IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ADAMS & BOYLE, P.C., on behalf of itself and its patients; *et al*., Plaintiffs, v. HERBERT H. SLATERY III, Attorney General of Tennessee, in his official capacity; *et al*., Defendants.	CASE NO. 3:15-cv-00705 JUDGE FRIEDMAN MAGISTRATE JUDGE FRENSLEY

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

Plaintiffs ("the Providers") respectfully submit this memorandum in opposition to Defendants' ("the State") motion (D.E. 246) for a stay of this Court's April 17, 2020 Order (D.E. 244) (the "Order"), which preliminarily enjoined Tennessee Executive Order 25 ("EO-25") as applied to procedural abortions.

I. The State Fails to Properly Apply the Test for Stay of a Preliminary Injunction

The State's attempts to re-litigate issues carefully considered and decided by this Court should be rejected. The factors considered when resolving a motion to stay injunctive relief pending appeal are substantially the same as those governing whether to grant injunctive relief in the first place. *See Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). The party requesting the stay bears the "heavy" burden of showing that the circumstances justify an exercise of that discretion in its favor. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citations omitted); *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014).

The State completely ignores the third prong of the test, "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As this Court correctly found, after EO-25 took effect and until this Court's grant of injunctive relief, abortions after 11 weeks from a woman's last menstrual period ("LMP"), and abortions at any point in pregnancy for women for whom a medication abortion is contraindicated, were unavailable in Tennessee. Order at 8-9. The Providers were forced to cancel procedural abortions to avoid risking criminal and other penalties. *Id*. at 8. The Court's Order has made it possible for patients who were initially turned away to obtain vital, time sensitive care. *See* Declaration of DeeDee Chism (detailing the significant harms she experienced after EO-25 took effect, and how she will now be able to access essential care in her own state), attached as Exhibit A. Granting the State's stay motion would reinstate the irreparable harms to patients this Court relied on in preliminarily enjoining EO-25.

II. The State Has Not Made a Strong Showing That They are Likely to Succeed on the Merits of Their Appeal

Even assuming *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) is relevant, this Court's Order is entirely consistent with the limitations on police power recognized in that decision. First, the State argues that under *Jacobson* it has the power to enact quarantine laws and health laws of every description "*even where those laws may curtail constitutional rights*." State's Br. at 2 (emphasis added). But that is a mischaracterization of the Supreme Court's ruling in *Jacobson*. There, the Court was clear that "even if based on the acknowledged police powers of a state, [a rule] must always yield in case of conflict with . . . any right which [the Constitution] gives or secures." 197 U.S. at 25. Rather than holding that federal courts are powerless to intercede in such circumstances, the Court deemed it its "duty to hold such laws invalid." *Id at 28*. Likewise, this Court correctly exercised its duty by enjoining EO-25 as applied

to procedural abortion, based on its finding that EO-25 violates a fundamental right that has been clearly established for decades. *See* Order at 8-9 (citing *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) ("[T]he fundamental right to privacy contained in the Due Process Clause of the Fourteenth Amendment includes the right to choose to have an abortion …prior to viability, without undue interference from the State.") (quotation marks omitted).

Second, the State wrongly asserts that *Jacobson* prohibits "judicial second-guessing of the state's public health measures." State's Br. at 2. On the contrary, consistent with this Court's decision, the State's emergency police power is subject to judicial review and must actually serve the State's asserted interest. *Jacobson*, 197 U.S. at 28, 31. Here, the record shows that EO-25 does not advance, but rather frustrates, its stated purpose of conserving personal protective equipment ("PPE") and reducing transmission of COVID-19. As this Court found, the Providers "have implemented sanitation procedures, as well as procedures to minimize the use of PPE"; "they do not use N95 masks or other hospital resources needed to respond to COVID-19"; "procedural abortion[s] use[] less PPE and involve[] significantly less patient interaction than carrying a pregnancy to term and giving birth;" and forcing women to travel out of state to access abortion will lead to greater risk of infection. Order at 11. The State does not address this evidence and indeed cannot contest it. *Id.* ("Defendants have presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions.").

Finally, the State argues that no other court has granted similar relief. State's Br. at 2. That is incorrect. As this Court noted in its opinion, every court presented with this issue has granted a temporary restraining order. *See* Order at 8 n.3.

III. The State Has Failed to Demonstrate Irreparable Harm and the Balance of Harms and Public Interest Weigh in Favor of the Plaintiffs

The State will not be irreparably harmed by the denial of a stay, nor does the balance of harms or public interest counsel in favor of a stay, as this Court has already found. Order at 10-11. The Sixth Circuit has repeatedly declined to grant motions to stay injunctive relief, including in case law cited by the State, where, as here, the plaintiff and/or public would face substantial harm. *See, e.g.*, *Graveline v. Johnson*, 747 F. App'x 408, 412 (6th Cir. 2018) (denying stay where plaintiffs would face "substantial harm" because candidate's name would not appear on ballot and voter plaintiffs would be unable to vote for him); *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389–90 (6th Cir. 2014) (holding stay would cause significant public harm by causing confusion and suppressing voter turnout).

CONCLUSION

For the foregoing reasons, the State's motion for a stay pending appeal should be denied.

Dated: April 20, 2020

Respectfully submitted,

/s/ Thomas H. Castelli
Thomas H. Castelli (No. 24849)
American Civil Liberties Union
Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142
tcastelli@aclu-tn.org

Attorney for Plaintiffs

Scott P. Tift
David W. Garrison
BARRETT JOHNSTON MARTIN & GARRISON, LLC
Bank of America Plaza
414 Union Street, Suite 900
Nashville, TN 37219
Tel: (615) 244-2202

Fax: (615) 252-3798
stift@barrettjohnson.com
dgarrison@barrettjohnson.com

Thomas C. Jessee
Jessee & Jessee
P.O. Box 997
Johnson City, TN 37605
Tel: (423) 928-7175
jjlaw@jesseeandjessee.com

Michael J. Dell*
Jason M. Moff*
Irene Weintraub*
Timur Tusiray*
Catherine Hoge*

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Tel: 212-715-9129
Tel: 212-715-9113
mdell@kramerlevin.com
jmoff@kramerlevin.com
iweintraub@kramerlevin.com
ttusiray@kramerlevin.com
choge@kramerlevin.com

Attorneys for Plaintiffs Adams & Boyle, P.C., Memphis Center for Reproductive Health, and Planned Parenthood of Tennessee and North Mississippi

Autumn Katz*
Genevieve Scott*
Michelle Moriarty*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3600
Fax: (917) 637-3666
akatz@reprorights.org
gscott@reprorights.org
mmoriarty@reprorights.org

Attorneys for Plaintiffs Adams & Boyle, P.C. and Memphis Center for Reproductive Health

Maithreyi Ratakonda*
Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
Tel: (212) 261-4405
Fax: (212) 247-6811
mai.ratakonda@ppfa.org

Attorney for Plaintiffs Planned Parenthood of Tennessee and North Mississippi and Dr. Kimberly Looney

Julia Kaye**
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2633
jkaye@aclu.org

Attorney for Plaintiff Knoxville Center for Reproductive Health

*Admitted *pro hac vice*
**Application for admission *pro hac vice* pending

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Memorandum of Law in Opposition to Defendants' Motion for a Stay Pending Appeal* has been served on the following counsel of record through the Electronic Filing System on this 20th day of April, 2020:

Alexander Stuart Rieger
Steven Ashley Hart
Sue A. Sheldon
Lindsay Sisco
Matt Cloutier
Amber Seymour
Kathryn Baker

Tennessee Attorney General's Office
P O Box 20207
Nashville, TN 37202-0207
(615) 741-2408
Fax: (615) 532-5683
alex.rieger@ag.tn.gov
steve.hart@ag.tn.gov
sue.sheldon@ag.tn.gov
lindsay.sisco@ag.tn.gov
matt.cloutier@ag.tn.gov
amber.seymour@ag.tn.gov
kathryn.baker@ag.tn.gov

/s/ Thomas H. Castelli
Thomas H. Castelli