No. 20-3365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVE YOST, ATTORNEY GENERAL OF OHIO, et al.,	:	
Defendants-Appellants,	:	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division
v.	:	
PRETERM-CLEVELAND, et al.,	:	District Court Case No. 2:19-cv-360
Plaintiffs-Appellees.	:	

REPLY

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
DIANE BREY
ZACHERY P. KELLER
Deputy Solicitors General
HEATHER L. BUCHANAN
Senior Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

Other Authorities

REPLY

"The Constitution created a government dedicated to equal justice under law." *Cooper v. Aaron*, 358 U.S. 1, 9 (1958). That principle cannot be reconciled with the appellees' theory of this case, which makes abortion providers more equal than everyone else. In their *Animal Farm* vision of the Constitution, every other profession may be forced to cease non-essential activities during a pandemic—even constitutionally protected activities like art shows and political rallies—but abortion providers must be allowed to go on performing business as usual. While every other litigant must *prove* entitlement to a preliminary injunction, abortion providers can simply assert that a law poses an inconvenience and win relief—even in cases where the district court *acknowledges* that the challenged law is constitutional in all its applications, as the District Court in this case now has. *See* R.52, Order Denying Stay, PageID#1022–23. While the State may appeal temporary restraining orders that cause irreparable harm to the public safety, they may not do so when an appeal might cause abortion providers, just like every other doctor, to temporarily change the way they run their practices.

That vision is not our Constitution's. Our Constitution permits the States to require everyone, including abortion providers, to do their part to stop the spread of a deadly, fast-spreading disease. That means Ohio may halt elective surgeries to

preserve PPEs for those responding to COVID-19. And it means that Ohio may apply this generally applicable order even to abortion providers, requiring them to perform abortions without surgery, and to delay surgical abortions, where possible. That is all the Director's Order does.

In the current pandemic, everyone is making sacrifices. Some more than others. *See* Michael Schwirtz, *Nurses Die, Doctors Fall Sick and Panic Rises on Virus Front Lines*, New York Times (March 31, 2020), online at https://www.nytimes.com/2020/03/30/nyregion/ny-coronavirus-doctors-sick.html. The State can reasonably, and constitutionally, ask abortion providers to do their part.

ARGUMENT

The plaintiffs declined to file a merits brief, Resp.14 n.7, despite an order from the Clerk of the Court ordering a response to the State's Combined Motion and Brief. (That ought to be regarded as a waiver of the right to do so.) They do respond to the State's request for a stay of the District Court's ruling, arguing that this Court lacks jurisdiction over the appeal and that the stay request fails regardless. Neither argument is correct.

I. The Court has jurisdiction over this appeal.

The appellees concede that parties may immediately appeal a temporary restraining order in some cases. Resp.15. In particular, parties may appeal such

orders when, because of time-sensitive circumstances, delaying review "threaten[s] to inflict irretrievable harms." *See Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1005–06 (6th Cir. 2006). They may also immediately appeal a temporary restraining order that goes beyond "merely preserving the status quo." *Id.* at 1006 (quotations omitted). Both exceptions apply here.

A. First, the temporary restraining order, at a bare minimum, threatens to inflict irretrievable harm. *See id.* at 1005–06. It is hard to imagine more extreme, time-sensitive circumstances than the circumstances of this case. Much like an election, *id.*, or an execution, *Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007), the spread of a worldwide pandemic qualifies as an "irreversible event," *Ohio Republican Party v. Brunner*, 544 F.3d 711, 715 (6th Cir. 2008), under any reasonable definition. There is no unringing the bell if the implementation of the Director's Order is wrongfully delayed. That order is designed to preserve PPEs for use by those responding to the COVID-19 pandemic. Right now, our nation and the State face a critical shortage of PPEs—equipment needed to protect doctors, nurses, hospital employees, first responders, and others from contracting and spreading the illness. Every piece of PPE the appellees expend on a surgical abortion is one that those most in need of such equipment cannot use to protect themselves—and, ultimately, the rest of the population—from COVID-19. It is not at

all "hyperbole," Resp.21, to suggest that allowing the appellees to use up PPEs will cause deaths. That is irretrievable harm that justifies an immediate appeal.

The need for an immediate appeal is especially great because the District Court has effectively announced its intention to extend the temporary restraining order. It set a briefing schedule that will not wrap up until *after* the temporary restraining order would expire without an extension. Resp.11–12. Even the appellees admit that the District Court will not rule for at least a "few" weeks. Resp.16.

The appellees respond that the ruling below threatens no irretrievable harm because it will actually help *preserve* PPEs. According to the appellees, the Director's Order, by causing some women to delay abortions, will cause them to need more-complicated procedures that "will at least double the PPE needed for abortion care." Resp.18. Thus, they say, the order will *increase* the amount of PPEs expended by abortion providers and thus undermine the COVID-19 response.

This argument misunderstands the point of the Director's Order. The goal of the Director's Order is to preserve PPEs in the immediate near-term. This ensures that, until producers of PPEs can ramp up manufacturing to meet the rapidly expanding demand, those most in danger of contracting the disease are not without protection. If the State's efforts work, and if supply increases enough, then there will be enough PPEs for use even in elective surgeries. So the fact that the order

might require (some) abortionists to use more PPEs weeks or months from now (in some cases) is really beside the point. Anyway, Dr. Acton's views on this critical public-health issue are entitled to a good deal more deference than those of the appellees, who did not introduce a single piece of evidence from an epidemiologist capable of providing meaningful insight on the need for preserving PPEs.

B. Aside from the serious risk of irretrievable harm, this Court has jurisdiction because the District Court's ruling alters the *status quo* instead of preserving it. Dr. Acton issued the Director's Order on March 17, 2020. R.43, TRO, PageID#863. In the weeks since, Ohioans from Toledo to Marietta, and Cincinnati to Ashtabula, ceased providing and receiving non-essential surgeries. Even the appellees claimed to have been complying with the Director's Order for two weeks before they sued on March 30, and for ten days after the Attorney General notified them of the need to comply. *Id.*, PageID#863–64; Resp.9. The District Court's temporary restraining order changes this *status quo* by forbidding the State from enforcing the Director's Order in at least some circumstances. (Apparently, anyway. As this brief addresses below, it is now unclear what the District Court is purporting to enjoin. *See below* 14–15.) And by altering the *status quo*, the District Court keeps Ohio from doing what it can to preserve all PPEs except for those needed to carry out essential surgeries and treat COVID-19. Thus, immediate appeal is the

only "meaningful appellate option[]" for maintaining the *status quo*, *Workman*, 486 F.3d at 904, which is critical to the State's anti-pandemic efforts. The appellees offer no response to this. *See* Resp.14–16.

C. Finally, a word on timing. The appellees suggest that, in conferences before the District Court, the State consented to slow-walking the preliminary-injunction proceedings so that no decision would issue until mid-April. Resp.11–12. They even say the State agreed that the District Court "should extend the TRO under Federal Rule of Civil Procedure 65(b)(2)." Resp.12. That never happened. The State was clear in requesting a more-expedited briefing schedule and specifically informed the District Court that it would be filing an immediate appeal given the urgency of this matter. So any suggestion that the State failed to inform the District Court of the need for a speedy resolution, and that it thereby created the need for an immediate appeal, is false.

* * *

In sum, given the time pressure the State faces in having the Director's Order restored before it is too late to serve its function, the ruling below is a preliminary injunction in all but name. The Court has jurisdiction to entertain this appeal.

II. The State is entitled to a stay pending appeal and reversal on the merits.

On the merits, this curious case recently got curiouser. On April 2, in an opinion denying the State's request for a stay pending appeal, the District Court reported that it read the State's Sixth Circuit brief, that it *agreed* with the State's interpretation of the Director's Order, and that it *agreed* (apparently) that the Director's Order is constitutional in all of its applications. R.52, Order Denying Stay, PageID#1022–23. Yet, the District Court declined to issue a stay pending appeal, thus leaving in place a ruling that enjoins enforcement—in some, unknown applications that may not exist—of a public-health order that the court itself believes to be constitutional in every application.

Given that the District Court has now recognized the validity of the Director's Order, the appellees have a tough row to hoe in disputing the State's likelihood of prevailing on the merits. And if the State is likely to prevail on the merits, it has satisfied the other preliminary-injunction factors, too. The appellees mount a defense of the District Court's now-admittedly erroneous order, but the defense fails.

A. The State has shown a likelihood of success on the merits.

1. The Director's Order imposes no undue burden on abortion rights and is therefore constitutional. A law regulating abortion imposes an undue burden only

if it has "the purpose" or the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality). The test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). To win an order temporarily restraining or preliminarily enjoining an abortion law, plaintiffs must make a "*clear showing*" of likely success on the merits. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

The plaintiffs did not make that showing. Even in non-pandemic times, States may ban abortion *methods* as long as they allow women to pursue abortions through other methods. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). So the Director's Order is constitutional insofar as it requires doctors to perform medication abortions rather than surgical abortions when they can safely do so. The fact that the Director's Order will require some women to delay their abortions does not undermine its constitutionality. The undue-burden test permits health-and-safety regulations that delay the obtaining of an abortion, provided the regulation's benefits outweigh its costs. *See Casey*, 505 U.S. at 886; *Whole Woman's Health*, 136 S. Ct. at 2309. Here, the requirement to delay non-essential surgical abortions passes constitutional muster. Doctors must delay *only* surgical abortions, and *only if* the

patient can safely postpone the procedure without losing her right to abort before viability. Given the immense benefits of requiring delays of non-essential surgeries—preserving as many PPEs as possible for those responding to COVID-19, until manufacturers can ramp up production to meet demand—any burden caused by delay is amply justified. *See* States Br.20–21. That is particularly true given that States have immense power to take drastic steps, including steps that would otherwise violate the Constitution, to stop the spread of a pandemic. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902).

2. The appellees respond with a collection of errors and irrelevancies. Starting with the errors, they deny that they had the burden of making a "clear showing" of likely success on the merits. Resp.17 n.8. But the "clear showing" language is a direct quote from an opinion of the Supreme Court of the United States. *Mazurek*, 520 U.S. at 972 (emphasis omitted). The appellees' need to run from binding precedent is a good sign they lack the arguments needed to win.

And so they do. Recall that the undue-burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. The appellees try to avoid the need for balancing by asserting that "the Director's Order does not

serve a valid state interest." Resp. 19 n.12. According to the appellees, Dr. Amy Acton, a public-health expert working night and day to save Ohioans, issued the Director's Order *for no reason at all*. That rather-extreme accusation apparently rests on the argument that the Director's Order will cause some women to delay having an abortion until they need a procedure that "will at least double the PPE needed for abortion care." Resp.18. So, according to the appellees, Dr. Acton has it all wrong: her order will deplete the supply of PPEs instead of preserving it. As noted above, this fails to appreciate that one of the main purposes of the Director's Order is to preserve PPEs during the time when the State and the country face a shortage. Hopefully, that shortage will not last too long; producers will meet demand, and (if the States are allowed to implement their orders) the rate of COVID-19 infections will slow. If that happens, *it does not matter* whether abortion providers will need more PPEs weeks or months from now, as PPEs will not be in such high demand.

The appellees also hypothesize that *some* patients, rather than delaying their abortions, "will travel out of state" to obtain PPE-necessitating abortions in States doing less than Ohio to preserve PPEs. That is perhaps true (though this is at odds with abortion providers' oft-repeated theory that traveling over state lines is an immense burden). But even if *some* patients do this in the midst of a pandemic bad enough to inspire stay-at-home orders, most will not. And so the fact that some pa-

tients may leave Ohio to get treatment will not undercut the efficacy of the Director's Order in any meaningful way.

Again, it is an undeniable truth, not "hyperbole," Resp.21, to say that allowing the appellees to use up PPEs in a time of scarcity will cause deaths. After all, there are only so many PPEs to go around. So every piece of equipment the appellees use cannot be used by anyone else. And every doctor, nurse, hospital employee, or first responder made to work without adequate PPEs is at immensely greater risk of contracting and spreading the disease. Some of those who go without equipment because of the appellees will contract COVID-19; some of them will spread it to others; and some of the people afflicted with the condition will die. The appellees can talk all they want about the importance of those working to "abat[e] the crisis." Resp.1. Actions speak louder than words. And the appellees' actions leave no doubt that abortion providers are willing to risk the public health in order to provide a surgical abortion to anyone who wants one whenever they want it.

None of the appellees' other arguments fare any better. For example, they say the Director's Order "single[s] out abortion patients for a far heavier burden than any other Ohioans in need of essential medical care." Resp.2. In fact, far from singling out abortion, the Director's Order applies generally to *all* surgical

procedures and never even mentions abortion. It imposes precisely the same burden on every patient: *all* Ohioans must delay surgical procedures that can be safely delayed, and *all* Ohioans must pursue non-surgical options in the meantime if there are any that can be safely pursued. What the appellees want is special treatment, not equal treatment.

The appellees also stress the existence of guidance from the American College of Obstetricians & Gynecologists ("ACOG") that "abortion is 'a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.'" Resp.3 (citation omitted). This mealy-mouthed guidance is irrelevant. If it is impossible to delay the procedure without jeopardizing the patient's health or safety, then the Director's Order does not require a delay. To the extent the appellees mean to say that *no abortion* can be safely delayed for *any* length of time, Resp.4–5, their argument does not deserve to be taken seriously. If all surgical abortions were essential, then the appellees would have nothing to worry about, because every abortion would qualify as "essential" under the Director's Order. So the fact that they felt the need to bring this case reveals that *some* abortions *can* be safely delayed. And that comports with common sense. Even outside the pandemic context, does anyone really believe that a woman who decides she wants an abortion

during her twelfth week of pregnancy, but who puts it off until week fifteen, plays Russian roulette with her health? Of course not.

When the appellees and ACOG say that *any* delay imposes an "undue" risk, they are expressing an opinion that no risk posed by delay—regardless of how minimal it might be, and regardless of the important interests justifying delay—is *ever* justified. They are entitled to have that view, but it does not transform all surgical abortions into "essential" surgeries, and it does not reflect the current state of the law. Again, the Supreme Court has upheld waiting periods (and thus delay) against undue-burden challenges. *Casey*, 505 U.S. at 886. Indeed, since the undue-burden test *requires* considering health-and-safety laws' costs and benefits, *Whole Woman's Health*, 136 S. Ct. at 2309, it inherently leaves open the possibility that sufficiently strong benefits might justify even a fairly burdensome delay. True enough, no case has upheld a law that delays abortions for more than a few days. Resp. 19. But neither has any opinion applied the undue-burden test to regulations that burden abortions rights as a means to stop a pandemic. That context matters a great deal.

Finally, before wrapping up this likelihood-of-success section, it is important to make a few concluding points.

First, the appellees' defense of the District Court's ruling comes up short. In a footnote, they deny that "the district court erred by shifting the burden of

proof onto" the State. According to the appellees, the court, rather than shifting the burden, determined that the appellees' evidence was "uncontroverted 'at this point.'" Resp.19 n.12. But that is not what the District Court said. It said: "Defendants have not demonstrated to the Court, at this point, that Plaintiffs' performance of these surgical procedures will result in any beneficial amount of net saving of PPE in Ohio such that the net saving of PPE outweighs the harm of eliminating abortion." R.43, TRO, PageID#868. The decision does not discuss any evidence, let alone "uncontroverted" evidence, that the Director's Order will do no good. Nor could it have, since the appellees did not introduce any evidence from an epidemiologist or public-health expert on the need to preserve PPEs and the relationship between that need and the Director's Order. Instead of identifying uncontroverted evidence, the District Court faulted the State for failing to prove the need for the Director's Order. That is burden shifting, plain and simple.

The appellees also defend the District Court's "tailoring" of its injunction, claiming that the temporary restraining order is "already narrowly crafted to reach only unconstitutional applications of the" Director's Order. Resp. 20. But the District Court's stay order says that *there are no* unconstitutional applications of the Director's Order. *See* R.52, Order Denying Stay, PageID#1022–23. And the temporary restraining order itself seems to leave abortion providers with unfettered

discretion to decide whether any given abortion is sufficiently "essential." *See* R.43, TRO, PageID#868–69. So the District Court either enjoined a lawful order in circumstances to which it does not even apply, or else effectively gave the appellees permission to violate the Director's Order with impunity. If such an injunction is "tailored," then "tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting). Relatedly, in interpreting the Director's Order, it was the District Court's duty to avoid constitutional problems, not create and enjoin them. *See Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005).

Second, the appellees complain that the State declined to give abortion providers' "guidance" on whether their practices violate the Director's Order. Resp.1. Abortion providers have no constitutional right to guidance on the meaning of state law—indeed, they have no right to perform abortions at all. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 913 (6th Cir. 2019) (*en banc*). Again, this is a call for special treatment: the State cannot possibly give answers to every fact-specific hypothetical for every citizen or business. Why is this different for abortion providers? So the State's refusal to waste time assuaging the fears of abortion providers is legally irrelevant. Surely one of the ten attorneys listed on the cover of the appellees' brief could help them navigate the legal landscape.

Finally, the appellees fault the State for failing to file a brief before the District Court issued its temporary restraining order. Resp.17. As an initial matter, the State had little opportunity to do so, because the appellees sought a temporary restraining order on the same day the court awarded relief—this after previously informing lawyers at the Office of the Ohio Attorney General that the appellees were complying with the Director's Order and therefore would not seek a temporary restraining order. Regardless, the District Court never asked for a brief, and the appellees, not the State, bore the burden of making a "*clear showing*" that the Director's Order likely violates the Constitution. *Mazurek*, 520 U.S. at 972. They did not carry that burden, and the absence of a brief by the State is irrelevant.

B. The remaining stay factors all favor the State.

In light of all that, the State satisfies the remaining three stay factors.

First, because the Director's Order is lawful, enjoining it constitutes *per se* irreparable harm. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). And the State has shown irreparable harm even aside from the *per se* rule. Allowing the appellees to continue using desperately needed PPEs will deny those PPEs to physicians and others who need them most at the time they are most needed. Using

these PPEs for abortion procedures that can be delayed will thus contribute to the spread of the COVID-19 pandemic.

Second, while the State does not deny that a stay will impose a burden on those delayed in obtaining an abortion, that burden is more than justified by the immense importance of preserving PPEs for use in combatting COVID-19. After all, the harm to third parties who will die or suffer from COVID-19 if the appellees waste PPEs is a good deal more significant than the harm the appellees and their patients will suffer from delay or from the substitution of medication abortions.

Finally, the public interest in a stay is at its zenith here. The Governor and Dr. Acton determined that Ohioans across the State must take drastic actions—including postponing non-essential surgeries to preserve PPEs—to help save thousands upon thousands of lives. The ruling below exempts one category of physicians from having to do their part, and thus empowers them to use up protective equipment that ought to be used by those on the front lines of this battle against COVID-19. This stay application therefore presents, quite literally, a matter of life and death. A stay is in the public interest, even without regard to the principle that the public interest is *always* furthered by allowing the lawful actions of its elected representatives to go into effect. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006).

CONCLUSION

The Court should stay the District Court's ruling and reverse.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
DIANE BREY
ZACHERY P. KELLER
Deputy Solicitors General
HEATHER L. BUCHANAN
Senior Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume for a principal brief and contains 4,010 words. See Fed. R. App. P. 32(a)(7)(B)(ii).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS