20-6055

In The United States Court of Appeals for the Tenth Circuit

SOUTH WIND WOMEN'S CENTER LLC, d/b/a TRUST WOMEN OKLAHOMA CITY, on behalf of itself, its physicians and staff, and its patients; LARRY A. BURNS, D.O., on behalf of himself, his staff, and his patients; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, INC., on behalf of itself, its physicians and staff, and its patients,

Plaintiffs-Appellees,

vs.

J. KEVIN STITT in his official capacity as Governor of Oklahoma; MICHAEL HUNTER in his official capacity as Attorney General of Oklahoma; DAVID PRATER in his official capacity as District Attorney for Oklahoma County; GREG MASHBURN in his official capacity as District Attorney for Cleveland County; GARY COX in his official capacity as Oklahoma Commissioner of Health; and MARK GOWER in his official capacity as Director of the Oklahoma Department of Emergency Management,,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Oklahoma
The Honorable Charles B. Goodwin
District Court Case No. CIV-20-277-G

APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

South Wind Women's Center LLC d/b/a Trust Women Oklahoma City and Comprehensive Health of Planned Parenthood Great Plains, Inc. (collectively, "Appellees" or the "Providers"), pursuant to Fed. R. App. P. 26.1, each certify that they have no stock and therefore no publicly held corporation owns 10% or more of their stock.

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PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(3), Providers state that this case was previously before this Court when Appellants (collectively, the "State") sought to appeal the District Court's issuance of a temporary restraining order on April 6, 2020. That appeal was dismissed for lack of appellate jurisdiction on April 13, 2020. *S. Wind Women's Ctr. LLC v. Stitt,* No. 20-6045 (10th Cir. Apr. 13, 2020).

PRELIMINARY STATEMENT

As the District Court held, "[t]here is no dispute that the State of Oklahoma—like governments across the globe—is facing a health crisis in the COVID-19 pandemic[.]" Att. U ("Order"). The Providers recognize that they, like all other healthcare providers, have an important role to play in preserving personal protective equipment ("PPE") and other healthcare resources. Yet by imposing a ban on all abortion services, the executive order deprived Providers' patients of fundamental constitutional rights, violating decades of U.S. Supreme Court precedent. The District Court properly issued a preliminary injunction enjoining enforcement of that executive order against Oklahoma's abortion providers.

This motion to stay the preliminary injunction should be denied because Appellants have not shown that they are irreparably injured. Indeed, this Court previously held that the State did not show any such injury would result over the 14-day duration of the District Court's temporary restraining order ("TRO"). *South Wind Women's Ctr. LLC v. Stitt*, No. 20-6045, 2020 WL 1860683 at *3 (10th Cir. Apr. 13, 2020). The State's claims of irreparable injury at the TRO stage were purely hypothetical. Now—mere days before the executive order expires—

irreparable injury to the State is inconceivable. By contrast, irreparable injury to Providers' patients is very real; leading organizations of medical professionals, including the American College of Obstetricians and Gynecologists ("ACOG") and the American Medical Association ("AMA"), have advised that abortion should not be categorized as health care "that can be delayed during the COVID-19 pandemic" given its time-sensitive and critical nature. Nichols Decl. Ex. 1-5; Br. Of ACOG as *Amici Curae* In Support of Plaintiffs-Appellees, 20-6045 at 3, (10th Cir. April 10, 2020).

The State also falls short on establishing a likelihood of success on the merits. The District Court both acknowledged and applied *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) when it held that (i) the ban on medication abortions is an "'undue burden' on the right" to abortion; and (ii) the continued ban on procedural abortions is "unreasonable" in light of the State's decision to relax restrictions on other elective surgeries on April 24, 2020. Order at 18-19. The State has not identified any factual error underlying these conclusions, much less one that is "clearly" so.

Finally, the balance of the equities and public interest favor leaving the preliminary injunction in place. Oklahoma recently published a new executive order as part of the state's plan to "reopen" for business. Effective April 30, 2020, this new order permits *all* elective surgeries and minor medical procedures – including medication and procedural abortions – to resume. The State's professed concern that the preliminary injunction "undermines the State's ability to flatten the curve" is belied by its own actions. Stay Mot. at 19.

STATEMENT OF FACTS

A. Abortion in Oklahoma

There are two main methods of abortion: medication abortion and procedural abortion. Schivone Decl. ¶ 13. Both methods are safe and effective. Order at 13 (quoting National Academy of Sciences, Engineering and Medicine, *The Safety and Quality of Abortion Care in the United States* 77 (2018), ECF No. 84-1 at 124) ("National Academies Report"); *see also* Schivone Decl. ¶¶ 19–20.

Medication abortion is available only early in pregnancy and involves a combination of two orally administered pills. Burkhart Suppl. Decl. ¶ 7; Hill Decl. ¶ 8. The patient takes the first in the

healthcare facility and later takes the second elsewhere, usually at home. Schivone Decl. ¶ 14, Hill Suppl. Decl. ¶ 17.

Procedural abortion, or "surgical abortion," involves no incision or general anesthesia. Schivone Decl. ¶ 15. The clinician dilates the patient's cervix and uses gentle suction from a narrow, flexible tube to empty the contents of the uterus. *Id.* ¶ 16. As the pregnancy progresses to the second trimester, clinicians generally use instruments to complete the procedure. Schivone Decl. ¶ 17; Nichols Decl. ¶ 26; Burkhart Suppl. Decl. ¶ 15. Later in the second trimester, the clinician may begin cervical dilation the day before the procedure, requiring two days of clinical care instead of one. Nichols Decl. ¶ 27.

B. The Executive Order and Press Release

On March 15, 2020, Governor Stitt issued the first of several executive orders to address the COVID-19 pandemic. *See* Executive Order 2020-07 at 1.[1] On March 24, 2020, Governor Stitt issued the executive order at issue here. Fourth Am. Exec. Order ¶ 18 (No. 2020-07 (ECF No. 1-1) ("Executive Order").[2] Paragraph 18 of the Executive

[1] *Available at* https://bit.ly/39AnZOh.
[2] *Available at* https://bit.ly/3e2j5gf.

Order mandates that: "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020."

At a press conference, Governor Stitt explained that Paragraph 18 was intended: (i) to reduce the use of hospital beds; and (ii) to preserve and replenish the state's supply of PPE, such as respirators, for healthcare providers.[3] As the District Court noted in its findings of fact, the Executive Order "did not specify which surgeries and procedures fall within Paragraph 18's prohibition against elective surgeries and minor medical procedures or prescribe how that determination is to be made." Order at 5-6.

On its face, the Executive Order did not prevent Oklahomans from obtaining time-sensitive and essential abortion care, and it did not apply to medication abortions. At a press conference, when asked if this provision applied to abortion, Governor Stitt responded that he and his team "ha[d] not gotten into the details yet."[4]

[3] *Available at* https://bit.ly/39AjlzO
[4] *Available at* https://bit.ly/39AjlzO.

Three days later, on March 27, 2020, Governor Stitt issued a press release ("Press Release") declaring that the Executive Order suspended "*any type of abortion services*" as defined by Oklahoma law except in a "medical emergency" or as "otherwise necessary to prevent serious health risks to the unborn child's mother." Because Oklahoma law broadly defines "abortion services" to include abortions accomplished with medications, the Press Release expanded the prohibitions of the Executive Order beyond "elective surgeries" and "minor medical procedures" to medication abortions.

There is no evidence that any health official or medical professional had a role in the Press Release. The record shows only that Oklahoma's Secretary of Health recommended to Governor Stitt that he "temporarily delay elective surgeries and minor medical procedures," without specifying either medication or procedural abortions. *See* Loughridge Dec. ¶ 14. The State proffered no evidence that any state public health official had a role in this decision to expand the Executive Order.

Also on March 27, 2020, Oklahoma's Attorney General stated that violation of the Executive Order is a misdemeanor. *See* Cukor Decl.,

Ex. 7-1. Abortion services in Oklahoma thereafter ground to a halt. Burns Decl. ¶ 7; Burkhart Decl. ¶ 14-15; Hill Decl. ¶ 15.[5] On April 1, 2020, the Executive Order's mandatory postponement of elective surgeries and minor medical procedures was extended to April 30, 2020.[6] At a hearing held on April 3, 2020 in connection with the Providers' request for a TRO, the State acknowledged that this date could be extended. April 3, 2020 Hr'g Tr. at 27.

C. The Relaxation of the Executive Order

Not long after the Executive Order was issued, Governor Stitt and other Oklahoma officials disclosed that new shipments of PPE were resolving shortages. By April 7, 2020, Oklahoma's PPE "czar" publicly stated that Oklahoma "has plenty of personal protective equipment on hand for health care workers." Cukor Decl., Exs. 7-2, 7-3. At that same press conference, Governor Stitt announced that Oklahoma was also "in

[5] The State's repeated suggestions that the Providers have not "complied" with the Executive Order, *see*, *e.g.*, Stay Mot. at 2, are without basis.

[6] Seventh Amended Executive Order 2020-07, (ECF No. 38-1) ¶ 18.

a good spot" when it comes to hospital capacity, citing 5,000 available hospital beds and 2000 ventilators in the state."[7] Cukor Decl., Ex. 7-3.

On April 16, 2020, Governor Stitt announced that the State would begin lifting the Executive Order's prohibition on elective surgeries ahead of schedule:

> Elective surgeries will be able to resume starting on April 24th. We suspended them to protect hospital beds in case of a surge & to protect PPE for our health care workers treating #COVID19 patients. **Based on our data, we now feel confident about our hospital numbers and PPE**.

Governor J. Kevin Stitt (@GovStitt), Twitter (Apr. 15, 11:33 PM), https://bit.ly/3cBcUhR (emphasis added); *see also id.* (Apr. 17, 9:36PM) ("we currently have more than enough hospital beds, ICU beds, & ventilators statewide"), https://bit.ly/3bxZCm5.

On April 16, 2020, Governor Stitt amended the Executive Order ("Amended Executive Order") to provide that some "elective surgeries" could commence on April 24, subject to terms laid out in an

[7] Governor Stitt also issued a press release stating that Oklahoma had enough hospital beds to treat COVID-19 patients, "even if [Oklahoma is] faced with the worst-case scenario." Okla. Gov. Kevin Stitt, *Press Release: Governor's Solution Task Force Announce Hospital Surge Plan for COVID-19* (Apr. 10, 2020), https://bit.ly/2VcPMAp.

accompanying Executive Memorandum.[8] Other elective surgeries and all "minor medical procedures" could commence on April 30. *Id.*[9] The District Court asked counsel for the State to clarify how the Amended Executive Order was intended to apply to abortion services. *Id.* The State asserted that medication abortions and most procedural abortions would still be banned until April 30. The State allowed that procedural abortions could commence on April 24 *only* for those patients who could not legally obtain an abortion in Oklahoma on or after April 30.

D. The Disconnect Between Oklahoma's Abortion Ban and COVID-19 Preventative Measures

In the Press Release, and when Governor Stitt announced the end of the ban on elective surgeries and minor medical procedures, the ban was described as having two goals: (1) to preserve PPE and (2) to diminish activities that would use hospital beds and other hospital resources.[10] Before the District Court, the State identified yet a third

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[8] Att.T ("Defs.' Suppl. Br."), Exs. 1, 2.

[9] As noted by the District Court, certain technical revisions were made to the Amended Executive Order on April 20, 2020. Order at 8 n.6 (citing Executive Order No. 2020-13 (3rd Am.) ¶ 22; *id.* at 9 n.9.

[10] Okla. Gov. Kevin Stitt, *Press Release: Gov. Stitt Amends Executive Order to Allow for Elective Surgeries to Resume* (Apr. 16, 2020), https://bit.ly/2x7upqS; Executive Order No. 2020-13 (2d Am.).

purpose: the prevention of "close interpersonal contact." Defs.' Resp. in Opp. to Mot. for TRO, ECF No. 54 at 18-19; *see also id.* at 23-28; *accord* Defs.' Suppl. Br. at 4-5.

The evidence presented to the District Court demonstrated that the Executive Order and the Press Release do not advance any of these interests.

1. Medical PPE

The State made no attempt to prove that abortion services consume the types of PPE that were in short supply. While the State proffered a declaration from a physician who was forced to reuse N95 masks due to shortages at his hospital, uncontroverted evidence showed that two of the Providers do not use N95 masks at all, and the third Provider had a residual supply of 50 N95 masks but no plans to order more. Burkhart Decl. ¶ 33; Burns Decl. ¶ 24; Hill Decl. ¶ 9.

PPE used for medication abortion "is primarily limited to non-sterile gloves and surgical masks" used during a single in-person visit. Order at 12-13 (citing Schivone Decl. ¶ 35; Burns Decl. ¶¶ 23-24; Hill Suppl. Decl. ¶¶ 17-18; Burkhart Decl. ¶¶ 33, 25). Follow-up appointments can be conducted by telemedicine, eliminating the need

for PPE. *See* Order at 12 (citing Hill Suppl. Decl. ¶ 19, Burkhart Suppl. Decl. ¶ 8). With respect to procedural abortions, "[t]he PPE commonly used in performing these procedures includes sterile or non-sterile gloves, a gown, a face shield or protective eyewear, a surgical mask, a hair cover, and shoe covers." Order at 11 (citing Hill Suppl. Decl. ¶¶ 17-18; Burns Decl. ¶ 23; Burkhart Decl. ¶ 34; Hill Decl. ¶ 10).

If medication abortions are delayed, many patients would have to undergo a procedural abortion. Order at 19; Burns Decl. ¶ 23; Burkhart Decl. ¶ 33-34; *see* Hill Decl. ¶ 9-10. Delaying procedural abortions leads to more invasive procedures that consume more PPE, because a dilation and evacuation ("D&E") requires more PPE than an aspiration abortion, and a two-day D&E requires even more PPE. Burkhart Suppl. Decl. ¶ 16; Nichols Decl. ¶ 32. Moreover, patients prevented from obtaining a wanted abortion remain pregnant, and pregnant women need extensive healthcare – including prenatal care – that requires just as much PPE, if not more. Schivone Decl. ¶ 37; Stone Decl. ¶ 28.

In sum, substantial evidence, none of which is challenged here, supports the District Court's findings that (i) for medication abortions,

"[t]he evidence reflects that this procedure is reasonably safe and requires similar interpersonal contact and PPE as regular prenatal care and less interpersonal contact and PPE than surgical abortion," Order at 19; (ii) for procedural abortions, use of PPE "increase[s] as the pregnancy progresses," *id.* at 11; and (iii) that prolonged pregnancy "likewise will require medical care that involved in-person contact and the use of PPE," *id.* at 14.

2. Hospital Beds and Other Resources

A procedural abortion "is an outpatient procedure," and a medication abortion is typically completed at home. Order at 11. None of the Providers performs abortions at a hospital, and it was undisputed that their patients rarely experience complications that require a hospital transfer. Burkhart Decl. ¶ 31; Burns Decl. ¶ 20; Hill Decl. ¶ 11. The record evidence confirms that both medication and procedural abortion carry a low risk of complications and a very low risk of complications requiring hospitalization.[11] Nichols Decl. ¶ 61; Schivone Decl. ¶¶ 19-20.

[11] While the State argued that abortion carries significant risks of complications that might require hospital care, the "evidence" proffered

3. Interpersonal Contact

The State presented no evidence that the Executive Order was adopted to reduce "interpersonal contact." Rather, the declaration of Oklahoma Secretary of Health Jerome Loughridge, who recommended the delay, attests that he did so to preserve "hospital resources" and "the amount of PPE available for use." Loughridge Decl. ¶ 13.

Indeed, Oklahoma has never imposed some of the more stringent social distancing measures that are reducing the number of coronavirus infections in other states. Sharfstein Decl. ¶ 15. Many businesses that are exempt from the Executive Order, such as liquor stores, marijuana dispensaries, and sporting goods stores, also involve close interpersonal contact. Burkhart Suppl. Decl. ¶ 11; Burkhart Suppl. Decl., Ex. 2-3. Finally, Governor Stitt further relaxed preventative measures by announcing that as of today, April 24, personal care businesses such as hair and nail salons, can reopen for appointments—all of which clearly involve interpersonal contact.[12] As the District Court held, the

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by the State's purported experts has been rejected by multiple federal courts. *See* Plas.' Reply at 7, ECF No. 84.

[12] *Open Up and Recover Safely, A Three-phase Approach to Open Oklahoma's Economy*, (April 22, 2020) available at https://bit.ly/2S461NQ

interpersonal contact involved in medication abortion "is not dissimilar from the close personal contact the State has allowed in other contexts." Order at 20.

E. The Irreparable Injuries to Providers' Patients

The record also demonstrates the irreparable injuries to Providers' patients resulting from the Executive Order. Among other things, delays in accessing abortion care impose unnecessary health risks to patients because, though abortion is very safe, its health risks increase as pregnancy progresses. Schivone ¶¶ 21, 24, 28; Burns Decl. ¶ 31; Burkhart Decl. ¶ 18. Delays require patients to endure the physical and psychological burdens of pregnancy despite their decision to terminate their pregnancies. Schivone ¶¶ 24, 28; Burkhart Decl. ¶ 18. And delays increase the costs of abortion care. Burkhart Decl. ¶ 21.

F. Relevant Procedural History

Providers filed their Complaint on March 30, 2020 and their motion for a TRO and preliminary injunction on March 31, 2020. The State submitted a Response on April 2, 2020. The District Court held a telephonic hearing on April 3, 2020, and on April 6, 2020, issued a 14-page decision partially granting the TRO. The State sought to appeal that order and requested an emergency stay of the TRO, but this Court

dismissed the appeal for lack of jurisdiction because the State had failed to establish irreparable injury. *S. Wind Women's Ctr. LLC v. Stitt,* No. 20-6045, 2020 WL 1860683, ECF No. 89 at *3 (10th Cir. Apr. 13, 2020). The concurring opinion by Judge Lucero observed that the District Court had "carefully analyzed the need for reducing abortion services in different scenarios, weighed this against the harm from denying abortion services, and tailored its temporary relief accordingly." *Id.* (Lucero, J., concurring).

After the TRO was issued, both parties filed additional declarations and briefing, including a sur-reply from the State.[13] The District Court heard extensive oral argument from counsel on April 20, 2020, asked important questions to both parties about the evidence in the record, and issued its 23-page preliminary injunction ruling later that same day.

[13] The District Court did not abuse its discretion when it denied the State's motion to strike the Providers' reply papers and allowed the State to submit a sur-reply brief and declarations. In fact, the State asked to submit a sur-reply as an alternative form of relief. Defs.' Mot. To Strike, ECF No. 90. The District Court's decision to accept the reply papers and permit a sur-reply was a "permissible course[] of action." *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998).

ARGUMENT

This Court will grant an emergency stay pending appeal only when four factors are satisfied: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the injunction is not granted; (3) the absence of harm to opposing parties if the injunction is granted; and (4) risk of harm to the public interest. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). In addition, this Court must determine if the District Court abused its discretion and if the movant has demonstrated a "clear and unequivocal" right to relief. *Id.* at 1243. None of these factors is met here.

I. The Stay Should Be Denied Because the State Has Not Demonstrated Irreparable Injury

In its stay motion, the State does not identify any irreparable injury that it might suffer during the pendency of this appeal. Nor could it, given that the Amended Executive Order itself permits medication and procedural abortions to resume on April 30, 2020. In dismissing the State's previous appeal, this Court already held that the performance of abortions during the 14-day duration of the TRO did not constitute "irreparable injury." *S. Wind Women's Ctr. LLC v. Stitt*, No.

No. 20-6045, 2020 WL 1860683 at *3 (10th Cir. Apr. 13, 2020). The same is necessarily true here.

II. The Stay Should Be Denied Because the State Has Not Demonstrated a Likelihood of Success on the Appeal

To prevail on its appeal, the State would have to demonstrate that the District Court abused its discretion by granting the preliminary injunction on the basis of an erroneous legal conclusion or a clearly erroneous finding of fact. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). As discussed below, it has not come close to doing so.[14]

A. The District Court Correctly Interpreted and Applied *Jacobson* and *Casey*

The District Court correctly concluded that the Providers were likely to succeed on the merits of their claims under the frameworks of both *Jacobson* and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). Order at 15. The District Court applied the proper standard when it recognized that while Oklahoma may protect its

[14] Appellants contend that they are irreparably injured because their appeal will become moot when their Executive Order expires "*in toto* on April 30." Motion to Expedite at 2. But that argument is circular; if this appeal were to become moot, it would be irreparable injury only if the State had established injury from the preliminary injunction, which it has not.

citizens against a pandemic, it cannot exercise that power in an "oppressive," or "arbitrary" or "unreasonable" manner, Order at 2 (quoting and citing *Jacobson,* 197 U.S. at 27, 38), and may not impose an "undue burden" on the right of Providers' patients to access abortion services.

Under *Jacobson*, even when seeking to "protect the public health," a state violates the Constitution when its actions (1) "go beyond the necessity of the case," (2) result in "a plain, palpable invasion of rights secured by the fundamental law," or (3) have "no real or substantial relation to" the state's public health goals. 197 U.S. at 28, 31. Modern constitutional law properly recognizes *Jacobson* as having "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). As this Court has held, "'[t]o justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . .' *require* such interference; and, second, that the means are reasonably *necessary* for the accomplishment of the purpose, and not *unduly oppressive* upon individuals." *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584,

591 (10th Cir. 1999) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962)) (emphases added).

The right to an abortion is one of the "rights secured by the fundamental law" that courts must protect. *Jacobson*, 197 U.S. at 31. The Supreme Court has repeatedly recognized that the Constitution protects the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Such matters are "central to the liberty protected by the Fourteenth Amendment." *Id.*[15] Because the right to abortion is fundamental, state intrusions are subject to heightened judicial review. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) ("The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law.").

[15] Indeed, in *Casey*, the Supreme Court characterized *Jacobson* as "recognizing limits on government power" and cites the case in support of its holding that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857.

The State claims that it has blanket authority to disregard fundamental rights in a public health crisis. Stay Mot. at 10-12. More than a century of precedent refutes that position, including *Jacobson* itself. As the Supreme Court then explained, while the government has authority to "safeguard the public health and the public safety" in an emergency, the state may not—even while exercising that power—impose a restriction that is "a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. 11, 25, 31 (1905). Even "under the pressing exigencies of crisis," the Supreme Court has held that courts must resist the "temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963); *see Lawton v. Steele*, 152 U.S. 133, 137 (1894) (a state's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."). Just yesterday, in its review of Alabama's COVID-19 abortion ban, the Eleventh Circuit affirmed that courts are not rendered toothless when reviewing states' exercise of their police powers. *See Robinson v. Harris*, No. 20-11401-B, at 10 (11th Cir. Apr. 23, 2020) ("[J]ust as

constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency.").

The State's arguments to the contrary misread *Jacobson*. First, the State faults the District Court for "re-weigh[ing] the State's cost-benefit analysis during a public health crisis." Stay Mot. at 14. But Jacobson *requires* courts to consider whether an infringement on an individual's constitutional rights has "no real or substantial relation to" the state's public health goals. 197 U.S. at 31. Such an inquiry necessarily entailed an analysis of whether the State's stated goals—preserving PPE and hospital beds—bore a "real and substantial" relationship to the abortion ban.

Nor does *Jacobson* mandate "cumulative compliance" with public health measures without regard to any infringement on fundamental rights, as the State contends. Stay Mot. at 13. In *Jacobson*, the defendant challenged a universal vaccination scheme "of all the inhabitants of Cambridge." 197 U.S. at 13. The liberty interest asserted by the defendant was therefore one that he necessarily shared with "every person within [the] jurisdiction" of Cambridge. *Id.* at 26. Here, by contrast, the fundamental right at stake belongs only to a

small subset of persons whose procedures are delayed by the Executive Order, *i.e.*, patients who seek previability abortions. The District Court properly balanced the burden on those patients with the purported benefits derived from infringing their rights.

The State directs this Court to recent decisions from the Fifth and Eighth Circuits vacating TROs against enforcement of executive orders to ban abortion care. Stay Mot. at 13-14. The Eleventh Circuit explained that, even assuming these Courts of Appeals' decisions were correct, the outcomes were driven by the concern that the district courts had either failed to consider *Jacobson* or did so only "summarily," which is not the case here. *Robinson v. Harris*, No. 20-11401-B at 17 (11th Cir. Apr. 23, 2020).

1. The District Court Correctly Held that the Executive Order Is Unconstitutional with Respect to Medication Abortions

The District Court correctly held that the vast "disconnect" between Oklahoma's outright ban on medication abortions and the benefits purportedly received "indicates that the prohibition on medication abortion is improper under both the *Jacobson* and *Casey* standards of review." Order at 20.

Rather than identify any clearly erroneous factual findings, the State contends that the District Court did not address all of their evidence. Stay Mot. at 18-19. But this is not the right legal standard; so long as "plausible" evidence supports the District Court's finding, this Court cannot find it to be "clearly erroneous." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) ("[a] finding of fact is 'clearly erroneous' if it is without factual support in the record" or if the court of appeals is "left with a definite and firm conviction that a mistake has been made" after reviewing the entire record) (citation omitted).

No such claim can be made here. For example, the evidence amply supports the District Court's finding that the risk of complications from medication abortions is "quite low overall." Order at 13 (citing, *inter alia*, authoritative National Academies Report). The Order shows that the Court considered—because it cited—the State's purported expert's testimony in reaching this conclusion. *Id.* (citing Harrison Decl. ¶ 16). And the District Court's finding that a continued pregnancy "will require medical care that involves in-person contact

and the use of PPE" is fully supported by the declaration of "Dr. Stone, an obstetrician-gynecologist practicing in Oklahoma City," unlike the declarants on which the State relies, who presented no evidence of Oklahoma prenatal care practices. Order at 14 (citing Stone Decl. ¶¶ 23-24); *compare* Stay Mot. at 18 (citing Valley Decl. and Sanders Decl.).

2. The District Court Correctly Held that the Executive Order Is Unconstitutional with Respect to Procedural Abortions On or After April 24, 2020

The District Court also correctly held that in light of the "diminished need for rationing [PPE] after April 23rd," "the record does not reflect any reasonable basis to continue, beyond that date, the significant intrusion upon a constitutional right represented by the State's postponement of the relevant surgical abortions." Order at 18.

The State's principal contention is that the District Court committed legal error by making a "public policy decision." Stay Mot. at 17. To the contrary, the District Court did not itself conclude that PPE stores were sufficient to allow elective surgeries to commence on April 24; it expressly relied upon "the State's position and directives." Order at 18. Once the State determined that *some* elective surgeries could

proceed, the District Court properly concluded that it was not "reasonable" to maintain a ban on constitutionally-protected procedural abortions. *Id.*

Next, the State contends that there was a "clear factual error" in the District Court's purported determination that "the crisis in PPE is diminishing but not yet solved." Stay Mot. at 17 (emphasis omitted). But the District Court did not make any assessment of the adequacy of Oklahoma's PPE supplies; the State did, when it determined that elective procedures could commence on April 24. The District Court could properly conclude that allowing some elective surgeries to proceed, while maintaining a prohibition against procedural abortions, it is not just unreasonable but "arbitrary." Order at 18.

B. None of the District Court's Other Findings of Fact Is Clearly Erroneous

The State wrongly contends that the District Court "failed to parse the record evidence" when it concluded that the burdens on Providers' patients constitutional rights outweighed the benefits of banning their access to abortion services. Stay Mot. at 15. As Judge Lucero previously noted with respect to the TRO, the "careful" analysis of the District Court speaks for itself. And the evidence that the State

contends was overlooked by the District Court is irrelevant. For example, the District Court did not "overlook[] an obvious benefit to a categorical EO" when concluding that the Executive Order was an impermissible ban on abortion. Stay. Mot. at 15. The cited evidence says nothing about the quantities of PPE consumed in providing abortion care, much less how those quantities compare to the State's existing and anticipated supplies. Stay Mot. at 15. Nor was the District Court required to consider the hypothetical impact of extending the preliminary injunction to patients seeking *other* elective procedures such as knee replacements or face lifts. Stay Mot. at 16.

III. The Stay Should Be Denied Because the Balance of Harms and Public Interest Do Not Favor the State

The State cannot credibly contend that the public interest is harmed by the preliminary injunction because the abortions that it seeks to delay can, under the Amended Executive Order, commence on April 30. Indeed, Governor Stitt issued the Amended Executive Order relaxing the moratorium on elective surgeries and minor medical procedures on April 16, *while the initial TRO was in effect,* belying any claim that Providers' activities have made a material difference to the State's PPE stores. Providers' evidence also demonstrated that forcing

patients to delay abortion care against their will inflicts a substantial physical toll and exposes patients to numerous unnecessary health risks. Moreover, even a short delay can push patients into having more invasive and expensive procedures.

CONCLUSION

For the reasons stated above, Providers request that this Court deny the State's motion for an emergency stay. Should the Court consolidate this motion with expedited merits briefing, Providers request an opportunity to submit a merits brief that more fully addresses why the Order should be affirmed.

Dated: April 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned certifies the motion complies with the Rule 28 type-volume limitation as it contains 5179 words. Respectfully submitted this 24th day of April, 2020.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, a copy of this Brief was served via ECF upon the following parties:

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