No. 20-6045

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 TO STAY TEMPORARY RESTRAINING ORDER AND TEMPORARY ADMINISTRATIVE 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., 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.

TABLE OF CONTENTS

INTRODUCTION

On April 6, 2020, the District Court (Goodwin, J.) issued an order that temporarily restrains Oklahoma Governor J. Kevin Stitt and five other state officials ("Appellants" or the "State") from enforcing Oklahoma's ban on abortion services with respect to two groups of patients: those who otherwise could not legally access any abortion services in Oklahoma after the ban's expiration date; and those seeking only medication abortions. The District Court left the ban intact with respect to all other non-emergency abortions in Oklahoma. The District Court's temporary restraining order ("TRO") will expire on its own terms in 10 days, on April 20, 2020, and submissions on Appellees' pending motion for a preliminary injunction will be completed today (April 10, 2020).

Nothing in this scenario supports the extraordinary relief Appellants seek in their Emergency Motion to Stay TRO Pending Appeal ("Mot."). As a threshold matter, there is no appellate jurisdiction. It is black-letter law that a TRO is an interlocutory order only rarely appealable under 28 U.S.C. § 1292(a)(1). Earlier this week, the Sixth Circuit dismissed a nearly identical appeal of a TRO

restraining enforcement of a COVID-19 abortion ban because appellate jurisdiction was lacking. *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310 at *3 (6th Cir. Apr. 6, 2020).

Jurisdictional failings aside, Appellants do not satisfy any of the requirements for an emergency stay. First, the *sine qua non* of irreparable harm if the TRO is not lifted is missing. The TRO is narrow and expires in six business days, during which time only a small number of abortions will be performed by Appellees' physicians. On April 7, 2020, the day before the State filed this motion, an Oklahoma official admitted that Oklahoma has "plenty of personal protective equipment," the very resource that the State seeks to preserve by banning abortions.[1] Although Appellants have opted not to present any evidence of the actual figures in the District Court or here, that official disclosed that the State had amassed about 900,000 face masks, 110,000 respirators, and 120,000 gowns, and that more were on their way. *Id.* At that same press briefing, Governor Stitt stated that

[1] COVID-19 Response: Stitt 'Cautiously Optimistic' Curve is Flattening, Oklahoma Has 'Plenty' PPE, Matt Trotter, Public Radio Tulsa, Accessed 4/8/2020 at https://bit.ly/2Vdycek.

Oklahoma has 5,000 available hospital beds and 2,000 ventilators.[2] The State has done nothing to show how a few days of abortion services provided by Appellees could make a dent in its stockpile of personal protective equipment ("PPE") or the number of available hospital beds, much less an irreparable one. Appellants' claim that the TRO will leave the state "deciding whether to triage hospital beds" is a bogeyman. Mot. at 19.

Appellants also fall 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 outright denial of abortion access to patients who could not legally access abortions after expiration of the Executive Order was a "'plain, palpable invasion of rights'" and (ii) the ban on medication abortions is an "'undue burden' on the right" to abortion. R.242, 243. Appellees have standing to assert their patients' rights, and none of the District Court's findings of fact was erroneous, much less clearly so.

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[2] *Governor Stitt Gives Update On Personal Protective Equipment In Okla.*, Caleb Califano, News 9, Accessed 4/9/2020 at https://bit.ly/3aVKWgg.

Finally, the balance of the equities and public interest favor leaving the TRO in place. Appellees acknowledge the extraordinary circumstances the country now faces, and are following the latest medical guidance with respect to preventive procedures. The State's doomsday scenarios about theoretical long-term consequences of the TRO are unfounded speculation, while the irreparable injury that Appellees' patients would suffer if denied their constitutional right of access to abortion is immediate and very real.

BACKGROUND

I. Abortions in Oklahoma

Legal abortion is an extremely safe and common form of healthcare. As the United States Supreme Court held in *Whole Woman's Health v. Hellerstedt*, abortion "has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." 136 S. Ct. 2292, 2302 (2016); *see also* R.92. The record here confirms that abortions rarely result in serious complications. R.92-93 ¶ 20 ("Abortion-related emergency room visits constitute just 0.01% of all emergency room visits in the United States.").

In Oklahoma, abortions can be performed up to 22 weeks from the first day of a patient's last menstrual period ("LMP").[3] There are two main methods of abortion: medication abortion and procedural abortion, both of which are safe and effective. R.90.

Medication abortion is available only early in pregnancy, up to 11 weeks LMP. R.88. It involves a combination of two pills taken orally: mifepristone and misoprostol. R.91. The patient takes the mifepristone in the health center and later takes the misoprostol at a location of her choosing, most often at home, after which the contents of the pregnancy are expelled similar to a miscarriage. *Id.*

Procedural abortion, which the District Court called "surgical abortion," is not surgical at all; it involves no incision or general anesthesia. R.91, 112. Most often in a procedural abortion, the clinician dilates the patients' cervix and uses gentle suction from a narrow, flexible tube to empty the contents of the uterus. After 14 to 15 weeks LMP, clinicians generally use instruments to complete the

[3] 63 O.S. § 1-745.5 prohibits abortion when "the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks." Twenty weeks postfertilization is twenty-two weeks LMP.

procedure. R.91-92. Further in the second trimester, the clinician may begin cervical dilation the day before the procedure, requiring two days of clinical care instead of one. R.92, 98-99.

None of the Appellees performs abortions at a hospital, and it is undisputed that their patients rarely experience complications that require hospital transfer. R.114, 128, 136; *see also* R.92-93. The District Court found that the rate of hospitalization for complications arising from medication abortions is less than procedural abortions. R.239–40. Record evidence demonstrated that, for both methods, complications requiring hospitalization occur in less than a fraction of one percent of patients. R.92 ¶ 20.

In order to reduce the risk of COVID-19 transmission, Appellees (like other healthcare providers) are using PPE, but they take care to use those resources judiciously. *See, e.g.,* R.115, 126, 137–38. In its findings of fact, the District Court concluded that medical abortions require less PPE than procedural abortions. R.239–40. Record evidence demonstrated that, for both methods, minimal PPE is required. R.99 ¶ 35; R.115 ¶ 23; R.128-29 ¶¶ 33–34; R.136 ¶ 10.

II. 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, which declared a state of emergency. *See* Executive Order 2020-07 at 1.[4] On March 24, 2020, Governor Stitt amended this order to mandate that: "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020." Fourth Am. Exec. Order ¶ 18 (No.2020-07 (Doc. No. 1-1)) ("Executive Order").[5]

At a press conference, the Governor explained that Paragraph 18 of the Executive Order was included to reduce the use of hospital beds and to preserve and replenish the state's supply of PPE, such as respirators, for healthcare providers.[6] As the District Court noted in its findings of fact, "the Executive Order does 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." R.237.

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[4] *Available at* https://bit.ly/39AnZOh.
[5] *Available at* https://bit.ly/3e2j5gf.
[6] *Available at* https://bit.ly/39AjlzO

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, the Governor responded that he and his team "have not gotten into the details yet."[7]

On March 27, 2020, Governor Stitt issued a press release (the "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."[8] 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.

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

[8] Press Release (March 27, 2020) (emphasis added), *available at* https://bit.ly/2JssTlM. Oklahoma law defines "medical emergency" covering only abortions needed to avert the patient's death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy." 63 O.S. § 1-738.1A.

The American College of Obstetricians and Gynecologists has observed, specifically as to COVID-19, that abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible. The consequences of being unable to obtain an abortion profoundly impact a person's life, health, and well-being."[9] 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* R.186 ¶ 14.

Also on March 27, 2020, Oklahoma's Attorney General stated that violation of the Executive Order is a misdemeanor.[10] Abortion services thereafter ground to a halt. R.112, 124, 138. On April 1, 2020, the

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[9] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://bit.ly/33ULFeI.

[10] *See e.g.* Washington, Destiny, *AG Hunter Says Violation of Gov. Stitt's Executive Order Can Result in a Misdemeanor,* (March 27, 2020), https://bit.ly/3dA5PPP.

Executive Order's mandatory postponement of elective surgeries and minor medical procedures was extended by more than three weeks to April 30, 2020.[11] As the District Court found, Appellants "acknowledge that this prohibition may be extended beyond that date due to the ongoing severity of the COVID-19 pandemic." R.238.

III. The District Court's Decision and Order

Appellees filed their Complaint on March 30, 2020, and their motion for a TRO and preliminary injunction on March 31, 2020. R.10–11. The State submitted a Response on April 2, 2020. R.14. The District Court held a telephonic hearing on April 3, 2020, and issued the TRO on April 6, 2020 in a 14-page written decision. R.234–47.

In partially granting the TRO, the District Court recognized that in a public health emergency, "the State has broad power to act." R.235. However, contrary to the State's assertion that it enjoys unreviewable authority, the District Court noted "[t]hat power is not unfettered . . . and courts should carefully guard against 'unreasonable,' 'arbitrary,' or oppressive' exercise of it." *Id.* (quoting *Jacobson*, 197 U.S.

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[11] Seventh Amended Executive Order 2020-07, *available at* https://bit.ly/3bPnqRY.

at 26). The District Court also recognized that it could not "sanction 'a plain, palpable invasion of rights.'" *Id.* (quoting *Jacobson*, 197 U.S. at 31)).

Applying these principles to patients who would no longer be able to access abortion services after the Executive Order's expiration date, the District Court found that "the effect of the Executive Order and Press Release is to prevent access to surgical abortion altogether." R.242. The Court held "[t]his 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." R.242 (citing *Jacobson*, 197 U.S. at 31).

The District Court likewise concluded that with respect to medication abortions, "it is substantially likely that Plaintiffs will establish that the prohibition reflected in the Executive Order and Press Release is invalid as an 'unreasonable,' 'arbitrary,' and 'oppressive' use of the State's emergency powers and as an 'undue burden' on the right of Plaintiffs' patients to access abortion services." *Id.* This ruling relied upon the District Court's factual finding that

medication abortion "is safe and requires less interpersonal contract and PPE than surgical abortion." R.243. Accordingly, "it follows that the purpose and benefit the Defendants state they are trying to achieve though the Executive order and Press Release . . . are not advanced by prohibiting medication abortion." *Id.*

ARGUMENT

I. The Appeal Should Be Dismissed Because There Is No Appellate Jurisdiction

TROs are interlocutory orders that are "ordinarily not appealable." *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL-CIO*, 473 U.S. 1301, 1303–04 (1985). As the Sixth Circuit explained earlier this week when it dismissed Ohio's appeal from a TRO enjoining enforcement of a COVID-19 order against abortion patients:

> The rationale for this rule is that TROs are of short duration and usually terminate with a prompt ruling on a preliminary injunction, from which the losing party has an immediate right of appeal.

Preterm-Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020) (quotation marks and citation omitted). Although the Sixth Circuit permits such appeals when the appellant demonstrates "irretrievable harms or consequences before the

TRO expires" or where the TRO requires "affirmative action," it held that the Ohio district court's narrowly tailored TRO did not meet that test. *Id.*

The Sixth Circuit's ruling is fully consistent with this Court's precedents. For there to be jurisdiction over a TRO, this Court requires that the order:

> 1) must have the practical effect of granting or denying injunctive relief, 2) must be one which will result in serious or irreparable consequences if executed, and 3) must be a directive which can be challenged effectively only through immediate appeal.

United States v. McVeigh, 157 F.3d 809, 813 (10th Cir. 1998) (citation omitted). Appellants do not mention, much less try to meet, this standard. Indeed, none of the three prongs is met here.

First, the TRO does not have the effect of granting an injunction. On its face, the TRO will expire on April 20, 2020, while the Executive Order remains in effect until April 30, 2020, and almost assuredly will be extended. R.246.

Second, as addressed more fully below in Section II.A., the TRO does not have irreparable consequences for the Appellants. Appellants' claims that the State will be thwarted from containing the COVID-19

pandemic are clearly overblown in light of the District Court's narrow TRO. Their reliance on the Fifth Circuit's decision in *In re Abbott*, No. 20-50264, 2020 WL 1685929, at n. 18 (5th Cir. Apr. 7, 2020) is unavailing, for in that case, unlike here, the TRO "exempt[ed] all abortions" from Texas' COVID-19 ban on certain medical procedures.[12] *Duvall v. Keating*, 162 F.3d 1058, 1062 (10th Cir. 1998) is even further afield. There, the appellant was a death row prisoner six days from execution. Here, the only possible "injury" the Appellants can claim is that a subset of abortion services are allowed for the next 10 days.

Third, there are effective means of challenging the TRO other than immediate appeal because the District Court will soon decide Appellees' pending motion for a preliminary injunction, which will be subject to immediate appeal. *See* 28 U.S.C. § 1292(a)(1). Indeed, the

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[12] In reaching this ruling, the Fifth Circuit expressly recognized that the TRO at issue in this case is much narrower than the one issued by the Texas district court: "[t]he [Texas] TRO's broad sweep also distinguishes this case from recent district court decisions in Alabama and Oklahoma." *In re Gregg Abbott*, at n.18. On remand, the district court in Texas entered a second TRO blocking Texas from enforcing its executive order as to a subset of abortion services. *Planned Parenthood Ctr. For Choice v. Abbott*, No. A-20-CV-323-LY (W.D. Tx. Mar. 30, 2020) (ECF No. 63).

parties' factual submissions and briefing on the preliminary injunction will be complete later today. ECF No. 80. That appeal may raise some of the same legal issues, but is certain to be based on a fuller factual record, for it will include additional evidence filed by the State and Appellees after this appeal was noticed. ECF Nos. 75 & 80. It would be a more appropriate vehicle for this Court to consider the issues raised by this case.

II. The Motion for an Emergency Stay Should Be Denied

A. The State Has Not Established Irreparable Injury from the TRO

Appellants have not shown that they will suffer irreparable harm if the TRO is not lifted. Permitting Appellees to continue offering essential, time-sensitive abortion care while the District Court decides the preliminary injunction will not meaningfully affect Oklahoma's stores of PPE or its hospital resources. The State's contrary speculation is not supported by any record evidence.

First, by its own admission, the State has amassed a stockpile of hundreds of thousands of face masks, respirators, and gowns, and

thousands of available hospital beds.[13] An Oklahoma government official has acknowledged that the State has "plenty of personal protective equipment," with more on its way. *Id.*

Next, by the State's own admission, the number of procedural abortions that could be conducted before the TRO expires is very small. Because the Executive Order is currently set to expire on April 30, only women over 18 weeks LMP may now access a procedural abortion under the terms of the TRO. Appellants concede that only about 1% of abortions occur after 16 weeks gestation. Mot. at 15. Thus, the total number of procedural abortions that could be performed before the TRO expires is no more than a handful.[14] As to medication abortions, very little PPE is required to provide it, and reliable scientific evidence in the

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[13] *COVID-19 Response: Stitt 'Cautiously Optimistic' Curve is Flattening, Oklahoma Has 'Plenty' PPE*, Matt Trotter, Public Radio Tulsa, Accessed 4/8/2020 at https://bit.ly/2Vdycek; Governor J. Kevin Stitt (@GovStitt), Twitter (Mar. 30, 2020, 2:00 PM), https://bit.ly/2Uwn5h; *Governor Stitt Gives Update On Personal Protective Equipment In Okla.*, Caleb Califano, News 9, Accessed 4/9/2020 at https://bit.ly/3aVKWgg.

[14] Only 179 abortions were performed between 16 and 22 weeks in all of 2018. Okla. State Dep't of Health, *Abortion Surveillance in Oklahoma*, 2012-2018, Table 12, https://bit.ly/2JQR9ht.

record shows that medication abortion patients almost never require hospitalization.[15] R.92-93.

Appellants present no evidence that abortions provided during the pendency of the TRO could divert resources needed to combat the pandemic. The State's contention that "older residents who contract COVID-19 may be turned away by hospitals busy treating women with medication abortion complications" is overheated rhetoric that has no factual basis. *See* Mot. at 19. It is not grounds for a stay.

B. The State Has Not Established Likelihood of Success

Appellants have not established any error of law or any clearly erroneous factual findings in the District Court's decision that could support a finding that the District Court abused its discretion in issuing the limited TRO.

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[15] Luu Doan Ireland et al., *Medical Compared With Surgical Abortion for Effective Pregnancy Termination in the First Trimester*, 126 Obstetrics & Gynecol. 22 (2015); Ushma Upadhyay, et al., *Abortion-related Emergency Room Visits in the United States: An Analysis of a National Emergency Room Sample*, 16(1) BMC Med. 1, 1 (2018). Even if the State's bloated and unreliable 6% complications rate were credited, there could be no more than one or two such hospitalizations in this time period, based on the total number of medication abortions performed in Oklahoma in a year. *See* Okla. State Dep't of Health data cited at note 14, above.

1. The District Court Correctly Applied *Jacobson*

The State's principal contention of error in the District Court's decision is based on a misreading of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). According to Appellants, *Jacobson* establishes a state prerogative to "altogether prevent[] the exercise of an individual liberty" when implementing an "otherwise-valid public health measure." Mot. at 14. But *Jacobson* did no such thing. Rather, as the District Court correctly recognized, even the State's broad power to "secure the health and safety of the public" is subject to review by the courts. R.235.

In *Jacobson*, the Supreme Court upheld a law requiring smallpox vaccination but recognized that, 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. Thus, under *Jacobson*, a court must determine whether a state's action abrogates "particular rights secured by the fundamental law." *Id.* at 31. And even if it does not, the court should also consider

whether rights are infringed because the State's action lacks a "real or substantial relation" to the state's professed goal or "go[es] beyond the necessity" of the situation. *Id.* at 28, 31.

None of the other cases cited by Appellants supports their claim that courts become toothless when states invoke the power to protect public health. Indeed, in *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir 2015) (per curiam), the Second Circuit recognized that under *Jacobson,* a court reviewing a challenge to a state's public health response must still determine whether the action violates the plaintiff's fundamental rights.[16]

Appellants have not shown that the District Court erred when it held that the complete denial of access to abortion was "beyond the reach of even the considerable powers allotted to a state in a public

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[16] The State's other citations are equally unavailing. In *Reynolds v. McNichols*, 488 F.2d 1378, 1382 (10th Cir. 1973), this Court did not suspend judicial review of an ordinance authorizing detention of persons suspected of carrying venereal disease, but considered whether the ordinance was "illogical or unreasonable." And in *Lech v. Jackson*, 791 Fed. App'x 711 (10th Cir. Oct. 29, 2019), this Court assessed whether property damage incurred during a police action could give rise to a claim under the Takings Clause, which has nothing to do with the issues raised here.

health emergency." R.242. Nor have they shown that the District Court erred when—in balancing whether the ban on medication abortions posed an "undue burden" on access to abortion rights under *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992)—it weighed the "state's interest of protection of public health from a pandemic" and considered it lacking.

2. Appellees Have Standing to Enforce the Violation of Their Patients' Constitutional Rights.

Appellants contend that the District Court erred by treating this case as "an as-applied challenge, rather than a facial challenge" to the Executive Order, on the ground that the number of patients who will suffer a complete denial of their rights is "a tiny fraction of cases." Mot. at 15. While their reasoning is opaque, insofar as the State is objecting to the scope of the TRO, the District Court tailored relief to prevent the constitutional harms that it found Appellees had demonstrated on the TRO record. The District Court had no occasion to consider whether the Executive Order is unconstitutional in a "large fraction of cases" because the TRO did not facially invalidate it.

Other arguments advanced by the State suggest that, in its view, the District Court should have refrained from granting relief to patients

who would be denied their right of access to abortion services and required individual patients to file their own lawsuits. As the District Court correctly determined, R.234 n.1, that contention flies in the face of nearly five decades of Supreme Court precedent recognizing that abortion providers have standing to vindicate patients' constitutional rights. *See*, *e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("doctors consulted by pregnant women" have standing); *see also Singleton v. Wulff*, 428 U.S. 106, 108 (1976) (plurality op.) ("physicians who perform nonmedically indicated abortions" have standing).[17] This Court adheres to these precedents. *See, e.g., Planned Parenthood of Rocky Mountains Servs. v. Owens*, 287 F.3d 910 (10th Cir. 2002).

The District Court correctly held that Appellees have standing to bring constitutional challenges on their patients' behalf. R.234 n.1. Accordingly, the District Court plainly had authority to invalidate the application of the Executive Order to those patients whose rights are affected by it.

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[17] These precedents remain binding on lower federal courts notwithstanding that the Supreme Court has granted certiorari on a cross-petition challenging third-party standing by abortion providers in *Russo v. June Medical Services, LLC*, No. 18-1460.

3. The District Court's Findings of Fact With Respect to Medication Abortions Are Not Clearly Erroneous.

Other than its spurious claim that the District Court did not follow *Jacobson*, the State's sole ground for seeking reversal of the TRO with respect to medication abortions is alleged factual error. Mot. at 16.

First, Appellants argue that in finding that the risks of medication abortion in "each instance [] is less than what … typically results from a surgical abortion," the District Court ignored "undisputed evidence that medication exposes women to a greater risk of complications than surgical abortions." Mot. at 16. The State may have presented evidence purporting to make this point, but it was far from undisputed. Appellants' only evidence regarding the supposed safety risks of abortion was a declaration from an "expert" whose views other courts have found to "lack scientific support," be "based on unsubstantiated concerns," and are "generally at odds with solid medical evidence." *MKB Management Corp. v Burdick*, No. 09-2011-CV-02205, 2013 WL 9885391, at *7 (D.N.D. July 15, 2013); *see also Planned Parenthood Ark. & E. Okla. v. Jegley*, 2018 WL 3816925, 42 (E.D. Ark. July 2, 2018) (rejecting this same expert's opinions "regarding the incidence of complications from medication abortions" because they directly conflict

with the "factual underpinning" of Supreme Court precedent). By contrast, Appellees presented the court with evidence from leading medical authorities demonstrating that the risk of complications with medication abortions is exceedingly low, and major complications requiring admission to a hospital are near zero. *See* R.92 ¶ 20; R.146 ¶ 11. It is this evidence that the District Court relied on in restraining the ban's application to medication abortion.

Next, Appellants contend that "the district court's order is logically inconsistent with its own terms" because the procedural abortions permitted by the TRO begin at 18 weeks LMP, but medication abortions are provided only up to 10 or 11 weeks LMP. Mot. at 17. But Appellants misapprehend the District Court's ruling. The District Court allowed medication abortions to continue because of the lower levels of PPE and interpersonal contact associated with them. R.243. That distinction fully supports the District Court's conclusion that "the disconnect between the means employed [under the Executive Order] and the benefits achieved indicates that the prohibition on medication abortion is improper." R.244.

C. The State Has Not Established a Balance of the Equities In Its Favor

In balancing the equities when it issued the TRO, the District Court held that "[t]he plain and palpable deprivation of a fundamental right outweighs the injury the public may suffer if those procedures are allowed to occur" with respect to patients who would no longer be able legally to access abortion services after April 30, 2020. R.245. As to medication abortions, the District Court held that the burden on patients' constitutional rights outweighs the "relatively minor" benefit of delaying them. This Court should reach the same conclusions in ruling on this motion for a stay of that order.

Tellingly, the State never addresses the purported harm to the public interest resulting *from the limited TRO entered by the District Court*. Rather, the State makes it sound as though the District Court struck down all COVID-19 preventive measures: "[i]f the state cannot enforce social distancing and preserve hospital capacity and needed PPE, it cannot implement the public health strategy needed to protect its health care resources." Mot. at 19. In an implicit acknowledgment that "elective abortions alone will not jeopardize thousands," the State focuses instead on what might happen if *all* elective surgeries and

minor medical procedures were to resume. *Id.* at 19–20 (noting the share of PPE consumed by all elective surgeries in Oklahoma). More broadly still, the State offers an apocalyptic vision of what might happen if still other parties were to raise different constitutional challenges to the enforcement of other COVID-19 restrictions against them: "[t]his case is not just about abortion; the TRO calls into question virtually all of the State's measures to avert pandemic disaster." *Id.* at 20.

Appellees share the State's concern with mitigating the impact of the COVID-19 pandemic. But Appellants' overheated rhetoric bears no relationship to the applicable legal standard for a stay. When a court balances the equities to award temporary equitable relief, the moving party cannot just wax hyperbolic, but must show that "such harm is likely to occur" before the court rules. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009); *accord Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (movant "must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief") (emphasis in original). Thus, this Court cannot consider whether there might be *different* consequences if

other plaintiffs were later to seek relief from any of the State's executive orders.

On the other side of the scale, the State diminishes the grave harm to Appellees' patients if the TRO were to be stayed. Here, the District Court correctly held that "the injury that will be suffered as a result of delaying abortion access to a woman with an unborn child nearing 20 weeks postfertilization is a complete denial, to those patients, of the Fourteenth Amendment right to access abortion." R.247. The outright denial of their constitutional rights is undeniably "irreparable injury" to those patients. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019). The State's characterization of the "complete denial" of the constitutional rights of those patients as a mere "delayed exercise" is an obfuscation, and a sure sign that the balance of the equities tips decidedly against them. Mot. at 20.

Finally, the State's contention that the TRO somehow "exempts" abortion patients from the "sacrifices" or "burdens" endured by others has it backwards. Mot. at 21. As the District Court held in its findings of fact, for all other patients in Oklahoma, the determination of what is

an "elective surgery" or a "minor medical procedure" is "being decided on a case-by-case basis by medical providers." R.237. And medication abortion patients are the *only* patients in Oklahoma barred from accessing medication under the Executive Order, which by its plain terms applies only to "elective surgery" and "minor medical procedures" and not to administering medications. The TRO does not favor abortion patients, it merely reduces some of the discrimination against them and their providers effected by the Press Release.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal and deny Appellants' application for a stay.

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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 27 type-volume limitation as it contains 5,197 words. Respectfully submitted this 10th day of April, 2020.

Travis J. Tu

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;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Avast Free Antivirus, 20.1.2397, last updated December 20, 2019, and according to the program are free of virus.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, a copy of this Brief was served via ECF upon the following parties:

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