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**United States Court of Appeals  
for the Eighth Circuit**

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

*Petitioners.*

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

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**BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, COLORADO,  
CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE,  
MASSACHUSETTS, MINNESOTA, NEVADA, NEW MEXICO, OREGON,  
PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND  
WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO  
PETITIONERS’ EMERGENCY MOTION TO STAY**

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## INTEREST OF AMICI

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia. Amici oppose a stay of the district court's temporary restraining order (TRO) because they have a strong interest in ensuring that women can obtain time-sensitive reproductive care in Arkansas without undertaking significant interstate travel that increases public health risks. Some of amici's residents are temporarily in Arkansas and unable to return home because of the current public health emergency. And some women in Arkansas will travel to or through amici States to obtain abortion services banned in Arkansas.

Amici's experiences show petitioners are wrong in claiming that responding effectively to the current crisis requires banning all surgical abortions prior to fetal viability—even when surgical abortion is the only abortion option available—except where immediately necessary to preserve the patient's life or health. Whether petitioners' ban is indefinite (*see* Opp'n to Emergency Mot. 3-4) or expires on May 11 as petitioners

assert, the ban will cause some women to permanently lose their right to lawfully obtain an abortion in Arkansas and will place an undue burden on women's exercise of that right.

The district court relied on evidence showing that banning surgical abortions does not advance petitioners' interests in preserving personal protective equipment (PPE), maintaining hospital capacity, and preventing COVID-19 transmission. Amici's experiences confirm the court's reasoning. Petitioners thus are not irreparably injured by the TRO, whereas staying the TRO will cause irreparable injury—rendering a stay of the TRO inappropriate. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (listing stay factors).

Petitioners also cannot show they are likely to obtain a writ of mandamus vacating the TRO. *See id.* The district court properly applied the well-settled standards governing review of abortion bans and restrictions and determined that the public necessity case law produced the same result. Moreover, mandamus is unavailable where, as here, petitioners have alternative avenues for pursuing equivalent and equally timely relief.

## ARGUMENT

### POINT I

#### AMICI'S EXPERIENCES SHOW PETITIONERS WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY

##### **A. Petitioners' Interests in Preserving Medical Resources and Reducing COVID-19 Transmission Are Not Being Irreparably Harmed.**

Petitioners are not irreparably harmed by allowing the surgical abortions permitted by the TRO, because banning those services does not preserve hospital capacity and PPE or reduce interpersonal contacts.

a. Surgical abortions are not performed in hospital settings, do not require the N95 masks particularly needed to treat COVID-19, and very rarely result in complications requiring hospital resources. (ECF No. 134-2, at 6; ECF No. 134-6, at 4; ECF No. 134-3, at 5-6 (0.01% of emergency room visits are abortion-related).)<sup>1</sup> They use far less PPE and medical resources than continuing a pregnancy, which typically entails more than one appointment per month, plus ultrasounds and laboratory testing that

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<sup>1</sup> ECF docket entries refer to filings in the district court and use ECF-imposed pagination. Other record citations are to documents in petitioners' appendix (App.s).



may require gloves, a face mask, and often other PPE. (ECF No. 134-3, at 14.)

Petitioners' ban, even if expiring on May 11, has prevented and will prevent women from obtaining an aspiration abortion: a one-day procedure that can be performed only in the first trimester. (*See id.* at 8.) Aspiration abortions, however, can avert more invasive later terminations that require more provider-patient interactions and PPE. (*See id.* at 8-9.)

Abortion considerations aside, early pregnancy occasions a significant number of hospitalizations resulting from complications and miscarriages.<sup>2</sup> Miscarriages commonly occur in the first trimester,

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<sup>2</sup> Anne Elixhauser & Lauren M. Wier, *Complicating Conditions of Pregnancy and Childbirth, 2008* (Healthcare Cost & Utilization Project, Statistical Brief No. 113, 2011) (internet) (up to 10% of pregnancy-related hospitalizations involve non-delivery complications); Sarah C.M. Roberts et al., *Miscarriage Treatment-Related Morbidities and Adverse Events in Hospitals, Ambulatory Surgery Centers, and Office-Based Settings*, J. Patient Safety, at 3-4 (2018) (internet) (75% of miscarriage treatments occurred in hospital and 1% of all miscarriage treatments involved major complications).

For sources available on the internet, full URLs appear in the Table of Authorities.

terminate 15-20% of all pregnancies, and often result in unplanned hospitalizations requiring surgery or blood transfusion. (See ECF No. 134-4, at 8, 20.)<sup>3</sup> Miscarriage rates might be even higher now, as a consequence of COVID-19 infections.<sup>4</sup> Because some of these events are inevitably avoided by providing access to timely abortion procedures, denying access to timely abortions may not appreciably conserve hospital resources and PPE in the coming weeks.

Meanwhile, other strategies can alleviate potential resource shortages, as amici's experiences have shown. To preserve hospital capacity, many amici have modified or waived hospital regulations to increase beds in existing facilities and create on-site temporary structures—or converted hotels, dormitories, and convention centers into

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<sup>3</sup> See also Am. Coll. of Obstetricians & Gynecologists (ACOG), *Early Pregnancy Loss* (Nov. 2018) (internet) (80% of miscarriages in first trimester); Roberts, *Miscarriage Treatment-Related Morbidities*, *supra*, at 3-4; J. Trinder et al., *Management of Miscarriage: Expectant, Medical, or Surgical? Results of Randomised Controlled Trial (Miscarriage Treatment (MIST) Trial)*, *BMJ* (May 27, 2006) (internet) (unplanned hospitalization rate of 8-49% following miscarriage depending on method of treatment).

<sup>4</sup> March of Dimes, *Coronavirus Disease (COVID-19): What You Need to Know About Its Impact on Moms and Babies* (Apr. 8, 2020) (internet).

quarantine sites and field hospitals.<sup>5</sup> Some amici have developed state-wide or regional hospital coordinating plans for transferring patients from hospitals nearing capacity to those with available bed space.<sup>6</sup>

To preserve PPE, some amici have issued guidance advising health care workers on conserving PPE,<sup>7</sup> directed businesses to make their PPE supplies available for distribution,<sup>8</sup> and established logistics centers to monitor PPE needs and coordinate PPE receipt and distribution.<sup>9</sup> Amici are also finding new ways to source PPE, including through new purchasing channels and by making funding available to enable businesses like clothing companies and distilleries to produce COVID-19 related supplies.<sup>10</sup>

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<sup>5</sup> Addendum (Add.) CA-1, CT-1, HI-1, IL-2, MA-2, NY-2, NY-4, OR-1, VA.

<sup>6</sup> Add. NY-5, OR-1.

<sup>7</sup> Add. CA-1, CO, DE-1, DE-2, MA-1.

<sup>8</sup> Add. NM-2.

<sup>9</sup> Add. CT-2, NY-5, MN-3, OR-1.

<sup>10</sup> Add. NY-1, RI-1.

b. The surgical abortions permitted under the TRO do not increase risks of COVID-19 transmission. Surgical abortions require no more interpersonal contact than petitioners are allowing in other medical contexts (ECF 134-10, at 2), or in social and religious gatherings and business operations (App. 7; *see* ECF No. 134-6, at 3).

To further decrease transmission risks in the context of reproductive health care, clinics in amici States have increased the use of telehealth to conduct assessments, which reduces travel and in-person interactions.<sup>11</sup> Some amici have modified state rules to allow increased use of telehealth during the pandemic.<sup>12</sup> While Arkansas has taken similar steps regarding telehealth generally,<sup>13</sup> it has refused to do so for abortion care, to eliminate in-person contacts that could be safely accomplished remotely (App. 9).

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<sup>11</sup> Add. CA-4.

<sup>12</sup> *See, e.g.*, Add. CA-3, HI-1, RI-2.

<sup>13</sup> Add. AR.

**B. A Stay Will Irreparably Harm Patients and Pose a Threat to the Public Interest.**

Petitioners' prohibition on surgical abortions will foreclose some patients from accessing pre-viability terminations altogether, unless they undertake risky and expensive interstate travel. For other women, it will lead to more complicated procedures that increase interpersonal contacts and PPE use. These results are contrary to the stated interests of petitioners and the public interest.

a. Petitioners' ban on surgical abortions will irreparably injure any woman who reaches the legal limit for an abortion during the ban (week 20 of the pregnancy, in Arkansas). (App. 4, 15.) Those women, for whom surgical abortion is the only available option (App. 4), will permanently lose their right to lawfully obtain an abortion in Arkansas.

Petitioners' characterization of the ban as prohibiting only "elective" procedures (Pet. 26) fails to recognize how the time-sensitive nature of abortion care distinguishes that care from services that can be postponed without patient harm during the current public health crisis. As amici have acknowledged through various means, abortions cannot be

deferred indefinitely or for long stretches without increasing risks for some women and denying access to others.<sup>14</sup>

b. The public interest counsels strongly against a stay here. Amici States' past experience and the record evidence (ECF No. 134-2, at 17-19; ECF No. 134-3, at 14, 17) show that if surgical abortions remain unavailable in Arkansas, many women will cross state lines, including to amici States, to obtain abortions and then return to Arkansas.<sup>15</sup> Petitioners' ban will thus encourage interstate travel, increasing the risks of COVID-19 transmission and infection-related burdens on petitioners' hospital facilities and PPE supplies.

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<sup>14</sup> Add. CA-2, DC, IL-1, MN-1, MN-2, NJ, NM-1, NY-3, OR-2, VT, WA.

<sup>15</sup> See Molly Hennessy-Fiske, *Crossing the 'Abortion Desert': Women Increasingly Travel Out of Their States for the Procedure*, L.A. Times (June 2, 2016) (internet); Jonathan Bearak et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care*, Guttmacher Inst. (Apr. 2, 2020) (internet); see also Alexa Garcia-Ditta, *With More Texans Traveling for Abortions, Meet the Woman Who Gets Them There*, Tex. Observer (June 9, 2016) (internet) (Texas patients in New Mexico doubled after 2013 Texas law restricting access).

## POINT II

### **PETITIONERS CANNOT SHOW THEY WILL LIKELY SUCCEED ON THE MERITS GIVEN DECADES OF BINDING PRECEDENT TO THE CONTRARY AND ALTERNATIVE AVENUES OF RELIEF**

Petitioners also cannot make “a strong showing” of likely success on their mandamus petition. *Nken*, 556 U.S. at 434. Mandamus “is a drastic and extraordinary remedy reserved for” truly “exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion.” *Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation marks and citation omitted). And it is unavailable where other avenues exist to obtain the desired relief. *Id.* at 380-81. The petition here satisfies neither prerequisite.

a. Petitioners cannot show the district court indisputably erred in evaluating petitioners’ ban on surgical abortions under well-established and binding precedent. The Supreme Court has repeatedly reaffirmed that “[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quotation marks omitted); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). Pre-

viability abortion bans thus have been uniformly rejected by courts for decades. (*See* ECF No. 135, at 24-25 & n.125.)

The district court correctly applied this settled law when the court enjoined petitioners from prohibiting surgical abortions by the only provider of surgical abortions in Arkansas (ECF No. 134-3, at 4)—thereby enjoining a ban on abortion for women who cannot legally or medically access medication abortions (women more than two months pregnant or with contraindications). (App. 11.)

The court properly determined (App. 13-16) that because the ban does not serve petitioners' stated interests, it is also an "undue burden." *Whole Women's Health*, 136 S. Ct. at 2309; *see also Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-901 (1992) (plurality op.). Allowing early surgical abortions ultimately preserves PPE and hospital capacity, and minimizes in-person contact. Permitting women access to early aspiration abortions now will prevent them from resorting to more complicated abortions in the upcoming weeks (*see supra* at 4), and thus help "flatten the curve" of rising infections and any PPE or hospital-bed shortages. Meanwhile, both types of abortion require less PPE, hospital capacity, and interpersonal



contact than the prenatal visits and miscarriage management associated with continued pregnancy (*supra* at 3-4).

The Supreme Court has explained repeatedly that an abortion restriction cannot survive constitutional scrutiny when it imposes greater burdens than benefits. *See Whole Woman's Health*, 136 S. Ct. at 2310. Here, the ready availability of other more effective measures to reduce transmissions and conserve PPE highlights the extent to which petitioners' abortion ban is unnecessary to advance the State's interest in protecting the public health. *See id.* at 2311; *supra* at 5-7.

Petitioners are incorrect in claiming that public necessity justifies their abortion ban. The district court properly considered petitioners' interest in public health and found that prohibiting surgical abortion "has no real or substantial relation to" that interest, while placing an undue burden on a woman's constitutional right to access abortion services. (App. 16-17 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 38 (1905)).)

Petitioners are therefore wrong in contending that the district court ignored *Jacobson* and improperly interfered with public health policies by entering the TRO. *Jacobson* recognized that liberty interests may be

subject to “reasonable regulation” to protect public health. 197 U.S. at 25-26, 29-30. But the Court there also made clear that where an exercise of the police power is arbitrary and unreasonable in relation to “particular circumstances” and “particular persons,” courts should intervene to protect individuals from the restriction. *Id.* at 28. The district court followed that direction here and enjoined petitioners’ ban under the “particular circumstances” where it deprives women of their fundamental constitutional right to access abortion services and does not serve petitioners’ asserted interests.<sup>16</sup>

b. Petitioners also cannot demonstrate a likelihood of success here because mandamus is unavailable where petitioners can seek equivalent relief on the same timeline through proper proceedings in district court. *See Cheney*, 542 U.S. at 380-81. For example, as the Tenth Circuit recently recognized in dismissing an appeal of a similar TRO, the State

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<sup>16</sup> Petitioners mistakenly rely on cases involving physical property or commercial interests (Pet. 16) that have no import here, where a personal liberty interest and right to bodily integrity are at issue. They also derive no support from *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944), which upheld a child labor law prohibiting children from selling religious materials, finding it a permissible regulation on the free exercise of religion because other ways existed to teach religious principles.

could achieve the same result by opposing the plaintiffs’ preliminary injunction motion. *South Wind Women’s Ctr. LLC v. Stitt*, No. 20-6045, 2020 WL 1860683, at \*3 (10th Cir. Apr. 13, 2020).

Alternatively, petitioners could move to dissolve the TRO upon two or fewer days’ notice. Fed. R. Civ. P. 65(b)(4). Indeed, in “provisionally grant[ing]” the ex parte TRO pursuant to Rule 65(b), the district court expressly invited petitioners to respond and noted the TRO could be dissolved before the expiration of its fourteen-day term. (App. 21-22.) Petitioners therefore miss the mark in arguing that they had no opportunity to respond and in relying on *In re Abbott*, where a Rule 65(b)(4) motion was unavailable because the TRO had been entered upon notice to and written briefing by both parties. No. 20-50264, 2020 WL 1685929, at \*3 (5th Cir. Apr. 7, 2020).<sup>17</sup>

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<sup>17</sup> Even if petitioners could satisfy the mandamus prerequisites, the Court should deny mandamus as inappropriate under these circumstances. *See Cheney*, 542 U.S. at 381. Granting mandamus here would interrupt timely proceedings in the district court and create rather than avoid “piecemeal litigation,” *id.* at 391—as has occurred in the Texas case, *In re Abbott*, 2020 WL 1685929 (granting first mandamus petition vacating TRO). *See In re Greg Abbott*, No. 20-50296 (5th Cir. filed Apr. 10, 2020) (second mandamus petition regarding TRO); *Planned Parenthood Center for Choice v. Abbott*, No. 20-50314 (5th Cir. filed Apr. 15, 2020) (appeal regarding TRO).

## CONCLUSION

For the reasons set forth above and in respondents' opposition, this Court should deny petitioners' motion for a stay.

Dated: New York, New York  
April 17, 2020

Respectfully submitted,

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# Addendum

## ADDENDUM

### Arkansas

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I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,550 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief complies with Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in Word using Century Schoolbook 14-point typeface.

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Dated: April 17, 2020

/s/ Anisha S. Dasgupta  
Anisha S. Dasgupta

## Certificate of Service

I certify that on April 17, 2020, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system.

Dated: April 17, 2020

/s/ Anisha S. Dasgupta  
Anisha S. Dasgupta