832 (internal quotation omitted); *see also, e.g.*, *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) (irreparable harm where "patients could face a delay"). This "disruption or denial of … care cannot be undone after a trial on the merits." *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied sub nom. Andersen v. Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638 (Mem.) (2018). Forcing patients to remain pregnant also prolongs the time during which they unwillingly face the risks of pregnancy itself, and—because pregnancy vastly increases their near-term need for medical care—increases their risk of COVID-19 exposure. Flowers Decl.¶ 37.

Accordingly, numerous courts have found that the deprivation of abortion care for a period of weeks or longer—including during this crisis—would result in irreparable injury. *See Adams & Boyle P.C.*, No. 3:15-cv-00705, slip op. at 10 ("Delaying a woman's access to abortion even by a matter of days can result in her having to undergo a lengthier and more complex

procedure that involves progressively greater health risks … or can result in her losing the right to obtain an abortion altogether. Therefore, plaintiffs have demonstrated that enforcement of [a COVID-19 health order] causes them irreparable harm."); *Robinson*, 2020 WL 1847128, at *15 (holding that any denial of women's "fundamental right to privacy" constitutes irreparable injury); *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *6 ("Plaintiffs here have demonstrated imminent, irreparable harm absent entry of injunctive relief, as their patients will be substantially delayed in or prevented from exercising their right to abortion access."); *Preterm-Cleveland*, 2020 WL 1957173, at *15 ("enforcement would, per se, inflict irreparable harm"). This Court should reach the same conclusion here.

III. THE REMAINING FACTORS SUPPORT INJUNCTIVE RELIEF

That Defendants would inflict these irreparable harms on patients in the midst of a global pandemic—increasing their risk of COVID-19 exposure and/or their risks from continued pregnancy, with no attendant public health benefit—only underscores the need for injunctive relief. Forcing those who seek abortions to remain pregnant increases demands on the health care system, including PPE and in-person clinical interactions. Forcing West Virginians to travel elsewhere for care would also increase COVID-19 risk for them and others.

A preliminary injunction will equalize access to urgent medical care in West Virginia. It will preserve the status quo of the state's balancing of public health interests as it existed prior to the challenged action. *See Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) ("[P]reliminary injunction … protect[s] the status quo and … prevent[s] irreparable harm during the pendency of a lawsuit." (internal citation omitted)). Likewise, an injunction will align access to this necessary care with the recommendations of national medical authorities.

Here, despite Defendants' efforts to pit public health against patients' constitutional

rights, the two are consistent and "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Particularly where Plaintiff is already taking appropriate steps to protect the safety of its patients, staff, and community, injunctive relief is supported by the balance of harms and the public interest.

IV. A BOND IS NOT NECESSARY IN THIS CASE

This Court has discretion to and should waive FRCP 65(c)'s bond requirement. *See Pashby*, 709 F.3d at 331–32; *see also, e.g.*, *T. v. Bowling*, No. 2:15-cv-9655, 2016 WL 4870284, at *15 n.10 (S.D. W. Va. Sept. 13, 2016); *Hernandez v. Montes*, No. 5:18-cv-5-D, 2018 WL 405977, at *2 (E.D.N.C. Jan. 12, 2018). The preliminary injunction will result in no monetary loss for Defendants. Moreover, Plaintiff is a non-profit health care provider dedicated to serving low-income and underserved communities, and a bond would strain its already-limited resources.

CONCLUSION

For these reasons, this Court should grant Plaintiff's motion and prohibit enforcement of the Order as applied to prohibit Plaintiff from providing abortion care when, in the physician's good-faith medical judgment and based on the panoply of relevant factors, delaying the abortion would prevent the patient from obtaining an abortion in West Virginia or otherwise compromise the patient's long-term health.

Respectfully submitted this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Loree Stark, do hereby certify that on this 24th day of April, 2020, I electronically filed a true and exact copy of ***Memorandum of Law in Support of Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction*** with the Clerk of Court and all parties using the CM/ECF System.

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