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 U.S. District Court, Middle District of Tennessee
No. 3:15-cv-00705

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

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INTEREST OF *AMICI*[1]

The *amici* States of Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia are engaged in responding to the COVID-19 pandemic. With some state-by-state variation, they review, defend, and enforce a wide variety of matters during a state-declared emergency. The rare emergency underlying this case—the pandemic spread of COVID-19—is a dangerous situation affecting virtually every aspect of American life.

The *amici* States have a strong interest in this case because its outcome profoundly and immediately affects both the rule of law and States' ability to enforce reasonable, non-arbitrary public-health orders during this rapidly developing pandemic. *Amici* have an interest in defending good-faith and non-arbitrary actions designed to save American lives.

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

SUMMARY OF ARGUMENT

In response to a once-in-a-century pandemic, the Governor of Tennessee issued an executive order that seeks to slow the spread of COVID-19, free up capacity in hospitals, and prioritize the use of personal protective equipment for doctors and nurses treating patients of the virus by ordering the postponement of all elective and non-urgent medical procedures. When such emergency measures are taken in a reasonable, non-arbitrary manner—as Tennessee's was—they lie directly in the heartland of the States' police power. The federal courts—by constitutional design—are removed from responsibility for such day-to-day decision-making during disasters such as pandemics. It is the States and their elected officials who bear constitutional responsibility for those decisions and the difficult consequences flowing from them, and federal courts should only second-guess those decisions when they are arbitrary, oppressive, or palpably violate a fundamental constitutional right. The district court did not even attempt to apply this standard, but, even if it had, it could have only concluded that nothing of the sort has happened in this case.

The daily-growing COVID-19 death toll acutely illustrates the exigent circumstances facing the States. According to statistics kept by Johns Hopkins University, 825,306 Americans are infected with COVID-19, 45,075 have died as of April 22, 2020,[2] and these numbers climb daily. As these numbers grow, States are confronted with a variety of interrelated challenges.[3] The executive order at issue in this case is one of many measures that Tennessee has taken to address those challenges.

Tennessee's executive order is facially neutral, applicable to all medical providers, and neither arbitrary nor oppressive. The Order requires the postponement, for a three-week period ending on April 30, of all "surgical and invasive procedures that are elective and non-urgent." Tenn. Exec. Order 25 at 2–3.[4] It defines "elective and non-urgent"

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[2] Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited Apr. 22, 2020).

[3] *See, e.g.,* 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 (last visited Apr. 21, 2020).

[4] https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf (last visited Apr. 21, 2020).

procedures as:

> 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.

Id.

Notwithstanding Tennessee's clear interests in deciding how best to protect its residents under such obviously exigent circumstances, and the reasonable, non-arbitrary nature of the Governor's executive order, the district court created a judicially superintended zone of protection for abortion providers, essentially giving them with preferential treatment among medical professionals. This is inappropriate. Rules should be applied neutrally and evenhandedly. No one should be singled out for arbitrary treatment—whether preferential or detrimental. But that is what the district court's preliminary injunction did in this instance.

This Court should stay and vacate the district court's preliminary injunction because the district court committed two overarching errors in granting a preliminary injunction: (1) it failed to apply—or even meaningfully acknowledge—the well-established framework from

Jacobson v. Massachusetts, 197 U.S. 11 (1905), that governs a State's exercise of emergency powers during a public health crisis; and (2) it failed to show appropriate respect for the State of Tennessee's authority under its police power to make reasonable, non-arbitrary policy decisions about how best to protect its citizens during the COVID-19 pandemic.

ARGUMENT

I. The district court evaluated the executive order under the wrong standard.

The United States of America is the land of liberty. There is no doubt about that. But our liberty is an *ordered* liberty, not an *unrestrained* liberty. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). This means that there are times when, in the interest of public safety, individual conduct may be temporarily restricted to prevent "liberty itself [from being] lost in the excesses of unrestrained abuses." *Id.* The district court failed to appreciate this, and failed to apply the correct legal standard as a result.

Epidemics are, perhaps, one of the oldest known and least-questioned justifications for such temporary restrictions. *See Morgan's La. & T. R. & S. S. Co. v. Bd. of Health of State of La.*, 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 traces 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 erred in failing to recognize Tennessee's 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; *see generally Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902).

Of course, epidemics do not give state governments a blank check to restrict liberty in whatever manner they decide. While it is true that "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," *Jacobson*, 197 U.S. at 29, it is equally true that the Supreme Court has provided a framework for determining the validity of such restraints.

In the well-known case of *Jacobson v. Massachusetts*, the Court established the enduring framework for evaluating the constitutionality of emergency measures taken in response to public health crises. *Jacobson* implicitly acknowledged that states have expanded authority when dealing with true emergencies, holding that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. But, *Jacobson* also recognized that while a state's authority might be greater in emergencies, it is not unlimited. Specifically, an emergency restriction on citizens is unconstitutional when it has "no real or substantial relation" to addressing the emergency, or is, "beyond all question, a plain, palpable invasion of rights secured by [the Constitution]." *Id.* at 31 (citations omitted). In other words, *reasonable* measures that have a real and substantial relation to the emergency are constitutional, but "arbitrary and oppressive" measures are not.[5] *Id.* at 38.

[5] For example, a state cannot attempt to stem the spread of an infectious disease by shutting down religious services that are conducted responsibly and in compliance with neutral social-distancing measures while arbitrarily allowing other establishments, like retail stores, to remain open to the public. *See On Fire Christian Center, Inc. v. Fischer*, __ F. Supp. 3d __, Civil Action No. 3:20-CV-264-JRW, 2020 WL 1820249, at *6–*7 (W.D. Ky. Apr. 11, 2020). Likewise, a state cannot pretextually

The Tennessee executive order at issue in this case easily meets the *Jacobson* standard. Inexplicably, however, the district court failed to even mention this standard, much less attempt to apply it.[6] Had it done so, it is difficult to see how it could have come to any conclusion but that a preliminary injunction is unwarranted here.

The Fifth Circuit's recent decisions on this very issue—one as recent as two days ago—prove this point. *See In re Abbott*, __ F.3d __, No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020) ("*Abbott II*"); *In re Abbott*, __ F.3d __, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) ("*Abbott I*").[7] At issue in the *Abbott* cases is an executive order

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squelch dissent and protest by arbitrarily excluding citizens from certain public fora.

[6] In an order entered on April 21, 2020, the district court denied Tennessee's motion for a stay pending appeal. The district court expressly cited *Jacobson* in that order, but it did little more than pay lip service to the case. *See* Doc. 252. The court also stated that it had considered *Jacobson* in its earlier preliminary injunction decision, but did not "find[ ] it necessary to reference this case by name." *Id.* at 4, PageID # 6268. The problem, however, is not that the district court failed to cite *Jacobson* in its preliminary injunction decision, but that it failed to engage with and apply the *Jacobson* standard correctly.

[7] The Eighth Circuit issued an opinion in a similar case on the morning of April 22, 2020. Because that decision is so new, counsel have not had time to analyze it. However, it appears to be in accord with the Fifth Circuit's decisions in the *Abbott* cases. *See In re Rutledge*, No. 20-1791,

issued by the Governor of Texas that is almost identical to the Tennessee executive order at issue here. Summarizing *Jacobson* in *Abbott I*, the Fifth Circuit articulated the applicable standard:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law. Courts may ask whether the state's emergency measures lack basic exceptions for extreme cases, and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

2020 WL 1685929, at *7 (quotations and citations omitted). Because the district court had not even attempted to apply this legal framework, the Fifth Circuit held that the temporary restraining order was "a patently erroneous result." *Id.* at *8 (quotation omitted).

On remand, the district court entered another temporary restraining order with only a passing reference to *Jacobson*. *See Planned Parenthood Center for Choice v. Abbott*, Cause No. A-20-CV-323-LY, 2020 WL 1815587, at *6 (W.D. Tex. Apr. 9, 2020). Because the new temporary

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slip op. at 14 (8th Cir. Apr. 22, 2020) ("Aside from summarily stating that its conclusion is consistent with *Jacobson*, the district court failed to apply that requisite framework and, thus, abused its discretion.")

restraining order also failed to apply *Jacobson*'s standard, the Fifth Circuit granted mandamus relief to Texas, finding that the district court's failure to follow the mandate from *Abbott I* "led to patently erroneous results and usurped the state's authority to craft emergency public health measures." *Abbott II*, 2020 WL 1911216, at *9 (citation omitted). Absent from the district court's temporary restraining order was any legitimate attempt to develop the necessary factual record or make a serious inquiry as to whether the executive order had a real or substantial relation to addressing the COVID-19 pandemic. The same is true of the preliminary injunction that the district court entered here.

Rather than apply *Jacobson*, the district court looked exclusively to the Supreme Court's abortion jurisprudence as developed through *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Whole Woman's Health v. Hellerstedt*. In doing so, it essentially held that abortion rights have more protection than any other rights and stand alone in being exempt from the *Jacobson* framework. This is so patently incorrect that to state it is to refute it. There is no authority whatsoever to support the notion that abortion rights have super-constitutional status that places them above and beyond the rules that apply to all other

constitutional rights. "[N]othing in the Supreme Court's abortion cases suggests that abortion rights are somehow exempt from the *Jacobson* framework. Quite the contrary, the Court has consistently cited *Jacobson* in its abortion decisions." *Abbott I*, 2020 WL 1685929, at *7.

"[T]hree of the Court's principal abortion cases—*Roe*, *Casey*, and [*Gonzales v.*] *Carhart*—cite *Jacobson* with approval and without suggesting that abortion rights are somehow exempt from its framework." *Id.* In *Roe*, for example, "the Supreme Court cited *Jacobson* as one example of the Court's refusal to recognize an "'unlimited right to do with one's body as one pleases.'" *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 154 (1973)). The *Roe* Court further "reasoned that the right to abortion 'is not unqualified and must be considered against important state interests in regulation.'" *Id.* (quoting *Roe*, 410 U.S. at 154). And, in *Casey*, "the plurality cited *Jacobson* as one example of the Court's balance between 'personal autonomy and bodily integrity' on one hand and 'governmental power to mandate medical treatment or to bar its rejection' on the other." *Id.* (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 857 (1992)). Thus, far from creating an exception to *Jacobson*'s framework for evaluating the constitutionality of a state's

emergency-response measures, the Supreme Court's abortion jurisprudence *actually contradicts* the existence of such an exception. The district court plainly erred by proceeding as if there were such an exception. Abortion rights do not exist on a higher plane than other rights, and abortion providers are not entitled to exemptions from neutrally applicable rules that apply to all other medical professionals. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.").

II. The district court's ruling gravely threatens state authority to protect public health.

Federalism is one of the bedrock principles of our Republic. The constitutional design established by the Founders places a limited number of issues within the realm of federal control and leaves the remainder for the states to govern. Among the most important of the issues left to the states is the police power, which is the authority to enact reasonable regulations to protect the public health and safety. *See Jacobson*, 197 U.S. at 25. In times of emergency, this power takes on special importance. In such circumstances, state officials' emergency

police-power decisions are not subject to being second-guessed by federal courts so long as the state officials' decisions are reasonable, non-arbitrary, and unoppressive. Federal courts simply are not equipped or authorized to judge the wisdom of those decisions. Specifically, a federal court is not "justified in disregarding the action of the [Governor] simply because in its opinion that particular method was—perhaps, or possibly—not the best." *Abbott II*, 2020 WL 1911216, at *13 (quoting *Jacobson*, 197 U.S. at 35). But that is essentially what the district court did in this case. And, in doing so, it failed to show adequate respect for Tennessee's police power and effectively usurped that power for itself. *See id.*

Significantly, the district court did not deny that a health crisis exists. But it improperly minimized the harm and broader systemic damage caused by the categorical exemption it created. It essentially found that abortion providers (and abortions) are exceptional, but it failed to recognize that this is a legally unjustified exception that—in its arbitrariness—simply exacerbates the problems facing Tennessee. *Cf. Pre-Term Cleveland v. Attorney General of Ohio*, No. 20-3365, 2020 WL 1673310, at *1–*2 (6th Cir. Apr. 6, 2020) (finding that the state had not

demonstrated irretrievable harm because the district court's temporary restraining order did not create a blanket exception allowing any and all elective surgical abortions).

The damage from the district court's erroneous ruling is not solely limited to Tennessee. If left unchecked, the ruling below will engender more litigation. Such litigation will only divert attention and resources away from addressing the pandemic. States are facing an onslaught of litigation related to COVID-19. For example, prison advocacy groups in Louisiana and Mississippi are demanding that federal judges second-guess or restrict the choices of prison officials on how to manage prison populations. *See, e.g.*, *Gumns v. Edwards*, No. 3:20-cv-00231-SDD-RLB (M.D. La.) (class action seeking mass prisoner release on Eighth Amendment grounds); *Amos v. Taylor*, No. 4:20-cv-00007-DMB-JMV, Doc. # 59 (N.D. Miss. Mar. 16, 2020) (same); *Graham v. Allegheny Cty.*, No. 2:20-cv-00496-CB-CRE (W.D. Pa.) (same).

Our constitutional structure vests state officials with the duty and power to protect the public and address downstream consequences of their carefully calibrated emergency decisions. The federal judiciary is certainly authorized and equipped to apply judicial standards to evaluate

the constitutionality of States' emergency measures. That is, the federal judiciary can inquire as to whether an emergency measure bears a real and substantial relation to the emergency, and whether it is arbitrary and oppressive. But that is as far as the judiciary's authority goes. It is uniquely unsuited to second-guessing the wisdom and judgment of infectious disease experts, public health officials, and state disaster managers.

Giving abortion providers a judicially created exception to the Tennessee Governor's reasonable, non-arbitrary executive order simply undermines Tennessee's ability to exercise its own police power. Indeed, it effectively appropriates that power to a branch of the federal government. And that is obviously inappropriate. No part of the federal government has any general police power. Only the states have such power. *See* U.S. Const. amend. X; *see also* The Federalist No. 45, at 260–61 (James Madison) (Clinton Rossiter ed., 1961, reprinted 1999) ("The powers delegated by the . . . Constitution to the federal government are few and defined. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern

the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

CONCLUSION

The district court substituted its judgment for that of state public-health officials based upon a flawed interpretation of Supreme Court jurisprudence and a factually deficient record. The Court should vacate and stay the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 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.

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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 3,116 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.

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Dated: April 22, 2020