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

APPELLANTS' OPENING BRIEF

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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;
3. Bailey, Daryl, D. – Defendant;
4. Beck, Andrew – Counsel for Appellees;
5. Billingsley, Dana Helton – Former Counsel for Appellee Scott Harris;
6. Boone, Brock – Former Counsel for Appellees;
7. Bowdre, Alexander Barrett – Counsel for Appellants;
8. Broussard, Robert L. – Defendant;
9. Burrows, Meagan Marlis – Counsel for Appellees;
10. Cameron, Daniel – Attorney General of Kentucky, Amicus Curiae;
11. Carr, Danny – Defendant;
12. Chynoweth, Brad A. – Counsel for Appellants;
13. Cohen, Marcia S. – Counsel for Third Party Movant;
14. Davis, James William – Counsel for Appellants;

15. Doyle, Hon. Stephen Michael – Magistrate Judge for the Middle District of Alabama;
16. Fitch, Lynn – Attorney General of Mississippi, Amicus Curiae;
17. Flaxman, Carrie Y. – Counsel for Appellees;
18. Greater Birmingham Chapter of the National Organization for Women – Third Party Movant;
19. Hale, Phillip Brian – Attorney for Appellant Scott Harris;
20. Harris, Scott – Appellant, Alabama State Health Officer;
21. Hill Jr., Curtis T. – Attorney General of Indiana, Amicus Curiae;
22. Hunter, Eric Wilson – Attorney for Defendant;
23. Hunter, Mike – Attorney General of Oklahoma, Amicus Curiae;
24. Kolbi-Molinas, Alexa – Counsel for Appellees;
25. LaCour Jr., Edmund Gerard – Counsel for Appellants;
26. Lambiase, Susan – Counsel for Appellees;
27. Landry, Jeff – Attorney General of Louisiana, Amicus Curiae;
28. LeQuire, Mark H. – Defendant;
29. Marshall, Randall Charles – Counsel for Appellees;
30. Marshall, Steve – Appellant, Alabama Attorney General;
31. Mills, Wallace Damon – Counsel for Defendant;
32. Morrisey, Patrick – Attorney General of West Virginia, Amicus Curiae;

33. Murrill, Elizabeth B. – Counsel for Amici Curiae;

34. Paxton, Ken – Attorney General of Texas, Amicus Curiae;

35. Peterson, Douglas J. – Attorney General of Nebraska, Amicus Curiae;

36. Planned Parenthood Southeast, Inc. – Appellee;

37. Ravnsborg, Jason – Attorney General of South Dakota, Amicus Curiae;

38. Reproductive Health Services – Appellee;

39. Reyes, Sean – Attorney General of Utah, Amicus Curiae;

40. Rich, Ashley – Defendant;

41. Robinson, Yashica – Appellee;

42. Rutledge, Leslie – Attorney General of Arkansas, Amicus Curiae;

43. Schmitt, Eric – Attorney General of Missouri, Amicus Curiae;

44. Segall, Robert David – Counsel for Defendants;

45. Slatery III, Herbert – Attorney General of Tennessee, Amicus Curiae;

46. Smith, Brenton Merrill – Counsel for Appellants;

47. St. John, Joseph S. – Counsel for Amici Curiae;

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.
Edmund G. LaCour Jr.
Solicitor General

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STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a preliminary injunction. At the same time the Appellants filed this brief, they also moved this Court to stay the injunction. Because of that, there is insufficient time to hold oral argument, and the Court should immediately grant a stay pending appeal. Then the Court should expedite briefing on the merits and hold argument by telephonic or video conferencing as needed.

JURISDICTIONAL STATEMENT

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. It entered a preliminary injunction on Sunday, 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 ISSUES

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.

1) Did the district court abuse its discretion when it granted Plaintiffs a preliminary injunction in their pre-enforcement, as-applied challenge to the emergency order, where the district court agreed with the State that the order is facially constitutional, evidence did not indicate that the State defendants would enforce the order unconstitutionally, and the injunction thus serves only to give the district court supervision over any State enforcement of the order as it relates to abortion procedures?
2) Does the Constitution require the State to exempt abortion procedures when responding to states of emergency in ways that necessarily, if temporarily, curtail the enjoyment of other Constitutional rights?

INTRODUCTION

This is an appeal from a preliminary injunction partially enjoining the Defendant-Appellants—the Attorney General and State Health Officer of Alabama, referred to in this brief as "the State"—from enforcing an emergency health order as it relates to abortion procedures. In response to the worldwide 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 to the mother 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 nevertheless concluded that an emergency injunction was necessary. And then the court continued to craft relief that Plaintiffs never requested—recall that they asked for a blanket exemption, not enforcement of the order in the way the State Health Officer said it would be enforced—and 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, Apr. 6, 2020 Hr'g 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 actions 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 federal district court's micromanagement of a separate sovereign's emergency health order intrudes upon the sovereignty of the State at the very time its police powers are at their zenith—and they are at their zenith precisely because this is the time in which they are most needed. Such oversight could be tolerable if the Constitution required it, but as binding caselaw from this Court and the Supreme Court demonstrate, it does not.

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

[1] The April 6 hearing transcript is the transcript of the preliminary injunction hearing. The transcript is found at document 133 on the district court's docket, but because that docket entry is not yet publicly accessible, references to the transcript will simply be to "Tr. at #"—where # refers to the page number assigned by the court reporter because the number generated by the district court's electronic filing system is not accessible at this time. *Cf.* 11th Cir. R. 28-5. (Presumably, those numbers should line up in this case.) If any other transcript is referenced in this brief, a full citation will be provided.

assertion by a medical 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 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, by making itself the de facto State Health Officer, the district court has so tethered the State's response to the ongoing COVID-19 crisis that the actual State Health Officer—Dr. Harris—risks contempt of court if he responds to changing conditions without first seeking the court's permission. Yet it is possible that even stricter measures could become necessary if too many Alabamians exempt themselves from compliance with the current order (as abortion providers already seek to do), or if the virus cannot be contained using less drastic measures, or if our ever evolving understanding of COVID-19 dictates some other response. Given that Dr. Harris has already issued seven different orders related to the pandemic in just over a month,[2] some change in course is probable, if not inevitable. But in Alabama, the State Health Officer 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

[2] *See* Docs. 88-1, 88-2, 88-3, 88-4, 88-5, 88-6, and 109-1.

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—but it is outright 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 (filed contemporaneously with this brief), 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

In the last two months, life has been radically transformed for all Americans as the nation responds to the COVID-19 pandemic. The virus, first identified in Wuhan, China, in late 2019, has spread across the globe with startling rapidity, reaching nearly every country in the world and all 50 states in our nation. It is easily transmissible, due in part to its long incubation period and the ability of asymptomatic carriers to infect others. And it is deadly. The world has watched in horror as hospital systems have become overrun in China, then in Iran, Italy, Spain—and then in places closer to home like Washington and New York. As of April 15,

the virus has infected nearly 2 million people around the world, killing roughly 130,000 of them.[3] And in the United States, there are now over half a million confirmed cases and over 22,000 deaths attributed to the disease.[4] By the time the Court reads this, those numbers will already be out of date as the virus continues its spread.

The White House coronavirus task force has projected that between 100,000 and 240,000 Americans may die from COVID-19, even with mitigating measures such as social distancing in place.[5] Approximately 60% of COVID-19 patients may require inpatient care, including 15% of patients with "severe disease that requires oxygen therapy or other inpatient interventions" and about 5% of patients with "critical disease that requires mechanical ventilation."[6]

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[3] *COVID-19 Case Tracker*, JOHNS HOPKINS CORONAVIRUS RESOURCE CENTER, https://coronavirus.jhu.edu (last visited Apr. 15, 2020).

[4] *Cases in U.S.*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Apr. 15, 2020).

[5] Rick Noack, Meryl Kornfield, Derek Hawkins, Teo Armus, Adam Taylor & Marisa Iati, *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts,* WASH. POST (Mar. 31, 2020), https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/.

[6] *Operational Considerations for Case Management of Covid-19 in Health Facility and Community*, WORLD HEALTH ORG. (Mar. 19, 2020), https://apps.who.int/iris/bitstream/handle/10665/331492/WHO-2019-nCoV-HCF_operations-2020.1-eng.pdf.

Another study warns that roughly 2.2 million Americans could die from COVID-19 if sufficient responsive measures are not taken.[7] The crux of the problem is that the rapid spread of the virus places severe strain on the healthcare system, 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. Without an aggressive suppression strategy, even a mitigated epidemic "would still likely result in hundreds of thousands of deaths and health systems (most notably intensive care units) being overwhelmed many times over."[8] To make matters worse, "[t]he chronic global shortage of personal protective equipment is now one of the most urgent threats to our collective ability to save lives."[9] Gowns, gloves, respirators, and masks—crucial requirements to prevent caregivers from becoming patients themselves—are in short supply.

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[7] Neil M. Ferguson et al., IMPERIAL COLLEGE COVID-19 RESPONSE TEAM, IMPACT OF NON-PHARMACEUTICAL INTERVENTIONS (NPIS) TO REDUCE COVID-19 MORTALITY AND HEALTHCARE DEMAND, at 7 (Mar. 16, 2020), https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf.

[8] *Id.* at 1.

[9] *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

As it is globally, so it is in Alabama. As of April 15, the State has already seen roughly 4,000 confirmed cases of the virus, which has resulted in 114 deaths.[10] The Institute for Health Metrics and Evaluation projects peak resource usage to occur in Alabama on April 21, 2020,[11] but according to Andy Mullins, the Director for the Center for Emergency Preparedness at the Alabama Department of Public Health, healthcare facilities across the State are *already* reporting shortages of personal protective equipment (PPE), with some healthcare facilities lacking PPE to meet even current needs. Doc. 88-16 at 3.

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 citizen of the State.[12] These orders would be unimaginable in normal times. But as Dr. Harris

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[10] *COVID-19 Case Tracker*, JOHNS HOPKINS CORONAVIRUS RESOURCE CENTER, https://coronavirus.jhu.edu/us-map (last visited Apr. 15, 2020).

[11] *Covid-19 Projections*, INST. FOR HEALTH METRICS & EVAL., https://covid19.healthdata.org/united-states-of-america/alabama/ (last visited Apr. 15, 2020).

[12] Dr. Harris is a medical doctor with a master's degree in public health, and in his role as State Health Officer has authority to issue orders to protect the public health during an emergency. *See* Ala. Code § 22-2-2(6) (authorizing the State Board of Health to adopt rules and giving those rules the force of law); Ala. Code § 22-2-8 (enabling the State Health Officer to act on behalf of the State Committee of Public Health when it is not in session); Ala. Admin. Code r. 420-1-2-.07(e) (authorizing the State Health Officer to adopt an emergency rule without notice or hearing if there is an immediate danger to public health).

explained at the preliminary injunction hearing, 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. Previous versions of the order already closed the public schools and all "non-essential businesses, venues, and activities" and forbade people from visiting friends and family in hospitals and nursing homes, except under certain dire circumstances. *See* Doc. 88-1 at 4–6.

Plaintiffs challenge a provision of the March 27 health order that has been carried over in the April 3 order. (Because the April 3 order is the operative health order, this brief will refer to it simply as "the 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. Plaintiffs Seek a Blanket Exemption from the Health Order That Governs Every Healthcare Provider in the State

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. Doc. 72. Their preexisting claim, brought in May 2019, challenged a law passed by the Alabama legislature that banned most abortions in the State. Doc. 1. The State agreed that under current precedent the district court should enter a preliminary injunction enjoining enforcement of the law, which the court did in October 2019. Doc. 69. Plaintiffs' challenge to the State Health Officer's emergency order thus has nothing to do with their earlier claim. The two claims are governed by different legal standards, exist in different stages of litigation, and challenge immensely different State actions. They should not have been joined together. *See Rowe v. U.S. Fid. & Guar. Co*., 421 F.2d 937, 943 (4th Cir. 1970) (noting that because a supplemental claim "supplements" the initial pleading, "matters stated in a supplemental complaint should have some relation to the claim set forth in the original pleading").

Nevertheless, without giving the State a chance to respond, the district court immediately granted Plaintiffs' motion and allowed the "supplemental" claim.[13]

Plaintiffs also moved for a TRO, which the district court also immediately granted. Docs. 73, 83. They argued that the application of the health order "to pre-viability abortions violates the constitutional right to privacy, which inflicts *per se* irreparable harm" and should therefore be enjoined to the extent the order applies to pre-viability abortions. Doc. 73-1 at 27, 29. After holding a short conference call with the parties, the district court granted Plaintiffs a blanket exemption from the health order and enjoined the State "from enforcing, threatening to enforce, or otherwise requiring evidence of compliance with the March 27 order against or from abortion providers, clinics, and their staff." Doc. 83 at 11. The State moved to dissolve the TRO, asked the district court to stay enforcement of its order, and sought an emergency stay from this Court. *See* Docs. 87, 89, 94, 95.

In response to the State's submissions, on April 3 the district court stayed its TRO in part, doc. 111, and the next day the parties jointly dismissed the appeal to this Court. The district court's stay order recounted four "clarifications" based on representations by the State regarding how the health order would be interpreted and applied:

[13] In its order granting the motion to supplement, the court did note that the State could file an objection to the order, doc. 78 at 2, which the State did two days later. Doc. 86.

> (1) In general, for an abortion, "like any other procedure, a doctor should examine his or her patient, consider all circumstances, and determine whether one of the exceptions [to the health order] applies. If they do, the procedure can go forward.…"
>
> (2) Specifically, if a healthcare provider determines, on a case-by-case basis in his or her reasonable medical judgment, that a patient will lose her right to lawfully seek an abortion in Alabama based on the [health] order's mandatory delays … then the abortion may be performed without delay pursuant to the exceptions in the [health] order.…
>
> (3) Further, a healthcare provider may also examine his or her patient to assess whether or not an abortion can be delayed for two weeks in a healthy way during the enforcement of the [health] order.… If a healthcare provider determines, again on a case-by-case basis in his or her reasonable medical judgment, that the abortion cannot be delayed in a healthy way, then the abortion may be performed without delay pursuant to the exceptions in the March 27 order.
>
> (4) The reasonable medical judgment of abortion providers will be treated with the same respect and deference as the judgments of other medical providers. The decisions will not be singled out for adverse consequences because the services in question are abortions or abortion-related.

Doc. 111 at 10–13 (cleaned up).

The State submitted three additional clarifications to the district court's understanding of how the health order would be enforced. First, the State clarified that while the reasonable medical judgment of all healthcare providers would be treated with respect and deference, "a healthcare provider's *assertion* that a procedure meets one of the exceptions is not conclusive proof that the procedure meets one of the exceptions in the [health order]." Doc. 120 at 2 (emphasis added).

Second, the State noted that though "[t]he fact that a delay would render a procedure unavailable could be relevant to determining whether it is currently necessary to perform the procedure," "any healthcare provider would still need to make an individualized determination for his or her patient as to whether losing the ability to have a procedure performed would cause serious harm to the patient." *Id.* at 3. And third, the State agreed that if a procedure cannot be delayed "in a healthy way" then it may be performed without delay, but clarified "that the exceptions require that the risk to a patient's health be sufficiently 'serious'"—and that "[w]hen it comes to judging which risks are sufficiently 'serious' to satisfy the order's exceptions," the reasonable medical judgment of the healthcare provider would be treated with respect and deference. *Id.*

C. The District Court Holds a Preliminary Injunction Hearing and Fashions Its Own Form of Relief

The district court held a preliminary injunction hearing by videoconference 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 he and the Alabama Department of Public Health crafted the emergency health orders to respond to COVID-19 in ways that would slow transmission rates through social distancing, free up hospital capacity for COVID-19 patients by reducing non-emergency procedures, and

preserve PPE for frontline workers who bore the greatest risk of infection. Tr. at 6–13. He emphasized that "[n]early all kinds" of PPE—N95 masks, surgical masks, gowns, gloves—are already in short supply in Alabama. *Id.* at 8.

Dr. Harris explained that the order postponing medical procedures applies to "all medical practices in the state"—"[m]edical, surgical, dental"—and that its purpose is "[to] promote[] social distancing by not having people show up at clinic sites or other places where they would be in close contact with other people," to "preserve[] in most cases the use of personal protective equipment," and to "preserve[] health care capacity" because "[i]f someone has an elective procedure, then they may need to consume other health care resources." *Id.* at 13. Dr. Harris 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.

Dr. Harris also explained how the exceptions to the order work. Simply put, he said, "[t]he health care provider who sees the patient makes 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 that 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.* He explained:

[State attorney] Dr. Harris, there are only two exceptions to paragraph 14 [of the April 3 order]; is that correct?

[Dr. Harris]. Yes, sir. That's right.

Q. Okay. And then the doctor must determine whether his or her patient fits within one of those two exceptions.

A. Yes, sir. That's correct.

Q. And in doing so, would you agree that a doctor should consider whatever characteristics of the patient in the situation is appropriate in the doctor's medical judgment?

A. Yes, sir. That's exactly right.

Q. So when I asked if you provided a list of factors, what I mean is have you provided any list of all things that a doctor should consider in determining whether his or her patient fits within one of the two exceptions?

A. No, we have not.

Q. Did you as state health officer consider a hypothetical situation in saying whether a patient would or would not fall within an exception?

A. We really – no, we did not. The idea was that we were not going to list those; that we would leave that to the judgment of the practitioner.

Q. Would you oppose a doctor considering any particular factor with respect to an individual patient?

A. That would be a clinical judgment of the provider.

Q. As you were envisioning the exceptions working, Dr. Harris, and as you envisioned medical doctors around the state applying reasonable medical judgment, would it be appropriate for a doctor to decide in advance that a particular set of characteristics would or would not fit within an exception in every case?

> A. I think applying medical judgment just means you make a case-by-case determination based on your patient.
>
> Q. And in the context of a doctor who provides abortions, Dr. Harris, would it be up to a doctor to determine whether the stage of pregnancy and the legal limits of abortion are considerations for participation?
>
> A. I would say we never intended to particularly use abortion, but I would say that physicians would use whatever factors are part of their own clinical judgment to make that determination.
>
> Q. And to be clear, paragraph 14 [of the April 3 order] does not target abortion doctors, does it?
>
> A. No, it does not. It does not address any – point the finger at any particular type of clinics or practices or scope of medicine or anything. It's just a general statement about all medical, surgical, and dental procedures.

Id. at 17–18.

Dr. Harris also clarified that a provider's "assertion" that a procedure fits within an exception is not by itself "conclusive proof" that the procedure was in fact necessary. *Id.* at 43. Rather, he explained, "the whole point is that medical judgment needs to be applied the way any provider would take care of any patient and make a decision using their reasonable medical judgment, which is … not an assertion, it's a reasonable medical judgment that a health care providers makes." *Id.*

Finally, Dr. Harris also agreed that in his opinion as the State Health Officer, the restrictions in the health orders are "necessary to protect the public health." *Id.* at 23. He said he was not sure when the restrictions 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, however, 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.

Following Dr. Harris's testimony, Dr. Robinson testified for the Plaintiffs. Dr. Robinson is an OB/GYN in Huntsville who serves as the medical director and abortion provider for an abortion clinic, in addition to running her own gynecology and obstetrics practice. *Id.* at 68. She testified about the safety of abortion procedures (testifying they are generally very safe for the mother), the two kinds of abortions (medication and surgical), and the differences between the two (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. For medication abortions, Dr. Robinson testified that the abortion is preceded by both a physical exam, in which the physician dons a surgical mask, gloves, and eye wear, and an ultrasound, which is administered by a nurse and ultrasound technician, both of whom also wear PPE. *Id.* at 141–43. As for surgical abortions, Dr. Robinson said that a physical exam and ultrasound is performed (again, by the nurse and the ultrasound technician wearing PPE), and then she performs the procedure along with an assistant. *Id.* When performing a surgical abortion, Dr. Robinson wears sterile

gloves, a surgical mask, eye wear, a surgical gown, and "occasionally shoe covers." *Id.* at 144. Her assistant wears gloves and a mask. *Id.* 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 because she provides abortions. *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 each day and have called law enforcement in an (unsuccessful) effort to get the clinic shut down. *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. Of course, neither of these examples indicate how *State* officials might interpret and enforce Dr. Harris's emergency health order. *Id.* at 163.

The preliminary injunction hearing was held on Monday, April 6; the parties submitted proposed orders on Wednesday morning, April 8; and the district court issued its preliminary injunction on April 12—Easter Sunday. *See* Docs. 131, 132, 137, 138. 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 in 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. Under this "lingering reticence" standard for when injunctive relief is appropriate, the court proceeded to forge such relief on its own:

> The motion is granted to the following extent. The defendants Alabama State Health Officer and Alabama Attorney General … are each PRELIMINARILY ENJOINED and RESTRAINED from, when applying and enforcing the "medical restrictions" … failing to allow healthcare providers who are determining whether to postpone abortions to consider and to base their decisions on the following factors, using the providers' reasonable medical judgment exercised on a case-by-case, individualized basis:
>
> (a) Whether under 1975 Ala. Code § 26-23B-5, a patient would lose her legal right to obtain an abortion if the procedure were delayed until after April 30, 2020 (or, if a new order is entered extending the application of the medical restrictions, if delayed until after the end date of that future state health order);

(b) The timing of the patient's last menstrual period, as determined by the healthcare provider;

(c) Gestational age of the fetus, as determined by the healthcare provider;

(d) The increase in risk to the life or health of the patient if the abortion is delayed;

(e) The increase in risk of serious complications if the abortion is delayed;

(f) Economic factors that may impact the patient's ability to obtain an abortion if the abortion is delayed;

(g) Social factors that may impact the patient's ability to obtain an abortion if the abortion is delayed;

(h) Logistical factors that may impact the patient's ability to obtain an abortion if the abortion is delayed; and

(i) Medical history and conditions of the patient.

Doc. 138 at 3–4.

The State entered its notice of appeal the next day. Doc. 139.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). At the district court, the burden was always on the Plaintiffs to demonstrate that (1) they had a "substantial likelihood of success on the merits," (2) they would suffer "irreparable injury" unless the injunction issued, (3) "the threatened injury to the[m]

outweigh[ed] whatever damage the proposed injunction may cause the [State]," and (4) "if issued, the injunction would not be adverse to the public interest." *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020) (citation omitted); *see also Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("The preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites. The burden of persuasion in all of the four requirements is at all times upon the plaintiff." (quotation marks and citations omitted)).

This Court reviews the district court's grant of a preliminary injunction for an abuse of discretion. *Jones*, 950 F.3d at 806. In so doing, the Court "review[s] the district court's underlying legal conclusions *de novo* and its findings of fact for clear error." *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's preliminarily injunction.

First, Plaintiffs failed to show a substantial likelihood of success on the merits. In fact, they are almost certain to lose. They bring a pre-enforcement, as-applied action to challenge one possible way that the health order could be enforced without producing any evidence that the order will be enforced in the way they fear. Contra the district court's novel "lingering reticence" standard, that was not enough to

demonstrate a "credible threat" of unlawful enforcement, and their claim is simply not ripe for review at this time.

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. In doing so, the district court also routinely placed the burden on the State to disprove what in fact was *Plaintiffs'* heavy burden to prove in the first place.

Second, Plaintiffs failed to show that they would be irreparably harmed if the State were not enjoined from enforcing the health order in ways it had no intention of enforcing it—particularly since if the State did act to enforce the order in that manner, Plaintiffs could seek relief at that time. 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. And yes, like everyone else in Alabama, the order thus burdens plaintiffs. But those

inconveniences do not count as "irreparable harm" during a pandemic. Otherwise, every single Alabamian—indeed, every single American—would be entitled to immediate injunctive relief for having to comply with emergency health orders.

Third, Plaintiffs failed to show that the threatened injury to them outweighed the harm that would flow to the State by way of the district court's injunction. Indeed, 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 on the ground as needed to protect the public welfare.

Fourth, Plaintiffs failed to show that the injunction would not be adverse to the public interest. Of course, Plaintiffs can't make that showing because the state health order was *required* by the public interest. It was fashioned as 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. Plaintiffs Are Unlikely to Prevail.

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

The district court properly found that the State health order was facially constitutional. As the court ruled, if the order is applied in the way that Dr. Harris said it will be, "the medical restrictions *would not* constitute an unlawful prohibition of any woman's abortion." Doc. 137 at 48; *see Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) ("A facial challenge asserts that a law *always* operates unconstitutionally; therefore, a facial challenge will succeed only if the statute could never be applied in a constitutional manner." (internal quotation marks and citations omitted)).

That means that whatever claim is left must be an as-applied, pre-enforcement challenge to the order. But Plaintiffs have not demonstrated standing to bring such a claim. As this Court has explained, pre-enforcement challenges are "the exception," not the norm. *Am. Charities for Reasonable Fundraising Regulation, Inc., v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000). They 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." *Id.* (quoting *Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999)). "[T]his standard can be met by showing that either '(1) plaintiff was threatened with

prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution.'" *Id.* (quoting *Jacobs v. Florida Bar*, 50 F.3d 901, 904 (11th Cir. 1995)).

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 misconstrued and applied in a different manner that singles out abortion providers and subjects them to greater risk of criminal penalties. *See* Tr. at 124–25; *see also* Doc. 110-1 at 1. But the evidence Plaintiffs offered was utterly 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.[14]

[14] The district court also placed much emphasis on what it considered to be an evolving interpretation of the health order by the State, perhaps as evidence of a credible threat of prosecution. *See* Doc. 137 at 7, 16. The problem, in the court's eyes at least, is that on the short teleconference call the day Plaintiffs sought a TRO, an attorney for the State mentioned that an abortion would meet the exceptions listed in the health order if the procedure was necessary to protect the life or health of the mother. *Id.* at 7. The court thus viewed any further interpretation of the order as inconsistent with that one, and thus evolving, and thus not to be trusted. *See id.* at 48. But as the State told the district court multiple times, by providing one off-the-cuff example at a hearing held just hours after Plaintiffs sought emergency relief, the State "did not mean to suggest that these are the only circumstances where an abortion would fit within one of the two exceptions." Doc. 89 at 22 n.30.

Yet instead of applying the tried and true "credible threat of prosecution" standard, the district court lightened Plaintiffs' load and created a new "lingering reticence" standard by which to judge Plaintiffs' fears. Doc. 137 at 48. Because "the plaintiffs have expressed a lingering reticence to trust the representations of the defendants," the district court explained, the State's "non-binding interpretations" of its own laws could not be trusted and "an injunction must issue." *Id.* at 48–49.

There are a few problems with this approach. First, of course, is the fact that it's not the one this Court requires. As noted above, this Court requires that Plaintiffs show a "credible threat of prosecution," not simply a "lingering reticence." Second, the new standard reverses the burden of proof and requires the *State* to assuage the concerns of the Plaintiffs rather than requiring the *Plaintiffs* to produce evidence of threatened unconstitutional enforcement. And third, the standard needlessly encroaches on the sovereign authority of the State's executive officers by doubting at the outset their ability to fairly interpret and enforce state law. As Judge Easterbrook on the Seventh Circuit explained in a slightly different context, "any position that disregarded the executive's views would raise profound questions in a federal system, one in which states rather than the national government establish the meaning of state law." *Huggins v. Isenbarger*, 798 F.2d 203, 208–09 (7th Cir. 1986) (Easterbrook, J., concurring) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

To be sure, a court is not bound by "mid-litigation assurances," which "are all too easy to make and all too hard to enforce." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328 (11th Cir. 2018). But that recognition does nothing to shift the burden of proof off Plaintiffs to first establish a credible threat of enforcement in the manner they fear. Were it otherwise, a plaintiff could bring a claim that she feared the State would enforce the speed limit in an arbitrary manner, the State could do nothing to assuage such a fear because any mid-litigation assurance would be considered worthless and the plaintiff could still have a "lingering reticence" of unfair enforcement, and the court would suddenly find itself in the business of regulating state traffic laws. Or emergency health orders, as the case may be.

B. Dr. Harris's order is constitutional under the deferential standard of review that applies to emergency measures.

Setting Plaintiffs' standing problems aside, their claim for relief also should have been denied because they failed to establish a substantial likelihood that Dr. Harris's emergency health order is unconstitutional under the deferential standard of review that applies to emergency measures. As this Court has held, "[i]n an emergency situation," a different set of rules apply than in normal times, and "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). It is for this reason that States can respond to hurricanes by enacting curfews—the facts in *Avino*—and why they can

respond to pandemics by shutting down businesses, prohibiting assembly of people, and requiring that people stay home whenever possible—as States across the country are currently doing. Exercising such police power may temporarily infringe on the exercise of citizens' fundamental rights, but courts have long counted the cost worthwhile if it means that citizens may live to enjoy their rights once more when the emergency has passed. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that "[t]he right to practice religion freely does not include liberty to expose the community … to communicable disease"); *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380, 385 (1902) (upholding geographic quarantine of several parishes around New Orleans); *Sentelle v. New Orleans & C.R. Co.*, 166 U.S. 698, 704-05 (1897) (noting that "[n]o property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration"); *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (recognizing that "the state may interfere wherever the public interests demand it" and that "discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests"); *Jacobson*, 197 U.S. at 29 ("Upon 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."); *Hickox v. Christie*, 205 F. Supp. 3d 579, 591–94 (D.N.J. 2016) (upholding quarantine during an Ebola crisis).

Just like other fundamental rights, then, the right to abortion can also be burdened in times of crisis. 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 for a few weeks if that can safely be done, "the circumstances existing at th[is] time [a]re not usual, nor [a]re they normal." *Avino*, 91 F.3d at 109. 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.* As the Supreme Court explained: "[I]n every well-ordered society charged with the duty of conserving the safety of its members[,] 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 to be vaccinated 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.

The Supreme Court likened such a response to a nation at war. Ordinarily, the Court recognized, "[t]he liberty secured by the 14th Amendment … consists, in part, in the right of a person to live and work where he will." *Id.* at 29. Yet in times of war, the Court emphasized, that same person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests … to take his place in the ranks of the army of his country." *Id.* So it is with emergency health directives: The normal constitutional guarantees do not apply as usual, and a different balancing is performed. *See id.*

This Court embraced this principle in *Avino* when it rejected a challenge to a curfew imposed in the wake of Hurricane Andrew. 91 F.3d at 109. The Court recognized that "[c]ases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction." *Id.* (citations omitted). As a result, the Court rightly held that when a state makes

decisions to respond to an emergency, it "must be granted the proper deference and wide latitude necessary for dealing with the emergency." *Id.*

The Court's role is thus limited to determining whether the response was "taken in good faith and whether there is some factual basis for the decisions that the restrictions … imposed were necessary to maintain order." *Id.* (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971)). And as the *Jacobson* Court explained, judicial review 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 id.* at 25, 27 ("The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned," that the State acts in a manner that is not "unreasonable or arbitrary."); *accord Lawton*, 152 U.S. at 137 ("To justify the state in thus interposing its [police power] in behalf of the public, it must appear that the interests of the public generally … require such interference; and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").

The Fifth Circuit recently applied *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. *See In re Abbott*, -- F.3d --, No. 20-50264, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020). That court explained the applicable test this way:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

Id. (pincites to *Jacobson* omitted).[15]

The district court here acknowledged these principles, but quickly sought to cabin them to their specific circumstances. *Jacobson*, the court noted, was decided "long before the development of modern substantive-due-process jurisprudence," doc. 30 at n.10, while *Avino* "addressed times 'when a curfew is imposed … in response to a *natural disaster*.'" Doc. 137 at 43 (emphasis in original) (quoting *Avino*, 91 F.3d at 109). But nothing in *Avino* suggests that its holding applies only after a hurricane. And as the Fifth Circuit explained, "nothing in the Supreme Court's

[15] The Fifth Circuit is the only Circuit Court of Appeals so far to have considered a challenge to a State's emergency COVID-19-related health orders outside of a direct appeal of a TRO. The Sixth and Tenth Circuits have dismissed such appeals for lack of jurisdiction. *See S. Wind Women's Ctr. v. Stitt*, No. 20-6045, 2020 WL 1860683 (10th Cir. Apr. 13, 2020); *Pre-Term Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020).

abortion cases suggests that abortion rights are somehow exempt from the *Jacobson* framework." *In re Abbott*, 2020 WL 1685929, at *7. "Quite the contrary, the Court has consistently cited *Jacobson* in its abortion decisions." *Id.* (collecting cases).

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

Applying *Jacobson* to the case at hand, it is clear that the Plaintiffs did not carry their burden of showing a substantial likelihood of success on the merits. "The first *Jacobson* inquiry asks whether [the State health order] lacks a 'real or substantial relation' to the crisis [Alabama] faces." *Id.* at *8 (quoting *Jacobson*, 197 U.S. at 31; *cf. Avino*, 91 F.3d at 109 (asking whether there exists "some factual basis for the decision that the restrictions … imposed were necessary"). Plaintiffs offered *no* evidence that Dr. Harris's emergency health orders are not related to the State's response to the COVID-19 pandemic, while the State presented ample factual support that the specific measures taken in the health orders promote social distancing, conserve medical equipment and PPE, and frees up hospital resources in anticipation of a surge of COVID-19 patients. *See* Tr. at 22–24. More than that, the State also presented the district court with 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 should arise. *Id.* And as Dr. Harris

also explained, it is particularly important that limited supplies of PPE be provided to healthcare workers treating COVID-19 patients in the coming weeks, when the peak use of such supplies is expected to occur. *Id.* Thus, Dr. Harris's order was "taken in good faith," *Avino*, 91 F.3d at 109, in response to a global pandemic and the rise of COVID-19 cases in Alabama.

Plaintiffs do not dispute that such measures are generally needed to conserve PPE and promote social distancing. *See* Doc. 73 at 15–18. They simply contend that the State could advance its goals while also exempting all abortions from the general health orders. *Id.* And the district court likewise second-guessed the State's allocation of scarce resources, finding that "abortions themselves require only a limited amount of PPE" and noting that "[w]ith respect to any PPE that *is* conserved, the defendants have not put forward evidence regarding how it might be used or re-directed to hospitals that are experiencing shortages." Doc. 137 at 39, 40 n.16. But in addition to putting the burden on precisely the wrong party at the preliminary stage, "[i]t is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. That is the State's job; here, it is Dr. Harris's job. And in any event, the district court's musings about abortions requiring only a limited amount of PPE could be said of any number of medical procedures. Yet not only does the State Health Officer not have time during an emergency to go

procedure by procedure to determine the approximate PPE usage of each, the entire point of the health orders is that cumulative effects matter and every piece of PPE is needed. Because Dr. Harris's health order promotes those goals, it is clear that it bears a "substantial relation" to the COVID-19 crisis.

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). In fact, Alabama's health order goes well beyond *Jacobson*'s carve out and provides an exemption for any procedure that, in a doctor's reasonable medical judgment, cannot safely be postponed until the order is lifted.

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). Only by doing so can one conclude whether the obstacle is "undue" or not. 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. *See Casey*, 505 U.S. at 886 (acknowledging mandatory waiting period may sometimes result in a delay of "much more than a day" but concluding that it was not an undue burden even if it increased costs and potential delays). 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.

A pandemic affects us all. 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 as the State's healthcare system faces unprecedented strains that could push it past the breaking point.

II. Plaintiffs Did Not Show Irreparable Harm.

Plaintiffs bore the burden below of showing that they would be imminently and irreparably harmed absent the district court's immediate intervention. This they also failed to do.

Plaintiffs' 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—namely, that the State will renege on its representations to the district court about how the health order will be enforced and instead go about selectively prosecuting abortion providers. *See* Doc. 110-1 at 1. But the *only* evidence Plaintiffs presented for this theory was an account by Dr. Robinson of her interactions with the public and with the federal government, Tr. at 120–24, and the State's refusal to provide abortion providers with a blanket exemption to the order, Doc. 73 at 48. Suffice it to say, that is insufficient evidence to show that State officers will enforce the health order unfairly. To the contrary, the evidence presented at the preliminary injunction hearing showed that the order was issued in good faith and without intent to target abortion doctors or their patients, and that it would be applied to doctors who perform abortions in the same way it applies to any other doctor in Alabama. Tr. at 17–18.

Moreover, Plaintiffs have also presented no evidence that women in Alabama will not 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 seeking abortions. Of course, should new evidence come to light that Plaintiffs are at risk of unconstitutional enforcement, they can seek relief at that time. But without such evidence, any such relief is wholly premature. *See Ne. Fla. Chapter of Ass'n of Gen. Contractors*, 896 F.2d at 1285 (noting that "[t]he injury must be neither remote nor speculative, but actual and imminent." (quotation marks and citation omitted)).

III. The Harm Caused by the Preliminary Injunction Outweighs Any Harm to Plaintiffs Caused by the Health Order.

In response to the COVID-19 pandemic, the world economy has basically shut down, States have entered "shelter in place" orders, and State health officials like Dr. Harris are doing everything they can to conserve vital resources for hospitals and physicians caring for COVID-19 patients. All of this is so that patients who need acute care will have a fighting chance of surviving. But that can only happen if hospitals do not become overrun with patients, and caretakers themselves do not become patients (or create more of them by unwittingly spreading the virus). Hence the series of emergency health orders that Dr. Harris issued.

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. The State possesses immense police powers to respond effectively to emergencies, yet the district court's micromanagement of those 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)); *see also Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.").

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 if the virus cannot be contained or if our evolving understanding of the virus dictates some other response. Indeed, Dr. Harris has already issued seven different health orders in response to changing conditions on the ground,[16] so it is

[16] *See* Docs. 88-1, 88-2, 88-3, 88-4, 88-5, 88-6, and 109-1.

probable that some alterations will still need to be made. But by placing itself as the ultimate umpire in the Alabama Department of Public Health, the district court has in effect required that Dr. Harris first seek the court's permission before issuing emergency orders lest he risk being held in contempt. Such a requirement is dangerous to the public health.

Moreover, the injunction also 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 are owed and will be given deference, that does not mean that any assertion by a medical provider that a particular procedure was medically necessary is conclusive proof of that fact. After all, the emergency order is not an emergency suggestion. 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.

IV. The Injunction is Adverse to the Public Interest.

Finally, Plaintiffs did not show that the public interest is best served by an injunction that hampers the State's response to the COVID-19 pandemic. Instead, the evidence 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. As the Supreme Court in *Jacobson* explained:

> We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent … may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population.

197 U.S. at 37–38. In a pandemic, if even one person fails to comply with measures designed to slow the spread of the disease, devastating consequences can result.

CONCLUSION

The Court should reverse the preliminary injunction entered by the district court.

Respectfully submitted,

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

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7). This brief contains 10,924 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 11th Cir. R. 35-1.

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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