No. 20-5408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAMS & BOYLE, P.C., et al.,
Plaintiffs-Appellees

v.

HERBERT H. SLATERY III, Attorney General and Reporter, et al.,
Defendants-Appellants

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

REPLY IN SUPPORT OF EMERGENCY PETITION FOR REHEARING EN BANC AND ADMINISTRATIVE STAY

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The State files this reply to briefly address four points raised in Plaintiffs' response.

First, Plaintiffs contend that, if this case becomes moot when EO-25 expires, vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950), would be unwarranted because mootness would be "attributable to the State." Resp.10 n.7. Not so. The Supreme Court vacated a judgment in similar circumstances in *Trump v. Hawaii*, 138 S. Ct. 377 (2017). There, a lawsuit challenging a federal executive order became moot on appeal when the relevant provisions of the order "expired by [their] own terms." *Id.* (alteration in original) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). The Supreme Court "[f]ollowed [its] established practice in such cases" and vacated the judgment below. *Id.* Similarly, this Court vacated a judgment under *Munsingwear* when a case become moot on appeal due to the legislature's repeal of the challenged law. *See, e.g., Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581, 582-83 (6th Cir. 2012). The expiration of an executive order by its own terms, established before litigation ensued, is exactly the sort of "happenstance" that justifies vacatur. *Watermark Senior Living Retirement Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421, 429 (6th Cir. 2018). It is no more the "fault" of the State than the conferring of a degree is the fault of a university. *Cf.*

Fialka-Feldman v. Oakland Univ. Bd. of Trustees, 639 F.3d 711, 716-17 (6th Cir. 2011).

In any event, that Tennessee's Governor has "opted not to extend" EO-25 at this time, Resp.10 n.7, does not mean that he will not need to limit elective and non-urgent healthcare procedures in the future. Plaintiffs do not dispute that the COVID-19 pandemic is ongoing. Nor do they dispute that COVID-19 cases have not yet peaked in Tennessee. And experts have warned that, absent a vaccine, a second wave of COVID-19 cases could hit the United States in the fall or winter. *See, e.g.*, Lena H. Sun, *CDC director warns second wave of coronavirus is likely to be even more devastating*, Wash. Post (Apr. 21, 2020), https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/.

Second, Plaintiffs suggest that the panel decision is not suitable for en banc review because it involved a "highly fact-intensive inquiry." Resp.5 n.4. But the only part of the panel's analysis that could be described as "highly fact-intensive" is its determination that EO-25 does not bear a "real or substantial relation" to protection of the public health. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). That was the one part of its analysis that should *not* have been fact intensive. *Jacobson*'s "real or substantial relation" test is one of reasonableness, and it does not permit, let alone require, courts to become arbiters of medical uncertainty. That

the panel decision engaged in the kind of judicial second-guessing that *Jacobson* forbids underscores the need for en banc review.

Moreover, the problem is not so much with the "facts" the panel majority found as part of that analysis, but with the legal conclusions it drew from them. The panel acknowledged that enforcing EO-25 against abortions would save *some* personal protective equipment ("PPE") and avoid *some* in-person contact. *See* Op.16 (referring to "the paltry amount of PPE saved, and limited amount of in-person contact avoided"). That was more than enough to establish that EO-25 is substantially related to its goals. As Judge Bush has explained, allowing exemptions for medical procedures that, viewed individually, use only a "negligible" amount of PPE would "constitute a serious free-rider problem, the likes of which the Supreme Court has looked upon with disfavor in cases involving state action during pandemics." *Pre-Term Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *4 (6th Cir. Apr. 6, 2020).

And even assuming Plaintiffs are right that delaying abortions *now* might increase PPE use and social interaction *later*, that in no way weakens the relationship between EO-25 and its stated goals. The "entire point of a mitigation measure" like EO-25 is that "delaying procedures *now* may prevent short-term exhaustion of critical medical resources." *In re Abbott*, --- F.3d ---, No. 20-50296, 2020 WL 1911216, at *12 (5th Cir. Apr. 20, 2020) ("*Abbott II*"). Because enforcing EO-25

against surgical abortions will indisputably further its goals of conserving PPE and preventing the spread of COVID-19 in the short term, it satisfies *Jacobson*'s "real or substantial" relation test and confers clear benefits that outweigh any incidental burdens on abortion rights.

Third, the relief in this case is not "narrow." Resp.2. Plaintiffs identify a single category of women who, under the modified injunction, will be "forced to delay needed care until EO-25 expires": those who are "too late for medication abortion (beyond 11 weeks), but too early for the more complex procedure (14-15 weeks)." *Id.* at 6. The injunction, meanwhile, grants relief to women who will be well within the legal limit for abortions in Tennessee when EO-25 expires and eligible for an abortion procedure that Plaintiffs themselves describe as "extremely safe." PI Memo, R.232, PageID#5756. It is hardly an undue burden, let alone a "plain" and "palpable" one, to temporarily delay an abortion that can later be obtained in an "extremely safe" manner. But the panel majority apparently thought otherwise. And that conclusion is wholly incompatible with *Jacobson*.

The injunction here is thus nothing like the "carefully tailored" relief allowed to stand elsewhere. Resp.8. In Texas, the Fifth Circuit left the TRO intact only as to women who "would be past the legal limit for an abortion in Texas" when the executive order expires. *Abbott II*, 2020 WL 1911216, at *18. And the Ohio TRO this Court lacked jurisdiction to review in *Pre-Term Cleveland* limited enforcement

only if a physician determined, on a case-by-case basis, that delay would "jeopardiz[e] the mother's health, life, or ability to exercise her Fourteenth Amendment right to a pre-viability abortion." 2020 WL 1673310, at *2 (internal quotation marks omitted); *see also id.* (noting that the TRO did not permit "blanket on-demand provision of elective abortions").

Fourth, the State is not asking this Court "for unchecked authority." Resp.5. The State is asking this Court to faithfully apply *Jacobson*, including the important federalism and separation-of-powers principles it reflects. The State agrees, of course, that *Jacobson* imposes limits on the State's exercise of its emergency police powers. The Fifth Circuit and Eighth Circuit recognized this too. *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020); *In re Rutledge*, --- F.3d ---, No. 20-1791, 2020 WL 1933122, at *4 (8th Cir. Apr. 22, 2020). But Plaintiffs did not even come close to showing that EO-25 exceeds those limits, and the analysis performed by the district court and the panel majority was completely untethered from *Jacobson*. This Court should grant en banc review to address the exceptionally important questions presented in this case.

Respectfully submitted,

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April 29, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief contains 1,131 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

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

April 29, 2020

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on April 29, 2020, a copy of the Reply in Support of Emergency Petition for Rehearing En Banc and Administrative Stay was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
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