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

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:15-cv-00705)

COMBINED EMERGENCY MOTION FOR STAY PENDING APPEAL AND MERITS BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

This is an emergency appeal and motion for stay from a preliminary injunction. Because these proceedings are time sensitive, the State of Tennessee requests that the Court immediately grant a stay pending appeal, without oral argument. If oral argument would assist the Court in ruling on the merits of the appeal, the State requests that argument be held telephonically or by videoconference.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. It issued its preliminary injunction on April 17, 2020. PI Order, R. 244, PageID #6136-48. Defendants filed a timely notice of appeal on April 17, 2020. Notice of Appeal, R. 245, PageID #6149-50. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

In response to the COVID-19 pandemic, Tennessee's Governor issued an executive order requiring all healthcare professionals and healthcare facilities to postpone elective and non-urgent surgical and invasive procedures to preserve personal protective equipment ("PPE") and prevent community spread of COVID-19. The question in this appeal is whether the district court abused its discretion in issuing a preliminary injunction prohibiting Tennessee from applying the executive order to surgical abortions. The State also seeks an emergency stay of the injunction pending this Court's ruling on the merits.[1]

[1] The State further requests a temporary administrative stay while the Court considers the stay motion.

INTRODUCTION

The COVID-19 pandemic has upended life for billions of people worldwide. Tennessee is no exception. In response to this crisis, the Governor issued a series of executive orders requiring individuals, businesses, and organizations across the State to make sacrifices necessary to mitigate the threat of COVID-19 transmission and ensure that the State's healthcare system is equipped to handle the inevitable surge of patients. EO-25 requires all Tennessee healthcare professionals and healthcare facilities to postpone elective and non-urgent surgical and invasive procedures for a three-week period ending on April 30, 2020.

Plaintiffs, abortion providers in Tennessee, decided they should not have to follow EO-25. They sued state officials alleging that applying EO-25 to surgical abortions violates the constitutional rights of their patients. The district court granted a preliminary injunction requiring the State to allow surgical abortions to proceed, unfettered, even though those abortions concededly use PPE and require personal contact that could spread COVID-19.

The district court abused its discretion in granting abortion providers a blanket exemption from a reasonable and generally applicable emergency measure necessary to protect public health. The district court committed the same errors that prompted the Fifth Circuit to grant Texas mandamus relief from a similarly broad TRO. *See In re Abbott*, --- F.3d ---, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr.

7, 2020). The court ignored the governing legal framework applicable to government actions taken in response to a public-health crisis and substituted its judgment for the State's in deciding what measures are needed. The preliminary injunction hampers the State's ability to respond to the crisis and encourages others to seek exemptions when swift, collective action is urgently needed. This Court should grant an immediate stay of the injunction and reverse the district court.

STATEMENT OF THE CASE

I. COVID-19 Presents a Grave Worldwide Threat.

COVID-19 is a highly contagious virus that can cause serious illness or death. It is by now well-known that it can remain infectious in the air for hours and on surfaces for days and be transmitted by asymptomatic people. The extent of COVID-19's severity is not fully known, but a preliminary report by the Centers for Disease Control ("CDC") estimates that 20.7-31.4% of reported cases required hospitalization, 4.9-11.5% required admission to an intensive care unit, and 1.8-3.4% were fatal. [2]

COVID-19 was first diagnosed in China on December 31, 2019, and soon spread rapidly throughout the world. By March 11, 2020, the World Health

[2] CDC, *Morbidity and Mortality Weekly Report, Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12-March 16, 2020* (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e2-H.pdf.

Organization had described the outbreak as a pandemic.[3] The United States saw its first case on January 14, 2020, and now has the highest number of confirmed cases and deaths in the world—695,353 and 35,443, respectively, as of April 19th.[4]

Because COVID-19 can be transmitted asymptomatically, the CDC advises that "[l]imiting face-to-face contact with others is the best way to reduce [its] spread."[5] And the CDC recommends that medical professionals, who are at particular risk for transmission, use PPE, including face shields or goggles; N95 or higher respirators; clean, non-sterile gloves; and isolation gowns.[6]

COVID-19's rapid growth has overwhelmed health care systems in other jurisdictions. In New York City, for example, ICUs are near capacity and the city's healthcare system is buckling as COVID-19 hospitalizations surge.[7] In Louisiana,

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[3] *WHO Director-General's opening remarks at the media briefing on COVID-19*, World Health Organization (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[4] World Health Organization, *Coronavirus (COVID-19)*, https://covid19.who.int/; CDC, *Cases of Coronavirus Disease (COVID-19) in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[5] CDC, *Social Distancing, Quarantine, and Isolation*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[6] CDC, *Use Personal Protective Equipment (PPE) When Caring for Patients with Confirmed or Suspected COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/downloads/A_FS_HCP_COVID19_PPE.pdf.

[7] Julian Marsh et al., *ICUs under strain as NYC's new coronavirus patients are sicker than ever*, N.Y. Post (Apr. 16, 2020), https://nypost.com/2020/04/16/icus-under-strain-as-nycs-coronavirus-patients-are-sicker-than-ever/.

hospitals were nearing systemic collapse until the State ordered PPE preservation and social distancing.[8] As these examples demonstrate, the rapid spread of COVID-19 can easily overwhelm critical infrastructure.

On March 4, 2020, the Tennessee Department of Health confirmed that a Tennessee resident had contracted the disease. By April 19, Tennessee's confirmed cases had grown to 7,070, and confirmed deaths had risen to 148.[9]

II. Tennessee Responds to the COVID-19 Pandemic.

State leaders swiftly adopted emergency measures to prevent COVID-19 transmission and ensure that hospitals would be prepared for the inevitable influx of patients. On March 12, 2020, Governor Lee declared a state of emergency.[10] In the days that followed, the Governor required Tennesseans to remain at home unless engaging in essential activities or services.[11] He limited participation in public gatherings and closed schools, in-restaurant dining, entertainment and recreational

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[8] WDSU News, *New data shows how New Orleans metro would have fared without efforts against COVID-19* (Apr. 16, 2020), https://www.wdsu.com/article/new-data-shows-how-new-orleans-metro-would-have-fared-without-efforts-against-covid-19/32176014.

[9] Tenn. Dep't. of Health, *Coronavirus Disease (COVID-19)*, https://www.tn.gov/health/cedep/ncov.html.

[10] Exec. Order 14, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf.

[11] Exec. Order 22, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee22.pdf; *see also* Exec. Order 23, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee23.pdf.

gathering venues, and businesses that perform close-contact personal services.[12]

The Governor also limited non-emergency healthcare procedures. He restricted some procedures on March 23rd.[13] Then, on April 8th, after "the spread of COVID-19 continue[d] to intensify and warrant[ed] additional limitations," he issued EO-25, the order at issue here.[14] The joint goals of EO-25 are to "preserv[e] personal protective equipment for emergency and essential needs and prevent[] community spread of COVID-19 through non-essential patient-provider interactions."[15] Following recommendations from national health experts, EO-25 provides in relevant part that for a three-week period ending on April 30th:

> 2. *All healthcare professionals and healthcare facilities* in the State of Tennessee *shall postpone surgical and invasive procedures that are elective and non-urgent*. Elective and non-urgent procedures are those procedures that can be delayed until the expiration of this Order because they are not 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 if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider.[16]

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[12] Exec. Order 17, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee17.pdf; *see also* Exec. Order 21, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee21.pdf.

[13] Exec. Order 18, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee18.pdf.

[14] Exec. Order 25, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf.

[15] *Id.*

[16] *Id.* (emphasis added).

Notably, EO-25 permits surgical and invasive procedures when delay presents a risk of death or serious adverse health consequences, as reasonably determined by the physician.

EO-25 is one of the many emergency measures necessary to "flatten the curve" of COVID-19 transmissions and preserve critical PPE as the State weathers the worst of this pandemic. And the measures taken by Tennessee have yielded positive results. A Vanderbilt University Medical School model shows that the State's social distancing efforts have significantly reduced the COVID-19 transmission rate.[17] But the model also demonstrates the importance of staying the course: because COVID-19 infections in Tennessee have not yet reached their peak, "the [S]tate will need further progress over the coming weeks."[18]

III. Plaintiffs Sue to Require the State to Exempt Surgical Abortions from EO-25.

On April 13, 2020, Plaintiffs sought to supplement their complaint in an existing lawsuit concerning Tennessee's abortion waiting-period and notice laws[19] by adding a claim related to EO-25. *See* Supp. Compl., R. 230-1, PageID #5696-

[17] *See* John Graves, *Vanderbilt Health Policy COVID-19 Modeling for Tennessee*, https://www.vumc.org/health-policy/sites/default/files/public_files/COVID%20Modeling%20Release%204-10%20FINAL2.pdf.

[18] *Id.*

[19] The lawsuit has been pending for nearly five years, and the challenges to the waiting-period and notice laws were tried to completion more than six months ago.

727. The new claim alleged that EO-25 violates a woman's constitutional right to abortion by "operat[ing] as a complete ban on procedural (sometimes called 'surgical') abortions in the State for some women" and "impos[ing] extreme burdens" on others. *Id.* at PageID #5697-98.[20] After briefing and a telephonic hearing, the district court granted a broad preliminary injunction prohibiting enforcement of EO-25 "as applied to procedural abortions," without limitation to particular patients or circumstances. PI Order, R. 244, PageID #6136.[21]

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (internal quotation marks omitted). To determine whether a plaintiff has cleared that high hurdle, a court considers: (1) "whether the movant has a strong likelihood of success on the merits," (2) "whether the movant would suffer irreparable injury without the injunction," (3) "whether issuance of the injunction would cause substantial harm to others," and (4) "whether the public interest would be served by issuance of the injunction." *City of*

[20] EO-25 applies only to "surgical" and "invasive" procedures; it does not prohibit medication abortions.

[21] The State sought a stay of the injunction from the district court; that motion remains pending. Stay Motion, R. 245, PageID #6151-56.

Pontiac Retired Employees Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014) (en banc).

On appeal, the district court's "ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting" a preliminary injunction is reviewed for abuse of discretion. *Id.* (internal quotation marks omitted). But its legal conclusions, including its determination of the likelihood of success on the merits, are reviewed de novo, and its factual findings for clear error. *Id.*

To determine whether a preliminary injunction should be stayed pending appeal, this Court considers similar factors: (1) "the likelihood that the party seeking the stay will prevail on the merits of appeal," (2) "the likelihood that the moving party will be irreparably harmed absent a stay," (3) "the prospect that others will be harmed if the court grants the stay," and (4) "the public interest in granting the stay." *Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).

ARGUMENT

I. Defendants Are Likely to Prevail on Appeal.

The preliminary injunction is a clear abuse of discretion. It should be stayed immediately pending this appeal and reversed on the merits. Plaintiffs did not show they are entitled to relief, let alone the extraordinarily broad relief the district court granted. The district court found EO-25 unconstitutional only by wholly disregarding the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905), and the compelling interests underlying the State's action. And it made no attempt to tailor the injunction to Plaintiffs' purported harm, as federalism principles require.

A. The Constitution does not prohibit the State from enforcing a neutral and generally applicable executive order against abortion providers during a public health crisis.

As the Fifth Circuit recently explained, the constitutionality of emergency public health measures like EO-25 is governed by *Jacobson*. *See In re Abbott*, --- F.3d ---, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir. Apr. 7, 2020). EO-25 is constitutional under that framework.

1. *Jacobson* establishes the legal framework for judicial review of the State's exercise of its police power during public-health emergencies.

The Supreme Court has long held that the State may, without violating the Constitution, exercise its police power to respond to emergencies that threaten the

public health. *See, e.g.*, *Jacobson*, 197 U.S. at 35 (upholding mandatory vaccinations for smallpox against a Fourteenth Amendment challenge); *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380, 387-93 (1902) (upholding state-imposed quarantine against Commerce Clause and procedural due process challenges). The police power, reserved to the States by the Tenth Amendment, plainly "embrace[s]" measures to "protect the public health and the public safety." *Jacobson*, 197 U.S. at 25; *see also*, *e.g.*, *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (the police power "is universally conceded to include everything essential to the public safety, health, and morals"); *Banzhaf v. FCC*, 405 F.2d 1082, 1097 (D.C. Cir. 1968) ("The power to protect the public health lies at the heart of the states' police power.").

The Court explained in *Jacobson* that, "in every well-ordered society charged with the duty of conserving the safety of its members[,] the 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." 197 U.S. at 29. That individual liberty must sometimes yield to the common good has been reaffirmed time and again. *See Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (recognizing States' authority to involuntarily commit individuals who "pose a danger to the public health"); *United States v. Caltex*, 344 U.S. 149, 154 (1952) (recognizing that the State may, "in times

of imminent peril[,] . . . destroy the property of a few that the property of many and the lives of many more could be saved"); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease . . .").

Any suggestion that this principle is inapplicable in the abortion context is belied by *Roe v. Wade*, 410 U.S. 113 (1973). There, the Supreme Court cited *Jacobson* in rejecting the argument that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153-54. The Court noted that it had "refused to recognize an unlimited right of this kind in the past" and made clear that the right to abortion "is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

Jacobson establishes that there are only two circumstances in which the judiciary may interfere with the State's response to a public-health emergency: (1) when the State's action "has no real or substantial relation" to protection of the public health; or (2) when the State's action is, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. Otherwise, courts should not second-guess the State's judgment about what measures are necessary. *See id.* at 30 (explaining that "[i]t is no part of the function of a court" to

decide which measures are "likely to be the most effective for the protection of the public against disease").

Plainly, "the effect on abortion arising from a [S]tate's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*." *In re Abbott*, 2020 WL 1685929, at *8. But the district court did not even cite *Jacobson*, much less evaluate the constitutionality of EO-25 under that governing standard. That abuse of discretion alone warrants reversal. *See Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997); *cf. In re Abbott*, 2020 WL 1685929, at *8 (granting mandamus relief because the district court "clearly and indisputably erred" in "refusing even to consider *Jacobson*"). Moreover, under the correct legal analysis, EO-25 is constitutional.

2. EO-25 is substantially related to the State's goals of preserving PPE and preventing transmission of COVID-19.

Under *Jacobson*, a State's actions in response to an emergency must bear a "real [and] substantial relation" to its goal of protecting the public health. 197 U.S. at 31. Both facially and as applied to surgical abortions, EO-25 satisfies that standard. The elective and non-urgent surgical and invasive procedures to which EO-25 applies use needed PPE and entail patient-provider interactions that risk community spread of COVID-19. Postponing those procedures thus directly

accomplishes the State's goals of preserving PPE and reducing community transmission.

The same goes for elective and non-urgent surgical abortions. Plaintiffs concede that surgical abortions require use of PPE and involve interactions that might spread COVID-19. PI Mem., R. 232, at PageID #5757, 5761-62. It follows that, as applied specifically to surgical abortions, EO-25 bears a "substantial relation" to protection of the public health.

Instead of asking whether EO-25 is substantially related to the State's public-health interests, the district court improperly "second-guess[ed] the wisdom [and] efficacy of the [State's] measures." *In re Abbott*, 2020 WL 1685929, at *7. The district court "accept[ed] as accurate" Plaintiffs' representations that "they have implemented sanitation procedures, as well as procedures to minimize the use of PPE, . . . and that a procedural abortion uses less PPE and involves significantly less patient interaction than carrying a pregnancy to term and giving birth." PI Order, R. 244, PageID #6146. And on that basis, it concluded that no "appreciable amount of PPE would actually be preserved" by applying EO-25 to surgical abortions. *Id.*

The district court's substitution of its judgment for the State's regarding the efficacy of its emergency measures directly contravened *Jacobson*. 197 U.S. at 30. And the district court's judgment was deeply flawed. Plaintiffs' argument that an individual application of EO-25 is unconstitutional because it conserves only

minimal PPE is nonsensical. The whole point of these executive orders is to require *collective* action because piecemeal individual actions would be ineffective. Creating exceptions for those who use only "negligible" PPE would create a "serious free-rider problem, the likes of which the Supreme Court has looked upon with disfavor in cases involving state action during pandemics." *Pre-Term Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *4 (6th Cir. Apr. 6, 2020) (Bush, J., concurring in part and dissenting in part) (citing *Jacobson*, 197 U.S. at 35).

Nor should the district court have accepted Plaintiffs' perverse argument that abortions further the State's goals by preventing the PPE use and personal interactions that would accompany childbirth. The goal of EO-25 is to conserve PPE and reduce the spread of COVID-19 *now*, at a time when transmissions are rising rapidly and current supplies of PPE will be insufficient if hospitals are inundated with patients. How delaying a procedure now might affect PPE supplies or community spread weeks or months from now—when circumstances, including manufacturing capacity for PPE, will have changed—is beside the point.

Plaintiffs do not seriously argue that EO-25 is arbitrary or pretextual. Nor could they—it is a generally applicable law that applies to *all* healthcare professionals and facilities and requires postponement of *all* elective and non-urgent surgical or invasive procedures, and it bears a direct relation to the State's goals of

PPE conservation and community mitigation. The district court's analysis should have ended there; its second-guessing the State's emergency measures warrants reversal.

3. EO-25 does not "beyond all question" violate the right to abortion.

The district court jumped to the conclusion that EO-25 creates an undue burden on abortion rights because it suspends surgical abortions until April 30 and might be extended beyond that date. PI Order, R. 244, PageID #6143-44. That conclusion was wrong even under an ordinary application of the undue burden standard. Under the more deferential standard required by *Jacobson*, the district court's conclusion was especially egregious.

A regulation may be an undue burden when it is a "substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 895 (1992). But this is only part of the analysis; courts must also consider the benefits that the challenged regulation confers. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

Binding precedent makes clear that the possibility that EO-25 might cause some abortions to be performed a few weeks later than preferred is not "beyond all question" an undue burden. In *Casey*, the Supreme Court held that a 24-hour waiting-period law was not an undue burden even though, in practice, it resulted in

delays "of much more than a day." 505 U.S. at 881. Similarly, in *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 366, 372-74 (6th Cir. 2006), this Court concluded that Ohio's informed-consent and 24-hour waiting-period laws were not an undue burden even though they delayed abortions for weeks and in some cases prevented women from obtaining abortions altogether.

The Supreme Court has also held that there is no constitutional right to a preferred method of abortion. *See Gonzales v. Carhart*, 550 U.S. 124, 163-65 (2007) (upholding ban on particular method of abortion); *Roe*, 410 U.S. at 153 (a woman does not have the right to "terminate her pregnancy . . . in whatever way . . . she chooses"). To the extent that any delay caused by EO-25 might affect a woman's choice of abortion procedures, that is not a constitutionally impermissible undue burden.

Nor is EO-25 a complete ban on pre-viability abortions. EO-25 postpones elective and non-urgent surgical abortions for three weeks. Surgical abortions that are necessary to prevent serious adverse consequences to a woman's physical health may proceed during that time, as may medication abortions. Not surprisingly, Plaintiffs presented no concrete evidence that a three-week delay will wholly deprive any woman of her right to obtain a pre-viability abortion.[22] And it is statistically

[22] Generally, abortions are available under Tennessee law until 20 weeks past the last menstrual period. *See* Tenn. Code Ann. §§ 39-15-211, -212. Plaintiffs speculate

unlikely that this situation would arise—in 2018, only 3.1% of abortions in Tennessee were performed after 17 weeks.[23] The vast majority of abortions are performed much earlier and may be temporarily delayed without interfering with a woman's right to pre-viability abortion.[24]

The district court also failed to consider the critical benefits conferred by EO-25, which far outweigh any burden on abortion rights. *See Hellerstedt*, 136 S. Ct. at 2309. As explained above, EO-25 directly furthers the State's compelling interest in protecting the public health by preserving critical medical resources during the COVID-19 pandemic and preventing community spread. These benefits to the greater good during this time of "great danger[]" justify any incidental burden on abortion rights. *Jacobson*, 197 U.S. at 362.

4. The district court failed to tailor the injunction to the purported harm.

The district court further abused its discretion by issuing extraordinarily broad

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that EO-25 might prevent women from obtaining abortions because some clinics stop performing abortions after 15 weeks, *see* PI Memo, R. 232, PageID #5773-74, but the State is not responsible for burdens caused by providers' own choices about what abortion procedures to offer.

[23] *See* Selected Induced Termination of Pregnancy (ITOP) Data (2018), https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/itop/ITOP 2018.pdf.

[24] If "competent evidence shows that a woman" will be completely deprived of her right to a pre-viability abortion, "nothing prevents her from seeking as-applied relief." *In re Abbott*, 2020 WL 1685929, at *11.

injunctive relief without any attempt to tailor the injunction to the specific harms purportedly identified by Plaintiffs.[25] The "nature of the violation" should always determine "the scope of the remedy," and this rule has special force when federal injunctive relief is sought against state officials given the State's interest in the "administration of its own law." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *see also Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-31 (2006); *Howe v. City of Akron*, 801 F.3d 718, 754 (6th Cir. 2015).

The district court was oblivious to these important principles. Plaintiffs identified three abstract categories of patients who, in their view, "are particularly burdened" by EO-25 because delay allegedly could deprive the patients of their right to obtain a pre-viability abortion or necessitate a more complex abortion procedure. PI Memo, R. 232, PageID #5751. But the district court did not tailor its injunctive relief to any of these situations. Instead, it barred the State from enforcing EO-25 against all surgical abortions. Unlike the "narrowly tailored" TRO at issue in *Pre-Term Cleveland*, the injunction here permits "blanket on-demand provision of elective abortions." 2020 WL 1673310, at *2 (internal quotation marks omitted). The injunction is an affront to federalism and should be reversed.

[25] Of course, even a narrowly tailored injunction would have been an abuse of discretion given that Plaintiffs failed to show that EO-25 "beyond all question" infringes abortion rights.

B. The district court lacked jurisdiction.

Finally, regardless of the effect of EO-25 on the constitutional right to abortion, the district court had no jurisdiction to grant Plaintiffs any relief because they lack standing. Plaintiffs here are abortion providers, not women seeking an abortion, and they have no constitutional right to perform abortions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910, 912 (6th Cir. 2019). Plaintiffs rely on the doctrine of third-party standing to assert the constitutional rights of their patients, but they fail to satisfy the requirements for third-party standing because they have demonstrated neither a close relationship to the patients whose rights they seek to assert nor that those patients are unable to protect their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Indeed, here, Plaintiffs' interests in proceeding with non-urgent abortions despite the risk of COVID-19 transmission seems to conflict with their patients' interests. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15, & n.7 (2004).

II. The Balance of Harms Weighs Strongly in Favor of a Stay.

Plaintiffs' failure to show a likelihood of success on the merits is reason enough to stay and reverse the preliminary injunction, but the district court also abused its discretion in balancing the harms at issue. It ignored and erroneously

discounted the important state and public interests at stake—interests that clearly tilt the balance in favor of enforcement of EO-25.

A. The State will be irreparably harmed if the preliminary injunction remains in place.

The injunction prohibiting enforcement of EO-25 against surgical abortions irreparably harms the State in two ways. *First*, it interferes with the State's critically important and time-sensitive efforts to respond to the COVID-19 crisis. *Second*, it infringes on the State's sovereignty.

1. The State's response to the COVID-19 crisis will be hindered.

The preliminary injunction will gravely hinder the State's ability to effectively and strategically respond to the COVID-19 pandemic. The injunction exempts *all* surgical abortions from EO-25. Using 2018 data as a baseline, that means that until EO-25 expires on April 30, nearly 100 surgical abortions will unnecessarily take place.[26] And if Plaintiffs' predictions of a backlog created by EO-25 are accurate, that number could be much higher. Each of these procedures will use PPE that should instead be conserved for healthcare professionals and require travel and close

[26] *See* Selected Induced Termination of Pregnancy (ITOP) Data (2018), https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/itop/ITOP2018.pdf. Because medication abortion is available only until 11-weeks gestational age, any abortion performed after that point will be a surgical abortion. In 2018, nearly 10,000 abortions were performed in Tennessee, and roughly 24% of those were performed after 11 weeks. *See id.*

personal contact that could spread COVID-19. These harms are not hypothetical. They are certain to occur.

The district court discounted these concrete harms by lauding Plaintiffs' efforts to "implement[] sanitation procedures" and "minimize the use of PPE" and crediting Plaintiffs' speculation that postponing abortions now might increase the use of PPE later. PI Order, R.244, PageID #6146. Those considerations are beside the point. The goal of EO-25 is to require extraordinary actions from everyone *now* to prevent greater harm *later*. Every exception that is carved out undermines this goal. Some exceptions—i.e., for procedures that cannot be delayed without risking serious adverse medical consequences—are obviously necessary. But exceptions based on claims of "minimal" PPE use and speculation about what might happen months down the road are both unnecessary and perilous. Each exception creates a chink in the armor and sets a dangerous precedent for other providers of non-urgent procedures to seek their own carve-out. The district court abused its discretion by discounting these substantial harms.

2. The State's sovereign authority will be infringed.

In second-guessing the wisdom of the State's policy judgments, the district court deeply intruded on the State's sovereignty. The State's sovereignty is irreparably harmed anytime action taken by its democratically elected leaders is enjoined. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Maryland v. King*, 133

S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). That harm is especially acute here, when the State is exercising its historic police power in a good-faith effort to protect the public health during an unprecedented crisis.

B. Any harm to Plaintiffs is outweighed by public necessity.

To justify a preliminary injunction, the alleged harm must be "actual and imminent" rather than "speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). But Plaintiffs failed to demonstrate that enforcement of EO-25 against surgical abortions would cause any actual and imminent harm, let alone harm substantial enough to outweigh the harms that are certain to befall the State and the public health if the injunction remains in place. Plaintiffs speculate that some women might be harmed if the temporary delay required by EO-25 forces them to undergo more complex abortion procedures or forgo their right to pre-viability abortion altogether, but Plaintiffs presented no concrete evidence that these purported harms are actual and imminent. And EO-25 already provides an exception when delay would in fact pose a risk of serious adverse medical consequences for a patient.

Thus, the only "actual and imminent" harm to Plaintiffs' patients if EO-25 is enforced is their inability to obtain a medical procedure at the precise time and in the precise manner they desire. That harm is not a constitutional injury, and it is hardly unique. It is shared by millions of Tennesseans who are equally affected by

EO-25 and millions more who have been inconvenienced by other restrictions necessitated by COVID-19. It provides no basis for a wholesale exemption from an emergency measure that is necessary to protect the public health.

The preliminary injunction runs directly counter to the public interest. During this unprecedented public-health crisis, the public interest undoubtedly lies in mitigating the threat posed by COVID-19 and protecting those who cannot protect themselves. It is in precisely these circumstances—when society is "under the pressure of great dangers"—that the State may take reasonable measures to restrain individual liberty to protect the common good. *Jacobson*, 197 U.S. at 29. When the State has concluded based on advice from medical experts that some individual liberties must temporarily yield in the public interest, giving abortion providers, and only abortion providers, a wholesale exemption from these temporary restraints is anathema to the public interest.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant an emergency stay of the preliminary injunction while it considers the merits of the State's appeal and then reverse the district court.

Respectfully submitted,

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April 20, 2020

ADDENDUM

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DESIGNATION OF COURT DOCUMENTS

Adams & Boyle, P.C. v. Slatery, No. 3:15-cv-00705 (M.D. Tenn.)

Docket Entry No.	Description	PageID #
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230-1	Plaintiffs' Proposed Supplemental Complaint for Temporary and Injunctive Relief	5695-726
230-2	Plaintiffs' Exhibit A to Proposed Supplemental Complaint, Tennessee Governor's Executive Order 25	5727-30
230-3	Plaintiffs' Exhibit B to Proposed Supplemental Complaint, Letter from the Tennessee Department of Health	5731-32
231	Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction	5738-43
232	Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction	5744-86
232-3	Plaintiffs' Exhibit 3 to Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, Temporary Restraining Order Issued in *Preterm-Cleveland v. Attorney Gen. of Ohio*	5855-63
232-5	Plaintiffs' Exhibit 5 to Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, Declaration of Kimberly Looney, M.D.	5782-904
232-6	Plaintiffs' Exhibit 6 to Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, Declaration of Rebecca Terrell	5905-18
232-7	Plaintiffs' Exhibit 7 to Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, Declaration of Corinne Rovetti, FNP, APRN-BC	5919-30

239	State's Response in Opposition to Plaintiffs' Expedited Motion to File Supplemental Complaint	5990-99
239-1	State's Exhibit A to Response in Opposition to Plaintiffs Expedited Motion to File Supplemental Complaint, COVID-19 Epidemiology and Surveillance Data	6000
239-2	State's Exhibit B to Response in Opposition to Plaintiffs Expedited Motion to File Supplemental Complaint, Tennessee Governor's COVID-19 Bulletin # 14	6001-03
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245	Notice of Appeal	6149-50
246	State's Motion for Stay Pending Appeal	6151-56

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and 32(a)(7)(B) because it contains 5,199 words, excluding the parts enumerated by Fed. R. App. P. 32(f).

This filing also 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 proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

April 20, 2020

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on April 20, 2020, a copy of the Combined Motion for Emergency Stay Pending Appeal and Merits Brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

Attachment 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ADAMS & BOYLE, P.C., et al.,

Plaintiffs,

Civil Action No. 3:15-cv-00705

vs.

HON. BERNARD A. FRIEDMAN

HERBERT H. SLATERY, III, et al.,

Defendants.
_____/

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This matter is presently before the Court on the motion to file a supplemental complaint [docket entry 229] and the motion for a temporary restraining order ("TRO") and/or preliminary injunction [docket entry 231] filed by plaintiffs and proposed plaintiffs (collectively "plaintiffs"). Defendants and proposed defendants (collectively "defendants") have responded to both motions, and plaintiffs have replied. On April 17, 2020, at 11:00 a.m., the Court held a ninety-minute telephonic hearing with counsel for both sides, and oral argument was heard. For the reasons stated below, the Court shall grant plaintiffs' motion to file a supplemental complaint, and it shall grant plaintiffs' motion for a TRO and/or preliminary injunction to the extent plaintiffs seek a preliminary injunction enjoining the enforcement of Tennessee Executive Order 25 ("EO-25") as applied to procedural abortions.[1]

[1] Procedural abortions are one type of abortion. Plaintiffs explain that

> [t]here are two methods of abortion care available in Tennessee: medication abortion or in-office procedural abortion (also referred to as "surgical abortion"). Tr. Vol. 2, 57:18-22 (Young); Looney Decl. ¶ 11. For a medication abortion, the patient takes mifepristone in the clinic and then, 24 to 48 hours later, takes misoprostol at a location of her choosing,

Background

Plaintiffs are providers of reproductive healthcare, including abortion services, in Tennessee. Plaintiffs challenge Tennessee Senate Bill 1222, Tenn. Code Ann. § 39-15-202(a)-(h), requiring women seeking an abortion to receive certain information beforehand in person from the attending physician performing the abortion, or a referring physician, and to then wait at least forty-eight hours after receiving the information before undergoing the procedure. Plaintiffs allege that the statute's "forty-eight-hour delay requirement" unduly burdens their patients' right to obtain an abortion. Plaintiffs, suing on their own behalf and also on behalf of their patients, assert due process and equal protection claims under the Fourteenth Amendment. In September 2019, the Court conducted a week-long bench trial in this matter.

> typically at home. Looney Decl. ¶ 11. The pregnancy is then passed in a process similar to miscarriage. *Id.*; Tr. Vol. 1, 39:15-11 (Wallett). The use of mifepristone in combination with misoprostol is safe and effective to terminate pregnancies up to 11 weeks LMP [last menstrual period] (or 77 days). Looney Decl. ¶ 12.
>
> Although procedural abortion is sometimes referred to as "surgical abortion," it is not what is commonly understood to be surgery, as a procedural abortion involves no incision or general anesthesia. Looney Decl. ¶ 14. In the majority of cases, a procedural abortion is performed using the "aspiration" technique, which involves the use of gentle suction to empty the uterus, typically takes about 5-10 minutes, and may at times involve local anesthesia or conscious sedation. *Id.*; Tr. Vol. 1, 40:12-20 (Wallett); Tr. Vol. 2, 58:9-59:1 (Young). Starting at 14-16 weeks, physicians typically use the dilation and evacuation ("D&E") technique, which requires additional skills and equipment to perform, and takes longer, including longer time spent by the patient in the recovery room. Looney Decl. ¶ 14; Tr. Vol. 1, 40:21-8 (Wallett). Starting around 18 weeks LMP, procedural abortion may be performed as a two-day procedure because a patient receives medications to dilate her cervix the day before the procedure itself. Looney Decl. ¶ 14. For some patients, procedural abortion is safer or medically indicated over medication abortion, such as for patients at increased risk of bleeding. *Id.* ¶ 13.

Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 7-8.

On March 23, 2020, Governor William Lee issued Tennessee Executive Order 18, entitled "An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures." This order provides in part:

> 2. All hospitals and surgical outpatient facilities in the State of Tennessee shall not perform non-essential procedures, which includes any medical procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider. . . . Medical procedures excluded from postponement include . . . pregnancy-related visits and procedures, including labor and delivery . . . .
>
> * * *
>
> 5. This Order shall be effective and enforceable at 12:01 a.m., Central Daylight Time, on March 24, 2020, and shall remain in effect until 12:01 a.m., Central Daylight Time, on April 13, 2020, at which time the suspension of any state laws and rules and the other provisions of this Order shall cease and be of no further force or effect.

On April 8, 2020, Governor Lee issued Tennessee Executive Order 25, entitled "An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures." This order provides in part:

> 2. All healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent. Elective and non-urgent procedures are those procedures that can be delayed until the expiration of this Order because they are not 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 if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider.
>
> 3. In order to conserve personal protective equipment [("PPE")], healthcare providers and facilities in Tennessee must limit attendance to essential personnel in the rooms where surgeries and invasive procedures are being performed.
>
> 4. Non-hospital healthcare providers impacted by this Order are requested and encouraged to provide necessary personal protective equipment in their possession and not required for the emergency care exempted in the Order,

> including, but not limited to, medical gowns, N95 masks, surgical masks, TYVEK suits, boot covers, gloves, and/or eye protection to the Tennessee Emergency Management Agency by delivering such equipment to the nearest open Tennessee National Guard Armory listed on the TEMA website (www.tn.gov/tema) between the hours of 9:00 a.m. and 2:00 p.m.
>
> * * *
>
> 6. This Order shall take effect at 12:01 a.m., Central Daylight Time, on April 9, 2020, and shall remain in effect until 12:01 a.m., Central Daylight Time, on April 30, 2020, at which time the suspension of any state laws and rules and the other provisions of this Order shall cease and be of no further force or effect.
>
> 7. Upon becoming effective, this Order amends and supersedes the provisions of Executive Order No. 18, dated March 23, 2020.

An April 10, 2020, letter signed by defendant State of Tennessee Department of Health Commissioner Lisa Piercey that is addressed to "Health Care Providers" states that

> [t]he intent of Executive Order 25 is to protect the health care providers, staff, patients, and the community from the transmission of COVID-19 and prevent the unnecessary use of the PPE resources that are in extremely short supply, especially N95 masks. Specifically, the Executive Order addresses the following:
>
> - Helps ensure that PPE is preserved, and community spread through close medical interaction is limited during the upcoming weeks in which cases/hospitalizations are expected to increase;
>
> - Expands Executive Order 18 to more specifically cover all procedures that are elective and non-urgent and can be delayed until after the Order without risking serious adverse consequences to a patient; and
>
> - Limits attendance at surgeries and invasive procedures to essential personnel to preserve PPE to the greatest extent possible[.]

Pls.' Mot. to File Suppl. Compl. Ex. B. The letter advises that the "failure to comply [with EO-25] is a Class A misdemeanor and may result in possible disciplinary action by your respective board." *Id.*

On April 13, 2020, plaintiffs filed a motion to file a supplemental complaint and a

motion for a TRO and/or preliminary injunction [docket entries 229 and 231]. As noted above, on April 17, 2020, the Court held a ninety-minute telephonic hearing on these motions in which both sides presented extensive oral argument.

Motion to File a Supplemental Complaint

Plaintiffs seek leave to file a supplemental complaint, a copy of which is attached to their motion as Exhibit 1, pursuant to Fed. R. Civ. P. 15(d). The proposed supplemental complaint alleges that EO-25, as applied to procedural abortions, violates plaintiffs' patients' substantive due process rights under the Fourteenth Amendment. Plaintiffs assert this constitutional challenge on their own behalf and on behalf of their patients.[2] The proposed supplemental complaint names two new plaintiffs – Knoxville Center for Reproductive Health and Dr. Kimberly Looney (Chief Medical Officer of plaintiff Planned Parenthood of Tennessee and North Mississippi) – and two new defendants – Governor Lee and Dr. Rene Saunders (Chair of the Board of Licensing Health Care Facilities). Plaintiffs indicate that one of the proposed plaintiffs "previously appeared as a plaintiff in the action" and that the proposed defendants "will be represented by the same counsel as the other Defendants and share substantially the same interests in this matter as the other Defendants." Pls.' Br. in Support of Mot. to File Suppl. Compl. at 9; Pls.' Reply in Support of Mot. to File Suppl. Compl. at 5.

Fed. R. Civ. P. 15(d) provides in relevant part: "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."

[2] "In [third-party standing] cases, the Supreme Court [has] held that abortion providers have standing to bring due process challenges on behalf of their patients." *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019) (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality); *Diamond v. Charles*, 476 U.S. 54, 65-66 (1986)).

"A supplemental pleading may include new facts, new claims, new defenses, and new parties." *Brian A. v. Bredesen*, No. 3:00-0445, 2009 WL 4730352, at *2 (M.D. Tenn. Dec. 4, 2009) (citing *Stewart v. Shelby Tissue, Inc.*, 189 F.R.D. 357, 361 (W.D. Tenn. 1999)). "Generally, [a motion to supplement under Rule 15(d)] can be brought at any time the action is before the trial court." *Id.* at *1 (citing *Stewart*, 189 F.R.D. at 362). "The granting of a motion to file a supplemental pleading is within the discretion of the trial court and, as a general rule, applications for leave to file a supplemental pleading are normally granted." *Id.* (*Stewart*, 189 F.R.D. at 362); *see also Bostic v. Biggs*, No. 3:14-1068, 2016 WL 4177094, at *1 (M.D. Tenn. Aug. 8, 2016) ("[T]he granting or refusing of leave to file a supplemental pleading rests in the discretion of the trial court." (citing *Schuckman v. Rubenstein*, 164 F.2d 952 (6th Cir. 1947))), *R&R adopted*, No. 3:14-CV-01068, 2016 WL 8730550 (M.D. Tenn. Sept. 9, 2016).

The Court finds that allowing plaintiffs to file a supplemental complaint will promote judicial economy. The Court is familiar with the subject matter of the proposed supplemental complaint from having presided over the September 2019 trial. The second amended complaint and the proposed supplemental complaint contain overlapping factual and legal issues, and they involve overlapping parties and counsel. The Court has considered defendants' arguments with respect to prejudice and finds them unpersuasive. A supplemental complaint will not prejudice defendants, who have been given notice and have had an opportunity to respond, and the gains in terms of judicial economy outweigh any possible prejudice to them. Therefore, the Court shall grant plaintiffs' motion to file a supplemental complaint.

Motion for a Temporary Restraining Order and/or Preliminary Injunction

Plaintiffs seek the issuance of a TRO and/or preliminary injunction pursuant to Fed. R. Civ. P. 65(b) to enjoin the enforcement of EO-25 insofar as that order prohibits all procedural

abortions except those necessary "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 if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider." EO-25 ¶ 2.

As this Court has noted, a preliminary injunction is "extraordinary relief." *I Love Juice Bar Franchising, LLC v. ILJB Charlotte Juice, LLC*, No. 3:19-CV-00981, 2019 WL 6050283, at *3 (M.D. Tenn. Nov. 15, 2019) (citing *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972)). In determining whether to issue a TRO or a preliminary injunction the Court must weigh the following factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017) (internal citations omitted). These "are factors to be balanced, not prerequisites that must be met," and "[n]o single factor will be determinative as to the appropriateness of equitable relief." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (citing *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994), and *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). However, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

Having read all of the parties' written submissions and considered all of their arguments carefully, and being mindful of the fact that such relief is extraordinary, the Court finds

that all four factors weigh in favor of granting a preliminary injunction.[3] As to plaintiffs' likelihood of success on the merits of their constitutional challenge to EO-25,

> [t]he fundamental right to privacy contained in the Due Process Clause of the Fourteenth Amendment includes the right to choose to have an abortion, subject to certain limitations. *See Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* confirmed that a woman has the right to choose to have an abortion prior to viability and to obtain an abortion without "undue interference from the State." 505 U.S. at 846, 112 S.Ct. 2791.

Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 602 (6th Cir. 2006). A state regulation is constitutionally invalid if it places an "undue burden" on a woman's right to decide to have an abortion. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (citing *Casey*, 505 U.S. at 878). An undue burden exists if the "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877.

In the present case, plaintiffs have shown that they are likely to succeed on the merits of their claim because the enforcement of EO-25 creates an undue burden on the right of women in Tennessee to choose to have a pre-viability abortion. EO-25 has caused plaintiffs to cancel all procedural abortions to avoid risking criminal and other penalties. Looney Decl. ¶¶ 5, 43; Terrell Decl. ¶¶ 36-37; Rovetti Decl. ¶¶ 5, 14. As a result, since EO-25 took effect on April 9, procedural abortions have been unavailable in Tennessee for women who are more than eleven

[3] The Court notes that the same issue has been decided by five other courts, all of which issued a TRO in those cases at plaintiffs' request. *See Robinson v. Marshall*, No. 2:19-cv-00365 (M.D. Ala. Mar. 30, 2020); *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020); *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020); *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020), *appeal dismissed*, No. 20-6045, 2020 WL 1860683 (10th Cir. Apr. 13, 2020); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449-KGB (E.D. Ark. Apr. 14, 2020).

weeks pregnant, as measured from the first day of their last menstrual period ("LMP"),[4] and for women of any gestational age for whom a medication abortion is contraindicated.[5] Procedural abortions made up approximately fifty to sixty percent of the abortions that plaintiffs performed in 2019 and/or 2020. Looney Decl. ¶¶ 16-17 (2,390 procedural abortions out of 4,742 abortions performed in 2019; 917 procedural abortions out of 1,700 abortions performed in January to March 2020); Terrell Decl. ¶ 10 (1,654 procedural abortions out of 2,792 abortions performed in 2019); Rovetti ¶ 15 (827 procedural abortions out of 1,366 abortions performed in 2019). EO-25 currently expires on April 30, but plaintiffs have provided evidence that the order is likely to be renewed or extended beyond that date. Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 4 n.5, 11, 23-24; Looney Decl. ¶ 58; Terrell Decl. ¶¶ 15, 45; Rovetti Decl. ¶¶ 21-22; Pls.' Reply in Support of Mot. for TRO and/or Prelim. Inj. at 1. Defendants do not dispute the likelihood of a renewal or extension of EO-25, and they acknowledge that Tennessee's COVID-19 infections "have not yet reached their peak." Defs.' Resp. to Mot. for TRO and/or Prelim. Inj. at 8, 21. Therefore, the Court finds that, for purposes of seeking a preliminary injunction, plaintiffs have shown that EO-25 "plac[es] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877.

Plaintiffs have also shown that they would suffer irreparable harm if defendants are not enjoined from enforcing EO-25 as it relates to procedural abortions. Plaintiffs argue that EO-25, as applied to procedural abortions, "prevents Tennessee patients from exercising their

[4] Medication abortions are available in Tennessee through eleven weeks, zero days LMP. Looney Decl. ¶¶ 2, 15; Terrell Decl. ¶ 9. "After 11 weeks, 0 days LMP, patients will generally need a procedural abortion." Looney Decl. ¶ 13.

[5] "[S]ome patients with pregnancies less than 11 weeks, 0 days LMP will have a procedural abortion for various reasons, including because of an underlying medical condition, such as an increased risk of bleeding, that makes this the safer option." Looney Decl. ¶ 13 (footnote omitted).

fundamental constitutional right to terminate a pregnancy" guaranteed by the Fourteenth Amendment. Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 30. Plaintiffs also argue that "[f]orcing patients to forgo abortion care and remain pregnant against their will inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm." *Id.* at 31. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984)). "[T]o establish irreparable harm based upon the denial of a constitutional right, the plaintiff must first show a substantial likelihood of success on the underlying constitutional claim." *Bokhari v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:11-00088, 2012 WL 1165907, at *8 (M.D. Tenn. Apr. 9, 2012) (citing *Overstreet*, 305 F.3d at 578). As noted above, plaintiffs have made this required showing of success on their substantive due process claim. Moreover, abortion is a time-sensitive procedure. *See* Looney Decl. ¶¶ 20, 43. Delaying a woman's access to abortion even by a matter of days can result in her having to undergo a lengthier and more complex procedure that involves progressively greater health risks, *see id.*; Rovetti Decl. ¶ 22, or can result in her losing the right to obtain an abortion altogether. Therefore, plaintiffs have demonstrated that enforcement of EO-25 causes them irreparable harm.

In terms of balancing the harm to others, plaintiffs argue convincingly that the irreparable harm they would suffer without injunctive relief, which includes violation of their constitutional rights, "vastly outweigh[s]" any "temporary reduction of PPE" resulting from the enforcement of EO-25. Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 32. Plaintiffs

claim that injunctive relief "will simply preserve 'the status quo that has been in place for more than 40 years since *Roe* was decided, and some 25 years since *Casey* followed.'" *Id.* (quoting *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019)). Defendants argue that granting the requested relief would "irreparably harm Tennessee's authority to protect the safety and health of its citizens" and that it would "also harm the public by hindering the State's otherwise comprehensive efforts to respond to the COVID-19 pandemic." Defs.' Resp. to Mot. for TRO and/or Prelim. Inj. at 21. But plaintiffs have provided evidence, which the Court accepts as accurate, that they have implemented sanitation procedures, as well as procedures to minimize the use of PPE, that they do not use N95 masks or other hospital resources needed to respond to COVID-19, and that a procedural abortion uses less PPE and involves significantly less patient interaction than carrying a pregnancy to term and giving birth. In addition, plaintiffs state that women may travel out-of-state to obtain an abortion while EO-25 is in effect, risking infection of COVID-19 and transmission to others when they return to Tennessee. *See* Rovetti Decl. ¶ 17 (stating that four patients with appointments on the day EO-25 went into effect were referred to an abortion clinic in Atlanta because the patients were not eligible for medication abortion care). While the stated goal of EO-25 to preserve PPE is unquestionably laudable, defendants have presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions. Plaintiffs, on the other hand, offered convincing evidence demonstrating the contrary. The balancing of harms therefore favors plaintiffs.

The fourth factor the Court must consider in deciding whether to issue a preliminary injunction also favors plaintiffs because "it is always in the public interest to prevent violation of a party's constitutional rights." *Thomas v. Schroer*, 116 F. Supp. 3d 869, 879 (W.D. Tenn. 2015) (citing *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 274 F.3d

377, 400 (6th Cir. 2001)); *see also Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (stating that protection of constitutional rights "is always in the public interest").

In seeking injunctive relief, plaintiffs ask that the Court waive the bond requirement of Fed. R. Civ. P. 65(c). Defendants do not oppose this request. Rule 65(c) states that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, "the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security," *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (internal citation omitted), and "a court has no mandatory duty to impose a bond as a condition for issuance of injunctive relief." *Stooksbury v. Ross*, No. 3:09-CV-498, 2012 WL 12841901, at *6 (E.D. Tenn. Aug. 1, 2012) (citing *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 952 (6th Cir. 2007)). "When determining whether to require the party seeking an injunction to give security, courts have considered factors such as the strength of the movant's case and whether a strong public interest is present." *I Love Juice Bar Franchising, LLC*, 2019 WL 6050283, at *14 (citing *Moltan Co.*, 55 F.3d at 1176). In light of these factors, the Court declines to impose a bond requirement in this case.

Conclusion

Accordingly,

IT IS ORDERED that plaintiffs' motion to file a supplemental complaint is granted. Within seven days of the date of this order, plaintiffs shall file a version of the supplemental

complaint that is identical to the one attached to plaintiffs' motion as Exhibit 1.

IT IS FURTHER ORDERED that plaintiffs' motion for a TRO and/or preliminary injunction is granted to the following extent: Defendants are hereby immediately enjoined from enforcing EO-25 as applied to procedural abortions.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: April 17, 2020
Detroit, Michigan

Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

ADAMS & BOYLE, P.C.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Docket No. 3:15-cv-0705**
	)	**Judge Friedman / Frensley**
HERBERT H. SLATERY III, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Defendants Governor Bill Lee; Herbert H. Slatery III; Lisa Piercey, M.D.; W. Reeves Johnson, Jr., M.D.; Glenn R. Funk; Amy Weirich; Barry Staubus; Charme Allen; and Rene Saunders, M.D., in their official capacities, hereby give notice of their appeal to the United States Court of Appeals for the Sixth Circuit from the district court's April 17, 2020 Order granting a preliminary injunction. (*See* D.E. 244.)

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice has been served on the following counsel of record through the Electronic Filing System on this 17th day of April, 2020:

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