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

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, on behalf of itself, its staff, its physicians, and its patients, Plaintiff, v. PATRICK MORRISEY, in his official capacity as ATTORNEY GENERAL OF WEST VIRGINIA; BILL CROUCH, in his official capacity as CABINET SECRETARY OF THE WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES; CATHERINE SLEMP, in her official capacity as SECRETARY OF THE WEST VIRGINIA BOARD OF MEDICINE; KISHORE CHALLA, in his official capacity as PRESIDENT OF THE WEST VIRGINIA BOARD OF MEDICINE; and CHUCK MILLER, in his official capacity as PROSECUTING ATTORNEY FOR KANAWHA COUNTY, Defendants.	Civil Action No. 2:20-cv-00293 Hon.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, by and through its attorneys, brings this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof states the following:

1. This is a constitutional challenge, under 42 U.S.C. § 1983 and the historic equity powers of the federal courts, to enforcement of West Virginia Executive Order 16-20 (the "Order"), attached as Exhibit A, to the extent it is applied to halt abortions during pre-viability

periods of pregnancy.

2. This application to pre-viability abortions, which are essential health care, undermines the Order's stated purpose. Citing the outbreak of the COVID-19 virus and West Virginia's State of Emergency declaration,[1] 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 necessary medical equipment and supplies." Subject to three exceptions, the Order indefinitely bars all procedures that "are not immediately medically necessary to preserve the patient's life or long-term health."

3. Plaintiff—West Virginia's only outpatient abortion provider—is committed to responding to the current public health crisis effectively, for both its own patients and the greater community. It is actively taking steps to do so, as explained below.

4. Defendants' interpretation of the Order is forcing Plaintiff—for the indefinite duration of the State of Emergency—to stop providing abortions unless the patient is at or near the legal limit for medication abortion in the state or at or near the point after which the patient could not obtain any abortion in the state. As a result, the Order is inflicting immediate and irreparable harm on Plaintiff's patients by violating their constitutional rights, increasing risks to their health, imposing economic burdens, threatening their overall well-being, and forcing them to continue their pregnancies against their will.

5. Moreover, far from eliminating a patient's need for medical care *during the COVID-19 crisis*, halting abortion care substantially *increases* it. Forcing patients to remain pregnant against their will forces them to have vastly more contact with the health care system. It therefore increases their risk of exposure to the virus and causes greater demand for medical

[1] Gov. Jim Justice, A Proclamation by the Governor (Mar. 16, 2020), *available at* https://governor.wv.gov/Documents/2020%20Proclamations/State-of-Emergency-March-16-2020.pdf.

personnel and equipment—in both the near and long term—than would be the case if these patients could access the abortion care they seek in a timely manner.

6. For over forty-six years, U.S. law has recognized the fundamental federal constitutional right to make the profoundly important and personal decision whether to continue or to terminate a pregnancy. The Supreme Court has repeatedly recognized that this right is central to obtaining equality and respecting the dignity, autonomy, and bodily integrity of all individuals.

7. Accordingly, Plaintiff requests that this Court declare the Order unconstitutional to the extent it deprives Plaintiff's clinicians of the ability to exercise their judgment to determine, on a case-by-case basis, when an abortion cannot be delayed without compromising long-term health, and to enjoin Defendants and any others acting in concert with them accordingly.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343(a).

9. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201(a) and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred and continues to occur in this judicial district.

PLAINTIFF

11. Plaintiff Women's Health Center of West Virginia ("WHC") is a nonprofit corporation organized under the laws of the State of West Virginia, in Charleston, which is in Kanawha County. It is licensed as a health facility and is the only outpatient health center offering abortion care in West Virginia. WHC sues on behalf of itself, its staff, its physicians, and its patients.

DEFENDANTS

12. Defendant Patrick Morrisey is the Attorney General of the State of West Virginia, located at State Capitol Complex, Building 1, Room E-26, Charleston, West Virginia. The Attorney General "shall institute and prosecute all civil actions and proceedings in favor of or for the use of the state which may be necessary in the execution of the official duties of any state officer, board or commission on the written request of such officer, board or commission." W. Va. Code Ann. § 5-3-2. As such, the Attorney General is responsible for civil prosecution arising from violation of the Order upon referral from state officers. Defendant Morrisey is sued in his official capacity.

13. Defendant Bill J. Crouch, MPH, is the Cabinet Secretary of the West Virginia Department of Health & Human Resources located at One Davis Square, Suite 100 East, Charleston, West Virginia. The West Virginia Department of Health & Human Resources may suspend or revoke a health care facility license on grounds of, inter alia, "[k]nowingly permitting, aiding or abetting the commission of any illegal act in such institution." W. Va. Code Ann. § 16-5B-6(2). As such, Defendant Crouch is responsible for initiating actions that could result in penalties or adverse actions against Plaintiff WHC's facility license relating to violations of the Order. Defendant Crouch is sued in his official capacity.

14. Defendant Catherine C. Slemp, MD, MPH, is the Secretary of the West Virginia Board of Medicine located at 101 Dee Drive, Suite 103, Charleston, West Virginia. The West Virginia Board of Medicine may initiate actions leading to the revocation or suspension of a physician's medical license for, inter alia, "[p]racticing or offering to practice beyond the scope permitted by law." W. Va. Code Ann. § 30-3-14(c)(15). As such, Defendant Slemp governs the Board responsible for initiating actions that could result in penalties or other adverse actions against physicians' licenses relating to violations of the Order. Defendant Slemp is sued in her official capacity.

15. Defendant Kishore K. Challa, MD, is the President of the West Virginia Board of Medicine located at 101 Dee Drive, Suite 103, Charleston, West Virginia. The West Virginia Board of Medicine may initiate actions leading to the revocation or suspension of a physician's medical license for, inter alia, "[p]racticing or offering to practice beyond the scope permitted by law." W. Va. Code Ann. § 30-3-14(c)(15). As such, Defendant Challa governs the Board responsible for initiating actions that could result in penalties or other adverse actions against physicians' licenses relating to violations of the Order. Defendant Challa is sued in his official capacity.

16. Defendant Chuck Miller is the Prosecuting Attorney for Kanawha County, located at 301 Virginia Street East, Charleston, West Virginia. Prosecuting attorneys "shall … attend to civil suits in the county in which the state or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested." W. Va. Code Ann. § 7-4-1(a). As such, Defendant Miller is responsible for civil suits

arising from violations of the Order upon referral from the state. Defendant Miller is sued in his official capacity.

THE CHALLENGED ORDER

17. The World Health Organization has deemed the disease outbreak from COVID-19 infections a pandemic. COVID-19 has now spread throughout the United States, including West Virginia. Experts expect the pandemic to continue for many months, including with potential future waves of infection into the fall and 2021.

18. On March 16, 2020, Governor Jim Justice declared a State of Emergency throughout West Virginia as a result of the COVID-19 pandemic and invoked the emergency powers set forth in Chapter 15, Article 5, Section 6 of the Code of West Virginia.

19. On March 23, 2020, the Governor issued a "stay at home" order, Executive Order 9-20, under those emergency powers. That order, however, allowed individuals to leave home to obtain medicine and "non-elective medical care and treatment and other similar vital services," among a number of activities that are still permitted outside the home. It deemed health care clinics and obstetricians and gynecologists, among others, to be essential businesses that could continue their activities and to which individuals could travel.

20. On March 31, 2020, the Governor issued the Order challenged here. Its stated premise is that "prohibiting elective medical procedures is necessary during this state of emergency to protect the public health, safety, and welfare by further limiting the movement of persons and occupancy of premises throughout the state, and by conserving limited medical personnel, personal protective equipment, and other necessary medical equipment and supplies in light of existing and anticipated treatment needs for COVID-19 patients."

21. The Order indefinitely bans "all elective medical procedures," defined as those "not immediately medically necessary to preserve the patient's life or long-term health," with three exceptions: 1) "procedures that cannot be postponed without compromising the patient's long-term health," 2) "procedures that cannot be performed consistent with other law at a later date," and 3) "procedures that are religiously mandated." The Order states that patients will still have "access to urgent, medically necessary procedures."

22. The Order does not provide any further explanation of those stated exceptions.

23. The Order took effect later the same day it was issued.

24. Unlike previous guidance from the Department of Health and Human Resources ("DHHR") concerning how health care facilities should operate during the pandemic, the Order contained no assurances that those enforcing the Order would "rel[y] upon licensed health care professionals within the state to exercise their best clinical judgment in the implementation" of the Order.[2]

25. 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 to, and ask that office for permission to, resume "more urgent elective medical procedures,"[3] with no explanation of what "more urgent elective medical procedures" means. WHC is not an ASC, and so is not eligible to submit a plan.

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[2] 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.

[3] 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.

26. WHC and its clinicians are licensed by the state. To the extent WHC and its clinicians are found in violation of the Order, they are susceptible to severe licensure penalties, including facility and medical license revocation, as well as any other enforcement actions Defendants might pursue against them.

27. The Attorney General and the Governor both have enforcement power over the Order and have both expressed hostility to abortion. Indeed, the Attorney General, to whom the Governor has deferred questions about enforcement of the Order against abortion clinics,[4] has participated as an amicus curiae in support of states defending the use of the COVID-19 public health crisis to ban abortion in a number of cases.

28. Given the Attorney General's hostility to abortion and his enforcement authority, Plaintiff reasonably feared the Attorney General might use the Order to ban abortion. Therefore, on April 1, Plaintiff sought assurance from Defendants Crouch, Challa, and Morrissey that the Order did not apply to abortions that consist of prescribing and dispensing medications (and therefore are not "procedures" under the Order), and did not ban abortion care that is urgent, time sensitive, and cannot be delayed with compromising long-term health.[5]

29. On April 2, 2020, the Attorney General responded to WHC's counsel that he did not agree with counsel's statement that medication abortions are not "procedures," and did not

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[4] 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.

[5] DHHR guidance 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.

agree that WHC's medication abortions and procedural abortions may continue under the Order. The Attorney General stated that the "Order applies broadly to all procedures, and 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."[6]

30. Last week, at the Governor's request, DHHR representatives phoned WHC to inquire how it was complying with the Order. This week, the Attorney General signed on to two more amicus briefs supporting efforts to severely restrict abortion during the pandemic.[7] And Attorney General Morrissey had singled out abortion providers for increased scrutiny before.[8]

31. Absent any assurance that its clinicians can exercise their clinical judgment to provide care on the same basis as clinicians providing other medical care under the Order, and, 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 to ensure that it would not be subject to enforcement under the Order for providing abortion care. As discussed in more detail below, WHC provides two kinds of abortion care: medication abortion, in which the patient takes pills, from 4 weeks through 11 weeks and 0 days as measured from the last menstrual period ("11.0

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[6] Ltr. from Att'y Gen. Patrick Morrisey to Loree Stark (Apr. 2, 2020), attached as Ex. 6 to the Decl. of Loree Stark, which is itself attached as Ex. A to Pls.' Mot. for TRO & Prelim. Inj., filed herewith.

[7] Br. of 18 States as *Amici Curiae* in Supp. of Defs.' Emergency Mot. for Stay & Appeal, *Marshall v. Robinson*, No. 20-110401 (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. 4903563) (8th Cir. Apr. 16, 2020).

[8] In 2013, when there were still two outpatient abortion clinics 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/.

weeks LMP"); and procedural abortion, in which the clinician empties the uterus with gentle suction, from 4 weeks through 16.0 weeks LMP.

32. Under this very restrictive policy, WHC is providing care only to patients in two categories.

33. The first is patients at or near the legal limit for medication abortion in West Virginia,[9] who would otherwise lose the ability to have a legal medication abortion in the state. In practice, this means patients at or near .0 weeks LMP. Under the Order, these are "procedures that cannot be performed consistent with other law at a later date."

34. The second is patients whose long-term health would be compromised by delay. Like all clinicians, WHC clinicians ought to be 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.

35. For that reason, WHC has thus far been able to see a very narrow set of patients based on the medical determination that delay would compromise long-term health: those whom delay would push past the point at which WHC can provide abortion care, and who would thus have to carry to term and give birth (or miscarry), and, under the Order, would involve "procedures that cannot be postponed without compromising the patient's long-term health." In

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

practice, this means patients at or near 16.0 weeks LMP, the latest point at which WHC can provide procedural abortion care.

36. Thus, patients who seek care at WHC before 11.0 weeks LMP cannot access it for up to 6 weeks. That is the gap between 4 weeks LMP (the earliest WHC provides abortions) and 10 weeks LMP (when WHC provides care pursuant to the Order's exception). Patients who seek care after 11.0 weeks LMP cannot access it for up to 4 weeks (the gap between 11 weeks LMP and 15 weeks LMP). Patients who have contraindications for medication abortion cannot access *any* abortion care for up to 11 weeks (the gap between 4 weeks LMP and 15 weeks LMP).

37. As a result of the Order, approximately 45 of the 49 abortion appointments (i.e., more than 90%) WHC had scheduled before the Order went into effect had to be cancelled or rescheduled.

38. Upon hearing that their care was cancelled, patients were angry, confused, and upset; some were devastated. Patients attempting to schedule new appointments in April have been equally distressed to learn that they could not obtain the care they sought.

39. A significant number of patients expressed the desire to seek care out of state, even though such travel can be difficult and, in current times, risky, rather than remain pregnant for weeks.

40. 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. With WHC's schedule reduced to allow for social distancing, it can provide care to a maximum of 133 abortion patients in May 2020. If April's abortion patients were forced to wait until May, WHC would expect a demand of approximately 200 patients needing care. Many of

them will be further along in pregnancy and thus face higher medical costs, which means greater obstacles to access care.

41. 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. As of April 20, 2020, under the Order, it had been able to provide care to only nine.

42. The vast majority of these patients—those whose care is being halted, those who are attempting to travel out of state rather than be delayed, and those who have yet to attempt to schedule appointments—are or will be seriously and irreparably harmed by the Order.

ABORTION AND PREGNANCY CARE DURING THE COVID-19 PANDEMIC

43. COVID-19 is testing the limits of the United States health care system.

44. The Order refers to, but does not define, personal protective equipment ("PPE"). Plaintiff understands that term generally to refer to masks, sterile gloves, disposable protective eyewear, disposable gowns, and shoe covers.

45. In response to COVID-19, and before the Governor issued the Order, WHC had reduced the number of patients it sees per day and taken other steps to enforce social distancing; stopped allowing non-patients to accompany patients (except for parents of minors); screened for COVID-19 symptoms both by phone before making appointments and by checking each patient's temperature and other symptoms upon arrival at the clinic; increased the sanitization of high-touch areas; and posted signage about decreasing the spread of the virus, among other actions.

46. WHC's response to COVID-19 follows the recommendations of expert bodies in the area of infectious disease and obstetrics and gynecology (Ob/Gyn), including the Centers for

Disease Control and Prevention ("CDC") and the National Abortion Federation, among the leading United States authorities in those fields, as further described below.

47. As explained further below, abortion care requires the use of only limited personal protective equipment ("PPE").

Abortion-Related Facts

48. Abortion is urgent, time-sensitive medical care. Abortion cannot be either blocked entirely or delayed indefinitely without compromising the patient's long-term health, and without becoming illegal in West Virginia.

49. Abortion is one of the safest medical procedures in the United States and is substantially safer than remaining pregnant or giving birth.

50. Abortion is also extremely common; approximately one in four women in this country will have an abortion by age forty-five.

51. Some people have abortions because they conclude that it is not the right time to become a parent given their age, because of their conviction that they lack the necessary financial resources or level of partner or familial support or stability, or because of their desire to pursue their education and/or career. Many are already parents; indeed, a majority of patients having abortions (59%) already have at least one child, and their need to care for their families is a major factor in many patients' decision to have an abortion.

52. Some people seek abortions to preserve their life or health; some because they have become pregnant as a result of rape; and others because they decide not to have children at all.

53. Some people who have suffered trauma, such as sexual assault or domestic violence, may be concerned that pregnancy, childbirth, and/or an additional child may exacerbate

already extremely difficult and dangerous situations for them and put them at risk of greater sexual or physical violence, or worse.

54. Some people decide to have an abortion because of a diagnosis of a fetal medical condition or anomaly. Some families do not feel they have the resources—financial, medical, educational, or emotional—to care for a child with special needs or to simultaneously provide for the children they already have.

55. Ultimately, the decision to terminate a pregnancy is motivated by a combination of diverse, complex, and interrelated factors that are intimately related to the individual's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability.

56. West Virginia law limits the time period during which abortion is legally available in the state. The law forbids abortion starting at 22.0 weeks LMP, except in cases of life endangerment or severely compromised health, and also forbids the most commonly used procedure for second-trimester abortions. W. Va. Code §§ 16-2O-1 & 16-2M-4. Thus, WHC can provide abortion only up to 16 weeks LMP.

57. There are two main methods of abortion: medication abortion and procedural abortion.

58. In 2019, WHC provided 466 medication abortions and 678 procedural abortions.

59. WHC provides only medication abortions on Mondays; it provides medication and procedural abortions on Wednesdays and Thursdays.

60. Medication abortion involves the patient ingesting a combination of two pills: mifepristone and misoprostol. The patient first takes the mifepristone and then, typically twenty-

four to forty-eight hours later, takes the misoprostol, after which they expel the contents of the uterus in a manner similar to an early miscarriage.

61. Medication abortion is available in West Virginia at WHC from 4.0 weeks through 11.0 weeks LMP.

62. For some patients, medication abortion is contraindicated or there are other factors that would necessitate a procedural abortion, such as when the patient has an allergy to the medications or other medical conditions that make procedural abortion relatively safer.

63. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision and WHC uses no general anesthesia.

64. The procedural abortion method performed at WHC is known as suction curettage or aspiration abortion. The clinician uses gentle suction through a narrow, flexible tube to empty the contents of the patient's uterus.

65. Procedural abortion is available in West Virginia at WHC from 4.0 weeks through 16.0 weeks LMP

66. Procedural abortion requires limited PPE. Medication abortion requires even less PPE than procedural abortion. WHC's protocols for PPE use comply with current CDC guidelines.

67. WHC does not use and does not have in supply any N-95 masks, but instead uses ones commonly referred to as "surgical" masks. The N-95 masks, upon information and belief, are the ones in shortest supply in the response to COVID-19.

68. For procedural abortions, only a small number of staff are involved and therefore in need of PPE. WHC clinicians use surgical masks, gowns, reusable protective eyewear, gloves,

and shoe coverings. Only the physician uses sterile gloves. Gloves are changed between patients; all other PPE is reused unless soiled. WHC does not use or possess any disposable protective eyewear.

69. Medication abortion requires even less PPE. Only two clinicians are involved in the administration of medication abortion and each uses only non-sterile gloves and surgical masks. The gloves are changed between patients and the masks are reused unless soiled

70. Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Patients will need to schedule an appointment, gather the resources to pay for the abortion and related costs, and arrange transportation to a clinic, and possibly time off work (potentially without paid sick leave) and childcare.

71. These obstacles and delays are further exacerbated when a patient can no longer obtain an abortion in the city where or close to where she lives, and must instead travel extended distances to obtain abortion services. Even apart from the COVID-19 pandemic, many West Virginia patients have to undertake long, difficult travel to access abortion because WHC is the state's only outpatient abortion provider.

72. The COVID-19 pandemic has only exacerbated existing burdens on patients seeking abortion care. It has constrained people's ability to use public transportation, caused layoffs and other work disruptions that deprive people of income, shuttered schools and childcare facilities, and otherwise limited patients' options for transportation and childcare support during a time of "stay at home" orders such as the one operative in West Virginia.

73. Delay in accessing abortion care results in higher financial and emotional costs to the patient.

74. Delay also results in higher risks. First, the longer a patient remains pregnant against their will, the longer they are exposed to the significant medical risks inherent in pregnancy. Second, although abortion is a very safe medical procedure, the health risks associated with it increase as pregnancy advances. Accessing abortion as early in pregnancy as possible is the single most important factor for ensuring the safety of abortion.

75. The risk of death associated with abortion increases with delay and, starting at 8 weeks, increases 38% for each week of delay. The mortality risk at 14–17 weeks is more than eight times greater than at eight weeks or less.

76. Complications from abortion are likewise rare, but also increase as pregnancy advances. Complications occur in 1.26% of first trimester surgical abortions and 1.47% of second-trimester cases. Major complications—defined as complications requiring hospital admissions, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases: in 0.31% of medication abortion cases, in 0.16% of first-trimester in-clinic abortion cases, and in 0.41% of in-clinic cases in the second trimester or later. Major complications occur nearly twice as frequently in second-trimester abortions as in first-trimester abortions.

77. While the risk of abortion-related mortality and morbidity is very low, there is no way to know in which patients those risks will materialize and cause harm. Because, statistically, the risks associated with abortion increase with each week of pregnancy, a provider forced to select certain patients to delay would be needlessly increasing the risks to patient's physical safety.

Pregnancy-Related Facts

78. While pregnancy can be a blessing for many families, even an uncomplicated pregnancy is an enormous medical challenge even for healthy patients, let alone those with underlying medical conditions, such as diabetes, hypertension, and obesity, which are common in West Virginia.

79. The risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions.

80. From the onset of pregnancy, every patient is at risk of complications. All of these complications can reach a level of severity that leads a patient to seek medical evaluation or urgent or emergency care.

81. Even an uncomplicated pregnancy poses challenges to a person's entire physiology and stresses most major organs. A pregnant patient's lungs must work harder to breathe and the pregnancy puts pressure on the lungs, leaving many if not most patients feeling chronically out of breath. The heart pumps 30–50% more blood during pregnancy, which results in the kidneys becomes enlarged, and the liver produces more clotting factors, which in turn increases the risk of blood clots or thrombosis. Pregnant patients are very likely to experience gastrointestinal symptoms including nausea and vomiting which, in the most severe cases, can cause dehydration that must be treated with IV fluids and medications.

82. 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 of pregnancy. 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. Pregnant patients also remain at risk for miscarriage throughout their pregnancy.

83. All of these conditions can reach a level of severity that leads a patient to seek medical evaluation or urgent or emergency care.

84. Medical evaluation and urgent and emergent care for pregnant patients requires more PPE, more interaction between patients and health care providers and more hospital resources than abortion.

85. 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.

86. A substantial proportion of pregnant women seek emergency department care at least once during their pregnancy. In one recent study, 49% visited the emergency department at least once, and 23% visited twice or more. Patients with comorbidities such as diabetes, hypertension and obesity—all of which are experienced at increased rates in West Virginia—are more likely to present to the emergency department for urgent or non-urgent care.

87. Patients who are pregnant and have severe symptoms consistent with COVID-19—including shortness of breath, which is a common symptom of pregnancy—are advised to seek immediate care in the emergency department or an equivalent unit that treats pregnancy. When seeing these patients in the emergency department, health care providers will use the appropriate amount of PPE for a suspected COVID-19 patient.

88. Moreover, approximately 17% of pregnant patients miscarry. Treatment for uncomplicated miscarriage is similar to abortion care but becomes much more involved the later in pregnancy the miscarriage occurs, which would require more intensive care and, therefore,

more interaction with the medical system and consumption of resources, including PPE. Patients miscarrying regularly seek hospital care, and often make multiple visits to hospitals.

89. Patients who carry to term and deliver will use extensive hospital resources and PPE. Pregnancy lasts 40 weeks LMP. Even with an uncomplicated pregnancy, patients should receive 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 providers are encouraged to use telemedicine during the 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 and each of them requires 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.

The Necessity of Health Care Resources for Pregnant People

90. As the above facts reflect, pregnancy itself is a condition that triggers the need for medical care, and often a significant amount of medical care. Because pregnant patients require *ongoing* clinical care, halting abortions does not postpone the demands that patients place on the medical system. Patients forced to remain pregnant under the Order must still seek medical care to maintain their health and well-being—more medical care than they would have needed in obtaining abortion care, using much more PPE.

91. All pregnant people will require health care—in simply being pregnant, and then in labor and delivery; in the management of miscarriage; or in ending the pregnancy through

abortion care. Abortion care demands the least medical resources of the three possibilities in terms of clinical time, PPE, and hospital beds.

92. A pregnancy cannot be paused until the COVID-19 pandemic passes. It is essential that pregnant patients, including those seeking abortion, receive the ongoing medical care they need at the same time as health care providers take precautions against the spread of COVID-19 and conserve PPE.

93. On March 18, 2020, the American College of Obstetricians and Gynecologists ("ACOG") and other experts in Ob/Gyn care issued a statement emphasizing that, "[t]o the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID19 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."[10]

94. The March 18 statement continued, "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."

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[10] 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 to Pls.' Mot. for TRO & Prelim. Inj., filed herewith.

95. The American Medical Association—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.'"[11]

THE ORDER'S IMPACT ON PLAINTIFF AND ITS PATIENTS

96. For all the reasons set forth above, abortion is not an "elective medical procedure," the phrase the Order uses, that can be delayed without severe harm to patients.

97. Indeed, medication abortion is not a "medical procedure" at all.

98. Regardless of method, abortions should continue during the COVID-19 crisis consistent with the Order's guidelines allowing "access to urgent, medically necessary" health care based on the clinician's medical determination.

99. In addition to the medical risks of remaining pregnant and of delayed abortions, delaying care will also increase the emotional, financial, and psychological stressors on patients during what is already an extremely stressful public health crisis.

100. For patients who lack social support or have underlying psychosocial conditions, this delay may be particularly stressful.

101. For those patients whose pregnancy results from episodes of violence, including sexual assault, being forced to carry an unwanted pregnancy for weeks is an unconscionable burden.

102. Because patients who remain pregnant will face continued, and likely increased, symptoms of pregnancy, their privacy may be compromised.

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[11] Am. Med. Ass'n, *AMA statement on government interference in reproductive health care*, Mar. 30, 2020, https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproductive-health-care.

103. Because the cost of the procedure increases as pregnancy advances, procedural abortion patients will have to try to pay for a more expensive procedure.

104. Finally, because so many patients, especially those with low incomes, already have extreme difficultly accessing care, the Order's halting of abortion creates yet another hurdle that some patients will not be able to overcome.

105. Even if the COVID emergency ends sooner than expected, and does not recur in waves, patients will have suffered greatly increased health risks and added psychological distress from the weeks of pregnancy they were forced to endure.

106. Further, because WHC is the only outpatient facility clinic offering abortion care in the state, patients who do try to wait to obtain care until after the Order is lifted will not be able to do so at that time: one clinic will simply not have the capacity to immediately meet the pent-up demand that accrued while the Order was in effect.

107. 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.

108. Travel is always a great burden, especially to patients with low incomes, and those burdens are heightened because of COVID-19. Today, travel is harder, more expensive, takes longer, and entails the risk of exposure to the virus. Travel will also delay care, pushing some patients past the point at which they can have an aspiration abortion. Those patients, if they can access care at all, will have to have a lengthier, more complicated procedure. Even for those West Virginia patients who can afford and manage to secure an abortion out of state, that involuntary, long-distance travel adds to their medical, emotional, and financial strain, and increases their risk of acquiring and/or spreading COVID-19.

109. Those patients who are unable to travel out of state and unable to obtain care in the narrow windows that the Order allows will be forced to remain pregnant against their will, with all the risks that entails, or may seek to end their pregnancies outside the regulated medical setting. The latter course presents further risks to the patient's health and can result in complications requiring urgent or emergent hospital care.

THE NEED FOR IMMEDIATE INJUNCTIVE RELIEF

110. Enforcement of the Order to halt abortion except in two very small windows during pre-viability pregnancy subjects Plaintiff's patients to significant and irreparable harm to their constitutional rights, as well as emotional, dignitary, and other harms for which there exists no adequate remedy at law.

111. This enforcement of the Order also exposes Plaintiff's patients to increased medical risks from continued, forced pregnancy, from delayed abortion, or from abortion outside the medical setting. Patients who travel longer distances to out-of-state providers, and patients who remain pregnant and access the intense, ongoing medical care associated with pregnancy and childbirth will also thereby suffer an increased risk of exposure to COVID-19.

112. The Order causes further irreparable harm by threatening Plaintiff, its staff, and its physicians with licensure or other penalties and by preventing them from providing necessary, urgent medical care for their patients.

CLAIMS FOR RELIEF

Count I – Substantive Due Process

113. Plaintiff repeats the factual allegations set forth above as if fully set forth herein.

114. Enforcement of the Order, to the extent Defendants' interpretation of the Order prohibits clinicians from using their medical judgment about whether to provide an abortion

under the Order and instead forces them to halt all pre-viability abortions except in two narrow windows of pregnancy, violates the rights to liberty and privacy secured to Plaintiff's patients by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Count II – Vagueness

115. Plaintiff repeats the factual allegations set forth above as if fully set forth herein.

116. By failing to adequately define the scope of the Order and interpreting the Order to halt all pre-viability abortions except in two narrow windows of pregnancy, notwithstanding that the Order should allow WHC's clinicians to rely on their medical judgment to the same extent as clinicians providing other medical care, Defendants have prevented Plaintiff from understanding what conduct is prohibited and put it at risk of arbitrary and discriminatory enforcement in violation of its due process rights.

Count III – Equal Protection

117. Plaintiff repeats the factual allegations set forth above as if fully set forth herein.

118. By selectively burdening Plaintiff's patients' fundamental right to abortion without justification and singling out abortion providers and their patients for treatment different from providers of, and patients in need of, other essential medical services that cannot be halted indefinitely without compromising long-term health, the Order violates the right to equal protection guaranteed by the Fourteenth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court take these actions:

A. To immediately issue a temporary restraining order and/or preliminary injunction, and later a permanent injunction, restraining Defendants, their employees, agents, and successors in office, and all those acting in concert with them, from enforcing the Order in a manner that

prohibits Plaintiff's clinicians from using their medical judgment to determine, on a case-by-case basis, whether an abortion can be provided consistent with the terms of the Order, and in a manner that halts all but a narrow subset of abortions.

B. To enter a judgment declaring Defendants' enforcement of the Order as described above a violation of the Fourteenth Amendment to the U.S. Constitution.

C. To award Plaintiff its attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b).

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

Respectfully submitted this 24th day of April, 2020.

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EXHIBIT A

STATE OF WEST VIRGINIA

EXECUTIVE DEPARTMENT

At Charleston

EXECUTIVE ORDER NO. 16-20

By the Governor

WHEREAS, a State of Emergency was declared on the Sixteenth Day of March, Two Thousand Twenty for all counties in West Virginia (the "State of Emergency Declaration"), to allow agencies to coordinate and create necessary measures to prepare for and respond to the outbreak of respiratory disease caused by a novel coronavirus now known as COVID-19; and

WHEREAS, Chapter 15, Article 5, Section 6 of the Code of West Virginia authorizes the Governor to, among other things, control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movement of persons within the area, and the occupancy of premises therein, and to perform and exercise other functions, powers, and duties that are necessary to promote and secure the safety and protection of the civilian population; and

WHEREAS, Executive Order 9-20 ordered, among other things, all individuals within the State of West Virginia to stay at home or their place of residence unless performing an essential activity, which term "essential activity" included travel for certain medical care and treatment; and

WHEREAS, further measures are necessary to protect the health, safety, and welfare of the public, to disrupt the spread of the virus, and to mitigate the impact of COVID-19, including the prohibition of elective medical procedures throughout the state; and

WHEREAS, prohibiting elective medical procedures is necessary during this state of emergency to protect the public health, safety, and welfare by further limiting the movement of persons and occupancy of premises throughout the state, and by conserving limited medical personnel, personal protective equipment, and other necessary medical equipment and supplies in light of existing and anticipated treatment needs for COVID-19 patients.

NOW, THEREFORE, I, JIM JUSTICE, pursuant to the authority vested in me pursuant to the provisions of Chapter 15, Article 5, Section 6 and Chapter 15, Article 5, Section 1 of the Code of West Virginia, hereby **DECLARE** and **ORDER,** effective as of 12:00 AM, Eastern Standard Time, on the First day of April, Two Thousand Twenty, that all elective medical procedures are hereby prohibited; 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. The term "elective" includes medical procedures that are not immediately medically necessary to preserve the patient's life or long-term health, except that 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 are religiously mandated shall not be considered "elective" under this Order.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.

DONE at the Capitol in the City of Charleston, State of West Virginia, this Thirty-first day of March, in the year of our Lord, Two Thousand Twenty in the One Hundred Fifty-seventh year of the State.

GOVERNOR

By the Governor

SECRETARY OF STATE