

No. 20-6045

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. KEVIN STITT, in his official capacity as
Governor of Oklahoma, et al.,
Defendants-Appellants,

v.

SOUTH WIND WOMEN'S CENTER, et al.,
Plaintiffs-Appellees.

Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:20-cv-277-G

**AMICUS CURIAE BRIEF OF SIXTY-TWO MEMBERS OF THE OKLAHOMA
SENATE AND OKLAHOMA HOUSE OF REPRESENTATIVES AND THE
AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING
APPELLANTS' EMERGENCY MOTION TO STAY.
FILED WITH CONSENT.**

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**STATEMENT OF PARTIES' CONSENT TO FILING
PURSUANT TO FED. R. APP. P. 29(a)(2)**

Pursuant to Fed. R. App. P. 29(a)(2), the undersigned counsel states that all parties have consented to the filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel certifies that *amicus curiae*, American Center for Law and Justice, has no parent corporations and issues no stock.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned further states:

- (i) No party's counsel authored the brief in whole or in part;
- (ii) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF *AMICI CURIAE*

Amici are sixty-two (62) elected Members of the Oklahoma Senate and Oklahoma House of Representatives, including Members holding offices of leadership in both chambers.

Amici Members of the Oklahoma Senate are Senate President *Pro Tempore* Greg Treat; Majority Floor Leader Kim David; David Bullard; Larry Boggs; Paul Scott; Dave Rader; Julie Daniels; Greg McCortney; Paul Rosino; Rob Standridge; Roland Pederson; Wayne Shaw; Casey Murdock; Brent Howard; Michael Bergstrom; Roger Thompson; Lonnie Paxton; Mark Allen; Joe Newhouse; Marty Quinn; Gary Stanislawski; Ron Sharp; Chuck Hall; Adam Pugh; Dewayne Pemberton; John Haste; and, James Leewright.

Amici Members of the Oklahoma House of Representatives are Majority Floor Leader Jon Echols; Jay Steagall; Tom Gann; Kevin West; Denise Crosswhite Hader; TJ Marti; Josh West; Brian Hill; Jim Olsen; Lewis Moore; Kevin McDugle; Marilyn Stark; Sean Roberts; Brad Boles; Randy Randleman; Tammy Townley; Mike Sanders; Kenton Patzkowsky; Garry Mize; Sheila Dills; Mark Vancuren; Tommy Hardin; Mark Lepak; Lonnie Sims; Tammy West; Jim Grego; David Smith; Chris Sneed; Dustin Roberts; Chris Kannady; Jeff Boatman; Nicole Miller; Trey Caldwell; Justin JJ Humphrey; and, Rhonda Baker.

Amici are involved in a wide variety of matters relating to Oklahoma's state-declared emergency and the Appellants' response thereto, including but not limited to communication with and assistance to constituents, the utilization of funds, and securing the public welfare. The COVID-19 pandemic is an enormously dangerous situation impacting virtually every aspect of the lives of *amici* and their constituents.

These *amici* have a direct interest in this case because the Court's disposition of the issues will affect the ability of their constituents to access critical services, but also the ability of Oklahoma's executive offices to respond as effectively and efficiently as possible to the emergency. *Amici* work with and alongside the offices of Appellants and offer their perspective to this Court.

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and State courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as an *amicus* in numerous cases, most recently in two other challenges to executive orders similar to the one at hand. *See Yost. v. Preterm-Cleveland*, No. 20-3365 (6th Cir.); *In re: Gregg Abbott*, No. 20-50264 (5th Cir.).

The ACLJ is devoted to defending our God-given individual rights and liberties, including those enumerated by the Founding Fathers in the Declaration of Independence and the United States Constitution. The ACLJ is especially dedicated to defending the fundamental human right to life; without it, no other right or liberty can be enjoyed. Further, the ACLJ defends the lawful actions of State government officials taken to protect their citizenry from harm.

Amici Members of the Oklahoma Senate and House of Representatives and *amicus* the ACLJ on behalf of itself and over 100,000 of its members, including over 1,700 Oklahoma residents, support Appellants and urge this Court to grant Appellants' Emergency Motion to Stay Temporary Restraining Order, which improperly interferes with Governor Stitt's Executive Order and the application and enforcement thereof by Appellants.

INTRODUCTION

Governor Stitt's Executive Order is not a "ban" on abortion. DCT Dkt. 38, Ex. 1. The Order is a temporary suspension of activities, and it has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the people of Oklahoma, including their very lives, during the COVID-19 pandemic. Governments across the country, and the world, are taking drastic, necessary measures to stem the tide of countless thousands of deaths. The Executive Order, which temporarily suspended elective procedures, including abortions, in

Oklahoma to alleviate unnecessary strain on its health system and to preserve personal protective equipment (“PPE”) for those health workers working to combat the pandemic, is constitutional.

On April 7, 2020, in a strikingly similar case to the instant appeal, the United States Court of Appeals for the Fifth Circuit granted a writ of mandamus directing a Texas district court to vacate its TRO that prevented the implementation of an executive order with regard to abortion. In so ruling, the Fifth Circuit explained:

“[U]nder the pressure of great dangers,” constitutional rights may be reasonably restricted “as the safety of the general public may demand.” *Id.* at 29. That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home. The right to abortion is no exception.

In re: Gregg Abbott, No. 20-50264, 2020 U.S. App. LEXIS 10893 at *4 (5th Cir. Apr. 7, 2020).

Amici urge this Court to grant a stay in this case for essentially the same reasons the Fifth Circuit granted mandamus and to restore Governor Stitt’s ability to protect the State during this emergency.

ARGUMENT

I. Constitutional Rights are Not Absolute.

The Supreme Court has long recognized that constitutional rights – even ones determined to be fundamental – are not absolute and can be subject to regulation and restriction, especially when the government acts to protect a compelling government

interest such as saving human life from an immediate harm.¹ The Supreme Court has stated that there is a “duty our system [of government] places on this Court to say where the individual’s freedom ends and the State’s power begins.” *Thomas v. Collins*, 323 U.S. 516 (1945).

Particularly relevant to the instant case is the Supreme Court’s recognition that, although the freedom of religion is among the most fundamental of liberties, “[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease. . . .” *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). There is no reason why the abortion right should be given a special, much broader construction than the fundamental rights protected by the First Amendment, which would allow individuals to endanger the lives and safety of others.

Of course, broad protection should indeed be given to our sacred liberties, and Americans must remain ever vigilant and hold our government accountable to protect against the encroachment of those liberties. But, it should not be impossible for the government to do what is required to protect lives from the grave threat of the COVID-19 pandemic, the likes of which have not been seen in generations.

¹ See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“[T]he Second Amendment . . . right was not unlimited, just as the First Amendment’s right of free speech was not.”); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

II. The Governor’s Executive Order is Constitutional and Does Not Permanently Diminish the Constitutional Rights of American Citizens.

a. States have broad authority to protect those within their borders.

As recognized by this Court, “[t]he state may exercise police power to maintain the health, safety and welfare of the public.” *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 591 (10th Cir. 1999)). Governor Stitt’s Order falls squarely within the police powers of Oklahoma. He has determined that any temporary infringement of a right to elective procedures is necessary to protect the health, safety, and lives of *all* Oklahomans. Where the safety of all citizens conflicts with the rights of some, the safety of all must prevail. *See Union Dry Goods Co. v. Ga. Public Service Corp.*, 248 U.S. 372, 375 (1919).

While a global pandemic implicates the interests and powers of both the federal and State governments, the Supreme Court has “distinctly recognized the authority of a *State* to enact quarantine laws and ‘health laws of *every description*[.]’” *Jacobsen*, 197 U.S. at 25 (internal emphasis added). The Court elaborated:

the liberty secured by the Constitution of the United States to every person within its jurisdiction *does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint*. There are manifold restraints to which every person is necessarily subject for the common good.

Id. at 26 (internal emphasis added). Furthermore, the Supreme Court has concluded that “[p]ersons and property are subjected to all kinds of restraints and burdens, in

order to secure the general comfort, health, and prosperity of the State[.]” *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1877); *see also Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 628-29 (1898) (noting that the States never surrendered their police powers to the federal government); *see also Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) (recognizing States and localities retain certain police powers to protect public health and safety).

When there is a question as to the validity of a State governor’s order, “[t]he presumption of law is in favor of the validity of the order” *Union Dry Goods Co.*, 248 U.S. at 374-75; *see also In re: Gregg Abbott*, 2020 U.S. App. LEXIS 10893 at *17, 34. Appellants enjoyed no such presumption. In *Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922), the Supreme Court of Illinois denied habeas corpus relief for a woman quarantined as an asymptomatic carrier of typhoid and concluded that the need to protect the public surpasses any individual liberty interests. The court there emphasized with regard to public health:

Among all the objects sought to be secured by governmental laws *none is more important than the preservation of public health*. The duty to preserve the public health finds ample support in *the police power*, which is *inherent in the state*, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction equal protection of the laws, *were not intended to limit the subjects upon which the police power of a state may lawfully be asserted*. . . .

Id. (internal citations omitted) (emphasis added); *see also Beer Company v. Massachusetts*, 97 U.S. 25, 33 (1877); *United States v. Shinnick*, 219 F. Supp. 789, 790 (E.D.N.Y. 1963).

Abortion rests within the State police power of Oklahoma and Governor Stitt. The ongoing health crisis caused by the COVID-19 pandemic presents not only a dire need for the continued protection of Oklahomans and, indeed, of all United States citizens, but also creates a haze of medical uncertainty of a kind not seen in this country for over a century. Thus, it is within the broad purview of State government to navigate the situation for the health and safety of its citizens. In light of the extraordinary deference courts have given to regulations enacted under State police powers, any exceptions to the above principles must be reserved for the most fundamental and expressly enumerated rights, which does not include abortion.

b. Abortion providers do not fall within a narrow exception to traditional State police powers.

Abortion is not a right enshrined in the actual text of the Constitution. In 1973, the Supreme Court held in *Roe v. Wade* that abortion is a right protected, at least to a certain extent, by the United States Constitution. 410 U.S. 113 (1973). After *Roe*, the Court commented on this new constitutional right by stating that the Court's rulings after *Roe* had "undervalue[d] the State's interest in [protecting] potential life." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992). In *Casey*, the Court created a balancing test under which "[r]egulations which do no more than create a

structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, 505 U.S. at 877. The Court has since ruled that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman," and that the State has an "interest in promoting respect for human life *at all stages* in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 157, 163 (2007).

As should be clear, the Supreme Court has established that there can be constitutional limits on abortion; in other words, abortion is not a right superior to any other right. If the government may place restrictions on abortion to protect the lives of the unborn, it follows that it may also place restrictions on abortion to save the lives of the born.

Governor Stitt's Executive Order applies equally to *all* licensed healthcare professionals and healthcare facilities. It requires that "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 30, 2020." DCT Dkt. 38, Ex. 1.

The Order is a temporary postponement of elective procedures, equally applied to all licensed healthcare professionals and healthcare facilities. The Order equally impacts any person who would ordinarily elect to have a surgery or

procedure during that time. It is not a “ban,” nor does it single out abortion for disfavored treatment. Rather, the Order is a reasonable means of furthering the stated, critically important purpose of combatting the “shortage of personal protective equipment (PPE) needed to protect health care professionals and stop transmission of the virus.” DCT Dkt. 38, Ex. 1.

In *Gonzales*, the Court noted that there was medical uncertainty regarding the Partial-Birth Abortion Ban Act of 2003 and whether it would impose a significant health risk on women. 550 U.S. at 163. The Court observed that it has “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Id.* But it held that “[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.” *Id.* at 164. Consequently, the Court determined that “[t]he medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.” *Id.*

The same principles apply here: Oklahoma has ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that temporarily halting elective procedures will help to save lives. The pandemic is claiming countless lives across the country and will continue to do so for the foreseeable future. Appellees’ insistence on continuing to perform

elective abortions will undoubtedly limit the necessary resources needed to treat COVID-19 patients. Appellees failed to show that elective abortions are more beneficial to the public interest than adequately treating pandemic patients and protecting healthcare workers. As such, allowing those abortions to proceed amidst this crisis, against Governor Stitt's Order, does not fall within a narrow exception to traditional State police powers, which are being properly exercised here.

In sum, the Supreme Court has repeatedly given deference to State governors and their police powers in times of emergency. *Amici* urge this Court to give deference to Governor Stitt and, ultimately, uphold his emergency order. As *Amici* Members are well aware, businesses across the State are suffering and sacrificing during this emergency. Abortion is, undeniably, a business; and that business should not be singled out for special treatment or status over all other business and over all other Oklahomans.

CONCLUSION

Amici Curiae respectfully urge this Court to grant Appellants' Emergency Motion to Stay Temporary Restraining Order.

Dated: April 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the typeface requirements of Fed. R. App. P. 32 and 10th Cir. R. 32, as required by Fed. R. App. P. 27, because it was prepared in a proportionally spaced font (Times New Roman, 14-point) using Microsoft Word for Mac 2019. The motion complies with the type-volume limitation of Fed. R. App. P. 27, because it contains 2,599 words, excluding the parts exempted.

CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. No paper copies are required pursuant to 10th Cir. R. 27.2. Additionally, this filing was scanned with ESET Endpoint Security antivirus using the latest version (6.8.400.0), most recently updated on April 8, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2020, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and was transmitted to those individuals receiving Notice of Electronic Filings in this matter.

/s/ Benjamin P. Sisney

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