No. 20-11401

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN MARSHALL,
in his official capacity as Attorney General of the State of Alabama, et al.,
Defendants-Appellants,

v.

YASHICA ROBINSON, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:19-cv-00365-MHT-JTA

EMERGENCY MOTION FOR STAY PENDING APPEAL

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April 16, 2020

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Adams, Hon. Jerusha T. – Magistrate Judge for the Middle District of Alabama;
2. Alabama Women's Center – Appellee;
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48. Taylor, Brian McDaniel – Counsel for Amici Curiae;
49. Thompson, Hon. Myron H. – Judge for the Middle District of Alabama;
50. Walburn, James H. – Defendant;

51. Wasden, Lawrence – Attorney General of Idaho, Amicus Curiae;

52. Webb, Hays – Defendant;

53. West Alabama Women's Center – Appellee;

54. Wilson, Alan – Attorney General of South Carolina, Amicus Curiae; and

55. Yost, Dave – Attorney General of Ohio, Amicus Curiae.

Respectfully submitted this 16th day of April, 2020.

/s/ Edmund G. LaCour Jr.
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JURISDICTIONAL STATEMENT

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. It entered a preliminary injunction on April 12, 2020. Doc. 138. "A district court's grant of a preliminary injunction is an appealable interlocutory order over which [this Court] ha[s] jurisdiction." *Jones v. Governor of Fla.*, 950 F.3d 795, 805 (11th Cir. 2020) (citing 28 U.S.C. § 1292(a)(1)).

STATEMENT OF THE ISSUE

In response to a once-in-a-century pandemic, the State Health Officer of Alabama entered an emergency order that seeks to slow the spread of COVID-19, free up capacity in hospitals, and prioritize the use of personal protective equipment for doctors and nurses treating patients of the virus by ordering the postponement of all non-emergency medical procedures. Should this Court grant a stay of the district court's preliminary injunction enjoining certain applications of the health order while the Court considers case on the merits?

INTRODUCTION

This Court should stay the district court's preliminary injunction pending appeal. Doing so would ensure that the State of Alabama can more effectively respond to the ever-changing COVID-19 pandemic while this Court considers the merits of the appeal. Defendant-Appellants—the Attorney General and State Health Officer, referred to in this brief as "the State"—have contemporaneously with this motion filed their brief on the merits to aid the Court's quick resolution of the case.

The appeal is from a preliminary injunction partially enjoining the State from enforcing an emergency health order as it relates to abortion procedures. In response to the COVID-19 pandemic, Dr. Scott Harris, Alabama's State Health Officer, ordered that all elective medical and dental procedures be postponed unless the procedure is "necessary to treat an emergency medical condition," "necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment." Doc. 109-1 at 11. The purpose of the order is threefold: it frees up hospital capacity for the influx of patients suffering from COVID-19; it preserves personal protective equipment (PPE) for medical workers caring for COVID-19 patients; and it slows the spread of the virus by reducing social interactions.

Plaintiffs, a group of abortion clinics in Alabama and one of their physicians, characterized the health order as an abortion "ban" and sought a blanket exemption

for all previability abortions. Doc. 73-1 at 20, 29. The district court initially agreed with that characterization and granted the proposed relief in a temporary restraining order. Doc. 83. After hearing from the State, however, it narrowed the application of the TRO to largely mirror the State's interpretation of its order. According to Dr. Harris, the determination of whether is it is "necessary" to perform a procedure without delay is to be made by the treating physician applying his or her reasoned medical judgment on a case-by-case basis, and one of the factors the physician can consider when determining whether an abortion may safely be postponed is whether the procedure will be available at a later date. *See* Doc. 111 at 10–12. It is that understanding of the health order that the district court used to "enjoin" the State in its TRO.

Another way of saying this is that the district court found that the emergency health order was facially constitutional *and* that the State's interpretation of how it would apply the order was constitutional, yet still concluded that an emergency injunction was necessary. Nevertheless, the court then entered a preliminary injunction enjoining the State from enforcing the health order to the extent that doing so would "fail[] to allow healthcare providers who are determining whether to postpone abortions to consider and to base their decisions on" a list of nine specific considerations devised by the court. Doc. 138 at 3–4. The considerations largely track what Dr. Harris testified to—that a reasonable physician determining whether

to postpone an abortion could consider things like the gestational age of the fetus, the mother's particular health risks, and additional factors that could seriously impact the mother's ability to obtain an abortion, including whether delays would make it impossible for her to obtain an abortion. Doc. 138 at 3–4; Doc. 133, Tr. at 46–47.[1]

So the problem is not so much the substance of the district court's addendum to the emergency health order. The problem is that the district court crafted it at all and that the court continues to exercise an over-the-shoulder review of any action taken by the State in relation to a facially constitutional health order that responds to an *ongoing emergency*. That causes immense harm to the State. The district court's micromanagement of a separate sovereign's emergency order intrudes upon the sovereignty of the State at the moment its police powers are at their zenith—and they are at their zenith precisely because this is the time when they are most needed.

Then there are the deep practical impairments. First, while the State made clear that all medical providers are owed deference, that does not mean that any assertion by a provider that a particular procedure was medically necessary is conclusive proof of that fact. Otherwise, the emergency order would be a mere emergency suggestion. The district court appeared to agree. Yet, even if the State

[1] References to the April 6, 2020 preliminary injunction hearing transcript will simply be to "Tr. at #." No other transcript is cited in this motion.

obtains clear proof that an abortion provider is violating the emergency order and putting public health at risk, any potential enforcement would almost certainly lead to further litigation in federal court and possibly even contempt hearings.

Moreover, the preliminary injunction threatens to inhibit the State's response to the unfolding crisis, as the threat of contempt hearings hang over the State Health Officer as he considers whether additional measures are needed to combat COVID-19. If stricter measures are necessary, Dr. Harris will have to consider whether any additional exercise of the State's police powers in response to an evolving emergency could result in a contempt order. And to the extent the State could seek preclearance from the district court, that not only stands the usual legal burdens on their head—it's typically the plaintiff who must demonstrate that a particular application is unconstitutional, not the sovereign who must seek permission before acting—it is dangerous in times of emergency. The district court's injunction thus threatens to inhibit a swift response just when it is needed most, and it does so needlessly because the underlying order is, by the court's own finding, facially constitutional.

This Court should thus grant the State's emergency motion for stay, issue an expedited briefing schedule on the merits, and quickly reverse the district court's overreach so the State is not improperly inhibited in responding effectively to the COVID-19 crisis.

STATEMENT OF THE CASE

A. Alabama Takes Extraordinary Measures in Response to COVID-19

By now, the Court is aware of the COVID-19 pandemic and the emergency measures every State is taking in response. The virus spreads rapidly, which places severe strain on healthcare systems, meaning that patients in need of urgent care may find themselves gasping for breath with no hospital bed—and no doctor or nurse—available to them. Freeing up hospital capacity is thus crucial, as is preserving PPE for frontline workers. Yet surgical gowns, gloves, respirators, and masks are in short supply the world over. That's the case in Alabama, too. Hospitals across Alabama are reporting shortages of PPE, which is especially concerning because peak usage is not expected to occur until later this month. *See* Doc. 88-16 at 3.

Thus, like every State, Alabama has responded to this extraordinary threat with extraordinary measures. Governor Kay Ivey declared Alabama to be in a state of emergency on March 13, 2020, and Dr. Harris, the State Health Officer, has since issued increasingly expansive health orders that have affected every Alabamian. These orders would be unimaginable in normal times. But they are necessary now to preserve PPE for frontline workers, conserve hospital capacity, and reduce the spread of the virus through social distancing. *See* Tr. at 13. The latest order, issued on April 3, requires every person in the State "to stay at his or her place of residence" except as necessary to perform certain "essential activities." Doc. 109-1 at 1–2.

Plaintiffs challenge a provision of the March 27 health order that has been carried over in the April 3 order. It provides:

> Effective March 28, 2020 at 5:00 P.M., all dental, medical, or surgical procedures shall be postponed until further notice, subject to the following exceptions:
>
> a. Dental, medical, or surgical procedures necessary to treat an emergency medical condition. For purposes of this order, "emergency medical condition" is defined as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected by a person's licensed medical provider to result in placing the health of the person in serious jeopardy or causing serious impairment to bodily functions or serious dysfunction of bodily organs.
>
> b. Dental, medical, or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment.

Doc. 109-1 at 11; *see* Doc. 88-1 at 6. The order will remain in effect until 5:00 p.m. on April 30 unless a determination is made to extend or relax it before then. Doc. 109-1 at 11. Knowing violations of the order can be punished as a misdemeanor.

B. The District Court Issues a Preliminary Injunction

On March 30, 2020, Plaintiffs filed in the district court an emergency motion to supplement their preexisting and unrelated challenge to Alabama's abortion laws with a claim challenging Dr. Harris's March 27 order. They also sought injunctive relief. Docs. 72, 73. The district court held a preliminary injunction hearing on April 6. The State presented one witness—Dr. Harris—and the Plaintiffs presented one

witness—Dr. Yashica Robinson, the medical director and abortion provider for Alabama Women's Center for Reproductive Alternatives in Huntsville and a plaintiff in this case.

Dr. Harris testified that the order postponing medical procedures applies to "all medical practices in the state" and that its purpose is to promote social distancing, preserve PPE, and increase health care capacity. Tr. at 13. He agreed that the "the PPE supply for the next three, four weeks, is … more critical to the state" than PPE later on in the year because of the anticipated surge of COVID-19 cases in the coming weeks. *Id.* at 22. And he said that he was not sure when the restrictions in the health order could be lifted, but that if the situation changed for the better he would consider lifting them before they otherwise expire on April 30. *Id.* at 23–24. Conversely, he warned that if the situation changes such that stricter measures are required, he would also have the responsibility to enact those changes as well. *Id.* at 24.

Dr. Harris also explained how the exceptions to the order work. Simply put, he said, "[t]he health care provider who sees the patient make th[e] determination" whether a patient fits within one of the exceptions and requires a procedure that cannot safely be postponed. *Id.* at 13. He said the Department of Public Health did not list which factors a health care provider should consider, and instead chose to

leave it up to the reasonable medical determination of the specific provider on a case-by-case basis. *Id.*

Following Dr. Harris's testimony, Dr. Robinson testified for the Plaintiffs. She is an OBGYN in Huntsville who serves as the medical director and abortion provider for an abortion clinic. *Id.* at 68. She testified that abortions are generally very safe and that medication abortions, in which the mother takes a series of medications to induce a miscarriage, are provided up to 10 weeks gestational age, while surgical abortions are provided up to 21 weeks and 6 days gestational age. *Id.* at 74–75, 78. Both kinds of abortions require PPE and close contact between the patient and the provider. Dr. Robinson stated that, based on historical data, her clinic would likely perform about 100 surgical abortions and 50 to 60 medical abortions in April of this year. *Id.* at 151.

Dr. Robinson agreed that some abortions could safely be postponed and that doing so could, in some instances at least, temporarily conserve PPE and other medical resources by reducing the need for their use now and minimizing the risk of complications that could require hospitalization. *Id.* at 154–55. But she testified that her concern with Dr. Harris's health order is that it could potentially be enforced in an unfair and arbitrary manner and that her medical judgment as to which abortions can and cannot be postponed will not be treated with the same respect as other doctors' decisions. *Id.* at 124–25. She gave two examples as evidence for her

concern. First, she recounted her experience with abortion protestors, who protest outside her clinic and have called law enforcement in an (unsuccessful) effort to shut down the clinic. *Id.* at 120–22. Second, she stated that in 2012 or 2013 she was indicted on a federal criminal charge, which was later dismissed by the United States. *Id.* at 123–24.

On April 12, 2020, the district court denied Plaintiffs' request for a blanket injunction in part, granted what it considered to be a more tailored injunction in part, and held in abeyance the motion "to the extent that it seeks relief prohibiting application to *all* medication abortions of the medical restrictions" of the state health orders. Doc. 138 at 5. Although it agreed that the health order would be constitutional if enforced the way Dr. Harris said it would be enforced, the district court refused to credit Dr. Harris's statements because the plaintiffs had "expressed a lingering reticence to trust the representations of the defendants." Doc. 137 at 48. The court thus enjoined the State from enforcing the health order in any other manner, and specifically provided seven different factors that a healthcare provider could consider in determining whether an abortion could safely be postponed. Doc. 138 at 3–4. The State entered its notice of appeal the next day. Doc. 139. The State has not sought a stay from the district court because the "the time-sensitive nature of the proceedings," *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901, at *4 (11th Cir. Apr. 19, 2000), and the district court's recent orders

enjoining the State show that "seeking such relief there would not be practicable," *Populist Party v. Herschler*, 746 F.2d 656, 657 n.1 (10th Cir. 1984); *see also* Fed. R. App. P. 8(a)(2)(A)(i).

STANDARD OF REVIEW

In determining whether to stay a lower court's decision pending appeal, this Court will consider: "(1) whether the stay applicant has made a strong showing that it 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." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). These factors "substantially overlap" with those governing review of preliminary injunctions. *Id.* at 1317 & n.6. A district court's decision to grant a preliminary injunction is reviewed for an abuse of discretion, while its underlying legal conclusions are reviewed *de novo* and its findings of fact for clear error. *Id.* at 1317.

SUMMARY OF THE ARGUMENT

This Court should grant a stay of the district court's preliminary injunction pending appeal.

First, the State Defendants are almost certain to win on the merits. Plaintiffs bring a pre-enforcement, as-applied action to one possible way the health order could be enforced without producing any evidence that the order will be enforced in the

manner they fear. That is not enough to demonstrate a credible threat of unlawful enforcement, and their claim is thus not ripe for review.

Moreover, the Supreme Court has held for more than a hundred years that in times of emergency States acting pursuant to their police powers are entitled to great deference and that judicial review is "only" available if a law "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." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). The district court misread this precedent and failed to give the State the deference it was due in determining how to respond to an ongoing public health emergency.

Second, the harm caused by the district court's order cannot be overstated. By making itself the ultimate arbiter of what the State's ongoing emergency response to the COVID-19 pandemic can be, the district court has deeply intruded on State sovereignty while simultaneously inhibiting the State's ability to respond to changing conditions as needed to protect the public welfare

Third, weighed against such irreparable harm, Plaintiffs' claims pale in comparison. They failed to show that they would be harmed if the State were not enjoined from enforcing the health order in ways it had no intention of enforcing it. To be sure, Plaintiffs will be required to postpone certain elective, non-emergency

abortion procedures for a limited time if in a doctor's reasonable medical judgment it is safe to do so. But those burdens do not count as "irreparable harm" during a pandemic. Otherwise, it would be hard to find an Alabamian who would not be entitled to immediate injunctive relief for having to comply with emergency health orders.

Fourth, the public interest clearly lies with the State Defendants. The challenged order, after all, is an emergency measure to protect the public from the worst ravages of COVID-19. The remedy the district court instituted, on the other hand, puts the public at greater risk.

ARGUMENT

I. The State Defendants Are Likely to Prevail.

A. Plaintiffs lack standing to bring an as-applied, pre-enforcement challenge.

The district court properly found that Dr. Harris's health order was facially constitutional because it could be applied in a lawful manner. The Plaintiffs' claim is an as-applied, pre-enforcement challenge to the order. Yet Plaintiffs have not demonstrated standing to bring such a claim. Pre-enforcement challenges are "the exception," and are considered ripe for review only when a plaintiff has "demonstrate[d] that a 'credible threat of an injury exists,' not just a speculative threat which would be insufficient for Article III purposes." *Am. Charities for*

Reasonable Fundraising Regulation, Inc., v. Pinellas County, 221 F.3d 1211, 1214 (11th Cir. 2000) (citation omitted).

Plaintiffs have not met this burden. As Dr. Robinson testified, her fear is not that the order will be applied in the way that Dr. Harris says it will be, but that it will be applied in a different manner that singles out abortion providers and subjects them to greater risk of criminal penalties. *See* Tr. at 124–25. But the evidence Plaintiffs offered was irrelevant to how the order might be interpreted and applied. In her testimony, Dr. Robinson (1) recounted the hostility she has experienced from anti-abortion protesters, and (2) asserted that a prior prosecution *by the United States* was unfair. Tr. at 120–24. How that evidence relates to how the *State of Alabama* will enforce an emergency health order is anyone's guess, but it was certainly insufficient to establish standing at this time.

B. Dr. Harris's order is constitutional.

Plaintiffs' claim also fails because Dr. Harris's health order is constitutional under the deferential standard of review that applies when reviewing emergency measures. As this Court has held, "[i]n an emergency situation, fundamental rights … may be temporarily limited or suspended." *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Thus, while it may be that "[u]nder usual and normal circumstances and as a general proposition" the State may not require a woman to

postpone an abortion by a few weeks if it is safe to do so, "the circumstances existing at th[is] time [a]re not usual, nor [a]re they normal." *Id.* Rather, in an emergency situation like the pandemic we now face, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." *Id.* That means that a court's review of the constitutionality of an emergency order promoting the public health "is limited to a determination whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order." *Id.* Or as the Supreme Court put it, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29.

In *Jacobson*, the "great danger" was the spread of smallpox in Cambridge, Massachusetts, and the "reasonable regulation" was a requirement by the City that all its citizens get vaccinated. 197 U.S. at 12-13, 27-28. One citizen, Jacobson, refused and challenged the ordinance under the Fourteenth Amendment. He lost. *Id.* at 27. But importantly, he lost not because he was wrong that the Fourteenth Amendment guarantees an individual the right to liberty in his own body. *See id.* at 28-30. He was right about that. Rather, he lost because, acting "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself

against an epidemic of disease which threatens the safety of its members"—even if that response comes at a cost to individual freedoms. *Id.* at 27.

Under *Jacobson*, judicial review of a State's emergency measure is available *only* "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." 197 U.S. at 31 (emphasis added); *see also In re Abbott*, -- F.3d --, No. 20-50264, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (applying *Jacobson* to grant Texas emergency mandamus relief to vacate a TRO entered by the district court in response to the state's COVID-19 health orders).

1. Dr. Harris's health order bears a "substantial relation" to the State's response to the ongoing COVID-19 crisis.

Dr. Harris's health order bears a "real or substantial relation" to the crisis the State faces. Plaintiffs offered no evidence that Dr. Harris's emergency health orders are not related to the State's response to the COVID-19 pandemic, and the State presented ample factual support that the specific measures taken in the health orders promote social distancing, conserve medical equipment and PPE, and free up hospital resources in anticipation of a surge of COVID-19 patients. *See* Tr. at 22–24. The State also presented evidence that these three interests are served *specifically* by postponing the procedures performed at Plaintiffs' clinics that are not covered by the exceptions in the health orders. Those procedures require the use of PPE, they

do not promote social distancing, and they run the risk of burdening the healthcare system even more if complications arise. *Id.*

2. Plaintiffs have not shown that the health order is "beyond all question" in "palpable conflict with the Constitution."

Plaintiffs also failed to prove *Jacobson*'s second requirement, which is that the State's health order be "*beyond all question*, in palpable conflict with the Constitution." *Jacobson*, 197 U.S. at 31 (emphasis added). What the Fifth Circuit found of the Texas order could well be said of Alabama's: "The order is a concededly valid public health measure that applies to all surgeries and procedures, does not single out abortion, and merely has the effect of delaying certain non-essential abortions. Moreover, the order has an exemption for serious medical conditions, comporting with *Jacobson*'s requirement that health measures 'protect the health and life' of susceptible individuals." *In re Abbott*, 2020 WL 1685929, at *10 (quoting *Jacobson*, 197 U.S. at 39).

Importantly, it was not enough for Plaintiffs to show that the health order burdens their right to abortions, or even that such a burden would be found unlawful in normal times. The Supreme Court explained in *Planned Parenthood v. Casey* that States are generally prohibited form placing an "undue burden" on the right to obtain a previability abortion, and that a law normally imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. 833, 878 (1992). But the Court also made clear that "[n]ot all burdens on the right to

decide whether to terminate a pregnancy will be undue." *Id.* at 876. That is, even if a state regulation "increas[es] the cost or decreas[es] the availability," or otherwise makes it "more difficult or more expensive to procure an abortion," that "cannot be enough to invalidate it" *if the law serves a "valid purpose … not designed to strike at the right itself." Id.* at 874 (emphasis added).

Thus, if a law does present an obstacle to a woman's access to abortion, the next step is to "consider the burden a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Grafted into *Jacobson*'s framework, this burden balancing means that Plaintiffs had to show that Dr. Harris's health order "imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic [Alabama] now faces." *In re Abbott*, 2020 WL 1685929, at *11.

Plaintiffs did not carry that burden. Dr. Harris's order imposes only a temporary burden on abortion access by requiring providers to postpone procedures that, in their professional medical judgment, can safely be postponed. Delay of a few weeks for public health reasons does not amount to a total denial. *Cf. Casey*, 505 U.S. at 886. Nor does the health order single out Plaintiffs' patients. Rather, it applies to *every* physician and *every* clinic and *every* medical procedure in the State. Clearly the order is not "designed to strike at the right itself." *Id.*

As for the benefits of the health order, it is undisputed that the State is in dire need of PPE, that it needs to conserve hospital capacity, and that it needs to promote social distancing to reduce the coronavirus's spread in the coming weeks. It is likewise undisputed that Plaintiffs' clinics use PPE, that abortion procedures can result in complications requiring further medical attention, and that healthcare providers at the clinics cannot maintain adequate distance from the patients to ensure that they do not spread the virus to each new patient they see. *See* Tr. at 143–44, 154–55. And finally, it is undisputed that some abortions can safely be postponed, and that if they are not, Dr. Robinson's clinic alone will provide approximately 100 surgical abortions *this month*. *Id.* at 151, 155–56.

Plaintiffs have not shown that the temporary burden imposed on them "beyond all question" exceeds the benefits to the public health in light of the State's compelling need to preserve limited medical resources over the next few weeks.

II. Alabama Faces Irreparable Harm if the Injunction is Not Stayed.

State health officials like Dr. Harris are doing everything they can to conserve vital resources for hospitals and physicians caring for COVID-19 patients. Against this backdrop, the district court granted Plaintiffs an injunction that provides them with no additional relief—it more-or-less memorializes Dr. Harris's testimony of how the order will be enforced—while at the same time causing great harm to the State and its ongoing efforts to respond to the COVID-19 pandemic.

First there is the legal harm. An injunction prohibiting the State from "enforce[ing] its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Moreover, the district court's micromanagement of the State's police powers intrudes upon the sovereignty of the State at the very time its decisive and independent action is most required. As the Fifth Circuit found in *In re Abbott*, "[s]uch judicial encroachment intrudes on the duties of the 'executive arm of Government' and 'on a delicate area of federal-state relations." 2020 WL 1685929, at *12 (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004)).

The district court's action also risks impeding the State's ongoing efforts to combat COVID-19 in more practical ways. It is possible that stricter measures could become necessary. But the ongoing injunction and accompanying threat of a contempt order will hang over Dr. Harris as he considers what steps might next be needed to fight COVID-19.

Moreover, the injunction potentially impairs the State's ability to enforce its constitutional health order, even in the manner prescribed by the district court. For example, while the State made clear that all medical providers will be given deference, that does not mean that any provider's assertion that a particular procedure was medically necessary is conclusive proof of that fact. The district court appeared to agree. Yet, even if the State obtains clear proof that an abortion provider

is violating the emergency order and putting public health at risk, any potential enforcement would undoubtedly lead to further litigation in federal court and most likely contempt hearings.

III. The Inconvenience Caused Plaintiffs by the Health Order is Outweighed by Public Necessity.

Plaintiffs bore the burden below of showing that they would be imminently and irreparably harmed absent the district court's immediate intervention. But their entire theory for relief depends on an interpretation of Dr. Harris's health order that the State has never advanced and for which no relevant evidence exists. *See* Doc. 110-1 at 1; Tr. at 120–24. In contrast, the State presented abundant evidence showing that the order does not target abortion providers and that it will be applied to those doctors in the same way it applies to any other doctor in Alabama. Tr. at 17–18.

Plaintiffs have also not presented evidence that women in Alabama won't be able to get an abortion if their medical doctor reasonably determines that they fit into one of the exceptions to the health order. Dr. Robinson confirmed in her testimony that at least some abortions could safely be postponed for a period of days or weeks, *see* Tr. at 155, meaning that the order can be applied to postpone at least some abortion procedures without increasing the risk of serious harm to women.

IV. The Public Interest Supports a Stay.

Finally, the public interest also requires action by this Court. The evidence presented to the district court showed that when healthcare resources are stretched

to the breaking point, every available resource helps. Uniform compliance with Dr. Harris's health orders is thus essential.

CONCLUSION

The Court should stay the district court's preliminary injunction pending this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. I certify that this motion complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2)(A). This motion contains 5,129 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I filed the foregoing petition using the Court's CM/ECF system, which will serve all counsel of record.

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