**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| **AALFA Family Clinic**, et al.<br><br>Plaintiffs,<br><br>v.<br><br>**Tim Walz**, et al.<br><br>Defendants. | Case No. 0:20-cv-01037-PJS-DTS |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS WHOLE WOMAN'S HEALTH OF THE TWIN CITIES, LLC; WE HEALTH CLINIC, P.A.; AND ROBBINSDALE CLINIC, P.A.**

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## INTRODUCTION

Defendants Whole Woman's Health of the Twin Cities, LLC ("WWH"); WE Health Clinic, P.A. ("WE Health Clinic"); and Robbinsdale Clinic, P.A. ("Robbinsdale Clinic") (collectively, the "Clinics" or "Clinic Defendants"), respectfully submit this memorandum of law in support of their Motion to Dismiss Plaintiffs' Amended Complaint.

The Amended Complaint asserts claims against the Clinic Defendants and various representatives of the State of Minnesota (the "State Defendants") arising from recent executive orders seeking to arrest the spread of COVID-19. These claims, alleging constitutional violations, are meritless even as directed to the State Defendants who issued the executive orders. With respect to the Clinic Defendants, however, Plaintiffs utterly fail to allege any conduct upon which a claim could be based. The Clinic Defendants are not state actors capable of violating the Constitution. Further, Plaintiffs' claims are deficient for lack of standing, mootness, and ripeness.

Plaintiffs' third and final claim for relief—a demand for a declaration that "Abortion Is Not A Constitutional Right"—reveals Plaintiffs' true intentions. Am. Compl. (ECF No. 36) ¶ 90. This case is nothing more than a pretext for demanding judicial nullification of a constitutional right to which Plaintiffs are ideologically opposed. But the rule of law demands that the parties and the Court adhere to Supreme Court precedent. Accordingly, Plaintiffs' claim for declaratory relief fails to give rise to a substantial federal question.

The Court should dismiss Plaintiffs' claims against the Clinic Defendants.

## BACKGROUND

### I. THE EXECUTIVE ORDERS

On March 13, 2020, in response to the COVID-19 pandemic, Governor Walz issued Executive Order 20-01, declaring a peacetime emergency. Exec. Order No. 20-01 (2020) (ECF No. 36-1).

On March 19, 2020, Governor Walz issued Executive Order 20-09, which declared that "all non-essential or elective surgeries and procedures, including non-emergent or elective dental care, that utilize PPE or ventilators must be postponed indefinitely." Exec. Order No. 20-09 ¶ 1 (2020) (ECF No. 36-2). The Order defined "non-essential or elective surgeries and procedures" as "surger[ies] or procedure[s] that can be delayed without undue risk to the current or future health of a patient" and included criteria for use by health professionals in determining whether a particular surgery or procedure was non-essential or elective.[1] *Id.* ¶ 2. On March 25, 2020, the Minnesota Department of Health ("Health Department") issued written guidance, which provided additional criteria for health professionals to use when determining whether to postpone a procedure. MINNESOTA DEPARTMENT OF HEALTH, *FAQ: Executive Order Delaying Elective Medical Procedures*, 1-2 (Mar. 25, 2020) (attached as Ex. A).

On March 23, 2020, Governor Walz issued Executive Order 20-16, which required all Minnesota businesses, nonprofits, and non-hospital health care facilities possessing

[1] Governor Walz clarified the application of Executive Order 20-09 to veterinary surgeries and procedures in Executive Order 20-17, issued on March 23, 2020. Exec. Order No. 20-17 (2020) (ECF No. 36-8).

"PPE, ventilators, respirators, or anesthesia machines (including any consumable accessories to these devices) that are not required for the provision of critical health care services or essential services" to inventory such supplies. Exec. Order No. 20-16 ¶ 1 (2020) (ECF No. 36-7).

On March 25, 2020, Governor Walz issued a stay-at-home order, Executive Order 20-20, which required all persons currently living in Minnesota to remain in their homes. Exec. Order No. 20-20 ¶ 1 (2020) (ECF No. 36-4). Residents could only leave their homes to engage in "Activities or Critical Sector work" as defined in the Order. *Id.* The Activities exempted from the stay-at-home requirement included relocation to ensure safety, health and safety activities, outdoor activities, necessary supplies and services, essential travel, and care of others. *See id.* ¶ 5. The Critical Sector work exempted from the stay-at-home requirement included work performed by "healthcare and public health" workers and by "faith leaders and workers," where the work could "not be done at [a worker's] home or residence through telework or virtual work and [could] be done only at a place of work outside of their home or residence." *Id.* ¶¶ 6(a)(ii); 6(v).[2]

On April 8, 2020, Governor Walz issued a second stay-at-home order, Executive Order 20-33, which rescinded Executive Order 20-20 and extended the stay-at-home requirement. Exec. Order No. 20-33 ¶ 1 (2020) (ECF No. 36-5). The Order expanded

[2] The Order defined "faith leaders and workers" as "officials, workers, and leaders in houses of worship and other places of religious expression or fellowship, wherever their services may be needed, [and] workers necessary to plan, record, and distribute online or broadcast content to community members." *Id.* ¶ 6(v).

the list of exempted Activities—for example, residents were permitted to "attend funerals, whether at a place of worship, funeral home, burial site, or other similar location, provided that the gathering consist[ed] of no more than 10 attendees" and allowed for social distancing. *Id.* ¶ 5(j). The Critical Sector work exemptions for work performed by healthcare and faith workers remained unchanged. *Id.* ¶¶ 6(a)(ii); 6(y).

On April 30, 2020, Governor Walz issued a third stay-at-home order, Executive Order 20-48, which rescinded Executive Order 20-33 and extended the stay-at-home requirement. Exec. Order No. 20-48 ¶ 1 (2020) (attached as Ex. B). The Order exempted all Activities and non-Critical Sector work included in previous executive orders[3] and further expanded the list of exemptions—for example, residents were permitted to "leave their home or residence to be married, to serve as witnesses, or to officiate a marriage, provided the gathering consist[ed] of no more than 10 attendees" and allowed for social distancing. *Id.* ¶ 5(k). The Critical Sector work exemptions for work performed by healthcare and faith workers remained unchanged. *Id.* ¶¶ 6(a)(ii); 6(y).

On May 5, 2020, Governor Walz issued Executive Order 20-51, which rescinded Executive Orders 20-09 and 20-17. Exec. Order No. 20-51 ¶¶ 1-2 (2020) (ECF No. 36-9). The Order allowed non-essential and elective surgeries and procedures to resume. *Id.* ¶ 2. It also required all "healthcare facilities providing procedures that utilize

[3] *See* Exec. Order No. 20-20 ¶ 5 (2020) (ECF No. 36-4); Exec. Order No. 20-33 ¶ 5 (2020) (ECF No. 36-5); Exec. Order No. 20-38 (2020) (attached as Ex. C) (expanding exemptions related to outdoor recreational activities and facilities); Exec. Order No. 20-40 (2020) (allowing certain non-Critical Sector workers to return to work) (attached as Ex. D).

PPE or ventilators—whether veterinary, medical, or dental" to "develop and implement an internal oversight structure and written plan . . . establishing criteria for determining whether a procedure should proceed during the COVID-19 pandemic, for prioritizing procedures, and for ensuring a safe environment for staff, patients, and visitors." *Id.* ¶¶ 1, 6.

On May 13, 2020, Governor Walz issued Executive Order 20-53, which extended the peacetime emergency through June 12, 2020. Exec. Order No. 20-53 ¶ 2 (2020) (attached as Ex. E). The same day, the Governor issued the current stay-at-home order, Executive Order 20-56, which rescinded Executive Order 20-48 and implemented new stay-at-home guidelines that remain in effect through May 31, 2020. Exec. Order No. 20-56 ¶¶ 1-2 (2020) (attached as Ex. F). Executive Order 20-56 allows individuals to leave their homes for activities, subject to certain guidelines. *Id.* ¶ 6. Under the Order, all gatherings of more than 10 people are prohibited. *Id.* ¶ 6(c). The Order defines gatherings as "groups of individuals, who are not members of the same household, congregated together for a common or coordinated social, civil, community, faith-based, leisure, or recreational purpose—even if social distancing can be maintained." *Id.* The Order explains, "Large social and other gatherings of people for extended periods of time raise the risk of COVID-19 transmission from household to household." *Id.* at p. 2. The Order allows most "non-critical businesses"[4] (including churches and places of worship)

[4] Under Executive Order 20-56, "businesses" are "broadly defined to include entities that employ or engage workers, including private sector entities, public-sector entities,

to open or remain open, subject to certain requirements.[5] *Id.* ¶ 7. The Critical Sector work exemptions continue to apply to reproductive health care providers and faith leaders and workers. *Id.* ¶ 7(d).

On May 23, 2020, Governor Walz enacted Executive Order 20-62, which is scheduled to take effect on May 26, 2020, at 11:59 p.m. Exec. Order No. 20-62 (attached as Ex. H). It amends Executive Order 20-56 to permit places of worship and related venues to host weddings, funerals, and services with more than ten participants, provided that they meet certain social-distancing and maximum-occupancy guidelines and develop and implement a "COVID-19 Preparedness Plan in accordance with guidance developed by the Minnesota Department of Health." *Id.* at 3. Depending on the size of the indoor space, weddings, funerals, and services could have up to 250 participants. *Id.*

As of today, Executive Orders 20-09, 20-17, 20-20, 20-33, and 20-48 have been rescinded. Executive Orders 20-01, 20-04, 20-16 (subject to the amendments set forth in Executive Order 20-51), 20-51, 20-53, and 20-56 remain in effect. At 11:59 p.m. tonight, Executive Order 20-62 will take effect, amending Executive Order 20-56.

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non-profit entities, and state, county, and local governments." Exec. Order No. 20-56 ¶ 5(c).

[5] Executive Order 20-56 extends the temporary closure of bars, restaurants, and other places of public accommodation as required under Executive Order 20-04. *See* Exec. Order No. 20-56 ¶ 7(a). Executive Order 20-04 does not list churches or places of worship as places of public accommodation and does not require them to close. *See* Exec. Order No. 20-04 ¶ 1 (2020) (attached as Ex. G). Businesses not subject to Executive Order 20-04 may open or reopen if they "establish and implement a COVID-19 Preparedness Plan." Exec. Order No. 20-56 ¶ 7(e).

## II. THE PARTIES

The First Amended Complaint identifies three groups of Plaintiffs.

First, AALFA Family Clinic, Paul J. Spencer, D.O., Mary M. Paquette, M.D., Matthew J. Paquette, M.D., Kathleen Kobbermann, M.D., Cheryl McKee, PA-C, MPAS, Patrick G. Spencer FNP-C, MSN, RN, Matthew Anderson, M.D., OB/GYN, Sarah Slattery, PA-C, MPAS, Abigail Tierney, PA., are healthcare providers; the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is an association of healthcare providers; and Pro-Life Action Ministries, Incorporated ("PLAM"), is an interest group whose members may require medical treatment for COVID-19. *See* Am. Compl. (ECF No. 36) ¶¶ 4-5, 7-8, 59, 61-68. These Plaintiffs (collectively, the "Healthcare Plaintiffs") claim that they are injured by abortion providers' use of personal protective equipment ("PPE") to provide early aspiration abortions. *Id.* ¶¶ 59, 62, 66.

Second, Dr. Peter J. Daly (the "Rescinded EO 20-09 Plaintiff") is an orthopedic surgeon who was required to stop performing elective surgeries during the brief period when Executive Order 20-09 was in effect. *Id.* ¶ 60.

Third, Rebecca Vavilov, Melanie Schumacher, Noel Diedrich, Victoria Pauling, James Benyon, Mike Fuith, Angie Fuith, Greg Schmitz, Paulette Kostick, and Jennifer Steffel (collectively, the "Church-Member Plaintiffs") are members of Minnesota churches. *Id.* ¶¶ 9-17.[6]

[6] The Amended Complaint refers to other individuals, who are not identified as Plaintiffs or listed in the case caption, including Sarah Clochie, Bernadine Schneider, Cynthia Deal, Joseph Docksey, Julie Millman, and Jack Dorcey. *See* Am. Compl. (ECF No. 36) ¶ 69.

The Defendants include the Governor of Minnesota; the Commissioner of the Health Department ("Health Commissioner"); Planned Parenthood Minnesota, North Dakota, South Dakota; and the Clinic Defendants. *Id.* ¶¶ 18-23.

Apart from identifying the Clinic Defendants as parties, *id.* ¶¶ 21-23, Plaintiffs mention them only twice in their twenty-four-page amended complaint. First, Plaintiffs allege that Defendant WE Health Clinic is recommending that patients opt for medication abortion over early aspiration abortion for social distancing reasons, but that the Defendant clinics are continuing to perform early aspiration abortions. *Id.* ¶¶ 56-57. Second, Plaintiffs allege that the "defendant abortion clinics are acting under color of state law because they have received special dispensations from the State's COVID-19 orders, and their conduct has been explicitly authorized by state officials." *Id.* ¶ 89.

## III. PLAINTIFFS' CLAIMS

Plaintiffs assert three claims for relief. First, they allege that certain executive orders violate the Equal Protection Clause by treating abortion providers differently from other healthcare providers. *Id.* ¶¶ 70-76. Second, they allege that certain executive orders violate the Equal Protection Clause by treating abortion providers differently from church members. *Id.* ¶¶ 77-89. Third, they seek a declaratory judgment that there is no constitutional right to abortion, *id.* ¶¶ 90-95, calling on "lower courts to force reconsideration of *Roe* in the Supreme Court" by refusing to follow controlling precedent, *id.* ¶ 93.

Plaintiffs' demand for relief includes a request that the Court enjoin the Governor and Health Commissioner from enforcing "Executive Orders 20-09, 20-16, 20-17, 20-20,

20-30, 20-51, and any current or future executive orders that restrict elective surgeries, regulate the use or consumption of PPE, restrict church attendance, or impose social distancing requirements" until such time as those executive orders "are amended or reinterpreted to prohibit" certain abortion procedures; as well as a request that the Court "enjoin the defendant abortion clinics from performing" certain abortion procedures. Am. Compl. (ECF No. 36) ¶ 96(c)-(d).

## IV. PROCEDURAL HISTORY

Plaintiffs commenced this action on April 28, 2020. (ECF No. 1). They waited five days to move for a preliminary injunction and then requested expedited handling. (ECF No. 8). They did not serve any of the Defendants with the summons or complaint, or otherwise notify them about the lawsuit or preliminary injunction motion, until a day later. (ECF No. 20).

After Governor Walz issued Executive Order 20-51, allowing non-essential or elective surgeries and procedures to resume, Exec. Order No. 20-51 (2020) (ECF No. 36-9), Plaintiffs filed an amended complaint (ECF No. 36) and amended preliminary injunction brief (ECF No. 37). After Governor Waltz issued Executive Order 20-56, permitting gatherings of up to ten people, Exec. Order No. 20-56 (2020) (ECF No. 50-1), Plaintiffs withdrew their preliminary injunction motion. (ECF No. 50). They have declined, however, to voluntarily dismiss the case despite the complete erosion of its original basis.

## ARGUMENT

### I. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To determine whether Plaintiffs have stated a facially plausible claim for relief, the Court must look to well-pleaded factual allegations rather than legal theories or conclusions. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058-59 (8th Cir. 2002). The court may also consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 299 (2d ed. 1990)). Where these materials show an insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997).

A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) that is limited to a facial attack on the pleadings is subject to the same standard as a motion under Rule 12(b)(6). *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). Accordingly, under Rule 12(b)(1), well-pleaded factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

## II. PLAINTIFFS FAIL TO STATE ANY CLAIM FOR RELIEF AGAINST THE CLINIC DEFENDANTS.

Plaintiffs' claims fail to satisfy even the low bar for notice pleading. Plaintiffs must include in their complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *N. States Power Co. v. Fed. Transit Admin*., 358 F.3d 1050, 1056-57 (8th Cir. 2004) ("The essential function of notice pleading is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.") (internal quotations omitted).

"In order to state a claim for relief, actions brought against multiple defendants must clearly specify the claims with which each particular Defendant is charged." *Reinholdson v. Minnesota*, No. 01-1650 (RHK/JMM), 2002 WL 32658480, at *3 (D. Minn. Nov. 21, 2002) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1248 (3d ed. 1998)). This is especially true where, as here, plaintiffs allege a deprivation of their constitutional rights. *See Liggins v. Morris*, 749 F. Supp. 967, 971 (D. Minn. 1990) (holding that constitutional claims should not be pled in a "shotgun manner"). In granting partial summary judgment in *Liggins*, the court expressed frustration with the general failure of "practitioners in this district to prepare complaints alleging violations of 42 U.S.C. § 1983 in a fashion that will identify the specific claims of individual plaintiffs for specific constitutional violations as against only culpable defendants." *Id.* It held that complaints failing to specify "what discrete constitutional violations are in fact legitimate and proper as to each plaintiff and as

against each defendant" are "subject to dismissal for failure to comply with Rule 8" and are potentially sanctionable under Fed. R. Civ. P. 11. *Id.* Several courts in this district have relied on these principles in dismissing, pursuant to Rule 12(b)(6), claims that run afoul of Rule 8 in this way. *See, e.g.*, *Benson v. Piper*, No. 17-cv-266 (DWF/TNL), 2019 WL 2017319, at *9 n.4 (D. Minn. Jan. 25, 2019), *adopted by* 2019 WL 1307883 (D. Minn. March 22, 2019); *Mashak v. Minnesota*, No. 11-473 (JRT/JSM), 2012 WL 928225, at *32 (D. Minn. Jan. 25, 2012), *adopted by* 2012 WL 928251 (D. Minn. Mar. 19, 2012); *Tully v. Bank of Am., Nat'l Ass'n*, No. 10-4734 (DWF/JSM), 2011 WL 1882665, at *6 (D. Minn. May 17, 2011).

Plaintiffs' allegations concerning the Clinic Defendants—contained in just three paragraphs of the Amended Complaint—fail to state a legally cognizable claim against them. These three paragraphs neither allege how the Clinic Defendants violated Plaintiffs' constitutional rights nor specify which Plaintiff's rights were violated by which Clinic Defendant. In short, the Amended Complaint fails to provide the Clinic Defendants with the requisite notice of what each is alleged to have done to harm each of the Plaintiffs. For this fundamental reason, the Amended Complaint should be dismissed as to the Clinic Defendants.

## III. PLAINTIFFS FAIL TO STATE A SECTION 1983 CLAIM AGAINST THE CLINIC DEFENDANTS.

Even if the Court finds that the Plaintiffs' claims against the Clinic Defendants withstand Rule 8(a) scrutiny, the Amended Complaint fails to state a claim under Section 1983 because the Clinic Defendants are not state actors. Plaintiffs' theory that the Clinic

Defendants "are acting under color of state law because they have received special dispensations from the State's COVID-19 orders, and their conduct has been explicitly authorized by state officials," Am. Compl. (ECF No. 36) ¶ 89, would render every private person or commercial entity that is exempted in any manner from a COVID-19 stay-at-home order a state actor subject to being named as an equal protection defendant under Section 1983; every liquor store, every garden center, every florist shop, every laundromat.[7] This is plainly incorrect.

Because the Equal Protection Clause is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Id.* at 936. "A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Id.* at 936-37.

In the context of Section 1983 claims, courts apply a two-part test to determine whether "the conduct allegedly causing the deprivation of a federal right [is] fairly

[7] The challenged executive orders have permitted many businesses to remain open during the pandemic in Minnesota. *See* Exec. Order Nos. 20-20, 20-33, 20-48, 20-56. As entities that have received "special dispensations from the State's COVID-19 orders," Am. Compl. (ECF No. 36) ¶ 89, all of these businesses would be state actors under Plaintiffs' legal theory. If Walmart, for example, were to mandate that its employees wear masks, Plaintiffs' theory would allow them to name the company as a defendant for contributing to the alleged PPE shortage.

attributable to the State." *Id.* at 937. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* Here, the second element of the test is dispositive.

Under no theory could the Clinic Defendants be fairly said to be state actors. "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *accord Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 422 (8th Cir. 2007). To qualify as a state actor, a party must be "a state official"; have "acted together with or . . . obtained significant aid from state officials"; or engage in "conduct [that] is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937 ("Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.").

The Clinic Defendants, which are private medical practices operating on private property, are not state officials; Plaintiffs have not alleged—much less plausibly alleged—that the Clinic Defendants are acting in concert with state officials,[8] and the

[8] For a private person who willfully participates in conjunction with a state actor to have acted under color of state law, there must at minimum be a shared purpose to deprive the plaintiff of a constitutional right, namely, "a mutual understanding, or a meeting of the minds, between the private party and the state actor." *Mershon v. Beasley*, 994 F.2d 449, 451-52 (8th Cir. 1993); *see also Crawford v. Van Buren Cty.*, 678 F.3d 666, 670-71

Clinics' provision of abortion care is in no way chargeable to the State. Plaintiffs' erroneous allegation that the Clinic Defendants "received special dispensations" from the challenged executive orders and engaged in conduct "explicitly authorized by state officials," Am. Compl. (ECF No. 36) ¶ 89, even if true, would not render the Clinics state actors. *See Manhattan Cmty. Access Corp. v. Halleck*, __ U.S. __, 139 S. Ct. 1921, 1932 (2019) ("Put simply, being regulated by the State does not make one a state actor."); *see also Shqeirat v. United States Airways Grp., Inc.*, 645 F. Supp. 2d 765, 793 (D. Minn. 2009) ("U.S. Airways is not a state actor for purposes of . . . § 1983 . . . . Having its security policies regulated by the state and regularly receiving financial and administrative aid from the government does not render U.S. Airways a state actor.").

Because the Clinic Defendants are not state actors, the Court should dismiss the claims against them *with prejudice*. Courts, including those within this district, routinely dismiss actions with prejudice where there is no state action. *See, e.g.*, *Stuke v. Grostyan*, No. 12-cv-2099 (SRN/JSM), 2012 WL 5458903, at *1 (D. Minn. Nov. 8, 2012) ("On October 4, 2012, this Court dismissed Plaintiff's 42 U.S.C. § 1983 action because the

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(8th Cir. 2012) (stating that a plaintiff "must establish not only that a private actor caused a deprivation of constitutional rights, but that the private actor willfully participated with state officials and reached a mutual understanding concerning the unlawful objective of a conspiracy"). "Mere allusion to such a conspiracy is insufficient; the conspiracy, or meeting of the minds, must be pleaded with specificity and factual support." *Magee v. Trs. of the Hamline Univ.*, 957 F. Supp. 2d 1047, 1058 (D. Minn. 2013); *see also Murdock v. L.A. Fitness Int'l, LLC*, No. 12-975 (DSD/SER), 2012 WL 5331224, at *3 (D. Minn. Oct. 29, 2012) ("Murdock does not allege any facts indicating that LA Fitness conspired with, or had a joint enterprise with, a state actor. As a result, LA Fitness cannot be interpreted as acting under color of state law, and Murdock's § 1983 claim fails.").

statute requires the person charged to be a state actor, which the Defendant is not. As such, the Court dismissed Plaintiff's action with prejudice and directed the Clerk of the Court to enter judgment against the Defendant."); *Liedtke v. Runningen*, No. 15-3361 (JRT/HB), 2016 WL 5660455, at *7 (D. Minn. Sept. 29, 2016) ("Liedtke's § 1983 claims [ ] dismissed with prejudice because Timberland Partners is a private landlord, and Liedtke has not alleged state action or joint activity"); *McDonald v. Overnite Express*, No. 08-5069 (JNE/JSM), 2009 U.S. Dist. LEXIS 132057, at *11 (D. Minn. June 18, 2009) ("Given that MacDonald failed [to] allege any state action in conjunction with his § 1983 claim, defendants' motions to dismiss should be granted and the claims denied with prejudice."); *see also Bilello v. Kum & Go*, 374 F.3d 656, 661 (8th Cir. 2004) ("[W]e dismiss, with prejudice, Bilello's section 1981 equal benefit claim for want of standing and for failure to allege state action.").

## IV. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF IS IMPROPER.

Plaintiffs' request for a permanent injunction barring the State from enforcing the challenged executive orders unless they are amended to prohibit the provision of certain abortion procedures and/or directly barring the Clinics from providing those abortion procedures is improper and should be dismissed.

The Supreme Court has explained that: "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Because the judiciary's "constitutional

mandate and institutional competence are limited," courts must restrain themselves from "'rewrit[ing] state law to conform it to constitutional requirements' even as [they] strive to salvage it." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Accordingly, when formulating a remedy for an unconstitutional law, a court must avoid "judicial legislation," particularly when it is unclear whether the proposed remedy would be consistent with the intent of the law's author. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995).

In *National Treasury Employees Union*, for example, the Supreme Court held that a federal statute prohibiting receipt of honoraria by governmental employees was unconstitutional as applied to lower level executive branch employees. 513 U.S. at 477-78. The Court rejected the Government's suggestion that it narrow the injunction approved by the court of appeals by crafting a nexus requirement for the honoraria ban. *Id.* at 479. It explained that: "We cannot be sure that our attempt to redraft the statute . . . would correctly identify the nexus Congress would have adopted in a more limited honoraria ban." *Id.* The Court concluded that "the Court of Appeals properly left to Congress the task of drafting a narrower statute." *Id.*

Here, should the Court find that one or more of the challenged executive orders violates the Equal Protection Clause, the proper remedy would be to enjoin their application to the Plaintiffs, leaving it up to the Governor to decide whether and how to modify the orders to cure the constitutional defect. *See id.* Conditioning an injunction on the State's enactment of a ban on certain abortion procedures or directly enjoining the

Clinic Defendants from providing those procedures would constitute an improper "invasion of the [executive] domain." *Id.* at 479 n.26. Plaintiffs' requests for such relief should therefore be dismissed.

## V. THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

### A. The Plaintiffs Lack Standing.

The doctrine of standing is rooted in Article III's case-or-controversy requirement. *See* U.S. Const. Art III, § 2; *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). The "irreducible constitutional minimum" of standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact,[9] (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision." *Spokeo, Inc*., 136 S. Ct. at 1547 (quoting *Lujan*, 505 U.S. at 560). Article III standing "requires a showing that each defendant caused [the plaintiff's] injury and that an order of the court against each defendant could redress the injury." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017).

#### 1. The Healthcare Plaintiffs Lack Standing.

The Healthcare Plaintiffs lack standing to sue the Clinic Defendants because the Clinics Defendants are not causing them any injury in fact. The Healthcare Plaintiffs' claim that the Clinics' use of PPE in connection with early aspiration abortions threatens

their lives, safety, and health is conjectural and hypothetical. *See* Am. Compl. (ECF No. 36) ¶ 59. Although the Amended Complaint contains vague allegations about a "worldwide shortage" of PPE, *see, e.g.*, *id.* at p. 2, it is devoid of allegations that the Healthcare Plaintiffs are actually unable to obtain PPE needed in connection with medical care that they provide. The Amended Complaint contains no information about the type or quantity of PPE that they require, the sources from which they obtain their PPE, or whether they have had any indication from their suppliers that future PPE orders will go unfilled. Likewise, it provides no information about the type or quantity of PPE that the Clinic Defendants use to perform early aspiration abortions, or the sources from which the Clinic Defendants obtain their PPE. Accordingly, there is no plausible basis for the assertion that the Clinics' use of PPE to provide early aspiration abortions is depriving the Healthcare Plaintiffs of the ability to obtain PPE that would otherwise be available to them. *Cf. Iqbal*, 556 U.S. at 678 (explaining that a complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" cannot survive a motion to dismiss (quoting *Twombly*, 550 U.S. at 557)).

Further, the Healthcare Plaintiffs fail to allege how much PPE would be conserved by forcing patients best suited for early aspiration abortion procedures to have medication abortions instead. Their allegation that "[m]edication abortions do not require the use of PPE when the drugs are distributed," *id.* ¶ 33, is in blatant conflict with the Minnesota

[9] An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (citations, footnotes, and internal quotation marks omitted).

Department of Health's current instruction, incorporated by reference into the Amended Complaint, that *all* healthcare workers wear face masks and eye protection, such as face shields and goggles, during the pandemic. *See* Am. Compl. Ex. 10 (ECF No. 36-10) at 3 (citing Minn. Dep't of Health, *Responding to and Monitoring COVID-19 Exposures in Health Care Settings* (Apr. 21, 2020)).

In addition, the Healthcare Plaintiffs' claim that the provision of early aspiration abortions by the three Clinic Defendants and a Planned Parenthood affiliate has a meaningful impact on the global supply chain for PPE is not plausible. Their alleged injury is even more speculative than the injury at issue in *Warth v. Seldin*, 422 U.S. 490 (1975). There, the Court held that the plaintiffs lacked standing to challenge a purportedly discriminatory zoning ordinance because they failed to "allege facts from which it reasonably could be inferred" that there was a "substantial probability" that they could have secured certain housing absent the ordinance. *Id.* at 504. The Court concluded that the economics of the housing market likely prevented them from obtaining housing regardless of the challenged ordinance. *Id.* at 504, 506; *see also Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 42-43 (1976) (holding that indigent patients denied hospital treatment lacked standing to challenge tax laws encouraging such denials because it was "purely speculative whether the denials . . . fairly c[ould] be traced to [the laws] or instead result[ed] from decisions made by the hospitals without regard to the tax implications").

The present case is even more clear-cut. Assuming for the sake of argument that the Healthcare Plaintiffs are experiencing a concrete and particularized shortage of PPE,

they have failed to allege any plausible basis for concluding that the Clinics are the but-for cause of that shortage, or that the shortage would be redressed by requiring a handful of abortion clinics to require a subset of their patients to have medication abortions instead of aspiration abortions.

Likewise, the Healthcare Plaintiffs have not alleged any facts that would permit the Court to conclude that the PPE used in early aspiration abortions would make its way to them if the Clinics were enjoined from providing those procedures. *See Warth*, 422 U.S. at 507 (holding that the purported injury was unlikely to be redressed where plaintiffs "rel[ied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might . . . improve were the court to afford relief").

**2. The Rescinded EO 20-09 Plaintiff Lacks Standing**

The Rescinded EO 20-09 Plaintiff also lacks standing. Executive Order 20-09, which prevented medical professionals from using PPE on non-essential surgeries, was rescinded on May 10, 2020. Exec. Order No. 20-51 ¶ 2 (2020) (ECF No. 36-9). Under Executive Order 20-51, this Plaintiff may now resume non-essential surgeries. *Id.* Accordingly, he faces no actual or imminent injury from enforcement of the Executive Orders. *See Lujan*, 504 U.S. at 560. In any event, the Clinic Defendants are not responsible for enforcing the Executive Orders. Consequently, any injury that Plaintiff suffered as a result of those orders is not fairly traceable to their conduct. *See Balogh v. Lombardi*, 816 F.3d 536, 544 (8th Cir. 2016) (holding that an injury is not fairly traceable where the defendant does not have "'authority to enforce the complained-of provision'") (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007)).

### 3. The Church-Member Plaintiffs Lack Standing.

The Church-Member Plaintiffs similarly cannot establish the causality element of standing. *See Lujan*, 504 U.S. at 560. Any limitations on those Plaintiffs' ability to attend in-person religious services are not fairly traceable to any action by the Clinics. *See id.*; *Balogh*, 816 F.3d at 544.

## B. Plaintiffs' Claims Against the Rescinded Executive Orders Are Moot.

In addition to standing, Article III's case-or-controversy requirement demands that federal courts adjudicate only "live" claims in which the parties have a "legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). For the Court to have jurisdiction over Plaintiffs' claims—and therefore to entertain the relief they seek—an actual controversy must be present throughout the entire life of the case. *See Abdurrahman v. Dayton*, 903 F.3d 813, 817 (8th Cir. 2018). When this criterion is no longer met, the claim becomes moot and beyond the jurisdiction of the Court. *See Hickman v. State of Mo.*, 144 F.3d 1141, 1142 (8th Cir. 1998).

Plaintiffs' claims are plainly moot as to executive orders that once formed the basis of their claims but have since been rescinded and/or superseded. *See Teague v. Cooper*, 720 F.3d 973, 976 (8th Cir. 2013) ("'When a law has been amended or repealed, actions seeking declaratory or injunctive relief for earlier versions are generally moot.'") (quoting *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012)); *see also McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1035-36 (8th Cir. 2004) (curative amendments by the Arkansas legislature and regulatory action by the Arkansas Department of Health during the course of the litigation mooted plaintiffs' claims).

Plaintiffs seek a permanent injunction against the enforcement of Executive Orders 20-09, 20-16, 20-17,[10] 20-20, 20-30, and 20-51. Am. Compl. (ECF No. 36) ¶ 96(c). Of these, only Order 20-51 remains, in relevant part, in force. Order 20-51 expressly rescinds Orders 20-09 and 20-17, thus mooting any claims associated with those orders. Exec. Order No. 20-51 ¶ 2 (2020) (ECF No. 36-9). Order 20-51 also amends Order 20-16 to strike the restriction on elective surgeries that Plaintiffs seek to enjoin, likewise mooting the demand for relief from that restriction. *Id.* ¶ 3. The relevant provision of Executive Order 20-20, relating to elective surgeries, invokes Executive Orders 20-09 and 20-17, both of which have been rescinded. Order 20-48 has been rescinded by Order 20-56, which in turn has been amended in relevant part by Order 20-62. Because Plaintiffs lack a cognizable legal interest in enjoining enforcement of defunct orders, their claims regarding all challenged Executive Orders other than Order 20-51 and Order 20-62 are moot. *See Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 964-65 (8th Cir. 2015) (stating that courts can "neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect") (internal quotations and citations omitted); *see also Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.*, 836 F. Supp. 2d 504, 520 (E.D. Mich. 2011) ("[D]eclaring a repealed ordinance void and enjoining its enforcement—particularly when the current ordinance is also before the Court—would be . . . as meaningful as shooting a dead horse.").

[10] Plaintiffs' reference to Executive Order 20-30 appears to be a typographical error, as that order relates to National Guard assistance for spring flooding.

Plaintiffs allege that their claims are saved by the so-called "voluntary cessation" exception to the mootness doctrine. Am. Compl. (ECF No. 36) ¶ 75. This argument—based on pure speculation that Minnesota might someday reinstate the executive orders it rescinded—is unavailing. It is settled law in this Circuit that "statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Teague*, 720 F.3d at 977; *see also Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017). Exceptions to this rule are rare, and "typically involve situations where it is *virtually certain* that the repealed law will be reenacted." *Teague*, 720 F.3d at 977 (emphasis added).

Plaintiffs have not shown, nor can they, that Minnesota is "virtually certain" to reenact the policies contained in executive orders that have been rescinded and/or superseded. *See id; see also McCarthy*, 359 F.3d at 1036 ("speculative possibility" that Arkansas might take future legislative or regulatory action did not create jurisdiction). To the contrary, Executive Order 20-51 cites Minnesota's "significant headway in securing additional PPE" among the reasons for revoking Executive Order 20-09, suggesting that the restrictions it contained are simply no longer necessary.

By contrast, the rare cases in which plaintiffs have prevailed on a voluntary cessation argument are easily distinguished. *See, e.g., City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 298-90 (1983) (applying voluntary cessation exception where municipality overtly declared its intention to reenact the repealed provision); *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012) (mere adjustments to procedures at state-run

facility constituted voluntary cessation). Unlike in *Mesquite*, Minnesota has given no indication it plans to revoke Executive Order 20-51 or reinstate the policies it replaced.[11] And, unlike in *Strutton*, Minnesota has done more than merely adjust the practices at a facility; it has rescinded the law.[12]

### C. The Plaintiffs' Claims Against Future Executive Orders Are Unripe.

Plaintiffs' demand for a permanent injunction against any "future executive orders that restrict elective surgeries, regulate the use or consumption of PPE, restrict church attendance, or impose social-distancing requirements," Am. Compl. (ECF No. 36) ¶ 96, are not yet ripe, and cannot be adjudicated. *Parrish v. Dayton*, 761 F.3d 873, 875-76 (8th Cir. 2014) ("'A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

[11] While the Eighth Circuit has yet to consider the question, many courts interpret *Mesquite* as requiring a "bad faith attempt by the government to avoid judicial review." *Get Outdoors II, LLC v. City of Chula Vista*, 407 F. Supp. 2d 1172, 1178–79 (S.D. Cal. 2005), *aff'd*, 254 F. App'x 571 (9th Cir. 2007); *see also Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) ("Critical to the Court's decision…was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot.")

[12] The "capable of repetition, yet evading review" exception to the mootness doctrine is similarly unavailing to Plaintiffs. A federal court may assert jurisdiction to hear an otherwise moot claim where there is "a reasonable expectation that the complaining party would be subjected to the same action again." *Spencer v. Kemna*, 91 F.3d 1114, 1118 (8th Cir. 1996), *aff'd*, 523 U.S. 1, 118 (1998). The type of "mere physical or theoretical possibility" raised by Plaintiffs, however, is insufficient to override Article III mootness. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

### D. Plaintiffs' Declaratory Judgment Claim Fails to Raise a Substantial Federal Question.

Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, a federal court may award declaratory relief "[i]n a case of actual controversy within its jurisdiction." An "actual controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek 'specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *See HSK, LLC v. United States Olympic Comm.,* 248 F. Supp. 3d 938, 943, 946 (D. Minn. 2017) (internal citation omitted) (dismissing declaratory judgment action pursuant to Rule 12(b)(1) because relief sought did not relate to a "concrete dispute between the parties").

Plaintiffs demand from this Court a declaration that "(a) There is no constitutional right to have an abortion; and (b) The previous Supreme Court's abortion jurisprudence violates the Tenth Amendment and the Republican Form of Government Clause by subordinating state law to the policy preferences of unelected judges." Am. Compl. (ECF No. 36) ¶ 94. Rather than tie this demand to a relevant controversy before the Court—for there is none—Plaintiffs explain that "[i]t is time for the lower courts to force reconsideration of *Roe* in the Supreme Court by announcing that they will follow the Constitution rather than a widely criticized judicial opinion that is unlikely to have majority support among the sitting justices." *Id.* ¶ 93.

A claim seeking an advisory opinion on the law—e.g., that the Supreme Court's prior rulings on abortion are wrong—must be dismissed for lack of jurisdiction. *See, e.g.*,

*Pub. Water Supply Dist. No. 8 of Clay Cty., Mo. v. City of Kearney, Mo.*, 401 F.3d 930, 932 (8th Cir. 2005) (remanding for dismissal an action for declaratory judgment because there was no controversy ripe for decision); *Cass Cty. v. United States*, 570 F.2d 737, 741 (8th Cir. 1978) (affirming dismissal of action for declaratory relief that would "amount to no more than an advisory opinion").

Moreover, a claim that is squarely foreclosed by prior decisions of the Supreme Court fails to raise a federal question substantial enough to support jurisdiction under 28 U.S.C. § 1331. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper . . . when the claim is . . . foreclosed by prior decisions of the Court, or otherwise [so] completely devoid of merit as not to involve a federal controversy." (citation omitted)); *Biscanin v. Merrill Lynch & Co., Inc.*, 407 F.3d 905, 906-08 (8th Cir. 2005) ("If the asserted basis of federal jurisdiction is patently meritless, then dismissal for lack of jurisdiction is appropriate."); *Sassower v. Dosal*, 744 F. Supp. 908, 909 (D. Minn. 1990) ("Jurisdiction is deemed not to lie where the federal claim asserted is immaterial, insubstantial or frivolous."). In an unbroken line of precedent spanning nearly five decades, the Supreme Court has consistently held that the right to end a pregnancy is a fundamental component of the liberty protected by the Due Process Clause. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292, 2309-10 (2016); *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851-53 (1992); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). The most recent case in the line is less than four years old. *Whole Woman's*

*Health*, 136 S. Ct. at 2309-10. Plaintiffs do not allege that any factual or legal development undermines the vitality of this precedent. *See* Am. Compl. (ECF. No. 36) ¶¶ 90-95. Instead, they simply ask the Court to disregard it. *See id.* Their claim does not raise a federal question substantial enough to give this Court subject-matter jurisdiction.

For these reasons, the Court should dismiss Plaintiffs' third claim for relief.

## CONCLUSION

As to the Clinic Defendants, Plaintiffs' Amended Complaint should be dismissed with prejudice.

Dated: May 26, 2020

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE – L.R. 7.1(a)**

The undersigned attorney hereby certifies that in accordance with Local Rule 7.1(a), counsel for the Clinic Defendants has offered to meet and confer with counsel for Plaintiffs but received no response.

/s/ *Jessica Braverman*

**CERTIFICATE OF COMPLIANCE – L.R. 7.1(f)**

The undersigned attorney hereby certifies that the foregoing memorandum of law complies with the word limit set forth in Local Rule 7.1(f) because it contains 7,561 words set in Times New Roman, a proportional font. The undersigned attorney further certifies that the foregoing memorandum of law complies with the type-size requirements set forth in Local Rule 7.1(h)(1).

/s/ *Jessica Braverman*

**CERTIFICATE OF SERVICE**

I certify that on May 26, 2020, I served this document through CM/ECF upon:

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