No. 20-3365
In the United States Court of Appeals for the Sixth Circuit

PRETERM-CLEVELAND; *et al*,
Plaintiffs-Appellees

v.

DAVID YOST, Attorney General of Ohio; *et al,*
Defendants-Appellants

On Appeal from the U.S. District Court, Southern District of Ohio
No. 1:19-cv-00360-MRB

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI*

Amici are chief legal officers of their respective States. They review, defend, and enforce a wide variety of matters during a state declared emergency. The federal government and all 50 states have declared emergencies in connection with the COVID-19 pandemic. State officials are undertaking unprecedented efforts to protect the public. The outcome of this case will profoundly and *immediately* affect States' ability to enforce gubernatorial executive orders and public health orders during this rapidly-developing pandemic.

Federal courts are removed from day-to-day decision-making in a disaster response. And so they should hesitate before intervening when a State uses its broad and long-recognized police powers to quell a global pandemic. It was well within Ohio's power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary. The district court's temporary restraining order—which is effectively a preliminary injunction—should be immediately stayed and Ohio's appeal should be expedited to allow the Court to address these critical issues and to prevent the proliferation of challenges to emergency orders during this pandemic.

Amici have authority to file this Brief without leave of the Court pursuant to Fed. R. App. P. 29(a)(2).

ARGUMENT

I. THE DISTRICT COURT FAILED TO GRASP THE IMPORTANCE OF STATES' POLICE POWERS IN TIMES OF EMERGENCY.

Responding to COVID-19 has challenged States and the Federal government in virtually every way. As of Thursday, April 2, 2020, 4,513 Americans have died from COVID-19 and more than 200,000 people are infected.[1] In Louisiana, which has had the highest growth trajectory of infections in the world, 370 people have died and 535 people are kept alive only by the State's dwindling supply of ventilators.[2] And, in Kentucky, 770 individuals have tested positive for the virus, and 31 have perished as a result.[3] By the time this brief is filed, those numbers will have increased as State healthcare systems march toward collapse.

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[1] *Coronavirus Disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html#2019coronavirus-summary.

[2] *Coronavirus*, LOUISIANA DEPARTMENT OF HEALTH, http://ldh.la.gov/Coronavirus/.

[3] *See* https://govstatus.egov.com/kycovid19.

Every day, governors report numbers: the number of people who have tested positive, have died, have been hospitalized, have been placed in ICU and on ventilators. Several states are experiencing exponential growth in COVID-19 cases. Convention centers and parks are being transformed into field hospitals.[4]

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, recently warned that the outbreak could kill 100,000–200,000 Americans. Other officials warn of shortages of personal protective equipment ("PPE") used to protect healthcare providers and prevent the spread of infections. Nurses and doctors on the front lines plead for PPE. On April 1, federal officials confirmed the National Strategic Stockpile of PPE was nearly exhausted and the global supply chain for PPE has broken down.[5]

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[4] T. PEARCE, *Emergency Field Hospitals Popping Up Across the Country for Corona Virus Patients*, https://www.washingtonexaminer.com/news/emergency-field-hospitals-popping-up-around-the-country-for-coronavirus-patients.

[5] N. MIROFF, *Protective Gear in National Stockpile Is Nearly Depleted, DHS Officials Say*, WA. POST (Apr. 1, 2020), https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3_story.html.

Officials and citizens are understandably very concerned. COVID-19 appears to be transmissible by asymptomatic carriers.[6] The virus has an incubation period of up to 14 days, during which "[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection."[7] The virus can remain on surfaces many days[8], and patients may remain infectious for weeks after their symptoms subside.[9] Not surprisingly, healthcare professionals have tested positive even while going to great lengths to protect themselves,[10] and healthcare facilities have been identified as a vector for COVID-19 transmission.[11]

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[6] L.F. MORIARTY ET AL, *Pub. Health Responses to COVID-19 Outbreak*, 69 MMWR 347, 350 (2020).

[7] D.L. HEYMANN & N. SHINDO, *COVID-19: What Is Next for Public Health?*, 395 LANCET 542, 543 (2020).

[8] MORIARTY, *supra* Note 5, at 350.

[9] Y. WU ET AL, *Prolonged Presence of SARS-CoV-2 Viral RNA in Faecal Samples*, LANCET GASTROENTEROL HEPATOL (2020), https://www.thelancet.com/journals/langas/article/PIIS2468-1253(20)30083-2/fulltext (accessed Mar. 31, 2020)

[10] J. ADAMY, *Doctors with Coronavirus Frightened by Their Own Symptoms*, WSJ, https://www.wsj.com/articles/doctors-with-coronavirus-frightened-by-their-own-symptoms-11585479600.

[11] *Id.*; *see also* M. NACOTI ET AL, *At the Epicenter of the COVID-19 Pandemic and Humanitarian Crisis in Italy*, NEJM, https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080.

Citing the grave threat posed by the epidemic, the President declared a national emergency March 13, 2020.[12] He has invoked the Defense Production Act to prioritize and allocate medical resources, to prevent hoarding of resources, and "to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators."[13]

At the same time, the Centers for Disease Control and Prevention ("CDC") issued guidance that healthcare providers should "delay all elective ambulatory provider visits" and "delay inpatient and outpatient elective surgical procedural cases."[14] The CDC explained that doing so "can preserve staff, personal protective equipment, and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic." Indeed, the CDC issued detailed guidance on optimizing the supply of PPE under both

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[12] *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 18, 2020).
[13] *Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19*, 85 Fed. Reg. 18403 (Apr. 1, 2020).
[14] *Resources for Clinics and Healthcare Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/index.html (visited Apr. 1, 2020)

contingency and crisis conditions.[15] The Centers for Medicare and Medicaid Services ("CMS") also issued detailed recommendations for conserving resources by limiting non-essential adult elective surgery and medical and surgical procedures, including all dental procedures.[16] Heeding that advice, healthcare providers have deferred a wide variety of procedures, even life-saving transplants.[17]

Like the governors of all 50 States, the Governor of Ohio declared a state of emergency in connection with the COVID-19 pandemic.[18] On March 17, 2020, the Director of the Ohio Department of Health promulgated an order to preserve PPE and critical hospital capacity and resources within Ohio:

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[15] *Strategies to Optimize the Supply of PPE and Equipment*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html (visited April 1, 2020).

[16] *Adult Elective Procedure Recommendations*, CMS, https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf (visited April 1, 2020).

[17] A. MARCIUS, *Coronavirus Threat Forces Longer Waits for Some Organ-Transplant Patients*, WSJ (Mar. 25, 2020), https://www.wsj.com/articles/coronavirus-threat-forces-longer-waits-for-some-organ-transplant-patients-11585137601.

[18] GOVERNOR OF OHIO, MIKE DEWINE, *Executive Order 2020-01D, Declaring a State of Emergency*, https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d.

> 1. Effective 5:00p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.
>
> 2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
>
> > a. Threat to the patient's life if surgery or procedure is not performed;
> > b. Threat of permanent dysfunction of an extremity or organ system;
> > c. Risk of metastasis or progression of staging; or
> > d. Risk of rapidly worsening to severe symptoms (time sensitive)
>
> 3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE.

Exh. (ECF 41-1) at ECF p.62. In reliance on the emergency and guidance issued by the CDC, the Director then promulgated orders limiting mass gatherings, closing schools, closing non-essential businesses, and ordering "all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence."[19]

Ohio's actions are, without doubt, extraordinary. But they arise during extraordinary times. Compliance from the public and *all* medical

[19] *Public Health Orders*, OHIO DEPT. OF HEALTH, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/public-health-orders

providers to delay *all* non-essential procedures is critical. The Governor's and the Director's actions are consistent with actions in other States, and with the CDC's and CMS's guidance. The district court, however, offered only lip service to this crisis.

II. A STAY IS PROPER BECAUSE THE DISTRICT COURT CLEARLY AND INDISPUTABLY LEGALLY ERRED.

A. The Supreme Court has recognized a State's compelling interest in protecting the public from a deadly epidemic and the State's vast power to do so.

Few principles are as well established in our system of federalism than that States retain the police power to protect the health, safety and welfare of their citizens. U.S. Const. amend. X; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). This includes the authority to restrict *individual* activities when doing so is necessary to protect the rights of *everyone else* in society. Epidemics are, perhaps, one of the oldest known and least-questioned justifications for such restrictions. *See Morgan's Louisiana & T. R. & S. S. Co. v. Bd. of Health of State of Louisiana*, 118 U.S. 455, 459 (1886); *Gibbons v. Ogden*, 22 U.S. 1 (1824). And quarantines have long been accepted as appropriate responses to dangerous epidemics. Some form of quarantine has existed since ancient times, and the "modern" quarantine has been traced back to fourteenth

century Europe. Indeed, "quarantine" is derived from the Italian word quarantina, meaning forty days. *See* FELICE BATLAN, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 62–63 (2007).

The district court clearly and indisputably erred in failing to grapple with States' deeply-rooted power to stem the spread of contagion and protect the public—a power that the United States Supreme Court has long recognized. *See Jacobson*, 197 U.S. at 25; *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *see also United States v. Caltex*, 349 U.S. 149 , 154 (1953) ("[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."); *Bowditch v. City of Boston*, 101 U.S. 16 (1879) ("There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. The rights of necessity are a part of the law.").

A State's police power is at its zenith during times of emergency and crisis, and can tip the balance in analyzing constitutional rights that,

in other times, would not survive judicial scrutiny. "[T]he rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29; *see also Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698 (1897) (stating that "it is clearly within the power of the state to order [property] destruction in times of epidemic" and whenever such property "become[s] infected and dangerous to the public health"). The Supreme Court "ha[s] long recognized," for example, "that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v. Caltex*, 344 U.S. 149, 154 (1952) (destruction of property in retreat from Japanese forces after Pearl Harbor). "Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right . . . ." *Caltex*, 344 U.S. at 153 (quoting *United States v. Russell*, 80 U.S. 623, 628 (1871)).

For example, in *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, the Supreme Court upheld a quarantine of several

parishes around New Orleans intended to "exclude healthy persons from a locality infested with a contagious or infectious disease." 186 U.S. 380, 385 (1902). The quarantine was held not to violate the Fourteenth Amendment, *Id.* at 387, 393, as "[t]he object in view was to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same." *Id.* at 385.

As has been said often, no right is absolute. *Jacobson*, 197 U.S. at 26; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012); *Furnace v. Oklahoma Corp. Comm'n*, 51 F.3d 932, 936 (10th Cir. 1995). And this is never more true than in situations of extraordinary emergency, like the current pandemic. Of course, it is also true that a State's use of emergency powers is not unlimited. Specifically, the use of emergency power cannot extend past the time of emergency, and a State's use of emergency power cannot be used in a way that is "unreasonable or arbitrary." *Jacobson*, 197 U.S. at 27. But neither of these limitations is implicated here.

B. The district court clearly and indisputably erred by ignoring controlling Supreme Court authority.

The district court ignored the power of States to protect the health and safety of the public during a pandemic in favor of an *absolute* right to abortion that the Supreme Court has never recognized. *See Jacobson*, 197 U.S. at 12–13; *Compagnie Francaise,* 186 U.S. at 385; *see also Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016).

Every state has laws empowering state officials to take exceedingly broad steps to stop the spread of contagious disease. *See* Exhibit A (non-exhaustive list of state public health and disaster statutes). A New Hampshire state court applied the proper analysis in a recent challenge to Governor Sununu's COVID-19 executive order. *See Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Sup. Ct. March 25, 2020) (attached as exhibit B).[20] The plaintiffs there argued, among other things, that the order violated their right to religious freedom. Recognizing little case law existed in New Hampshire on the executive's authority to suspend or

[20] S*ee also* EUGENE VOLOKH, *N.H. Court Rejects Challenge to Ban on Gatherings of 50 or More People*, THE VOLOKH CONSPIRACY, https://reason.com/2020/03/26/n-h-court-rejects-challenge-to-ban-on-gatherings-of-50-or-more-people/ (approvingly discussing the state court's analysis).

infringe upon civil liberties during states of emergency, the court applied the analysis established in *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996),[21] where the Eleventh Circuit found that in an emergency situation, fundamental rights may be temporarily limited or suspended. *See also United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (invocation of an emergency necessarily restricts activities that would normally be constitutionally protected).

Specifically, in *Avino*, the Eleventh Circuit applied a two-prong test to determine whether the executive order passed constitutional muster. Under that test, the court inquired only into whether (1) officials were acting in good faith in issuing the order and (2) whether the governor had asserted a sufficient factual basis showing the restrictions were necessary. 91 F.3d at 109.

Finding both of the prongs of the Eleventh Circuit's test to be amply satisfied, the New Hampshire state court upheld the governor's ban on gatherings in excess of 50 people. This limited and deferential analysis was the correct and preferable to any balancing test.

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[21] *Smith v. Avino* was abrogated on other grounds *by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

That States' vast power to deal with epidemics has been repeatedly upheld is unsurprising. The Fourteenth Amendment does not ban the deprivation of any right. Rather, it provides that no State shall "deprive any person of life, liberty, or property without due process of law." And nothing in *Roe v. Wade* exempts abortion providers from compliance with generally applicable public health orders in the face of a grave public health crisis.

None of the underlying facts of the crisis is disputed. Plaintiffs acknowledge COVID-19 is a pandemic, and "federal and state officials expect a surge of infections . . . to test the limits of the healthcare system, which is already facing a shortage of PPE," Mem. (ECF 42) at 4. And Plaintiffs do not dispute that Ohio's emergency restriction on "non-essential surgery" was promulgated "in light of this new reality." *Id.* at 5. Plaintiffs thus are left only to attack the "fit" of the Director's emergency order, Opp. (ECF 15) at 20, an issue on which federal courts should hesitate before intervening because they are unsuited to second-guess health official's recommendations. *Jacobson*, 197 U.S. at 28; *see also Hickox*, 205 F. Supp. 3d at 579. In any event, Plaintiffs offered no

evidence that their practices and use of PPE are adequate to protect against the spread of this highly contagious infectious disease.

None of Plaintiffs' declarants is qualified to opine on these issues. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue."). Declarant France is a business manager, with no apparent medical expertise. France Decl. (ECF 42-2) ¶ 1. Declarants Liner, Krishen, and Haskell are only family practice physicians. Liner Decl (ECF 42-1) ¶ 1; Krishen Decl. (ECF 42-3) ¶ 1; Haskell Decl. (ECF 42-4) ¶¶ 2–4. The expertise of declarant Burkons, an obstetrician-gynecologist, is similarly limited. Burkons Decl. (ECF 42-5) ¶ 1. None are epidemiologists or infectious disease specialists. Even if they were, they are neither answerable to the community for their decisions nor are they responsible to the people for the consequences, as public officials are. Far from supporting their claim for a blanket exemption, Plaintiffs' declarations make clear the Director's emergency order is necessary to protect the public: Plaintiffs perform thousands of abortions every year, which requires them to routinely consume significant quantities of PPE. This

also raises a strong inference that the abortion providers have already treated patients with COVID-19 and therefore have been exposed themselves. *See* Liner Decl. ¶ 7, France Decl. ¶¶ 6, 8; Krishen Decl. ¶¶ 7, 10; Haskell Decl. ¶¶ 8, 10; Burkons Decl. ¶¶ 7, 10.

Indeed, Plaintiff PPSWO candidly admits it screens patients for COVID-19 symptoms—but merely provides the patient with a "mask" if there is "concern for COVID 19." Liner Decl. ¶¶ 7 n.1, 35. PPSWO does not, however, "use or have in supply [the] N95" respirators needed to protect staff and other patients. *Id.* ¶ 39. Plaintiff PPGOH apparently follows a similar policy. Krishen Decl. ¶¶ 10, 11, 14. But neither PPSWO nor PPGOH appears to have closed or suspended services following treatment of such patients, as the guidance on which Plaintiffs' rely suggests they should have. *See* Liner Decl. Exh. E.

III. OHIO AND OTHER STATES WILL BE IRREPARABLY HARMED IN THE ABSENCE OF A STAY.

The district court's second-guessing of the judgment of State and federal officials during an ongoing pandemic disaster response causes irreparable harm. It will undoubtedly contribute to higher exposure and death rates. The resulting damage is not limited to Ohio. The ruling

below will engender more litigation, serving only to distract state officials, deplete PPE, and contribute to the spread of COVID-19.

State governments' capacity to protect citizens is being tested like never before. *Amici* cannot adequately convey in a brief the *complexity* of States' response to a disaster like the one presently unfolding. To give this Court some idea of the depth and breadth of it, *amici* have supplied copies of a Louisiana Situation Report, issued daily from the Governor's Office of Homeland Security, which tracks the major activity of a multitude of state officials. *See* Exhibit C.

In the COVID-19 crisis, governors are making extremely difficult choices, with far-reaching consequences. Closing schools burdens parents who have to stay home with children and experience lost leave time, income, and potentially their jobs. Graduations, bar exams, and criminal trials are on hold. Medical testing, housing, and treatment of individuals in prisons, nursing homes, juvenile facilities, and foster homes must be considered. Some cities will receive floating Navy hospitals while in New Orleans a field hospital is being set up in a convention center, and, in Kentucky, the state fairgrounds is being converted into a 2,000-bed field

hospital. State first responders are becoming ill.[22] Unemployment numbers are going up. The homeless must be evaluated, housed, tested, and treated. No State has blithely made decisions restricting work, school, commerce, travel, association, worship, and medical care. These decisions are *necessary* under emergent and exigent circumstances. Indeed, the very fact so many states have found such drastic action necessary underscores the gravity of the situation.

Plaintiffs' attitude of exceptionalism, and the district court's adoption of it, underscores the challenge states face stemming the spread of the virus. A district court's second-guessing of the judgment of state and federal officials during an ongoing pandemic broadly undermines compliance, which only prolongs the agony and increases the death toll. *There is no effective remedy for this harm*. This is precisely why the Supreme Court—and virtually every state court to ever consider the issue—has recognized that state power is at its zenith during an epidemic. Spotty or flagrant noncompliance by those who believe they are

[22] JOSEPH GUSMAN, *More than 1,400 New York police officer test positive for coronavirus*, THE HILL, https://thehill.com/changing-america/well-being/prevention-cures/490615-more-than-1000-new-york-city-police-officers, last accessed April 1, 2020.

exceptional worsens the disaster.

No one believes this situation will last forever. But States should not be subjected to judicially imposed categorical exclusions to public health orders that perpetuate the threat of contagious disease. The very existence of such exclusions threatens state government's ability to enforce all public health orders. The district court's ruling directly interferes with infection control and will contribute to increasing infection rates and deaths. *No federal court should assume that grave responsibility*. It was well within the State's power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary. The district court abdicated its duty when it gave only lip service to the undisputedly compelling public interest in restricting procedures to protect the health and safety of the public and minimize additional burdens on emergency responders as well as the use of PPE.

CONCLUSION

The district court gave carte-blanche protection to abortion clinics from state-wide, neutrally-applicable emergency orders the Ohio Governor and Director issued to address a grave threat to public health,

when their powers are at a zenith. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). That was indisputably wrong. This undoubtedly undermines Ohio's and the *Amici* States' ability to enforce their public health orders and to protect the public. If ever a situation exists where the individual's rights yield to that of the public at large, it is during an epidemic. This Court should grant Ohio's request for a stay of this extraordinarily flawed order, promptly vacate it, and direct the district court to dismiss Plaintiffs' claims.

Respectfully submitted,

/s/ S. Chad Meredith
DANIEL CAMERON
Attorney General of Kentucky
BARRY L. DUNN
Deputy Attorney General
S. CHAD MEREDITH
Solicitor General
**Counsel of Record*
MATTHEW F. KUHN
Deputy Solicitor General
OFFICE OF THE KENTUCKY ATTORNEY GENERAL
700 Capital Ave., Suite 118
Frankfort, KY 40601
(502) 696-5300
chad.meredith@ky.gov

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor General
LOUISIANA DEPT. OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

ADDITIONAL COUNSEL:

Steve Marshall, Attorney General of Alabama

Kevin G. Clarkson, Attorney General of Alaska

Leslie Rutledge, Attorney General of Arkansas

Lawrence Wasden, Attorney General of Idaho

Curtis T. Hill, Jr., Attorney General of Indiana

Jeff Landry, Attorney General of Louisiana

Lynn Fitch, Attorney General of Mississippi

Eric Schmitt, Attorney General of Missouri

Tim Fox, Attorney General of Montana

Douglas J. Peterson, Attorney General of Nebraska

Mike Hunter, Attorney General of Oklahoma

Alan Wilson, Attorney General of South Carolina

Jason Ravnsborg, Attorney General of South Dakota

Herbert Slatery, Attorney General of Tennessee

Ken Paxton, Attorney General of Texas

Sean Reyes, Attorney General of Utah

Patrick Morrisey, Attorney General of West Virginia

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ S. Chad Meredith

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because the brief contains 3,733 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

/s/ S. Chad Meredith
S. Chad Meredith
Attorney for Amici Curiae

Dated: April 3, 2020