

20-11401

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.

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

**BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MAINE, MASSACHUSETTS, MINNESOTA, NEVADA, NEW MEXICO,
OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON,
AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN
SUPPORT OF APPELLEES AND IN OPPOSITION TO
APPELLANTS' APPLICATION FOR A STAY**

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Dated: April 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN MARSHALL, in his official
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Defendants-Appellants,

Case No. 20-11401

v.

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Plaintiffs-Appellees.

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

1. The name of each person, attorney association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, public traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

Adams, Hon. Jerusha T. – Magistrate Judge for the Middle District
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Alabama Women's Center – Appellee;

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2. The name of every other entity whose public trade stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

Respectfully submitted this 21st day of April, 2020.

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- Molly Hennessy-Fiske, *Crossing the ‘Abortion Desert’: Women Increasingly Travel Out of Their States for the Procedure*, L.A. Times (June 2, 2016), <https://www.latimes.com/nation/la-na-adv-abortion-traveler-20160530-snap-story.html> 9
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INTEREST OF AMICI

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia. Amici oppose a stay of the district court's preliminary injunction because they have a strong interest in ensuring that women can obtain time-sensitive reproductive care in Alabama without undertaking significant interstate travel that increases public health risks. Some of amici's residents are temporarily in Alabama and unable to return home because of the current public health emergency. And some women in Alabama may travel to or through amici States to obtain abortion services banned in Alabama.

As the district court found and amici's experiences show, responding effectively to the current crisis does not require banning all abortions prior to fetal viability except where necessary to preserve the patient's life or health.¹ The district court's preliminary injunction

¹ Although appellants now proffer a different interpretation of Alabama's emergency order, this is how appellants had characterized the effect of the order in the proceedings below, the order can be read this

appropriately blocks enforcement of the ban when a provider has made a case-specific determination that delay will impose serious harm, pose substantial risk, or make a later abortion impossible.

The district court correctly found—and amici’s experiences confirm—that banning such care does not advance appellants’ interests in preserving personal protective equipment (PPE), maintaining hospital capacity, and preventing COVID-19 transmission. Appellants thus are not irreparably injured by the preliminary injunction, whereas staying the preliminary injunction will cause irreparable injury.

For these same reasons, appellants cannot show they are likely to succeed on the merits. The district court properly applied the well-settled standards governing review of abortion bans and restrictions and determined that the public necessity case law produced the same result. Appellants therefore do not qualify for a stay. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (listing stay factors).

way, and appellants have not provided any binding assurance that they will not enforce this interpretation. (App.526, 527 n.5.)

ARGUMENT

POINT I

AMICI'S EXPERIENCES SHOW APPELLANTS WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY

A. Appellants' Interests in Preserving Medical Resources and Reducing COVID-19 Transmission Are Not Being Irreparably Harmed.

Appellants are not irreparably harmed here because barring abortions permitted under the district court's tailored preliminary injunction would not preserve hospital capacity and PPE, or reduce interpersonal contacts.

a. Neither medication abortions nor procedural abortions are performed in hospital settings, and both very rarely result in complications requiring hospital resources. (App.30² (0.01% of emergency room visits in the United States are abortion-related); *see* App.410, 545.) Dispensing medication for a medication abortion does not typically require any PPE, and while procedural abortions use some PPE, they do not use N95 masks particularly needed to treat COVID-19. (App.37.)

² The Robinson declaration in the Appendix (App.27-47) and cited here is the same as the corrected declaration (ECF No. 99-1) in all relevant respects.

A prohibition on abortions even for a short period will force some women who otherwise would have been able to obtain medication abortions to undergo more invasive and lengthier terminations requiring more provider-patient interactions and PPE. (See App.42-43.) Other women will be prevented from obtaining abortions altogether. Abortions use far less PPE and medical resources than continuing a pregnancy, which generally entails more than one prenatal appointment per month, plus ultrasounds and laboratory testing that may require gloves, a face mask, and often other PPE. (App.37, 456, 546.)

Abortion considerations aside, early pregnancy occasions a significant number of hospitalizations resulting from complications and miscarriages.³ Miscarriages commonly occur in the first trimester,

³ Anne Elixhauser & Lauren M. Wier, *Complicating Conditions of Pregnancy and Childbirth, 2008* (Healthcare Cost & Utilization Project, Statistical Brief No. 113, 2011) (internet) (up to 10% of pregnancy-related hospitalizations involve non-delivery complications); Sarah C.M. Roberts et al., *Miscarriage Treatment-Related Morbidities and Adverse Events in Hospitals, Ambulatory Surgery Centers, and Office-Based Settings*, J. Patient Safety, at 3-4 (2018) (internet) (75% of miscarriage treatments occurred in hospital and 1% of all miscarriage treatments involved major complications).

terminate 15-20% of all pregnancies, and often result in unplanned hospitalizations requiring surgery or blood transfusion.⁴ Miscarriage rates might be even higher now, as a consequence of COVID-19 infections.⁵ Because some of these events are inevitably avoided by providing access to timely abortions, denying access to timely abortions will not appreciably conserve hospital resources and PPE in the coming weeks.

Meanwhile, other strategies can alleviate potential resource shortages, as amici's experiences have shown. To preserve hospital capacity, many amici have modified or waived hospital regulations to increase beds in existing facilities and create on-site temporary

For sources available on the internet, full URLs appear in the Table of Authorities.

⁴ See Am. Coll. of Obstetricians & Gynecologists (ACOG), *Early Pregnancy Loss* (Nov. 2018) (internet) (80% of miscarriages in first trimester); Roberts, *Miscarriage Treatment-Related Morbidities*, *supra*, at 3-4; J. Trinder et al., *Management of Miscarriage: Expectant, Medical, or Surgical? Results of Randomised Controlled Trial (Miscarriage Treatment (MIST) Trial)*, *BMJ* (May 27, 2006) (internet) (unplanned hospitalization rate of 8-49% following miscarriage depending on method of treatment); Craig P. Griebel, et al., *Management of Spontaneous Abortion*, *Am. Family Physician* (Oct. 1, 2005) (internet) (up to 20% miscarriage rate).

⁵ March of Dimes, *Coronavirus Disease (COVID-19): What You Need to Know About Its Impact on Moms and Babies* (Apr. 20, 2020) (internet).

structures—or converted hotels, dormitories, and convention centers into quarantine sites and field hospitals.⁶ Some amici have developed state-wide or regional hospital coordinating plans for transferring patients from hospitals nearing capacity to those with available bed space.⁷

To preserve PPE, some amici have issued guidance advising health care workers on conserving PPE,⁸ directed businesses to make their PPE supplies available for distribution,⁹ and established logistics centers to monitor PPE needs and coordinate PPE receipt and distribution.¹⁰ Amici are also finding new ways to source PPE, including through new purchasing channels and by making funding available to enable businesses like clothing companies and distilleries to produce COVID-19 related supplies.¹¹

⁶ Addendum (Add.) CA-1, CT-1, HI-1, IL-2, MA-2, NY-2, NY-4, OR-1, VA.

⁷ Add. NY-5, OR-1.

⁸ Add. CA-1, CO, DE-1, DE-2, MA-1.

⁹ Add. NM-2.

¹⁰ Add. CT-2, NY-5, MN-3, OR-1.

¹¹ Add. NY-1, RI-1.

b. The abortions permitted under the preliminary injunction do not increase risks of COVID-19 transmission. As the district court found, medication and procedural abortions require no more interpersonal contact than appellants are allowing for pregnancy care, including prenatal visits and treatment of complications. (App.543-544, 546-547.)

To further decrease transmission risks in the context of reproductive health care, clinics in amici States have increased the use of telehealth to conduct assessments, which reduces travel and in-person interactions.¹² Some amici have modified state rules to allow increased use of telehealth during the pandemic.¹³ Alabama has not done so for abortion care, to eliminate in-person contacts that could be safely accomplished remotely. (App.36.) The American College of Obstetricians and Gynecologists (ACOG) advises that telehealth can be safely and effectively used for gynecological visits, counseling, and certain steps in medication abortion.¹⁴

¹² Add. CA-4.

¹³ See, e.g., Add. CA-3, HI-1, RI-2.

¹⁴ See ACOG, *Medical Management of First-Trimester Abortion* (Mar. 2014) (internet).

B. A Stay Will Irreparably Harm Patients and Pose a Threat to the Public Interest.

Prohibiting abortions except to preserve a woman's life or health will foreclose some women from accessing pre-viability terminations altogether, unless they undertake risky and expensive interstate travel. For other women, it will lead to more complicated procedures that increase interpersonal contacts and PPE use. These results are contrary to the stated interests of appellants and the public interest.

a. As the district court found, the ban on abortions will irreparably injure any woman who reaches the legal limit for an abortion during the ban (week 20 of the pregnancy, in Alabama). (App.528.) Other women will be permanently foreclosed from receiving a medication abortion (available until week 10 of the pregnancy) and will otherwise require more complicated and invasive procedures that increase medical risks. (App.528-531.)

Appellants fail to recognize how the time-sensitive nature of abortion care distinguishes that care from services that can be postponed without patient harm during the current public health crisis. As the district court found and as amici have acknowledged through various

means, abortions cannot be deferred indefinitely or for long stretches without increasing risks for some women and denying access to others.¹⁵

b. The public interest counsels strongly against a stay here. Amici States' past experience and the record evidence (App.445, 463; *see* App.43-44) show that if abortions are unavailable in Alabama, many women will cross state lines to obtain abortions and then return to Alabama.¹⁶ Appellants' ban will thus exacerbate the travel requirements that many women in Alabama already face (App.423), increasing the risks of COVID-19 transmission and infection-related burdens on appellants' hospital facilities and PPE supplies.

¹⁵ Add. CA-2, DC, IL-1, MN-1, MN-2, NJ, NM-1, NY-3, OR-2, VT, WA.

¹⁶ *See* Molly Hennessy-Fiske, *Crossing the 'Abortion Desert': Women Increasingly Travel Out of Their States for the Procedure*, L.A. Times (June 2, 2016) (internet); Jonathan Bearak et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care*, Guttmacher Inst. (Apr. 2, 2020) (internet); *see also* Alexa Garcia-Ditta, *With More Texans Traveling for Abortions, Meet the Woman Who Gets Them There*, Tex. Observer (June 9, 2016) (internet) (Texas patients in New Mexico doubled after 2013 Texas law restricting access).

POINT II

APPELLANTS CANNOT SHOW THEY WILL LIKELY SUCCEED ON THE MERITS GIVEN DECADES OF BINDING PRECEDENT TO THE CONTRARY

Appellants cannot make “a strong showing” of a likelihood of success in seeking to ban pre-viability abortions absent a threat to the woman’s life or health. *Nken*, 556 U.S. at 434 (quotation marks omitted). The Supreme Court has repeatedly reaffirmed that “[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quotation marks omitted); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). As demonstrated by the long list of decisions cited by appellees (App.110-111), attempts to ban abortion prior to viability have been uniformly rejected by appellate courts across the country for decades.

The district court properly applied settled law to these facts in determining that appellants’ ban was likely unconstitutional regarding women whom it would entirely bar from legally accessing abortion (App.528, 532-533, 537-539). *See Gonzales*, 550 U.S. at 146. Accordingly, the district court correctly enjoined the ban where a provider has

determined that delaying an abortion would cause the woman to lose her right to a legal abortion. (App.565.)

Appellants do not and cannot argue that the district court committed clear error in determining that the ban does not serve appellants' stated interests and will likely impose an "undue burden" on women in certain circumstances. *Whole Women's Health*, 136 S. Ct. at 2309; *see also Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-901 (1992) (plurality op.). The district court first found that the ban will not conserve PPE and hospital resources "even when measured on a very short time horizon" because (i) abortions "require a limited amount of [PPE]," (ii) "the rate of abortions that require hospitalization is extremely low," and (iii) many delayed abortions will simply "re-route[]" PPE to other medical services that are similarly unrelated to the pandemic, such as early prenatal visits. (App.543-546.) In the longer term, permitting women access to abortions now will conserve PPE and hospital resources that would otherwise be used for later prenatal visits, any pregnancy complications, and delivery. (App.546.) The district court also found the ban would not decrease interpersonal contacts in the short term because the patient

would have early prenatal visits, and would increase such contacts in the longer term because later abortion procedures, multiple prenatal visits, and delivery require many more provider-patient interactions. (App.546; *see* App.543-544.) Indeed, appellants' stay motion does not contend that the abortions permitted by the preliminary injunction will cause shortages in PPE or hospital capacity or increase the risk of transmission, thereby irreparably harming the State. (*See* Mot.19-21.)

The district court also found that for some women, even a temporary ban may cause serious harm or pose substantial risk, or would make later abortions "far more difficult, or even impossible." (App.529-531.) The court's preliminary injunction accordingly permits abortions on a case-by-case basis where a provider determines such circumstances are present. (App.565-566.) The Supreme Court has explained repeatedly that a measure furthering a valid state interest "cannot be considered a permissible means of serving its legitimate ends" if it "has the effect of placing a substantial obstacle in the path of a woman's choice." *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2309. And the Court has made clear that an abortion restriction cannot survive constitutional scrutiny when it imposes greater burdens than benefits.

See Whole Woman's Health, 136 S. Ct. at 2310. Meanwhile, the ready availability of other more effective measures to conserve public health resources and limit the risk of transmission (*supra* at 5-7), highlights the extent to which appellants' abortion ban is unnecessary to advance the State's interest in protecting the public health, *see Whole Woman's Health*, 136 S. Ct. at 2311. The district court thus properly found that, in certain cases, the burdens of appellants' ban will outweigh any "preservation of healthcare resources" or "prevention of close social contact." (App.542.)

Appellants are incorrect in claiming that public necessity justifies their abortion ban. The district court fully considered appellants' asserted interest in public health and found that the ban here "impinges on a fundamental right in a 'plain, palpable' way." (App.535 (quoting *Jacobson v Massachusetts*, 197 U.S. 11, 31 (1905)).)

Appellants identify no error in the district court's analysis of *Jacobson*. There, the Supreme Court rejected a challenge to a mandatory vaccination requirement in the context of a small pox outbreak. The Court recognized that liberty interests may be subject to "reasonable regulation" to protect public health. *Jacobson*, 197 U.S. at 25-26, 29-30.

But the Court also made clear that where an exercise of the police power is arbitrary and unreasonable in relation to “particular circumstances” and “particular persons,” the courts should intervene to protect individuals from the restriction. *Id.* at 28, 38. The district court followed that direction here and enjoined appellants’ ban where it operates to completely deprive women of their fundamental constitutional right to access abortion services and does not serve appellants’ asserted interests.¹⁷ (App.533-547.)

¹⁷ Appellants mistakenly rely on cases involving physical property or commercial interests (Br.29) that have no import here, where a personal liberty interest and right to bodily integrity are at issue. Appellants also derive no support from cases (*see id.* at 29-30) involving temporary and partial restrictions on freedom of movement or exercise of religion that, as the district court explained (App.547-548), are not comparable to the permanent consequences imposed on appellees’ patients. *See Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (temporary nighttime curfew imposed in the wake of Hurricane Andrew); *see also Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (child labor law prohibiting children from selling religious materials, where other ways existed to teach religious principles); *Hickox v Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (temporary quarantine of an individual at risk of exposure to Ebola).

CONCLUSION

For the reasons set forth above and in appellees' opposition, this Court should deny appellants' motion for a stay.

Dated: New York, New York
April 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,570 words and complies with the typeface requirements and length limits of Rules 21(d), 29, and 32(a)(5)-(7), and the corresponding local rules.

/s/ William P. Ford

Addendum

ADDENDUM

California

- CA-1 Cal. Dep't of Pub. Health, *COVID-19 Health Care System Mitigation Playbook* (Mar. 2020), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CDPH%20Document%20Library/AFL-20-23-Mitigation-Playbook.pdf>.
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