No. 20-11401

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STEVEN MARSHALL, in his official capacity as
Attorney General of the State of Alabama, et al.,
Defendants-Appellants,
v.
YASHICA ROBINSON, et al.,
Plaintiffs-Appellees.

Appeal from the United States District Court for the
Middle District of Alabama
Case No. 2:19-cv-00365-MHT-JTA

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN SUPPORT OF APPELLANTS AND REVERSING THE PRELIMINARY INJUNCTION. FILED WITH CONSENT.

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April 16, 2020

Marshall. v. Robinson
11th Circuit Case No. 20-11401

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that *amicus curiae*, American Center for Law and Justice, has no parent corporations and issues no stock. Adding to the list provided by the Appellants in their Opening Brief, the undersigned lists the following as additional persons who may have an interest in the outcome of this case:

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and State courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005). The ACLJ has participated as an *amicus curiae* in cases addressing issues similar to those this Court will be considering in the instant appeal. *In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 8, 2020); *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 20-3365 (6th Cir. April 3, 2020); *South Wind Women's Ctr. v. Stitt*, No. 20-6045 (10th Cir. Apr. 8, 2020).

[1] All parties to this appeal consented to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The ACLJ is devoted to defending our God-given individual rights and liberties, including those enumerated by the Founding Fathers in the Declaration of Independence and the United States Constitution. The ACLJ is especially dedicated to defending the fundamental human right to life; without it, no other right or liberty can be enjoyed. The ACLJ and more than 132,000 of its members submit this brief in support of Appellants and urge this Court to reverse the preliminary injunction entered on April 12, 2020, which enjoins Appellants from fully enforcing the temporary Order of the Alabama State Health Officer ("State Health Officer's Order"), on non-essential surgeries and procedures.

STATEMENT OF THE ISSUE

Whether the State has authority to enact Orders during emergency circumstances that temporarily curtail individual liberties for the purpose of protecting and promoting the health and welfare of its people.

SUMMARY OF THE ARGUMENT

One of the most essential and fundamental purposes of our constitutional system of government, if not the most essential and fundamental, is to protect the lives of Americans from threats, whether foreign or domestic. As this Court has noted, protecting "the health, morals and safety of the community" is a legitimate exercise of the State's police power. *Corn v. Lauderdale Lakes*, 816 F.2d 1514, 1518 (11th Cir. 1987). Furthermore, the Supreme Court has plainly stated that when a

"clear and present danger" of an "immediate threat to public safety" exist, "the power of the state to prevent or punish is obvious." *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940).

Although the federal and State constitutions set forth numerous individual rights that may not be infringed upon without a compelling (or other very important) reason, none of these rights are *absolute*. Law, history, and common sense all recognize that one's exercise of individual liberty may rarely, if ever, extend so far as to put the lives, health, or property of others in serious jeopardy. That is the root of the core issue in the case at hand: whether a right (here, the abortion right first recognized by the Supreme Court in 1973) is "absolute" such that a State government has no ability to temporarily interfere with the exercise of that right as a necessary means of addressing a deadly pandemic. The State Health Officer's Order at issue is not a "*ban*" on a constitutional right. The Order is a temporary suspension of activities with a definitive end to the suspension. It has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the people of Alabama. The Order also helps to alleviate the unnecessary strain on the Alabama health system and to preserve personal protective equipment ("PPE") for those healthcare workers combatting the COVID-19 pandemic. The State Health Officer's Order is constitutional and should be fully enforced as requested by Appellants

ARGUMENT

I. Constitutional Rights Are Not Absolute.

The Supreme Court has long recognized that constitutional rights – even ones determined to be fundamental – are not absolute and can be subject to regulation and restriction, especially when the government acts to protect a compelling government interest such as protecting Americans' lives.[2] The Court has stated that there is a "duty our system [of government] places on this Court to say where the individual's freedom ends and the State's power begins." *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

Particularly relevant to the case at hand is the Supreme Court's recognition that, although the freedom of religion is among the most fundamental of liberties, "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). There is no reason why the abortion right asserted by Appellees

[2] *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("[T]he Second Amendment . . . right was not unlimited, just as the First Amendment's right of free speech was not."); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); *Cantwell*, 310 U.S. at 303-04 (holding that the Free Exercise Clause protects two distinct freedoms: the freedom to believe and the freedom to act; the latter is not absolute).

should be given a special, much broader construction than the fundamental rights protected by the First Amendment, which would allow individuals to endanger the lives and safety of others. *Cf. A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 267 n.74 (5th Cir. 2010) (health and safety interests are sufficient "to justify inroads into a student's free expression"); *see also In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 at *4 (5th Cir. Apr. 8, 2020) (noting that, in times where public safety may demand, a State may restrict rights and the "right to abortion is no exception").

Broad protection should indeed be given to our sacred liberties, and Americans must remain ever vigilant and hold our government accountable to protect against the encroachment of those liberties. Yet, it should not be impossible for the government to do what is required to protect lives from a grave threat, the likes of which have not been seen in generations. The temporary, necessary restrictions imposed by the State Health Officer's Order are constitutionally sound.

II. The State Health Officer's Order is Constitutional and Does Not Permanently Diminish the Constitutional Rights of American Citizens.

a. States have broad authority to protect those within their borders.

In times of emergency as well as times of peace, the States possess substantial police power to protect their residents' health and safety. The State Health Officer's Order falls squarely within the constitutionally-recognized police powers of Alabama, and any temporary infringement of a right to abortion is necessary to protect the health, safety, and lives of *all* Alabamians. Where the safety of all citizens

conflicts with the rights of some, the safety of all must prevail. *See Union Dry Goods Co. v. Ga. Public Service Corp.*, 248 U.S. 372, 375 (1919).

While a global pandemic implicates the interests and powers of both the federal and State governments, the Supreme Court has "distinctly recognized the authority of a *State* to enact quarantine laws and 'health laws of *every description*[.]'" *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905) (internal emphasis added). In fact, when Jacobsen argued that his Constitutional rights were violated by the mandatory vaccination requirement imposed by Massachusetts, the Court went so far as to say that

> the liberty secured by the Constitution of the United States to every person within its jurisdiction *does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint*. There are manifold restraints to which every person is necessarily subject for the common good.

Id. at 26 (internal emphasis added). "Real liberty for all" does not exist in a vacuum, where one person may exercise his or her rights to the injury of others. *Id.*; *see also, e.g.*, *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (concluding that mandatory vaccinations were constitutional and stating that "[police powers are] universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance").

When there is a question as to the validity of such an emergency order, "[t]he presumption of law is in favor of the validity of the order. . . ." *Union Dry Goods Co.,* 248 U.S. at 374-75; *accord In re: Abbott*, 2020 U.S. App. LEXIS 10893 at *17, 34. For example, in *Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922), the Supreme Court of Illinois denied habeas corpus relief for a woman quarantined as an asymptomatic carrier of typhoid and concluded that the need to protect the public surpasses any individual liberty interests. The court emphasized with regard to public health:

> Among all the objects sought to be secured by governmental laws *none is more important than the preservation of public health*. The duty to preserve the public health finds ample support in *the police power*, which is *inherent in the state*, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction equal protection of the laws, *were not intended to limit the subjects upon which the police power of a state may lawfully be asserted*. . . .

Id. (internal citations omitted) (emphasis added); *see also Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (noting that "[w]hatever differences of opinion may exist as to the extent and boundaries of the police power . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to preservation of good order and public morals").

Abortion, while residing in the tension between morality and health, still squarely rests within Alabama's police power. The ongoing crisis stemming from

the COVID-19 pandemic presents not only a dire need for the continued protection of Alabamians and, indeed, of all United States citizens, but also creates a haze of medical uncertainty, of a kind not seen in this country for over a century. Thus, it is within the broad purview of State government to navigate the situation for the health and safety of its citizens. In light of the extraordinary deference courts have given to regulations enacted under State police powers, any exceptions to the above principles must be reserved for the most fundamental and expressly enumerated rights, which does not include abortion.

b. Abortion providers do not fall within a narrow exception to traditional State police powers.

Abortion is not a right enshrined in the actual language of the Constitution. In 1973, the Supreme Court held in *Roe v. Wade* that abortion is a right protected, at least to a certain extent, by the federal Constitution. 410 U.S. 113 (1973). After *Roe*, the Court commented on this new constitutional right by stating that the Court's rulings after *Roe* had "undervalue[d] the State's interest in [protecting] potential life." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The Court has since ruled that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman," and that the State has an "interest in promoting respect for human life *at all stages* in the pregnancy." *Gonzales*, 550 U.S. at 157, 163. In sum, the Court has clearly established that there can be constitutional limits on abortion;

in order words, abortion is not a right superior to any other right. Thus, if the government may place restrictions on abortion to protect the lives of the unborn, it follows that it may also place restrictions, as here, on abortion to save the lives of the born.

In *Gonzales v. Carhart*, the Court noted that there was medical uncertainty regarding the Partial-Birth Abortion Ban Act of 2003 and whether it would impose a significant health risk on women. 550 U.S. at 163. The Court noted that it has "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* Furthermore, it held that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164. Consequently, the Court determined that "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.*

The same principles apply here: Alabama has ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that temporarily halting certain medical procedures, including abortions, will help save lives. The State Health Officer's Order has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the people of Alabama. The Order also helps to alleviate

the unnecessary strain on the Alabama health system and to preserve personal protective equipment ("PPE") for those healthcare workers combatting the COVID-19 pandemic. As such, allowing abortions to proceed amidst this crisis, against the State Health Officer's Order, does not fall within a narrow exception to traditional State police powers.

c. The State Health Officer was acting within Alabama's police powers when enacting the Order.

The situation presented by COVID-19 would not be the first instance in which a State entity was called upon to exercise its police powers in a time of medical crisis. For example, in *Louisiana v. Texas*, 176 U.S. 1, 13 (1900), the governor of Texas placed an embargo on Louisiana, prohibiting all individuals and common carriers from entering Texas, due to an outbreak of Yellow Fever. *Id.* at 19. While the Court dismissed the case for lack of subject matter jurisdiction,[3] it noted that "*quarantine laws belong to that class of state legislation which is valid until displaced by Congress,* and . . . such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government." *Id.* at 20-21 (emphasis added). The Court also stated that "it is not for this court to restrain

[3] The controversy was not between the two States directly, as required for original jurisdiction under U.S. CONST. art. III, § 2, because Louisiana brought the suit on behalf of its citizens and not itself. *Id.* at 23.

the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment." *Id.* at 23.

In giving its reasoning, the Court quoted the case of *Morgan Steamship Co. v. La. Board of Health*, 118 U.S. 455 (1886), in which the Court upheld fees that were collected as part of a quarantine system provided by Louisiana statute for protection of the people from infectious and contagious diseases that may have been transferred by the vessels. *Id.* In that decision, the Court stated that

> [t]he matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason *be better understood and more wisely established by the local authorities*. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Id. at 465 (emphasis added).

In sum, the Supreme Court has repeatedly given deference to State entities and their police powers in times of emergency. Therefore, this Court should also give deference to the State of Alabama and allow the State Health Officer's Order to be implemented fully as requested by the Appellants.

CONCLUSION

Amicus curiae respectfully requests that this Court reverse the preliminary injunction entered on April 12, 2020.

DATED: April 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(g) because it contains 2,813 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached 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 a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on April 16, 2020, using CM/ECF. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt:

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