

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SOUTH WIND WOMEN’S CENTER)
LLC, d/b/a/ TRUST WOMEN)
OKLAHOMA CITY, on behalf of itself,)
its physicians and staff, and its patients,)
et al.,)

Plaintiffs,)

v.)

J. KEVIN STITT, in his official capacity)
as Governor of Oklahoma, et al.,)

Defendants.)

Case No. CIV-20-277-G

**BRIEF OF *AMICI CURIAE* THE ROMAN CATHOLIC DIOCESE OF
TULSA, ARCHDIOCESE OF OKLAHOMA CITY, CATHOLIC
CONFERENCE OF OKLAHOMA, OKLAHOMA BAPTISTS, AND
OKLAHOMA FAITH LEADERS IN OPPOSITION TO PLAINTIFFS’
REQUEST FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

ARGUMENT	4
I. Plaintiffs lack third-party standing because their interests conflict with the women’s interests they purport to represent.....	7
II. Pre-viability abortion is not an absolute right and is subject to regulation in virtually every state.....	10
A. The right to abortion has never been absolute.....	10
B. Oklahoma’s interest in fighting the pandemic satisfies the undue burden standard.....	12
C. Virtually all states regulate abortion in some way.....	15
III. The abortion industry wants special treatment while churches and others with fundamental constitutional rights are voluntarily cooperating with civil authorities to fight the pandemic.....	16
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases:

Canfield Aviation, Inc. v. Nat’l Transportation Safety Board,
854 F.2d 745 (5th Cir. 1988).....9

Doe v. Bolton,
410 U.S. 179 (1973)..... 10

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004)..... 8, 9

In re Majestic Star Casino, LLC,
716 F.3d 736 (3d Cir. 2013)9

Kowalski v. Tesmer,
543 U.S. 125 (2014).....8

Lepelletier v. FDIC,
164 F.3d 37 (D.C. Cir. 1999).....9

Planned Parenthood v. Casey,
505 U.S. 833 (1992)..... 11, 13

Powers v. Ohio,
499 U.S. 400 (1991).....7

Singleton v. Wulff,
428 U.S. 106 (1976)..... 8, 9, 10

State ex rel. Speweik v. Wood County Board of Elections,
No. 2020-0382, 2020 WL 1270759 (Ohio March 17, 2020) 17

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986)..... 10

Warth v. Seldin,
422 U.S. 490 (1975).....7

Whole Woman’s Health v. Hellerstedt,
136 S.Ct. 2292 (2016)..... 5, 11

Statutes:

63 O.S. § 1-174.5 16

63 O.S. § 1-738.1A.....5

Other Authorities:

Ambulatory Surgery Center Association, *State Guidance on Elective Surgeries* (April 6, 2020).....6

Catholic Church, *Catechism of the Catholic Church* (Vatican City: Libreria Editrice Vaticana 1994) 1,2,16

Center for Disease Control and Prevention, *Coronavirus Diseases 2019 (COVID-19), Social Distancing, Quarantine, and Isolation*..... 12

Center for Disease Control and Prevention, *Coronavirus Diseases 2019 (COVID-19), Strategies to Optimize the Supply of PPE and Equipment* 12

Ethan Siegel, *Why ‘Exponential Growth’ is so Scary for the COVID-19 Coronavirus*, Forbes Magazine (March 17, 2020) 12

Guttmacher Institute, *An Overview of Abortion Laws* (April 1, 2020) 15

Guttmacher Institute, *Requirements for Ultrasound* (April 1, 2020) 15

Guttmacher Institute, *State Facts About Abortion: Oklahoma* 15

Hakim, Danny, *Ailing N.R.A. Finds New Rallying Cry: Keep Gun Shops Open*, The New York Times (April 2, 2020) 17

INTEREST OF AMICI

Amici are religious organizations and faith leaders within the State of Oklahoma. All have an interest in protecting the sanctity of human life from conception to natural death. Amici also have an interest in the health and welfare of their parishioners and other citizens of Oklahoma, and therefore an interest in implementing social distancing and preserving medical equipment by the temporary suspension of elective medical procedures during the unprecedented COVID-19 pandemic.

The Roman Catholic Diocese of Tulsa was founded in 1973 and consists of 79 parishes and missions and 9 elementary schools across 31 counties in eastern Oklahoma. The Diocese holds as its purpose to proclaim “in word and deed the saving message of Jesus Christ and His Church that all may know, love, and serve Him.” In accordance with the teachings of the Catholic Church, the Diocese opposes abortion in all forms. As the Catholic Church teaches, “From the first moment of his [or her] existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life.”¹ The Diocese holds as its sincere religious

¹ Catholic Church, *Catechism of the Catholic Church* at 2270 (Vatican City: Libreria Editrice Vaticana 1994), http://www.vatican.va/archive/ENG0015/_P7Z.HTM (last accessed Apr. 6, 2020).

belief that human life is sacred and that each person is made in the image of God.² As part of this belief, the programs and activities of the Diocese and affiliated entities include, but are not limited to, various social programs for pregnant women, including housing and adoption services; ministries for women who have suffered an abortion; the annual Tulsa March for Life; participation in the national March for Life; the annual 40 Days for Life campaign; and an annual pro-life Mass. Due to the ongoing situation regarding COVID-19, the Diocese has suspended virtually all activities—including the public celebration of the Mass.

The Archdiocese of Oklahoma City includes central and western Oklahoma, covering 46 counties and 109 parishes and missions. The purpose of the Archdiocese of Oklahoma City is to witness to the Catholic faith in central and western Oklahoma through the teaching, sanctifying and governing ministry of Christ and His Church. The Archdiocese does so through making the Body of Christ present, proclaiming the universal call to holiness, and welcoming all people to the promise of eternal life. The Archdiocese's pro-life activities include an annual Sanctity of Life Mass, a bi-annual 40 Days for Life campaign, and resources for pregnancy and post-abortion healing.

² *Catechism of the Catholic Church* at 2258, http://www.vatican.va/archive/ENG0015/_P7Y.HTM (last accessed Apr. 6, 2020).

Because of the COVID-19 pandemic, the Archdiocese has suspended all services—even sacraments—that would require two or more people to be together, less than six feet apart, and without a protective barrier.

The Catholic Conference of Oklahoma serves as the official voice of the Catholic Church in Oklahoma on matters of public policy. The Conference operates at the intersection of faith and politics. By applying Catholic moral principles to the important political questions of the day, the Conference strives to ensure that citizens and elected officials evaluate public policy options given a moral framework that transcends party affiliation or partisan politics. The Catholic Conference of Oklahoma has defined six policy areas as essential priorities for advocacy efforts, one of which is Life & Human Dignity.

Oklahoma Baptists has over 1,700 congregations and more than 550,000 members in the state who worship in more than 29 languages weekly. Oklahoma Baptists touches the lives of many individuals and communities by providing disaster relief, collegiate ministries, and meeting the literacy needs of adults, children, and youth. The organization is well-known for strong and unwavering support of the unborn, as well as ministry to abortion-vulnerable women. For more than 25 years, Oklahoma Baptists has taken a leading role in pro-life work including events, speaking out for life, pro-life public policy advocacy, peaceful prayer efforts, as well as offering pregnancy resource ministry across the state.

Oklahoma Faith Leaders is an ecumenical group that organizes the faith community to fight for the moral future of the state. It encourages, educates, and equips people of faith to connect with their elected leaders, fostering communication and action.

All Amici have an interest in protecting religious liberty, the sanctity of human life from conception till natural death, and the health of their parishioners and all Oklahomans which amici are called to love and care for.

ARGUMENT

As former U.S. Surgeon General of the United States Dr. C. Everett Koop explained, “The fact of the matter is that abortion as a necessity to save the life of the mother is so rare as to be nonexistent.” Everett Koop, *The Right to Live: The Right to Die* at 61 (1981). In other words, for virtually all intents and purposes, abortion is elective. That’s why even Plaintiffs characterize this procedure as a “choice.” Pls.’ Mot. for T.R.O. at 18, 19, 20, 22, ECF No. 16.

Abortion is not an absolute right. The Supreme Court has long recognized that States have a valid interest in regulating abortion. States also have a duty to protect the health and safety of women who undergo this life-altering procedure. That is why courts have upheld laws requiring waiting periods, ultrasounds, parental rights notifications for minors, and prohibitions against partial-birth abortions—even before viability.

Plaintiffs are not women protected by these laws and do not qualify for third-party standing to represent them. Plaintiffs' interest in not being regulated by the Executive Order conflicts with the interest of women seeking safe medical services.

Yet Plaintiffs seek a special exemption to Defendant Oklahoma Governor J. Kevin Stitt's Executive Order requiring postponing *all* elective surgeries and minor medical procedures until April 30, 2020.³ The Order exempts non-elective abortions—*i.e.*, those due to true medical emergencies as defined in 63 O.S. § 1-738.1A—including those necessary to prevent serious health risks to the unborn child's mother.⁴ *See* 63 O.S. § 1-738.1A. Otherwise, the Order treats abortion the same as other elective procedures, just as pro-choice advocates have done for many years. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2320-21(2016) (Ginsburg, J., concurring) (citing Brief for Social Science Researchers filed in support of *Whole Woman's Health* and comparing abortion to dental procedures). And to be perfectly clear, the extraordinary suspension

³ Office of the Governor, State of Oklahoma, *Executive Department Fourth Amended Executive Order 2020-07*, <https://www.sos.ok.gov/documents/executive/1919.pdf> (last accessed April 6, 2020).

⁴ Office of the Governor, State of Oklahoma, *Governor Stitt Clarifies Elective Surgeries and Procedures Suspended under Executive Order*, https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries (last accessed April 6, 2020).

of all elective medical procedures⁵ is important to slow the spread of the virus through social distancing and to ensure that healthcare workers fighting COVID-19 have adequate access to Personal Protective Equipment (PPE). Governors across the country have called for a halt to all elective surgeries and procedures at all hospitals and ambulatory surgical centers.⁶

Postponing non-essential medical procedures is not the only unprecedented action being taken by most states. They are also enforcing social distancing by prohibiting gatherings in groups of more than 10 and by enacting stay-at-home orders that prohibit virtually any face-to-face encounters other than buying groceries. As church communities voluntarily comply with prudential judgment of civil authorities, such governmental policies touch upon the constitutional and God given right to assemble for

⁵ *Id.*

⁶ Twenty-Seven States currently require postponing elective procedures because of the pandemic: Alabama, Arizona, Colorado, Florida, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Michigan, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

Seven states *recommend* postponing elective procedures: Alaska, Illinois, Maine, Massachusetts, North Carolina, South Carolina, and Tennessee.

Ambulatory Surgery Center Association, *State Guidance on Elective Surgeries*, Apr. 6, 2020, <https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-state> (last accessed Apr. 6, 2020).

worship. The policies also implicate and drastically restrict the constitutional rights to purchase firearms, protest, and speak freely. Yet governments enacted these policies anyway to protect healthcare workers, the elderly, those with compromised immune systems, and all others—including Plaintiffs.

Everyone’s priority during this national crisis should be to protect vulnerable lives. Others seeking elective medical procedures are making that immense sacrifice. So are people of faith. So are public protestors. The abortion industry is demanding special treatment not to save lives, but to end them. This Court should not allow abortion businesses to drain critical medical resources from the front lines and flout social distancing requirements. Because if Plaintiffs succeed in obtaining a court-ordered exemption to the Order, others will surely follow.

Plaintiffs’ motion for a preliminary injunction should be denied.

I. Plaintiffs lack third-party standing because their interests conflict with the women’s interests they purport to represent.

“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Accord Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (expressing a “reluctance to exert judicial power when the plaintiff’s claim to relief rests on the legal rights of third parties”).

There are some exceptions to this default rule. Most relevant here is the catchall exception that applies when (1) the litigant “has a ‘close’ relationship with the person who possesses the right” and (2) the third party faces a “hindrance” to protecting her own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). In *Singleton v. Wulff*, a plurality held that those factors were satisfied when two doctors raised women’s abortion rights in a challenge to a state law that excluded elective abortions from Medicaid funding. 428 U.S. 106, 114–18 (1976). But exceptions to the bar on third-party standing—both the general two-prong exception and that exception as applied to abortion doctors in *Singleton*—do not apply when there is a conflict between the litigant’s and the third party’s interests.

The Supreme Court established this in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). The plaintiff there was a father raising his daughter’s asserted constitutional interest in objecting to hearing others recite the words “under God” in the Pledge of Allegiance at public school. *Id.* at 5. According to her mother, the daughter had “no objection either to reciting or hearing” the Pledge. *Id.* at 9. The Court held that the father could not raise the daughter’s rights. *Id.* at 15. The father’s “standing derives entirely from his relationship with his daughter.” *Ibid.* But “[i]n marked contrast to our case law on [third-party standing],” the Court said while citing *Singleton*, “the interests of this parent [the litigant] and this child [the third party] are not parallel and,

indeed, are potentially in conflict.” *Ibid.* *Elk Grove* reaffirmed that conflict between a litigant’s and third party’s interests displaces the rules for third-party standing—including *Singleton*’s analysis for abortion providers. Under those circumstances, the litigant cannot assert the third party’s rights.⁷

This conflict-of-interest rule fits within the logic of existing third-party standing doctrine. The first prong of the catchall exception—the “close relation[ship]” between litigant and third party— contemplates “an *identity* of interests” between the two. *Lepelletier*, 164 F.3d at 44 (emphasis added). No such relationship exists when the litigant’s and third party’s interests diverge, as when a doctor seeks to invalidate a rule that helps keep his patients safe.

The conflict-of-interest rule also makes sense in other contexts. Courts would not allow an adoption agency to raise children’s asserted right to a family placement in a case challenging agency-screening requirements for child safety. Nor could employers raise their employees’ wage-and-hour rights to invalidate an OSHA regulation that limits dangerous tasks to a few hours per week.

⁷ “[C]onflicts of interests between the plaintiff and the third party . . . strongly counsel against third party standing,” *In re Majestic Star Casino, LLC*, 716 F.3d 736, 763 (3d Cir. 2013); “there must be an identity of interests” between the litigant and the third party, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999); and the litigant and the third party must “have interests which are aligned,” *Canfield Aviation, Inc. v. Nat’l Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988).

An unavoidable conflict of interests exists here. Plaintiffs' interest in avoiding the Executive Order conflicts with women's interests in protecting their health (and the health of every other Oklahoman). Yet Plaintiffs are usurping women's rights to overturn a regulation that helps keep those women safe.

Allowing abortion doctors to raise women's abortion interests in this circumstance would turn principles of third-party standing on their head. A conflicted litigant is not a fitting "proponent" for the third party's interest. *See Singleton*, 428 U.S. at 115 (plurality). Such a litigant is an advocate who will distort the case and sacrifice the right-holder's interests. Women seeking abortion are the best parties to protect their rights. There is no hinderance to them doing so here.

Plaintiffs' motion for a preliminarily injunction should be denied because they lack standing.

II. Pre-viability abortion is not an absolute right and is subject to regulation in virtually every state.

A. The right to abortion has never been absolute.

"[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 189 (1973) (cleaned up). *Accord Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 782 (1986) (Burger, Chief Justice, dissenting) ("[E]very Member of

the *Roe* Court rejected the idea of abortion on demand.”). That is why, throughout the United States, pre-viability abortions are legally subject to regulation in many ways, including waiting periods, ultrasound requirements, parental rights notifications, and prohibitions on partial-birth abortion. Restrictions on pre-viability abortion are permissible if they do not place an “undue burden” on a woman’s decision to end her pregnancy. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

The undue-burden standard is less protective of abortion procedures than strict scrutiny. *See id.* at 876–78. To apply the test, courts evaluate whether an abortion restriction furthers a valid state interest. *Hellerstedt*, 136 S. Ct. at 2310. In so determining, courts may conduct their own inquiry based on the evidence presented. *Id.* Courts then analyze whether the law confers benefits that outweigh the burdens imposed. *Id.* at 2309.

Oklahoma has a valid interest in slowing COVID-19’s spread to the most vulnerable members of society and to ensure adequate medical care for those who contract the virus and the healthcare personnel who care for them by conserving personal protection equipment. The Governor’s Order furthers those interests by suspending all non-essential services, including elective medical procedures of all kinds. The Order does not single out abortion; neither does it grant abortion a special exemption. In short, it is neutral among elective medical procedures. And with good reason. Preventing a single transmission

of the virus by postponing an elective abortion may save many lives.⁸ And healthcare workers treating patients with COVID-19 can put PPE to the best use at this critical juncture. Yet abortion clinics claim that they, among all services in Oklahoma, should get a free pass when all other citizens are making sacrifices for the good of the whole.

B. Oklahoma’s interest in fighting the pandemic satisfies the undue burden standard.

Limiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease. The CDC recommends avoiding gathering in groups and staying at least 6 feet from other people.⁹ Additionally, the viral pandemic that the United States and Oklahoma are experiencing has led to a shortage of vital medical equipment routinely used in elective procedures. According to the CDC, of particular concern is the shortage of PPE used by “healthcare personnel to protect themselves, patients, and others when

⁸ COVID-19 spreads exponentially. So just one infected person in a population can spread the disease to 1024 others in 30 days. Ethan Siegel, *Why ‘Exponential Growth’ is so Scary for the COVID-19 Coronavirus*, Forbes Magazine (March 17, 2020). <https://www.forbes.com/sites/startswithabang/2020/03/17/why-exponential-growth-is-so-scary-for-the-covid-19-coronavirus/#2d581ceb4e9b> (last accessed Apr. 6, 2020).

⁹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19), Social Distancing, Quarantine, and Isolation*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last accessed Apr. 6, 2020).

providing care” to infectious patients.¹⁰ This shortage is “posing a tremendous challenge to the US healthcare system because of the COVID-19 pandemic.”¹¹ A vital key to combating this shortage is for “local and state health departments, and local and state partners to work together to develop strategies that identify and extend PPE supplies.”¹² One of the strategies specifically recommended by the CDC is to “cancel elective and non-urgent procedures/appointments.”¹³

Governor Stitt’s Executive Order temporarily suspending all elective medical procedures to maintain social distancing and preserve medical equipment like PPE implements these CDC recommendations. The Order’s purpose is to save the lives of Oklahomans experiencing medical emergencies and those requiring necessary procedures by limiting the spread of the virus and preserving medical equipment necessary to treat it.

When evaluating the constitutionality of laws inhibiting abortion, the Supreme Court considers their purpose. *Casey*, 505 U.S. at 877. One legitimate—even compelling—purpose is to protect the health of Oklahoma

¹⁰ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Strategies to Optimize the Supply of PPE and Equipment*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html> (last accessed Apr. 6, 2020).

¹¹ *Id.*

¹² *Id.* (cleaned up).

¹³ *Id.*

citizens. *Id.* at 878. The compelling interest of protecting public health justifies the resulting loss of abortion access.

Moreover, the Governor's Executive Order benefits Plaintiffs and their patients. The "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973). During this public health crisis, "maximum safety" for patients—and medical staff—is to minimize contact with others, especially in view of the need for social distancing and the PPE shortage. Plaintiffs' continued performance of elective abortions creates unnecessary close contact and encourages traveling, which will also spread the virus. *See Amicus Br. of 16 States* at 11 (ECF No. 59) (listing the testimony of Plaintiffs' own witnesses that proves travel by abortion doctors and their patients, as well as the doctors' high-volume abortion practice, contribute to the spread of the virus). This is all on top of abortion patients' need for scarce hospital services because of the well-recognized risk of serious complications that accompanies both surgical and medication abortion. *See Defs.' Resp. in Opp'n to Pls.' Mot. for T.R.O. Br.* at 11-12 (ECF No. 54) (cataloguing the risks of both procedures).

The purpose of the Governor's Executive Order is to protect public health in a time of national crisis, not to restrict abortion. It applies to all elective medical procedures. The Order meets the undue burden standard and

Plaintiffs have not proved they are entitled to a special exemption from the Order.

C. Virtually all states regulate abortion in some way.

Almost all states restrict abortion, and many of these restrictions regulate abortions before viability. Currently, twenty-seven states require a waiting period between an initial consultation and the abortion procedure. Twenty-one states have laws prohibiting partial-birth abortions (a particular abortion procedure), all but three of which apply to pre-viability abortions. Thirty-seven states “require some type of parental involvement in a minor’s decision to have an abortion.”¹⁴ Twenty-six states “regulate the provision of ultrasound by abortion providers,” and fourteen of these states require an ultrasound for each woman seeking an abortion.¹⁵

Oklahoma has various limitations on abortion that legally apply to abortions performed before viability.¹⁶ For example, abortions in Oklahoma are prohibited after 20 weeks postfertilization, “unless, in reasonable medical

¹⁴ Guttmacher Institute, *An Overview of Abortion Laws as of April 1, 2020*, <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws><https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last accessed Apr. 6, 2020).

¹⁵ Guttmacher Institute, *Requirements for Ultrasound as of April 1, 2020*, <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (last accessed Apr. 6, 2020).

¹⁶ See Guttmacher Institute, *State Facts About Abortion: Oklahoma*, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-oklahoma> (last accessed Apr. 6, 2020).

judgment, she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.” O.S. § 63-1-745.5. In many cases, this restriction will mean that a woman who desires to terminate her preborn child will be unable to do so, preserving that child’s life. Even so, it is not an unconstitutional deprivation of the mother’s rights, because the state’s policy is furthering a valid state interest.

Plaintiffs’ insinuation that abortion is an unassailable right and cannot be restricted, even during a national crisis, is unfounded

III. The abortion industry wants special treatment while churches and others with fundamental constitutional rights are voluntarily cooperating with civil authorities to fight the pandemic.

Amici represent thousands of churches across Oklahoma who have voluntarily cooperated with the orders of civil authorities in order to fight the current pandemic.¹⁷ Limiting church services is particularly difficult for those churches that require weekly church attendance and observance of religious

¹⁷ See e.g., Fourth Amended Executive Order 2020-07, Mar. 24, 2020, <https://www.sos.ok.gov/documents/executive/1919.pdf>.

ceremonies. For example Catholics believe “[t]he Sunday celebration of the Lord’s Day and his Eucharist is at the heart of the Church’s life.”¹⁸

This is no small incursion on religious liberty as churches across the world have been following the requirement to worship together for almost 2,000 years. Worse, it will last through Good Friday and Easter—the holiest days of the year for amici and the parishioners they represent. As such, the burden on religious practice during the next week, statewide, nationwide, and worldwide, is nearly unfathomable. Yet it is being borne.

Prohibiting gatherings of more than ten also impedes the right to assemble for political and other purposes. Court closures have postponed criminal jury trials and caused the loss of Sixth Amendment rights. Ohio restricted the right to vote by postponing a primary election due to COVID-19 health concerns.¹⁹ And New York is restricting Second Amendment rights by forcing stores selling firearms to close.²⁰

¹⁸ *Catechism of the Catholic Church* at 2177, https://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c1a3.htm (last accessed Apr. 6, 2020)

¹⁹ *See State ex rel. Speweik v. Wood Cty. Bd. of Elections*, No. 2020-0382, 2020 WL 1270759 (Ohio Mar. 17, 2020); J. Edward Moreno, *Ohio Supreme Court Denies Challenge to State Primary Delay* (The Hill Mar. 17, 2020), <https://thehill.com/homenews/state-watch/487983-ohio-supreme-court-denies-challenge-to-state-primary-delay> (last accessed Apr. 6, 2020).

²⁰ Hakim, Danny, *Ailing N.R.A. Finds New Rallying Cry: Keep Gun Shops Open*, *The New York Times* (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/us/nra-guns-coronavirus.html> (last accessed Apr. 6, 2020).

Individuals are even prohibited from visiting their loved ones in hospitals and nursing homes. And schools and universities have closed. In view of these sacrifices, Plaintiffs' request for special treatment is surprising and shortsighted. Perhaps that is why no women seeking abortion agreed to serve as Plaintiffs in this lawsuit.

CONCLUSION

Plaintiffs lack the third-party standing necessary to sue and the Executive Order postponing all elective surgery—including abortion—meets the low threshold of the undue burden test. The Court should deny Plaintiffs' request for a preliminary injunction.

Respectfully submitted this 6th day of April 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2020, I electronically filed the above with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

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