

**April 22, 2020**

**ATTORNEY GENERAL RAOUL CHALLENGES ALABAMA'S ABORTION BAN DURING COVID-19 PANDEMIC**

**Chicago** — Attorney General Kwame Raoul, as part of a multistate coalition of 18 attorneys general, acted to stop Alabama from banning almost all abortions in the state during the coronavirus pandemic. Raoul and the coalition [filed an amicus brief](#) in the U.S. Court of Appeals for the 11th Circuit, supporting the plaintiffs in *Robinson v. Marshall*, as they fight to preserve access to reproductive health care for women across Alabama.

"It is unacceptable that a state would use the COVID-19 crisis as an excuse to push an anti-abortion agenda and stand in the way of a woman's right to reproductive health care," Raoul said. "I am committed to fighting actions that violate the constitution and further endanger women during this crisis."

On March 17, Alabama's state health officer issued an order declaring that "all dental, medical, or surgical procedures shall be postponed until further notice," with exceptions to be made only for emergencies, in order to avoid serious harm, or to continue ongoing and active treatment. Alabama Attorney General Steve Marshall later confirmed that abortion services would not be exempt from the order, claiming that abortion clinics use valuable personal protective equipment (PPE), and that abortions typically require hospitalization.

On March 30, Dr. Yashica Robinson and Alabama's three independent abortion clinics filed a complaint in the U.S. District Court for the Middle District of Alabama. On April 12, the district court granted a preliminary injunction, explaining that, in Alabama, abortion becomes illegal after the 20th week of pregnancy. The court reasoned that the order is the equivalent of an abortion ban that would prevent some women from exercising their right to terminate a pregnancy, or would make it extremely difficult for some women to access abortion services. The court further explained that Alabama's efforts to combat COVID-19 do not outweigh the significant lasting harm on women who cannot exercise their right to terminate a pregnancy. Alabama appealed the preliminary injunction to the U.S. Court of Appeals for the 11th Circuit.

In the amicus brief, Raoul and the coalition argue that Alabama's order fails to take into account the time-sensitive nature of abortion care, which makes it different than medical services that can be postponed during the COVID-19 crisis without harming the patient. If allowed to go into effect, the order will harm women by requiring more invasive and lengthier terminations or, in some cases, entirely depriving women of their right to an abortion.

Additionally, Raoul and the coalition point out that Alabama's order would force some women in Alabama to seek abortion care by undertaking potentially risky and expensive trips across state lines at a time when the entire U.S. population is being asked to limit travel to stop the spread of COVID-19. Further, the coalition notes that residents of Illinois and other amici states may currently be in Alabama without a way to return home, those women still have a right to time-sensitive reproductive care.

Finally, Raoul and the coalition explain that restricting abortions would not help Alabama preserve PPE, free up hospital beds, or prevent the spread of COVID-19. The coalition points out that abortions require significantly less PPE and medical resources than continuing a pregnancy, and medication abortions typically require none. Indeed, abortions rarely require admission to a hospital. Raoul and the coalition cite that each year, one out of 10,000 emergency room visits are abortion-related. However, a significant number of annual hospitalizations result from complications related to pregnancies and miscarriages.

The brief follows three similar amicus briefs filed earlier this month by Raoul and other attorneys general supporting lawsuits challenging similar efforts by states – Texas, Oklahoma, and Arkansas – to ban abortion during the COVID-19 public health crisis. Medical professionals, including the American College of Obstetricians and Gynecologists, recently denounced the abortion bans being imposed by states during the spread of COVID-19, saying that delays in providing time-sensitive reproductive health care could significantly impact a woman’s life, health, and well-being.

In addition to Alabama, Arkansas, Texas, and Oklahoma, the states of Iowa, Louisiana, Mississippi, Ohio, and Tennessee have all also attempted to ban many pre-viability abortions during the COVID-19 pandemic, limiting their residents’ constitutional rights.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Vermont, Virginia, and Washington.

# 20-11401

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## United States Court of Appeals for the Eleventh Circuit

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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.*

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

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**BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA,  
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,  
MAINE, MASSACHUSETTS, MINNESOTA, NEVADA, NEW MEXICO,  
OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON,  
AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN  
SUPPORT OF APPELLEES AND IN OPPOSITION TO  
APPELLANTS' APPLICATION FOR A STAY**

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Dated: April 21, 2020

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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

*Defendants-Appellants,*

Case No. 20-11401

v.

YASHICA ROBINSON, et al.,

*Plaintiffs-Appellees.*

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

1. The name of each person, attorney association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, public traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

Adams, Hon. Jerusha T. – Magistrate Judge for the Middle District

of Alabama;

Alabama Women's Center – Appellee;

Bailey, Daryl D. – Defendant;

Balderas, Hector – Attorney General of New Mexico, Amicus Curiae;

Becerra, Xavier – Attorney General of California, Amicus Curiae;

Beck, Andrew – Counsel for Appellees;

Billingsley, Dana Helton – Former Counsel for Appellee Scott Harris;

Boone, Brock – Former Counsel for Appellees;

Bowdre, Alexander Barrett – Counsel for Appellants;

Broussard, Robert L. – Defendant;

Burrows, Meagan Marlis – Counsel for Appellees;

Cameron, Daniel – Attorney General of Kentucky, Amicus Curiae;

Carr, Danny – Defendant;

Chynoweth, Brad A. – Counsel for Appellants;

Clarkson, Kevin – Attorney General of Alaska, Amicus Curiae;

Cohen, Marcia S. – Counsel for Third Party Movant;

Connors, Clare E. – Attorney General of Hawai'i, Amicus Curiae;

Dasgupta, Anisha S. – Counsel for Amici Curiae;

Davis, James William – Counsel for Appellants;

Donovan Jr., Thomas J. – Attorney General of Vermont, Amicus  
Curiae;

Doyle, Hon. Stephen Michael – Magistrate Judge for the Middle  
District of Alabama;

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Etlinger, Laura – Counsel for Amici Curiae;

Ferguson, Robert W. – Attorney General of Washington, Amicus  
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Herring, Mark R. – Attorney General of Virginia, Amicus Curiae;

Hill Jr., Curtis T. – Attorney General of Indiana, Amicus Curiae;

Hunter, Eric Wilson – Attorney for Defendant;

Hunter, Mike – Attorney General of Oklahoma, Amicus Curiae;

James, Letitia – Attorney General of New York, Amicus Curiae;

Jennings, Kathleen – Attorney General of Delaware, Amicus Curiae;

Kolbi-Molinas, Alexa – Counsel for Appellees;

LaCour Jr., Edmund Gerard – Counsel for Appellants;

Lambiase, Susan – Counsel for Appellees;

Landry, Jeff – Attorney General of Louisiana, Amicus Curiae;

LeQuire, Mark H. – Defendant;

Marshall, Randall Charles – Counsel for Appellees;

Marshall, Steve – Appellant, Alabama Attorney General;

Mills, Wallace Damon – Counsel for Defendant;

Morrisey, Patrick – Attorney General of West Virginia, Amicus Curiae;

Murrill, Elizabeth B. – Counsel for Amici Curiae;

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

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

Planned Parenthood Southeast, Inc. – Appellee;

Racine, Karl A. – Attorney General of the District of Columbia,  
Amicus Curiae;

Raoul, Kwame – Attorney General of Illinois, Amicus Curiae;

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

Reproductive Health Services – Appellee;

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

Rich, Ashley – Defendant;

Robinson, Yashica – Appellee;

Rosenblum, Ellen F. – Attorney General of Oregon, Amicus Curiae;

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

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

Segall, Robert David – Counsel for Defendants;

Shapiro, Josh – Attorney General of Pennsylvania, Amicus Curiae;



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

Smith, Brenton Merrill – Counsel for Appellants;

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

Taylor, Brian McDaniel – Counsel for Amici Curiae;

Thompson, Hon. Myron H. – Judge for the Middle District of  
Alabama;

Tong, William – Attorney General of Connecticut, Amicus Curiae;

Underwood, Barbara D. – Counsel for Amici Curiae;

Walburn, James H. – Defendant;

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

Webb, Hays – Defendant;

Weiser, Philip J. – Attorney General of Colorado, Amicus Curiae;

West Alabama Women’s Center – Appellee;

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

and

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

*Marshall v. Robinson*, No. 20-11401

2. The name of every other entity whose public trade stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

Respectfully submitted this 21st day of April, 2020.

*/s/ Anisha S. Dasgupta*  
Anisha S. Dasgupta  
Deputy Solicitor General

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## INTEREST OF AMICI

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia. Amici oppose a stay of the district court's preliminary injunction because they have a strong interest in ensuring that women can obtain time-sensitive reproductive care in Alabama without undertaking significant interstate travel that increases public health risks. Some of amici's residents are temporarily in Alabama and unable to return home because of the current public health emergency. And some women in Alabama may travel to or through amici States to obtain abortion services banned in Alabama.

As the district court found and amici's experiences show, responding effectively to the current crisis does not require banning all abortions prior to fetal viability except where necessary to preserve the patient's life or health.<sup>1</sup> The district court's preliminary injunction

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<sup>1</sup> Although appellants now proffer a different interpretation of Alabama's emergency order, this is how appellants had characterized the effect of the order in the proceedings below, the order can be read this

appropriately blocks enforcement of the ban when a provider has made a case-specific determination that delay will impose serious harm, pose substantial risk, or make a later abortion impossible.

The district court correctly found—and amici’s experiences confirm—that banning such care does not advance appellants’ interests in preserving personal protective equipment (PPE), maintaining hospital capacity, and preventing COVID-19 transmission. Appellants thus are not irreparably injured by the preliminary injunction, whereas staying the preliminary injunction will cause irreparable injury.

For these same reasons, appellants cannot show they are likely to succeed on the merits. The district court properly applied the well-settled standards governing review of abortion bans and restrictions and determined that the public necessity case law produced the same result. Appellants therefore do not qualify for a stay. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (listing stay factors).

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way, and appellants have not provided any binding assurance that they will not enforce this interpretation. (App.526, 527 n.5.)

## ARGUMENT

### POINT I

#### **AMICI'S EXPERIENCES SHOW APPELLANTS WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY**

#### **A. Appellants' Interests in Preserving Medical Resources and Reducing COVID-19 Transmission Are Not Being Irreparably Harmed.**

Appellants are not irreparably harmed here because barring abortions permitted under the district court's tailored preliminary injunction would not preserve hospital capacity and PPE, or reduce interpersonal contacts.

a. Neither medication abortions nor procedural abortions are performed in hospital settings, and both very rarely result in complications requiring hospital resources. (App.30<sup>2</sup> (0.01% of emergency room visits in the United States are abortion-related); *see* App.410, 545.) Dispensing medication for a medication abortion does not typically require any PPE, and while procedural abortions use some PPE, they do not use N95 masks particularly needed to treat COVID-19. (App.37.)

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<sup>2</sup> The Robinson declaration in the Appendix (App.27-47) and cited here is the same as the corrected declaration (ECF No. 99-1) in all relevant respects.



A prohibition on abortions even for a short period will force some women who otherwise would have been able to obtain medication abortions to undergo more invasive and lengthier terminations requiring more provider-patient interactions and PPE. (See App.42-43.) Other women will be prevented from obtaining abortions altogether. Abortions use far less PPE and medical resources than continuing a pregnancy, which generally entails more than one prenatal appointment per month, plus ultrasounds and laboratory testing that may require gloves, a face mask, and often other PPE. (App.37, 456, 546.)

Abortion considerations aside, early pregnancy occasions a significant number of hospitalizations resulting from complications and miscarriages.<sup>3</sup> Miscarriages commonly occur in the first trimester,

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<sup>3</sup> Anne Elixhauser & Lauren M. Wier, *Complicating Conditions of Pregnancy and Childbirth, 2008* (Healthcare Cost & Utilization Project, Statistical Brief No. 113, 2011) (internet) (up to 10% of pregnancy-related hospitalizations involve non-delivery complications); Sarah C.M. Roberts et al., *Miscarriage Treatment-Related Morbidities and Adverse Events in Hospitals, Ambulatory Surgery Centers, and Office-Based Settings*, J. Patient Safety, at 3-4 (2018) (internet) (75% of miscarriage treatments occurred in hospital and 1% of all miscarriage treatments involved major complications).

terminate 15-20% of all pregnancies, and often result in unplanned hospitalizations requiring surgery or blood transfusion.<sup>4</sup> Miscarriage rates might be even higher now, as a consequence of COVID-19 infections.<sup>5</sup> Because some of these events are inevitably avoided by providing access to timely abortions, denying access to timely abortions will not appreciably conserve hospital resources and PPE in the coming weeks.

Meanwhile, other strategies can alleviate potential resource shortages, as amici's experiences have shown. To preserve hospital capacity, many amici have modified or waived hospital regulations to increase beds in existing facilities and create on-site temporary

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For sources available on the internet, full URLs appear in the Table of Authorities.

<sup>4</sup> See Am. Coll. of Obstetricians & Gynecologists (ACOG), *Early Pregnancy Loss* (Nov. 2018) (internet) (80% of miscarriages in first trimester); Roberts, *Miscarriage Treatment-Related Morbidities*, *supra*, at 3-4; J. Trinder et al., *Management of Miscarriage: Expectant, Medical, or Surgical? Results of Randomised Controlled Trial (Miscarriage Treatment (MIST) Trial)*, *BMJ* (May 27, 2006) (internet) (unplanned hospitalization rate of 8-49% following miscarriage depending on method of treatment); Craig P. Griebel, et al., *Management of Spontaneous Abortion*, *Am. Family Physician* (Oct. 1, 2005) (internet) (up to 20% miscarriage rate).

<sup>5</sup> March of Dimes, *Coronavirus Disease (COVID-19): What You Need to Know About Its Impact on Moms and Babies* (Apr. 20, 2020) (internet).

structures—or converted hotels, dormitories, and convention centers into quarantine sites and field hospitals.<sup>6</sup> Some amici have developed state-wide or regional hospital coordinating plans for transferring patients from hospitals nearing capacity to those with available bed space.<sup>7</sup>

To preserve PPE, some amici have issued guidance advising health care workers on conserving PPE,<sup>8</sup> directed businesses to make their PPE supplies available for distribution,<sup>9</sup> and established logistics centers to monitor PPE needs and coordinate PPE receipt and distribution.<sup>10</sup> Amici are also finding new ways to source PPE, including through new purchasing channels and by making funding available to enable businesses like clothing companies and distilleries to produce COVID-19 related supplies.<sup>11</sup>

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<sup>6</sup> Addendum (Add.) CA-1, CT-1, HI-1, IL-2, MA-2, NY-2, NY-4, OR-1, VA.

<sup>7</sup> Add. NY-5, OR-1.

<sup>8</sup> Add. CA-1, CO, DE-1, DE-2, MA-1.

<sup>9</sup> Add. NM-2.

<sup>10</sup> Add. CT-2, NY-5, MN-3, OR-1.

<sup>11</sup> Add. NY-1, RI-1.

b. The abortions permitted under the preliminary injunction do not increase risks of COVID-19 transmission. As the district court found, medication and procedural abortions require no more interpersonal contact than appellants are allowing for pregnancy care, including prenatal visits and treatment of complications. (App.543-544, 546-547.)

To further decrease transmission risks in the context of reproductive health care, clinics in amici States have increased the use of telehealth to conduct assessments, which reduces travel and in-person interactions.<sup>12</sup> Some amici have modified state rules to allow increased use of telehealth during the pandemic.<sup>13</sup> Alabama has not done so for abortion care, to eliminate in-person contacts that could be safely accomplished remotely. (App.36.) The American College of Obstetricians and Gynecologists (ACOG) advises that telehealth can be safely and effectively used for gynecological visits, counseling, and certain steps in medication abortion.<sup>14</sup>

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<sup>12</sup> Add. CA-4.

<sup>13</sup> See, e.g., Add. CA-3, HI-1, RI-2.

<sup>14</sup> See ACOG, *Medical Management of First-Trimester Abortion* (Mar. 2014) (internet).

**B. A Stay Will Irreparably Harm Patients and Pose a Threat to the Public Interest.**

Prohibiting abortions except to preserve a woman's life or health will foreclose some women from accessing pre-viability terminations altogether, unless they undertake risky and expensive interstate travel. For other women, it will lead to more complicated procedures that increase interpersonal contacts and PPE use. These results are contrary to the stated interests of appellants and the public interest.

a. As the district court found, the ban on abortions will irreparably injure any woman who reaches the legal limit for an abortion during the ban (week 20 of the pregnancy, in Alabama). (App.528.) Other women will be permanently foreclosed from receiving a medication abortion (available until week 10 of the pregnancy) and will otherwise require more complicated and invasive procedures that increase medical risks. (App.528-531.)

Appellants fail to recognize how the time-sensitive nature of abortion care distinguishes that care from services that can be postponed without patient harm during the current public health crisis. As the district court found and as amici have acknowledged through various

means, abortions cannot be deferred indefinitely or for long stretches without increasing risks for some women and denying access to others.<sup>15</sup>

b. The public interest counsels strongly against a stay here. Amici States' past experience and the record evidence (App.445, 463; *see* App.43-44) show that if abortions are unavailable in Alabama, many women will cross state lines to obtain abortions and then return to Alabama.<sup>16</sup> Appellants' ban will thus exacerbate the travel requirements that many women in Alabama already face (App.423), increasing the risks of COVID-19 transmission and infection-related burdens on appellants' hospital facilities and PPE supplies.

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<sup>15</sup> Add. CA-2, DC, IL-1, MN-1, MN-2, NJ, NM-1, NY-3, OR-2, VT, WA.

<sup>16</sup> *See* Molly Hennessy-Fiske, *Crossing the 'Abortion Desert': Women Increasingly Travel Out of Their States for the Procedure*, L.A. Times (June 2, 2016) (internet); Jonathan Bearak et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care*, Guttmacher Inst. (Apr. 2, 2020) (internet); *see also* Alexa Garcia-Ditta, *With More Texans Traveling for Abortions, Meet the Woman Who Gets Them There*, Tex. Observer (June 9, 2016) (internet) (Texas patients in New Mexico doubled after 2013 Texas law restricting access).

## POINT II

### **APPELLANTS CANNOT SHOW THEY WILL LIKELY SUCCEED ON THE MERITS GIVEN DECADES OF BINDING PRECEDENT TO THE CONTRARY**

Appellants cannot make “a strong showing” of a likelihood of success in seeking to ban pre-viability abortions absent a threat to the woman’s life or health. *Nken*, 556 U.S. at 434 (quotation marks omitted). The Supreme Court has repeatedly reaffirmed that “[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quotation marks omitted); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016). As demonstrated by the long list of decisions cited by appellees (App.110-111), attempts to ban abortion prior to viability have been uniformly rejected by appellate courts across the country for decades.

The district court properly applied settled law to these facts in determining that appellants’ ban was likely unconstitutional regarding women whom it would entirely bar from legally accessing abortion (App.528, 532-533, 537-539). *See Gonzales*, 550 U.S. at 146. Accordingly, the district court correctly enjoined the ban where a provider has

determined that delaying an abortion would cause the woman to lose her right to a legal abortion. (App.565.)

Appellants do not and cannot argue that the district court committed clear error in determining that the ban does not serve appellants' stated interests and will likely impose an "undue burden" on women in certain circumstances. *Whole Women's Health*, 136 S. Ct. at 2309; *see also Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-901 (1992) (plurality op.). The district court first found that the ban will not conserve PPE and hospital resources "even when measured on a very short time horizon" because (i) abortions "require a limited amount of [PPE]," (ii) "the rate of abortions that require hospitalization is extremely low," and (iii) many delayed abortions will simply "re-route[]" PPE to other medical services that are similarly unrelated to the pandemic, such as early prenatal visits. (App.543-546.) In the longer term, permitting women access to abortions now will conserve PPE and hospital resources that would otherwise be used for later prenatal visits, any pregnancy complications, and delivery. (App.546.) The district court also found the ban would not decrease interpersonal contacts in the short term because the patient



would have early prenatal visits, and would increase such contacts in the longer term because later abortion procedures, multiple prenatal visits, and delivery require many more provider-patient interactions. (App.546; *see* App.543-544.) Indeed, appellants' stay motion does not contend that the abortions permitted by the preliminary injunction will cause shortages in PPE or hospital capacity or increase the risk of transmission, thereby irreparably harming the State. (*See* Mot.19-21.)

The district court also found that for some women, even a temporary ban may cause serious harm or pose substantial risk, or would make later abortions "far more difficult, or even impossible." (App.529-531.) The court's preliminary injunction accordingly permits abortions on a case-by-case basis where a provider determines such circumstances are present. (App.565-566.) The Supreme Court has explained repeatedly that a measure furthering a valid state interest "cannot be considered a permissible means of serving its legitimate ends" if it "has the effect of placing a substantial obstacle in the path of a woman's choice." *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2309. And the Court has made clear that an abortion restriction cannot survive constitutional scrutiny when it imposes greater burdens than benefits.

*See Whole Woman's Health*, 136 S. Ct. at 2310. Meanwhile, the ready availability of other more effective measures to conserve public health resources and limit the risk of transmission (*supra* at 5-7), highlights the extent to which appellants' abortion ban is unnecessary to advance the State's interest in protecting the public health, *see Whole Woman's Health*, 136 S. Ct. at 2311. The district court thus properly found that, in certain cases, the burdens of appellants' ban will outweigh any "preservation of healthcare resources" or "prevention of close social contact." (App.542.)

Appellants are incorrect in claiming that public necessity justifies their abortion ban. The district court fully considered appellants' asserted interest in public health and found that the ban here "impinges on a fundamental right in a 'plain, palpable' way." (App.535 (quoting *Jacobson v Massachusetts*, 197 U.S. 11, 31 (1905)).)

Appellants identify no error in the district court's analysis of *Jacobson*. There, the Supreme Court rejected a challenge to a mandatory vaccination requirement in the context of a small pox outbreak. The Court recognized that liberty interests may be subject to "reasonable regulation" to protect public health. *Jacobson*, 197 U.S. at 25-26, 29-30.

But the Court also made clear that where an exercise of the police power is arbitrary and unreasonable in relation to “particular circumstances” and “particular persons,” the courts should intervene to protect individuals from the restriction. *Id.* at 28, 38. The district court followed that direction here and enjoined appellants’ ban where it operates to completely deprive women of their fundamental constitutional right to access abortion services and does not serve appellants’ asserted interests.<sup>17</sup> (App.533-547.)

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<sup>17</sup> Appellants mistakenly rely on cases involving physical property or commercial interests (Br.29) that have no import here, where a personal liberty interest and right to bodily integrity are at issue. Appellants also derive no support from cases (*see id.* at 29-30) involving temporary and partial restrictions on freedom of movement or exercise of religion that, as the district court explained (App.547-548), are not comparable to the permanent consequences imposed on appellees’ patients. *See Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (temporary nighttime curfew imposed in the wake of Hurricane Andrew); *see also Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (child labor law prohibiting children from selling religious materials, where other ways existed to teach religious principles); *Hickox v Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (temporary quarantine of an individual at risk of exposure to Ebola).

## CONCLUSION

For the reasons set forth above and in appellees' opposition, this Court should deny appellants' motion for a stay.

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April 21, 2020

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,570 words and complies with the typeface requirements and length limits of Rules 21(d), 29, and 32(a)(5)-(7), and the corresponding local rules.

*/s/ William P. Ford*

# Addendum



## ADDENDUM

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