No. 20-5408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAMS & BOYLE, P.C., on behalf of itself and its patients; *et al.*,

vs.

HERBERT H. SLATERY III, Attorney General of Tennessee, in his official capacity; *et al*.

On Appeal from the United States District Court
Middle District of Tennessee, Nashville Division
No. 3:15-cv-00705-BAF

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Thomas H. Castelli
American Civil Liberties Union
Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142

Attorney for Plaintiffs-Appellees

[Additional Counsel Below]

Genevieve Scott
Autumn Katz
Michelle Moriarty
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3600

Attorneys for Plaintiffs-Appellees
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) 261-4749
Fax: (212) 247-6811

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

Richard Muniz
Planned Parenthood Federation of America
1110 Vermont Ave NW, Suite 300
Washington, DC 20005
Tel: (202) 973-4800

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

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

Attorney for Plaintiffs-Appellees Adams & Boyle, P.C., Memphis Center for Reproductive Health, Kimberly Looney, and Planned Parenthood of Tennessee and North Mississippi

Michael J. Dell
Jason M. Moff (admission pending)
Chase Mechanick (admission pending)
Aaron Webman (admission pending)
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Tel: 212-715-9129

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

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

Attorney for Plaintiff-Appellee
Knoxville Center for Reproductive Health

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Adams & Boyle, P.C., Memphis Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, and Knoxville Center for Reproductive Health do not have parent corporations. No publicly held corporation owns ten percent or more of Plaintiffs-Appellees' stock.

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INTRODUCTION

Since the beginning of the COVID-19 pandemic, Plaintiffs-Appellees ("the Providers") have taken measures, consistent with the recommendations of the Centers for Disease Control and Prevention, to use only minimal personal protective equipment ("PPE") and prevent community spread while continuing to ensure timely access to constitutionally protected abortion care for their patients. Leading medical authorities, including those relied upon by Tennessee, agree that abortion is "essential" care for which a delay of weeks or even days may increase risks or make abortion inaccessible.[1] Despite this medical consensus, and without a shred of contrary evidence, on April 8, 2020, Governor Lee issued Executive Order 25 ("EO-25"), which bans all procedural abortions—the only abortion care available after 11 weeks of pregnancy—for as long as it remains in effect. EO-25 delays this time-sensitive care for all patients by at least three weeks, and outright bans abortion for

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[1] *See, e.g.*, Am. Coll. Of Obstetricians & Gynecologists ("ACOG") et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak; Am. Coll. of Surgeons, *COVID-19 Guidelines for Triage of Gynecology Patients* (Mar. 24, 2020), https://www.facs.org/covid-19/clinical-guidance/elective-case/gynecology; World Health Organization, *COVID-19: Operational guidance for maintaining essential health services during an outbreak*, at 4 (Mar. 25, 2020), *available at* https://www.who.int/publications-detail/covid-19-operational-guidance-for-maintaining-essential-health-services-during-an-outbreak.

any patient at least 16 weeks and 6 days pregnant when EO-25 was issued—i.e., within three weeks of the point when abortion care is no longer available in Tennessee.

The District Court enjoined EO-25's application to procedural abortion, based on undisputed record evidence that EO-25 would significantly delay patients in accessing abortion, forcing some to undergo a lengthier and more complex procedure involving progressively greater health risks and preventing some from accessing care altogether; and that since EO-25 took effect, procedural abortions were unavailable in Tennessee for women who are past 11 weeks of pregnancy and for women of any gestational age for whom a medication abortion is contraindicated. The District Court held that these severe burdens on patients were not counter-balanced by any valid State interest: as applied to procedural abortions, EO-25 *frustrates* rather than serves the State's asserted goals of preserving PPE and preventing the spread of COVID-19. That is because pregnant patients need medical care throughout pregnancy, including in the first trimester, that requires more PPE and patient-provider contact than abortion—including prenatal care, miscarriage management, care for complications, and, according to recent ACOG guidance, immediate emergency department evaluation for suspected COVID-19 symptoms. Moreover, forcing patients to delay abortion care may require them to undergo more

complex procedures that entail more risk and require more PPE and patient-provider contact than allowing them to access timely care.

The District Court, after weighing the "entirely speculative" benefits of EO-25's ban on procedural abortions, R.252, PageID#6271, against the significant burdens imposed on patients' constitutional right to pre-viability abortion, appropriately concluded that preliminary injunctive relief was warranted. R.244, PageID##6143-45. This Court should deny the motion to stay the District Court's April 17, 2020 order, R.244, PageID##6136-48, because the State has not met its heavy burden for this extraordinary relief.[2]

BACKGROUND

A. The COVID-19 Pandemic and the Governor's Executive Order

On April 8, 2020, Governor Lee signed EO-25, which provides that "[a]ll healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent." R.230-2, PageID#5729. Elective and non-urgent procedures are defined as "those procedures that can be delayed until the expiration of this Order because they are not

[2] Appellants have also moved to expedite the appeal and proposed a now-moot briefing schedule. The Providers respectfully request that the Court set a merits schedule after the stay issue is fully resolved.

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.*, PageID#5729-30. The stated purpose of EO-25 is to "preserv[e] personal protective equipment [PPE] for emergency and essential needs and prevent[] community spread of COVID-19. *See id.,* PageID#5729; *see also* R.244, PageID##6138-6139. EO-25 took effect on April 9, 2020 and remains in effect until April 30, 2020. R.230-2, PageID#5730.

B. Abortion in Tennessee and Impact of EO-25

There are two methods of abortion care available in Tennessee: medication abortion and procedural abortion. R.244, PageID##6136-37. Medication abortion, which involves two medications and no "procedure," is available only to 11 weeks from the patient's last menstrual period ("LMP").[3] *Id.*, PageID##6136-37, 6144.

Procedural abortion, sometimes referred to as "surgical abortion," is not what is commonly understood to be surgery; it does not involve an incision or general anesthesia. *Id.*, PageID#6137. Most procedural abortions are performed by

[3] As Defendants acknowledge, EO-25 does not prohibit medication abortions. See Appellants' Br. 10 n. 20.

"aspiration," which involves the use of gentle suction to empty the uterus and typically takes about 5-10 minutes. *Id*. Starting at 14-16 weeks, physicians typically perform a dilation and evacuation ("D&E"), which is technically more complex and involves a longer procedure and recovery time. *Id.* Starting around 18 weeks, procedural abortion is a two-day process because the patient must visit the clinic to receive medications to dilate her cervix the day before the procedure. *Id*. For some patients, procedural abortion is medically indicated over medication abortion, such as those at increased risk of bleeding. *Id*.

Procedural abortion typically takes place in an outpatient setting and involves only minimal use of PPE: typically gloves, a surgical mask or reusable plastic face shield, and either reusable scrubs or a gown or smock. R.232-5, PageID#5882; R.232-6, PageID#5913; R.232-7, PageID#5927. Abortion care does not require use of any hospital resources such as hospital beds, beds in an Intensive Care Unit, or ventilators. R.232-5, PageID#5882.

Abortions rarely result in complications and do so at rates of no more than a fraction of a percent. *Id*., PageID##5875-76. In fact, every pregnancy-related complication is more common among women giving birth than among those having abortions, *id.*, PageID#5876, and the risk of death is approximately 14 times higher for pregnancy and childbirth than abortion. *See id*. Although abortion is extremely safe throughout pregnancy, risks increase exponentially as pregnancy progresses;

the later in pregnancy a patient accesses a procedural abortion, the more likely she is to experience a rare complication. *Id.*, PageID#5888.

The window to receive abortion care in Tennessee closes after 19 weeks and 6 days, *id*., PageID#5877, and only two health centers offer abortions after 15 weeks. *Id*. Following any period of suspended abortion access, there will be a cascading effect in which patients at earlier gestations will be forced to delay procedures so patients who would otherwise be denied care entirely can be treated first. R.232-6, PageID##5917-18.

Patients who are delayed may require a longer, more complex, and costlier one or two-day D&E procedure—increasing medical risks and requiring more time in the clinic, more staff, and thus increased use of PPE. R.232-5, PageID#5889; R.232-7, PageID##5926-27. As ACOG and other leading medical organizations recently emphasized, abortion is an essential procedure and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible." R.232-5, PageID##5878-79.[4]

Patients who are forced to delay an abortion still need urgent pregnancy-related care, including prenatal care, especially women with complications and high-

[4] *See* ACOG et al., *supra* note 1.

risk pregnancies. *Id*., PageID##5882-83. Unlike abortion, for which complications and hospital transfers are extremely rare, *see* R.232-6, PageID#5913, R.232-5, PageID##5875-76, one in five pregnant women will visit a hospital prior to delivery, R.232-5, PageID#5883.[5] Fifteen to twenty percent of pregnancies end in miscarriage, which typically occurs in the first trimester, and for which patients often seek care at a hospital emergency room. *Id.*, PageID##5884-85. Every time a pregnant person presents to the hospital for evaluation before labor, which could happen multiple times, she will interact with more people and increase the hospital's use of PPE. *Id*. Moreover, ACOG recommends that pregnant women reporting certain potential COVID-19 symptoms, including common pregnancy symptoms, "immediately seek care in an emergency department or equivalent unit that treats pregnant women," further straining hospital resources and increasing the patient's social contacts. *Id*., PageID#5885.[6]

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[5] Shayna D. Cunningham et al., *Association Between Maternal Comorbidities and Emergency Department Use Among a National Sample of Commercially Insured Pregnant Women*, 26 Acad. Emergency Med. 940, 942 (2017).

[6] *See* Am. Coll. of Obstetricians & Gynecologists and Soc. for Fetal-Maternal Med., *Outpatient Assessment and Management for Pregnant Women With Suspected or Confirmed Novel Coronavirus (COVID-19)* (Apr. 10, 2020), https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/clinical-guidance/practice-advisory/covid-19-algorithm.pdf?la=en&hash=2D9E7F62C97F8231561616FFDCA3B1A6.

Some patients forced to delay care may attempt to travel out of state to obtain an abortion. R.244, PageID#6146; R.232-5, PageID#5890; R.232-7, PageID#5927. This will require them to overcome numerous logistical barriers and costs associated with accessing abortion care out of state, virtually all of which are exacerbated by the COVID-19 crisis. R.232-5, PageID#5890. This travel will also increase the risk of contracting COVID-19 and bringing the virus back to Tennessee. *Id*.

Other patients who cannot access legal abortion services will find ways to do so outside the healthcare system, not all of which may be safe. *Id*., PageID##5891-92. Some may be forced to seek emergent medical care, further taxing the medical system as it works to respond to the COVID-19 crisis. *Id*.

Since the COVID-19 crisis began, the Providers have diligently protected the health of their patients and staff while continuing to provide access to high-quality abortion care; instituting, for example, strict "social distancing" measures, R.232-6, PageID#5912; R.232-5, PageID#5882; R.232-7, PageID##5922-23, and sanitation procedures. R.244, PageID#6146. The Providers are also minimizing the use of PPE and "do not use N95 masks or other hospital resources needed to respond to COVID-19." *Id.*; *see also* R.232-5, PageID#5882; R.232-6, PageID##5913-14; R.232-7, PageID#5927.

The COVID crisis has magnified the challenges patients already face in accessing abortion. R.232-5, PageID##5880-81; R.232-6, PageID#5910; R.232-7,

PageID##5924-25. Following the District Court's injunction, some patients were able to be rescheduled. *See, e.g.*, R.248-1, PageID##6167-72. Reinstating EO-25 would expose patients to the confusion and chaos they faced prior to the injunction. *Id.*

C. Procedural History

The Providers filed their initial complaint on June 25, 2015, seeking a declaratory judgment that certain abortion restrictions were unconstitutional and injunctive relief. On April 14, 2020, the Providers moved for leave to file a supplemental complaint under Fed. R. Civ. P. 15(d) and moved to enjoin Appellants from enforcing EO-25 with respect to procedural abortions. Appellants opposed both motions.

On April 17, 2020, Judge Friedman held a telephonic hearing and granted the Providers' motions to file a supplemental complaint and for a preliminary injunction against the enforcement of EO-25 as applied to procedural abortions. R.244, PageID#6136. The District Court found that (1) the Providers were "likely to succeed on the merits of their claim because the enforcement of EO-25 creates an undue burden on the right of women in Tennessee to choose to have a pre-viability abortion" and "has caused plaintiffs to cancel all procedural abortions to avoid risking criminal and other penalties"; (2) "they would suffer irreparable harm if defendants are not enjoined from enforcing EO-25 as it relates to procedural

abortions," as "[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 that involves progressively greater health risks, or losing the right to obtain an abortion altogether"; (3) the irreparable harm the Providers' patients would suffer without injunctive relief, which includes violations of their constitutional rights, "'vastly outweighs' any 'temporary reduction of PPE' resulting from the enforcement of EO-25"; indeed, "defendants have presented no evidence that any appreciable amount of PPE would actually be preserved"; and (4) granting the injunction is in the public interest because it "prevent[s] violation of a party's constitutional rights." *Id.*, PageID#6143-46 (internal citations and alterations omitted).

Appellants filed a notice of appeal and a motion in the District Court to stay the preliminary injunction. R.245, PageID##6149-50; R.246, PageID##6151-56. Without waiting for the Providers' response or the District Court's ruling, Appellants moved this Court for an emergency stay of the preliminary injunction on April 20.

On April 21, the District Court denied Appellants' stay motion, finding that EO-25 "as it relates to procedural abortions . . . does not appreciably advance either of its stated goals" and instead "interfere[s], on a broad scale, with the exercise of a recognized constitutional right." R.252, PageID#6269. The Court further explained that the State's "unsupported assertion" that allowing procedural abortions to continue will waste PPE and put patients at great risk of contracting COVID-19

"disregards the unrebutted evidence showing that plaintiffs had already adopted significant procedures for social distancing and preserving PPE prior to EO-25 taking effect." *Id.*, PageID#6270.

STANDARD OF REVIEW

"'[A] stay is not a matter of right,'" and the party requesting a stay bears a "heavy burden" of "showing that the circumstances justify an exercise of that discretion." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387, 389 (6th Cir. 2014) (alterations omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 433-434 (2009)). In determining whether to grant a stay, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Id.* (quoting *Nken*, 556 U.S. at 434). The Court must determine whether Appellants are "likely to be able to show that the district court abused its discretion in granting the preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

ARGUMENT

I. Appellants Have Not Made a Strong Showing That They Are Likely to Succeed on the Merits

Courts throughout the country have enjoined executive orders that unduly burden access to abortion. *See, e.g.*, *S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-

20-277-G (W.D. Okla. Apr. 20, 2020) (ECF No. 107) (attached as Exhibit 1) (preliminarily enjoining executive order as to most abortions effective immediately, and as to all abortions as of April 24), *appeal docketed*, No. 20-6055 (10th Cir. Apr. 21, 2020); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449-KGB, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020) (granting temporary restraining order ("TRO") as to all procedural abortions), *vacated sub. nom., In re Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) (attached as Exhibit 2); *Robinson v. Marshall*, Case No. 2:19-cv-365 (MHT), 2020 WL 1847128, at *8-*9 (M.D. Ala. Apr. 12, 2020) (entering preliminary injunction to allow healthcare providers to make individualized determinations regarding provision of abortion care), *appeal docketed*, No. 20-11401 (11th Cir. Apr. 13, 2020); *Preterm-Cleveland v. Attorney General of Ohio*, No. 1:19-cv-360, 2020 U.S. Dist. LEXIS 61221 (S.D. Ohio Mar. 30, 2020) (granting TRO allowing providers to make case-by-case basis determinations regarding provision of abortion care), *stay denied and appeal dismissed*, *Pre-Term Cleveland v. Att'y Gen. of Ohio* No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020) ("*Pre-Term Cleveland*").[7]

[7] The Fifth Circuit decision cited by Appellants, *In re Abbott*, regarding a recently expired Texas executive order, recognizes that courts have a duty to weigh the benefits and burdens of an abortion restriction. *In re Abbott*, No. 20-50296, 2020

A. EO-25 Violates the Providers' Patients' Fundamental Constitutional Rights

As the District Court found, EO-25 categorically bans abortion after 11 weeks LMP for all patients, and bans abortion altogether for anyone for whom a medication abortion is contraindicated. R.244, PageID##6143-44. It is axiomatic that a State may not ban pre-viability abortions. *Roe v. Wade*, 410 U.S. 133, 163–64 (1973); s*ee also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992); *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2299 (2016) (stating a law is invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)). As this Court has recognized, the fact that abortion may be available earlier in pregnancy does not alter this conclusion. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (finding law that would inhibit "the vast majority of second-trimester abortions" imposed a substantial, and unconstitutional, obstacle).

Appellants insist that EO-25 is not a "complete ban," but rather a three-week delay. Appellants' Br. 19. This is plainly wrong: at a minimum, EO-25 is a complete

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WL 1911216 (5th Cir. Apr. 20, 2020). The Eighth Circuit's decision today, *In re Rutledge*, is an outlier in that it allowed no procedural abortions despite the challenged order's indeterminate end date, absent further district court findings. *In re Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) (Exhibit 2).

ban for any pregnant person who was 16 weeks and 6 days pregnant or beyond when EO-25 was issued and therefore would be past the point when abortion is available in Tennessee when EO-25 expires. But, even assuming EO-25 is an abortion restriction rather than a ban, it cannot stand. As Appellants recognize, abortion restrictions must be evaluated under the undue burden standard, which "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309; *see also* Appellants' Br. 18.

Applying that test, Appellants do not dispute any of the Providers' evidence demonstrating the significant burdens wrought by EO-25's mandatory delay. As the District Court found, "[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 that involves progressively greater health risks, or can result in her losing the right to obtain an abortion altogether." R.244, PageID#6145 (internal citations omitted). The Providers' uncontroverted evidence shows that even brief delays are consequential, potentially pushing patients from a one-day to two-day procedure, or from a shorter aspiration procedure to a longer, more complex D&E procedure with greater risks. *See supra* Background Section B. The window of time to access abortion care will close for some patients before April 30. Moreover, these delays will create a backlog, compounding the delay and harm. *See id.*; *see also Whole*

Woman's Health, 136 S. Ct. at 2313 (acknowledging burdens on patients of longer wait times and increased crowding). The burdens imposed by EO-25 are only magnified by the severe difficulties associated with the COVID-19 pandemic. *See supra* Background Section B.

On the benefits side, as the District Court found, Appellants "presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions." R.244, PageID#6146. The District Court's factual findings demonstrate that EO-25's restrictions on procedural abortion would actually undermine rather than serve the State's interests. *See supra* Background Section C. Procedural abortions "use[] less PPE and involve[] significantly less patient interaction" as compared to forcing patients to continue a pregnancy, even for a few weeks. R.244, PageID#6146. Pregnant people require medical care throughout pregnancy—including prenatal visits, miscarriage management, and emergency department evaluation—well before labor and delivery, using up far greater PPE and resources than procedural abortion. *See supra* Background Section B.

Furthermore, the District Court found the Providers "do not use N95 masks or other hospital resources needed to respond to COVID-19," and "have implemented sanitation procedures, as well as procedures to minimize the use of PPE . . . ." R.244, PageID#6146. The District Court also found "that women may

travel out-of-state to obtain an abortion while EO-25 is in effect, risking infection of COVID-19 and transmission to others when they return to Tennessee." *Id.* Finally, the record shows that delaying a procedural abortion will cause clinics to consume more PPE, *see* R.232-5, PageID#5889, a fact this Court found significant in *Pre-Term Cleveland*, 2020 WL 1673310, at *2.

Weighing the significant burdens caused by EO-25's forced delay against the lack of any benefits, the District Court properly found EO-25 likely created an undue burden on abortion access. Rather than engage with the proper balancing analysis, Appellants claim that, under *Casey* and *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006), it is per se constitutional to "delay[] abortions for weeks and in some cases prevent[] women from obtaining abortions altogether." Appellants' Br. 19. But those cases concerned 24-hour delay laws under the guise of informing a woman's abortion decision, not a blanket three-week prohibition on procedural abortions. Indeed, the *Casey* Court considered even a 24-hour delay a "close[] question," but ultimately found it did not "impose[] a real health risk." 505 U.S. at 885–86. In *Taft*, this Court did not consider the kinds of health risks discussed above. Both cases were decided before *Whole Woman's Health*, which explicitly recognized that "3-week wait times" can burden women's access to abortion. 136 S. Ct. at 2318. And as this Court recently acknowledged, even a temporary delay can "deprive[] a woman of her right to an abortion during the optimal 15-week period

during which the aspiration method can be performed." *Pre-Term Cleveland*, 2020 WL 1673310, at *2.[8]

B. *Jacobson* Refutes, Rather than Supports, Appellants' Position

The State argues a stay is warranted because the District Court erred in failing to consider *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). But as the District Court explained, "EO-25 is easily distinguishable from the statute at issue in *Jacobson*, and the [c]ourt considered *Jacobson* and its limitations on judicial intervention." R.252, PageID#6268. As the District Court explained, because "EO-25 did not have a 'real or substantial relation' to protecting public health or public safety and was invading plaintiffs' fundamental rights, it was 'the duty of the [C]ourt[] to so adjudge, and thereby give effect to the Constitution.'" *Id.* (quoting *Jacobson*, 197 U.S. at 11).

First, *Jacobson* made clear that a state's police powers—even during an epidemic—"must always yield in the case of conflict with . . . any right which [the

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[8] Providers' standing is established by decades of Supreme Court precedent holding that third-party standing exists where, as here, the providers themselves are directly regulated by the challenged provision, and it threatens their patients with constitutional injury. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019).

Constitution] gives or secures." 197 U.S. at 25. Appellants concede that *Jacobson* does not supplant the modern substantive constitutional test applied to the right in question, acknowledging that the critical question under *Jacobson* is whether "an abortion regulation 'conflict[s]' with the Constitution," namely whether it "imposes an undue burden on a woman's right to obtain an abortion." R.249, PageID#6176; *see also*, *e.g.*, *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 419–20 (6th Cir. 2019) (applying strict scrutiny to substantive due process claim, even where the challenged program "may be an example of a state's proper exercise of its parens-patriae role" (citing *Jacobson*, 197 U.S. at 38)). Indeed, the right to abortion is "secured by fundamental law." *Jacobson*, 197 U.S. at 31; *see Casey*, 505 U.S. at 851 (recognizing reproductive rights as "central to personal dignity and autonomy" and "central to the liberty protected by the Fourteenth Amendment"); *Roe*, 410 U.S. at 153. The Supreme Court's abortion jurisprudence already accounts for the need to balance State interests against a woman's right to abortion, as *Jacobson* instructs. *See id*. at 154 (citing *Jacobson*); *Casey*, 505 U.S. at 857 (holding state interests cannot justify "any plenary override of individual liberty claims") (citing *Roe* and *Jacobson*). As discussed above, because EO-25 does not advance

State interests but imposes extreme burdens, it erects a substantial obstacle to Tennesseans' right to abortion.[9]

Second, *Jacobson* clearly holds the "means prescribed by the state" must bear a "real or substantial relation to the protection of the public health and the public safety." *Jacobson*, 197 U.S. at 28, 31. The State asserts that *Jacobson* prohibits "second-guessing the State's emergency measures" or "substitut[ing] its judgment for the State's . . . ." Appellants' Br. 16, 18. But even under *Jacobson*, exercise of the police power must be limited to "reasonable regulations" necessary to protect public health and safety. R.252, PageID#6267 (citing *Jacobson*, 197 U.S. at 25). Here, however, as the District Court already found, "EO-25, as applied to procedural abortions, [does] not have a 'real or substantial relation' to protecting public health or public safety.," *id*., PageID#6268, because it frustrates EO-25's stated goals by "increas[ing] patient interaction and [causing] greater risk of infection and spreading

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[9] *See, e.g.*, *Robinson*, 2020 WL 1847128, at *9 ("Abortion is a fundamental right … [a]nd so *Jacobson* asks courts to protect it, even in times of emergency."); *S. Wind Women's Center*, No. CIV-20-277-G (Exhibit 1), at 15 ("This effective denial of the Fourteenth Amendment right to abortion access represents the type of 'plain, palpable invasion of rights' identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency"). *See Pre-Term Cleveland*, 2020 WL 1673310 (declining to stay TRO enjoining enforcement of COVID-19 emergency order against certain abortions).

of COVID-19," *id*. This evidence controls, not "[u]ncritical deference to" state officials' "factual findings." *Whole Woman's Health*, 136 S. Ct. at 2310 (noting the Court "*retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." (emphasis original) (quotation omitted).

II. The Remaining Factors Favor Denial of a Stay

Appellants will not be irreparably harmed should this Court deny their stay motion. As the District Court found, permitting EO-25 to bar procedural abortions will not aid in conserving PPE or otherwise containing the virus. R.244, PageID#6146. By contrast, the Providers and their patients would be substantially harmed if EO-25 were reinstated even temporarily during the pendency of this appeal, and the public interest would be greatly harmed. As the District Court found, Tennesseans would be forced to delay time-sensitive abortion care, facing heightened medical risk and, in some cases, losing their right to an abortion altogether. R.244, PageID#6145. Patients have already faced the devastating prospect of cancelled appointments, only (for some) to be rescheduled upon relief from the District Court. *See* R.248-1, PageID##6167-72. Reinstating EO-25 would cause patients severe emotional distress in addition to the myriad harms described above. *Id*. Additionally, as the District Court found, lifting the preliminary injunction would likely contribute to the worsening of the COVID-19 pandemic in Tennessee, because procedural abortions consume less PPE than pregnancy care, and because

the effective prohibition of procedural abortions in the State would encourage or require individuals seeking abortion to travel out of state. R.244, PageID#6146. Finally, the denial of an injunction constitutes irreparable harm where, as here, "the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

III. Appellants' Challenge to the Scope of the Order Does Not Warrant a Stay

The District Court properly exercised its discretion in enjoining EO-25 with respect to procedural abortions. However, even if the Court finds the preliminary injunction overbroad, a stay should be granted only insofar as necessary to narrow the scope of the injunction. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017). Any narrowed injunction should take into account the particular harms EO-25 poses to three groups of patients. First, patients who, in the good faith professional judgment of the provider, will likely lose their ability to obtain an abortion in Tennessee if their procedures are delayed beyond April 30, 2020. EO-25 will force such patients to either carry an unwanted pregnancy to term, and bear the far greater health risks and risk of death associated with ongoing pregnancy and childbirth, or attempt to seek abortion care out of state, which imposes significant costs, burdens, and emotional distress that the COVID-19 pandemic will exacerbate. Second, patients who, in the good faith professional judgment of the provider, will likely be forced to undergo a lengthier and more

complex abortion procedure, which is only available at two health centers in the state, if their procedures are delayed beyond April 30, 2020. These patients will likely have to travel farther for abortion care as a result of EO-25, which increases the costs and burdens of accessing such care, and will face greater health risks associated with the more complex procedure. Third, patients who, in the good faith professional judgment of the provider, will likely be forced to undergo a two-day procedure—which is only available at two health centers in the state, and which requires at least three separate visits to the provider—if their procedures are delayed beyond April 30, 2020. In making these determinations, providers must be permitted to take into account a number of factors which bear on an individual patient's ability to timely access abortion care and medical risk, including the patient's medical history, familial circumstances, and any logistical and financial obstacles faced by the patient. *See, e.g.*, *Robinson*, 2020 WL 1847128, at *13 (enumerating factors relevant to an abortion provider's medical determination of harm).

The State argues that EO-25 will cause patients no harm because it "already provides an exception when delay would in fact pose a risk of serious adverse medical consequences for a patient." Appellants' Br. 25. But, the State's vigorous defense of this lawsuit demonstrates that EO-25's extremely narrow exceptions are inadequate to protect the rights at stake here. Indeed, the State has only confirmed that Providers' reading of EO-25 to ban abortion is not mere "speculation," *see*, *e.g.*,

Appellants' Br. 19 n.22, 24-25, and thus that there is urgent need for continued relief, especially because EO-25 carries both criminal and licensure penalties, *see* Tenn. Code Ann. § 58-2-119; *see also* R.230-3, PageID#5732.

CONCLUSION

For the foregoing reasons, Appellants' motion for an emergency stay of the District Court's preliminary injunction should be denied.

Dated: April 22, 2020

Respectfully submitted,

/s/ *Genevieve Scott*

Thomas H. Castelli
American Civil Liberties Union Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142

Attorney for Plaintiffs-Appellees

Genevieve Scott
Autumn Katz
Michelle Moriarty
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3600

Attorneys for Plaintiffs-Appellees 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) 261-4749
Fax: (212) 247-6811

Scott P. Tift
BARRETT JOHNSTON MARTIN & GARRISON, LLC
Bank of America Plaza
414 Union Street, Suite 900

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

Richard Muniz
Planned Parenthood Federation of America
1110 Vermont Ave NW, Suite 300
Washington, DC 20005
Tel: (202) 973-4800

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

Nashville, TN 37219
Tel: (615) 244-2202

Attorney for Plaintiffs-Appellees Adams & Boyle, P.C., Memphis Center for Reproductive Health, Kimberly Looney, and Planned Parenthood of Tennessee and North Mississippi

Michael J. Dell
Jason M. Moff (admission pending)
Chase Mechanick (admission pending)
Aaron Webman (admission pending)
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Tel: 212-715-9129

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

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

Attorney for Plaintiff-Appellee Knoxville Center for Reproductive Health

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,994 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 22, 2020

/s/ *Genevieve Scott*
Genevieve Scott

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Genevieve Scott*
Genevieve Scott

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the District Court's electronic records:

***Adams & Boyle, P.C., et al., v. Herbert H. Slatery III,* 3:15-cv-00705-BAF**

Date Filed	R.No.; PageID#	Document Description
April 20, 2020	R.248; PageID## 6160-66	Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for a Stay Pending Appeal
April 20, 2020	R.248-1; PageID## 6167-72	Exhibit A to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for a Stay Pending Appeal
April 21, 2020	R.249; PageID## 6173-6179	Reply in Response to Plaintiffs' Opposition to the State's Motion for a Stay Pending Appeal
April 21, 2020	R.252; PageID## 6265-72	Opinion and Order Denying Defendants' Motion for a Stay Pending Appeal