IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA

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I. INTRODUCTION

Defendant Planned Parenthood Minnesota, North Dakota, South Dakota ("PPMNS") submits this Memorandum of Law in Support of its Motion to Dismiss.[1]

Plaintiffs claim that State Defendants[2] have violated or may in the future violate their right to equal protection by permitting some Minnesotans to obtain aspiration abortions while temporarily restricting Plaintiffs' ability to provide elective surgery or attend in-person church services.[3] *See generally* First Am. Compl. ("Am. Compl."), ECF No. 36. Based on this attenuated legal theory, Plaintiffs seek to enjoin Defendant Health Centers from providing most early aspiration abortions and to enjoin the State of Minnesota from enforcing "any current or future executive orders" governing elective surgery, personal protective equipment, church attendance, or social distancing, unless it also prohibits such abortions.[4] *See* Am. Compl. ¶ 96(c). Remarkably, while Plaintiffs' claimed injuries are pandemic-related, their requested relief is not time-limited, indicating that

[1] Defendants PPMNS, Whole Woman's Health of the Twin Cities LLC, WE Health Clinic P.A., and Robbinsdale Clinic are referred to collectively in this brief as "Defendant Health Centers."

[2] Defendants Governor Tim Walz and Minnesota Department of Health Commissioner Jan Malcolm are referred to collectively in this brief as the "State" or "State Defendants."

[3] Plaintiffs include as an additional cause of action that "Abortion Is Not a Constitutional Right." *See* Am. Compl. ¶¶ 90–95. Plaintiffs' alleged injuries do not relate to the decades of precedent holding that patients have a substantive due process right to choose abortion and Plaintiffs have pointed to no caselaw permitting individuals who otherwise lack standing to bring federal lawsuits solely because they hope for a change in that precedent due the Supreme Court's composition. *See* Am. Compl. ¶ 93.

[4] While Plaintiffs' claimed injuries are pandemic-related, their requested relief is not time-limited, indicating that Plaintiffs seek to *permanently* prohibit most Minnesotans from choosing to obtain an early aspiration abortion.

Plaintiffs seek to *permanently* prohibit most Minnesotans from choosing to obtain an early aspiration abortion.

Despite amending their pleadings, Plaintiffs allegations have not substantially changed despite the fact that Minnesota has now lifted both the executive order prohibiting elective surgery and the Stay-at-Home Order, the latter of which has been replaced by an order expressly permitting religious gatherings of up to 250 people—thus leaving Plaintiffs free to resume the activities they complained were prohibited. As a result, Plaintiffs claims are either moot or unripe and must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Even with respect to the now-expired executive orders, Plaintiffs have failed to plead injuries fairly traceable to any Defendants (much less Defendant Health Centers who indisputably are charged with neither issuing nor enforcing Minnesota's executive orders), or that can be remedied by the extraordinary relief they seek. Similarly, Plaintiffs have failed to allege injuries which could conceivably be remedied by a favorable decision. Plaintiffs thus lack standing, further requiring dismissal under Rule 12(b)(1).

Nor have Plaintiffs alleged facts which, taken as true, give rise to a plausible equal protection claim—particularly as against non-state actors, such as Defendant Health Centers. Plaintiffs have thus failed to state a claim upon which relief can be granted and their claims must be dismissed under Rule 12(b)(6).

II. FACTUAL BACKGROUND

A. Executive Orders Concerning Procedures and Personal Protective Equipment

On March 13, 2020, the State of Minnesota declared a peacetime emergency due to the COVID-19 pandemic. *See* Minn. Emergency Exec. Order No. 20-01 (March 13, 2020), ECF No. 37-1. On March 19, 2020, Governor Walz issued Executive Order 20-09 ("Non-Essential Procedure Order" or "EO 20-09"), postponing non-essential surgeries and procedures that use personal protective equipment ("PPE")[5] or ventilators. *See* Minn. Emergency Exec. Order No. 20-09 (March 19, 2020), ECF No. 37-2. The Non-Essential Procedure Order was rescinded effective May 11, 2020, approximately two weeks after Plaintiffs filed suit. *See* Minn. Emergency Exec. Order No. 20-51 (May 11, 2020), ECF No. 37-15.

When in effect, the Non-Essential Procedure Order defined "non-essential" procedures as those that "can be delayed without undue risk to the current or future health of a patient." EO 20-09. The order did not exempt any class of medical providers or procedures. *See id*. The Minnesota Department of Health issued guidance titled "FAQ: Executive Order Delaying Elective Medical Procedures." *See* Decl. of Christine Clarke ("Clarke Decl.") Ex. A ("EO 20-09 FAQ" or "FAQ"). These FAQ made clear that the determination of whether a procedure must be delayed under the order was to be made by the medical provider "in the context of numerous considerations, both medical and

[5] Plaintiffs characterize PPE to include "masks, gloves, gowns, and face shields." Am. Compl. ¶ 24.

logistical." EO 20-09 FAQ at 1. The FAQ further noted that "family planning services" did not fall within the order's definition of prohibited non-essential procedures. EO 20-09 FAQ at 1. Other states across the country similarly concluded that reproductive health services are essential and should not be delayed.[6] This is consistent with guidance issued by the American College of Obstetricians and Gynecologists ("ACOG"), the American College of Surgeons ("ASC"), and the American Medical Association ("AMA"), which also classify reproductive health care, including abortion care specifically, as essential medical care which should not be delayed during the pandemic.[7]

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[6] *See, e.g.*, Mass. Dep't of Public Health, Nonessential, Elective Invasive Procedures in Hospitals and Ambulatory Surgical Centers during the COVID-19 Outbreak 1-2, https://www.mhalink.org/MHADocs/Communications/COVID19/20-03-15C19%20 Elective%20Procedure%20OrderUPDATE.pdf ("terminating a pregnancy is not considered a nonessential, elective invasive procedure for the purpose of this guidance"); N.J. Exec. Order No. 109 at 5, https://nj.gov/infobank/eo/056murphy/pdf/EO-109.pdf ("Nothing in this Order shall be construed to limit access to the full range of family planning services and procedures, including terminations of pregnancies. . . ."); N.M. Dep't of Health, Pub. Health Order at 2-3 (March 24, 2020), https://www.governor. state.nm.us/wp-content/uploads/2020/03/3_24_PHO_1.pdf ("This order's prohibition on non-essential health care services . . . is not meant to apply to . . . the full suite of family planning services); Va. Order of Public Health Emergency Two at 2 (March 25, 2020), https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/Order-of-Public-Health-Emergency-Two---Order-of-The-Governor-and-State-Health-Commissioner.pdf (same).

[7] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak ("To the extent that [medical] facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure."); AMA, *AMA Statement on Government Interference in Reproductive Health Care* (Mar. 30, 2020), https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproduct ive-health-care; *see also* ACS, *COVID-19 Guidelines for Triage of Gynecology Patients* (Mar. 24, 2020), https://www.facs.org/covid-19/clinical-guidance/elective-case /gynecology (including "[p]regnancy termination (for medical indication or patient request)" in list of "[s]urgeries that if significantly delayed could cause significant harm").

On May 6, 2020, Governor Walz signed Executive Order 20-51 ("EO 20-51" or "Facilities Plan Order"), rescinding the Non-Essential Procedure Order effective May 11, 2020. The Facilities Plan Order states that any facility providing procedures that use PPE or ventilators must "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." EO 20-51 at 3.

Thus, the State of Minnesota is no longer prohibiting non-essential procedures by doctors, dentists or veterinarians, or differentiating between essential and non-essential procedures at all. EO 20-51 at 2, 3. Governor Walz was clear that the state has "changed the calculus with PPE and readiness, and it's one of the reasons today I am signing this order that allows doctors, dentists and veterinarians to go back in with elective surgeries and procedures after completing a plan complying with requirements set by the Minnesota Department of Health."[8]

Nowhere does either the Non-Essential Procedure Order or the Facilities Plan Order require that, where multiple methods are available to obtain the same treatment goal, health care providers are only permitted to use the method utilizing the least PPE, regardless of a patient's individualized circumstances or preference.[9]

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[8] Paul John Scott, *Doctors, Dentists, Vets Can All Work in Minnesota on Monday*, West Central Tribune, May 5, 2020, https://www.wctrib.com/newsmd/coronavirus/6477924-Doctors-dentists-vets-can-all-work-in-Minnesota-on-Monday.

[9] Thus, for example, the Minnesota Board of Dentistry notes that routine dental hygiene appointments may utilize "ultrasonic scalers or air polishers" so long as the dental providers utilize N95 or KN95 masks—the form of PPE in shortest supply globally—

B. Stay-at-Home Order and Religious Services Order

On March 25, 2020, Governor Walz issued Executive Order 20-20 ("EO 20-20"), which required most people to stay at home except to engage in certain listed activities. *See* Minn. Emergency Exec. Order No. 20-20, ECF No. 37-4. The requirements of EO 20-20 (and its successor, Executive Order 20-30) were extended by Executive Order 20-48 ("EO 20-48") (collectively, "Stay-at-Home Order") through May 18, 2020. *See* Minn. Emergency Exec. Order No. 20-48 at 3, ECF No. 37-6. The Stay-at-Home Order was rescinded effective May 18, 2020, less than three weeks after Plaintiffs filed suit. *See* Minn. Emergency Exec. Order No. 20-56 (May 13, 2020), ECF No. 50-1 ("EO 20-56").

While in effect, the Stay-at-Home Order exempted certain Critical Sector Workers, including "health care and public health" workers, a category that included, *inter alia*:

> (1) Healthcare workers (including health care support staff, therapists, home care workers, and workers supporting the medical cannabis industry);
>
> (2) Faith leaders, as well as workers needed to help record and broadcast services; and
>
> (3) Workers supporting certain public and private outdoor recreational services (including parks, ski areas, golf courses, and bait shops).

EO 20-48 at 7–8, 14, 17.

On May 13, 2020, Governor Walz signed Executive Order 20-56, rescinding the Stay-at-Home Order, effective May 18, 2020. EO 20-56 allows Minnesota residents to

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despite the fact that "hand scaling techniques" are also available for such routine dental cleanings. *See* Clarke Decl. Ex. B.

engage in activities outside the home, but limits gatherings to ten people or fewer. EO 20-56 at 3–4.

On May 23, 2020, Governor Walz signed Executive Order 20-62 ("Religious Services Order"), which exempts "places of worship" and "other venues that offer gathering spaces for weddings, funerals, or planned services such as worship, rituals, prayer meetings, or scripture studies" from the prohibition on gatherings of more than ten people. The Religious Services Order permits places of worship to hold gatherings of up to 250 people, so long as indoor gatherings remain at or below twenty-five percent of the facility's full occupancy. *See* Minn. Emergency Exec. Order No. 20-62 at 3 (May 23, 2020), ECF No. 62-8.

C. Abortion in Minnesota

Plaintiffs' claims rely on alleged difference in PPE used and in-person contact involved in early aspiration abortions as compared with medication abortions. *See, e.g.*, Am. Compl. ¶¶ 73–74, 78, 82.

Medication abortion involves a combination of two medications.[10] Outside the research context, the FDA requires that the first medication be dispensed at a health center, clinic, or hospital by or under the supervision of the prescribing physician.[11] The second

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[10] *See Medication Abortion*, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687 (last visited June 3, 2020) ("Mayo Clinic") *cited by* Am. Compl ¶ 54.

[11] Fed. Drug Admin., Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200mg at 2 (Apr. 11, 2019), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2019_04_11_REMS_Full.pdf. Defendant PPMNS respectfully requests that the Court take judicial notice of this FDA requirement, as it constitutes publicly available information on a governmental website. *See Owner-Operator*

medication is taken twenty-four to forty-eight hours after the first, at a place of the patient's choosing after which the patient expels the pregnancy in a process similar to a miscarriage.[12] Medication abortion is only available in the first trimester of pregnancy.[13] The other method of abortion available in the first trimester is an aspiration abortion. Despite sometimes being referred to as a method of "surgical abortion," aspiration abortion is not what is commonly understood to be "surgery," as it does not require an incision.[14] Aspiration abortion involves inserting a narrow plastic tube through the opening of a patient's cervix and then using suction to empty the uterus and evacuate the pregnancy.[15] The process typically takes less than ten minutes.[16]

Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 831 F.3d 961, 968 n.2 (8th Cir. 2016) (taking judicial notice of publicly available information on government websites in determining plaintiffs had not suffered injury-in-fact for purposes of motion to dismiss); Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

[12] *See* Mayo Clinic, *supra* note 10; *see also Adams & Boyle, P.C. v. Slatery*, No. 3:15-CV-00705, 2020 WL 1905147, at *1 n.1 (M.D. Tenn. Apr. 17, 2020), *aff'd as modified*, 956 F.3d 913 (6th Cir. 2020), *and modified*, No. 3:15-CV-00705, 2020 WL 2026986 (M.D. Tenn. Apr. 27, 2020); *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 1:19-CV-00360, 2020 WL 1957173, at *6 (S.D. Ohio Apr. 23, 2020).

[13] *See Id.*

[14] *See What is Surgical Abortion: Overview, Benefits, and Expected Results*, DocDoc, https://www.docdoc.com/medical-information/procedures/surgical-abortion (last visited June 3, 2020) ("DocDoc") *cited by* Am. Compl. ¶ 55 (while the web address included in the Amended Complaint does not exist, it appears to be a link to a web page about surgical abortion on the same domain, and therefore counsel presumes the intended address is the one cited here).

[15] *See id*.

[16] *See, e.g.,* Nat'l Acads. of Scis., Eng'g & Med., *The Safety & Quality of Abortion Care in the United States* 59 (2018); *What are the Types of Abortion Procedures*, WebMD, https://www.webmd.com/women/abortion-procedures#2-4 (last visited June 3, 2020) (noting an aspiration abortion takes "several minutes").

When patients are eligible for both medication and aspiration abortion, many choose medication abortion.[17] However, for some, medication abortion is inappropriate, whether for medical reasons (such as a medical contraindication) or due to a patient's individual circumstances or strong preferences.[18] For example, aspiration abortion, which is completed at a health center, may be preferable for patients who suffer from violence in their homes and who thus cannot find a safe place to complete the medication abortion process without being put at heightened risk of violence and abuse. Others may strongly prefer an aspiration abortion because they cannot afford to take as much time off from work or childcare duties as a medication abortion may require.

D. Personal Protective Equipment ("PPE")

Neither medication nor aspiration abortion require extensive use of PPE.[19] Indeed, Plaintiffs allege only that aspiration abortion uses "gloves, a surgical mask, and protective eyewear." Am. Compl. ¶¶ 32–33 (citing PPE usage of a Texas Planned Parenthood affiliate). Plaintiffs do not allege that PPMNS health centers use or have any supplies of N95 masks—the PPE in shortest supply during the COVID-19 pandemic. Nor do Plaintiffs

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[17] S. Marie Harvey et al., *Choice of and Satisfaction with Methods of Medical and Surgical Abortion Among U.S. Clinic Patients*, 33 Fam. Plan. Persp. 212 (2001); *see also* Ellen R. Wiebe, *Choosing Between Surgical Abortions and Medical Abortions Induced with Methotrexate and Misoprostol*, 55 Contraception 67 (1997).

[18] *See* Nat'l Acads., *supra* note 16 at 8–9.

[19] *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020) (noting "paltry amount of PPE saved, and limited amount of in-person contact avoided, by halting procedural abortions for a three-week period"); *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1181–1182 (11th Cir. 2020) (holding that district court's finding that "abortions themselves only require a limited amount of PPE" was "amply supported by the record"); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1847128, at *11 (M.D. Ala. Apr. 12, 2020) (noting both procedural and medication abortions "require only a limited amount of PPE").

allege that protective eyewear (even assuming it is used by PPMNS) is disposable and thus "consumed" after any particular procedure. Moreover, Minnesota Department of Health Guidance currently recommends *all* health centers employ universal masking, meaning that all staff are wearing masks, regardless of the nature of the medical service being provided. Clarke Decl. Ex. C. Thus, most medication abortion patients must enter a health clinic, where all employees are wearing masks, to obtain a medication abortion.

III. PROCEDURAL BACKGROUND

A. Original Complaint and Motion for Preliminary Injunction

Plaintiffs filed suit on April 28, 2020. In their original Complaint, Plaintiffs AALFA Family Clinic, McKee, Anderson, Slattery, Tierney, Paul and Patrick Spencer, Mary and Matthew Paquette, and Daly (collectively, "Healthcare Plaintiffs") and unnamed members of Plaintiff American Association of Pro-Life OBGYNs ("AAPLOG") alleged that the State of Minnesota violated their rights to equal protection in its enforcement of the now-expired Non-Essential Procedure Order. *See* Compl. ¶¶ 24–36, 46–52, 67, ECF No. 1. Healthcare Plaintiffs had alleged they were injured by the Non-Essential Procedure Order because: (1) they had difficulty obtaining PPE, which they sought to attribute to Defendant Health Centers' provision of aspiration rather than medication abortions to some unspecified number of patients; and (2) Dr. Daly was prevented from performing certain procedures he wished to perform. *See* Compl. ¶¶ 46–47.

Plaintiffs Vavilov, Schumacher, Diedrich, Pauling, Benyon, Mike and Angie Fuith, Schmitz, Kostick, and Steffel (collectively, "Churchgoer Plaintiffs"[20]) alleged that the State violated their rights to equal protection in the enforcement of the now-expired Stay-at-Home Order, claiming that the Stay-at-Home Order prevented them from attending church services. *See* Compl. ¶¶ 37–45, 56; *see also* Mem. Law Supp. Mot. Prelim. Inj. ("First PI Br.") at 11–13, 16–17, ECF No. 9.

Plaintiffs thereafter sought a preliminary injunction permanently preventing Defendant Health Centers from providing early aspiration abortions to eligible patients unless the patient was contraindicated for medication abortion, and preventing the state of Minnesota from enforcing "any current or future executive orders" governing elective surgery, personal protective equipment, church attendance, or social distancing, unless it also prohibits such abortions. First PI Br. at 4; [Proposed] Order Granting Pls.' Mot. Prelim. Inj. ¶¶ 1–2, ECF No. 11.

B. Expiration of Executive Order 20-09

On May 7, 2020, the parties informed this Court that the Non-Essential Procedure Order was expiring and was being replaced by the Facilities Plan Order. *See* Joint Notice to Court & Mot. Amend Briefing Schedule at 1, ECF No. 25. As a result, doctors, dentists, and veterinarians throughout Minnesota, including Plaintiffs, are now able to perform all procedures, essential or otherwise, and thereby consume whatever PPE those procedures require, so long as the facility has the required plan. EO 20-56; *see also supra* Section II.B.

[20] Defendant PPMNS borrows this nomenclature from Plaintiffs' papers. *See* Am. Mem. Law Supp. Mot. Prelim. Inj. at 16, 17, ECF No. 37.

In response to these developments, Plaintiffs filed an Amended Complaint and an Amended Memorandum of Law in Support of Motion for Preliminary Injunction. *See generally* Am. Compl.; Am. Mem. Law Supp. Mot. Prelim. Inj. ("Second PI Br."), ECF No. 37. Despite the expiration of the executive order forming a substantial basis of Plaintiffs' original claims, both the Amended Complaint and Amended Memorandum were almost identical to the original versions: alleging virtually identical claims, seeking identical relief, and submitting identical evidence, including undated declarations claiming irreparable harm if this Court did not enjoin an executive order that Plaintiffs admit was expiring the next business day. *See* Second PI Br. at 17 ("Executive Order 20-51 will allow Dr. Daly and Anderson to resume elective surgeries on May 11, 2020, so they will no longer be suffering irreparable harm from their inability to perform elective surgeries"); Decl. Peter J. Daly ("Daly Decl.") ¶ 11, ECF No. 37-10 ("My practice and I will suffer additional irreparable injury absent a preliminary injunction, because state officials are prohibiting us from performing elective surgeries or procedures. . . ."); Decl. Matthew Anderson, M.D. ("Anderson Decl.") ¶ 11, ECF No. 37-11 (same).

C. Expiration of Executive Order 20-48

On May 14, 2020, counsel for Defendant PPMNS notified Plaintiffs' counsel of the expiration of the Stay-at-Home Order and inquired as to whether Plaintiffs intended to dismiss their claims or amend their pleadings in light of the fact that both executive orders forming the basis of Plaintiffs' original claims had expired. Clarke Decl. Ex. J.

On May 16, 2020, Plaintiffs informed this Court that the Stay-at-Home Order was also set to expire and would be replaced by EO 20-56, and that Plaintiffs were withdrawing

their second preliminary injunction motion accordingly. Notice to Court That Pls. Are Withdrawing Their Mot. for Prelim. Inj. at 1, ECF No. 50. However, Plaintiffs did not dismiss their claims or amend their pleadings.

D. Religious Services Order Permits Indoor Church Gatherings of Up to 250 People

On May 27, 2020, counsel for Defendant PPMNS brought to the attention of Plaintiffs' counsel the fact that, five days earlier, the State of Minnesota had issued the Religious Services Order, permitting services of up to 250 people to resume. *See* Clarke Decl. Ex. K. Indeed, the two churches identified in Plaintiffs' papers as places allegedly prevented from opening due to the Stay-at-Home Order have now both resumed in-person services. *See* Clarke Decl. Exs. D, E; Decl. Angie Fuith ¶ 4, ECF No. 37-14; Decl. Rebecca Vavilov ¶ 4, ECF No. 13. Counsel for PPMNS again noted that Plaintiffs' claims had been mooted and inquired whether Plaintiffs intended to dismiss the action. Clarke Decl. Ex. K. Plaintiffs' counsel did not respond.

Plaintiffs have not amended their pleadings since the expiration of the Stay-at-Home order or the issuance of the Religious Services Order. As a result, the Amended Complaint makes no reference to EO 20-56; to the fact the stay-at-home orders have been lifted; or the fact that religious services may be held in gatherings of up to 250 people. *See generally* Am. Compl. In fact, the Amended Complaint does not even make reference to EO 20-48, the version of the Stay-at-Home Order in effect at the time the Amended Complaint was filed. *See generally id.*; EO 20-48.

The Amended Complaint does acknowledge that the Non-Essential Procedure Order expired and was replaced by the Facilities Plan Order. *See* Am. Compl. ¶ 42. Plaintiffs argue that their related claims are not mooted by these developments by: (a) alleging that the State may "resurrect its prohibition" on non-essential procedures because it "remains possible that the COVID-19 pandemic will worsen"; and (b) alleging that the State "intend[s]" to allow Defendant Health Centers to continue performing early aspiration abortions. Am. Compl. ¶¶ 75–76. The Amended Complaint does not allege that the State "intends" to prevent any Plaintiff from doing anything. *See generally* Am. Compl.

IV. ARGUMENT

Plaintiffs do not present a justiciable case or controversy, having failed to meet the basic requirements of Article III. *See* U.S. Const. art. III, § 2, cl. 1; *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). Plaintiffs also fail to allege sufficient factual matter, even if accepted as true, to state a plausible claim to relief. *See* Fed. R. Civ. P. 12(b)(6); *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059 (8th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). For these reasons, Plaintiffs' claims must be dismissed both for lack of subject matter jurisdiction and for failure to state a claim.

A. This Case Does Not Meet the Case and Controversy Requirements of Article III

As the Eighth Circuit has noted:

> Our Constitution is a charter for limited government. Article III limits the "judicial power" to "cases" and "controversies." From this "bedrock requirement" flow several doctrines—*e.g.* standing, mootness, ripeness, and political question—which "state fundamental limits on federal judicial power

> in our system of government." Article III's standing requirement is a restraint on the "judicial power" as unyielding as that placed on Congress by, for example, the First Amendment.

Mausolf, 85 F.3d at 1300 (internal citations omitted) (quoting U.S. Const. art. III, § 2, cl. 1; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

The instant case fails to meet the "bedrock requirement" because Plaintiffs' claims are either moot or unripe and all Plaintiffs lack standing, having failed to plead injuries that are fairly traceable to any Defendant, let alone Defendant PPMNS, or that could be remedied by judicial intervention, let alone by the extraordinary permanent injunctive relief requested. Indeed, in many cases, Plaintiffs have failed to allege any injury at all. Having failed to present a live case or controversy under Article III, Plaintiffs' claims must be dismissed.

1. Plaintiffs' Claims Are Moot as to the Non-Essential Procedure Order and the Stay-at-Home Order

Plaintiffs originally brought this case on the grounds that the State treated Plaintiffs differently from Defendant Health Centers under the Stay-at-Home Order and the Non-Essential Procedure Order. *See* Compl. ¶¶ 57–68. Both orders have now expired. Health care providers throughout Minnesota are now permitted to provide procedures, whether elective or essential, so long as the providers create the required facilities plan. *See* EO 20-51. Indeed, while Plaintiffs' allegations focus on their disagreement with State Defendants' categorization of abortion as an essential procedure, *see* Am. Compl. pp. 2–3, ¶¶ 27–29, 34, 47, 60, 62–63, 66–67, 72–76, 90, the orders currently in effect do not distinguish between

essential and nonessential care. No Minnesotans are required to stay at home and, indeed, they may gather for religious services in groups of up to 250 people, even while indoors. *See* EO 20-56; EO 20-62. Moreover, the only two churches identified as places Churchgoer Plaintiffs wish to worship have both re-opened to in-person services. *See* Clarke Decl. Exs. D, E.

While Plaintiffs allege that their claims concerning the Non-Essential Procedure Order remain live under the voluntary cessation doctrine (*see* Am. Compl. ¶ 75), the Amended Complaint is void of any facts, even if taken to be true, that could lead a reasonable fact-finder to conclude that the State is "virtually certain" to reissue the Non-Essential Procedure Order, as required by the Eighth Circuit. *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013). The only allegation Plaintiffs make is that it is "*possible*" the State may pass a similar order in the future, Am. Compl. ¶ 75 (emphasis added), but as the State makes clear in its brief, this is "pure speculation," and indeed EO 20-51 contemplates that there would be no need for another executive order like EO 20-09, *see* Mem. Supp. State Defs.' Mot. Dismiss ("State's Br.") at 31–32, ECF No. 56.

To the contrary, it is "virtually certain" that any future restrictions will be different from prior orders. COVID-19 was unknown to humankind six months ago and regulatory and medical authorities are struggling in real time to identify means to ensure effective medical responses and to control transmission by the least intrusive means available. Should restrictions need to be tightened again, those will be tailored to the current best information. In this novel and rapidly evolving medical context it is beyond speculative to

claim that: (a) expired orders will be reinstated at all, and (b) reinstatement will take materially the same form as the original.

Such speculation is far from sufficient under Eighth Circuit law to rescue Plaintiffs' claims from mootness.[21] *See Teague*, 720 F.3d at 977 (remanding case to district court with directions to dismiss complaint as moot, despite the fact that the state was "almost guarantee[d]" to "revisit the issue," noting "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") (quoting *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (affirming district court's dismissal of complaint as moot))). Nor have Plaintiffs alleged any facts that would lead to a conclusion that any future reenactment would evade review. *See Epp v. Kerrey*, 964 F.2d 754, 755 (8th Cir. 1992) ("There is no evidence here that the State intends to reenact the repealed statute, nor that any such legislative action could 'evade review.'").

2. Plaintiffs' Claims Are Unripe as to the Facilities Plan Order

Upon the expiration of the Non-Essential Procedure Order, Healthcare Plaintiffs amended their pleadings to suggest that the state "intend[s]" to treat them differently under the new Facilities Plan Order. *See* Am. Compl. ¶ 76. Plaintiffs offer no factual allegations whatsoever to support this assertion, nor could they: State Defendants confirmed to counsel

[21] Plaintiffs' claims are not saved from mootness by the fact that Plaintiffs have sought nominal compensatory damages. *See* Am. Compl. ¶ 96(d)). For the reasons noted below, Plaintiffs have failed to plead any injury caused by Defendant Health Centers. *See infra* Section IV.A.3. Even were it the case, which it is not, that Plaintiffs plausibly alleged injury caused by the State, State Defendants are immune from suits for damages. *See* State's Br. at 21–23.

for Plaintiffs that Order 20-51 applied equally to all providers in an email on May 7. *See* State's Br. at 31 (citing Decl. Liz Kramer Supp. Mot. Dismiss, Ex. 25, ECF No. 57-2).

"The touchstone of a ripeness inquiry is whether the harm asserted has 'matured enough to warrant judicial intervention.'" *Vogel v. Foth & Van Dyke Assocs., Inc.*, 266 F.3d 838, 840 (8th Cir. 2001) (quoting *Paraquad v. St. Louis Housing Auth.*, 259 F.3d 956, 958 (8th Cir. 2001)). 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.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 569, 580–81 (1985)).

Here, Plaintiffs rely solely on a conclusory assertion that the State does not "intend" to enforce the Facilities Plan Order against Defendant Health Centers in the precise way that Plaintiffs would like. Am. Compl. ¶¶ 48–49, 76; *see also* Second PI Br. at 14. Such unsubstantiated and conclusory arguments about "contingent future events" do not come close to meeting Article III's ripeness requirement. *Texas v. United States*, 523 U.S. at 300.

3. Plaintiffs Lack Standing to Bring Claims Against Any Defendant, Much Less PPMNS

Plaintiffs have not established their standing to bring this action. "'[T]he irreducible constitutional minimum of standing' requires the party invoking federal jurisdiction to identify a 'concrete and particularized' injury-in-fact that is 'actual or imminent, not conjectural or hypothetical.'" *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 831 F.3d 961, 966 (8th Cir. 2016) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, the injury alleged must be

"fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "The elements of standing 'cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.'" *Owner-Operator Indep. Drivers Ass'n, Inc.*, 831 F.3d at 966 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).

Even focusing on the period when the executive orders Plaintiffs complain of were in effect, no Plaintiff has pleaded any particularized injury, let alone injury that is fairly traceable to the minimal amount of PPE Plaintiffs allege is used in aspiration abortion as compared with medication abortion. Neither has any Plaintiff pleaded injury that could be redressed by the relief requested. As a result, Plaintiffs' claims must be dismissed. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n*, 831 F.3d at 966; *Gaslin v. Fassler*, 377 F. App'x 579, 579 (8th Cir. 2010) (collecting cases); *McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728, 731 (8th Cir. 2005); *see also Frost v. Sioux City*, 920 F.3d 1158 (8th Cir. 2019) (holding that district court did not abuse its discretion in failing to hold evidentiary hearing prior to *sua sponte* dismissal for lack of standing); *Meuir v. Greene Cty. Jail Emps.*, 487 F.3d 1115, 1119 (8th Cir. 2007) (examining standing *sua sponte* and reversing decision of lower court where plaintiff lacked standing to seek an injunction due to a failure to show a likelihood of future injury).

a. Healthcare Plaintiffs

In essence, Healthcare Plaintiffs allege that they are using PPE, that Defendant PPMNS also uses PPE, and that there is a worldwide shortage of PPE. *See* Am. Compl.

¶ 59; *see also* Second PI Br. at 16–17.[22] Plaintiffs do not actually anywhere allege that they have actually been unable to obtain any PPE that they seek. Even when required to marshal evidence in support of two since-withdrawn motions for preliminary injunction, Plaintiffs failed to show any injury whatsoever, let alone injury fairly traceable to the provision of aspiration abortions in Minnesota or to PPMNS specifically. Plaintiffs Daly, Anderson, and Spencer declared to this Court that they obtained the PPE they sought, including the PPE in shortest supply globally, N95 respirators. Daly Decl. ¶ 9; Anderson Decl. ¶ 9; Decl. Paul J. Spencer, D.O. ("Spencer Decl.") ¶ 6, ECF No. 37-9; *see also* Decl. Donna J. Harrison, M.D. Supp. Pls.' Mot. Prelim. Inj. ¶ 5, ECF No. 37-12. While Plaintiff Spencer complained of prior difficulty obtaining gowns and N95 respirators (*see* Spencer Decl. ¶ 6), Plaintiffs have not alleged that Minnesota abortion providers use either gowns or N95 respirators at all, let alone during aspiration abortions. *See* Am. Compl. ¶¶ 32–33. Therefore, even as to the period when the executive orders they complain of were in effect, Healthcare Plaintiffs have failed to allege any injury-in-fact, let alone injury fairly traceable to Defendant PPMNS, or indeed to any Defendant.

Plaintiffs make conclusory allegations throughout the Amended Complaint that aspiration abortion requires more PPE than medication abortion (*see* Am. Compl. ¶¶ 33, 36, 47, 48, 57, 72–74, 76, 82, 86–88, 90) and are less consistent with social distancing (*id.* ¶¶ 58, 69, 78, 82–84, 88–89). Plaintiffs support this allegation by alleging that medication

[22] While Plaintiff Daly makes the additional argument that he was prevented from performing certain elective procedures while the Non-Essential Procedure Order was in effect (*see* Am. Compl. ¶¶ 60, 75), as explained *supra*, any such claims are moot, and in any event he fails to allege that Defendant PPMNS is the cause of any alleged injury.

abortions can be "performed at home." *Id.* at ¶ 83. The reality is—as the Executive Director of Plaintiff AAPLOG, Dr. Donna Harrison, is well aware[23]—the FDA generally requires that mifepristone, the first of two medications taken as part of a medication abortion regimen, be dispensed in a health center, medical office, or hospital by or in the presence of the prescribing physician. *See supra* Section II.C. Thus, between the in-person visit requirement for most patients obtaining mifepristone and the universal-masking requirement for health care facilities (*see supra* Section II.C; Clarke Decl. Ex. C), Plaintiffs cannot plausibly allege that medication abortion will utilize fewer surgical masks or require fewer in-person visits than aspiration abortion, let alone that Plaintiffs' PPE usage causes them any injury now that they (like doctors, dentists, and veterinarians throughout Minnesota) are allowed to preform even non-essential procedures that use PPE.

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[23] Dr. Harrison has testified extensively about the FDA protocols for medication abortion. In a North Dakota case, Dr. Harrison identified herself as "an expert in . . . the United States Food and Drug Administration (FDA) drug approval process" and testified at length about the FDA protocols for the administration of abortion medication, as well as the supposed dangers of medication abortion drugs. Affidavit of Donna Harrison, *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-cv-02205, 2013 WL 9885391 (N.D. Dist. Ct. Nov. 29, 2011). The Supreme Court of North Dakota found that her "opinions lack[ed] scientific support, tend[ed] to be based on unsubstantiated concerns, and [were] generally at odds with solid medical evidence" and concluded that she was not a credible witness. *MKB Mgmt. Corp. v. Burdick*, 2013 WL 9885391, at *7 (N.D. Dist. July 15, 2013); *see also Planned Parenthood of Ark. & E. Okla. v. Jegley*, No. 4:15-cv-00785-KGB, 2018 WL 3816925, at *42 (E.D. Ark. July 2, 2018) (noting that Dr. Harrison's views on medication abortion "must be rejected"). Dr. Harrison also testified before Congress, at the invitation of National Right to Life, when the FDA's approval of mifepristone was first being considered in 1996. FDA, Reprod. Health Drugs Advisory Committee, Transcript of Hearing on RU-486 247 (July 19, 1996).

Healthcare Plaintiffs have failed to allege injury, let alone injury traceable to any acts or omissions of any Defendant or which could be remedied by any judicial order.[24] As a result, Healthcare Plaintiffs lack standing and their claims should be dismissed.

b. Organizational Plaintiffs

Plaintiffs AAPLOG and Pro-Life Action Ministries ("PLAM") too have failed to allege any injury traceable to Defendants, but they lack standing because the Amended Complaint fails to establish that any of their individual members have standing. *Owner-Operator Indep. Drivers Ass'n, Inc.*, 831 F.3d at 967 (membership-based organizational standing requires organization's members to have standing in their own right). Neither organization has pleaded that any of its members reside in Minnesota or are subject to any of Minnesota's laws. Neither organization has pleaded that any of its members were harmed by any actions of any Defendant (even during the period when the executive orders they complain of were in effect).

AAPLOG's only allegation of harm is that its members are using PPE and are harmed by the fact that Defendant PPMNS is also using PPE. *See* Am. Compl. ¶ 62. For the reasons noted above, this is far from sufficient to establish standing. *See supra* Section IV.A.3.a.

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[24] Indeed, one of Plaintiffs' requested forms of relief—that the State of Minnesota be enjoined from enforcing *any* orders concerning social distancing, elective surgeries or PPE (Am. Compl. ¶ 96(c)) would presumably *worsen* any PPE shortage, both by preventing the State from limiting COVID-19 transmission *and* preventing the State from enforcing any PPE-related measures whatsoever.

PLAM pleads only that it "has members who are **or will potentially be** COVID-19 patients." Am. Compl. ¶ 66 (emphasis added). Such injuries are neither "concrete and particularized" nor "actual or imminent," as Article III standing requires. *Owner-Operator Indep. Drivers Ass'n*, 831 F.3d at 966 (quoting *Lujan*, 504 U.S. at 560).

Moreover, while both AAPLOG and PLAM plead that their missions are germane to this lawsuit (*see* Am. Compl. ¶¶ 63, 67), both organizations' websites make clear that their missions have nothing to do with preserving either PPE or in-person church attendance, but rather relate exclusively to opposing abortion. *See* Clarke Decl. Exs. L, M; *Owner-Operator Indep. Drivers Ass'n*, 831 F.3d at 966 (to have organizational standing, the interests an association seeks to protect must be germane to the organization's purpose).

Thus, neither organization has standing and both organizations' claims must be dismissed.

c. Churchgoer Plaintiffs

The Churchgoer Plaintiffs similarly lack standing because, even when the relevant executive orders were in effect, the Amended Complaint's allegations do not tie their claimed injuries to any actions of Defendant PPMNS. Nor have Plaintiffs adequately pleaded injuries which could be addressed by a court-ordered prohibition on any given medical procedure.

While Defendant PPMNS is sympathetic to the need, particularly in times of crisis, to be able to assemble with one's community of faith, Plaintiffs have provided only conclusory allegations that their inability to attend in-person church services was caused by the now-expired executive orders at all. This is particularly important given that, in light

of the pandemic, many churches ceased providing in-person services prior to any Stay-at-Home Order in Minnesota, in order to protect their congregations and reduce COVID-19 transmission.

Two Churchgoer Plaintiffs, Plaintiffs Vavilov and Fuith, submitted declarations in support of the two since-withdrawn motions for preliminary injunction in which they indicate which church they would normally attend. It is clear, based on the published online statements of these churches, that the Stay-at-Home Order was not the cause of Plaintiffs Vavilov and Fuith's injuries.

The website of Plaintiff Vavilov's church states that all services went digital on March 13, 2020, weeks before the Governor's first stay-at-home order, as a result of the Governor's March 13, 2020 recommendation that social gatherings be limited to fewer than 250 people. *See* Clarke Decl. Ex. F.[25] Likewise, the Archdiocese of Saint Paul & Minneapolis, which covers Plaintiff Fuith's church (*see* Clarke Decl. Ex. G), has stated that public mass was cancelled on the advice of State officials and after consultation with the Presbyteral Council and College of Consultors, noting "the moral impossibility of attending mass" (*see* Clarke Decl. Ex. H). The Archdiocese also noted that "[i]t is critical for the common good that we do everything we possibly can to minimize the risk to others and to ourselves, which means simply staying home as much as possible." *See* Clarke Decl.

[25] *See also* Brian Bakst, *Walz Advises no Gatherings Over 250 People As MN COVID-19 Cases Hit 14*, MPR News, March 13, 2020, https://www.mprnews.org/story/2020/03/13/14-covid19-cases-now-in-mn-walz-to-unveil-new-control-measures (noting that the 250 person limit was a recommendation, rather than an enforceable order).

Ex. I. Accordingly, Plaintiffs have failed to plausibly allege that any inability to attend in-person services was caused by the Stay-at-Home Order.

Thus, Churchgoing Plaintiffs have alleged no injuries fairly traceable to the acts of any Defendant, let alone injuries that could be remedied by a court order permanently prohibiting Minnestonas from obtaining early aspiration abortions.

B. Plaintiffs Fail to State a Plausible Claim to Relief

Even if this Court had subject matter jurisdiction over Plaintiffs' claims, Plaintiffs have nevertheless failed to allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" so as to survive a motion to dismiss. *In re Pre-Filled Propane Tank Antitrust Litig*., 860 F.3d at 1063 (quoting *Iqbal*, 556 U.S. at 678). "A plausible claim must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quoting *Iqbal*, 556 U.S. at 678). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (alteration in original) (quoting *Iqbal*, 556 U.S. at 678). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Because Plaintiffs are unable to meet the *Iqbal/Twombly* pleading standards, their case must be dismissed.

Plaintiffs' only cognizable claim (*see supra* note 3) concerns alleged equal protection violations. Yet, Plaintiffs have not pleaded facts that, even if assumed to be true,

give rise to a plausible claim that the State violated their right to equal protection.[26] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Equal Protection Clause does not, however, "require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler*, 457 U.S. at 216 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *see Adam & Eve Jonesboro, LLC v. Perrin,* 933 F.3d 951, 960 (8th Cir. 2019) ("It is well-established that '[d]issimilar treatment of dissimilarly situated persons does not violate equal protection.'" (alteration in original) (quoting *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994))).

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[26] Plaintiffs do not allege that Defendant PPMNS issues or enforces any executive orders, equally or otherwise. Nor could they do so, as PPMNS has no power to issue or enforce executive orders. While Plaintiffs have pleaded that PPMNS is "acting under color of state law" (Am. Compl. ¶ 68), this argument misunderstands 42 U.S.C. § 1983. Section 1983 creates a cause of action only when the alleged state actor "deprives another of a federally protected right." 42 U.S.C. § 1983. Plaintiffs make no such allegations against PPMNS. Simply noting that Plaintiffs believe Defendant Health Centers are permitted to perform procedures Plaintiffs believe should be prohibited is insufficient to make PPMNS a state actor under Section 1983. *See Miller v. Compton*, 122 F.3d 1094, 1098 (8th Cir. 1997) ("a private actor may be liable under § 1983 only if she is a willing participant in joint action with the State or its agents" (internal quotation marks omitted)); *Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993) ("a plaintiff seeking to hold a private party liable under § 1983 must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor"); *see also Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (5th Cir. 2001).

To assert an equal protection violation concerning the application of a given rule or statute, the complaining party must show: "(1) they were singled out and compelled to comply with [the law] while others similarly situated were not so compelled, and (2) the government action in singling [Plaintiffs] out for discriminatory enforcement was based on an impermissible purpose or motive." *Ellebracht v. Police Bd. of Metro. Police Dep't of City of St. Louis*, 137 F.3d 563, 566 (8th Cir. 1998). Where a challenged law does not treat groups differently, an equal protection claim does not attach. *See Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 702 (8th Cir. 2011) (holding that a law cannot violate the Equal Protection Clause unless it "disadvantages one group over another so as to result in unequal treatment"); *Klinger,* 31 F.3d at 731 ("[T]he first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her."); *Mandrell v. Baer*, 863 F.2d 27, 28 (8th Cir. 1988) (holding that plaintiff's equal protection claim failed because the challenged statute did not draw the alleged classification); *Shortino v. Wheeler,* 531 F.2d 938, 939 (8th Cir. 1976) ("Absent any allegation of improper classification or discrimination among citizens, there is no judicially cognizable equal protection cause of action.").

Plaintiffs have failed to adequately plead that they are similarly situated to Defendant Health Centers or that they were subject to differential enforcement of any order. Indeed, Plaintiffs have made *no* allegations concerning the State's enforcement of any current executive order, other than speculation about the State's "inten[t]." *See supra* Section III. Accordingly, their claims must be dismissed.

1. Healthcare Plaintiffs Have Not Adequately Alleged an Equal Protection Violation

Healthcare Plaintiffs have failed to adequately allege an equal protection violation. While Plaintiffs allege that some *procedures* were treated differently from others under the now-expired Non-Essential Procedure Order, they do not allege that Plaintiffs themselves were treated differently from Defendant Health Centers. *See Ellebracht*, 137 F.3d at 566.

None of the executive orders that Plaintiffs complain of exempted Defendant Health Centers or abortion providers from any requirements or otherwise classified or singled-out health care providers for differential treatment. *See supra* Section II.A. The now-expired prohibition on non-essential procedures was accompanied by an explicit definition of "non-essential procedure" that applied to all health care facilities equally. No healthcare facilities were permitted to perform procedures "that can be delayed without undue risk to the[] current or future health" of a patient—neither Healthcare Plaintiffs nor Defendant Health Centers. EO 20-09 FAQ at 1. State Defendants, like states around the country (*see supra* pp. 4–5) and consistent with guidance from leading professional organizations (*see id.*), determined that abortion services cannot be delayed and thus were not prohibited, presumably due to the time-sensitive nature of pregnancy. EO 20-09 FAQ at 1.

Plaintiffs have not alleged that they were prohibited from providing essential non-delayable medical care while Defendant Health Centers were not. Am. Compl. ¶ 60 (noting Plaintiff Daly had to cease only "elective surgeries"). In the absence of any allegations that Plaintiffs were subject to differential treatment or enforcement, Plaintiffs fail to state an

equal protection claim. *See Libertarian Party of N.D.*, 659 F.3d at 702; *Klinger,* 31 F.3d at 731.

While Plaintiffs allege that Defendant Health Centers should be permitted to provide only the least PPE-intensive procedures available, Plaintiffs paradoxically do *not* allege that they are (or were) subject to any such requirement, as required to establish differential enforcement under the Equal Protection Clause. *See Ellebracht*, 137 F.3d at 566. Similarly, Plaintiffs nowhere alleged that they are required to choose only the means of treatment involving the least in-person contact. *See* Am. Compl. ¶ 49. The fact that Defendant Health Centers are *also* not required to do so deprives Plaintiffs of no rights. *See id.; see also Libertarian Party of N.D.*, 659 F.3d at 702; *Klinger,* 31 F.3d at 731.

While Plaintiffs have not pleaded a plausible violation of their right to equal protection, Plaintiffs' requested relief would *create* an equal protection violation by unjustifiably treating Defendant Health Centers and their patients differently from others similarly situated. *See City of Cleburne*, 473 U.S. at 439–41 (setting forth standards for the various levels of scrutiny in an equal protection analysis). None of Minnesota's executive orders require physicians (or dentists or veterinarians) to cease conducting any particular procedure across the board, whether to conserve PPE or otherwise. *See* EO 20-51. Plaintiffs' requested injunction would make Defendant Health Centers the *only* medical providers subject to any such restrictions.

Medicine is rife with instances where a given treatment goal can be achieved by more than one means—by medication or surgery; by surgery or physical therapy; by immediate treatment or by careful monitoring of patient symptoms. These decisions must

be made through a careful balancing of a number of factors, including patient preference. Patients may hold preferences for any number of reasons—different risk tolerances, aversions to surgery or certain possible side effects of medications, convenience, and ability to comply with various treatment regimens.

For example, though uncomplicated appendicitis can, in some instances, be treated either by surgery or by administering antibiotics, the overwhelming majority of people prefer surgery.[27] The State of Minnesota, however, does not (nor did it previously under the now-expired executive orders) require that all individuals with uncomplicated appendicitis be given antibiotics or that they be prohibited from having an appendectomy because of the PPE required. *See* EO 20-09; EO 20-51. Indeed, in *no* instances does the State of Minnesota require physicians to choose the least PPE-consuming method of obtaining a given treatment outcome, regardless of the patient's desires or individual circumstances. *Id.*

Plaintiffs' requested injunction would result in Defendant Health Centers being the only medical facilities required to choose a particular method of treatment based *solely* on whether it (arguably) consumes more or less PPE, disregarding the individualized circumstances of their patients.

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[27] Alexis L. Hanson et al., *Patient Preferences for Surgery or Antibiotics for the Treatment of Acute Appendicitis*, 153 JAMA Surgery 471 (2018); *see also* Steven Reinberg, "Antibiotics May Cure Appendicitis Without Surgery," WebMD (Sept. 25, 2018), https://www.webmd.com/digestive-disorders/news/20180925/antibiotics-may-cure-appendicitis-without-surgery#1

Because Plaintiffs have not plausibly alleged that they were treated differently from Defendant Health Centers, Plaintiffs' claims must be dismissed.

2. Churchgoer Plaintiffs Have Not Adequately Alleged an Equal Protection Violation

Like Healthcare Plaintiffs, Churchgoer Plaintiffs have not alleged that Defendant PPMNS issues or enforces any executive orders, equally or otherwise. Nor have Churchgoer Plaintiffs pleaded anywhere that they are similarly situated to Defendant PPMNS or its staff. *See generally* Am. Compl. Their claims must be dismissed on these bases alone. *See Libertarian Party of N.D.*, 659 F.3d at 702; *Klinger,* 31 F.3d at 731.

Presumably, Churchgoer Plaintiffs could assert the same claims against Healthcare Plaintiffs as they do against Defendant PPMNS, since Healthcare Plaintiffs were also classified under the Stay-at-Home Order as Critical Sector Workers. EO 20-48. The more apt comparison may be between Defendant Health Center's employees and the leaders of Churchgoer Plaintiffs' respective congregations, *i.e.* the individuals providing the relevant services. Such comparison similarly shows no equal protection violation, as faith leaders (and their employees) were also classified as Critical Sector Workers and exempt from the Stay-at-Home Order. *Id*. Indeed, Minnesotans, such as Churchgoer Plaintiffs, are currently permitted to attend much larger in-person gatherings for religious purposes than they can for most other purposes. *See* EO 20-62.

Without any plausible allegation of past or present unequal treatment as compared with Defendant Health Centers—or even allegations that Churchgoer Plaintiffs are

similarly situated to Defendant Health Centers—Churchgoer Plaintiffs' equal protection claims must be dismissed.

V. CONCLUSION

Because Plaintiffs have failed to invoke this Court's subject matter jurisdiction and the Amended Complaint fails to state any claims upon which relief can be granted, all of Plaintiffs' claims must be dismissed.

Respectfully submitted,

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