No. 20-5408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAMS & BOYLE, P.C., on behalf of itself and its patients; *et al.*,

vs.

HERBERT H. SLATERY III, Attorney General of Tennessee, in his official capacity; *et al*.

On Appeal from the United States District Court
Middle District of Tennessee, Nashville Division
No. 3:15-cv-00705-BAF

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Adams & Boyle, P.C., Memphis Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, and Knoxville Center for Reproductive Health do not have parent corporations. No publicly held corporation owns ten percent or more of Plaintiffs-Appellees' stock.

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INTRODUCTION

Since the beginning of the COVID-19 pandemic, Plaintiffs-Appellees ("the Providers") have taken measures, consistent with the recommendations of the Centers for Disease Control and Prevention, to use only minimal personal protective equipment ("PPE") and prevent community spread while continuing to ensure timely access to constitutionally protected abortion care for their patients. Leading medical authorities, including those relied upon by Tennessee, agree that abortion is "essential" care for which a delay of weeks or even days may increase risks or make abortion inaccessible.[1] Despite this medical consensus, and without a shred of contrary evidence, on April 8, 2020, Governor Lee issued Executive Order 25 ("EO-25"), which bans all procedural abortions—the only abortion care available after 11 weeks of pregnancy—for as long as it remains in effect. EO-25 delays this time-sensitive care for all patients by at least three weeks, and outright bans abortion for

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[1] *See, e.g.*, Am. Coll. Of Obstetricians & Gynecologists ("ACOG") et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak; Am. Coll. of Surgeons, *COVID-19 Guidelines for Triage of Gynecology Patients* (Mar. 24, 2020), https://www.facs.org/covid-19/clinical-guidance/elective-case/gynecology; World Health Organization, *COVID-19: Operational guidance for maintaining essential health services during an outbreak*, at 4 (Mar. 25, 2020), *available at* https://www.who.int/publications-detail/covid-19-operational-guidance-for-maintaining-essential-health-services-during-an-outbreak.

any patient at least 16 weeks and 6 days pregnant when EO-25 was issued—i.e., within three weeks of the point when abortion care is no longer available in Tennessee.

The District Court enjoined EO-25's application to procedural abortion, based on undisputed record evidence that EO-25 would significantly delay patients in accessing abortion, forcing some to undergo a lengthier and more complex procedure involving progressively greater health risks and preventing some from accessing care altogether; and that since EO-25 took effect, procedural abortions were unavailable in Tennessee for women who are past 11 weeks of pregnancy and for women of any gestational age for whom a medication abortion is contraindicated. The District Court held that these severe burdens on patients were not counter-balanced by any valid State interest: as applied to procedural abortions, EO-25 *frustrates* rather than serves the State's asserted goals of preserving PPE and preventing the spread of COVID-19. That is because pregnant patients need medical care throughout pregnancy, including in the first trimester, that requires more PPE and patient-provider contact than abortion—including prenatal care, miscarriage management, care for complications, and, according to recent ACOG guidance, immediate emergency department evaluation for suspected COVID-19 symptoms. Moreover, forcing patients to delay abortion care may require them to undergo more

complex procedures that entail more risk and require more PPE and patient-provider contact than allowing them to access timely care.

The District Court, after weighing the "entirely speculative" benefits of EO-25's ban on procedural abortions, R.252, PageID#6271, against the significant burdens imposed on patients' constitutional right to pre-viability abortion, appropriately concluded that preliminary injunctive relief was warranted. R.244, PageID##6143-45. This Court should deny the motion to stay the District Court's April 17, 2020 order, R.244, PageID##6136-48, because the State has not met its heavy burden for this extraordinary relief.[2]

BACKGROUND

A. The COVID-19 Pandemic and the Governor's Executive Order

On April 8, 2020, Governor Lee signed EO-25, which provides that "[a]ll healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent." R.230-2, PageID#5729. Elective and non-urgent procedures are defined as "those procedures that can be delayed until the expiration of this Order because they are not

[2] Appellants have also moved to expedite the appeal and proposed a now-moot briefing schedule. The Providers respectfully request that the Court set a merits schedule after the stay issue is fully resolved.

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." *Id.*, PageID#5729-30. The stated purpose of EO-25 is to "preserv[e] personal protective equipment [PPE] for emergency and essential needs and prevent[] community spread of COVID-19. *See id.,* PageID#5729; *see also* R.244, PageID##6138-6139. EO-25 took effect on April 9, 2020 and remains in effect until April 30, 2020. R.230-2, PageID#5730.

B. Abortion in Tennessee and Impact of EO-25

There are two methods of abortion care available in Tennessee: medication abortion and procedural abortion. R.244, PageID##6136-37. Medication abortion, which involves two medications and no "procedure," is available only to 11 weeks from the patient's last menstrual period ("LMP").[3] *Id.*, PageID##6136-37, 6144.

Procedural abortion, sometimes referred to as "surgical abortion," is not what is commonly understood to be surgery; it does not involve an incision or general anesthesia. *Id.*, PageID#6137. Most procedural abortions are performed by

[3] As Defendants acknowledge, EO-25 does not prohibit medication abortions. See Appellants' Br. 10 n. 20.

"aspiration," which involves the use of gentle suction to empty the uterus and typically takes about 5-10 minutes. *Id*. Starting at 14-16 weeks, physicians typically perform a dilation and evacuation ("D&E"), which is technically more complex and involves a longer procedure and recovery time. *Id.* Starting around 18 weeks, procedural abortion is a two-day process because the patient must visit the clinic to receive medications to dilate her cervix the day before the procedure. *Id*. For some patients, procedural abortion is medically indicated over medication abortion, such as those at increased risk of bleeding. *Id*.

Procedural abortion typically takes place in an outpatient setting and involves only minimal use of PPE: typically gloves, a surgical mask or reusable plastic face shield, and either reusable scrubs or a gown or smock. R.232-5, PageID#5882; R.232-6, PageID#5913; R.232-7, PageID#5927. Abortion care does not require use of any hospital resources such as hospital beds, beds in an Intensive Care Unit, or ventilators. R.232-5, PageID#5882.

Abortions rarely result in complications and do so at rates of no more than a fraction of a percent. *Id*., PageID##5875-76. In fact, every pregnancy-related complication is more common among women giving birth than among those having abortions, *id.*, PageID#5876, and the risk of death is approximately 14 times higher for pregnancy and childbirth than abortion. *See id*. Although abortion is extremely safe throughout pregnancy, risks increase exponentially as pregnancy progresses;

the later in pregnancy a patient accesses a procedural abortion, the more likely she is to experience a rare complication. *Id.*, PageID#5888.

The window to receive abortion care in Tennessee closes after 19 weeks and 6 days, *id*., PageID#5877, and only two health centers offer abortions after 15 weeks. *Id*. Following any period of suspended abortion access, there will be a cascading effect in which patients at earlier gestations will be forced to delay procedures so patients who would otherwise be denied care entirely can be treated first. R.232-6, PageID##5917-18.

Patients who are delayed may require a longer, more complex, and costlier one or two-day D&E procedure—increasing medical risks and requiring more time in the clinic, more staff, and thus increased use of PPE. R.232-5, PageID#5889; R.232-7, PageID##5926-27. As ACOG and other leading medical organizations recently emphasized, abortion is an essential procedure and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible." R.232-5, PageID##5878-79.[4]

Patients who are forced to delay an abortion still need urgent pregnancy-related care, including prenatal care, especially women with complications and high-

[4] *See* ACOG et al., *supra* note 1.

risk pregnancies. *Id*., PageID##5882-83. Unlike abortion, for which complications and hospital transfers are extremely rare, *see* R.232-6, PageID#5913, R.232-5, PageID##5875-76, one in five pregnant women will visit a hospital prior to delivery, R.232-5, PageID#5883.[5] Fifteen to twenty percent of pregnancies end in miscarriage, which typically occurs in the first trimester, and for which patients often seek care at a hospital emergency room. *Id.*, PageID##5884-85. Every time a pregnant person presents to the hospital for evaluation before labor, which could happen multiple times, she will interact with more people and increase the hospital's use of PPE. *Id*. Moreover, ACOG recommends that pregnant women reporting certain potential COVID-19 symptoms, including common pregnancy symptoms, "immediately seek care in an emergency department or equivalent unit that treats pregnant women," further straining hospital resources and increasing the patient's social contacts. *Id*., PageID#5885.[6]

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[5] Shayna D. Cunningham et al., *Association Between Maternal Comorbidities and Emergency Department Use Among a National Sample of Commercially Insured Pregnant Women*, 26 Acad. Emergency Med. 940, 942 (2017).

[6] *See* Am. Coll. of Obstetricians & Gynecologists and Soc. for Fetal-Maternal Med., *Outpatient Assessment and Management for Pregnant Women With Suspected or Confirmed Novel Coronavirus (COVID-19)* (Apr. 10, 2020), https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/clinical-guidance/practice-advisory/covid-19-algorithm.pdf?la=en&hash=2D9E7F62C97F8231561616FFDCA3B1A6.

Some patients forced to delay care may attempt to travel out of state to obtain an abortion. R.244, PageID#6146; R.232-5, PageID#5890; R.232-7, PageID#5927. This will require them to overcome numerous logistical barriers and costs associated with accessing abortion care out of state, virtually all of which are exacerbated by the COVID-19 crisis. R.232-5, PageID#5890. This travel will also increase the risk of contracting COVID-19 and bringing the virus back to Tennessee. *Id*.

Other patients who cannot access legal abortion services will find ways to do so outside the healthcare system, not all of which may be safe. *Id*., PageID##5891-92. Some may be forced to seek emergent medical care, further taxing the medical system as it works to respond to the COVID-19 crisis. *Id*.

Since the COVID-19 crisis began, the Providers have diligently protected the health of their patients and staff while continuing to provide access to high-quality abortion care; instituting, for example, strict "social distancing" measures, R.232-6, PageID#5912; R.232-5, PageID#5882; R.232-7, PageID##5922-23, and sanitation procedures. R.244, PageID#6146. The Providers are also minimizing the use of PPE and "do not use N95 masks or other hospital resources needed to respond to COVID-19." *Id.*; *see also* R.232-5, PageID#5882; R.232-6, PageID##5913-14; R.232-7, PageID#5927.

The COVID crisis has magnified the challenges patients already face in accessing abortion. R.232-5, PageID##5880-81; R.232-6, PageID#5910; R.232-7,

PageID##5924-25. Following the District Court's injunction, some patients were able to be rescheduled. *See, e.g.*, R.248-1, PageID##6167-72. Reinstating EO-25 would expose patients to the confusion and chaos they faced prior to the injunction. *Id.*

C. Procedural History

The Providers filed their initial complaint on June 25, 2015, seeking a declaratory judgment that certain abortion restrictions were unconstitutional and injunctive relief. On April 14, 2020, the Providers moved for leave to file a supplemental complaint under Fed. R. Civ. P. 15(d) and moved to enjoin Appellants from enforcing EO-25 with respect to procedural abortions. Appellants opposed both motions.

On April 17, 2020, Judge Friedman held a telephonic hearing and granted the Providers' motions to file a supplemental complaint and for a preliminary injunction against the enforcement of EO-25 as applied to procedural abortions. R.244, PageID#6136. The District Court found that (1) the Providers were "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" and "has caused plaintiffs to cancel all procedural abortions to avoid risking criminal and other penalties"; (2) "they would suffer irreparable harm if defendants are not enjoined from enforcing EO-25 as it relates to procedural

abortions," as "[d]elaying 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, or losing the right to obtain an abortion altogether"; (3) the irreparable harm the Providers' patients would suffer without injunctive relief, which includes violations of their constitutional rights, "'vastly outweighs' any 'temporary reduction of PPE' resulting from the enforcement of EO-25"; indeed, "defendants have presented no evidence that any appreciable amount of PPE would actually be preserved"; and (4) granting the injunction is in the public interest because it "prevent[s] violation of a party's constitutional rights." *Id.*, PageID#6143-46 (internal citations and alterations omitted).

Appellants filed a notice of appeal and a motion in the District Court to stay the preliminary injunction. R.245, PageID##6149-50; R.246, PageID##6151-56. Without waiting for the Providers' response or the District Court's ruling, Appellants moved this Court for an emergency stay of the preliminary injunction on April 20.

On April 21, the District Court denied Appellants' stay motion, finding that EO-25 "as it relates to procedural abortions . . . does not appreciably advance either of its stated goals" and instead "interfere[s], on a broad scale, with the exercise of a recognized constitutional right." R.252, PageID#6269. The Court further explained that the State's "unsupported assertion" that allowing procedural abortions to continue will waste PPE and put patients at great risk of contracting COVID-19

"disregards the unrebutted evidence showing that plaintiffs had already adopted significant procedures for social distancing and preserving PPE prior to EO-25 taking effect." *Id.*, PageID#6270.

STANDARD OF REVIEW

"'[A] stay is not a matter of right,'" and the party requesting a stay bears a "heavy burden" of "showing that the circumstances justify an exercise of that discretion." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387, 389 (6th Cir. 2014) (alterations omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 433-434 (2009)). In determining whether to grant a stay, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Id.* (quoting *Nken*, 556 U.S. at 434). The Court must determine whether Appellants are "likely to be able to show that the district court abused its discretion in granting the preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

ARGUMENT

I. Appellants Have Not Made a Strong Showing That They Are Likely to Succeed on the Merits

Courts throughout the country have enjoined executive orders that unduly burden access to abortion. *See, e.g.*, *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-

20-277-G (W.D. Okla. Apr. 20, 2020) (ECF No. 107) (attached as Exhibit 1) (preliminarily enjoining executive order as to most abortions effective immediately, and as to all abortions as of April 24), *appeal docketed*, No. 20-6055 (10th Cir. Apr. 21, 2020); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449-KGB, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020) (granting temporary restraining order ("TRO") as to all procedural abortions), *vacated sub. nom., In re Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) (attached as Exhibit 2); *Robinson v. Marshall*, Case No. 2:19-cv-365 (MHT), 2020 WL 1847128, at *8-*9 (M.D. Ala. Apr. 12, 2020) (entering preliminary injunction to allow healthcare providers to make individualized determinations regarding provision of abortion care), *appeal docketed*, No. 20-11401 (11th Cir. Apr. 13, 2020); *Preterm-Cleveland v. Attorney General of Ohio*, No. 1:19-cv-360, 2020 U.S. Dist. LEXIS 61221 (S.D. Ohio Mar. 30, 2020) (granting TRO allowing providers to make case-by-case basis determinations regarding provision of abortion care), *stay denied and appeal dismissed*, *Pre-Term Cleveland v. Att'y Gen. of Ohio* No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020) ("*Pre-Term Cleveland*").[7]

[7] The Fifth Circuit decision cited by Appellants, *In re Abbott*, regarding a recently expired Texas executive order, recognizes that courts have a duty to weigh the benefits and burdens of an abortion restriction. *In re Abbott*, No. 20-50296, 2020

A. EO-25 Violates the Providers' Patients' Fundamental Constitutional Rights

As the District Court found, EO-25 categorically bans abortion after 11 weeks LMP for all patients, and bans abortion altogether for anyone for whom a medication abortion is contraindicated. R.244, PageID##6143-44. It is axiomatic that a State may not ban pre-viability abortions. *Roe v. Wade*, 410 U.S. 133, 163–64 (1973); s*ee also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992); *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2299 (2016) (stating a law is invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)). As this Court has recognized, the fact that abortion may be available earlier in pregnancy does not alter this conclusion. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (finding law that would inhibit "the vast majority of second-trimester abortions" imposed a substantial, and unconstitutional, obstacle).

Appellants insist that EO-25 is not a "complete ban," but rather a three-week delay. Appellants' Br. 19. This is plainly wrong: at a minimum, EO-25 is a complete

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WL 1911216 (5th Cir. Apr. 20, 2020). The Eighth Circuit's decision today, *In re Rutledge*, is an outlier in that it allowed no procedural abortions despite the challenged order's indeterminate end date, absent further district court findings. *In re Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) (Exhibit 2).

ban for any pregnant person who was 16 weeks and 6 days pregnant or beyond when EO-25 was issued and therefore would be past the point when abortion is available in Tennessee when EO-25 expires. But, even assuming EO-25 is an abortion restriction rather than a ban, it cannot stand. As Appellants recognize, abortion restrictions must be evaluated under the undue burden standard, which "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; *see also* Appellants' Br. 18.

Applying that test, Appellants do not dispute any of the Providers' evidence demonstrating the significant burdens wrought by EO-25's mandatory delay. As the District Court found, "[d]elaying 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, or can result in her losing the right to obtain an abortion altogether." R.244, PageID#6145 (internal citations omitted). The Providers' uncontroverted evidence shows that even brief delays are consequential, potentially pushing patients from a one-day to two-day procedure, or from a shorter aspiration procedure to a longer, more complex D&E procedure with greater risks. *See supra* Background Section B. The window of time to access abortion care will close for some patients before April 30. Moreover, these delays will create a backlog, compounding the delay and harm. *See id.*; *see also Whole*

Woman's Health, 136 S. Ct. at 2313 (acknowledging burdens on patients of longer wait times and increased crowding). The burdens imposed by EO-25 are only magnified by the severe difficulties associated with the COVID-19 pandemic. *See supra* Background Section B.

On the benefits side, as the District Court found, Appellants "presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions." R.244, PageID#6146. The District Court's factual findings demonstrate that EO-25's restrictions on procedural abortion would actually undermine rather than serve the State's interests. *See supra* Background Section C. Procedural abortions "use[] less PPE and involve[] significantly less patient interaction" as compared to forcing patients to continue a pregnancy, even for a few weeks. R.244, PageID#6146. Pregnant people require medical care throughout pregnancy—including prenatal visits, miscarriage management, and emergency department evaluation—well before labor and delivery, using up far greater PPE and resources than procedural abortion. *See supra* Background Section B.

Furthermore, the District Court found the Providers "do not use N95 masks or other hospital resources needed to respond to COVID-19," and "have implemented sanitation procedures, as well as procedures to minimize the use of PPE . . . ." R.244, PageID#6146. The District Court also found "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." *Id.* Finally, the record shows that delaying a procedural abortion will cause clinics to consume more PPE, *see* R.232-5, PageID#5889, a fact this Court found significant in *Pre-Term Cleveland*, 2020 WL 1673310, at *2.

Weighing the significant burdens caused by EO-25's forced delay against the lack of any benefits, the District Court properly found EO-25 likely created an undue burden on abortion access. Rather than engage with the proper balancing analysis, Appellants claim that, under *Casey* and *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006), it is per se constitutional to "delay[] abortions for weeks and in some cases prevent[] women from obtaining abortions altogether." Appellants' Br. 19. But those cases concerned 24-hour delay laws under the guise of informing a woman's abortion decision, not a blanket three-week prohibition on procedural abortions. Indeed, the *Casey* Court considered even a 24-hour delay a "close[] question," but ultimately found it did not "impose[] a real health risk." 505 U.S. at 885–86. In *Taft*, this Court did not consider the kinds of health risks discussed above. Both cases were decided before *Whole Woman's Health*, which explicitly recognized that "3-week wait times" can burden women's access to abortion. 136 S. Ct. at 2318. And as this Court recently acknowledged, even a temporary delay can "deprive[] a woman of her right to an abortion during the optimal 15-week period

during which the aspiration method can be performed." *Pre-Term Cleveland*, 2020 WL 1673310, at *2.[8]

B. *Jacobson* Refutes, Rather than Supports, Appellants' Position

The State argues a stay is warranted because the District Court erred in failing to consider *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). But as the District Court explained, "EO-25 is easily distinguishable from the statute at issue in *Jacobson*, and the [c]ourt considered *Jacobson* and its limitations on judicial intervention." R.252, PageID#6268. As the District Court explained, because "EO-25 did not have a 'real or substantial relation' to protecting public health or public safety and was invading plaintiffs' fundamental rights, it was 'the duty of the [C]ourt[] to so adjudge, and thereby give effect to the Constitution.'" *Id.* (quoting *Jacobson*, 197 U.S. at 11).

First, *Jacobson* made clear that a state's police powers—even during an epidemic—"must always yield in the case of conflict with . . . any right which [the

[8] Providers' standing is established by decades of Supreme Court precedent holding that third-party standing exists where, as here, the providers themselves are directly regulated by the challenged provision, and it threatens their patients with constitutional injury. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019).

Constitution] gives or secures." 197 U.S. at 25. Appellants concede that *Jacobson* does not supplant the modern substantive constitutional test applied to the right in question, acknowledging that the critical question under *Jacobson* is whether "an abortion regulation 'conflict[s]' with the Constitution," namely whether it "imposes an undue burden on a woman's right to obtain an abortion." R.249, PageID#6176; *see also*, *e.g.*, *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 419–20 (6th Cir. 2019) (applying strict scrutiny to substantive due process claim, even where the challenged program "may be an example of a state's proper exercise of its parens-patriae role" (citing *Jacobson*, 197 U.S. at 38)). Indeed, the right to abortion is "secured by fundamental law." *Jacobson*, 197 U.S. at 31; *see Casey*, 505 U.S. at 851 (recognizing reproductive rights as "central to personal dignity and autonomy" and "central to the liberty protected by the Fourteenth Amendment"); *Roe*, 410 U.S. at 153. The Supreme Court's abortion jurisprudence already accounts for the need to balance State interests against a woman's right to abortion, as *Jacobson* instructs. *See id*. at 154 (citing *Jacobson*); *Casey*, 505 U.S. at 857 (holding state interests cannot justify "any plenary override of individual liberty claims") (citing *Roe* and *Jacobson*). As discussed above, because EO-25 does not advance

State interests but imposes extreme burdens, it erects a substantial obstacle to Tennesseans' right to abortion.[9]

Second, *Jacobson* clearly holds the "means prescribed by the state" must bear a "real or substantial relation to the protection of the public health and the public safety." *Jacobson*, 197 U.S. at 28, 31. The State asserts that *Jacobson* prohibits "second-guessing the State's emergency measures" or "substitut[ing] its judgment for the State's . . . ." Appellants' Br. 16, 18. But even under *Jacobson*, exercise of the police power must be limited to "reasonable regulations" necessary to protect public health and safety. R.252, PageID#6267 (citing *Jacobson*, 197 U.S. at 25). Here, however, as the District Court already found, "EO-25, as applied to procedural abortions, [does] not have a 'real or substantial relation' to protecting public health or public safety.," *id*., PageID#6268, because it frustrates EO-25's stated goals by "increas[ing] patient interaction and [causing] greater risk of infection and spreading

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[9] *See, e.g.*, *Robinson*, 2020 WL 1847128, at *9 ("Abortion is a fundamental right … [a]nd so *Jacobson* asks courts to protect it, even in times of emergency."); *S. Wind Women's Center*, No. CIV-20-277-G (Exhibit 1), at 15 ("This effective denial of the Fourteenth Amendment right to abortion access represents the type of 'plain, palpable invasion of rights' identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency"). *See Pre-Term Cleveland*, 2020 WL 1673310 (declining to stay TRO enjoining enforcement of COVID-19 emergency order against certain abortions).

of COVID-19," *id*. This evidence controls, not "[u]ncritical deference to" state officials' "factual findings." *Whole Woman's Health*, 136 S. Ct. at 2310 (noting the Court "*retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." (emphasis original) (quotation omitted).

II. The Remaining Factors Favor Denial of a Stay

Appellants will not be irreparably harmed should this Court deny their stay motion. As the District Court found, permitting EO-25 to bar procedural abortions will not aid in conserving PPE or otherwise containing the virus. R.244, PageID#6146. By contrast, the Providers and their patients would be substantially harmed if EO-25 were reinstated even temporarily during the pendency of this appeal, and the public interest would be greatly harmed. As the District Court found, Tennesseans would be forced to delay time-sensitive abortion care, facing heightened medical risk and, in some cases, losing their right to an abortion altogether. R.244, PageID#6145. Patients have already faced the devastating prospect of cancelled appointments, only (for some) to be rescheduled upon relief from the District Court. *See* R.248-1, PageID##6167-72. Reinstating EO-25 would cause patients severe emotional distress in addition to the myriad harms described above. *Id*. Additionally, as the District Court found, lifting the preliminary injunction would likely contribute to the worsening of the COVID-19 pandemic in Tennessee, because procedural abortions consume less PPE than pregnancy care, and because

the effective prohibition of procedural abortions in the State would encourage or require individuals seeking abortion to travel out of state. R.244, PageID#6146. Finally, the denial of an injunction constitutes irreparable harm where, as here, "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).

III. Appellants' Challenge to the Scope of the Order Does Not Warrant a Stay

The District Court properly exercised its discretion in enjoining EO-25 with respect to procedural abortions. However, even if the Court finds the preliminary injunction overbroad, a stay should be granted only insofar as necessary to narrow the scope of the injunction. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017). Any narrowed injunction should take into account the particular harms EO-25 poses to three groups of patients. First, patients who, in the good faith professional judgment of the provider, will likely lose their ability to obtain an abortion in Tennessee if their procedures are delayed beyond April 30, 2020. EO-25 will force such patients to either carry an unwanted pregnancy to term, and bear the far greater health risks and risk of death associated with ongoing pregnancy and childbirth, or attempt to seek abortion care out of state, which imposes significant costs, burdens, and emotional distress that the COVID-19 pandemic will exacerbate. Second, patients who, in the good faith professional judgment of the provider, will likely be forced to undergo a lengthier and more

complex abortion procedure, which is only available at two health centers in the state, if their procedures are delayed beyond April 30, 2020. These patients will likely have to travel farther for abortion care as a result of EO-25, which increases the costs and burdens of accessing such care, and will face greater health risks associated with the more complex procedure. Third, patients who, in the good faith professional judgment of the provider, will likely be forced to undergo a two-day procedure—which is only available at two health centers in the state, and which requires at least three separate visits to the provider—if their procedures are delayed beyond April 30, 2020. In making these determinations, providers must be permitted to take into account a number of factors which bear on an individual patient's ability to timely access abortion care and medical risk, including the patient's medical history, familial circumstances, and any logistical and financial obstacles faced by the patient. *See, e.g.*, *Robinson*, 2020 WL 1847128, at *13 (enumerating factors relevant to an abortion provider's medical determination of harm).

The State argues that EO-25 will cause patients no harm because it "already provides an exception when delay would in fact pose a risk of serious adverse medical consequences for a patient." Appellants' Br. 25. But, the State's vigorous defense of this lawsuit demonstrates that EO-25's extremely narrow exceptions are inadequate to protect the rights at stake here. Indeed, the State has only confirmed that Providers' reading of EO-25 to ban abortion is not mere "speculation," *see*, *e.g.*,

Appellants' Br. 19 n.22, 24-25, and thus that there is urgent need for continued relief, especially because EO-25 carries both criminal and licensure penalties, *see* Tenn. Code Ann. § 58-2-119; *see also* R.230-3, PageID#5732.

CONCLUSION

For the foregoing reasons, Appellants' motion for an emergency stay of the District Court's preliminary injunction should be denied.

Dated: April 22, 2020

Respectfully submitted,

/s/ *Genevieve Scott*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,994 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 22, 2020

/s/ *Genevieve Scott*
Genevieve Scott

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Genevieve Scott*
Genevieve Scott

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the District Court's electronic records:

***Adams & Boyle, P.C., et al., v. Herbert H. Slatery III,* 3:15-cv-00705-BAF**

Date Filed	R.No.; PageID#	Document Description
April 20, 2020	R.248; PageID## 6160-66	Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for a Stay Pending Appeal
April 20, 2020	R.248-1; PageID## 6167-72	Exhibit A to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for a Stay Pending Appeal
April 21, 2020	R.249; PageID## 6173-6179	Reply in Response to Plaintiffs' Opposition to the State's Motion for a Stay Pending Appeal
April 21, 2020	R.252; PageID## 6265-72	Opinion and Order Denying Defendants' Motion for a Stay Pending Appeal

EXHIBIT 1

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SOUTH WIND WOMEN'S CENTER LLC, d/b/a TRUST WOMEN OKLAHOMA CITY, on behalf of itself, its physicians and staff, and its patients, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. CIV-20-277-G**
J. KEVIN STITT in his official capacity as Governor of Oklahoma et al.,	)	
Defendants.	)	

PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs'[1] Motion for Preliminary Injunction (Doc. No. 16). Following the submission of that Motion, Defendants[2] filed a Response (Doc. No. 54) and Supplement (Doc. No. 82) thereto, Plaintiffs filed a Reply (Doc. No. 84) and Supplements (Doc. Nos. 86, 87) thereto, and Defendants filed a Surreply (Doc. No. 96). Further, Plaintiffs and Defendants submitted proposed findings of fact and

[1] Plaintiffs are: South Wind Women's Center LLC, d/b/a Trust Women Oklahoma City, on behalf of itself, its physicians and staff, and its patients; Larry A. Burns, DO, on behalf of himself, his staff, and his patients; and Comprehensive Health of Planned Parenthood Great Plains, Inc., on behalf of itself, its physicians and staff, and its patients. The Supreme Court has held that abortion providers have standing to raise constitutional challenges on behalf of their patients. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality op.).

[2] Defendants are: J. Kevin Stitt in his official capacity as Governor of Oklahoma; Michael Hunter in his official capacity as Attorney General of Oklahoma; David Prater in his official capacity as District Attorney for Oklahoma County; Greg Mashburn in his official capacity as District Attorney for Cleveland County; Gary Cox in his official capacity as Oklahoma Commissioner of Health; and Mark Gower in his official capacity as Director of the Oklahoma Department of Emergency Management.

conclusions of law (Doc. Nos. 92, 93) and responses to each other's respective proposals (Doc. Nos. 100, 101). Finally, as directed by the Court, Defendants filed a Supplemental Brief (Doc. No. 102) addressing the effect of the executive order and guidance issued by the Governor of Oklahoma on April 16, 2020. In addition to the evidence and argument submitted by the parties in the briefs detailed above, the Court on April 3, 2020, held a telephonic hearing on the initial question of whether a temporary restraining order should issue and, on April 20, 2020, held a telephonic hearing on the question of whether a preliminary injunction should issue.[3]

This case presents an issue that has long been a source of struggle for the courts: the proper use of the judicial power in reviewing laws and executive orders or actions taken in response to a public health emergency. There is no dispute that the State of Oklahoma—like governments across the globe—is facing a health crisis in the COVID-19 pandemic that requires, and will continue for an indeterminate time to require, emergency measures. In this effort to secure the health and safety of the public, the State has broad power to act and even, temporarily, impose requirements that intrude upon the liberty of its citizens. "[T]he rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905). That power is not unfettered, however, and courts should carefully guard against "unreasonable," "arbitrary," or "oppressive" exercises of it. *Id.* at 27, 38. The

[3] Various amicus briefs and a response thereto also have been allowed and considered by the Court. *See* Doc. Nos. 59, 68, 76, 85.

court's duty, then, is narrow but essential: it must not "usurp the functions of another branch of government" by substituting its opinion for that of the officers tasked with responding to an emergency, *see id.* at 26, 28, 30, but neither may it permit "a plain, palpable invasion of rights" or any action for which "the means prescribed by the state . . . has no real or substantial relation to the protection of the public health and the public safety," *id.* at 31.

The right at issue here is access to abortion. The Supreme Court has held (and the parties do not dispute, at least for purposes of this action) that the Fourteenth Amendment to the United States Constitution establishes a fundamental right of a woman to "mak[e] the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality op.). This holding prohibits outright bans on abortion prior to viability and shields the right of access to abortion from any "undue burden" caused by state regulation. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) ("[T]he standard that this Court laid out in *Casey* . . . asks courts to consider whether any burden imposed on abortion access is 'undue.'"). In applying *Casey*'s undue burden rule, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309.

Plaintiffs contend that executive orders issued by the Governor of Oklahoma impose a complete ban on nonemergency abortion procedures in the State of Oklahoma, violating the Fourteenth Amendment's guarantees of due process and equal protection. *See* Compl. ¶¶ 65-70 (Doc. No. 1). Plaintiffs seek entry of a preliminary injunction barring

enforcement of those executive orders as applied to previability abortions. *See* Pls.' Mot. Prelim. Inj. (Doc. No. 16) at 22-33.

I.

At the April 3, 2020 telephonic hearing on Plaintiffs' request for a temporary restraining order, the Court discussed with counsel the procedures to be employed in determining the Motion for Preliminary Injunction. The parties stipulated that the Court may consider the Motion based on the evidence submitted with the briefing of that Motion and need not conduct any additional evidentiary hearing. Specifically, the parties agreed that the Court may accept the submitted affidavit testimony and documentary exhibits as evidence and waived the right to call or cross-examine any affiant (or other witness) at a hearing. At the April 20, 2020 telephonic hearing, the Court heard further argument from counsel for both Plaintiffs and Defendants.

Upon careful consideration of the evidence and argument submitted by the parties, the Court makes the following findings of fact:

1. In Oklahoma, nonemergency abortions are prohibited when "the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks." Okla. Stat. tit. 63, § 1-745.5(A).

2. Plaintiffs in this action are providers of abortion services in Oklahoma. Compl. ¶¶ 9-11. Although each Plaintiff's services vary, one or more of them provide abortion through administration of two pills ("medication" or "chemical" abortion) up to 10 or 11 weeks from the pregnant person's last menstrual period (i.e., eight or nine weeks postfertilization) and provide abortion through cervical suction and/or instruments

("procedural" or "surgical" abortion) up to 21.6 weeks from the last menstrual period (i.e., 19.6 weeks postfertilization). *See* Pls.' Mot. Prelim. Inj. at 13-15; *id.* Ex. 5, Burns Decl. ¶ 11 (Doc. No. 16-5); *id.* Ex. 6, Burkhart Decl. ¶ 2 (Doc. No. 16-6); *id.* Ex. 7, Hill Decl. ¶ 8 (Doc. No. 16-7).

3. The coronavirus known as COVID-19 ("COVID-19") has caused a global pandemic and public health crisis that is expected to test the limits of this country's healthcare system. On March 13, 2020, President Donald J. Trump declared that the COVID-19 outbreak in the United States constitutes a national emergency.[4]

4. On March 15, 2020, the Governor of Oklahoma issued Executive Order No. 2020-07. *See* EO 2020-07, https://www.sos.ok.gov/documents/executive/1913.pdf. In EO 2020-07, the Governor declared a state of emergency in all 77 counties in Oklahoma "caused by the impending threat of COVID-19 to the people of this State and the public's peace, health, and safety." *Id*. at 1.

5. On March 24, 2020, the Governor issued an amended version of EO 2020-07, which directed at Paragraph 18: "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020." Compl. Ex. 1, EO 2020-07 (4th Am.) ¶ 18 (Doc. No. 1-1); *see also* Compl. ¶¶ 1-2.

6. Generally, EO 2020-07 did not specify which surgeries and procedures fall within Paragraph 18's prohibition against elective surgeries and minor medical procedures

[4] *See* https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

or prescribe how that determination is to be made. *See* EO 2020-07 (4th Am.), ¶ 18. As to abortion procedures, the Governor on March 27, 2020, stated in a Press Release that the postponement referenced in the Executive Order applied to "any type of abortion services as defined in 63 O.S. § 1-730(A)(1) [that] are not a medical emergency as defined in 63 O.S. § 1-738.1[A] or otherwise necessary to prevent serious health risks to the unborn child's mother." Compl. Ex. 2, Press Release at 1 (Doc. No. 1-2).[5]

7. The stated purpose and benefit of EO 2020-07's requirement of postponement of "all elective surgeries" and "minor medical procedures" is to protect the public's health by preventing "(1) close interpersonal contact [in order to slow the rate of spread of the virus], (2) depletion of medical PPE [personal protective equipment], and (3) activities that will increase the use of hospital beds, staff, and other resources." Defs.' Resp. (Doc. No. 54) at 26-27; *see also id.* at 23-38; *accord* Defs.' Suppl. Br. (Doc. No. 102) at 4-5.

8. EO 2020-07 states that it was issued pursuant to, among other things, the Oklahoma Emergency Management Act of 2003 ("OEMA," Okla. Stat. tit. 63, §§ 683.1 et seq.). *See* EO 2020-07, at 1. Pursuant to the OEMA, the Governor is authorized to "[m]ake, amend, and rescind the necessary orders and rules to carry out the provisions of

[5] Title 63, section 1-738.1A(5) of the Oklahoma Statutes provides that a "medical emergency" "means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy."

the [OEMA] within the limits of authority conferred upon the Governor [pursuant to the OEMA], with due consideration of the emergency management plans of the federal government." Okla. Stat. tit. 63, § 683.8(D)(1).

9. On March 26, 2020, the Oklahoma Attorney General stated that "violation of an executive order can be a misdemeanor." Press Release, Attorney General Hunter Clarifies Governor's Executive Order Regarding Law Enforcement Action for Non-Compliance (Mar. 26, 2020), http://www.oag.ok.gov/attorney-general-hunter-clarifies-governors-executive-order-regarding-law-enforcement-action-for-non-compliance. The OEMA provides that willful violation of an OEMA order is a misdemeanor punishable by imprisonment for up to six months and/or a fine of up to $3000, with each day of violation constituting a separate offense. Okla. Stat. tit. 63, § 683.23(C).

10. On April 1, 2020, the Governor amended EO 2020-07 by extending the postponement of elective surgeries and minor medical procedures "until April 30, 2020." Pls.' Notice Ex. 1, EO 2020-07 (7th Am.), ¶ 18 (Doc. No. 38-1).

11. On April 16, 2020, the Governor issued Second Amended Executive Order No. 2020-13 ("EO 2020-13"), which further revised the directive regarding elective surgeries and minor medical procedures as follows:

> Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries until April 24th, 2020. Elective procedures after April 24th, 2020 are subject to the guidelines set forth in Executive Memo 2020-02. Oklahomans and medical providers in Oklahoma shall postpone minor medical procedures and non-emergency dental procedures until April 30th, 2020. For purposes of aiding in the determination of what is considered an elective surgery, medical providers are encouraged to consult the Centers for Medicare & Medicaid Services (CMS) Non-Emergent, Elective Medical Services, and Treatment Recommendations.

Defs.' Suppl. Br. Ex. 1, EO 2020-13 (2nd Am.), ¶ 22 (Doc. No. 102-1).[6]

12. On that same date, the Governor issued Executive Memorandum No. 2020-02 ("EM 2020-02"), which provides guidance to "be [used] when elective surgeries are performed." Defs.' Suppl. Br. Ex. 2, EM 2020-02, at 2 (Doc. No. 102-2). The guidance "is subject to individual institutions' availability of personal protective equipment" and sets forth both "key considerations for providers" and a tiered approach to surgeries (the "Elective Surgery Acuity Scale" or "ESAS"). *Id.* at 2-3. Providers are instructed that they "should" both "abide by" the ESAS and "require a COVID-19 test as a portion of the pre-operation process." *Id.*[7]

13. The ESAS sets forth a scale of Tiers 1 through 3, each with sub-tiers "a" and "b."[8] Defendants have clarified that the impact on persons seeking abortion is as follows:

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[6] On April 20, 2020, the Governor issued Third Amended Executive Order No. 2020-13, which amended the "after April 24th, 2020," of the second sentence to read "*on and* after April 24th, 2020." EO 2020-13 (3rd Am.) ¶ 22 (Doc. No. 106-1).

[7] Defendants state that the requirement of a COVID-19 test "does not apply where not feasible because the surgery is immediately necessary as part of a medical emergency," Defs.' Suppl. Br. at 4, but no such exception appears in the cited guidance. At the April 20, 2020 hearing, Plaintiffs raised the concern that asymptomatic patients who have not had exposure to the virus do not currently qualify in all counties for testing and, thus, could be unable to access an abortion even if one was otherwise allowable. The Court lacks a sufficient record to make any finding as to the effect of the testing requirement at this juncture.

[8] The Centers for Medicare & Medicaid Services Non-Emergent, Elective Medical Services, and Treatment Recommendations ("CMS Recommendations") referenced in EO 2020-13 set forth a different tiered framework and state: "A tiered framework is recommended to prioritize services and care to those who require emergent or urgent attention to save a life, manage severe disease, or avoid further harms from an underlying condition. Decisions remain the responsibility of local healthcare delivery systems, including state and local health officials, and those clinicians who have direct responsibility for their patients." *CMS Recommendations* (Apr. 7, 2020),

a. Tiers 3a and 3b concern surgeries that are performed only in hospitals and are "[h]igh acuity." *Id.* at 2. These surgeries are "[n]ot impacted" by the Executive Order postponement and are "allowable currently." *Id.* Defendants state that Tier 3a and Tier 3b surgeries include the emergency abortions referenced in the Press Release. *See* Defs.' Suppl. Br. at 2.

b. Tiers 2a and 2b concern surgeries that are performed in either a hospital or a surgery center for conditions that are "[n]ot life threatening but [have] potential for future morbidity and mortality." EM 2020-02, at 2. Surgeries that fall within these Tiers may take place on April 24, 2020. *See id.*; *accord* EO 2020-13, ¶ 22. Defendants state that Tier 2a and Tier 2b surgeries include "elective surgical abortions where delay until April 30 would make elective abortion unavailable under Oklahoma law." Defs.' Suppl. Br. at 2; *see also id.* at 3.

c. Tiers 1a and 1b concern surgeries that are outpatient by nature and performed in connection with non-life-threatening illnesses. *See* EM 2020-02, at 2. Surgeries that fall within these tiers may take place on April 30, 2020. *See* EO 2020-13, ¶ 22.[9] Defendants state that Tiers 1a and 1b "include[] all elective surgical abortions" that would still be

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https://www.cms.gov/files/document/cms-non-emergent-elective-medical-recommendations.pdf.

[9] On April 20, 2020, the Governor issued Amended Executive Memorandum No. 2020-02, which clarified that these surgeries are "[a]llowable April 30." EM 2020-02 (Am.) at 2 (Doc. No. 106-2); *see also* Defs.' Suppl. Br. at 3 n.4.

available to the pregnant person on or after April 30, 2020. Defs.' Suppl. Br. at 3.

-and-

d. Defendants state that medication abortions remain subject to the Executive Orders' postponement on "minor medical procedures" and therefore likewise may not be provided "'until April 30th, 2020.'" *Id.* (quoting EO 2020-13, ¶ 22).

14. Accordingly, as of April 20, 2020, the effect of the Executive Orders, Press Release, and Executive Memorandum (collectively, the "Executive Orders"), absent any Court intervention, is to prevent abortion providers statewide from lawfully performing an elective surgical abortion[10] until: (a) April 24, 2020, for abortions where delay until April 30, 2020, or thereafter would make surgical abortion unavailable under Oklahoma law; or (b) April 30, 2020, for abortions where delay until that date or thereafter would not make surgical abortion unavailable under Oklahoma law. Further, the effect of the Executive orders, absent any Court intervention, is to prevent abortion providers statewide from lawfully performing an elective medication abortion until April 30, 2020.

15. Absent travel to another state, the postponement directed by the Executive Orders would require at least some pregnant persons in Oklahoma who would be eligible

[10] The Court here uses "elective" solely to distinguish the abortions at issue from those abortions not affected by the Executive Order—i.e., those abortions deemed necessary "to avert [the pregnant person's] death or to avert substantial and irreversible impairment of a major bodily function [of the pregnant person] arising from continued pregnancy" or to "otherwise . . . prevent serious health risks to" the pregnant person. Okla. Stat. tit. 63, § 1-738.1A(5); Press Release at 1; *see also* Defs.' Suppl. Br. at 2.

for a medication abortion to instead obtain a more invasive surgical abortion. Pls.' Mot. Prelim. Inj. Ex. 4, Schivone Decl. ¶¶ 31-32 (Doc. No. 16-4). Further, this postponement would effectively eliminate the ability of some pregnant persons in Oklahoma who are presently able to obtain a medication abortion, but for whom the surgical option is medically contraindicated, to obtain an abortion at all. *See id.* ¶ 31.

16. Absent travel to another state, the postponement directed by the Executive Orders would effectively eliminate the ability of pregnant persons in Oklahoma who would reach their last eligible date under Oklahoma law prior to April 30, 2020—specifically, the date when "the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks," Okla. Stat. tit. 63, § 1-745.5(A)—to obtain an abortion until April 24, 2020, or thereafter. *See* Pls.' Reply Ex. 2, Burkhart Suppl. Decl. ¶¶ 4, 6 (Doc. No. 84-2); EO 2020-13, ¶ 22; Defs.' Suppl. Br. at 2 (representing that "elective surgical abortions where delay until April 30 would make elective abortion unavailable under Oklahoma law" "may take place starting on April 24").

17. A surgical abortion is an outpatient procedure. The PPE commonly used in performing these procedures includes sterile or non-sterile gloves, a gown, a face shield or protective eyewear, a surgical mask, a hair cover, and shoe covers. Pls.' Reply Ex. 3, Hill Suppl. Dec. ¶¶ 17-18 (Doc. No. 84-3); Burns Decl. ¶ 23; Burkhart Decl. ¶ 34; Hill Decl. ¶ 10; *see also* Burkhart Decl. ¶ 35 (stating that clinic already had a small quantity of N95 masks in stock and was planning to have staff use one per week until that supply ran out). The invasiveness, complexity, potential need for sedation, clinic time, and use of staff and PPE involved in the surgical abortion increase as the pregnancy progresses. Pls.' Reply

Ex. 1, Nichols Decl. ¶ 25 & n.8 (Doc. No. 84-1); Burkhart Suppl. Decl. ¶¶ 16, 17; Hill Suppl. Decl. ¶¶ 13-14.

18. On a surgical abortion performed up until 12 to 13 weeks postfertilization, the clinician typically uses aspiration, which involves dilating the cervix using medications and/or small expandable rods, inserting a narrow, flexible tube through the cervix into the uterus, and emptying the uterus through suction. Schivone Decl. ¶ 16. This procedure typically takes 5 to 10 minutes. *Id.*

19. Beginning at approximately 12 to 13 weeks postfertilization, patients cannot have an aspiration procedure; clinicians instead use instruments to complete the surgical abortion in a technique called dilation and evacuation. *Id.* ¶ 17; Nichols Decl. ¶ 26; Burkhart Suppl. Decl. ¶ 15. This procedure typically can be completed in one day. Nichols Decl. ¶ 27; Burkhart Suppl. Decl. ¶ 16.

20. Beginning at approximately 16 to 18 weeks postfertilization, patients must come to the clinic twice over two consecutive days to receive a surgical abortion. Nichols Decl. ¶ 27; Burkhart Suppl. Decl. ¶ 17. The patient visits the clinic on the first day to commence dilation and then returns for the uterine evacuation. Nichols Decl. ¶ 27.

21. A medication abortion typically requires an in-person visit, with an ultrasound and bloodwork, and a prescription of two pills (mifepristone and misoprostol). The pregnant person takes the first pill at the provider's office and the second pill at a location of her choosing. Schivone Decl. ¶ 14; Hill Suppl. Decl. ¶ 17. There is a later follow-up appointment, which at least two Plaintiff providers are currently conducting via telemedicine. Hill Suppl. Decl. ¶ 19; Burkhart Suppl. Decl. ¶ 8. The PPE used at the in-person visit is primarily limited

to non-sterile gloves and surgical masks. *See* Schivone Decl. ¶ 35; Burns Decl. ¶¶ 23-24 (testifying that for medication abortions the only protective equipment used is non-sterile gloves and surgical masks); Hill Suppl. Decl. ¶¶ 17-18 (same); Burkhart Decl. ¶¶ 33, 25 (testifying that staff is using one N95 mask per week, until existing supply runs out, and for medication abortions uses non-sterile gloves and surgical masks).

22. While the parties dispute the opposing experts' interpretation of the medical literature, the evidence in the record reflects that the occurrence of serious complications associated with medication abortions is quite low overall. *See, e.g.*, Nichols Decl. ¶ 67 & n.49 (discussing FDA warning label for mifepristone, which informs patients that in 10 studies of approximately 31,000 women "[s]erious adverse reactions were reported in <0.5%" (Doc. No. 84-1, at 138-39)); Pls.' Reply Ex. 1, Grossman Decl. ¶ 6 (Doc. No. 84-1) (citing three studies of medication abortions as finding: (i) "0.16% of patients experienced a significant adverse event"; (ii) "0.26% of patients experienced a clinically significant adverse event"; and (iii) "a major complication rate of 0.31%"); Defs.' Resp. Ex. 7, Harrison Decl. ¶ 16 (Doc. No. 54-7) (noting a study finding that 3.3% of first-trimester mifepristone patients required emergency treatment); *see also* National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 77 (2018) ("The clinical evidence makes clear that legal abortions in the United States—whether by medication, aspiration, D&E, or induction—are safe and effective. Serious complications are rare; in the vast majority of studies, they occur in fewer than 1 percent of abortions, and they do not exceed 5 percent in any of the studies the committee identified." (Doc. No. 84-1, at 124)).

23. A pregnant person eligible for abortion but who continues the pregnancy likewise will require medical care that involves in-person contact and the use of PPE, even if later pregnancy and childbirth are not considered. Dr. Stone, an obstetrician-gynecologist practicing in Oklahoma City, has testified that although she has made some changes to her practice and increased the amount of PPE she wears as a result of the COVID-19 pandemic, she is continuing to provide in-person prenatal care to pregnant persons, such that "even during COVID-19, before a patient has reached 28 weeks gestation, she will have met with me in-person at least 3 times, had 2-3 ultrasounds in-person, and visited the laboratory at least twice for testing, 3 times if she chooses to have a first trimester screen." Pls.' Reply Ex. 4, Stone Decl. ¶¶ 23-25 (Doc. No. 84-4). Dr. Stone states that she has knowledge that "other Oklahoma prenatal care providers" are similarly treating their pregnant patients. *Id.* ¶ 24.

II.

As explained by the Tenth Circuit,

> Ordinarily, a movant seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest. Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal.

Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001) (citation omitted).[11]

[11] Defendants contend that Plaintiffs must "satisfy a heightened standard" because they are seeking relief that is "disfavored" due to "afford[ing] [Plaintiffs] all the relief that [they] could recover at the conclusion of a full trial on the merits." *Fish v. Kobach*, 840 F.3d 710, 723-24 (10th Cir. 2016) (internal quotation marks omitted); *see* Defs.' Resp. at 22.

A. Substantial Likelihood of Success on the Merits

The Court has considered the potential for success of Plaintiff's claims under both *Jacobson*'s standard for permissible state action during a public health emergency and *Casey*'s standard for permissible state regulation of access to abortion. *See Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1847128, at *8 (M.D. Ala. Apr. 12, 2020) (assuming that both legal frameworks should be applied and granting preliminary injunction), *appeal docketed*, No. 20-11401 (11th Cir. Apr. 13, 2020). Plaintiffs have established a substantial likelihood of success on the merits.

1. Surgical Abortions Where Delay Renders Abortion Unavailable

In some instances, the effect of the Executive Orders is to prevent access to surgical abortion altogether. In Oklahoma nonemergency abortions are prohibited when "the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks." Okla. Stat. tit. 63, § 1-745.5(A). As detailed above, the current effect of the Executive Orders is to prevent abortion providers statewide from lawfully performing an elective surgical abortion until at least April 24, 2020 (based on probable postfertilization age on April 30, 2020). This delay would make surgical abortion unavailable to a patient under section 1-745.5(A) if the probable postfertilization age of the unborn child reaches 20 or more weeks prior to or on April 24, 2020. This effective denial of a constitutional right represents the type of "plain, palpable invasion of rights" identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency.

Assuming the heightened standard applies, Plaintiffs meet that standard for the reasons outlined below.

Jacobson, 197 U.S. at 31. As such, the Executive Orders are, in this respect, invalid as an "unreasonable," "arbitrary," and "oppressive" use of the State's emergency powers. *Cf. Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, 2020 WL 1905147, at *5-7 (M.D. Tenn. Apr. 17, 2020) (order granting preliminary injunction against enforcement of state executive order preventing procedural abortions until at least April 30, 2020), *appeal docketed*, No. 20-5408 (6th Cir. Apr. 20, 2020). Moreover, whether viewed as a ban or as a restriction subject to the undue burden standard, this effective denial of the right of access to abortion is impermissible under *Casey*. *See Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effect right to elect the procedure.").

2. Other Surgical Abortions

In other instances, where the probable postfertilization age of the unborn child will not reach 20 or more weeks until after April 24, 2020, the effect of the Executive Orders is to require a pregnant patient to temporarily delay receipt of a surgical abortion until: (i) April 24, 2020 (for pregnant patients for whom "delay after April 30 would make elective abortion unavailable under Oklahoma law," Defs.' Suppl. Br. at 2)[12] or (ii) April 30, 2020 (for pregnant patients for whom delay beyond that date would not make elective abortion unavailable under Oklahoma law, *id*. at 3).

[12] This would include patients whose unborn children reach probable postfertilization age of 20 weeks from April 25 through April 30, 2020.

a. Procedures Performed Prior to April 24, 2020

Giving deference to the state executive as the primary arbiter of what steps are necessary in that area to stop the spread of COVID-19, and to ration resources needed to treat patients infected with that virus, the Court concluded in its Temporary Restraining Order of April 6, 2020, that a temporary delay of surgical abortions is a permissible use of state power in the current public health emergency—so long as the pregnant patient would remain able to lawfully obtain an abortion upon the cessation of the Executive Orders. Further, upon "consider[ing] the burdens a law imposes on abortion access together with the benefits those laws confer," *Hellerstedt*, 136 S. Ct. at 2309, the Court concluded in the Temporary Restraining Order that the benefit of emergency action during this great public health crisis justifies such a temporary delay of access to abortion services.[13] Those remain the conclusions of the Court as to the current situation, based on a full examination of the evidence presented by the parties.

[13] In applying these principles to the facts established in this case, the Court accepts and assumes that the holdings in *Casey* and its progeny do not foreclose application of a *Jacobson* analysis of whether a postponement of abortion procedures may be ordered as part of a State's effort to protect public health during a pandemic. Absent this assumption, it is even more plain that Plaintiffs are likely to succeed on the merits. The Supreme Court in *Casey* explained that "a statute which, while furthering . . . [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice," is invalid. *Casey*, 505 U.S. at 877. Further, though the state "may enact regulations to further the health or safety of a woman seeking an abortion," the state may not impose "[u]necessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* at 878. If *Casey* is read to speak to any exercise of state interest, including emergency action to avert a public health crisis, it would be clear that restrictions on abortion services of the kind reflected in the Executive Orders constitute a substantial obstacle to abortion access and, therefore, are invalid.

b. Procedures Performed On or After April 24, 2020

Since the issuance of the TRO, the State's position and directives have changed. Based upon a stated "confiden[ce] in the State's "hospital numbers & PPE," the State is now permitting certain elective surgeries to resume six days sooner, on April 24, 2020. Governor J. Kevin Stitt (@GovStitt), Twitter (Apr. 15, 2020); *see also id.* (Apr. 17, 2020) ("[W]e currently have more than enough hospital beds, ICU beds, & ventilators statewide but . . . we remain prepared for a surge."); *see* EO 2020-07, ¶ 22; EM 2020-02, at 2; *cf.* Defs.' Suppl. Ex. 1, Blankenship Suppl. Decl. ¶ 2 (Doc. No. 96-1) (stating that Oklahoma hospitals are reporting an average stockpile of a 12-day supply of PPE although some hospitals would more typically have a month's or more supply on hand with a lower use rate).

Consistent with *Jacobson*, the Court defers to the State's judgment that April 24, 2020, is the earliest date upon which its restrictions on medical procedures can be safely loosened. In light of the diminished need for rationing after April 23rd, however, the record does not reflect any reasonable basis to continue, beyond that date, the significant intrusion upon a constitutional right represented by the State's postponement of the relevant surgical abortions. Absent such justification, the post-April 23, 2020 prohibition on surgical abortions reflected in the Executive Orders is invalid as an "unreasonable," "arbitrary," and "oppressive" use of the State's emergency powers and as an "undue burden" on the right of Plaintiffs' patients to access abortion services.

3. Medication Abortions

With respect to medication abortion, the Court likewise concludes that it is substantially likely that Plaintiffs will establish that the prohibition reflected in the Executive

Orders is invalid as an "unreasonable," "arbitrary," and "oppressive" use of the State's emergency powers and as an "undue burden" on the right of Plaintiffs' patients to access abortion services. The evidence reflects that this procedure is reasonably safe and requires similar interpersonal contact and PPE as regular prenatal care and less interpersonal contact and PPE than surgical abortion. It follows that the purpose and benefit that Defendants state the government is trying to achieve through the Executive Orders—preventing "(1) close interpersonal contact, (2) depletion of medical PPE, and (3) activities that will increase the use of hospital beds, staff, and other resources," Defs.' Resp. at 26-27—are not advanced by prohibiting medication abortion, especially in light of the State's early revocation of a portion of the elective-surgery and minor-medical-procedure ban as described above. As an example, delay of medication abortion for a patient with an unborn child nearing nine weeks postfertilization (the latest date when Plaintiff medical providers will administer drugs for a medication abortion) will limit that person's ability to access abortion within the State of Oklahoma to the surgical option, a procedure that will divert more medical resources and PPE than medication abortion.[14] For a patient for whom surgical abortion is contraindicated, such a delay would constitute a complete denial of access to abortion services. And, while administration of medication abortion will require some amount of close interpersonal

[14] Defendants argued at the April 20, 2020 hearing that the State's interests would be advanced by a ban on medication abortions because—up to a certain point in time, at least—a surgical abortion would not be an option for an affected patient pursuant to the Executive Orders. The Court does not find this persuasive in light of (a) the imminent restoration of surgical abortions ordered herein, and (b) the PPE and in-person contact demands attendant to prenatal care that would be necessary for the patient during any extended wait for a surgical abortion.

contact, as outlined above that amount will be small and not dissimilar from the close interpersonal contact the State has allowed in other contexts. This disconnect between the means employed and the benefits achieved indicates that the prohibition on medication abortion is improper under both the *Jacobson* and *Casey* standards of review. *See Jacobson*, 197 U.S. at 31 (explaining that police power is improperly used when "the means prescribed by the state . . . has no real or substantial relation to the protection of the public health and the public safety"); *Hellerstedt*, 136 S. Ct. at 2309 (requiring balancing of "burdens a law imposes on abortion access together with the benefits those laws confer').

In sum, Plaintiffs have established a substantial likelihood of success on the merits of their claim that the Executive Orders violate Plaintiffs' patients' constitutional rights under the Fourteenth Amendment.

B. Irreparable Injury Absent Injunctive Relief

Plaintiffs here have demonstrated imminent, irreparable harm absent entry of injunctive relief, as their patients will be substantially delayed in or prevented from exercising their right to abortion access. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019) ("Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury."); Pls.' Mot. Prelim. Inj. at 30-32; *id.* Ex. 4, Schivone Decl. ¶¶ 28-33, 37. Further, "[a] plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video Satellite*, 269 F.3d at 1156; *cf. Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) ("A disruption or denial of

these patients' health care cannot be undone after a trial on the merits." (internal quotation marks omitted)).

C. The Balance of Hardships and the Effect of an Injunction on the Public

Given the nature of the State's interest in issuing the Executive Orders, namely the protection of public health, the final two considerations for injunctive relief are merged. As detailed above, Plaintiffs have demonstrated that the injury that will be suffered as a result of delaying abortion access to a pregnant patient nearing 20 weeks postfertilization is a complete denial, to that patient, of the Fourteenth Amendment right to access abortion. That plain and palpable deprivation of a fundamental right outweighs the injury the public may suffer if those procedures are allowed to occur. As for other pregnant patients, the State's own guidance indicates that the need for the disputed restrictions will be at least partly eliminated by April 24, 2020. A delay may result in fewer and more invasive abortion options being available, and supplying prenatal care for these patients in the meantime would indisputably require interpersonal contact and use of PPE and other hospital supplies. The current record reflects that the public health benefit achieved by delaying access to abortions "do[es] not outweigh the lasting harm imposed by the denial of an individual's right to terminate her pregnancy" or "by an undue burden or increase in risk on patients imposed by a delayed procedure." *Robinson*, 2020 WL 1847128, at *15; *see also Adams & Boyle*, 2020 WL 1905147, at *6 ("[I]t is always in the public interest to prevent violation of a party's constitutional rights." (internal quotation marks omitted)); *accord Planned Parenthood of Ark. & E. Okla. v. Cline*, 910 F. Supp. 2d 1300, 1308 (W.D.

Okla. 2012) ("The public has an interest in constitutional rights being upheld and in unconstitutional decisions by the government being remedied.").

CONCLUSION

As outlined above, Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 16) is GRANTED IN PART and DENIED IN PART.

Specifically, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants and their employees, agents, attorneys, successors, and all others acting in concert or participating with them are PRELIMINARILY ENJOINED from enforcing Governor J. Kevin Stitt's Seventh Amended Executive Order No. 2020-07 of April 1, 2020, the March 27, 2020 Press Release, and the April 16, 2020 Second Amended Executive Order No. 2020-13 and Executive Memorandum No. 2020-02, against Oklahoma abortion providers, clinics, and their staff, to the following extent:

1. Effectively immediately, the prohibition on surgical abortions may not be enforced with respect to any patient for whom a delay in receipt of the surgical abortion to April 24, 2020, would render elective abortion unavailable to that patient under Oklahoma law; and
2. Effective Friday, April 24, 2020, the prohibition on surgical abortions may not be enforced as to any patient; and
3. Effectively immediately, the prohibition on medication abortions may not be enforced as to any patient.

The Temporary Restraining Order previously entered by the Court (Doc. No. 70) shall expire as outlined therein. The terms of this Preliminary Injunction shall remain in place until further order of the Court.

IT IS FURTHER ORDERED that the security requirement of Federal Rule of Civil Procedure 65(c) is waived.

IT IS SO ORDERED this 20th day of April, 2020.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

EXHIBIT 2

United States Court of Appeals
For the Eighth Circuit

No. 20-1791

In re: Leslie Rutledge, in her official capacity as Attorney General of the State of Arkansas; Larry Jegley, in his official capacity as Prosecuting Attorney of Pulaski County; Matt Durrett, in his official capacity as Prosecuting Attorney of Washington County; Sylvia D. Simon, M.D., in her official capacity as Chairman of Arkansas State Medical Board; Robert Breving, M.D., in his official capacity as member of the Arkansas State Medical Board; Veryl D. Hodges, D.O., in his official capacity as member of the Arkansas State Medical Board; John H. Scribner, M.D., in his official capacity as member of the Arkansas State Medical Board; Omar Atiq, M.D., in his official capacity as member of the Arkansas State Medical Board; Rhys L. Branman, M.D., in his official capacity as member of the Arkansas State Medical Board; Rodney Griffin, M.D., in his official capacity as member of the Arkansas State Medical Board; Marie Holder, in her official capacity as member of the Arkansas State Medical Board; Brian T. Hyatt, M.D., in his official capacity as member of the Arkansas State Medical Board; Larry D. Lovell, "Buddy" in his official capacity as member of the Arkansas State Medical Board; Timothy C. Paden, M.D., in his official capacity as member of the Arkansas State Medical Board; Don R. Phillips, M.D., in his official capacity as member of the Arkansas State Medical Board; William L. Rutledge, M.D., in his official capacity as member of the Arkansas State Medical Board; David L. Staggs, M.D., in his official capacity as member of the Arkansas State Medical Board; Nathan Smith, M.D., M.P.H., in his official capacity as Director and State Health Officer of the Arkansas Department of Health

*Petitioner*s

American Academy of Family Physicians

Amicus Curiae

State of Alabama

Amicus on Behalf of Petitioner

American Academy of Nursing

Amicus Curiae

State of Alaska

Amicus on Behalf of Petitioner

American Academy of Pediatrics

Amicus Curiae

State of Idaho

Amicus on Behalf of Petitioner

American College of Osteopathic Obstetricians and Gynecologists

Amicus Curiae

State of Indiana

Amicus on Behalf of Petitioner

American Psychiatric Association

Amicus Curiae

State of Kentucky

Amicus on Behalf of Petitioner

American Society for Reproductive Medicine

Amicus Curiae

State of Louisiana

Amicus on Behalf of Petitioner

North American Society for Pediatric and Adolescent Gynecology

Amicus Curiae

State of Mississippi

Amicus on Behalf of Petitioner

National Association of Nurse Practitioners in Women's Health

Amicus Curiae

State of Missouri

Amicus on Behalf of Petitioner

Society of Family Planning

Amicus Curiae

State of Montana

Amicus on Behalf of Petitioner

Society of Gynecologic Surgeons

Amicus Curiae

State of Nebraska

Amicus on Behalf of Petitioner

Society of OB/GYN Hospitalists

Amicus Curiae

State of Oklahoma; State of Ohio; State of South Dakota; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of West Virginia; American Center for Law and Justice

Amici on Behalf of Petitioner

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: April 16, 2020
Filed: April 22, 2020

Before LOKEN, SHEPHERD, and ERICKSON, Circuit Judges.

SHEPHERD, Circuit Judge.

The State of Arkansas[1] petitions for a writ of mandamus after the district court entered a temporary restraining order (TRO) enjoining it from enforcing a health directive against a provider of surgical abortions. Having jurisdiction under 28 U.S.C. § 1651(a), we grant the writ of mandamus in part and direct the district court

[1]Petitioners are elected and appointed state officials, hereinafter referred to as the State of Arkansas or the State.

to dissolve the TRO. We deny the pending emergency motion to stay the ex parte TRO and for a temporary administrative stay as moot.

I.

Arkansas, along with the rest of the nation and the world, is in the midst of an unprecedented health crisis occasioned by the worldwide COVID-19 pandemic. Every day, the number of people infected with COVID-19 continues to rise, along with the virus's death toll. As of April 20, 2020, testing has revealed 746,625 cases in the United States with 39,083 deaths.[2] In Arkansas, as of April 20, 2020, 1,853 cases have been confirmed with 41 deaths.[3] Experts believe that hospitalizations related to the disease have not yet peaked within the state, and personal protective equipment (PPE) for healthcare workers is in short supply while concerns remain about the demand for ventilators. In response to the COVID-19 pandemic, Arkansas has issued a number of emergency orders and directives in order to slow the spread of the disease and prevent hospitals and other healthcare providers from becoming overwhelmed due to the rising number of patients. These include the closing of schools for the remainder of the academic year, requiring state employees to telework, prohibiting restaurants and bars from offering dine-in service, and requiring healthcare facilities to screen staff and visitors for fever and other symptoms.

[2]Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in the US, (last updated Apr. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[3]Arkansas Department of Health, COVID-19, (last updated Apr. 20, 2020), https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus.

A.

One such directive from the Arkansas Department of Health (ADH), issued on April 3, 2020, requires that all non-medically necessary surgeries be postponed. The purpose of this directive is multifold, but it primarily stems from a need to preserve existing PPE resources and limit social contact among patients, healthcare providers, and hospital staff. The directive itself is facially neutral: it applies to all types of surgical procedures. Currently, only those procedures that are deemed to be immediately necessary may take place. If it is safe to postpone an elective surgery, then it must be postponed. However, it is left to a patient's healthcare provider to determine whether a surgery is immediately necessary or whether it may be safely performed at a later date.

On March 11, 2020, the Governor of Arkansas signed Executive Order 20-03, directing the ADH to "do everything reasonably possible to respond to and recover from the COVID-19 virus." The ADH directive was subsequently promulgated in response to Executive Order 20-03 and pursuant to the ADH's general authority under Ark. Code Ann. §§ 20-7-109, 20-7-110. Although it has no explicit expiration date, and "while neither the ADH nor [the Governor of Arkansas] have determined how long [the directive] will remain in effect," the current state of emergency declared by the State of Arkansas may not continue "for longer than sixty (60) days unless renewed by the Governor." Ark. Code Ann. § 12-75-107(b)(2). In that the current state of emergency was declared on March 11, 2020, under state law, it may last no longer than May 10, 2020, unless renewed by the Governor of Arkansas.[4] The

[4]It bears mentioning that the President, on March 13, 2020, issued a proclamation declaring a National Emergency concerning COVID-19. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

State concedes in its brief that, absent an extension to the current state of emergency, the ADH directive must expire on May 11, 2020.[5]

B.

Surgical abortions, like other surgical procedures, ordinarily require providers to use PPE to prevent "exposure to blood and other bodily fluids and tissue, and to protect the patient from infection." The relevant PPE in a surgical abortion could include a surgical mask, gloves, gown, and eye protection. Moreover, given the increasing risk of infection, all patients who undergo any type of surgical procedure may themselves need to use PPE in order to avoid contracting COVID-19. Unless deemed immediately medically necessary by a woman's healthcare provider, surgical abortions are prohibited under the ADH directive. It appears, however, that non-surgical abortions, such as medication abortions, may still continue—again, the directive only prohibits elective or non-emergency surgical procedures.

On April 9, 2020, inspectors from the ADH conducted an unannounced inspection of the Little Rock Family Planning Services (LRFP) facility, which is a provider of surgical abortions in Arkansas. It was found that the facility was still providing surgical abortions that were not deemed immediately necessary. The following day, April 10, 2020, the ADH sent LRFP a cease-and-desist letter stating that LRFP was violating the ADH directive and ordering it to stop performing non-emergency abortion surgeries. That letter stated that surgical abortions, consistent

[5]The White House recently issued guidelines that are meant to advise local and state governments on when it is safe to ease existing restrictions and begin reopening the economy. White House, Guidelines: Opening Up America Again (Apr. 16, 2020), https://www.whitehouse.gov/openingamerica/. This seems to suggest that, as time goes on, state and local governments will prepare to relax measures intended to combat the spread of COVID-19.

with the ADH directive, may not take place "except where immediately necessary to protect the life or health of the patient."

C.

On April 13, 2020, LRFP challenged the ADH directive in federal district court. However, instead of filing a new action in the district court, it sought leave to file a supplemental complaint in a pending case filed on June 26, 2019. See Little Rock Family Planning Servs. v. Rutledge, No. 4:19-CV-00449-KGB (E.D. Ark. filed June 26, 2019). In that case, LRFP, along with other plaintiffs, challenged the constitutionality of three separate abortion-related laws passed by the Arkansas General Assembly. The district court preliminarily enjoined Arkansas from enforcing those statutes, and the State has taken an interlocutory appeal from that injunction. See Little Rock Family Planning Servs. v. Rutledge, No. 19-2690. That appeal remains pending before this Court. See id.

In the supplemental complaint, LRFP challenged the ADH directive as it applies to surgical abortions. It alleges that, rather than being motivated by any concern for public health, the directive is "the latest effort in the State's long-running campaign to eliminate women's access to constitutionally guaranteed health care" and that it effectively operates as a ban on pre-viability surgical abortions.

That same day, after moving for leave to file the supplemental complaint, LRFP moved for an ex parte TRO. The following day, on April 14, 2020, the district court entered a TRO enjoining the State from enforcing the directive against surgical-abortion providers. Now, unlike all other surgical procedures, Arkansas cannot proscribe non-emergency surgical abortions in its effort to conserve PPE and to limit social contact.

The State filed the instant petition for a writ of mandamus directing the district court to dissolve the ex parte TRO and dismiss the supplemental complaint. It also has moved to stay the district court's TRO and for expedited briefing and consideration of the motion and petition. We entered an order granting expedited briefing on the motion and petition, and we now consider the merits of the State's petition for mandamus relief.

II.

Mandamus relief is an "extraordinary remedy" to be employed only under the most "exceptional circumstances." Will v. United States, 389 U.S. 90, 95 (1967). In order to obtain it, petitioners must show that they "have no other adequate means to attain the relief [they] desire[ ]." Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (internal quotation marks omitted). Indeed "[t]he traditional use of the writ . . . has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." Id. (third alteration in original) (internal quotation marks omitted). Put differently, mandamus may only lie in "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." Id. (internal quotation marks and citations omitted). "[A] clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion." In re Apple, Inc., 602 F.3d 909, 911 (8th Cir. 2010) (per curiam).

> To grant a writ of mandamus, this court weighs three factors: (1) the petitioning party must satisfy the court that he has no other adequate means to attain the relief he desires; (2) his entitlement to the writ is clear and indisputable; and (3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

In re Kemp, 894 F.3d 900, 905 (8th Cir. 2018) (internal quotation marks omitted).

III.

We first consider whether the State is entitled to mandamus relief concerning the district court's entry of the order granting the TRO. We conclude that it is, and in so holding, adopt the reasoning of the Fifth Circuit in In re Abbott, No. 20-50264, 2020 WL 1685929 (5th Cir. April 7, 2020). Indeed, the State has satisfied its burden in demonstrating that it has no other means to obtain the relief that it seeks, that it is clearly and indisputably entitled to the writ, and that entry of the writ is appropriate under the circumstances.

A.

First, we find that the State has no other means to attain the relief that it seeks. This "condition [is] designed to ensure that the writ will not be used as a substitute for the regular appeals process." Cheney, 542 U.S. at 380-81. In light of the "surging tide of COVID-19 cases and deaths, [the State has] made this showing." In re Abbott, 2020 WL 1685929, at *14.

Under 28 U.S.C. § 1292(a)(1), courts of appeals have jurisdiction "to review [i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." Nordin v. Nutri/System, Inc., 897 F.2d 339, 341 (8th Cir. 1990) (alterations in original) (internal quotation marks omitted). We have, however, interpreted this to mean that we would ordinarily lack jurisdiction to hear an interlocutory appeal from the district court's grant or denial of a TRO. See Schlafly v. Eagle Forum, 771 F. App'x 723, 724 (8th Cir. 2019) (per curiam); see also S. Wind Women's Ctr. LLC v. Stitt, No. 20-6045, 2020 WL 1860683 (10th Cir. April 13, 2020) (dismissing interlocutory appeal from a similar order granting a TRO for lack of jurisdiction); Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL

1673310, at *1 (6th Cir. April 6, 2020) (per curiam) (noting that jurisdiction did not lie in the court of appeals from a similar order granting a TRO). If a litigant would suffer "serious, perhaps irreparable consequence" from the district court's TRO, then an interlocutory appeal may properly lie from that order. Hunter v. Bradford, 642 F. App'x 648, 649 (8th Cir. 2016) (per curiam) (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)). However, "where mandamus is clearly an appropriate remedy, we are not bound to require that the petitioner first seek interlocutory review." In re Apple, 602 F.3d at 912. Therefore, even if we assumed, without deciding, that an interlocutory appeal from the district court's TRO is available to the State, we may nevertheless consider the petition for a writ of mandamus. See id.

Moreover, given the broader context of the COVID-19 pandemic, we agree with the Fifth Circuit that "[i]n mill-run cases, it might be a sufficient remedy to simply wait until the expiration of the TRO, and then appeal an adverse preliminary injunction. In other cases, a surety bond may ensure that a party wrongfully enjoined can be compensated for any injury caused. Those methods would be woefully inadequate here." In re Abbott, 2020 WL 1685929, at *14 (internal citations omitted). Day after day, the number of individuals testing positive for, and dying from, COVID-19 continues to climb both in Arkansas and nationally. Additionally, PPE continues to be used in hospitals each day. The "peak" of infections in Arkansas has not yet occurred, and if the State were "required to wait and appeal an adverse preliminary injunction, the harms from a . . . suspension of [the ADH directive] for all [surgical abortions] could not be put back in the bottle." Id. (internal quotation marks omitted).

Also relevant to the issue of whether the State has no other means to attain the relief that it seeks is the fact that LRFP chose to seek judicial relief from the ADH directive via a motion for permission to file a supplemental complaint in Little Rock Family Planning Servs., No. 4:19-CV-00449-KGB, rather than by instituting a new action. LRFP took this path even though that case has been confined to the

consideration of a challenge to certain laws passed by the Arkansas General Assembly, a matter now on appeal to this Court, and did not involve a challenge to the very recent ADH directive, which was issued pursuant to an executive order from the Governor of Arkansas. As discussed below, utilization of this procedure in the context of this case is procedurally suspect at best, however, the order permitting the filing of the supplemental complaint is interlocutory and not appealable until entry of final judgment. Thus, the State has no ability to challenge the amended complaint which gave rise to the TRO.

Accordingly, we are satisfied that the State has no other means to attain the relief that it seeks.

B.

Second, we address whether the State has a clear and indisputable right to issuance of the writ. A petitioner's right to issuance of the writ is clear and indisputable "only [in] exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." Cheney, 542 U.S. at 380 (internal quotation marks and citations omitted). The Supreme Court has sanctioned the use of the writ "to restrain a lower court when its actions would threaten the separation of powers by embarrass[ing] the executive arm of the Government, or result in the intrusion by the federal judiciary on the delicate area of federal-state relations." Id. at 381 (alteration in original) (internal quotation marks and citations omitted).

We conclude that the State has shown that it is clearly and indisputably entitled to issuance of the writ. In issuing the TRO, the district court first interpreted the ADH directive as "prohibit[ing] nearly all pre-viability abortions past 10 weeks LMP [(last menstrual period)]." On that basis, the court found the directive to be "facially unconstitutional," and thus concluded that LRFP was likely to prevail on the merits. See Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (noting that the Supreme Court

has held that the Constitution restricts states from "prohibit[ing] any woman from making the ultimate decision to terminate" a pre-viability pregnancy (quoting Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion)). In reaching this conclusion, however, the court failed to meaningfully apply the Supreme Court's framework for reviewing constitutional challenges to state actions taken in response to a public health crisis. Such a failure constitutes a clear abuse of discretion.

In Jacobson v. Massachusetts, 197 U.S. 11 (1905), the Supreme Court held that, when faced with a public health crisis, a state may implement measures that infringe on constitutional rights, subject to certain limitations. The Court explained that the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Id. at 26. Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27. Therefore, while constitutional rights do not disappear during a public health crisis, "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." Id. at 29. With these conflicting considerations in mind, the Court set forth the following two-part framework: in the context of a public health crisis, a state action is susceptible to constitutional challenge only if it, "purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" Id. at 31. As the Fifth Circuit accurately explained,

> [t]he 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.

In re Abbott, 2020 WL 1685929, at *7 (quoting Jacobson, 197 U.S. at 31, 38).

Here, the ADH directive, pursuant to the Governor's Executive Order, was issued in response to the impact of the COVID-19 pandemic in Arkansas. Accordingly, even assuming, arguendo, that the district court correctly interpreted the directive to be an outright ban on all pre-viability surgical abortions in Arkansas, the directive is not subject to constitutional challenge unless it "has no real or substantial relation to" the public health crisis, or "is, beyond all question, a plain, palpable invasion of" a woman's right to elective abortion. Jacobson, 197 U.S. at 31; see also In re Abbott, 2020 1685929, at *8 ("[T]he effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in Jacobson."). 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.

Furthermore, we find that the district court's failure to apply the Jacobson framework produced a patently erroneous result. As discussed, Jacobson provides that a court may review a constitutional challenge to a government's response to a public health crisis only if the state's response lacks a "real or substantial relation" to the public health crisis or it is, "beyond all question, a plain, palpable invasion" of the right to abortion. 197 U.S. at 31. We address each prong separately.

1.

Under Jacobson, we must first consider whether the ADH directive has a "real or substantial relation" to the public health crisis in Arkansas brought about by the

COVID-19 pandemic. Id. at 31. In our analysis, we must take care not to "usurp the functions of another branch of government," id. at 28, such as by "second-guess[ing] the state's policy choices in crafting emergency public health measures." In re Abbott, 2020 WL 1685929, at *6.

LRFP argues that the district court correctly found that there is no real or substantial relationship between the ADH directive and the State's public health rationale. In support, it points out that it is "wholly self-sustaining in terms of PPE, and has no intent of utilizing the State's stockpile." Moreover, it contends that requiring women to continue their pregnancies will actually utilize more PPE and hospital resources than allowing non-emergency surgical abortions. Put differently, LRFP does not suggest that the ADH directive itself bears no real or substantial relation to public health—rather, it argues that the directive has no real or substantial relation to public health as applied to surgical abortions.

At the outset, we note that although the district court's analysis of Jacobson was perfunctory, it did acknowledge the State's "legitimate interests in protecting or promoting the public's health and safety during the COVID-19 panic." And as discussed above, the ADH directive has stopped *all* elective or non-emergency surgical procedures, not just surgical abortions, in order to deal with PPE shortages, the rising number of people infected with COVID-19, and existing burdens on hospitals and other healthcare facilities. On the record before us, the State's interest in conserving PPE resources and limiting social contact among patients, healthcare providers, and other staff is clearly and directly related to public health during this crisis. That interest is being effectuated by the ADH directive. The directive is a legally valid response to the circumstances confronted by the Governor and state health officials. As the Fifth Circuit has noted, this is similar to other extreme measures that the State has taken, such as closing schools, prohibiting gatherings of more than ten people, and prohibiting restaurants and bars from offering dine-in services. See id. at *9 (noting that such "measures would be constitutionally

intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis").

Additionally, we find unpersuasive LRFP's arguments that the ADH directive, as applied to surgical abortions, fails to bear a real or substantial relation to public health. First, we do not read Jacobson to require that courts take a piecemeal approach and scrutinize individual surgical procedures or otherwise create an exception for particular providers, such as those performing non-emergency, surgical abortions. Indeed, this would encroach upon the State's policy determinations in how best to combat COVID-19, and we are not empowered to "usurp the functions of another branch of government." Jacobson, 197 U.S. at 28. Second, we are not convinced by LRFP's contention that it has a self-sustaining amount of PPE and that it will not draw upon state stockpiles—the purpose behind the ADH directive is that, by delaying all non-emergency surgeries, conservation of a finite amount of PPE resources across Arkansas may be possible today. Additionally, the fact that LRFP has its own reserve of PPE does not lessen the problem of additional social contact between patients and providers. Third, the claim that non-emergency surgical abortions actually further the State's public health goals by reducing the demand for PPE required for pre-natal care and delivery and reducing the burden on hospitals occasioned by continued pregnancies and childbirths is a policy argument, and the judiciary may not "second-guess the state's policy choices in crafting emergency public health measures." In re Abbott, 2020 WL 1685929, at *6.

For these reasons, and on this record, we conclude that the ADH directive bears a real and substantial relation to the State's interest in protecting public health in the face of the COVID-19 pandemic.[6]

[6]We also note that the record does not suggest that the Governor of Arkansas or the ADH issued the directive in an attempt to deliberately "exploit[] the present crisis as a pretext to target abortion providers sub silentio." In re Abbott, 2020 WL 1685929, at *13 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

2.

The second Jacobson inquiry is whether the ADH directive is "beyond all question, a plain, palpable invasion" of the right to abortion. The Supreme Court has held that the Constitution imposes two restrictions on a state's ability to regulate abortion. The first, addressed above, is that a state "may not prohibit any woman from making the ultimate decision to terminate" a pre-viability pregnancy. Gonzales, 550 U.S. at 146 (quoting Casey, 505 U.S. at 879). The second constitutional restriction is that a state "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" Id. (quoting Casey, 505 U.S. at 878). Accordingly, in order for the court to have the authority to intervene in the State's response to the public health crisis, the ADH directive must, "beyond all question," violate at least one of these constitutional restrictions. On the record before the district court, we find that it does not.

a.

The ADH directive does not operate as an outright ban on all or virtually all pre-viability abortions. First, the directive does not apply to medication abortions, which are available in Arkansas up to 10 weeks LMP. Moreover, contrary to the district court's finding, the directive does not operate as an outright ban on pre-viability abortions for women who are past 10 weeks LMP or for whom medication abortion is contraindicated.

In finding that the directive "prohibit[s] virtually all pre-viability abortions after 10 weeks LMP and prohibit[s] virtually all pre-viability abortions for patients for whom medication abortion is contraindicated," the district court interpreted the directive to be indefinite. However, Arkansas law provides that "[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the

Governor." Ark. Code Ann. § 12-75-107(b)(2). The Governor declared a state of emergency on March 11, 2020. Accordingly, the ADH directive, which was issued pursuant to the Governor's emergency powers and the ADH's general authority under Ark. Code Ann. §§ 20-7-109, 20-7-110, will necessarily expire on May 11, 2020 unless the Governor renews the state of emergency. Such an expiration date makes the ADH directive a delay, not a ban. "The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes." Garza v. Hargan, 874 F.3d 735, 755 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), vacated sub nom. Azar v. Garza, 138 S. Ct. 1790 (2018).

Moreover, the directive contains emergency exceptions, including where "there is a threat to the patient's life if the procedure is not performed." The directive explicitly applies only to "surgical abortions that are not immediately necessary to protect the life or health of the patient." Accordingly, the directive complies with Jacobson's requirement that the emergency measures contain basic exceptions for "extreme cases."

"Properly understood, then, [the ADH directive is] a temporary postponement of all non-essential medical procedures, including abortion, subject to facially broad exceptions." In re Abbott, 2020 WL 1685929, at *10. We agree with the Fifth Circuit's conclusion that such an emergency measure "does not constitute anything like an 'outright ban' on pre-viability abortion[.]" Id. Accordingly, the ADH directive is not, beyond all question, a prohibition of pre-viability abortion in violation of the Constitution.

b.

Finally, we turn to whether the ADH directive, beyond all question, imposes an "undue burden" on a woman's ability to choose whether to terminate a pre-

viability pregnancy. Casey, 505 U.S. at 876. A state action imposes an "undue burden" when it places a "substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." Id. at 878. "Not all burdens on the right to decide whether to terminate a pregnancy will be undue." Id. at 876. Further, for a burden to be facially undue, the benefits of the directive must be "substantially outweighed by the burdens it imposes on a large fraction of women seeking" non-essential surgical abortion in Arkansas. Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 960 n.9 (8th Cir. 2017). Applying this standard within the Jacobson framework, the question is whether the burdens imposed by the ADH directive on a large fraction of women seeking non-essential surgical abortions in Arkansas "beyond all question" substantially outweigh the benefits to the State.

Because the district court erroneously found the ADH directive to be per se unconstitutional as a prohibition on nearly all pre-viability abortions, it determined that Casey's undue burden standard does not apply to its analysis. The court nonetheless concluded that, "[e]ven if the undue-burden standard applies[,] . . . the Supplemental Complaint Plaintiffs are likely to prevail because the burdens of the Challenged Provisions far outweigh their purported benefits." We find that, in its perfunctory analysis of Casey's undue burden standard, the district court committed clear abuses of discretion and, further, usurped the functions of the state government by second-guessing the State's policy choices in responding to the COVID-19 pandemic. Moreover, the district court failed to consider whether LRFP satisfied Casey's undue burden standard "beyond all question," as required under Jacobson.

First, in assessing the benefits of the directive, the district court found that LRFP is likely to prevail on its argument that the directive does not meaningfully further the State's admittedly legitimate interests in protecting or promoting the public's health and safety during the COVID-19 pandemic. However, the purpose of the ADH directive is to delay *all* non-emergency surgeries so that the State may conserve its finite amount of PPE resources and limit social contact among patients,

healthcare providers, and other staff. As discussed above, this facially-neutral directive has a real and substantial relation to the State's interest in combating the COVID-19 pandemic, and the directive's benefits in addressing this public health crisis are clear. Further, the district court's conclusory determination that the directive does not meaningfully address the COVID-19 pandemic constitutes an improper "second-guess[ing of] the state's policy choices in crafting its emergency public health measures." In re Abbott, 2020 WL 1685929, at *6. Accordingly, we find that the district court abused its discretion by erroneously minimizing the directive's benefits in combating the public heath crisis.

Next, in assessing the claimed burdens of the directive, the district court found that LRFP is likely to prevail on its argument that, in a large fraction of cases in which the directive is relevant, the directive will likely operate as a substantial obstacle to a woman's choice to undergo an abortion. There are two issues with the district court's finding. First, the court's determination that a "large fraction" of women will face a substantial obstacle in seeking a pre-viability abortion is based on the court's erroneous finding that the directive indefinitely postpones non-essential surgical abortions. As discussed, however, the directive is not indefinite; it merely postpones non-essential surgical abortions until May 11, unless the Governor renews the state of emergency declaration for another sixty days. Because we must apply Jacobson's "beyond all question" standard to our analysis, we cannot say that it is beyond all question that the state of emergency will continue beyond May 11. Accordingly, the district court abused its discretion in assuming that the directive will continue indefinitely.

Further, the district court failed to conduct any analysis to support its finding that a "large fraction" of women would face a substantial obstacle in seeking pre-viability abortions. Specifically, the court did not determine the number of women currently seeking but unable to obtain a surgical abortion in Arkansas; how many of those women will be past the legal limit for obtaining an abortion by May 11; how

many of those women will be forced to obtain a dilation and evacuation (D&E) abortion instead of an aspiration abortion by May 11; or how many of those women will be forced to undergo a two-day D&E abortion instead of the one-day procedure by May 11. "As a result, we are left with no concrete district court findings estimating the number of women who would be unduly burdened by [the ADH directive] . . . and whether they constitute a 'large fraction' of women seeking [non-essential surgical] abortions in Arkansas[.]" Jegley, 864 F.3d at 960. Accordingly, we find that the district court clearly abused its discretion in finding that LRFP is likely to prevail on its argument that, in a large fraction of cases in which the directive is relevant, the directive will likely operate as a substantial obstacle to a woman's choice to undergo an abortion.

We conclude that the State is clearly and indisputably entitled to issuance of the writ.

C.

Finally, we consider whether it is appropriate to exercise our discretion to issue the writ in light of the circumstances of this case. See Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976) (noting that "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed"). "The longstanding view is that discretion to issue the writ[] should be exercised only in special cases . . . ." In re Abbott, 2020 WL 1685929, at *15 (second alteration in original) (quoting 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3933 (3d ed. 2019)).

Because of the impact of the ongoing global pandemic in Arkansas, "[w]e are persuaded that this petition presents an extraordinary case justifying issuance of the writ." Id. As discussed above, the total number of Arkansas residents infected with, and dying from, COVID-19 is growing daily; PPE continues to be used; and state

officials remain concerned with continued spread of the disease, supply shortages, and burdens on hospitals and other healthcare facilities. Because "even a minor delay in fully implementing the [S]tate's emergency measures could have major ramifications," it is appropriate for us to exercise our discretion in issuing the writ. Id.

Our conclusion is supported by our concern that the district court committed a serious error in failing to meaningfully apply the Jacobson framework, which resulted in a clear abuse of discretion. The consequence of this error, which effectively "bestow[ed] on [surgical] abortion providers a blanket exemption from a generally-applicable emergency public health measure," is magnified because of its "effect on the [S]tate's ongoing emergency efforts to slow COVID-19." Id. Further, we think that in so doing, the district court "usurped the power of state authorities by passing judgment on the wisdom and efficacy of . . . emergency measures" in the midst of a public health crisis. Id. Mandamus is an appropriate remedy to correct this error.

IV.

Finally, we consider whether the State is entitled to mandamus relief concerning the district court's order granting LRFP leave to file the supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d). We begin by noting that we lack appellate jurisdiction to review the district court's decision to allow LRFP to file the supplemental complaint. Mo.-Kan.-Tex. R. Co. v. Randolph, 182 F.2d 996, 999 (8th Cir. 1950) ("We think the order granting plaintiffs leave to file their supplemental and dependent bill of complaint was not appealable."); 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1504 (3d ed. 2019) ("The decision to permit or deny leave to file a supplemental pleading is interlocutory and cannot be reviewed except on an appeal from the final judgment."). Further, this is not the sort of error ordinarily entitled to mandamus relief. See Kay Ferer, Inc. v.

Hulen, 160 F.2d 146, 149 (8th Cir. 1947) (denying petition for writ of mandamus to set aside order allowing supplemental complaint).

Nevertheless, because the decision to allow the supplemental complaint is unreviewable and not remediable by mandamus relief, we consider the propriety of the decision to the extent it bears on the appropriateness of mandamus relief regarding the TRO. As discussed above, LRFP sought leave to file the supplemental complaint challenging the ADH directive in a pending case. See Little Rock Family Planning Servs. v. Rutledge, No. 4:19-CV-00449-KGB. In that case, LRFP challenged the constitutionality of three separate abortion-related laws in Arkansas. Unlike the ADH directive, none of those laws seek to limit surgical abortions on the basis of the COVID-19 pandemic. Because the ADH directive is distinct and separate from the Arkansas statutes challenged in that case, we express serious doubt that the supplemental complaint challenging the directive "cover[s] matters subsequently occurring but pertaining to the original cause" within the meaning of Rule 15(d). United States v. Vorachek, 563 F.2d 884, 886 (8th Cir. 1977) (internal quotation marks omitted); see also Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400, 402-03 (9th Cir. 1997) (per curiam) (holding district court abused its discretion in allowing supplemental complaint because "[a]lthough both the original suit and the supplemental complaint sought to challenge Arizona's parental consent law, the supplemental complaint challenged a different statute than the one that had been successfully challenged in the original suit").

Accordingly, we decline to exercise our mandamus power to direct the district court to dismiss the supplemental complaint. We consider the district court's decision to allow the supplemental complaint only for the limited purpose of further demonstrating why mandamus relief regarding the TRO is appropriate.

V.

For these reasons, we grant a writ of mandamus in part and direct the district court to dissolve the TRO of April 14, 2020. We deny the emergency motion to stay the ex parte TRO and for a temporary administrative stay as moot.

LOKEN, Circuit Judge, dissents.
