

No. 20-6045

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOUTH WIND WOMEN'S CENTER LLC, d/b/a Trust Women
Oklahoma City, on behalf of itself, its physicians and staff, and its
patients; LARRY A. BURNS, D.O, on behalf of himself and his staff
and his patients; COMPREHENSIVE HEALTH OF PLANNED
PARENTHOOD GREAT PLAINS INC., on behalf of itself, its
physicians and staff, and its patients,

Plaintiffs-Appellees,

v.

J. KEVIN STITT, in his official capacity as Governor of Oklahoma;
MICHAEL HUNTER, in his official capacity as Attorney General of
Oklahoma; DAVID PRATER, in his official capacity as District
Attorney for Oklahoma County; GREG MASHBURN, in his official
capacity as District Attorney for Cleveland County; GARY COX, in
his official capacity as Oklahoma Commissioner of Health; MARK
GOWER, in his official capacity as Director of the Oklahoma
Department of Emergency Management,

Defendants-Appellants.

**Motion of the States of New York, California, Colorado,
Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts,
Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode
Island, Vermont, Virginia, Washington, and the District of
Columbia to Submit a Brief as Amici Curiae
in Support of Appellees and in Opposition to
Appellants' Application for a Stay**

The States of New York, California, Colorado, Connecticut,
Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada,
New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia,

and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amici curiae in opposition to appellants' application for a stay pending appeal of the district court's April 6, 2020 order granting appellees' motion for a temporary restraining order.¹ The brief includes material that is "relevant to the disposition" of the stay application, and which would be "desirable" for the Court to consider. Fed. R. App. P. 29(a)(3)(B).

The brief describes, through amici's own experiences, how the present public health crisis can be addressed effectively without denying access to abortion services. Amici explain how they have been able to permit abortions to continue while still conserving personal protective equipment and hospital capacity, and minimizing interpersonal contacts. Amici also explain the other strategies available to alleviate potential shortages of public health resources, and how they have successfully pursued those strategies.

¹ While a State is permitted to file an amicus brief without the parties' consent or permission of the Court during the "consideration of a case on the merits," Fed. R. App. P. 29(a)(1)-(2), that Rule does not expressly permit a State to file an amicus brief during the Court's consideration of a motion. Accordingly, in an abundance of caution, amici States move for leave to file an amicus brief in opposition to appellants' stay request.

The outcome of this litigation is of significant concern to amici in ways that go beyond their general commitment to safeguarding the constitutional right to reproductive self-determination recognized and reaffirmed by the Supreme Court over decades. The current public health emergency has prevented some students, workers, and caregivers from returning home to the amici States from Oklahoma and other States that similarly have sought to deny access to pre-viability abortions. Amici have an interest in ensuring that those residents can continue to obtain time-sensitive reproductive care.

The proposed brief complies with the type-volume limitations for an amicus brief on a motion because it uses fewer than half of the 5,200 words permitted for a motion or response. *See* Fed. R. App. P. 27(d)(2(A); *id.* 29(a)(5).

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in support of plaintiffs-appellees and in opposition to defendants-appellants' stay application.

Dated: New York, New York
April 10, 2020

/s/ Anisha S. Dasgupta
ANISHA S. DASGUPTA

20-6045

United States Court of Appeals for the Tenth Circuit

SOUTH WIND WOMEN'S CENTER LLC, d/b/a Trust Women Oklahoma City, on behalf of itself, its physicians and staff, and its patients; LARRY A. BURNS, D.O., on behalf of himself and his staff and his patients; COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS INC., on behalf of itself, its physicians and staff, and its patients,

Plaintiffs-Appellees,

v.

J. KEVIN STITT, in his official capacity as Governor of Oklahoma; MICHAEL HUNTER, in his official capacity as Attorney General of Oklahoma; DAVID PRATER, in his official capacity as District Attorney for Oklahoma County; GREG MASHBURN, in his official capacity as District Attorney for Cleveland County; GARY COX, in his official capacity as Oklahoma Commissioner of Health; MARK GOWER, in his official capacity as Director of the Oklahoma Department of Emergency Management,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma

**BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE,
MASSACHUSETTS, MINNESOTA, NEVADA, NEW MEXICO, OREGON,
PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA,
WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS'
APPLICATION FOR A STAY**

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INTEREST OF AMICI

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. Some of amici's residents are temporarily in Oklahoma and unable to return home because of the current public health emergency. Amici have a strong interest in ensuring that those women and others can obtain time-sensitive reproductive care without undertaking interstate travel that increases public health risks. Some women in Oklahoma will travel to, or through, amici States in order to obtain services banned in Oklahoma.

Amici's experiences show that appellants are wrong in claiming that responding effectively to the current crisis requires banning all abortions prior to fetal viability unless the abortion is necessary to prevent a woman's death or the irreversible impairment of a major bodily function. The district court's temporary restraining order (TRO) appropriately paused the application of appellants' ban on (i) medication abortions and (ii) abortion procedures for which a delay during the

duration of the ban will cause the patient to permanently lose her right to lawfully obtain an abortion in Oklahoma.

The district court correctly found—and amici’s experiences confirm—that banning such care does not advance appellants’ interests in preserving personal protective equipment (PPE), maintaining hospital capacity, and preventing COVID-19 transmission. Appellants thus are not irreparably injured by the TRO, whereas staying the TRO will cause irreparable injury.

For these same reasons, appellants cannot show they are likely to succeed on the merits under the well-settled undue-burden standard governing review of abortion bans and restrictions. The result is the same under the public necessity framework that appellants invoke. Appellants therefore do not qualify for a stay. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (listing stay factors).

ARGUMENT

POINT I

AMICI'S EXPERIENCES SHOW THAT APPELLANTS WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY

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

Appellants fail to support their claim that they are irreparably harmed by allowing the abortions permitted by the TRO: medication abortions and abortions that will become illegal by the time appellants' ban expires. Banning those services does not appreciably preserve PPE and hospital capacity or reduce interpersonal contacts.

a. Neither medication abortions nor procedural abortions are performed in hospital settings, and they rarely result in complications that might require hospital resources. Mot. to Stay TRO (Mot.) 94, 151-152.¹ Dispensing medication for medication abortions does not typically require PPE. Mot. 194. Procedural abortions use some PPE but generally do not use N95 masks (Mot. 174, 188, 194), which are particularly needed

¹ Citations to appellants' motion ("Mot.") use ECF-imposed pagination. Citations to appellants' motion-brief ("Br.") and the TRO use the internal pagination of those documents.

to treat COVID-19 patients. Moreover, any such use of PPE is minimal. According to appellants' own estimates, only about 1% of procedural abortions are currently permitted under the TRO. Br. at 15.

By increasing the availability of medication abortions, which can be performed only in the early stages of pregnancy, States can avert invasive terminations that require more provider-patient interactions and PPE use. Mot. 95, 97. And abortion considerations aside, early pregnancy occasions a significant number of hospitalizations resulting from pregnancy-related complications and miscarriages.² Miscarriages commonly occur in the first trimester³ in a significant number of

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

³ See, e.g., Am. Coll. of Obstetricians & Gynecologists (ACOG), *Early Pregnancy Loss* (Nov. 2018) (internet) (80% of miscarriages occur in first trimester).

confirmed pregnancies,⁴ and often result in unplanned hospitalizations that require surgery or blood transfusion.⁵ Indeed, rates of miscarriage may be even higher now, as miscarriage “has been observed in cases of infection with other related coronaviruses.” Mot. 93 (quoting CDC guidance).

Some substantial number of these early-pregnancy events are inevitably avoided by providing access to early medication abortions and timely abortion procedures. Thus, denying access to abortion care will not appreciably conserve hospital resources and PPE in the upcoming weeks.

At the same time, other strategies are available to alleviate potential shortages of public health resources. To preserve hospital

⁴ A clinically recognized pregnancy loss before the twentieth week of gestation occurs in up to 20% of all recognized pregnancies. *See, e.g.,* Craig P. Griebel, et al., *Management of Spontaneous Abortion*, *Am. Family Physician* (Oct. 1, 2005) (internet); Christopher Everett, *Incidence and Outcome of Bleeding Before the 20th Week of Pregnancy: Prospective Study from General Practice*, *BMJ* (July 5, 1997) (internet).

⁵ Roberts et al., *supra*, at 3-4; J Trinder et al., *Management of Miscarriage: Expectant, Medical, or Surgical? Results of Randomised Controlled Trial (Miscarriage Treatment (MIST) Trial)*, *BMJ* (May 27, 2006) (internet) (unplanned hospitalization rate of 8-49% following miscarriage depending on method of treatment).

capacity, many amici have modified or waived hospital regulations to increase beds in existing facilities and on-site temporary structures, or have converted hotels, dormitories, and convention centers into quarantine sites and field hospitals.⁶ Some States have developed state-wide or regional hospital coordinating plans for transferring patients from hospitals nearing capacity to those with available bed space.⁷

To preserve PPE, some amici have done one or more of the following: issued guidance advising health care workers how to conserve PPE,⁸ directed businesses to make their supplies of PPE available for distribution,⁹ and established logistics centers that monitor PPE needs and coordinate PPE receipt and distribution.¹⁰ Amici are also finding new ways to source PPE, including through new purchasing channels and by

⁶ Appendix (App.) CA-1, CT-1, HI-1, IL-2, MA-2, NY-2, NY-4, OR-1, VA.

⁷ App. NY-5, OR-1.

⁸ App. CA-1, CO, DE-1, DE-2, MA-1

⁹ App. NM-2.

¹⁰ App. CT-2, NY-5, MN-3, OR-1.

making funding available to enable businesses like clothing companies and distilleries to produce COVID-19 related supplies.¹¹

b. The subset of abortions permitted under the TRO does not pose an increased risk of COVID-19 transmission. As the district court found (TRO 10-11), medication abortions require no more interpersonal contact than appellants are allowing in other contexts, such as social gatherings.¹²

To further decrease transmission risks in the narrow context of reproductive health care, clinics in amici States have increased the use of telehealth to conduct assessments, which reduces travel and in-person interactions.¹³ In conjunction with guidance implementing federal enforcement discretion, some amici have modified state rules to allow increased use of telehealth during the COVID-19 pandemic.¹⁴ The American College of Obstetricians and Gynecologists (ACOG) advises

¹¹ App. NY-1, RI-1.

¹² See also Sarah Mervosh et al., *Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (updated April 7, 2020) (internet).

¹³ App. CA-4.

¹⁴ See, e.g., App. CA-3, HI-1, RI-2.

that telehealth can be safely and effectively used for gynecological visits, counseling, and certain steps in medication abortion.¹⁵

B. By Contrast, a Stay Will Irreparably Harm Patients and Pose a Threat to the Public Interest.

Staying access to medication abortions will increase the risks associated with eventual termination. And staying access to the other abortions allowed under the TRO will foreclose those patients from termination altogether, unless they undertake risky and expensive interstate travel for abortion services that are prohibited in Oklahoma. (Mot. 158, 176, 188-189.) These results are contrary to the stated interests of appellants and the public interest.

a. As the district court found, appellants' ban on abortions through April 30, 2020—a ban that appellants concede may be extended even further—will irreparably injure any woman who reaches the legal limit for an abortion during the ban (week 20 of the pregnancy, in Oklahoma). TRO 6, 11-12. As the ban continues, hundreds of women every month will

¹⁵ See ACOG, *Medical Management of First-Trimester Abortion* (Mar. 2014) (internet).

be permanently barred from obtaining an abortion, according to appellants' own estimates (*see* Br. 6).

Appellants' characterization of the ban as prohibiting only "elective" procedures (Br. 2) fails to recognize how the time-sensitive nature of abortion care distinguishes that care from services that can be deferred without patient harm during the current public health crisis. A number of amici have clarified through executive orders or public guidance that abortions do not qualify as elective or non-essential procedures that can be indefinitely delayed. They have done so by expressly exempting abortions from the scope of their emergency orders.¹⁶ Other amici have recognized that their requirements to delay elective or nonessential procedures do not apply to time-sensitive abortion care, including by allowing abortion providers to continue to operate as essential services, and by submitting this brief.¹⁷

b. The public interest also counsels strongly against a stay here. Appellants do not dispute that their abortion ban will likely encourage interstate travel, increasing the risks of COVID-19 transmission and the

¹⁶ App. MN-1, MN-2, NJ, NM-1, WA.

¹⁷ App. CA-2, DC, IL-1, NY-3, OR-2, VT.

attendant burdens on appellants' hospital facilities and PPE supplies after infection. Amici States' past experience and the current record evidence (Mot. 158, 176, 188-189) shows that if abortions remain unavailable in Oklahoma, many women will cross state lines to obtain abortions and then return home to Oklahoma.¹⁸

Separately, some students, workers, and caregivers who reside in amici States are temporarily in Oklahoma, and the current public health emergency has prevented them from returning home. Amici have an interest in ensuring that those residents can continue to obtain time-sensitive reproductive care.

¹⁸ See Molly Hennessy-Fiske, *Crossing the 'Abortion Desert': Women Increasingly Travel Out of Their States for the Procedure*, L.A. Times (June 2, 2016) (internet); Jonathan Bearak et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care*, Guttmacher Inst. (Apr. 2, 2020) (internet); see also Alexa Garcia-Ditta, *With More Texans Traveling for Abortions, Meet the Woman Who Gets Them There*, Tex. Observer (June 9, 2016) (internet) (Texas patients in New Mexico doubled after 2013 Texas law restricting access).

POINT II

APPELLANTS ALSO FAIL TO SHOW THAT THEY WILL SUCCEED ON THE MERITS IN THE FACE OF DECADES OF BINDING PRECEDENT TO THE CONTRARY

Appellants cannot make “a strong showing” of a likelihood of success in seeking to ban *all* pre-viability abortions absent a threat to the woman’s life or major bodily function. *Nken*, 556 U.S. at 434 (quotation marks omitted). The Supreme Court has repeatedly reaffirmed that “[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quotation marks omitted); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). As demonstrated by the long list of decisions cited by appellees (Mot. 99-101 & nn. 27-28), attempts to ban abortion prior to viability have been uniformly rejected by courts across the country for decades.

The district court properly applied the settled law to these facts to except from appellants’ ban those women who would be entirely barred from legally accessing abortion. For those women, the ban clearly contravenes Supreme Court precedent holding that “a State may not prohibit *any* woman from making the ultimate decision to terminate her

pregnancy” before viability. *Gonzales*, 550 U.S. at 146 (emphasis added) (quotation marks omitted).

The district court also properly found that appellants’ ban on medication abortions does not serve appellants’ stated interests and therefore is necessarily “undue.” *Whole Women's Health*, 136 S. Ct. at 2309; see also *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-901 (1992) (plurality op.). As appellants admit (Br. 5) and the district court found, medication abortion “is safer and requires less interpersonal contact and PPE than surgical abortion.” TRO 10. Medication abortion thus better serves appellants’ stated interests in preserving PPE and hospital capacity and minimizing in-person contact. *Id.* Permitting women access to medication abortions now will prevent them from resorting to procedural abortions in the upcoming weeks, and thus help “flatten the curve” of rising infections and any PPE or hospital-bed shortages. *See id.*

Although appellants assert that a stay of those tailored exceptions is necessary to conserve every piece of PPE and every hospital bed for COVID-19 patients, in fact our nation’s health system must continue to serve broader purposes—including time-sensitive reproductive care. The

Supreme Court has explained repeatedly that a measure furthering a valid state interest “cannot be considered a permissible means of serving its legitimate ends” if it “has the effect of placing a substantial obstacle in the path of a woman’s choice.” *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman’s Health*, 136 S. Ct. at 2309. And the Court has made clear that an abortion restriction cannot survive constitutional scrutiny when it imposes greater burdens than benefits. *See Whole Woman’s Health*, 136 S. Ct. at 2310. Meanwhile, the ready availability of other more effective anti-transmission measures highlights the extent to which appellants’ abortion ban is unnecessary to advance the State’s interest in protecting the public health. *See id.* at 2311.

Appellants are also incorrect in claiming that public necessity justifies their abortion ban. The district court properly considered appellants’ asserted interest in public health and found that prohibiting abortion entirely or through medication was “unreasonable,” “arbitrary,” and “oppressive,” and placed an undue burden on a woman’s constitutional right to access abortion services. TRO 10-11 (quoting *Jacobson v Massachusetts*, 197 U.S. 11, 26 (1905)).

Appellants identify no error in the court’s analysis. They mistakenly rely on cases involving physical property or commercial interests that are irrelevant here (*see* Br. 10-11), where a personal liberty interest and right to bodily integrity are at issue. Nor are appellants aided by *Jacobson*, which rejected a challenge to a mandatory vaccination requirement in the context of a small pox outbreak. In *Jacobson*, the Court recognized that liberty interests may be subject to “reasonable regulation” to protect the public health. 197 U.S. at 25-26, 29-30. But the Court also made clear that where an exercise of the police power is arbitrary and unreasonable in relation to “particular circumstances” and “particular persons,” the courts should intervene to protect individuals from the restriction. *Id.* at 28, 38. The district court followed that direction here and enjoined appellants’ ban under the “particular circumstances” where it operates to completely deprive women of their fundamental constitutional right to access abortion services and does not serve appellants’ asserted interests.¹⁹ TRO 7-11.

¹⁹ Appellants thus misplace their reliance (Br. 13, 18) on *In re: Greg Abbott, et al.*—a case where the Fifth Circuit vacated a TRO enjoining the entirety of a similar abortion ban because the district court did not

consider *Jacobson* and the State's public health interest. No. 20-50264, slip op. at 2-3 (5th Cir. Apr. 7, 2020). The Fifth Circuit remanded for additional factual development and a tailored TRO. Here, the district court carefully considered *Jacobson* and appellants' asserted public health interests in crafting its tailored TRO.

Appellants also derive no support from *Hickox v Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016), involving a challenge to the temporary quarantine of an individual at risk of exposure to Ebola. The limited restriction on freedom of movement imposed on the *Hickox* plaintiff is not comparable to the permanent consequences imposed on appellees' patients.

CONCLUSION

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

Dated: New York, New York
April 10, 2020

Respectfully submitted,

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I. Certificate of Compliance

1. The brief accompanying this motion complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).
2. The motion and brief accompanying this motion comply with Fed. R. App. P. 32(a)(5)-(6) because they have been prepared in a proportionally spaced typeface in Word using Century Schoolbook 14-point typeface.

Dated: April 10, 2020

/s/ Anisha S. Dasgupta
Anisha S. Dasgupta

II. ECF Certifications

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;
2. any hard copies of the foregoing document required to be submitted to the clerk's office are exact copies of the document as filed via ECF; and
3. This motion with accompanying brief filed by ECF was prepared on a system using CrowdStrike Falcom Sensor anti-virus software version 5.28.11009.0 and no viruses were identified in the document.

Dated: April 10, 2020

/s/ Anisha S. Dasgupta
Anisha S. Dasgupta

III. Certificate of Service

I certify that on April 10, 2020, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system.

Dated: April 10, 2020

/s/ Anisha S. Dasgupta
Anisha S. Dasgupta

Appendix

APPENDIX

California

- CA-1 Cal. Dep't of Pub. Health, *COVID-19 Health Care System Mitigation Playbook* (Mar. 2020), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CDPH%20Document%20Library/AFL-20-23-Mitigation-Playbook.pdf>.
- CA-2 Cal. Dep't of Pub. Health, *Stay Home Except for Essential Needs*, California Coronavirus (COVID-19) Response (Mar. 31, 2020), <https://covid19.ca.gov/stay-home-except-for-essential-needs/>.
- CA-3 Cal. Exec. Dep't, Exec. Order N-43-20 (April 3, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.3.20-EO-N-43-20.pdf>.
- CA-4 Cal. Health & Human Servs. Agency, Dep't of Health Care Servs., *Update to Information on Coronavirus (COVID-19) for Family PACT 2* (Mar. 26, 2020), <https://www.dhcs.ca.gov/services/ofp/Documents/OFP-Notice-COVID19-Update.pdf>.

Colorado

- CO Colo. Dep't of Pub. Health & Env't, *Colorado Crisis Standards of Care* (2019), <https://www.colorado.gov/pacific/cdphe/colorado-crisis-standards-care>.

Connecticut

- CT-1 Dave Altimari, *State Releases Plan to Move Sick Nursing Home Patients to COVID-19 Facilities*, Hartford Courant (Apr. 1, 2020), <https://www.courant.com/news/connecticut/hc-news-coronavirus-nursing-homes-plan-20200402-zcavm6iqrrbpze4dhrtingicqe-story.html>.
- CT-2 Press Release, Connecticut Governor Ned Lamont, Governor Lamont Provides Update on Connecticut's Coronavirus Response Efforts (Mar. 20, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/04-2020/Governor-Lamont-Coronavirus-Update-April-1>.

Delaware

- DE-1 Del. Dep't of Health & Soc. Servs., Health Alert Notifications 2020, <https://dhss.delaware.gov/dhss/dph/php/alertshan2020.html>.
- DE-2 Del. Office of the Governor, Eighth Modification: State of Emergency Declaration (Mar. 30, 2020), <https://governor.delaware.gov/health-soe/eighth-state-of-emergency/>.

District of Columbia

- DC D.C. Health, *Recommendations on Limitations of Elective and Non-Urgent Medical and Dental Procedures* (Mar. 17, 2020), https://providers.amerigroup.com/Public%20Documents/DCDC_CAID_PU_COVID19DHCFDirectiveElectiveProcedures.pdf.

Hawaii

- HI-1 Haw. Office of the Governor, Exec. Order 20-02, https://governor.hawaii.gov/wp-content/uploads/2020/03/2003219-ATG_Executive-Order-No.-20-02-distribution-signed.pdf.
- HI-2 U.S. Army Corps of Eng'rs, Honolulu Dist., U.S. Army Corps of Engineers Evaluates Oahu, Kauai Sites for Use as Potential Alternate Care Facilities (April 3, 2020), <https://www.poh.usace.army.mil/Media/News-Releases/Article/2139471/us-army-corps-of-engineers-evaluates-oahu-kauai-sites-for-use-as-potential-alte/>.

Illinois

- IL-1 Ill. Dep't of Pub. Health, *COVID-19 – Elective Surgical Procedure Guidance* (last visited Apr. 2, 2020), <https://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/health-care-providers/elective-procedures-guidance>.
- IL-2 Ill. Office of the Governor, *Governor Pritzker and Mayor Lightfoot Announce Plans For 3,000-Bed Alternate care Setting at McCormick Place to Treat COVID-19 Patients*, Illinois.gov (Mar. 30, 2020), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21324>.

Massachusetts

- MA-1 Mass. Dep't of Pub. Health & Mass. Emergency Mgmt. Agency, *Guidance on Optimization of PPE in the Commonwealth of Massachusetts* (Mar. 22, 2020), <https://www.mass.gov/doc/guidance-for-prioritization-of-personal-protective-equipment-ppe-in-massachusetts/download>.
- MA-2 Mem. from Elizabeth Kelley, Dir., Mass. Bureau of Health Care Safety & Quality, to Mass. Licensed Hospital Chief Exec. Officers (Mar. 22, 2020), <https://www.mass.gov/doc/guidance-regarding-the-elective-procedures-order/download>.

Minnesota

- MN-1 Minn. Dep't of Health, *FAQ: Executive Order Delaying Elective Medical Procedures* (Mar. 25, 2020), <https://www.health.state.mn.us/diseases/coronavirus/hcp/electivefaq.pdf>.
- MN-2 Minn. Office of the Governor, Emergency Exec. Order No. 20-09 (Mar. 19, 2020), <https://www.leg.state.mn.us/archive/execorders/20-09.pdf>.
- MN-3 Minn. Office of the Governor, Emergency Exec. Order No. 20-16 (Mar. 23, 2020), https://mn.gov/governor/assets/FINAL%20EO%2020-16%20PPE%20Inventory%20Filed%20032320_tcm1055-424510.pdf.

New Jersey

- NJ N.J. Office of the Governor, Exec. Order No. 109 (Mar. 23, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-109.pdf>.

New Mexico

- NM-1 N.M. Dep't of Health, Public Health Emergency Order Imposing Temporary Restrictions on Non-Essential Health Care Services, Procedures, and Surgeries; Providing Guidance on Those Restrictions; and Requiring a Report from Certain Health Care Providers (Mar. 24, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/03/3_24_PHO_1.pdf.
- NM-2 N.M. Dep't of Health, Public Health Emergency Order Temporarily Regulating the Sale and Distribution of Personal Protective Equipment Due to Shortages Caused by COVID-19 (Mar. 24, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/03/3_24_PHO_2.pdf.

New York

- NY-1 Empire State Dev., *New York State Needs Your Help Sourcing COVID-19 Products* (last visited Apr. 2, 2020), <https://esd.ny.gov/sourcing-covid-19-products-nys>.
- NY-2 N.Y. Dep't of Health, DHDTC DAL 20-09, Emergency Approvals for COVID-19 (REVISED) (Mar. 19, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/03/doh_emergencyapprovalscapacitysites_031920.pdf.
- NY-3 N.Y. Office of the Governor, Exec. Order No. 202.10 (Mar. 23, 2020), <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
- NY-4 Press Briefing, Governor Andrew M. Cuomo, Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Completion of First 1,000-Bed Temporary Hospital at Jacob K. Javits Convention Center (Mar. 27, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-completion-first-1000-bed-temporary>.
- NY-5 Press Briefing, Governor Andrew M. Cuomo, Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Statewide Public-private Hospital Plan to Fight COVID-19 Governor's Press Briefing (Mar. 30, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-statewide-public-private-hospital-plan>.

Oregon

- OR-1 Or. Health Auth., *Oregon Reports 13 New COVID-19 Cases; State Prepares Oregon Medical Station* (Mar. 19, 2020), <https://www.oregon.gov/oha/ERD/Pages/Oregon-reports-13-new-COVID-19-cases-state-prepares-Oregon-Medical-Station.aspx>.
- OR-2 Oregon Office of the Governor, Exec. Order No. 20-10 (Mar. 19, 2020), https://www.oregon.gov/gov/admin/Pages/eo_20-10.aspx.

Rhode Island

RI-1 Associated Press, Rhode Island Counts 10 Total Virus Deaths, Nearly 600 Cases, U.S. News (Apr. 1, 2020), <https://www.usnews.com/news/best-states/rhode-island/articles/2020-04-01/mayors-want-shuttered-hospital-reopened-as-virus-care-site>.

RI-2 R.I. Office of the Governor, Exec. Order 20-06 (March 18, 2020), <http://www.governor.ri.gov/documents/orders/Executive-Order-20-06.pdf>.

Vermont

VT Vt. Office of the Governor, Exec. Order No. 01-20 (Mar. 20, 2020), <https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%203%20TO%20EXECUTIVE%20ORDER%2001-20.pdf>.

Virginia

VA Va. Office of the Governor, Exec. Order No. 52 (Mar. 20, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-(COVID-19).pdf).

Washington

WA Wash. Office of the Governor, Proclamation No. 20-24 (Mar. 19, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-19%20non-urgent%20medical%20procedures%20%28tmp%29.pdf>.