UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ADAMS & BOYLE, P.C., et al.,

Plaintiffs,

Civil Action No. 3:15-cv-00705

vs.

HON. BERNARD A. FRIEDMAN

HERBERT H. SLATERY, III, et al.,

Defendants.
_____/

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

This matter is presently before the Court on defendants' motion for a stay pending appeal [docket entry 246]. Plaintiffs have filed a response in opposition, and defendants have filed a reply. Pursuant to M.D. Tenn. LR 78.01, the Court shall decide this motion without a hearing. For the reasons explained below, the Court shall deny defendants' motion.

Plaintiffs are reproductive healthcare providers who, on their own behalf and on behalf of their patients, assert a constitutional challenge to a Tennessee statute that requires women seeking an abortion to receive certain information in person at least forty-eight hours before undergoing the procedure. On April 8, 2020, Governor William Lee issued Tennessee Executive Order 25 ("EO-25"), requiring that, between April 9 and April 30, healthcare providers "postpone surgical and invasive procedures that are elective and non-urgent," as defined by the order. EO-25 ¶ 2. The stated purposes of EO-25 are to reduce the spread of COVID-19 and to conserve personal protective equipment ("PPE"). On April 13, plaintiffs filed a motion to file a supplemental complaint alleging that EO-25, as applied to procedural abortions, violates plaintiffs' patients' substantive due process rights under the Fourteenth

Amendment. Plaintiffs simultaneously filed a motion for a TRO and/or preliminary injunction to enjoin enforcement of EO-25 as it applies to procedural abortions.

On April 17, the Court heard extensive oral argument from the parties during a ninety-minute telephonic hearing, after which the Court issued an opinion and order granting plaintiffs' motion to file a supplemental complaint and granting plaintiffs' motion for a TRO and/or preliminary injunction "to the following extent: Defendants are hereby immediately enjoined from enforcing EO-25 as applied to procedural abortions." Op. & Order Granting Pls.' Mot. for Prelim. Inj. at 12-13. Shortly thereafter, defendants filed a notice of appeal and the instant motion to stay the injunction pending appeal.

A motion for a stay pending appeal is governed by Fed. R. Civ. P. 62(c). The Sixth Circuit has stated:

> In deciding whether to grant a stay of a preliminary injunction, "we consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (internal quotation marks omitted). . . . The Defendants as movants for the stay have the burden of persuasion. *See Nken v. Holder*, 556 U.S. 418, 433-34, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

Graveline v. Johnson, 747 F. App'x 408, 412 (6th Cir. 2018). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "[B]ecause the burden of meeting the standard is a heavy one, more commonly stay requests will be found not to meet this standard and will be denied." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2904 (3d ed. 2012) (footnotes omitted).

Regarding the first factor, defendants have not shown that they are likely to prevail on the merits. Defendants argue that "[t]he broad relief afforded by this Court's Order cannot be squared with the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)[,]" in which "the Supreme Court explained that the States have wide-ranging authority to 'enact quarantine laws and health laws of every description,' even where those laws may curtail constitutional rights. *See id.* at 26, 31." Defs.' Mot. for Stay Pending Appeal at 2.

In *Jacobson*, the Supreme Court rejected an individual's constitutional challenge to a state's compulsory vaccination law enacted when smallpox was "prevalent and increasing." *Jacobson*, 197 U.S. at 28. The Court recognized the "police power" of states to enact "reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[1] *Id.* at 25. But the Court also recognized the possibility that

> it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Id. at 28. Further,

> [i]f there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute *purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

[1] The Court notes that the "police power" acknowledged by the Supreme Court in *Jacobson* is for the state's enactment of "*reasonable* regulations" to protect public health and public safety. *Jacobson*, 197 U.S. at 25 (emphasis added). Defendants have not demonstrated the reasonableness of EO-25.

Id. at 31 (emphasis added). The Court in *Jacobson* affirmed plaintiff's criminal conviction because "the [vaccination] statute in question is a health law, enacted in a reasonable and proper exercise of the [state's] police power." *Id.* at 35. The Court found that the statute had a "real or substantial relation to the protection of the public health and the public safety," *id.* at 31; and the Court further found that the statute did not "invade[] any right secured by the Federal Constitution." *Id*. at 38.

Defendants fault the Court for not mentioning *Jacobson* in its opinion. However, EO-25 is easily distinguishable from the statute at issue in *Jacobson*, and the Court considered *Jacobson* and its limitations on judicial intervention without finding it necessary to reference this case by name. In its April 17 decision, the Court determined that EO-25, as applied to procedural abortions, did not have a "real or substantial relation" to protecting public health or public safety. The Court noted plaintiffs' evidence that enforcement of EO-25 would result in increased patient interaction and greater risk of infection and spreading of COVID-19. Op. & Order Granting Pls.' Mot. for Prelim. Inj. at 11. The Court also noted that defendants had "presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 is applied to procedural abortions" despite plaintiffs having "offered convincing evidence demonstrating the contrary." *Id.* In addition, the Court found that EO-25 placed an undue burden on the right of women in Tennessee to choose to have a pre-viability abortion, a constitutional right recognized by the Supreme Court since *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 8-9. Because the Court determined, based on the record before it at the preliminary injunction stage, that 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." *Jacobson*, 197 U.S. at 31.

Therefore, defendants have not shown that the Court's decision to issue a preliminary injunction in this matter is in any way inconsistent with *Jacobson*. And for the reasons set forth in the Court's April 17 opinion, the Court remains firmly convinced that defendants are highly unlikely to prevail on the merits.

Regarding the second factor, defendants argue that they and the citizens of Tennessee will be irreparably harmed without a stay because "[i]t is well-settled that the wrongful enjoining of a valid state action always qualifies as irreparable harm." Defs.' Mot. for Stay Pending Appeal at 3. Defendants characterize EO-25 as a "valid state action" because it "is a good-faith effort to slow the spread of COVID-19 and is well within the Governor's power to issue in a time of crisis." *Id.* While the Governor certainly has the power – indeed, the obligation – to take reasonable measures to safeguard public health, EO-25 is not reasonable, and not a "valid state action," as it relates to procedural abortions because it does not appreciably advance either of its stated goals, i.e., to slow the spread of COVID-19 or conserve PPE. There is no irreparable harm in enjoining the enforcement of an ineffectual executive order that accomplishes nothing except to interfere, on a broad scale, with the exercise of a recognized constitutional right.

Defendants argue that the last two factors – the balance of harms and the public interest – favor granting a stay because the Court's April 17 order "undermines the State's ability to effectively prepare for the incoming wave of [COVID-19] infections and ensures that the virus may continue to spread through the State's healthcare system and beyond." *Id.* at 4. Defendants state that "[i]n recent years, an average of nearly 50 patients per week obtained surgical abortions in Tennessee after 11 weeks gestation." *Id.* (citing Tenn. Dep't of Health, *Selected Induced Termination of Pregnancy (ITOP) Data, According to Age and Race of Woman, Tennessee and*

Department of Health Regions, Resident Data, 2018, https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/itop/ITOP2018.pdf). They argue that the Court's order "all but guarantees that similar numbers of patients, if not more, will require medical professionals to expend valuable personal protective equipment and will flout the State's generally applicable social distancing guidelines, thus putting themselves and everyone they come into contact with at greater risk of contracting COVID-19." *Id.* But this unsupported assertion, which defendants also made in opposing plaintiffs' request for emergency injunctive relief, disregards the unrebutted evidence showing that plaintiffs had already adopted significant procedures for social distancing and preserving PPE prior to EO-25 taking effect.[2]

[2] Plaintiffs previously indicated that

> [e]ven before EO-25 was issued, they proactively adopted recommendations and guidelines from the Centers for Disease Control and Prevention ("CDC"), National Abortion Federation to reduce the spread of COVID-19, while continuing to comply with all relevant Tennessee laws and regulations governing abortion. Terrell Decl. ¶ 19; Looney Decl. ¶ 25; Rovetti Decl. ¶ 8.
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> For example, the Providers have postponed or cancelled non-essential procedures such [as] wellness visits. Terrell Decl. ¶ 26; Looney Decl. ¶ 26; Rovetti Decl. ¶ 8. They screen patients for symptoms over the telephone prior to their appointments and when they arrive at the clinics prior to entering the facilities to ensure that no one experiencing symptoms of COVID-19 enters the clinic. Terrell Decl. ¶¶ 20-21; Looney Decl. ¶ 27; Rovetti Decl. ¶¶ 9, 11. Based on the particularized needs of each facility, the Providers maintain social distancing by, for example, staggering appointments, asking patients to wait outside the clinic until their appointment, prohibiting patients from bringing a support person to their appointment, keeping patients in separate rooms whenever possible, and spacing patients a minimum of six feet apart during their time in the clinic. Terrell Decl. ¶ 22; Looney Decl. ¶ 28; Rovetti Decl. ¶¶ 9, 11-12. At any given time, the Providers have fewer people inside the clinic than they normally had before the COVID-19 pandemic. Terrell Decl. ¶ 23; Looney Decl. ¶ 26; Rovetti Decl. ¶¶ 8-9. Where medically appropriate, several of the Providers have reduced the number of staff in the clinic and restricted the number of staff in the room during procedural abortion to

Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 12-13. The Court commends defendants' efforts to prepare for an expected increase in COVID-19 infections, but the entirely speculative constraints the preliminary injunction allegedly imposes on these efforts do not outweigh the demonstrated irreparable harm plaintiffs will suffer if a stay is issued, particularly in light of the many precautionary steps plaintiffs have taken to limit the spread of the virus and to conserve PPE. *See* Op. & Order Granting Pls.' Mot. for Prelim. Inj. at 9-11. The Court has already determined that the balancing of harms and the public interest favor issuing a preliminary injunction, *id.* at 10-12, and defendants' arguments do not alter the Court's conclusion.

For these reasons, the Court finds that defendants have not shown that they are entitled to a stay pending the appeal of the Court's April 17 opinion and order granting plaintiffs'

> only those who are medically essential or required by law. Terrell Decl. ¶¶ 23-24; Rovetti Decl. ¶ 24. Additionally, the Providers continuously disinfect chairs, doorknobs, pens, clipboards, and other frequently touched surfaces throughout the day. Terrell Decl. ¶ 27; Looney Decl. ¶ 28; Rovetti Decl. ¶¶ 8, 12.
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> Abortion care does not require the use of any hospital resources that may be needed for COVID-19 response such as hospital beds, ICU beds, or ventilators. Looney Decl. ¶ 30. Indeed, procedural abortion takes place in an outpatient setting. *Id.* Procedural abortion involves only minimal use of PPE: typically gloves, a surgical mask or reusable plastic face shield, and either reusable scrubs or a disposable gown or smock. *Id.* ¶ 29; Terrell Decl. ¶¶ 30; Rovetti Decl. ¶ 24. None of the Providers stock the N95 respirators that are in short supply during this COVID-19 pandemic. Looney Decl. ¶ 30; Terrell Decl. ¶ 29; Rovetti Decl. ¶ 24. Procedural abortion after approximately 18 weeks LMP [last menstrual period] requires more PPE than a procedural abortion at an earlier point in pregnancy, because it is typically a two-day procedure at that stage. Looney Decl. ¶ 50. Nevertheless, as explained *infra*, abortion care requires vastly less PPE than continuing a pregnancy. The provision of abortion care in Tennessee does not deplete hospital resources and the Providers have made every effort to conserve PPE and minimize the spread of COVID-19 while still providing this time-sensitive, essential healthcare to patients. *Id.* ¶¶ 24, 30; Terrell Decl. ¶ 33; Rovetti Decl. ¶ 24.

Pls.' Br. in Support of Mot. for TRO and/or Prelim. Inj. at 12-13.

motion for a preliminary injunction. Accordingly,

IT IS ORDERED that defendants' motion for a stay pending appeal is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: April 21, 2020
Detroit, Michigan