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' RESPONSE TO DEFENDANTS-APPELLANTS' EMERGENCY PETITION FOR REHEARING EN BANC AND ADMINISTRATIVE STAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES……ii

INTRODUCTION ii

ARGUMENT 2

I. The Panel Decision is Consistent with Well-Settled Supreme Court Precedent, Including Jacobson, and Does Not Warrant En Banc Review 2

II. The Panel Decision Is Not Inconsistent with Other Circuits. 6

III. The Panel Correctly Held the Providers Face Irreparable Harm and that the Balance of Equities Favors the Providers.....9

TABLE OF AUTHORITIES

Page(s)

Cases

In re Abbott,
No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020).....7

Ford v. Wilder,
469 F.3d 500 (6th Cir. 2006) 10

Jacobson v. Massachusetts,
197 U.S. 11 (1905).....*passim*

Mitts v. Bagley,
626 F.3d 366 (6th Cir. 2010) (Sutton and Kethledge, JJ., concurring).....1

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992).....3, 4, 6, 7

Planned Parenthood of Wisconsin, Inc. v. Van Hollen,
738 F.3d 786 (7th Cir. 2013) 9

Pre-Term Cleveland v. Att'y Gen. of Ohio,
No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020).....8

Preterm-Cleveland v. Att'y Gen. of Ohio,
No. 1:19-cv-360, 2020 WL 1957173 (S.D. Ohio Apr. 23, 2020) 8

Robinson v. Att'y Gen. of Ala.,
No. 20-11401-B, 2020 WL 1952370 (11th Cir. Apr. 23, 2020).....7, 9

Robinson v. Marshall,
C.A. No. 2:19-cv-365 (MHT), 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020) 8

In re Rutledge,
No. 20-1791, 2020 WL 1933122 (8th Cir. Apr. 22, 2020).....7

S. Wind Women's Ctr. LLC v. Stitt,
No. 20-6055 (10th Cir. Apr. 27, 2020).....8

S. Wind Women's Ctr. LLC v. Stitt,
No. CIV 20-277-G, 2020 WL 1932900 (W.D. Okla. Apr. 20, 2020) 8

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994).....10

U.S. v. American-Foreign S.S. Corp.,
363 U.S. 685 (1960).....1

United States v. Munsingwear,
340 U.S. 36 (1950).....10

Whole Woman's Health v. Hellerstedt,
136 S. Ct. 2292 (2016).....6

Women's Med. Prof'l Corp. v. Voinovich,
130 F.3d 187 (6th Cir. 1997) 4

Statutes

28 U.S.C. § 46(c) 1

Rules

Fed. R. App. P. 27(d)(1)(E) 13

Fed. R. App. P. 32(f).....13

Fed. R. App. P. 35(b)(1) 2

6th Cir. I.O.P. 35(a) 1, 4

Other Authorities

Attorney General William Barr, *Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys re: Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020),
https://www.justice.gov/opa/page/file/1271456/download.....3

TN Office of the Governor, *Gov. Lee Issues Guidelines for Restaurants, Retail Stores to Reopen Early Next Week in 89 Counties* (Apr. 24, 2020), https://www.tn.gov/governor/news/2020/4/24/gov--lee-issues-guidelines-for-restaurants--retail-stores-to-reopen-early-next-week-in-89-counties.html 10

INTRODUCTION

Defendants-Appellants ("the State") request the "extraordinary procedure" of *en banc* rehearing, 6th Cir. I.O.P. 35(a), and further ask this Court to rehear and decide their request by April 29, because the Executive Order ("EO-25") is set to expire one day later. The State's petition has no basis and should be denied. In its well-reasoned opinion, a panel of this Court affirmed a preliminary injunction against EO-25, which prevents patients from accessing constitutionally protected healthcare, operating as a total ban for some, and as a significant delay for others. Though the State conceded below that the undue burden standard is applicable, it now asks this Court for unchecked authority to curtail fundamental rights without any judicial oversight. That request is unsupported by case law and subverted by record evidence showing that EO-25—as applied to the three categories of patients identified in the panel's opinion—frustrates rather than serves the State's goals of preserving personal protective equipment ("PPE") and limiting community spread.

En banc courts are convened only when extraordinary circumstances exist. *U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960), *superseded by statute on other grounds*, 28 U.S.C. § 46(c); *see also Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton and Kethledge, JJ., concurring) (*en banc* should be saved for "the rarest of circumstances") (internal quotations omitted). A party seeking this extraordinary form of review must demonstrate either (1) that the panel's decision

conflicts with U.S. Supreme Court or Sixth Circuit precedent, or (2) that the case involves "one or more questions of exceptional importance," such as a decision that creates a circuit split. Fed. R. App. P. 35(b)(1). Neither requirement is met here. The panel's decision is consistent with Supreme Court precedent recognizing as fundamental the right to access abortion pre-viability and constraining unconstitutional state action during a public health emergency.[1] Further, the narrow relief granted by the panel, which gives greater deference to the State than required under Supreme Court precedent, is consistent with the relief already upheld in this and other circuits. The Court should deny rehearing *en banc*.

ARGUMENT

I. The Panel Decision is Consistent with Well-Settled Supreme Court Precedent, Including *Jacobson*, and Does Not Warrant *En Banc* Review

Contrary to the State's argument here, and as it conceded below, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "does not give States *carte blanche* to violate the rights of their citizens." R.249, PageID#6175. The panel considered *Jacobson* at length and significantly narrowed the District Court's injunction in express deference to the State while heeding *Jacobson*'s mandate that courts protect

[1] The State also requests a temporary administrative stay but advances no argument or authority in support of this extraordinary request.

fundamental rights. Op. at 14-17, 21 (holding it did not "suggest that abortion rights during a public health crisis are *identical* to abortion rights during normal times").[2]

Although the State conceded below that the critical question under *Jacobson* is whether EO-25 "'beyond all question' imposes an undue burden on a woman's right to obtain an abortion," R.249, PageID#6176, it now asks this Court to afford it uncritical deference whenever it declares a public health emergency. Pet. at 16-18. But the State's argument finds no support. On the contrary, careful scrutiny of state action, including whether the State's goals are actually served, is required under both *Jacobson* and Supreme Court abortion jurisprudence. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (holding state interests cannot justify plenary override of individual liberty) (citing *Jacobson*, 197 U.S. at 24-30). As the panel correctly held, *Jacobson* articulated clear limits on state police powers: 1) when there is "beyond all question a plain, palpable invasion of rights secured by the fundamental law"; and 2) when they have no "real or substantial relation" to the State's objectives. Op. at 15 (quoting *Jacobson*, 197 U.S. at 31).

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[2] *See, e.g.*, Attorney General William Barr, *Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys re: Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020), https://www.justice.gov/opa/page/file/1271456/download ("Many policies that would be unthinkable in regular times have become commonplace in recent weeks, and we do not want to unduly interfere with the important efforts of state and local officials to protect the public. But the Constitution is not suspended in times of crisis. We must therefore be vigilant to ensure its protections are preserved, at the same time that the public is protected.").

First, the State attempts to circumvent fifty years of Supreme Court precedent establishing that there is a fundamental right at stake here, by arguing that EO-25 is not a ban on previability abortion. But the State does not dispute that any patient who was 16 weeks and 6 days from their last menstrual period on the day EO-25 went into effect would be completely prevented from accessing abortion in Tennessee. *See* Op. at 16, 18 n.13; R.232-5, PageID##5887–88. As this Court has recognized, under *Casey*, "a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997). In any case, EO-25's lengthy mandatory delay also fails the undue burden test, and the State cites no case in which a court has countenanced a three-week state-mandated delay. As the panel correctly held, the right to a previability abortion is "part of 'the fundamental law,'" and in preventing patients from exercising the right to abortion, or requiring them to undergo a more invasive, riskier, longer, and costlier procedure, EO-25 "constitutes 'beyond question, a plain, palpable invasion of rights secured by [that] fundamental law.'" Op. at 15-16 (quoting *Jacobson*, 197 U.S. at 31).

Second, the State falsely alleges that the panel ruled "without any analysis of the specific burdens alleged" by Plaintiffs-Appellees (the "Providers") or "any attempt to weigh those burdens against EO-25's benefit." Pet. at 12. In fact, the panel addressed this balancing under *Jacobson* in depth. Like the *Jacobson* Court, the

panel reviewed expert medical opinion, explaining that the State provided nothing more than its "say so" that barring abortion for three weeks would protect public health, whereas "every serious medical or public health organization to have considered the issue has said the opposite." Op. at 16-17.[3] And, whereas in *Jacobson*, the benefits of vaccination in those circumstances were widely accepted, the panel stated that "it is much harder to discern that relation here, given the paltry amount of PPE saved, and limited amount of in-person contact avoided, by halting procedural abortions for a three-week period." Op. at 16. Notably, the State's petition does not challenge the factual underpinnings of the decisions below that, as applied to the three categories of abortion patients set forth in the panel's decision, EO-25 bears no "real or substantial relation" to the State's asserted interests. *See* Op. at 15-16 ("[T]he State has never, at any point in this litigation, attempted to support its policy choice with expert or medical evidence."); *id.* at 19 ("[T]he State presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions, and the State has not remedied that shortcoming on appeal.") (internal quotations omitted).[4]

[3] *See also Br. of Am. Coll. of Obstetricians & Gynecologists & Other Nationwide Orgs. of Medical Professionals as Amici Curiae*, 1 (explaining "the consensus of the nation's medical experts," "on the front lines" of fighting COVID-19 is that it "does not justify restricting or prohibiting abortion care" and "EO-25 will increase, rather than decrease, use of hospital resources and personal protective equipment").

[4] A proceeding is not an ideal candidate for *en banc* review where the panel's decision was dictated by a highly fact-intensive inquiry. *See* 6th Cir. I.O.P. 35(a).

That the panel conducted the requisite balancing is further confirmed by the significantly narrowed injunction it directed. Though the State claims the majority modified the injunction only "slightly" and in a manner "that in practice will likely include all women," Pet. at 1, 8, that is incorrect. As modified by the panel, the injunction only applies to three carefully-delineated categories of patients: 1) those who are likely at risk of losing access altogether, 2) those who will likely be forced to have a two-day versus one-day procedure, and 3) those who will likely be forced to undergo a lengthier, riskier and more complex procedure that typically occurs at 14-15 weeks and later. Op. at 21. This means that, for instance, any patients too late for medication abortion (beyond 11 weeks), but too early for the more complex procedure (14-15 weeks) will be forced to delay needed care until EO-25 expires. The panel has thus afforded extraordinary deference to the State due to COVID-19—particularly since the Supreme Court has recognized that even the imposition of a 24-hour waiting period for an abortion is a "close[ ] question" under normal circumstances. *See Casey,* 505 U.S. at 885. Any notion that the panel failed to account for what "*Jacobson* requires in these extraordinary times," Pet. at 12, is a gross distortion.

II. The Panel Decision Is Not Inconsistent with Other Circuits.

Like the panel, every other circuit court to consider similar state actions recognized that the undue burden standard set out in *Casey* and *Whole Woman's*

Health v. Hellerstedt, 136 S. Ct. 2292 (2016) applies even in the context of a public health emergency. *Robinson v. Att'y Gen. of Ala.*, No. 20-11401-B, 2020 WL 1952370, at *5-7 (11th Cir. Apr. 23, 2020) (denying Alabama's motion for a stay pending appeal, holding that even in a public health emergency, states do not "have *carte blanche* to impose any measure without justification or judicial review"); *In re Abbott*, No. 20-50296, 2020 WL 1911216, at *3 (5th Cir. Apr. 20, 2020) (discussing "how the *Jacobson* framework works with the *Casey* undue-burden analysis"); *In re Rutledge*, No. 20-1791, 2020 WL 1933122, at *7 (8th Cir. Apr. 22, 2020) (evaluating directive at issue under *Casey*'s undue burden standard "within the *Jacobson* framework"). The Fifth and Eighth Circuit opinions do not support the State's argument for blind deference: like the panel opinion, both circuits considered record evidence to determine whether the purported benefits of the challenged orders outweigh the burdens imposed on patients seeking abortions. *In re Abbott*, 2020 WL 1911216, at *13-14; *In re Rutledge*, 2020 WL 1933122, at *2, 7-8. And even the *Abbott* Court permitted an injunction to stand, tailoring the injunction to mitigate harm to patients most burdened by the executive order. *In re Abbott*, 2020 WL 1911216, at *5.

The panel's decision is also consistent with another Sixth Circuit panel, which declined to stay a temporary restraining order blocking Ohio from prohibiting abortion providers from determining when procedures could be safely postponed

during COVID-19. *Pre-Term Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *2 (6th Cir. Apr. 6, 2020). The State fails to cite this opinion.

In addition, the narrow relief afforded here is consistent with the carefully tailored relief that district courts across the country have granted against similar state orders, accommodating the exigencies of the pandemic while ensuring patients are not unduly burdened in accessing time sensitive health care. *See, e.g.*, *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 1:19-cv-360, 2020 WL 1957173, at *5 (S.D. Ohio Apr. 23, 2020) (blocking order to extent it prevents providers from making individualized determinations regarding when abortions cannot be delayed based on several factors including "the timing of pre-viability or other medical conditions"); *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV 20-277-G, 2020 WL 1932900, at *9, 11 (W.D. Okla. Apr. 20, 2020) (allowing most abortions to proceed immediately, and all to proceed as of April 24, citing "disconnect between the means employed and the benefits achieved"), *request for stay denied*, No. 20-6055 (10th Cir. Apr. 27, 2020);[5] *Robinson v. Marshall*, C.A. No. 2:19-cv-365 (MHT), 2020 WL 1847128, at *8-9 (M.D. Ala. Apr. 12, 2020) (enjoining order to extent it prohibits abortion providers from making individualized determinations based on several factors

[5] The Tenth Circuit denied Oklahoma's emergency motion to stay the preliminary injunction of an executive order barring certain categories of abortion procedures, stating it had "not shown a probability [it] or the public will be irreparably harmed between now and April 30" when the executive order expires. *S. Wind Women's Ctr. LLC v. Stitt*, No. 20-6055, at 3 (10th Cir. Apr. 27, 2020) (attached as Exhibit 1).

including gestational age and increased health risk), *aff'd*, *Robinson*, 2020 WL 1952370. It is the State's position that is the outlier.

III. The Panel Correctly Held the Providers Face Irreparable Harm and that the Balance of Equities Favors the Providers

Contrary to the State's assertions, the panel majority did not "excuse[]" the Providers from any burden to demonstrate irreparable harm. Pet. at 11. On the contrary, the majority found that irreparable harm would result from EO-25 based in part on "evidence that hundreds of women in any given month seek procedural abortions because they are past the point where medication abortion is an option, and that [the Providers] had to cancel specific procedural appointments because of EO-25, including some where the woman was literally at the clinic." Op. at 18 n.13. Tellingly, the State agrees, claiming in its merits brief "that until EO-25 expires on April 30, nearly 100 surgical abortions will unnecessarily take place." State Br. 23; *see also* R.246, PageID#6154 (stating that an average of nearly 50 abortions per week are provided after 11 weeks in Tennessee).[6] The panel thus properly based its irreparable harm finding on the fact that: (1) Tennessee women would continue to seek procedural abortions while EO-25 is in effect; and (2) "if Tennessee is allowed

[6] Despite this concession, the State claims the Providers did not point to "specific patients." Pet. at 11. Even were that true, which it is not, *see, e.g.*, Op. at 5-6, there is no requirement to pinpoint "specific patients" to establish harm, and the State cites no authority. *See*, *e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013) (upholding preliminary injunction of admitting privileges law without showing that specific patient would be prevented from obtaining care).

to enforce EO-25 in the sweeping manner it desires," those women "stand[] at risk of losing [their] constitutional rights, or at least of incurring substantial physical, emotional, and financial harms en route to exercising those rights." Op. at 18.

Finally, the State's claimed urgency around enforcing EO-25 to prevent the three categories of patients outlined in the panel's opinion from obtaining abortions is belied by its own actions. EO-25 expires on April 30, and the State has not asserted any intention to extend it.[7] Indeed, the State already touts plans to reopen businesses, such as restaurants and retail outlets.[8] The State's Petition should be denied.

[7] The State argues that this appeal must be reheard and decided *en banc* prior to EO-25's April 30 expiration, while also insisting that the appeal should move forward absent any operative order (and thus without any live controversy). The State's theory is that this matter is "capable-of-repetition-yet-evading-review" because "the COVID-19 pandemic is ongoing." Pet. at 2 n.1. But the fact remains that Appellant Governor Lee set the deadline for EO-25's expiration and opted not to extend it. Nor is there any merit to the State's assertion that it is entitled to vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950). "[V]acatur is an equitable remedy rather than an automatic right." *Ford v. Wilder*, 469 F.3d 500, 505 (6th Cir. 2006) (quotation marks omitted). And vacatur is not warranted here where the mootness is attributable to the State. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23–27 (1994); *Ford*, 469 F.3d at 505–07.

[8] TN Office of the Governor, *Gov. Lee Issues Guidelines for Restaurants, Retail Stores to Reopen Early Next Week in 89 Counties* (Apr. 24, 2020), https://www.tn.gov/governor/news/2020/4/24/gov--lee-issues-guidelines-for-restaurants--retail-stores-to-reopen-early-next-week-in-89-counties.html.

Dated: April 28, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with this Court's instructions because it contains 10 pages, 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 28, 2020

/s/ *Genevieve Scott*
Genevieve Scott

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 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

EXHIBIT 1

FILED
United States Court of Appeals
Tenth Circuit

April 27, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOUTH WIND WOMEN'S CENTER LLC, on behalf of itself, its physicians and staff, and its patients, d/b/a Trust Women Oklahoma City; LARRY A. BURNS, D.O, on behalf of himself and his staff and his patients; COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS INC., on behalf of itself, its physicians and staff, and its patients,

Plaintiffs - Appellees,

v.

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; MARK GOWER, in his official capacity as Director of the Oklahoma Department of Emergency Management,

Defendants - Appellants.

No. 20-6055
(D.C. No. 5:20-CV-00277-G)
(W.D. Okla.)

ORDER

Before **LUCERO**, **BACHARACH**, and **MORITZ**, Circuit Judges.

This matter is before the court on Appellants' emergency motion to stay the district court's April 20, 2020, preliminary injunction pending appeal of that order. Appellees responded to the motion, and Appellants filed a reply. In addition, two amicus briefs were filed, and a third was submitted with a motion for leave to file. We grant the motion for leave to file an amicus brief filed by the Roman Catholic Diocese of Oklahoma and other faith-based entities.

To obtain a stay pending appeal, Appellants must address the same four factors applicable to preliminary injunctions: (a) "the likelihood of success on appeal"; (b) "the threat of irreparable harm if the stay or injunction is not granted"; (c) "the absence of harm to opposing parties if the stay or injunction is granted"; and (d) "any risk of harm to the public interest." 10th Cir. R. 8.1; *see also FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (per curiam). "A stay is not a matter of right," but rather is an "exercise of judicial discretion . . . dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). Further, "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court's] discretion." *Nken*, 556 U.S. at 433-34.

A motion for stay pending appeal is subject to the same standards as a preliminary injunction. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). "Courts have consistently noted that because a showing of probable irreparable harm is the single most

important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements will be considered. Demonstrating irreparable harm is not an easy burden to fulfill." *First W. Capital Mgmt. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017) (citation and internal quotation marks omitted).

Currently, certain categories of abortion procedures are prohibited by Executive Order in Oklahoma until after April 30. Appellants have not shown a probability they or the public will be irreparably harmed between now and April 30 absent a stay of the preliminary injunction by this court pending their appeal of that order. As a result, the emergency motion for stay pending appeal is denied, as is the motion to expedite the appeal.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk