UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AALFA Family Clinic, et al.,

Plaintiffs,

v.

Tim Walz, et al.,

Defendants.

Court File No. 20-cv-01037 (PJS/DTS)

MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Defendants Governor Tim Walz and Commissioner Jan Malcolm ("State Defendants") move this Court to dismiss Plaintiffs' First Amended Complaint, which challenges a series of executive orders.

The Governor's executive orders have been thoughtfully conceived by public health professionals to address the specific and deadly exigencies posed by the public health crisis facing our State. As Governor Walz described in his address on May 13, 2020, the Stay at Home order and other restrictions were necessary in March because Minnesota needed time to acquire lifesaving personal protective equipment ("PPE"), ventilators, ICU beds, and other capacity-building equipment needed for the inevitable surge in cases.[1] Those measures have been successful. The State partnered with public and private entities to ramp up testing, acquire PPE and ventilators, and make ICU beds available.

The danger has not passed, however. In fact, 33 Minnesotans died of COVID-19

[1] (Declaration of Liz Kramer ("Kramer Decl."), Ex. 1.)

on May 22, the highest single day of casualties since the pandemic began.[2] The total number of Minnesotans hospitalized continues to climb steadily, with the number hospitalized standing at 2,676 on May 25.[3] In hopes of keeping Minnesotans healthy while researchers develop more effective treatments for the virus and a vaccine, State Defendants have encouraged Minnesotans to stay home as much as possible.

State Defendants understand that the measures necessitated by the COVID-19 pandemic have not been easy or painless for Minnesotans. Emergencies like this pandemic call for temporary collective sacrifices to protect our neighbors. This shared sacrifice forms the context of this lawsuit. Plaintiffs are health professionals who were affected by the temporary prohibition on elective procedures, Minnesotans who would like to attend church services in person (presumably with more than 25% capacity), and individuals opposed to abortion. Plaintiffs' attempt to enjoin certain executive orders fails, however, because courts give great deference to state action during a public health emergency. Plaintiffs have made no showing that the level of deference being granted by federal courts to similar state orders around the nation should not also be shown here. Furthermore, the gravamen of Plaintiffs' complaint, the restrictions on medical procedures due to shortages of PPE, has been rescinded by the Governor. The State has entrusted physicians, in consultation with their patients, with the important decisions regarding which procedures should go forward during the pandemic. As such, plaintiffs' complaint should be dismissed.

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[2] (Kramer Decl. ¶ 4.)

[3] (*Id.*)

FACTUAL AND PROCEDURAL BACKGROUND

I. THE COVID-19 PANDEMIC

COVID-19 is an infectious disease caused by a newly discovered coronavirus that spreads rapidly through respiratory transmission. (Kramer Decl., Ex. 2.) Asymptomatic individuals may carry and spread the virus and there is currently no known vaccine or effective treatment, making response efforts complex and daunting. (Kramer Decl., Exs. 2–3.) On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. (Kramer Decl., Ex. 4.) As of May 25, 2020, 21,315 Minnesotans have tested positive for COVID-19 and 881 have died. (Kramer Decl. ¶ 5.) The virus has claimed over 97,000 lives in the United States since January 24, 2020. (Kramer Decl. ¶ 8.)

II. MINNESOTA'S RESPONSE TO COVID-19

In response to the COVID-19 public health crisis, Minnesota Governor Tim Walz declared a peacetime emergency on March 13, 2020. (Dkt. 36-1.) That same day, the President declared a National Emergency, and—for the first time in history—the President has approved major disaster declarations in all 50 states. (Kramer Decl., Exs. 6–7.) Minnesota has engaged in a comprehensive plan to combat COVID-19 that includes slowing the spread of the disease, protecting the capacity of the state's medical system to respond to the disease, and ensuring the continued operation of critical sectors to protect the public's access to necessary services and supplies. *See* Emergency Executive Orders 20-02 through 20-62.[4] Plaintiffs have challenged seven of these

[4] All of Minnesota's Emergency Executive Orders regarding COVID-19 are available online at www.leg.state.mn.us/lrl/execorders/eoresults?gov=44.

Executive Orders: Emergency Executive Order 20-09 (March 20, 2020), Emergency Executive Order 20-16 (March 23, 2020), Emergency Executive Order 20-17 (March 23, 2020), Emergency Executive Order 20-20 (March 25, 2020), Emergency Executive Order 20-33 (April 8, 2020), Emergency Executive Order 20-48 (April 30, 2020), and Emergency Executive Order 20-51 (May 5, 2020) (collectively "Challenged Orders").[5] Notably, five of the Challenged Orders have been entirely rescinded and one is partially rescinded.

A. Executive Orders Regarding Non-Essential Surgery

1. Non-essential surgeries and procedures were delayed

As part of Minnesota's comprehensive strategy to address COVID-19, and at the request of Minnesota's hospital systems, Governor Walz issued Executive Order 20-09 on March 20, 2020, directing the postponement of "all non-essential or elective surgeries and procedures, including non-emergent or elective dental care, that utilize PPE or ventilators." (Dkt. 36-2; *see also* Kramer Decl., Ex. 8.) This directive was consistent with guidance from the U.S. Centers for Medicare and Medicaid Services ("CMS"). (Kramer Decl., Ex. 9.) The COVID-19 pandemic strained the global supply chain of PPE used by medical professionals and threatens to overwhelm hospital systems with patients requiring intensive care and ventilation. (Kramer Decl., Exs. 8–9.) Postponing certain surgeries and procedures that use PPE or ventilators is an effective way to conserve PPE supplies and protect hospital system capacity. (*Id.*) On March 23, 2020, in response to

[5] It is unclear whether Plaintiffs intend to challenge Executive Order 20-48. This order does not appear in their amended complaint but did appear in the memorandum in support of a preliminary injunction and proposed order.

questions regarding the scope of Executive Order 20-09, Governor Walz issued Executive Order 20-17 clarifying that veterinary procedures were also postponed because veterinary medicine uses PPE suitable for humans. (Dkt. 36-8.)

On March 25, 2020, the Minnesota Department of Health ("MDH") posted a "Frequently Asked Questions" document regarding Executive Orders 20-09 and 20-17 on its website. (Kramer Decl., Ex. 10.) The guidance document clarified that Executive Order 20-09 "does not apply to the full suite of family planning services." (*Id.*) This guidance conforms to American College of Obstetricians and Gynecologists' position that access to comprehensive reproductive healthcare services is essential. (Kramer Decl., Ex. 11.)

Simultaneously with Executive Order 20-17, Governor Walz issued Executive Order 20-16. (Dkt. 36-7.) Executive Order 20-16 directed Minnesota businesses, nonprofits, and non-hospital healthcare facilities to submit an inventory of certain PPE to the State. Executive Order 20-16 also directed these entities to refrain from using PPE except for use in delivering critical healthcare services or essential services.

2. Non-essential surgeries have resumed

The pandemic is a rapidly evolving situation. Following the issuance of Executive Orders 20-09, 20-16, and 20-17, Minnesota made, and continues to make, significant headway in securing additional PPE and improving testing and hospital surge capacity. (*See* Dkt. 36-9). On April 19, 2020, CMS issued guidance encouraging states to resume the provision of nonessential, non-COVID-19 care to patients as clinically appropriate, as long as the applicable states, localities, or facilities have the resources to provide such

care and the ability to quickly respond to a surge in COVID-19 cases, if necessary. (Kramer Decl., Ex. 12.)

Recognizing these developments, on May 5, 2020, Governor Walz issued Executive Order 20-51 with the support of Minnesota's hospital systems. (Dkt. 36-9; Kramer Decl., Ex. 13.) Executive Order 20-51 does not distinguish between essential and non-essential procedures, but rather places identical requirements on all providers that offer procedures using PPE and ventilators. All providers are directed to make a 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. (Dkt. 36-9.) Providers must use their sound medical judgment and discretion to determine which procedures should take place and no procedures are categorically banned. (*Id.*) Neither the order nor the accompanying guidance from MDH references abortion or reproductive health, and abortion providers are treated equally to other providers under the order. (*Id.*; Kramer Decl., Exs. 14–15.) Executive Order 20-51 rescinded Orders 20-09 and 20-17 in their entirety, and rescinded the portion of 20-16 directing businesses, nonprofits, and non-hospital healthcare facilities to refrain from using PPE. (Dkt. 36-9.)

B. Executive Orders Directing Minnesotans to Stay Home

1. Challenged orders directing Minnesotans to stay home

Because COVID-19 is primarily spread from person-to-person contact, limiting contact between people is the most effective way to slow the spread of COVID-19. (Kramer Decl., Ex. 16.) On March 25, 2020, Governor Walz issued Executive Order 20-20, directing Minnesotans to stay home except to engage in essential activities and

allowed outdoor recreation, or work in critical sectors. (Dkt. 36-4.) The identified critical sectors were rooted in federal guidance from the United States Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"). (*Id.* at 2.) CISA Guidance designates healthcare providers, including all physicians and nurses, as critical workers. (*Id.* at 15.) Although that federal guidance did not include faith leaders, recognizing such leaders' importance to the spiritual wellbeing of Minnesotans, Governor Walz designated them as "critical workers." (Dkt. 21, Ex. 2 at 8.) Essential activities included obtaining medical services and seeking medical care, without limitation. (*Id.*) State Defendants also issued guidance making clear that drive-in religious services, which do not pose the same public health risks as other services, were authorized under Executive Order 20-20. (Kramer Decl., Ex. 17.)

Recognizing the continued need to slow the spread of COVID-19, Governor Walz issued Executive Order 20-33 on April 8, 2020. (Dkt. 36-5.) Executive Order 20-33 rescinded Executive Order 20-20, but retained its principle terms relevant to this case. Changes included adopting the then-current version of CISA guidance, clarifying certain categories of exempt workers, and modifying the penalties for violation of the Order. (*Id.*)

On April 30, 2020, Governor Walz issued a modified stay-at-home order that rescinded Executive Order 20-33. (Dkt. 37-6.) Recognizing the progress Minnesota had made in preparing for and combatting the pandemic, and that certain work settings were more conducive to social distancing, Executive Orders 20-38 and 20-48 permitted non-critical manufacturing and office employees to return to work under specific conditions

and allowed additional outdoor recreation activities that could be performed under conditions specified by MDH and the Minnesota Department of Natural Resources. (*Id.*)

2. Stay-at-home is rescinded and Minnesota is safely reopening

On May 13, 2020, Governor Walz announced that the stay-at-home order would not be extended beyond May 17, 2020. Instead, Governor Walz issued Executive Order 20-56 to continue safely reopening Minnesota beginning May 18, 2020. (Kramer Decl., Ex. 18.) Under the new order, gatherings of ten people or fewer, including religious services, are permitted when conducted consistent with social distancing. (*Id.*) The order also explicitly incorporated the earlier guidance allowing for drive-in religious services. (*Id.*) The order permits non-essential customer-facing retail businesses to continue the process of reopening under certain conditions and also directs the Commissioners of Health, Employment and Economic Development, and Labor and Industry to "develop a phased plan to achieve the limited and safe reopening of bars, restaurants, and other places of public accommodation beginning on June 1, 2020." (*Id.*)

On May 23, 2020, the Governor signed Executive Order 20-62 further relaxing restrictions on gatherings for weddings, funerals, and faith-based services. Upon the Executive Council's approval of EO-62, places of worship will be able to hold services with more than 10 participants, provided that they adhere to certain requirements, including development of a COVID-19 Preparedness Plan and occupancy limitations of 25 percent of normal occupancy, up to a maximum of 250 people in a single self-contained space. (Kramer Decl., Ex. 22.)

III. PLAINTIFFS' COMPLAINT

After amending their initial complaint to address Emergency Executive Order 20-51, Plaintiffs' First Amended Complaint ("Complaint") still seeks broad relief. It asks this court to declare that State Defendants are violating the Equal Protection Clause by "exempting surgical abortion" from social-distancing requirements and PPE conservation. (Dkt. 36 ¶ 96.) It also asks the Court to enjoin State Defendants from enforcing seven existing executive orders (20-09, 20-16, 20-17, 20-20, 20-33, 20-48 and 20-51), as well as any future executive order that "restrict[s] church attendance" or "imposes social-distancing requirements, unless and until" every order is interpreted to prohibit surgical abortions in the ways that Plaintiffs prefer. (*Id*.) In other words, Plaintiffs ask this Court to make nearly *every future executive order* issued during this pandemic, even ones that have nothing to do with surgery or abortion, *contingent on restricting abortions*. As set forth below, there is no legal support for their request.

ARGUMENT

Plaintiffs' Complaint fails because they have not alleged any constitutional injury sufficient to overcome the high burden for challenging an emergency order issued during a public health crisis. Further, their claims are not justiciable, Plaintiffs have failed to establish standing, State Defendants are protected by Eleventh Amendment immunity, and at least the first claim of Plaintiffs' Complaint is moot.

I. RULE 12 STANDARD

A complaint that fails to demonstrate the Court's jurisdiction or state a claim upon which relief can be granted must be dismissed. Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(h)(3). "Subject-matter jurisdiction is a threshold requirement which must be assured

in every federal case." *Kronholm v. F.D.I.C.*, 915 F.2d 1171, 1174 (8th Cir. 1990). When evaluating these facial challenges to subject matter jurisdiction, "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015) (internal quotation marks and citation omitted) (emendation in original). "If the asserted basis of federal jurisdiction is patently meritless, then dismissal for lack of jurisdiction is appropriate." *Biscanin v. Merrill Lynch & Co., Inc.*, 407 F.3d 905, 907 (8th Cir. 2005). As it considers this facial challenge to subject matter jurisdiction brought under Rule 12(b)(1), "[t]he district court may take judicial notice of public records and may thus consider them[.]" *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim must be granted where the complaint does not allege "enough facts to state a claim to relief that is plausible on its face" rather than merely "conceivable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

II. ALL CHALLENGED ORDERS SURVIVE UNDER THE *JACOBSON* FRAMEWORK

Requests to enjoin executive orders issued during a public health crisis are not evaluated under otherwise-applicable constitutional scrutiny. Instead courts give significant deference to the emergency measures instituted during an epidemic, deploying the *Jacobson* standard articulated by the U.S. Supreme Court over one hundred years ago.

Under that standard, a state action is precluded only if it, "purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). This relaxed court scrutiny is rooted in the fact that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Just last month, the Eighth Circuit took the opportunity to adopt a modern description of the *Jacobson* analysis, in the form of a test that courts can easily apply:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

In re Rutledge, --- F.3d ----, 2020 WL 1933122, at *5 (8th Cir. April 22, 2020). Nearly every federal court case resolving challenges to state executive orders during COVID-19 has applied this test. *See, e.g.*, *Adams & Boyle, P.C. v. Slatery*, No. 20-5408, 2020 WL 1982210 (6th Cir. Apr. 24, 2020); *Robinson v. Attorney General*, No. 20-11401-B, 2020 WL 1952370 (11th Cir. Apr. 23, 2020); *In re Abbott*, 956 F.3d 696 (5th Cir. Apr. 20, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194 (N.D. Ill. May 13, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913 (D. Me. May 9, 2020); *Givens v. Newsom*, No. 2:20-cv-

00852, 2020 WL 2307224 (E.D. Cal. May 8, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020).

Plaintiffs' Complaint implies they do not challenge the first half of the *Jacobson* test: whether the Challenged Orders have a real or substantial relation to the public health crisis. Indeed, the Complaint acknowledges "[a] State may curtail the exercise of constitutional rights to prevent the spread of a deadly pandemic." (Dkt. 36 at 3.) Plaintiffs repeatedly emphasize the importance of preserving PPE and of social distancing to curtail the spread of COVID-19. (*Id.* at ¶¶ 25, 50). In their memo supporting their now-withdrawn motion for emergency relief, Plaintiffs admitted the State "unquestionably has the authority to require health-care providers to conserve PPE during a pandemic" as well as authority to impose social distancing requirements that curtail constitutional rights. (Dkt. 37 at 3.)

In any case, courts across the country have concluded that "[t]he COVID-19 pandemic constitutes the sort of public health crisis—or 'epidemic of disease which threatens the safety of [a community's] members'—contemplated by the *Jacobson* court." *Amato v. Elicker*, No. 3:20-cv-464, 2020 WL 2542788, at *10 (D. Conn. May 19, 2020) (quoting *Jacobson*, 197 U.S. at 27); *see also Spell v. Edwards*, Civ. No. 20-00282, 2020 WL 2509078, at *4 (M.D. La. May 15, 2020) (applying *Jacobson* due to the "current severe public health crisis" caused by COVID-19). And courts have similarly concluded that measures exactly like those contained in Executive Order 20-56—aimed at limiting gatherings and maintaining social distancing—bear a real and substantial relationship to the protection of public health. *See Calvary Chapel of Bangor v. Mills*,

Civ. No. 20-00156, 2020 WL 2310913, at *6–7 (D. Me. May 9, 2020) ("Given what we know about how COVID-19 spreads, the nature of the orders—in permitting drive-in services, online services, and small gatherings, while restricting large assemblies of people—demonstrates a substantial relation to the interest of protecting public health."); *Cross Culture Christian Center v. Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *4 (E.D. Cal. May 5, 2020) (finding that challenged stay at home orders "bear a real and substantial relation to public health" associated with the COVID-19 pandemic).

As a result, State Defendants will focus on the second aspect of the *Jacobson* test: whether the Challenged Orders constitute a plain, palpable invasion of any of Plaintiffs' fundamental rights. The Eighth Circuit clarified the meaning of a plain invasion by saying: "in order for the court to have the authority to intervene in the State's response to the public health crisis, the [challenged regulation] must, 'beyond all question,' violate" a fundamental right of the plaintiff. *In re Rutledge*, 2020 WL 1933122, at *6. The Complaint does not set forth a violation of fundamental rights, because the only constitutional violation it asserts is equal protection, which is not an independent substantive right.

A. Equal Protection Is Not a Valid Challenge to the Orders

The first two claims of Plaintiffs' First Amended Complaint arise under the Equal Protection Clause. (Dkt. 36 at 15–20.) Under the *Jacobson* test, however, that is not a valid basis to challenge to an executive order during a public health crisis, because it does not raise an independent fundamental right. *In re Rutledge*, 2020 WL 1933122, at *5 (analyzing whether "rights secured by the fundamental law" are violated); *accord* Dkt. 37

at 13 (admitting "[a] State may require fundamental rights to yield to its efforts to prevent the spread of a pandemic."). The Equal Protection Clause "creates no substantive rights." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). As the Equal Protection Clause does not bestow any substantive rights at all, it certainly does not bestow any fundamental rights. "Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Id.*

Without a fundamental right at issue, the Orders pass muster unless they are "pretextual." *In re Rutledge*, 2020 WL 1933122, at *5. Plaintiffs have not made any allegation of pretext. Nor could they credibly make any such allegation. The State's decision to differentiate between essential and non-essential procedures, as well as the State's determination of what falls within the Order's definition of "non-essential," is rational and consistent with the findings of multiple courts during this pandemic. *E.g.*, *Adams & Boyle, P.C. v. Slatery*, No. 20-5408, 2020 WL 1982210 (6th Cir. Apr. 24, 2020); *Robinson v. Attorney General*, No. 20-11401-B, 2020 WL 1952370 (11th Cir. Apr. 23, 2020); *South Wind Women's Ctr v. Stitt*, No. CIV-20-277-G, 2020 WL 1932900 (W.D. Okla. Apr. 20, 2020).

Similarly, the State's decision to require social distancing in the great majority of settings, but not in the healthcare setting (including abortion), challenged in Claim II, can hardly be called pretextual. While many things can be done from a distance of six feet, providing medical care is not one of them.

B. The Orders Do Not Plainly Invade Plaintiffs' Religious Rights

Plaintiffs do not assert a separate claim for violation of any constitutional right except the Equal Protection Clause. Importantly, the Complaint does not argue that the Challenged Orders restricting their rights to exercise their religious beliefs (such as restrictions on in-person church services) violate the First Amendment. (Dkt. 36.) Rather, Plaintiffs argue that the differential treatment of fundamental rights somehow violates Equal Protection. (*Id.* at 16–20.) For the reasons described above, such a claim fails as a matter of law. It would also be severely diminished by the Governor's latest executive order, 20-62, which allows indoor and outdoor services of up to 250 attendees.

Regardless, even if Plaintiffs were seeking to enjoin the Challenged Orders because they prohibited them from attending faith-based services in person with more than 250 people, such a claim would fail. Courts around the country have considered the constitutionality of more restrictive orders, and the great majority have found that Free Exercise and Establishment Clause claims are unlikely to succeed. *See, e.g.*, *Calvary Chapel of Bangor v. Mills*, No. 1:20-CV-00156, 2020 WL 2310913, at *7 (D. Me. May 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, 2:20-cv-00832, 2020 WL 2121111, at *4 (E.D. Cal. May 5, 2020); *Cassell v. Snyders*, 20-C-50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Lighthouse Fellowship Church v. Northam*, 2:20-cv-204, 2020 WL 2110416, at *8 (E.D. Va. May 1, 2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Gish v. Newsom*, EDCV 20-755, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23,

2020), *appeal docketed*, No. 20-55445 (9th Cir. Apr. 28, 2020); *Legacy Church, Inc. v. Kunkel*, CIV 20-0327, 2020 WL 1905586, at *30 (D.N.M. Apr. 17, 2020).

Minnesota's restrictions are also not a plain, palpable invasion of Plaintiffs' religious rights. The churchgoing Plaintiffs are still able to exercise their religious rights and practice their faith in many ways. They can view or listen to services online, and attend drive-in church services. Their faith leaders can visit them at home. They can pray, sing, worship, and read their Bible at home. And under the newest executive order, 20-62, they can also worship in person, as long as the gathering has fewer than 250 people or 25% of the building's capacity.

For these reasons, Minnesota's limitations on in-person church services are well within the State's authority under *Jacobson* and Plaintiffs claims fail as a matter of law.

C. Plaintiffs Have No Fundamental Right to Perform Non-Emergent Surgeries

Certain Plaintiff medical providers alleged they were prevented from performing non-emergent surgeries such as routine orthopedic procedures. (Dkt. 36 ¶ 60.) It merits noting that this also is not a valid complaint under *Jacobson*, because there is no fundamental right at issue. Doctors and clinics do not have a constitutional right to perform certain procedures or practice their trade. Federal courts have long recognized that there is no fundamental right to pursue an occupation and, as a result, laws regulating professions are subject to rational basis review. *See, e.g.*, *Williamson v. Lee Optical of Oklahoma Inc*., 348 U.S. 483 (1955) (upholding law prohibiting unlicensed persons from fitting lenses for eyeglasses); *Mass. Bd. Of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (declining to apply strict scrutiny to challenge of mandatory retirement law).

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Because Plaintiffs have not demonstrated that any of their fundamental rights are plainly violated by the Challenged Orders, the court "may not second-guess the wisdom or efficacy of the measures," *In re Rutledge*, 2020 WL 1933122, at *5, and Plaintiffs cannot succeed on their claims. The Complaint should be dismissed.

III. EVEN WITHOUT *JACOBSON*, PLAINTIFFS FAIL TO STATE A CLAIM

Even if this Court were to ignore that Minnesota is in the midst of a public health crisis necessitating deference to the health-based decisions of State Defendants, Plaintiffs' claim would still fail to meet Rule 12 muster.

A. Plaintiffs Do Not State a Valid Equal Protection Challenge

As set forth *supra*, in II.A, Plaintiffs equal protection challenges are without merit. In the first claim, Plaintiffs assert that the State improperly distinguished between abortion providers and providers of other procedures. Yet the State defined non-essential surgeries, and then treated all providers of non-essential surgeries equally. In their second claim, Plaintiffs suggest that if the State infringes on one constitutional right (like free exercise or assembly), it must equally infringe on all constitutional rights at the same time.[6] There is no case law to support such an odd interpretation of the Equal Protection Clause.

"The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws.'" *Vacco*, 521 U.S. at 799. But the

[6] Plaintiffs' argument calls to mind DeTocqueville's quote that "But one also finds in the human heart a depraved taste for equality, . . . which reduces men to preferring equality in servitude to inequality in freedom." Alexis de Toqueville, *Democracy in America Vol. I* (1835) (quotes available at https://en.wikiquote.org/wiki/Alexis_de_Tocqueville).

Equal Protection Clause does not require identical treatment of different things or circumstances. *Id.*; *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."). The level of scrutiny that the court applies to alleged differential treatment depends on whether the law impacts a suspect classification or fundamental right. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012).

As to Plaintiffs' first claim (assuming it is not moot, see *infra*), Minnesota's decision to treat all providers of non-essential surgeries equally, and to implicitly classify abortion as essential, does not violate the Equal Protection Clause. That decision to conclude that abortion does not fit within the definition of "non-essential" is rational, given the stage at which women often realize they are pregnant, how quickly pregnancy progresses, and the increased health risk as the pregnancy progresses, and the similar conclusion of national organizations.[7] Regulating different types of medical care differently has routinely been upheld by the Supreme Court. *See, e.g.*, *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (holding the "distinction between assisting suicide and withdrawing life-sustaining treatment" to be rational).

In their second equal protection claim, Plaintiffs present a novel legal theory: that their rights to Equal Protection were violated not because different medical procedures are treated differently, but because different constitutional rights were treated differently

[7] The risks of an abortion, as well as the risk attendant with being pregnant, increase as the pregnancy advances over time. *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) (noting that second-trimester abortions are risker than first-trimester abortions).

(right to abortion versus right to free exercise). (Dkt. 36 at 16–20.) Plaintiffs cite no case adopting their theory and the argument can be easily discarded.

Critically, there can be no violation of Equal Protection absent a threshold showing that similarly-situated persons are being treated differently. *See Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim."). In this case, Plaintiffs seeking to attend a mass faith-based gathering are not similarly situated to women seeking an essential medical procedure, such as surgical abortion. The differences, interests, and needs between these categories of persons are so significant and obvious that they hardly need to be enumerated here.[8] *In re Kemp*, 894 F.3d 900, 909–10 (8th Cir. 2018) ("Because [d]issimilar treatment of dissimilarly situated persons does not violate equal protection [plaintiff] does not state a claim.") (internal quotation marks and citation omitted); *Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918, 922 (8th Cir. 2016) ("Due to these significant differences between the two classifications of claimants and the losses they incurred, we conclude the insurance companies are not similarly situated to the uninsured property owners for purposes of an Equal Protection Clause claim.").

B. Plaintiffs Do Not State a Valid Challenge to Federal Abortion Jurisprudence

Plaintiffs' complaint demands a declaratory judgment that abortion is not a fundamental right and that previous U.S. Supreme Court decisions affirming a woman's

[8] Indeed, if Plaintiffs' legal theory were adopted, it would mean that all rights and liberties would have to be impacted identically for any State to respond to a pandemic in a constitutional manner. That is not the law.

right to choose are invalid because they "subordinat[e] state law to the policy preferences of unelected judges." (Dkt. 36 ¶ 92.) This claim fails as a matter of law.

The United States Supreme Court has held that the Fourteenth Amendment of the United States Constitution establishes a fundamental right of a woman to make the "ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992); *see also Roe v. Wade*, 410 U.S. 113 (1973). This holding prohibits outright bans on abortion prior to viability and shields the right of access to abortion from any "undue burden." *Id.* at 878, *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, as revised (June 27, 2016). *Roe*, *Casey*, and their progeny affirm the fundamental right to choose remains the valid law of the land. *See Adams & Boyle, P.C. v. Slatery*, No. 20-5408, 2020 WL 1982210, at *9 (6th Cir. Apr. 24, 2020 ("As of today, a woman's right to a pre-viability abortion is a part of 'the fundamental law'").

Additionally, Plaintiffs entirely disregard that the Minnesota Constitution independently protects, as a fundamental right, "the right of a pregnant woman to decide whether to terminate her pregnancy." *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995). "The right of privacy under [the Minnesota] constitution protects not simply the right to an abortion, but rather it protects the woman's decision to abort; any legislation infringing on the decision-making process, then, violates this fundamental right." *Id.* at 31.

Furthermore, Plaintiffs' attempt to invalidate decisions of the United States Supreme Court on the premise that Supreme Court justices are not elected is frivolous.

Article 3 of the United States Constitution provides for the lifetime appointment of federal judges and precedent going back to *Marbury v. Madison*, 5 U.S. 137 (1803), affirms the right of the courts to conduct judicial review of legislative and executive actions.

Plaintiffs' third claim fails to state a claim upon which relief can be granted.

IV. THE STATE DEFENDANTS ARE IMMUNE FROM SUIT UNDER THE ELEVENTH AMENDMENT.

Not only does the Plaintiffs' Complaint fail to state a claim, it also has significant justiciability problems. The first of which is that the State Defendants are immune from suit. "The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state." *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). In *Ex parte Young*, the Supreme Court established a very limited exception to this rule allowing suit against a government official for prospective injunctive relief when two conditions are met: (1) the official "must have some connection with the enforcement" of the challenged law; and (2) the official must "threaten and [be] about to commence proceedings" to enforce the statute. 209 U.S. 123, 156–57 (1908).

Indeed, "[t]he *Ex parte Young* exception *only* applies against officials who threaten and are about to commence proceedings." *281 Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) (emphasis added) (quotation omitted). It "does not apply when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional." *Id.* (quotation omitted). "Absent a real

likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Id*. (quotation omitted). The *Ex parte Young* exception does not apply to either State Defendant.

A. The Commissioner of the Minnesota Department of Health

Plaintiffs seek to enjoin the enforcement of Executive Orders 20-09, 20-16, 20-17, 20-20, 20-33, and 20-51. (Dkt. 36.) The Commissioner of the Minnesota Department of Health does not have any authority to enforce the first five of those Executive Orders. With respect to the sixth, while she can enforce 20-51, she has not threatened Plaintiffs with any enforcement proceedings nor is there any evidence she about to commence any such proceedings against them. The *Ex parte Young* exception therefore does not apply, and she is immune from suit.

B. The Governor

As for the Governor, his connection with the enforcement of the challenged Orders is limited at best. It is a crime to willfully violate the challenged orders. Minn. Stat. § 12.45; (ECF 37-2 at 2; ECF 37-4 at 11; ECF 37-5 at 14; ECF 37-6 at 21). The responsibility for prosecuting crimes in Minnesota has been "specifically delegate[d] . . . to the offices of county attorneys and city attorneys," and it is done "almost exclusively" through those officials. *State v. Lemmer*, 736 N.W.2d 650, 661–62 (Minn. 2007) (collecting statutes). Although the Governor has some limited criminal

authority[9], it is merely a "safety-valve alternative[] for use in extreme cases of prosecutorial inaction." *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 365 (Minn. 1977).

Even if the Governor's limited criminal authority is a sufficient connection with the enforcement of the challenged Orders, the Governor is still immune from suit because he has not threatened Plaintiffs with any enforcement proceedings nor is he about to commence any such proceedings. Plaintiffs do not even attempt to allege otherwise in their Complaint. In fact, Plaintiffs do not assert any desire to engage in prohibited conduct. Since there is no risk of any enforcement action against Plaintiffs, Plaintiffs do not qualify for the narrow *Ex parte Young* exception to Eleventh Amendment Immunity. *See, e.g.*, *Advanced Auto Transp., Inc. v. Pawlenty*, No. 10-159, 2010 WL 2265159, at *3 (D. Minn. June 2, 2010) (finding Governor immune from suit under the Eleventh Amendment because plaintiffs did not allege that the Governor had "threatened a suit or [is] about to commence proceedings against [the plaintiff]"); *see also Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1640 (2011) (reiterating that incorrect denial of Eleventh Amendment immunity "offends the dignity of a State"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing that Eleventh Amendment immunity is designed to protect "the dignity and respect afforded a State").

V. PLAINTIFFS LACK STANDING FOR THEIR CLAIMS AGAINST THE STATE DEFENDANTS.

Article III standing is "built on separation of powers principles" and is designed "to prevent the judicial process from being used to usurp the powers of the political

[9] "Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney." Minn. Stat. § 8.01.

branches." *Clapper v. Amnesty Int'l.*, 133 S. Ct. 1138, 1146 (2013). The "standing inquiry" is therefore "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by" another branch of government is unconstitutional. *Id.* at 1147. Plaintiffs fail to meet this especially rigorous standard.

To demonstrate standing, a plaintiff must show: (1) he has "suffered an injury-in-fact"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (quotations and internal marks omitted). Plaintiffs, as "[t]he party invoking federal jurisdiction[,] bears the burden of establishing these elements." *Id.* at 561. At the pleading stage, "the plaintiff must clearly allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted).

To establish the required "injury-in-fact," Plaintiffs must show that there has been "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 (internal citations omitted). "A concrete injury must be *de facto*; that is, it must actually exist."[10] *Spokeo*, 136 S. Ct. at 1548. To be particularized, the injury "must affect the plaintiff in a personal and individual way." *Id*. The injury must also be "certainly impending"—allegations of possible future injuries are insufficient. *Clapper*, 133 S. Ct. at 1147.

[10] "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549.

Instead of meeting their burden, Plaintiffs rest on unfounded assumptions and speculation. *See, e.g.*, *DuBois v. Ford Motor Credit Co*., 276 F.3d 1019, 1022 (8th Cir. 2002) ("[T]he complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal."). Plaintiffs provide no evidence or allegations about the actual amount of PPE consumed by any surgical abortions during the period when elective procedures were postponed. Plaintiffs assume that abortion clinics have had no difficulty in obtaining PPE, despite the industry-wide shortages.

Plaintiffs also have not and cannot causally link any PPE used in surgical abortions during the period when elective procedures were postponed to their alleged injuries. Plaintiffs concede this worldwide shortage of PPE is a result of *COVID-19.* This shortage is simply not attributable to the actions of the State Defendants, and Plaintiffs cannot prove that their requested relief would redress their alleged injuries concerning PPE.

A. PLAM

PLAM is an organization suing on behalf of its members. (Dkt. 36 ¶¶ 65–68.) It therefore must establish, among other things, that its members "have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). PLAM asserts that its members have standing because they "are or will potentially be COVID-19 patients" who are endangered by the use of PPE by abortion clinics. (Dkt. 36 ¶ 66.) This allegation fails to establish standing for at least four reasons.

First, PLAM fails to explain how this alleged injury is traceable to the Governor or the Health Commissioner. (Dkt. 36 ¶¶ 65–68.) As PLAM acknowledges, it is the abortion clinics that are allegedly using PPE, not the State Defendants. *See Duit Const. Co. Inc. v. Bennett*, 796 F.3d 938, 941 (8th Cir. 2015) ("When the injury alleged is the result of actions by some third party, not the defendants, the plaintiff cannot satisfy the causation element of the standing inquiry." (quotation omitted)); *Quinones v. City of Evanston, Illinois*, 58 F.3d 275, 277 (7th Cir. 1995) ("A person aggrieved by the application of a legal rule does not sue the rule maker—Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him.").

Second, PLAM fails to explain how an injunction lifting the PPE restrictions in the challenged orders will redress this alleged injury. (Dkt. 36 ¶¶ 65–68.) If PLAM's goal is to preserve PPE, a court order allowing unrestricted use of PPE will not achieve that goal.

Third, PLAM improperly relies on speculative future injuries that are not certainly impending. PLAM asserts that its members "will *potentially* be COVID-19 patients." (Dkt. 36 ¶ 66 (emphasis added).) These hypothetical future injuries are insufficient to establish standing.

Fourth, potentially being a COVID-19 patient is an injury common to all members of the public. But "a plaintiff must have more than a general interest common to all members of the public" to have standing. *Lance v. Coffman*, 549 U.S. 437, 440, 127 S. Ct. 1194, 1197 (2007) (quotation omitted).

B. Plaintiff Daly (surgeon)

Plaintiff Daly's alleged injury is his inability to perform elective surgeries. (Dkt. 36 ¶ 60.) But that simply is not true. Before Plaintiff Daly filed the Amended Complaint, the Governor issued Executive Order 20-51, which allows Plaintiff Daly to perform elective surgeries under certain conditions that apply equally to all healthcare providers. Plaintiff Daly therefore cannot establish an injury in fact.

C. AALFA, AALFA Employees, and AAPLOG

This group of Plaintiffs are either medical professionals or organizations comprised of medical professionals. (Dkt. 36 ¶¶ 4–5, 7, 59; Dkt. 37 at 15.) Their alleged injury is that they (or their members) are endangered by the use of PPE by abortion clinics. (Dkt. 36 ¶ 59.) These Plaintiffs do not have standing for at least three reasons.

First, these Plaintiffs fail to explain how this alleged injury is traceable to the Governor or Health Commissioner. (Dkt. 36 ¶ 59.) They acknowledge, as they must, that it is the abortion clinics that are allegedly using PPE, not the State Defendants. *See Duit*, 796 F.3d at 941 ("When the injury alleged is the result of actions by some third party, not the defendants, the plaintiff cannot satisfy the causation element of the standing inquiry." (quotation omitted)); *Quinones*, 58 F.3d at 277 ("A person aggrieved by the application of a legal rule does not sue the rule maker—Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him.").

Second, these Plaintiffs fail to explain how an injunction lifting the PPE restrictions in the challenged orders will redress their alleged injury. (Dkt. 36 ¶ 59.) If

PPE conservation is their goal, a court order lifting Minnesota's PPE restrictions will not achieve it.

Third, in a pre-enforcement challenge like this, the plaintiffs must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and there must be "a credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 2342 (2014). Neither is present in this case. These Plaintiffs have not and cannot allege that the State Defendants have threatened them with any civil or criminal enforcement proceedings. Nor do they assert that they wish to engage in prohibited conduct. Instead, they seek to "enjoin[] the performance of surgical abortions when medication abortion is available." (Dkt. 36 ¶ 59.)

This Court has no authority to direct the State of Minnesota to prohibit surgical abortions. All it can do is enjoin the State Defendants from enforcing unconstitutional provisions in the challenged orders. But because Plaintiffs are not subject to or threatened with any enforcement action by the State Defendants, they do not have standing to seek relief.

D. Churchgoing Plaintiffs

The churchgoing Plaintiffs have also failed to establish standing. The Amended Complaint contains no information about any of their churches, when they closed, or whether they would re-open absent the challenged orders. Without this basic information, Plaintiffs cannot demonstrate that their inability to attend in-person church services is fairly traceable to the State Defendants. Indeed, at least two of the Plaintiffs'

churches voluntarily suspended in-person services at least one week *before* the challenged Executive Orders were issued.[11] Plaintiffs have provided no evidence or even allegations that these churches will resume in-person services if an injunction is granted.

In any event, the Amended Complaint makes it clear that the churchgoing Plaintiffs do not seek to redress their alleged injury (*i.e.* their inability attend church in person). Instead, Plaintiffs seek to "enjoin[] the performance of surgical abortions when medication abortion is available." (Dkt. 36 ¶ 69.) The disconnect between the alleged injury and the relief sought further demonstrates their lack of standing.

Even if the churchgoing Plaintiffs were seeking to attend church in person, they still would not have standing. As set forth in section IV.B, *supra*, that injury is not traceable to the State Defendants because county attorneys are responsible for prosecuting crimes.

E. None of the Plaintiffs have Standing to Bring Claim III.

In Claim III, Plaintiffs assert that abortion is not a right protected by the U.S. Constitution. None of the Plaintiffs have standing to assert such a claim. Indeed, the Plaintiffs have not and cannot claim any cognizable injury from other people exercising their right to obtain an abortion. Plaintiffs acknowledge that their proposed relief "will not prevent any patient who wants an abortion from obtaining one." (Dkt. 37 at 18.) Furthermore, the right to abortion is protected by the Minnesota Constitution regardless

[11] *Compare* Kramer Decl. Ex. 23 (March 13, 2020 announcement that in-person services at Plaintiff Vavilov's church are suspended until further notice) *and* Kramer Decl. Ex 24 (March 18, 2020 announcement that in-person services at Plaintiff Fuith's church are suspended) *with* Executive Order 20-20 (first stay-at-home order issued March 25, 2020).

of how federal courts interpret the U.S. Constitution. *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995). Under these circumstances, Plaintiffs do not have standing to bring a stand-alone challenge to abortion as a constitutional right.

VI. EXECUTIVE ORDER 20-51 MOOTS PLAINTIFFS' EQUAL PROTECTION CLAIM

The gravamen of Plaintiffs' Amended Complaint relates to alleged inequities between abortion providers and other healthcare providers in their ability to perform surgical procedures. (Dkt. 36.) However, Executive Order 20-09 treated all non-essential procedures equally. Once the critical shortage of PPE passed, Executive Order 20-51, issued on May 6, 2020, removed the distinction between essential and non-essential surgeries. Physicians are entrusted to make sound judgments in weighing the need for each particular procedure to happen quickly against the risk of the patient being exposed to COVID-19 in the hospital or unduly diminishing the supply of PPE. (Dkt. 36-9.) State Defendants confirmed to counsel for Plaintiffs that Order 20-51 applied equally to all providers in an email on May 7. (Kramer Decl., Ex. 25.) Because Executive Order 20-51 provides the relief Plaintiffs seek in Claim I, that claim is moot and should be dismissed.

Federal courts only adjudicate cases or controversies. Therefore, cases must be dismissed as moot when "'changed circumstances [have] already provide[d] the requested relief and eliminate[d] the need for court action.'" *Moore v. Thurston*, 928 F.3d 753, 757 (8th Cir. 2019) (internal citations omitted). In particular, when the statute or rule that a plaintiff challenges is repealed, the case is generally moot. *Id.* (dismissing the appeal because "[t]he recent amendment addresses the current—and soon

obsolete—statute's infirmity, granting the relief Moore sought"); *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"); *see generally* Wright & Miller Superseding Legislative Action, 13C Fed. Prac. & Proc. Juris. § 3533.6 (3d ed.) ("Mootness principles have direct and often obvious application in dealing with attacks on legislative rules that have expired or been repealed. Mootness has overtaken attacks on expired statutes, ordinances, court rules, and administrative acts.")

Here, Plaintiffs' first claim is moot because Order 20-51 rescinds Order 20-09. There is no longer a moratorium on non-essential surgeries. Instead, the important judgments regarding the benefit of proceeding immediately with a surgery versus any detriment in doing so rests appropriately in the hands of physicians, in consultation with their patients, for every type of healthcare. As such, it moots any claim of an equal protection violation.[12]

Anticipating State Defendants' mootness argument, the Complaint posits that the State may at some point return to the guidance in place under Order 20-09. (Dkt. 36 ¶ 75.) Plaintiffs' pure speculation is insufficient to satisfy any exception to the mootness doctrine. Instead, the Eighth Circuit has stated the exception is rare and only applies if it is "virtually certain" that the repealed order will be reenacted. *Moore*, 928 F.3d at 757. In the current context, where due to increased capacity to handle an influx of cases in

[12] Tellingly, Plaintiffs' initial memorandum seeking preliminary relief stated "These proposed injunctions will expire when state officials lift all social-distancing requirements *and all restrictions on the performance of elective surgeries*." (Dkt. 9 at 4 (emphasis added).)

hospitals, the State is gradually relaxing restrictions on surgery, there is no basis to suggest it is "virtually certain" that the Governor would revive Executive Order 20-09 (or its equivalent). Indeed, under Order 20-51, the facilities should have plans in place to accommodate any later surge in cases on their own, without the need for an additional executive order.

CONCLUSION

Based on the foregoing, State Defendants respectfully request that the Court grant their motion to dismiss.

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