

No. 20-11401

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

YASHICA ROBINSON, M.D., et al.,
Plaintiffs-Appellees,

v.

STEVEN MARSHALL, in his official capacity as Alabama Attorney General, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Alabama
No. 2:19-cv-365 (Thompson, J.)

**MOTION FOR NATIONAL ORGANIZATION FOR WOMEN
FOUNDATION, FEMINIST MAJORITY FOUNDATION, LEGAL
MOMENTUM, AND 18 OTHER WOMEN’S RIGHTS AND CIVIL RIGHTS
ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN OPPOSITION TO
THE EMERGENCY STAY MOTION**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

- Antoine, Nicole, counsel for *amici curiae*
- Becker, Jennifer M., counsel for *amicus curiae* Legal Momentum, the Women's Legal Defense and Education Fund
- Cheng, Ting Ting, counsel for *amicus curiae* Legal Momentum, the Women's Legal Defense and Education Fund
- Civil Liberties and Public Policy Program, *amicus curiae*
- Cohen, Marcia S., counsel for *amicus curiae* National Organization for Women Foundation
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- Feminist Majority Foundation, *amicus curiae*
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- Hall, John E., counsel for *amici curiae*
- In Our Own Voice: National Black Women's Reproductive Justice Agenda, *amicus curiae*
- Jewish Women International, *amicus curiae*

- Lawyers' Committee for Civil Rights Under Law, *amicus curiae*
- Leadership Conference on Civil and Human Rights, *amicus curiae*
- Legal Momentum, the Women's Legal Defense and Education Fund, *amicus curiae*
- Mac Dougall, Sarah, counsel for *amici curiae*
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- National Advocates for Pregnant Women, *amicus curiae*
- National Alliance to End Sexual Violence, *amicus curiae*
- National Association for the Advancement of Colored People, *amicus curiae*
- National Coalition Against Domestic Violence, *amicus curiae*
- National Council of Jewish Women, *amicus curiae*
- National Domestic Violence Hotline, *amicus curiae*
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- SisterSong Women of Color Reproductive Justice Collective, *amicus curiae*
- Southern Poverty Law Center, *amicus curiae*

- SPARK Reproductive Justice NOW!, Inc., *amicus curiae*
- Transformative Justice Coalition, *amicus curiae*
- Wang, Annie X., counsel for *amici curiae*
- Women's Law Project, *amicus curiae*
- Zions, David M., counsel for *amici curiae*

Respectfully submitted this 21st day of April, 2020.

s/John E. Hall
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CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* make the following disclosures:

- For non-governmental corporate parties please list all parent corporations: None.
- For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

11TH CIR. R. 26-1 CERTIFICATION

Proposed *amici curiae* have consent from all parties to file this motion.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, proposed *amici curiae* the National Organization for Women Foundation, Feminist Majority Foundation, Legal Momentum, Civil Liberties and Public Policy Program, In Our Own Voice: National Black Women’s Reproductive Justice Agenda, Jewish Women International, Lawyers’ Committee for Civil Rights Under Law, Leadership Conference on Civil and Human Rights, National Abortion Federation, National Advocates for Pregnant Women, National Alliance to End Sexual Violence, National Association for the Advancement of Colored People, National Coalition Against Domestic Violence, National Council of Jewish Women, National Domestic Violence Hotline, National Network to End Domestic Violence, SisterSong Women of Color Reproductive Justice Collective, Southern Poverty Law Center, SPARK Reproductive Justice NOW!, Inc., Transformative Justice Coalition, and Women’s Law Project respectfully file this Motion seeking leave of Court to file an *amicus curiae* brief on behalf of themselves in support of Plaintiffs-Appellees and in opposition to the State of Alabama’s motion for a stay. *Amici* are organizations dedicated to the promotion and protection of women’s rights and civil rights. In support of this Motion, proposed *amici* state as follows:

1. The National Organization for Women (“NOW”) Foundation is a 501(c)(3) entity affiliated with the National Organization for Women, the largest

grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing women's equal rights in all aspects of law and policy, especially with regard to women's full access to reproductive health care and safeguarding women's constitutional right to abortion care.

2. The Feminist Majority Foundation ("FMF"), is a cutting-edge organization dedicated to promoting women's equality, protecting and advancing reproductive freedom, and embracing non-violence. In all spheres, FMF utilizes research and action to empower women economically, socially, and politically. FMF spearheads the National Clinic Access Project to reduce anti-abortion violence, keep providers safe and clinics open, and bring anti-abortion extremists to justice. Since 1993, FMF has conducted periodic National Clinic Violence Surveys, which measure anti-abortion violence and harassment.

3. Legal Momentum, the Women's Legal Defense and Education Fund, is the oldest civil rights organization in the country dedicated to advancing the rights of women and girls. For 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy and education. Inherent in our mission is securing and protecting reproductive rights. Legal Momentum has been involved in dozens of cases protecting reproductive freedom and health in courts throughout the country and has submitted several amicus briefs to state and federal

courts challenging the constitutionality of policies and statutes that infringe on women's right to reproductive health.

4. Civil Liberties and Public Policy Program ("CLPP") is a national program dedicated to educating, mentoring, and inspiring new generations of advocates and supporters for the reproductive health, rights, and justice movements. Combining activism, organizing, leadership training, and reproductive rights movement building, CLPP promotes an inclusive agenda that advances reproductive rights and health, and social and economic justice.

5. In Our Own Voice: National Black Women's Reproductive Justice Agenda, a Reproductive Justice national organization, approaches sexual and reproductive health issues from a human rights perspective, incorporating the intersections of race, class, sexual orientation and gender identity with the situational impacts of economics, politics and culture that make up the lived experiences of Black women in America.

6. Jewish Women International ("JWI") is a leading Jewish organization working to empower women and girls. JWI has been an unwavering Jewish voice for comprehensive reproductive health services and continues to advocate for reproductive justice. As a faith-based organization, JWI upholds the importance of protecting religious liberty, but not at the expense of an individual's right to access health care services or information.

7. The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African Americans and other racial minorities. The Lawyers' Committee's principal mission is to secure equal justice for all through rule of law, and the organization frequently participates as counsel for a party or as *amicus curiae* to protect the interests of racial and ethnic minorities. The Lawyers' Committee has a strong interest in eliminating systemic and structural barriers to healthcare coverage, including barriers to access to reproductive health experienced by people of color, and to that end has served as *amicus curiae* in relevant cases. *See, e.g., June Medical Services L.L.C v. Gee*, (No. 18-1323); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019), *appeal filed*, No. 19-1685 (4th Cir. June 26, 2019); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), *aff'd*, 930 F.3d 543 (3d Cir. 2019), *petition for cert. filed*, (U.S Oct. 1, 2019) (No. 19-431).

8. The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including low-income women of color. It is the nation's largest and most diverse civil and human rights coalition. The Leadership Conference was

founded in 1950 by leaders of the civil rights and labor rights movements, grounded in the belief that civil rights would be won not by one group alone but through a coalition. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

9. The National Abortion Federation (“NAF”) is the professional association of abortion providers. Its mission is to unite, represent, serve, and support abortion providers in delivering patient-centered, evidence-based care. NAF’s members include more than 400 private and non-profit clinics, Planned Parenthood affiliates, women’s health centers, physicians’ offices, and hospitals. Together NAF members care for more than half the people who choose abortion in the U.S. and Canada each year. NAF members adhere to NAF’s evidence-based *Clinical Policy Guidelines for Abortion care* (CPGs), which set the standards for quality abortion care. NAF collects annual *Violence and Disruption Statistics*, tracking harassment of, and violence against, abortion providers and the patients attempting to access abortion care. Through its supporting organization, the NAF Hotline Fund, NAF also operates a toll-free hotline, which was established in 1978 to help people access unbiased information and referrals to NAF member providers offering safe, high-quality abortion care. The Hotline receives thousands of calls each week from patients, their partners, families, and friends. It offers factual information about pregnancy and abortion; confidential,

nonjudgmental support; referrals to quality abortion providers in the caller's area; limited financial assistance for abortion care; help in understanding state abortion restrictions; and case management for patients with special or unique needs.

10. National Advocates for Pregnant Women ("NAPW") is a non-profit organization that combines pro-bono criminal defense, advocacy, public education, and organizing to ensure no one is locked-up, shamed, or denied constitutional or human rights because they have the capacity for pregnancy, are pregnant, or because of any outcome of pregnancy, including abortion, miscarriage, stillbirth, and birth.

11. The National Alliance to End Sexual Violence ("NAESV") is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1500 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors. NAESV works to ensure all survivors of sexual violence have access to the full range of reproductive health choices and options regardless of whether or not they have reported to law enforcement.

12. The National Association for the Advancement of Colored People ("NAACP") is a non-profit corporation with membership throughout the nation. The NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social and economic equality of all persons

and to eliminate racial hatred and racial discrimination. The NAACP has long championed women's rights, including the right to choose free of unreasonable restrictions.

13. The National Coalition Against Domestic Violence (“NCADV”) provides a voice to victims and survivors of domestic violence. It strives to foster a society in which there is zero tolerance for domestic violence by influencing public policy, increasing public awareness of the impact of domestic violence, and providing programs and education that drive that change.

14. The National Council of Jewish Women (“NCJW”) is a grassroots organization of over 90,000 advocates who strive for social justice by improving the quality of life for women and children, and by safeguarding individual rights and freedoms. For over 125 years, NCJW has engaged in communities nationwide to protect access to safe and legal abortions, medically accurate information, and contraception, and to eliminate all obstacles that limit reproductive freedom. Consistent with our mission, our Jewish values, and our Resolution to work for comprehensive, equitable, and accessible family planning and reproductive health services, including abortion, NCJW joins this brief.

15. The National Domestic Violence Hotline (“The Hotline”), first established in 1996 as a component of the Violence Against Women Act (VAWA), provides lifesaving tools and immediate support to enable victims to find safety

and live lives free of abuse. Callers to The Hotline can expect highly trained, experienced advocates to offer compassionate support, crisis intervention information, educational services, and referral services in more than 200 languages. The Hotline offers free, confidential, and 24/7 support to survivors year-round through text, chat, and phone services.

16. The National Network to End Domestic Violence (“NNEDV”) is a nonprofit organization that serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV is a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs. NNEDV is deeply concerned about the connection between domestic violence and reproductive coercion, understanding that abusers will try to maintain power and control over the victim’s reproductive health. Allowing women to terminate unwanted pregnancies and preserving access to other reproductive healthcare options are important pieces in promoting the autonomy and safety of domestic violence survivors.

17. Sister-Song Women of Color Reproductive Justice Collective (“SisterSong”) is a Southern-based national organization working to strengthen and amplify the voices of Indigenous women and women of color to achieve Reproductive Justice by eradicating reproductive oppression and securing human

rights for all people. Reproductive Justice is a social movement based in Black feminist theory and the human rights framework that centers the right to have children, the right to not have children, the right to parent their children in safe environments with the appropriate social supports, and the right to bodily autonomy. As such, SisterSong fights for all people's access to the information, resources, and services they need to make decisions for their lives and their families.

18. The Southern Poverty Law Center ("SPLC") has provided pro bono civil rights representation to low income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. SPLC provides educational materials, engages in policy reform, and develops litigation to minimize the burdens placed on the poor, to ensure meaningful access to social safety nets, and to enable upward mobility.

19. Founded in 2007 by two queer women of color, SPARK Reproductive Justice NOW works to build and strengthen the power of our communities and a reproductive justice movement that centers Black Women, Women of Color, and Queer & Trans Young People of Color in Georgia and the South. Based in Atlanta, Georgia, SPARK has fostered a dynamic, collaborative model of advocacy, leadership development, collective action, and discourse that creates change and impact for Black women and Queer people's struggles for reproductive justice.

20. The Transformative Justice Coalition (“TJC”) is a national organization committed to fostering racial, gender, economic, social, and environmental justice. Among its major gender justice projects is the African American Women and the Law Conference. In 2016, TJC hosted a national African American Women and the Law Conference devoted to developing policy solutions to improve the healthcare and reproductive freedoms of Black women and girls. TJC has been active in public education about women’s rights, especially the right to a healthcare system not plagued by racial and economic disparities. TJC maintains an active social media presence which includes platforms devoted to the health and welfare of Black women. TJC has a particular emphasis on ensuring that African American women are able to access safe abortion care without violence and harsh restrictions.

21. The Women’s Law Project is a nonprofit women’s legal advocacy organization based in Pennsylvania with offices in Philadelphia and Pittsburgh. Founded in 1974, the Women’s Law Project provides free legal services, individual legal counseling, policy advocacy, and public education on a wide range of issues affecting the health, equality, autonomy, and dignity of women and LGBTQ people. The Women’s Law Project represented the plaintiff abortion providers in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and has for

decades provided legal representation to Pennsylvania's non-hospital-based abortion care providers.

22. The proposed brief of *amici curiae* will be filed on behalf of the National Organization for Women Foundation, Feminist Majority Foundation, Legal Momentum, Civil Liberties and Public Policy Program, In Our Own Voice: National Black Women's Reproductive Justice Agenda, Jewish Women International, Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil and Human Rights, National Abortion Federation, National Advocates for Pregnant Women, National Alliance to End Sexual Violence, National Association for the Advancement of Colored People, National Coalition Against Domestic Violence, National Council of Jewish Women, National Domestic Violence Hotline, National Network to End Domestic Violence, SisterSong Women of Color Reproductive Justice Collective, Southern Poverty Law Center, SPARK Reproductive Justice NOW!, Inc., Transformative Justice Coalition, and Women's Law Project. These organizations are dedicated to the promotion and protection of women's rights and civil rights. They have developed expertise on the impact of violence on abortion care providers, women seeking abortion services, and marginalized communities, including low-income communities, women of color, minors, the LGBTQIA+ communities, and victims of domestic and sexual violence.

23. *Amici* seek leave of Court to file the brief attached as Exhibit 1 to this Motion in order to assist the Court in considering the State's request for a stay of the district court's injunction. The proposed brief explains the undue burden that Alabama's COVID-19 Executive Order poses to abortion providers and already marginalized communities. It describes how the State's Order—and its threat of criminal prosecution for healthcare providers who do not comply with its vague directives—would give state officials enforcement discretion that could be used, as such discretion has been used historically, to target abortion providers. Providers would be forced to choose between serving their patients and risking bad-faith criminal prosecution. Further, it explains that, through this chilling effect, the Order imposes an undue burden on marginalized communities, namely low-income communities, women of color—in particular, Black women—minors, the LGBTQIA+ community, and victims of domestic and sexual violence.

WHEREFORE, proposed *amici curiae* respectfully request that this Court grant this Motion and accept their brief for consideration in this case.

April 21, 2020

Respectfully submitted,

s/John E. Hall

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) and 27(d)(2)(A) because this motion contains 2525 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2016, the word processing software used to prepare this brief.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft® Word 2016, Times New Roman, 14 point.

s/John E. Hall
John E. Hall

Counsel for amici curiae
April 21, 2020

CERTIFICATE OF SERVICE

I certify that on April 21, 2020, I electronically filed the foregoing **MOTION FOR NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, FEMINIST MAJORITY FOUNDATION, LEGAL MOMENTUM, AND 18 OTHER WOMEN’S RIGHTS AND CIVIL RIGHTS ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN OPPOSITION TO THE EMERGENCY STAY MOTION** with the Clerk of the Court using the CM/ECF system, which I understand will automatically send an e-mail notification of such filing to the counsel of record for this matter.

s/John E. Hall
John E. Hall

Counsel for amici curiae

EXHIBIT 1

No. 20-11401

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Respectfully submitted this 21st day of April, 2020.

s/John E. Hall
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Rachel Wells, <i>Abortion Rights Foes Have Weaponized Zoning Regulations. Here’s How</i> , Rewire.News (Apr. 18, 2019), https://bit.ly/2xAx90f	7

Rosemary Westwood, <i>How State Health Departments are Closing Abortion Clinics: Five Key Takeaways</i> , Pacific Standard (Jul. 31, 2019), https://bit.ly/2VrspTP	7
Sara MacNeil, <i>Challenges of domestic violence worsen amid coronavirus pandemic</i> , Montgomery Advertiser (Apr. 7, 2020), https://bit.ly/2VpfXU	12
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INTEREST OF AMICI CURIAE

Amici are organizations dedicated to the promotion and protection of women's rights and civil rights, as detailed in their Motion for Leave to File. A complete list of *amici* is at Appendix A.

INTRODUCTION

COVID-19 is an emergency that warrants emergency measures. It cannot, however, be used as pretext for attacking a constitutional right. Yet that is exactly what Alabama’s COVID-19 Executive Order (the “State’s Order” or “Order”) does. Under the guise of a generally applicable restriction on non-emergency medical services, the Order poses a palpable threat that healthcare providers who determine that an abortion should go forward will be criminally prosecuted. In an environment where government processes and enforcement discretion have routinely been weaponized to target abortion providers, the few remaining providers in Alabama face an untenable choice between serving their patients and risking bad-faith criminal prosecution. For Alabama women,¹ the result is an undue burden on their constitutional rights.

This chilling effect is real and immediate: the Order has already hindered the availability of abortion for Alabama women during this pandemic. In doing so, the Order disproportionately harms marginalized communities, including low-income communities, women of color—in particular, Black women—minors, the LGBTQIA+ community, and victims of domestic and sexual violence.

¹ *Amici* recognize not everyone who obtains or needs an abortion identifies as a woman. *Amici* further recognize the Order also disproportionately impacts other historically marginalized communities not specifically addressed within this brief.

The district court properly assessed the Order’s impact in its “real-world context.”² It took seriously the health crisis facing the State, issuing a narrowly tailored injunction that protects both public health during the pandemic and a constitutionally-protected right. The district court provided the “clear, enforceable standard” that the State has been unable—or unwilling—to articulate.³ The injunction should not be stayed.

ARGUMENT

I. WITHOUT THE DISTRICT COURT’S “CLEAR, ENFORCEABLE STANDARD,” ABORTION PROVIDERS WOULD REASONABLY FEAR THE UNEVEN APPLICATION OF THE ORDER, SEVERELY BURDENING THE CONSTITUTIONAL RIGHTS OF WOMEN.

Casey warned that “[l]iberty must not be extinguished for want of a line that is clear.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992). Yet here, the State has been anything but clear, offering evasive and contradictory accounts of what procedures it means to restrict. As *amici* well know, when it comes to abortion, purportedly neutral government processes are abused with regularity. Providers in Alabama have every reason to fear that their reasonable medical judgments will land them in criminal jeopardy. For patients, delaying abortion care can have serious health consequences, and often an abortion delayed

² Opinion at 36, Dkt. 137 (“Opinion”).

³ *Id.* at 49.

is an abortion denied. The district court correctly supplied the “clear, enforceable standard” that was missing from the State’s Order.⁴

A. The State’s Order Gives Public Officials Discretion to Second-Guess and Impose Criminal Penalties on Healthcare Providers.

The Order postpones “all dental, medical and surgical procedures” subject to narrow exceptions for emergency treatments, to avoid serious harm from an underlying condition, and for ongoing and active treatments.⁵ As the district court recognized, the State has “put forth several divergent interpretations of the [Order’s] medical restrictions.”⁶ It has stated that a provider’s medical judgment “is not conclusive proof that the procedure meets one of the exceptions.”⁷ And it has refused to recognize “[t]he fact that a delay would render a procedure unavailable” as sufficient, instead stating cryptically it “could be relevant.”⁸

What this means is anyone’s guess. The only point on which the State has been clear is that it intends to subject providers’ medical judgments to discretionary review by non-medical governmental actors. And if these reviewers disagree with a provider’s medical judgment, the consequence is criminal

⁴ *Id.*

⁵ State’s Order at 4, Dkt. 79 Ex. B.

⁶ Opinion at 20.

⁷ Dkt. 111 at 12-13; Dkt. 120 at 2.

⁸ Dkt. 120 at 3.

prosecution.⁹ This does not provide the “fair notice of what is prohibited” necessary to impose a criminal penalty. *United States v. Williams*, 553 U. S. 285, 304 (2008). Indeed, criminal prohibitions that are so open-ended that they invite “selective law enforcement” present a classic case of unconstitutional vagueness. *Smith v. Goguen*, 415 U.S. 566, 576 (1974). Here, that vagueness threatens to foreclose a fundamental right.

B. Abortion Providers Have Faced Harassment and Targeting Through the Machinery of Government.

On its face, the Order applies to all “dental, medical or surgical procedures.”¹⁰ However, abortion providers are differently situated than other healthcare providers. They already operate in a climate of threats and violence from anti-abortion activists.¹¹ On top of that, public officials who oppose abortion wield extraordinary power to burden and intimidate abortion providers.¹² As the district court noted, this power “is no secret to any provider in Alabama—it is

⁹ *Id.* at 2.

¹⁰ State’s Order at 4.

¹¹ See, e.g., Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015), <https://nyti.ms/2RP53VK> (describing a bombing at an Alabama clinic that killed a police officer and disfigured and partially blinded a nurse); 2018 FMF National Clinic Violence Survey, <https://bit.ly/3cC29eO> (reporting that 52% of responding clinics experienced targeted threats and intimidation directed at doctors and staff including death threats, stalking, and harassing emails).

¹² See David S. Cohen & Krysten Cannon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 105-06 (Oxford University Press 2015).

evident when she opens the newspaper, drives by a group of protestors at a clinic, or learns that another piece of legislation concerning abortion has been enacted.”¹³

Providers in Alabama have come to expect that they will be unfairly targeted for harassment and intimidation through laws specifically targeting them and their clinics,¹⁴ and through seemingly neutral government processes:

- **Complaints to, and investigations by, public health officials.** Oversight functions of public health authorities are regularly exploited to harass abortion providers. For example, abortion clinics in Alabama have been singled out for “inconsistent and arbitrary inspections” by the Department of Health.¹⁵ One administrator reported, “it’s overwhelming because we never know how [regulations] are going to be interpreted. One time everything’s in order and the next time they change . . . [s]o you’re really at their mercy.”¹⁶
- **Zoning ordinances.** Since 2013, at least nine cities have attempted to use local zoning ordinances to shutter abortion clinics.¹⁷ Even the Alabama state

¹³ Opinion at 49.

¹⁴ See *Targeted Regulation of Abortion Providers*, Guttmacher Institute (Apr. 1, 2020), <https://bit.ly/2RQSf0Y>.

¹⁵ Center for Reproductive Rights, *Defending Human Rights* (2009), at 51, <https://bit.ly/3brgdId>.

¹⁶ *Id.*

¹⁷ Rachel Wells, *Abortion Rights Foes Have Weaponized Zoning Regulations. Here’s How*, Rewire.News (Apr. 18, 2019), <https://bit.ly/2xAx90f>.

legislature has tried to weaponize zoning laws by passing a law that would have prohibited the issuance or renewal of licenses for abortion clinics located within 2,000 feet of a K-8 public school; this law would have closed two of the then-five clinics in the state.¹⁸

- **Building code and facility licensing requirements.** Statewide building codes and facility licensing requirements are also commonly used to harass abortion providers.¹⁹ For example, in 2013, Alabama's state legislature passed a law requiring abortion clinics to meet the same building, equipment, and staffing standards as ambulatory surgical centers.²⁰ Among other things, it required widening doors and hallways to accommodate gurneys.²¹ The law, which had no medical basis²² and was later found to be

¹⁸ Letitia Stein, *New Alabama law could shutter two abortion clinics near schools*, Reuters (May 12, 2016), <https://reut.rs/3auRgdG>; see also *W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1249 (M.D. Ala. 2017), *aff'd*, 900 F.3d 1310 (11th Cir. 2018).

¹⁹ See, e.g., Rosemary Westwood, *How State Health Departments are Closing Abortion Clinics: Five Key Takeaways*, Pacific Standard (Jul. 31, 2019), <https://bit.ly/2VrspTP>; Sarah McCammon & Sam Gringlas, *Missouri Could Soon Become 1st State Without A Clinic That Performs Abortions*, NPR Illinois (May 28, 2019), <https://bit.ly/3bn8ElC> (reporting that state officials in Missouri refused to renew the license of the state's only abortion clinic until several providers submitted to questioning that could lead to criminal consequences).

²⁰ Erik Eckhol, *Alabama Legislature Passes New Limits on Abortion Clinics*, N.Y. Times (Apr. 3, 2013), <https://nyti.ms/2RTRDaX>.

²¹ *Id.*

²² See ACOG, *FAQs Induced Abortion*, <https://bit.ly/2RSzuue>.

unconstitutional,²³ forced the only clinic serving north Alabama to close while it worked to come into compliance.²⁴

- **Criminal investigations and prosecutions.** State officials and anti-abortion activists in Alabama have recently gone so far as to pass legislation criminalizing abortion. Indeed, the law that was the basis of the original legal challenge in this case—Alabama’s Human Life Protection Act (2019)—demonstrates the State’s objective to criminally prosecute abortion providers.²⁵ Alabama’s efforts reflect a common tactic to use criminal procedures to harass and intimidate abortion providers.²⁶

This clear historical record of harassment and abuse of legal process is reflected in Dr. Robinson’s experience in Alabama. State authorities passed a zoning ordinance that forced Dr. Robinson’s clinic to change buildings.²⁷

Protestors filed complaints against her clinic with the Department of Public Health

²³ *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1332 (M.D. Ala.).

²⁴ Drew Galloway, *Alabama Women’s Center to surrender license, close downtown facility*, WHNT News 19 (Jun. 24, 2014), <https://bit.ly/3eAVkw7>; Drew Galloway, *Huntsville abortion clinic reopens after securing approval from health officials*, WHNT News 19 (Oct. 25, 2014), <https://bit.ly/3cwOd60>.

²⁵ See Alabama HB 314 (making abortion a felony offense, punishable by a sentence of imprisonment from 10 to 99 years (or life)).

²⁶ See, e.g., Associated Press, *Abortion foes use 19th-century law for help*, NBC News (Jan. 17, 2008), <https://nbcnews.to/34POsGE> (describing how anti-abortion activists twice used a law allowing grand juries to be impaneled by citizen petition to target a provider with criminal investigations and charges).

²⁷ 4/6/2020 Hearing Transcript 165:8-15 (“Tr.”).

and the State Attorney General, leading to investigations of the clinic, even though no other type of medical practice in Alabama has been subjected to investigations as a result of such routine complaints.²⁸ And protestors have regularly called the police to Dr. Robinson's clinic and posted on social media asking others to do the same.²⁹

C. State Officials Will Use the Order to Limit Abortion Services in Alabama.

This history confirms that unfair, selective enforcement of the State's Order is not a hypothetical concern—it is virtually inevitable. The State's cryptic and conflicting interpretations have already had a chilling effect: abortion providers have been forced to cancel appointments because they fear selective prosecution.³⁰

Anti-abortion activists are, at the same time, exploiting the pandemic to pressure state officials to close Alabama abortion clinics, including Dr. Robinson's.³¹ The Department of Public Health has already succumbed to the pressure, requiring abortion providers, but not other healthcare providers, to submit written procedures and protocols in place during the COVID-19 outbreak.³²

²⁸ Tr. 122:13-25; 123:1-6.

²⁹ Tr. 121:3-9.

³⁰ Gray Decl. ¶18, Dkt. 73.

³¹ Tr. 121:12-21 (describing activists calling the Attorney General, Governor, and other public officials demanding that the clinic cease providing abortions during the pandemic).

³² Tr. 121:22-122:6.

After giving the State repeated chances to address this problem, the district court did what the State could or would not do: it articulated a “clear, enforceable standard.”³³ That the State would seek emergency relief against this modest clarification confirms why abortion providers need it. Without it, the constitutional rights of women will be denied.

II. THE STATE’S ORDER DISPROPORTIONATELY IMPACTS MARGINALIZED WOMEN.

The Order must be reviewed by considering the substantial obstacle to abortion care it creates for the people “most burdened by it.” *Casey*, 505 U.S. at 886–87. Tragically, the State’s pretextual use of the COVID-19 pandemic will disproportionately burden and harm Alabamians who are among the hardest hit: low-income women, women of color, minors, and victims of domestic and sexual violence, among other marginalized groups.

A. The State’s Order Disproportionately Harms Low-Income Communities, Women of Color, Minors, and the LGBTQIA+ Community.

It is well-documented that restrictions on abortion access disproportionately harm low-income women and their families, women of color—particularly Black women—minors, and the LGBTQIA+ community. Nationwide, 75% of women seeking abortions are low-income, nearly half live below the federal poverty line,

³³ Opinion at 49.

and 61% are women of color.³⁴ In Alabama, 60% of abortions are sought by Black women,³⁵ and the majority of women seeking abortion care at Dr. Robinson's clinic are low-income.³⁶ For minors, additional restrictions can be devastating, as they often are unable to seek care until later in their pregnancies and have fewer financial resources.³⁷ Additional restrictions on abortion disproportionately burden these groups.³⁸

Rather than mitigating the risk of COVID-19 exposure to marginalized populations, the Order increases it. COVID-19 is already disproportionately harming these same communities.³⁹ In Alabama, the Black community already accounts for 37% of confirmed cases and a shocking 52% of deaths from COVID-19, even though they make up only 27% of the state population.⁴⁰ If women in these marginalized groups are forced to postpone abortion services or carry

³⁴ Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), <https://bit.ly/3apXZFE>.

³⁵ Kaiser Family Foundation, *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence: Alabama*, <https://bit.ly/3bkA23I>.

³⁶ Tr. 91:4-10.

³⁷ Defending Human Rights at 88, <https://bit.ly/3brgdId>.

³⁸ Heather Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – and the Women They Serve – in the Crosshairs*, Guttmacher Institute, 2014, <https://bit.ly/2VoTl6q>.

³⁹ See Max Fisher, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. Times (Mar. 15, 2020), <https://nyti.ms/2zafEEa>.

⁴⁰ See *Characteristics of Laboratory-Confirmed Cases of COVID-19*, Alabama Public Health (Apr. 18, 2020), <https://bit.ly/2wRdLvk>.

pregnancies to term, they will have more—not fewer—interactions with medical providers, resulting in *increased* risk of exposure to COVID-19, and greater risk of pregnancy-related harm: Alabama already ranks third in the nation in maternal death rates,⁴¹ and Black women in Alabama are nearly five times more likely to die from pregnancy related causes than white women.⁴² Further, COVID-19’s disproportionate economic impact on low-income women will make it harder to access any healthcare, especially while contending with the economic hardship of a forced pregnancy.⁴³

B. The State’s Order Harms Victims and Survivors of Domestic and Sexual Violence.

Since the imposition of stay-at-home orders, reported instances of intimate partner violence have surged.⁴⁴ Domestic and sexual violence are frequently the reason women seek abortion services. Yet for victims of domestic and sexual violence, rescheduling or postponing visits is particularly burdensome because an

⁴¹ Tr. 40:1-4.

⁴² See Opinion at 41 (“A typical uncomplicated pregnancy will require multiple prenatal appointments and delivery.”); *see also Maternal Mortality Facts & Figures: Alabama*, Society for Maternal Fetal Medicine (Dec. 4 2018), <https://go.aws/2VptsU2>.

⁴³ Kim Hart, *The coronavirus pandemic threatens low-wage jobs*, Axios (Apr. 8, 2020), <https://bit.ly/2Vov2FV>.

⁴⁴ See Sara MacNeil, *Challenges of domestic violence worsen amid coronavirus pandemic*, Montgomery Advertiser (Apr. 7, 2020), <https://bit.ly/2VpfXU>; Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. Times (Apr. 6, 2020), <https://nyti.ms/2wRf5yi>.

abusive partner may impose restrictions or surveil their movements.⁴⁵ Further, forced pregnancy can keep victims in contact with violent partners, increasing their risk of harm.⁴⁶ These women need more flexibility in receiving care, not less.⁴⁷ See *Casey*, 505 U.S. at 893–94 (recognizing that spousal consent requirement for victims of domestic and sexual violence poses “a substantial obstacle” to abortion). The Order’s restrictions on access to abortion are an undue burden on these and all Alabama women.

CONCLUSION

The State’s stay request should be denied.

⁴⁵ World Health Organization, World Report on Violence and Health: Chapter 4, Violence by Intimate Partners, 89 (2002), <https://bit.ly/2XOA6Vo>.

⁴⁶ Sarah Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, BMC Medicine (2014), <https://bit.ly/2Vot1JG>.

⁴⁷ Tr. 91:11-22.

April 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 2567 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2016, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2016, Times New Roman, 14 point.

s/John E. Hall
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April 21, 2020

CERTIFICATE OF SERVICE

I certify that on April 21, 2020, I electronically filed the foregoing **BRIEF FOR AMICI NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, FEMINIST MAJORITY FOUNDATION, LEGAL MOMENTUM, AND 18 OTHER WOMEN’S RIGHTS AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES** with the Clerk of the Court using the CM/ECF system, which I understand will automatically send an e-mail notification of such filing to the counsel of record for this matter.

s/John E. Hall
John E. Hall

Counsel for amici curiae

20-11401, Robinson, et al. v. Marshall, Attorney General, State of Ala, et al.

Appendix A: Amici Curiae In Support of Plaintiffs-Appellees

- Civil Liberties and Public Policy Program
- Feminist Majority Foundation
- In Our Own Voice: National Black Women's Reproductive Justice Agenda
- Jewish Women International
- Lawyers' Committee for Civil Rights Under Law
- Leadership Conference on Civil and Human Rights
- Legal Momentum, the Women's Legal Defense and Education Fund
- National Abortion Federation
- National Advocates for Pregnant Women
- National Alliance to End Sexual Violence
- National Association for the Advancement of Colored People
- National Coalition Against Domestic Violence
- National Council of Jewish Women
- National Domestic Violence Hotline
- National Network to End Domestic Violence
- National Organization for Women Foundation
- SisterSong Women of Color Reproductive Justice Collective
- Southern Poverty Law Center

20-11401, Robinson, et al. v. Marshall, Attorney General, State of Ala, et al.

- SPARK Reproductive Justice NOW!, Inc.
- Transformative Justice Coalition
- Women's Law Project