No. _____

In the Supreme Court of the United States

HERBERT H. SLATERY III, ET AL.,
Petitioners,

v.

ADAMS & BOYLE, P.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Only weeks after the first case of COVID-19 was confirmed in Tennessee, the Governor issued an executive order requiring all healthcare providers to postpone elective and non-urgent surgical and invasive procedures for three weeks. The order aimed to slow community spread of the virus and conserve personal protective equipment for the medical professionals who were treating COVID-19 patients. In the decision below, a divided panel of the Sixth Circuit upheld an injunction largely prohibiting the State from enforcing that executive order against abortion providers. The question presented is:

Whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the Sixth Circuit's judgment and remand with instructions to dismiss as moot the abortion providers' constitutional challenge to the now-expired executive order.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellants below, are Herbert H. Slatery III, Attorney General and Reporter of Tennessee; Lisa Piercey, M.D., Commissioner of the Tennessee Department of Health; W. Reeves Johnson, Jr., M.D., President of the Tennessee Board of Medical Examiners; Glenn R. Funk, District Attorney General of Metropolitan Nashville and Davidson County; Amy Weirich, District Attorney General of Shelby County; Barry P. Staubus, District Attorney General of Sullivan County; Charme P. Allen, District Attorney General of Knox County; William Lee, Governor of Tennessee; and Rene Saunders, M.D., Chair of the Tennessee Board for Licensing Health Care Facilities, all in their official capacities.

Respondents, plaintiffs-appellees below, are Adams & Boyle, P.C.[1]; Memphis Center for Reproductive Health; Planned Parenthood of Tennessee and North Mississippi; Knoxville Center for Reproductive Health; and Dr. Kimberly Looney, on behalf of themselves and their patients.

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[1] Adams & Boyle, P.C., was an appellee in the Sixth Circuit proceedings. After the court of appeals issued its judgment, the district court substituted Bristol Regional Women's Center, P.C., for Adams & Boyle, P.C., based on the latter's representation that it had dissolved in 2019. But no substitution occurred in the court of appeals.

RELATED PROCEEDINGS

Adams & Boyle, P.C. v. Slatery, No. 20-5408 (6th Cir. judgment entered Apr. 24, 2020)

Bristol Reg'l Women's Ctr., P.C. v. Slatery, No. 3:15-cv-00705 (M.D. Tenn. filed June 25, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-50a) is reported at 956 F.3d 913. The order denying rehearing en banc (App. 79a-80a) is unreported. The district court's opinion granting the motion for a preliminary injunction (App. 52a-68a) is reported at 455 F. Supp. 3d 619. The district court's opinion denying the motion for a stay pending appeal (App. 69a-78a) is unreported but is available at 2020 WL 2026986.

JURISDICTION

The court of appeals entered its judgment on April 24, 2020. Petitioners filed a petition for rehearing en banc on April 26, 2020, which the court of appeals denied on May 14, 2020. On March 19, 2020, this Court issued an order extending the deadline for petitions due on or after that date to 150 days from, as relevant here, the date of the order denying rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Tennessee Executive Order No. 25 (Apr. 8, 2020) is reproduced in the appendix at 81a-86a.

INTRODUCTION

In the initial days of the COVID-19 pandemic, as concerns mounted that hospitals would lack the capacity and necessary supplies to treat the growing number of patients infected with the virus, leading medical organizations recommended delaying elective and non-urgent medical procedures. Following this advice, the Governor of Tennessee issued an executive order requiring all healthcare facilities to postpone elective and non-urgent procedures for a three-week period to conserve needed personal protective equipment ("PPE") like gloves and masks and to reduce community spread of COVID-19.

Abortion providers immediately challenged the order, alleging that it violated their patients' constitutional right to abortion. After highly expedited proceedings, a divided panel of the Sixth Circuit affirmed a preliminary injunction largely prohibiting the State from requiring the providers to postpone surgical abortions. The panel majority held that it need not decide whether *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), should govern its constitutional analysis because, in its view, the order was

unconstitutional even under that deferential standard. According to the majority, the temporary delay unduly burdened the right to abortion and did not protect the public health because the procedures at issue used only a "paltry amount of PPE" and required only a "limited amount of in-person contact." App. 24a.

Other courts of appeals considering similar orders reached different conclusions. Both the Fifth and Eighth Circuits held that preliminary injunctions prohibiting Texas and Arkansas, respectively, from enforcing their orders against abortion providers were clear abuses of discretion that warranted mandamus relief. *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) ("*Abbott I*"), *petition for cert. filed* (U.S. Sept. 9, 2020); *In re Abbott*, 956 F.3d 696 (5th Cir. 2020) ("*Abbott II*"), *petition for cert. filed* (U.S. Sept. 9, 2020); *In re Rutledge*, 956 F.3d 1018, 1033 (8th Cir. 2020). Both courts held that the temporary delay occasioned by the orders did not unduly burden abortion rights. And both courts held that *Jacobson* precluded them from second-guessing the States' policy judgments that the measures were needed to protect public safety.

The decision below squarely conflicts with the decisions of the Fifth and Eighth Circuits. It is also deeply flawed. Under a correct application of this Court's abortion precedents, including *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 874 (1992), Tennessee's executive order did not unduly burden abortion. The Sixth Circuit reached the opposite conclusion, and enjoined "a measure at the heart of the State's response" to COVID-19, App. 34a (Thapar, dissenting), only by misconstruing those precedents

and second-guessing the State's policy judgments, in direct contravention of *Jacobson*.

The decision below warrants this Court's plenary review, but because the executive order at issue expired by its own terms on April 30, 2020, this case is now moot. This Court should follow its "established practice" for cases that become moot by "happenstance" before this Court can review them. *Munsingwear*, 340 U.S. at 39-40. It should vacate the judgment below and remand to the Court of Appeals with directions to remand to the district court for dismissal of the relevant claims as moot. *Id.* at 39. Vacatur here would prevent the Sixth Circuit's preliminary rulings from binding the parties in future litigation or hindering the State from carrying out its constitutionally assigned responsibility to protect the public health.

STATEMENT

A. Factual Background

1. Tennessee saw its first confirmed case of COVID-19 on March 4, 2020, only a week before the World Health Organization declared the rapidly spreading virus a global pandemic. *See* Tenn. Exec. Order. 14 (Mar. 12, 2020), https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf. Tennessee's Governor responded swiftly by declaring a state of emergency and adopting measures to protect the public health. *Id.*; App. 7a; *see also* Tenn. Code Ann. § 58-2-107(a)(1) (granting the Governor authority to "address[] the dangers presented to [the State] and its people by emergencies").

One of those measures, issued on April 8, 2020, was Executive Order 25—An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures. App. 81a-86a. The order recounted advice from the Centers for Disease Control and Prevention ("CDC"), federal Centers for Medicaid and Medicare Services, the American Dental Association, and the American College of Surgeons that non-essential healthcare procedures should be limited to "reduc[e] the spread of COVID-19" and "minimize use of essential items needed to care for patients, including . . . ICU beds, personal protective equipment, terminal cleaning supplies, and ventilators." *Id.* at 82a.

Consistent with that expert advice, Executive Order 25 required "[a]ll healthcare professionals and healthcare facilities in the State of Tennessee [to] postpone surgical and invasive procedures that are elective and non-urgent" for a period of three weeks. App. 84a. "Elective and non-urgent procedures" are those "that can be delayed until the expiration of th[e] Order because they are not 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.*

2. Executive Order 25 applied to "[a]ll healthcare professionals and healthcare facilities," without exception, including abortion providers. *Id.* But

because the order was limited to "surgical and invasive procedures" it did not require abortion providers to postpone medication abortions, which are generally available until 11 weeks LMP. *Id.* at 4a-5a, 84a. Nor did it require the postponement of surgical abortions that a provider reasonably determined could not be delayed without serious adverse consequences to the woman's health. *Id.* at 84a.

The only abortion procedures that Executive Order 25 affected, then, were the two methods of surgical abortion: (1) aspiration abortions, which are generally performed until 15 weeks LMP, and (2) dilation-and-extraction ("D&E") abortions, which are performed until approximately 20 weeks LMP. *Id.* at 5a. Both aspiration abortions and D&E abortions are performed in a clinic or physician's office and require the use of "gloves, a surgical mask or reusable plastic face shield, and either reusable scrubs or a disposable gown or smock." R. 230-1, at 15 ¶ 44.[2] Abortion providers consider both methods of abortion to be "exceedingly safe." *Id.*

3. Over 90 percent of abortions performed in Tennessee occur before 15 weeks LMP. Tenn. Dep't of Health, *Selected Induced Termination of Pregnancy (ITOP) Data (2018)*, https://www.tn.gov/content/dam/tn/health/ documents/vital-statistics/itop/ITOP2018.pdf. Only 3 percent occur at 17 weeks LMP or later. *Id.* Tennessee prohibits abortions after viability; a presumption of viability attaches at 24 weeks LMP,

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[2] Citations to "R." are to the record in *Bristol Regional Women's Center, P.C. v. Slatery*, No. 3-15-cv-00705 (M.D. Tenn.).

and a physician may not perform an abortion after 20 weeks LMP without first determining that the unborn child is not viable. App. 5a & n.2; Tenn. Code Ann. §§ 39-15-211, -212.

4. Executive Order 25 expired on April 30, 2020. App. 85a. It has not been extended. Nor has the Governor issued any other executive orders limiting healthcare procedures.

B. Proceedings Below

1. Plaintiffs, a group of abortion providers, immediately sued Tennessee officials. They alleged that Executive Order 25 "might cause their patients to lose their constitutional right [to abortion] altogether, or at least impose an 'undue burden' on that right." App. 9a. And they sought a preliminary injunction to bar the State from enforcing the order against them. *Id.* Rather than initiate a new lawsuit, Plaintiffs sought to supplement their complaint in a five-year-old lawsuit concerning Tennessee's abortion waiting-period law, the trial for which had concluded six months earlier. *Id.* at 35a.

On April 17, 2020, the district court allowed Plaintiffs to supplement their complaint, *id.* at 60a, and granted a broad preliminary injunction prohibiting enforcement of Executive Order 25 against *all* surgical abortions, *id.* at 68a. Without mentioning, let alone applying, this Court's decision in *Jacobson*, the district court concluded that Executive Order 25 "creates an undue burden on the right of women in Tennessee to choose to have a pre-viability abortion." App. 63a. That conclusion rested largely on the district court's

speculation that "the order [wa]s likely to be renewed or extended beyond" its expiration date. *Id.* at 64a.

Plaintiffs identified no specific women whom Executive Order 25 would prevent from obtaining an abortion, and they maintained that abortion is "extremely safe" at all stages of a pregnancy. *Id.* at 11a. Nevertheless, the district court concluded that Plaintiffs had established irreparable harm because "[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." *Id.* at 65a. And the court found that this harm outweighed any harm to the State or the public interest because no "appreciable amount of PPE would actually be preserved" by applying the order to surgical abortions. *Id.* at 66a.

In an order issued a few days later denying the State a stay pending appeal, the district court clarified that it had "considered *Jacobson* and its limitations on judicial intervention without finding it necessary to reference this case by name." *Id.* at 73a. And it doubled down on its determination that Executive Order 25 was unreasonable as applied to surgical abortions "because it does not appreciably advance either of its stated goals, i.e., to slow the spread of COVID-19 or conserve PPE." *Id.* at 75a.

2. The State immediately appealed and sought an emergency stay pending appeal and expedited review. *Id.* at 3a. On April 24, 2020, a divided panel of the

Sixth Circuit affirmed the injunction in large part,[3] narrowing its scope only slightly. *Id.* at 3a-50a. "[I]n normal times[,]" the majority reasoned, there would be "no way that a measure like [Executive Order 25] would pass constitutional muster" because it "functioned not just as a 'delaying regulation,' . . . but also as an outright ban on pre-viability abortion." *Id.* at 21a-22a. And the possibility that the order would be extended beyond April 30th made the burden "all the more crushing." *Id.* at 21a.

Although the majority found it "unfortunate that the district court did not address" *Jacobson* in its initial opinion, it nevertheless concluded that *Jacobson* "d[id] not substantially alter [its] reasoning." *Id.* at 22a, 24a. That was because, in the majority's view, Executive Order 25 "constitute[d] 'beyond question, a plain, palpable invasion'" of a woman's right to obtain an abortion, "at least in *some* applications." *Id.* at 24a (quoting *Jacobson*, 197 U.S. at 31). And the order was not substantially related to the State's public health goals "given the paltry amount of PPE saved, and limited amount of in-person contact avoided, by halting procedural abortions for a three-week period." *Id.*

The majority acknowledged that Plaintiffs "ha[d] not pointed to *specific* patients who would be irreparably harmed by" the order. *Id.* at 28a n.13. Yet it "forg[a]ve Plaintiffs for not being hyper-specific" given the "rapid timeline under which [they] were

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[3] Because the parties had combined their stay and merits briefing, the Sixth Circuit denied the motion for a stay pending appeal as moot. App. 4a.

operating" and concluded that their non-specific allegations of harm were enough to warrant a preliminary injunction. *Id.* On the other hand, the majority concluded that the harms an injunction would impose on the State and the public—the risk of COVID-19 transmission and depletion of PPE—were "speculative and abstract." *Id.* at 29a. Regarding the public interest, the majority concluded that it "need not say much" because "it is always in the public interest to prevent violation of a party's constitutional rights." *Id.* at 31a (internal quotations omitted).

The majority acknowledged that "orders analogous to" Executive Order 25 "had generated a flood of litigation . . . and that judges across the country ha[d] reached differing conclusions as the orders' legality," but it "declin[ed] to address these other opinions in detail" except to acknowledge that "there exists profound, but good faith, disagreement as to the constitutional questions involved." *Id.* at 26a-27a.

The majority agreed with the State on one point—that the scope of the injunction was overbroad. *Id.* at 31a-32a. But the majority narrowed the injunction only slightly to apply to women who would likely (i) "lose their ability to obtain an abortion in Tennessee if their procedures are delayed"; (ii) "be forced to undergo a lengthier or more complex abortion procedure"; or (iii) "be forced to undergo a two-day procedure." *Id.* at 32a-33a. The majority specified that the second category "includes women who . . . will likely be forced to undergo a D&E procedure instead of an aspiration procedure." *Id.* at 5a, 33a.

3. Judge Thapar dissented. *Id.* at 34a-50a. He explained that Executive Order 25 does not "ban[] most pre-viability abortions" because "any woman who was less than seventeen-weeks pregnant when the order went into effect would still have time to seek an abortion after the order expires." *Id.* at 38a. Plaintiffs had offered nothing more than speculation that "there *might* be women out there who were more than seventeen weeks pregnant when the order was issued and who will now be unable to obtain an abortion in Tennessee." *Id.* And they had "made [no] effort to quantify how this hypothetical pool of women relates to the broader pool of women affected by the order." *Id.* at 39a. In fact, the State's evidence had shown that "the vast majority of abortions in Tennessee occur before" seventeen weeks. *Id.* Plaintiffs had also offered only speculation that Executive Order 25 would be extended. *Id.* At most, then, the order delayed some abortions, but "[b]oth the Supreme Court and [the Sixth Circuit] have upheld laws that have the effect of delaying abortions for days or even weeks." *Id.* at 37a.

Judge Thapar found the majority's claim that Executive Order 25 is not substantially related to the public health "remarkable given that the order follows recommendations from our nation's leading public-health institution," as well as inconsistent with *Jacobson*'s prohibition of judicial second-guessing of public-health orders. *Id.* at 44a.

Judge Thapar concluded that Plaintiffs had not shown irreparable harm because they had identified no woman who would be prevented from obtaining an abortion. *Id.* at 45a. And the mere fact of delay did not

establish irreparable harm either given that Plaintiffs "themselves say that 'abortion is extremely safe throughout pregnancy.'" *Id.*

By contrast, it was "hard to imagine a scenario in which the harm imposed by an injunction" on the State and the public interest "would be greater" given that "[e]very piece of equipment used for something besides the pandemic response could cost a life." *Id.* at 46a. Judge Thapar explained that it is not the job of federal courts "to second-guess the Governor's judgment as to the amount of equipment that is *really* necessary to keep healthcare workers alive." *Id.* at 47a.

As for the majority's purported narrowing of the injunction, Judge Thapar noted that the majority failed to "explain why the executive order unduly burdens most of the" three categories of women protected by the narrowed injunction. *Id.* at 49a. And those categories were "amorphous" and "likely to sow confusion going forward." *Id.*

4. The State filed an emergency petition for rehearing en banc. The Sixth Circuit denied that petition on May 14, 2020. *Id.* at 79a-80a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Created a Circuit Conflict.

The decision below held that the Constitution forbids Tennessee from requiring the temporary postponement of surgical abortions during a global pandemic. The panel majority acknowledged that "judges across the country ha[d] reached differing conclusions as to the . . . legality" of similar orders, yet it "declin[ed] to address these other opinions in detail." App. 26-27a. In fact, two Courts of Appeals had reached conclusions directly at odds with the Sixth Circuit. The Fifth and Eighth Circuits held that TROs similar to the injunction upheld below were clear abuses of discretion that warranted mandamus relief. And although the Eleventh Circuit had upheld an injunction in this context, the injunction at issue merely enforced the State's existing interpretation of its executive order.

A. The decision below directly conflicts with decisions of the Fifth and Eighth Circuits.

In contrast to the decision below, the Fifth and Eighth Circuits held that TROs prohibiting States from enforcing similar executive orders against abortion providers were clear abuses of discretion that warranted mandamus relief.

The Fifth Circuit granted Texas mandamus relief not once, but twice. *See Abbott I*, 954 F.3d at 796; *Abbott II*, 956 F.3d at 723. The Governor of Texas issued an executive order that "postpone[d]" for a

month "all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient." *Abbott I*, 954 F.3d at 780 (quoting Tex. Exec. Order No. GA-09 (Mar. 22, 2020)). Unlike Executive Order 25, which did not require the postponement of medication abortions, the Texas order postponed both surgical abortions and medication abortions, at least to the extent those procedures would deplete PPE supplies. *Id.* at 780, 790.[4]

In *Abbott I*, the Fifth Circuit held that a broad TRO "exempt[ing] all abortion procedures from [the] scope" of the month-long order was a clear abuse of discretion. *Id.* at 778. Among other errors, the district court ignored *Jacobson* and erroneously construed the order as an "outright ban" on pre-viability abortions rather than applying *Casey*'s undue burden standard. *Id.* at 778, 783. It also "usurped the state's authority to craft emergency health measures" by "substitut[ing] its own view of the efficacy of applying [the order] to abortion." *Id.* at 778.

In *Abbott II*, the Fifth Circuit again granted mandamus relief from a narrower TRO that was issued on remand from *Abbott I*. Once again, the district court

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[4] Texas's order did not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." *Abbott I*, 954 F.3d at 780 (internal quotations omitted). It was undisputed that surgical abortions require the use of PPE. *Id.* at 790 & n.23. Whether medication abortions consume PPE was a point of contention. *See id.* at 790; *Abbott II*, 956 F.3d at 714-15.

clearly abused its discretion by failing to meaningfully apply *Jacobson* and by improperly "second-guess[ing] the basic mitigation strategy underlying" the executive order. *Abbott II*, 956 F.3d at 703. The district court also failed to "articulate the burden of a delay or why that delay should be considered" a constitutional violation. *Id.* at 719. The Fifth Circuit found that failure especially troublesome given this Court's approval of "a wide variety of abortion regulations . . . that in practice can occasion real-world delays of several weeks." *Id.* (quoting *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)).

The Fifth Circuit even vacated the portion of the TRO that barred enforcement against medication abortions because "[t]here is no constitutional right to any particular abortion procedure." *Id.* at 713-14 (citing *Gonzales v. Carhart*, 550 U.S. 124, 164-65 (2007)). The TRO was left in place only as to the narrow situation when a woman "would be past the legal limit for abortion in Texas" when the executive order expired. *Id.* at 723.

The Eighth Circuit granted Arkansas mandamus relief from a similar TRO. *See Rutledge*, 956 F.3d at 1032. The Arkansas Department of Health issued a directive requiring "that all non-medically necessary surgeries be postponed" for approximately five weeks unless "immediately necessary to protect the life or health of the patient." *Id.* at 1023-24 (internal quotation omitted). The district court issued a broad TRO prohibiting Arkansas from applying this directive

to surgical abortions. *Id.* at 1025. Following *Abbott I* and *Abbott II*, the Eighth Circuit held that the TRO was a clear abuse of discretion because the district court had "fail[ed] to meaningfully apply" *Jacobson* and reached "patently erroneous" results in holding that the directive was unconstitutional. *See id.* at 1028, 1031.

The Eighth Circuit concluded that the directive bore a "real and substantial relation to the State's interest in protecting public health" and explained that *Jacobson* did not permit courts "to take a piecemeal approach and scrutinize individual surgical procedures or otherwise create an exception for particular providers." *Id.* at 1029. Nor did the order "beyond all question" violate the right to abortion. *Id.* at 1030 (quoting *Jacobson*, 197 U.S. at 31). It did not *ban* pre-viability abortions, given the continued availability of medication abortions and the temporary nature of the restriction on surgical abortions. *Id.* And it did not constitute an undue burden for a large fraction of affected women. *Id.* at 1031. In concluding otherwise, the district court had made "no concrete . . . findings" about the burden on specific groups of women and had "abused its discretion in assuming that the directive w[ould] continue indefinitely." *Id.* at 1032 (internal quotations omitted). The Eighth Circuit directed the district court to dissolve the TRO in its entirety. *Id.* at 1033.

The decision below squarely conflicts with *Abbott I*, *Abbott II*, and *Rutledge*. Unlike the Fifth and Eighth Circuits, the Sixth Circuit applied *Jacobson* only in name and contravened that precedent's clear

instruction not to second-guess the State's policy judgments regarding which safety measures are likely to be effective. In further contrast to the Fifth and Eighth Circuits, the Sixth Circuit concluded that Executive Order 25 constituted an undue burden on abortion rights, even during a global pandemic, based on no concrete allegations, evidence, or findings regarding the actual burden on any specific categories of women. App. 28a n.13; *id.* at 38a-39a (Thapar, dissenting).

The upshot is that Texas and Arkansas could enforce their executive orders uniformly against all healthcare providers at a critical time during the early days of the COVID-19 pandemic. Tennessee, meanwhile, was forced to grant abortion providers an exemption because a federal court thought itself better suited to craft the State's emergency response than the elected officials charged with that very responsibility.

B. The decision below is in tension with a decision of the Eleventh Circuit.

The decision below is also in significant tension with *Robinson v. Attorney General*, 957 F.3d 1171 (11th Cir. 2020). In *Robinson*, the Eleventh Circuit denied Alabama a stay pending its appeal from a narrow preliminary injunction prohibiting certain applications of an executive order that limited healthcare procedures. The order "mandated the postponement of 'all dental, medical, or surgical procedures,' with two exceptions: (a) those 'necessary to treat an emergency medical condition;' and (b) those 'necessary to avoid serious harm from an underlying condition or disease, or necessary as a part of a patient's ongoing and active

treatment.'" *Id.* at 1174. Shortly after issuing the order, however, Alabama clarified that the order would not apply to abortion procedures if (1) "a doctor determines that one of the exceptions in the order applies"; (2) "a healthcare provider determines that a patient will lose her right to lawfully seek an abortion in Alabama based on the order's mandatory delays"; or (3) "a healthcare provider determines that an abortion may not be delayed 'in a healthy way.'" *Id.* at 1175. The district court granted a preliminary injunction that "merely preserve[d] [Alabama's enforcement position]—the status quo—while preventing the state from going back to any prior and more restrictive interpretations." *Id.* at 1181.

Alabama appealed and requested a stay of the preliminary injunction, but the Eleventh Circuit denied the stay because the State had "agree[d] that the preliminary injunction [wa]s consistent with its latest interpretation" of the challenged order. *Id.* at 1183. The court of appeals found that narrow injunction easily distinguishable from the broad TROs at issue in *Abbott I* and *Rutledge* where the district courts had "flatly prevented state officials" from applying their orders "to abortion procedures altogether" or enforcing their directives at all "against surgical abortion providers." *Id.*

Robinson thus provides no support for the broad injunction the Sixth Circuit upheld in this case. If anything, its emphasis on the narrow scope of the injunction against Alabama suggests that it would have reached a contrary conclusion if faced with a broader restriction on the State's emergency authority.

II. The Decision Below Is Erroneous.

As *Abbott I*, *Abbott II*, and *Rutledge* make clear, the decision below was not just erroneous, but a clear abuse of discretion. The temporary postponement of surgical abortion procedures required by Executive Order 25 was not unconstitutional under this Court's precedents even in ordinary times, let alone in the initial days of the COVID-19 pandemic. And the equities overwhelmingly weighed against a preliminary injunction, given that the providers had established no risk of irreparable harm and conceded that surgical abortions required the use of the very PPE the order aimed to conserve.

A. The decision below conflicts with this Court's abortion precedents.

The panel majority declined to decide whether it should apply "*Jacobson*'s more state-friendly standard of review" rather than "the usual *Roe/Casey* standard" because it determined that the providers were "likely to succeed on the merits of their constitutional claim" under either standard. App. 22a. But the majority got it exactly backwards. Even without the additional deference that *Jacobson* requires, Executive Order 25 was constitutional.

The possibility that a regulation might cause some abortions to be performed a few weeks later than preferred is not an undue burden under this Court's precedents. Properly understood, Executive Order 25 required the temporary, three-week postponement of surgical abortions that could be delayed without risking serious adverse consequences to a woman's

physical condition. *Id.* at 84a. That delay is not unconstitutional under this Court's precedents. When this Court recognized a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), it emphatically rejected the notion that a woman is "entitled to terminate her pregnancy at *whatever time*, in whatever way, and for whatever reason she alone chooses." *Id.* at 153 (emphasis added). And this Court "has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes," including "parental consent laws, parental notice laws, informed consent laws, and waiting periods." *Garza*, 874 F.3d at 755 (Kavanaugh, J., dissenting).

In *Casey*, this Court held that a 24-hour waiting-period law was not an undue burden even though, in practice, it resulted in delays "of much more than a day." 505 U.S. at 881 (plurality opinion). And this Court has upheld laws requiring minors to obtain parental consent for an abortion, or instead to seek a judicial bypass, notwithstanding that those procedures could delay an abortion by weeks. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 532 (1990) (Blackmun, J., dissenting) ("Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy."); *Hodgson v. Minnesota*, 497 U.S. 417, 465 (1990) (Marshall, J., dissenting) ("[T]he prospect of having to notify a parent causes many young women to delay their abortions . . . ."); *H.L. v. Matheson*, 450 U.S. 398, 439 (1981) (Marshall, J., dissenting) ("[T]he threat of parental notice may cause some minor women to delay past the first trimester of pregnancy . . . .").

The panel majority attempted to distinguish these precedents by positing that the delay in those cases occurred "for reasons *outside* a state's control." App. 22a n.11. As Judge Thapar observed, however, the majority did not "offer any support for this distinction" and "seem[ed] to assume that a once-in-a-century pandemic *is* within a state's control." App. 38a. Plainly, it is not.

Nor is the possibility that a regulation will deprive a woman of her preferred *method* of abortion an undue burden. *See Roe*, 410 U.S. at 153. In *Gonzales*, this Court rejected a challenge to the federal Partial-Birth Abortion Act, which prohibited intact D&E abortions—one method of abortion used during the second trimester. 550 U.S. at 135-36. This Court held that the law did not unduly burden abortion rights "given the availability of other abortion procedures that are considered to be safe alternatives," including the traditional D&E procedure. *Id.* at 167. It follows that, even if Executive Order 25 had the effect of causing some women to lose their ability to obtain a medication abortion or aspiration abortion, that did not constitute an undue burden. The providers themselves acknowledged that D&E abortions, which would remain available, are "exceedingly safe." R. 230-1, at 15 ¶ 44. It can hardly be an undue burden for an abortion regulation to provide access to only "exceedingly safe" abortions.

In concluding that Executive Order 25 imposed an undue burden, the panel majority emphasized that, "depending on the stage of a woman's pregnancy," the order "functioned not just as a 'delaying regulation,' . . .

but also as an outright ban on pre-viability abortion." App. 21a. But Plaintiffs presented no evidence that any woman would in fact lose her opportunity to obtain an abortion. And given that only 3 percent of women in Tennessee obtain abortions after 17 weeks (the point at which a delay of 3 weeks could conceivably have that effect), it was wholly unreasonable for the majority to "forgive Plaintiffs for not being hyper-specific." App. 28a n.13. Nor was it appropriate for the majority to artificially increase the purported burden imposed by Executive Order 25 by speculating that it could be extended. *Id.* at 21.

In any event, women who would "lose their ability to obtain an abortion" constituted only one of the three amorphous groups that remained protected by the majority's narrowed injunction. App. 32a. Neither the district court nor the majority made any findings regarding the specific burden imposed on the other two groups. But Plaintiffs' position that all surgical abortions are "exceedingly safe" would seem to preclude any finding that causing a woman to obtain a D&E abortion rather than an aspiration abortion is unduly burdensome, as would this Court's decision in *Gonzales*.

B. The decision below failed to apply *Jacobson* in any meaningful way.

The decision below was wrong under a traditional application of this Court's abortion precedents. But it was doubly wrong given that this case concerned a safety measure that the elected officials of Tennessee had deemed necessary to protect the public from a once-in-a-century pandemic. This Court has made

clear that the right to abortion "is not unqualified" and must be "considered against important state interests in regulation." *Roe*, 410 U.S. at 154 (citing *Jacobson*). Because *Jacobson* accounts for the State's especially important regulatory interests during a public-health emergency, "the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under" its deferential standard. *Abbott I*, 954 F.3d at 786; *see also Rutledge*, 956 F.3d at 1027-28. The panel majority ducked that important question. And in concluding that Plaintiffs were entitled to injunctive relief even if *Jacobson* applies, the majority failed to afford the State the deference *Jacobson* demands.

In *Jacobson*, this Court recognized that the Constitution entrusts to the State's elected branches policy decisions about what "the safety of the general public" requires. 197 U.S. at 29; *see also S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) ("Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of States 'to guard and protect.'" (alteration omitted) (quoting *Jacobson*, 197 U.S at 38)). Those policy decisions should not be disturbed unless the action at issue "has no real or substantial relation" to protection of the public health or "is, beyond all question, a plain palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. This standard prohibits the judiciary from second-guessing whether a particular health or safety measure "was likely to be the most effective for the protection of the public

against disease." *Id.* at 31; *see also S. Bay*, 140 S. Ct. at 1614.

Deference is especially warranted when "local officials are actively shaping their response to changing facts on the ground." *S. Bay*, 140 S. Ct. at 1614. "In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from denial of application for injunctive relief). "At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify"—luxuries like "[t]ime, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions." *Id.*

The panel majority completely disregarded these well-established principles. Even though it was reviewing an emergency order issued at the outset of a pandemic—when deference should be at its peak—the majority engaged in exactly the sort of second-guessing that *Jacobson* forbids. The majority second-guessed the State's reliance on the CDC's recommendation to limit elective and non-urgent procedures because it did not specifically mention abortion. App. 25a. And it concluded that limiting procedures that use only what it deemed to be "paltry amount[s] of PPE" did not further the State's interest, even though the State had determined that it was necessary to limit *all* procedures. *Id.* at 24a. The majority's second-guessing was perhaps nowhere more evident than in its weighing of the equities, where it chose to overlook

Plaintiffs' failure to identify any "*specific* patients who would be irreparably harmed" while inexplicably viewing the State's proffered harm—during a global pandemic—as "purely speculative." *Id.* at 28a n.13, 30a.

Even in ordinary times, the court of appeals should have required Plaintiffs to "clear[ly] show[]" an entitlement to the "extraordinary remedy" of preliminary relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Its failure to do so here, when Plaintiffs sought to enjoin the State "from enforcing a measure at the heart" of its response to the COVID-19 pandemic, was inexcusable. App. 34a.

III. The Decision Below Should Be Vacated Under *Munsingwear*.

If Executive Order 25 were still in place, this case would warrant this Court's plenary review. The decision below created a square conflict with the Fifth and Eighth Circuits, misapplied this Court's abortion precedents, and ignored *Jacobson*'s admonition against second-guessing the State's emergency measures. *See* Sup. Ct. R. 10(a), (c). But Executive Order 25 expired by its own terms on April 30, 2020. App. 85a. It has not been renewed, nor has the Governor issued any other orders limiting healthcare procedures or indicated that he will in the future.

By any measure, this appeal and the underlying challenge to Executive Order 25 are now moot. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (appeal arising from challenge of federal executive order became moot when the order

"expired by its own terms" (internal quotations omitted)); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (challenge to validity of bill became moot when "that bill expired by its own terms"); *S. Wind Women's Ctr. LLC v. Stitt*, --- Fed. Appx. ---, No. 20-6055, 2020 WL 4782347, at *2 (10th Cir. Aug. 18, 2020) (appeal from injunction prohibiting Oklahoma from limiting abortion procedures during the COVID-19 pandemic became moot when the challenged order expired); *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (challenge to stay-at-home order issued by Louisiana Governor became moot when the order expired by its own terms).

The "established practice of th[is] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That includes cases that become moot even before the petition for certiorari is filed. *See Garza*, 138 S. Ct. at 1793 (explaining that "the fact that the relevant claim here became moot before certiorari d[id] not limit this Court's discretion" to grant vacatur); *Eisai Co. v. Teva Pharm. USA, Inc.*, 564 U.S. 1001 (2011) (granting vacatur in case that become moot before certiorari petition was filed); *Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009) (same)

The point of vacatur is to "clear[] the path for future relitigation of the issues between the parties" and prevent the parties from being "prejudiced by a decision which in the statutory scheme was only preliminary." *Munsingwear*, 340 U.S. at 40. Vacatur "prevent[s] a judgment, unreviewable because of

mootness, from spawning any legal consequences." *Id.* at 41.

"[T]he decision whether to vacate" is equitable in nature and "turns on 'the conditions and circumstances of the particular case.'" *Garza*, 138 S. Ct. at 1792 (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). The "principal condition" to which this Court looks is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). When this Court's review is "'prevented through happenstance'—that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties,'" vacatur is clearly warranted. *Id.* at 23 (quoting *Karcher v. May*, 484 U.S. 72, 82-83 (1987)).

The equities strongly support vacatur here. Review of the decision below was prevented through "happenstance"—the expiration of Executive Order 25 by its own terms—and not voluntary action by the State. *Id.* The order's expiration date was a feature of the order when it was issued; it was not a response to this litigation and certainly not an attempt to avoid appellate review. *Cf. Alvarez v. Smith*, 558 U.S. 87, 97 (2009) (finding vacatur warranted where "a desire to avoid review in this case played no role at all in producing the state case terminations" that caused mootness). This case is no different from others in which this Court granted vacatur when the challenged actions expired by their own terms. *See Int'l Refugee*

Assistance Project, 138 S. Ct. at 353; *Burke*, 479 U.S. at 363.

Vacatur is also warranted because the decision below could "spawn[]" several "legal consequences" if left in place. *Munsingwear*, 340 U.S. at 41. *First*, because Plaintiffs asserted their challenge to Executive Order 25 by supplementing their complaint in an existing challenge to Tennessee's waiting-period law, App. 35a,[5] the decision below could adversely affect the State in that ongoing litigation. In the Sixth Circuit, "when a court reviewing the propriety of a preliminary injunction issues a fully considered ruling on an issue of law with the benefit of a fully developed record, then the conclusions with respect to the likelihood of success on the merits are the law of the case in any subsequent appeal" and any proceedings on remand. *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015); *see also Moody v. Mich. Gaming Bd.*, 871 F.3d 420, 425 (6th Cir. 2017) (explaining that the "law-of-the-case doctrine is intended to enforce a district court's adherence to an appellate court's judgment" (internal quotations omitted)). The conclusions the panel majority reached in the decision below were neither "fully considered" nor based on a "fully developed record," *Howe*, 801 F.3d at 740, so they should not be treated as the law of case under a correct application of that doctrine. But if the decision below remains in place, Plaintiffs could

[5] The plaintiffs in *Rutledge* employed the same tactic, supplementing their complaint in an existing challenge to unrelated abortion laws, and the Eighth Circuit called their "utilization of this procedure . . . procedurally suspect at best." *Rutledge*, 956 F.3d at 1027.

attempt to use those conclusions to bind the State in the waiting-period case, both in the district court and in any eventual appeal. Although those attempts should be unsuccessful, vacatur would ensure that the State is not subjected to them in the first place.

Second, there is a risk that the Sixth Circuit's findings in the decision below could be given preclusive effect in other litigation between Plaintiffs and the State. Although findings at the preliminary-injunction stage are not ordinarily entitled to preclusive effect in later litigation between the parties, "[p]reliminary injunction findings affirmed on appeal" may sometimes "support preclusion." 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4434 (3d ed. Apr. 2020 update); *see also Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chi.*, 701 F.2d 653, 658 (7th Cir. 1983). This possibility, however remote, is particularly concerning given that many of the Plaintiffs in this case are also plaintiffs in pending challenges to other Tennessee abortion regulations. *See, e.g.*, *Memphis Ctr. for Reproductive Health v. Slatery*, No. 3:20-cv-00501 (M.D. Tenn. filed June 19, 2020) (challenge to Tenn. Code Ann. §§ 39-15-216, -217); *Planned Parenthood of Tenn. & N. Miss. v. Slatery*, No. 3:20-cv-00740 (M.D. Tenn. filed Aug. 31, 2020) (challenge to Tenn. Code Ann. § 39-15-218). And they are almost certain to be plaintiffs in any future abortion-related litigation.

Third, even if the decision below is not preclusive in the technical sense, its precedential value will "have a significant future effect on the conduct of [Tennessee's] public officials." *Camreta v. Greene*, 563 U.S. 692, 704

(2011). The decision sets a remarkably low bar for plaintiffs wishing to obtain the supposedly "extraordinary" remedy of preliminary relief—during a global pandemic no less. And it endorses judicial second-guessing of a State's emergency measures to combat a public-health crisis. Vacatur would rightly "strip[] the decision below of its binding effect" so that it may not be used against the State in future litigation. *Camreta*, 563 U.S. at 713 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)); *Los Angeles Cnty. v. Davis*, 440 U.S. 625, n.6 (1975) (vacatur "deprives [a] court's opinion of precedential effect" (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 577-78, n.12 (1975)). That result is appropriate here to ensure that the Sixth Circuit's unreviewable "preliminary" decision, *Munsingwear*, 340 U.S. at 40—a decision issued on a highly expedited basis—does not hinder the State's ability to respond to future emergencies or enforce its valid laws.

CONCLUSION

This Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals with instructions to remand to the district court for dismissal of all claims related to Executive Order 25.

Respectfully submitted,

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