

No. 20-5408

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ADAMS & BOYLE, P.C., *et al.*,
Plaintiffs-Appellees,
v.

HERBERT H. SLATERY III, Attorney General and Reporter, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Tennessee, Case No. 3:15-cv-705

**BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND
JUSTICE, SUPPORTING APPELLANTS AND URGING THE GRANTING
OF *EN BANC* REVIEW AND AN ADMINISTRATIVE STAY
OF THE PRELIMINARY INJUNCTION**

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April 28, 2020

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Sixth Circuit

Case Number: No. 20-5408

Case Name: Adams & Boyle, P.C., et al. v.
Herbert H. Slatery III, et al.

Name of counsel: Edward L. White III

Pursuant to 6th Cir. R. 26.1, the American Center for Law and Justice, *amicus curiae*, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

The American Center for Law and Justice is unaware of any.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, 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 fundamental human right to life; without it, no other right or liberty can be enjoyed.¹ 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 *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court, this Court, and other lower federal courts. *E.g.*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (*en banc*).

In addition, the ACLJ has recently participated as an *amicus curiae* in the instant case on the merits as well as in cases addressing similar issues. *E.g.*, *In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 7, 2020) (“*In re: Abbott I*”); *In re: Abbott*, No. 20-50296, 2020 U.S. App. LEXIS 12616 (5th Cir. Apr.

¹ All parties to this appeal consented to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

20, 2020) (“*In re: Abbott IP*”); *Adams & Boyle, P.C. v. Slatery*, No. 20-5408, 2020 U.S. App. LEXIS 13357 (6th Cir. Apr. 24, 2020); *In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893 (8th Cir. Apr. 22, 2020); *S. Wind Women’s Ctr. v. Stitt*, No. 20-6045, 2020 U.S. App. LEXIS 12051 (10th Cir. Apr. 13, 2020); *Marshall v. Robinson*, No. 20-11401, 2020 U.S. App. LEXIS 13096 (11th Cir. Apr. 23, 2020).

This brief is submitted on behalf of the ACLJ and over 155,000 of its members, including nearly 4,000 Tennessee residents.

The decision under review—a 2-to-1 decision upholding a preliminary injunction, but modifying its scope, entered against Governor Bill Lee’s Executive Order No. 25,² which *temporarily* postponed *non-emergency, elective* surgical and invasive procedures—is a good case for *en banc* consideration as it presents questions of exceptional public importance. *See* Fed. R. App. P. 35(a); 6th Cir. I.O.P. 35(a). *Amicus* urges this Court to grant the petition for rehearing *en banc*, stay the preliminary injunction, and rehear this case of exceptional importance.

INTRODUCTION

The enjoined Executive Order is not a “*ban*” on any constitutional right and does not favor one group over another. The Executive Order is a temporary suspension of various activities with a definitive end to the suspension (currently set

² State of Tennessee, Executive Order No. 25 by the Governor (Apr. 8, 2020), <http://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf>.

to expire on April 30, 2020) that applies *equally* to *all* elective, non-emergency medical procedures and does not single out abortion.³ It was enacted in exigent circumstances for the purposes of protecting and promoting the welfare of Tennesseans, alleviating unnecessary strain on the Tennessee health system, and preserving personal protective equipment (“PPE”) for those healthcare workers combatting the COVID-19 pandemic.

The Majority’s decision improperly overrode the police power of Tennessee and second-guessed how the State is addressing the pandemic, in conflict with Supreme Court precedent. The decision also conflicts with decisions from the United States Courts of Appeal for the Fifth and Eighth Circuits, which comport with Supreme Court case law; those courts vacated injunctions entered in Texas and in Arkansas against similar COVID-19 emergency measures. *In re: Rutledge*, 2020 U.S. App. LEXIS 12893 (directing trial court to dissolve the TRO); *In re: Abbott I*, 2020 U.S. App. LEXIS 10893 (directing trial court to vacate first TRO); *In re: Abbott II*, 2020 U.S. App. LEXIS 12616 (directing trial court to vacate the bulk of its second TRO). As such, absent *en banc* review in this case, States within the Sixth

³ Notably, the Executive Order does not prohibit those procedures “required to provide life-sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or to prevent rapid deterioration or serious adverse consequences to a patient’s physical condition . . . as reasonably determined by a licensed medical provider.” State of Tennessee, Executive Order No. 25 by the Governor (Apr. 8, 2020), <http://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf>.

Circuit will have their emergency measures dealing with the ongoing pandemic reviewed under a different legal standard from those States within the Fifth and Eighth Circuits.

ARGUMENT

I. There Are Limits to Constitutional Rights

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 where, as here, the government acts to protect a compelling government interest such as protecting Americans’ lives. *E.g., Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (constitutional rights are not unlimited); *In re: Abbott I*, 2020 U.S. App. LEXIS 10893, at *23 (explaining that temporary but drastic government restrictions on rights, such as closing schools, prohibiting churches from holding public worship services, and medical service limitations—even those involving abortion—that would be constitutionally intolerable during ordinary times are appropriate and necessary responses to the COVID-19 pandemic).

Broad protection should indeed be given to our sacred liberties, and Americans must remain vigilant to protect against the encroachment of those liberties. Yet, it should not be impossible for the government to do what is required to protect countless lives from a grave threat, the likes of which have not been seen in generations. The temporary, necessary restrictions imposed by Executive Order

No. 25 are constitutionally sound and should be allowed to remain in full effect while the *en banc* Court considers the merits of the appeal.

II. Executive Order No. 25 Is Constitutional

a. Tennessee acted within its authority in addressing the pandemic.

While a global pandemic implicates the interests and powers of both the federal and State governments, the States retained the primary authority to protect the lives and health of their residents under the Constitution. The Supreme Court has “distinctly recognized the authority of a *State* to enact quarantine laws and ‘health laws of every description[.]’” *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905) (internal emphasis added). In fact, when Jacobsen argued that his Constitutional rights were violated by a mandatory vaccination requirement imposed by Massachusetts, the Court went so far as to say that

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); *see also Lawton v. Steele*, 152 U.S. 133, 136 (1894) (concluding that mandatory vaccinations were constitutional and stating that “[police powers are] universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance”).

Where, as here, there is a question as to the validity of such emergency measures, “[t]he presumption of law is in favor of the validity of the order. . . .” *Union Dry Goods Co. v. Ga. Public Serv. Corp.*, 248 U.S. 372, 374-75 (1919); *In re: Abbott I*, 2020 U.S. App. LEXIS 10893, at *34 (*Jacobson* instructs that “if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities” and not to a court or jury); *id.* at *32 (under *Jacobson*, courts may not “usurp[] the state’s authority to craft measures responsive to a public health emergency”); *accord In re: Rutledge*, 2020 U.S. App. LEXIS 12893, at *17-29. Here, the Majority (and the district court) erred in not deferring to the well-reasoned judgment of Tennessee about how to combat the pandemic and, instead, substituted their own judgments and thereby limited the effectiveness of the Executive Order. *See Adams & Boyle, P.C.*, 2020 U.S. App. LEXIS 13357, at *47-48, 54-55 (Thapar, J., dissenting) (explaining that courts should not second-guess the judgments of elected officials in times of emergency and noting that “[s]ometimes [the officials’] actions will incidentally impact a person’s liberty interests. But the Supreme Court has upheld such actions anyway. . . . And there’s no abortion exception to this well-settled principle.”).

The regulation of medical services, and abortion, squarely rests within Tennessee’s broad police power. The ongoing COVID-19 pandemic has placed the lives of countless Americans, including Tennesseans, in jeopardy, and it is well

within the broad purview of State governments to navigate the situation to protect the health and safety of their residents. Owing to the extraordinary deference courts have rightly given to regulations enacted under State police powers during times of emergency, the decision below clearly contradicts decisions of the Supreme Court and other circuits.

As the Eighth Circuit explained, under the Supreme Court's *Jacobson* decision, courts may sustain a "constitutional challenge to a government's response to a public health crisis only if the state's response lacks a real or substantial relation to the public health crisis or it is, beyond all question, a plain, palpable invasion of the right to abortion." *In re: Rutledge*, 2020 U.S. App. LEXIS 12893, at *16 (internal quotation marks omitted). Executive Order No. 25 fails neither prong of this analysis, and this Court should grant *en banc* review and stay the preliminary injunction pending its consideration of the merits of the appeal.

b. Tennessee may regulate abortions among other medical procedures.

Although abortion was widely prohibited for the first two centuries of the country's existence, the Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a right protected, at least to a certain extent, by the federal Constitution. The Court later noted that its rulings after *Roe* had "undervalue[d] the State's interest in [protecting] potential life." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992). The Court has since held that "[t]he government may use its

voice and its regulatory authority to show its profound respect for the life within the woman,” and recognized 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).

Like any other right, the abortion right recognized in case law *is not absolute*; rather, it is subject to reasonable regulation in ordinary times, and, at least temporarily, greater restriction in times of emergency. Accordingly, if the government may permanently regulate abortion to protect the lives of the unborn, it follows that it may also place temporary restrictions, as here, on abortion as part of the broader battle to save the lives of the born. As the Fifth Circuit pointed out, “[t]here is no constitutional right to any particular abortion procedure.” *In re: Abbott II*, 2020 U.S. App. LEXIS 12616, at *28; *see also In re: Abbott I*, 2020 U.S. App. LEXIS 10893, at *4 (noting that, in times where public safety may require it, a State may restrict rights, and the “right to abortion is no exception”).

In *Gonzales v. Carhart*, the Court noted that there was some 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 noted that it has “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Id.* Furthermore, 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: Tennessee had ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that *temporarily halting non-emergency, elective surgical and invasive procedures*, including abortions, will help save lives. Executive Order No. 25 was enacted in exigent circumstances for the purpose of protecting and promoting the welfare of the people of Tennessee. It also helps alleviate unnecessary strain on the State’s healthcare system and preserves PPE for those healthcare workers combatting the COVID-19 pandemic. Executive Order No. 25 is a reasonable and generally applicable measure designed to fight the pandemic. It applies equally to various elective, non-emergency medical procedures and does not single out abortion. As such, allowing elective abortions to proceed amidst this crisis, against the Executive Order, is not constitutionally required and does not fall within a narrow exception to traditional State police powers.

CONCLUSION

As the Supreme Court has explained, courts should give deference to the exercise of State police powers in times of emergency. The Majority as well as the district court should have done so here rather than second-guess Tennessee's judgment concerning how to best combat the pandemic. In so doing, the Majority decision not only runs contrary to Supreme Court precedent, it also conflicts with decisions of the Fifth and Eighth Circuits. *Amicus* respectfully requests that this Court grant Appellants' petition for rehearing *en banc* and also enter an administrative stay of the preliminary injunction while it decides this case of exceptional importance.

Dated: April 28, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,274 words, which does not exceed the maximum of 2,600 words allowed, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit on April 28, 2020, using CM/ECF. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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