No. 20-3365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVE YOST, ATTORNEY GENERAL OF OHIO, et al.,	:	
Defendants-Appellants,	:	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division
v.	:	
PRETERM-CLEVELAND, et al.,	:	District Court Case No. 2:19-cv-360
Plaintiffs-Appellees.	:	

COMBINED EMERGENCY MOTION FOR STAY PENDING APPEAL AND MERITS BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

The appellants ask this Court to resolve this case on the briefs, as there is insufficient time to hold an oral argument.

JURISDICTIONAL STATEMENT

The appellees sued to enjoin Ohio law under §1983. The District Court had jurisdiction under 28 U.S.C. §1331. It entered a temporary restraining order on Monday, March 30, 2020. For the reasons outlined below, *see below* 15–17, the Court has jurisdiction to entertain this interlocutory appeal under 28 U.S.C. §1292.

STATEMENT OF THE ISSUE

Does the Constitution bar States from requiring abortion providers to delay abortions or alter their methods, without denying anyone the right to an abortion, when doing so is necessary to preserve equipment needed to combat the spread of a lethal, once-in-a-lifetime pandemic?

INTRODUCTION

If this Court declines to stay and reverse the District Court's ruling, the people working hardest to save Ohioans from COVID-19 will die as a result. That is not an exaggeration. First responders and hospital personnel in Ohio face a critical shortage of "PPEs"—protective equipment needed to keep them from contracting and spreading the virus that causes COVID-19. *See* Jim Woods, *Coronavirus: Federal Shipment of personal protective equipment doesn't meet Ohio's need, Dr. Amy Acton Says*, The Columbus Dispatch (Mar. 31, 2020), https://tinyurl.com/PPEshortage. With that in mind, Dr. Amy Acton, the Director of Ohio's Department of Health, ordered a halt to non-essential surgeries, which will help preserve PPEs to the maximum extent possible for use in combating COVID-19. As applied to abortion providers, this means doctors must perform medicinal abortions (rather than surgical abortions) where that option is safe and available. It also means that doctors must delay surgical abortions *that can be delayed* without jeopardizing the patient's ability to secure a pre-viability abortion. Doctors remain free to perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights.

Doctors across Ohio are complying with this order, making patient-specific decisions regarding whether a surgery is "essential." But the abortion-provider

appellees deemed this an inconvenience and sued, claiming the Constitution guarantees them a right to perform surgical abortions whenever they want, *even when* it is possible to perform the abortion with medication (as opposed to surgery) or to delay the abortion without prejudice to the patient's right to abort before viability. Never mind the concerns regarding the pandemic; never mind the unnecessary use of scarce PPEs will inevitably cause nurses, doctors, and first responders to become afflicted with COVID-19; never mind that some of them will transmit that disease to others; never mind that some of the afflicted will die. According to the abortion providers, no slight inconvenience to the on-demand provision of elective abortions is a price worth paying to avoid these grisly, preventable deaths.

These outcomes would be tragic, though unavoidable, if the law compelled them. It does not. Doctors have no right to perform abortions, as the *en banc* Court held last year in an opinion reversing a decision by the very same judge who entered the order at issue here. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 913 (6th Cir. 2019) (*en banc*). And while patients have a right to have pre-viability abortions, that right is not categorical. Instead, States may regulate abortion as long as they do so without imposing an "undue burden." This means patients have no right to choose the method (for example, surgical or by medication) with which to abort, *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), or to insist on

obtaining an abortion at the precise moment they want one, *Planned Parenthood v. Casey*, 505 U.S. 833, 886 (1992). Indeed, the question whether a regulation imposes an "undue burden" is a fact-intensive inquiry that requires "consider[ing] the burdens 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). Here, the benefits (conserving PPEs for use in preventing the spread of a pandemic) more than justify the relatively minor burdens (substituting medication abortions for surgical abortions where it is safe to do so, and delaying abortions that can be safely done without jeopardizing the patient's abortion rights).

Anyway, to the extent a law *does* burden the right to an abortion, it must be enjoined only as to its unconstitutional applications. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 331 (2006). The District Court's decision facially enjoining the order in its application to the appellees—*even* in its application to abortions that can safely be performed with medicine or delayed without prejudice to the patient—is therefore as legally indefensible as it is conscience shocking. This Court should stay its decision, just as the Fifth Circuit did to a similar district court order in a similar posture, *see See In re: Gregg Abbott*, No. 20-50264, and reverse.

Because every minute that passes is a minute more during which abortion providers are using up PPEs on abortions of convenience, this Court should issue

an immediate stay and then ultimately reverse. The appellants—whom this brief will from now on call "Ohio" or the "State"—consent to treating this emergency motion as a motion for a stay *and* a brief on the merits. But if the Court desires further briefing, the parties can complete that by the end of this week. Either way, the Court should issue *at least* an administrative stay of the lower court's ruling that allows the Department of Health's order to remain in effect during the pendency of the emergency stay application.

STATEMENT OF THE CASE

COVID-19 is a respiratory disease that can result in serious illness or death. On March 11, 2020, the World Health Organization declared COVID-19, which is caused by the coronavirus, a pandemic. R.48-2, Director's Or., PageID#986. The Centers for Disease Control and Prevention has also described the virus as a pandemic and is working with state and local officials to respond to this "rapidly evolving situation." *Situation Summary*, Centers for Disease Control and Prevention, https://bit.ly/39C2XhW. To date, COVID-19 has caused over 3,600 reported deaths in the United States. *Cases in the U.S.*, Centers for Disease Control and Prevention, https://bit.ly/3dNT04k.

Like other States around the country, Ohio is working to contain COVID-19. On March 9, 2020, Ohio declared a state of emergency. It has since limited

activities in *many* different activities, such as mass gatherings and visits to nursing homes. Among these many actions, on March 17, 2020, Dr. Amy Acton, Director of the Department of Health, issued an emergency order requiring that healthcare providers cease non-essential surgeries in order to preserve Ohio's medical resources. R.48-2, Director's Or., PageID#984–87. It says:

> I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders ... for preventing the spread of contagious or infectious diseases" and for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio, ORDER the following:
>
> 1. Effective 5:00p.m. Wednesday March 18,2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.
>
> 2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
>
> a. Threat to the patient's life if surgery or procedure is not performed;
>
> b. Threat of permanent dysfunction of an extremity or organ system;
>
> c. Risk of metastasis or progression of staging; or
>
> d. Risk of rapidly worsening to severe symptoms (time sensitive)
>
> 3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals

> essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.
>
> 4. Each hospital and outpatient surgery or procedure provider, whether public, private, or nonprofit, shall establish an internal governance structure to ensure the principles outlined above are followed.
>
> 5. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.
>
> This Order take into consideration and is consistent with the *Ohio Hospital Association's Implementing Guidelines for the Management of Non-Essential Surgeries and Procedures Throughout Ohio* dated March 16, 2020.

R.48-2, Director's Or., PageID#984.

After Dr, Acton issued this order, the Ohio Department of Health received complaints that the appellee clinics were continuing to perform elective abortions. *See, e.g.*, R.42-2, PageID#820. The Ohio Attorney General's Office, therefore, sent letters instructions the clinics to stop performing non-essential and elective surgeries. *Id.*

Two days ago, the appellees—several abortion clinics and one of their doctors—moved to enjoin the Director's non-essential surgery order. This brief will call it the "Director's Order" from here on out. They specifically sought to

prevent the Director's Order from being applied to surgical abortions. The District Court granted a temporary restraining order. R.43, TRO, PageID#862–69. In doing so, it predicted that "some [women] could be forced to forgo an abortion entirely and carry an unwanted pregnancy to term." *Id.*, PageID#868. While crediting that possibility, it doubted whether forcing the clinics (like all other healthcare providers) to cease elective surgeries would result in "any beneficial amount of net saving" in terms of medical resources. *Id.* Based on this analysis, the District Court determined that at least some elective abortions are "legally essential." *Id.*, PageID#869. It enjoined the Director's Order in all its application to the appellees, reasoning that they could decide for themselves whether to perform a surgical abortion. *Id.*, PageID#868–69. The Court indicated that the temporary restraining order lasts for fourteen days. *Id.*

SUMMARY OF ARGUMENT

The decision whether to enter a preliminary injunction, and the decision whether to stay a lower court's ruling pending appeal, are subject to essentially the same standard. Courts must consider: "'(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent" relief; "(3) the prospect that others will be harmed if the court grants" the relief sought; "and (4) the public interest.'"

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006) (quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). So the Court may simultaneously consider whether to stay the District Court's order and whether to reverse its award of preliminary injunctive relief. Applying this standard, the Court should stay the District Court's decision pending appeal and reverse. The Fifth Circuit already issued a similar ruling, staying a similar district court decision pending the resolution of Texas's petition for a writ of mandamus. *See In re: Gregg Abbott*, No. 20-50264.

Likelihood of success. The State is likely to prevail. As an initial matter, the Court has jurisdiction to hear the appeal. Parties may appeal a temporary restraining order that "threaten[s] to inflict irretrievable harms before" it expires. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1005–06 (6th Cir. 2006). The decision below fits the bill: it requires Ohio to allow abortion providers to use PPEs in non-essential surgical abortions, notwithstanding the critical shortage of PPEs—a shortage that endangers those treating patients with COVID-19 and, ultimately, the entire community. The decision below, if not enjoined, will deprive doctors, nurses, and first responders of needed PPEs, causing them to contract and spread COVID-19. Those who die will suffer irreparable harm.

On the merits, the State is almost certain to prevail. Supreme Court case law prohibits States from adopting abortion regulations that impose an "undue burden" on the right to obtain a pre-viability abortion—in other words, abortions that have "the purpose" or "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality). The question whether an abortion regulation imposes an undue burden is a factbound determination that requires balancing the law's benefits against its costs. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Applying this test, the Supreme Court has held that States may ban certain abortion procedures, and impose requirements that delay the obtaining of an abortion, as long as they leave open reasonably available avenues for exercising the right to a pre-viability abortion. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Casey*, 505 U.S. at 886.

The Director's Order passes constitutional muster. More to the point, the appellees have not carried their burden of proving unconstitutionality. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The Director's Order forbids only *unnecessary* surgeries. That means doctors may not perform *surgical* abortions if they can induce the same abortion medicinally. And it means doctors may not perform abortions that can be delayed without jeopardizing the patient's ability to exercise her

right to a pre-viability abortion. But if the doctor determines that the abortion is necessary to protect the mother's life or health, or if the doctor determines that any delay will jeopardize the exercise of the abortion right, she is free under the Director's Order to perform the abortion. To the extent any delay or use of medicine imposes a burden, that burden is more than justified by the "benefits" the law helps secure—namely, giving doctors the equipment they need to safely combat a deadly pandemic that threatens irreparable harm to the entire American population. *Whole Woman's Health*, 136 S. Ct. at 2309.

Irreparable harm. The wrongful enjoining of a valid state action always qualifies as irreparable harm. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012)) (Roberts, C.J., in chambers) (citation omitted). So the wrongful enjoining of the Director's Order automatically satisfies the irreparable-harm requirement. In any event, the very real health threat posed by the District Court's ruling seals the deal in establishing irreparable harm.

Harm to others. Any inconvenience to those seeking a surgical abortion pales in comparison to the immense harm posed to the public if PPEs are not preserved and directed to their most important uses.

Public Interest. The public interest is always in "the will of the people of [the state] being effected in accordance with [state] law." *Coalition to Defend Af-*

firmative Action v. Granholm, 473 F.3d 237, 252 (6th Cir. 2006). The public interest thus supports allowing the Director's Order to go into effect.

* * *

Because the State will prevail on the merits, and because other factors weigh in its favor, the Court should stay the District Court's decision and reverse it.

STANDARD OF REVIEW

In deciding whether to stay a lower court's decision pending appeal, this Court will consider: "'(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.'" *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). This is effectively the same standard that governs the question whether to grant a preliminary injunction. *Id.* Accordingly, the Court may simultaneously consider the decision whether to stay the lower court's decision and whether to reverse.

On appeal, the Court reviews the decision to grant a preliminary injunction for abuse of discretion, and a legal error is always an abuse of discretion. *City of*

Pontiac Retired Emples Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*).

ARGUMENT

I. The State is likely to prevail on appeal.

The District Court's decision does not withstand the slightest scrutiny. The State is certain to win on appeal, *at least* on the question whether abortion providers can continue providing surgical abortions even in cases where doctors may safely induce an abortion medicinally. In so holding, this Court would align itself with the Fifth Circuit, which recently entered a stay in a similar posture. *See In re: Gregg Abbott*, No. 20-50264. This brief explains why the State is likely to win after a slight detour addressing this Court's jurisdiction.

A. This Court has jurisdiction to hear an appeal of the District Court's temporary restraining order.

The Court has jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. §1292(a). In ordinary circumstances, that jurisdiction does not extend to a district court's decision to grant or deny a temporary restraining order. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). The rationale being that such orders "are of short duration and

usually terminate with a prompt ruling on a preliminary injunction, from which the losing party has an immediate right of appeal." *Id.*

But ultimately it is the nature of the interlocutory order, not the label, that controls the Court's jurisdiction. *Id.* A defendant may appeal a temporary restraining order "if it has the practical effect of an injunction and 'further[s] the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Id.* (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)). Thus, the Court has jurisdiction if the ruling in question "threaten[s] to inflict irretrievable harms before" it expires. *Id.* at 1005–06. Additionally, defendants may appeal to protect their rights if a temporary restraining order "does not merely preserve the status quo pending further proceedings, but rather directs action so potent with consequences so irretrievable." *Id.* at 1006.

Applying these standards here, the Court has jurisdiction over this emergency appeal. Dr. Acton stayed non-essential surgeries as part of Ohio's ongoing effort to prevent and limit the spread of COVID-19. *See* R.48-2, Director's Or., PageID#984–87. The District Court's decision makes the Director's Order inapplicable to some non-essential surgeries. The District Court's ruling thus increases the likelihood and scope of the disease's spread as well as the amount of

PPEs being used for non-essential tasks. And that pause could last up to fourteen days, *see* R.43, TRO, PageID#869, which is a long time in this extreme context. What is more, the District Court's order *disrupts* (rather than protects) the current *status quo* in Ohio: under that *status quo*, all Ohioans are doing their part by ceasing non-essential activities. Given the literally life-and-death stakes of this case, irreversible harm will result from even a temporary pause of the Director's Order. So, Ohio may immediately appeal to protect its citizens.

B. The District Court erred in enjoining the Director's Order.

With jurisdiction established, turn to the question whether Ohio violated the abortion right by issuing a generally applicable order that requires abortion providers, just like all other doctors, not to perform elective surgeries. More precisely, it presents the question whether the appellees carried their burden of making a "*clear showing*" that the Director's Order violates the Constitution. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). They did not come close to doing so, and the District Court erred in holding otherwise. As a result, the State is likely to prevail on the merits and thus entitled to a stay and reversal of the injunction entered below.

1. Doctors have no right to perform abortions. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 913 (6th Cir. 2019) (*en banc*). Thus, there is no plausible argument that the Director's Order violates the appellees' rights. The appel-

lees do not allege otherwise—they are concededly asserting the rights of their patients.

But the appellees have not made a clear showing that the Director's Order violates their patients' rights. The right to a pre-viability abortion is not "absolute": no one has the right to "terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973). Instead, a woman has a right, before viability, not to be unduly burdened in her decision whether to abort. The States impose an undue burden only when they enact abortion regulations that have "the purpose" or the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality). Thus, States may ban certain abortion procedures, *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), or require patients to undertake steps that may delay their obtaining an abortion, *Casey*, 505 U.S. at 886, as long as they leave open reasonably available avenues for obtaining a pre-viability abortion. In the context of a health-and-safety regulation, the question whether an otherwise-substantial burden is "undue"—whether it leaves open sufficient avenues for exercising the right—requires balancing the health "benefits" of an abortion regulation against its "costs." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

The appellees have not made a "*clear showing*" that the Director's Order fails constitutional scrutiny. *Mazurek*, 520 U.S. at 972. Start with the undue-burden test's "purpose" prong. There is no good-faith argument that Dr. Acton issued the Director's Order with the purpose of putting a substantial obstacle between women and their abortion rights. (If the appellees want to say that Dr. Acton took time out of responding to a pandemic to target abortion rights, they should say so expressly.) Again, the Director's Order applies to *all* surgeries, not just abortions. And it bars only unnecessary surgeries. This means that providers may lawfully perform surgical abortions when, in the doctor's judgment, doing so is necessary for the mother's health or safety, or when delay would prevent the patient from exercising her right to an abortion. An order that permits abortions in these scenarios, notwithstanding the risk that PPEs will be lost in the process, lacks the purpose to put a substantial obstacle between women and the abortion right.

Now turn to the "effect" prong. In some applications, the Director's Order will not burden abortions rights *at all*, let alone "substantial[ly]." *Casey*, 505 U.S. at 877. For example, in cases where abortionists can safely induce an abortion with medication, requiring them to do so instead of performing a *surgical* abortion is no burden at all. At least in its application to these abortions, the Director's Order must be sustained. *Ayotte*, 546 U.S. at 331.

In other cases, the Director's Order does impose a burden, though the burden is justified. Women who can safely wait to get an abortion—and who can wait without running out of time in which to have a legal pre-viability abortion—will be asked to do so. But this is a temporary burden designed to help Ohio respond to a once-in-a-lifetime pandemic. Doctors, nurses, hospital workers, and first responders need PPEs so that they can avoid contracting the coronavirus and spreading COVID-19. At the same time, PPEs are in short supply—our nation generally, and Ohio in particular, face a critical shortage. *See* Jim Woods, *Coronavirus: Federal Shipment of personal protective equipment doesn't meet Ohio's need, Dr. Amy Acton Says*, The Columbus Dispatch (Mar. 31, 2020), https://tinyurl.com/PPEshortage. That is why Governor DeWine, Lieutenant Governor Husted, Dr. Acton, and their teams are working around the clock to procure PPEs, including by working with the FDA to secure approval for Battelle to begin implementing a technology that sterilizes surgical masks. *See* Rachel Roubien, *FDA increases mask decontamination after puschback from Ohio governor*, Politico (March 29, 2020), https://tinyurl.com/Ohio-FDA-emerg. "The rule announced in *Casey* … requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. Here, the burdens on abortion access (possible delay in obtaining an abortion) are amply justified by the tremen-

dous benefits the Director's Order confers (preserving PPEs for use in treating COVID-19). So the burden is constitutionally permissible.

What is more, the States have particularly wide latitude to regulate—even in ways that would otherwise be constitutionally impermissible—to prevent public-health catastrophes. For example, the Supreme Court has held that States may force people to vaccinate, against their will, to prevent an outbreak of smallpox. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). In another case, the Court held that cities may quarantine healthy people to prevent the spread of disease. *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902). This extra latitude reflects the judiciary's reluctance to second-guess public-health measures, and ought to count as another factor in the "balancing" of costs and benefits.

2. In grating a temporary restraining order, the District Court misapplied just about every governing principle.

First, the court facially enjoined the Director's Order as to the appellees without even considering whether to sever its unconstitutional applications. *Contra Ayotte*, 546 U.S. at 331. It thus enjoined the Director's Order even in its plainly constitutional applications—for example, in its application to abortions that can be safely performed with medicine, rather than surgically.

Second, the court failed to appreciate that the appellees, not the State, bore the burden of proof. *See Mazurek*, 520 U.S. at 972. The Court wrote that the State had "not demonstrated to the Court, at this point, that Plaintiffs' performance of these surgical procedures will result in any beneficial net saving of PPE in Ohio such that the net saving of PPE outweighs the harm of eliminating abortion." R.43, TRO, PageID#868. Since the court entered a temporary restraining order without a brief from the State, it is hard to know how the State was supposed to make such a showing. In any event, it did not have to: *the appellees* had to show that the Director's Order was unjustified. They did not, and they could not possibly: everyone agrees that Ohio has insufficient PPEs for those who need them. *See* Woods, *Coronavirus: Federal Shipment of personal protective equipment doesn't meet Ohio's need, Dr. Amy Acton Says*, https://tinyurl.com/PPEshortage.

Third, the court's application of the undue-burden test is pure *ipse dixit*. It simply recited the standards from *Casey* and *Whole Women's Health* and declared the State's conduct unlawful. That is not analysis at all, and it is certainly not analysis sufficient to justify enjoining safety measures in the midst of a pandemic. States dealing with public-health emergencies are owed more than unreasoned diktats.

3. In sum, there is no constitutional violation at all. If nothing else, the appellees have not shown that the Director's Order is unconstitutional in all its applications to abortion providers. The Fifth Circuit would apparently agree: just yesterday, it stayed a materially identical district court decision enjoining a materially similar order. *See In re: Gregg Abbott*, No. 20-50264. This Court should do the same, and then reverse the District Court's order.

II. The State faces irreparable harm if the District Court's decision is not immediately stayed and ultimately reversed.

"[A]ny time a State is enjoined by a court from effectuating" decisions made "by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). Thus, an injunction "seriously and irreparably harms" a State any time it wrongly "bar[s] the State from" carrying out a lawful order. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The District Court's decision enjoining the Director's Order thus irreparably harms the State.

That is all the State needs to show irreparable harm. But of course, here the State can show much more. Again, *people will die* as a result of the District Court's order if it is not stayed and reversed. Do the abortion providers think the CDC, Governor DeWine, Dr. Acton, and others are fibbing when they say we are facing a once-in-a-lifetime pandemic? Do they think Dr. Acton issued the generally appli-

cable order just for fun, and not because those fighting COVID-19 on the front lines desperately need PPEs that are in short supply? Do they think Governor DeWine and the FDA were pulling a stunt when they worked overtime to expedite the approval of a Battelle technology that helps sterilize masks? Unless this Court is prepared to say the answer is yes—unless it is willing to second-guess the judgment of public-health experts and elected officials on the need to conserve PPEs—it cannot help finding irreparable harm.

III. The inconvenience of delay is outweighed by public necessity.

In contrast to the peril facing Ohioans combating COVID-19, neither the providers nor their patients will face significant hardship from allowing the Director's Order to remain in place. Again, the Director's Order permits surgeries that are necessary rather than elective. That means women can get a surgical abortion when necessary to save their lives or to prevent a serious health complication. It also means that doctors can perform abortions when, given time constraints, delay means depriving the patient of the ability to abort. All the Director's Order does is stop these doctors, just like every other doctor in the State, from performing a surgery that can be safely delayed or performed using medication.

Delay of a wanted medical procedure is no doubt a harm. So is the temporary slowing of business. But patients and doctors around the State are coping with

these harms for the good of the public. Abortion providers and those seeking abortions can reasonably be expected to do the same.

IV. The public interest supports a stay pending appeal and reversal of the District Court's order.

In cases involving a constitutional challenge to a state law, the public interest lies in a correct application of the relevant federal constitutional and statutory provisions, "and ultimately … upon the will of the people of [the state] being effected in accordance with [state] law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). The public interest thus supports allowing the Director's Order to go into effect. The fact that the Director's Order addresses urgent needs in light of a deadly pandemic only heightens the public interest.

CONCLUSION

The Court should stay the District Court's ruling and reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume for a principal brief and contains 4,934 words. See Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2020, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

DESIGNATION OF DISTRICT COURT RECORD

Defendant-Appellee, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***Preterm-Cleveland, et al., v. Ohio Attorney General, et al.*, 1:19-cv-00360**

Date Filed	R. No.; PageID#	Document Description
5/15/2019	R.1	Complaint
3/30/2020	R.39	Amended Complaint
3/30/2020	R.42-2; 820	Attorney General Letter to Preterm
3/30/2020	R.43; 862–69	Temporary Restraining Order
3/31/2020	R. 48-2; 984–87	Health Director's Order
4/1/2020	R.50	Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Preterm-Cleveland, et al.,	:	
Plaintiffs,	:	Case No. 1:19-cv-00360
vs.	:	Judge Michael R. Barrett
Attorney General of Ohio, et al.,	:	
Defendants.	:	

TEMPORARY RESTRAINING ORDER

This matter is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction. (Doc. 42). This matter is also before the Court on Plaintiffs' Motion to File a Supplemental Complaint. (Doc. 41).

I. BACKGROUND

Plaintiffs—a collection of reproductive healthcare clinics and physicians providing abortion care—filed their Initial Complaint in this matter in May 2019. The Initial Complaint includes one count against Defendants challenging the constitutionality of Ohio Senate Bill 23 of the 133rd General Assembly ("S.B. 23") also known as the "Heartbeat Protection Act." (Doc. 1). Plaintiffs also filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction enjoining the enforcement of S.B. 23. (Doc. 2). In July 2019, the Court granted Plaintiffs' Motion for a Preliminary Injunction and enjoined Defendants from enforcing or complying with S.B. 23 pending further Order of this Court. (Doc. 29). That Order remains in effect.

Pertinent to the current Order, on March 9, 2020, the Governor of Ohio declared a State of Emergency via Executive Order in light of COVID-19. (Doc. 41-1, PageID 698-701). "COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread person to person." *Id.*

On March 17, 2020, Defendant Director of the Ohio Department of Health, Amy Acton, issued an order titled "RE: Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio" ("Director's Order"). *Id.* The Director's Order states, inter alia, that:

> 1. Effective 5:00 p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized P[ersonal protective equipment ("PPE")] should not be conducted.
>
> 2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
>
> a. Threat to the patient's life if surgery or procedure is not performed;
> b. Threat of permanent dysfunction of an extremity or organ system;
> c. Risk of metastasis or progression of staging; or
> d. Risk of rapidly worsening to severe symptoms (time sensitive).
>
> 5. . . . This Order shall remain in full force and effect until the State of Emergency Declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

Id. Defendant Acton states that the Order's purposes are to "prevent[] the spread of contagious or infectious diseases" and "preserv[e PPE] and critical hospital capacity and resources within Ohio." *Id.* A violation of the Director's Order is a second-degree misdemeanor. *See* Ohio Rev. Code. § 3701.352.

On March 20, 2020 and March 21, 2020, Defendant Attorney General of Ohio, Dave Yost, sent letters to Plaintiffs Planned Parenthood Southwest Ohio Region,

Preterm-Cleveland, and Women's Med Group Professional Organization citing the Director's Order and stating that "[t]he Ohio Department of Health has received a complaint that your facility has been performing or continues to offer to perform surgical abortions, which necessarily involve the use of PPE." (Doc. 42-1, PageID 807); (Doc. 42-2, PageID 820); (Doc. 42-4, PageID 845). Defendant Yost ordered Plaintiffs "to immediately stop performing non-essential and elective surgical abortions." *Id.* Defendant Yost concluded that, "[i]f you or your facility do not immediately stop performing non-essential or elective surgical abortions in compliance with the attached order, the Department of Health with take all appropriate measures." *Id.*

On March 30, 2020, Plaintiffs filed their Motion to File a Supplemental Complaint and Motion for a Temporary Restraining Order and/or Preliminary Injunction. (Docs. 41, 42). The proposed Supplemental Complaint seeks to add a constitutional challenge to the Director's Order as applied to surgical abortion procedures. (Doc. 42-1). The Motion for a Temporary Restraining Order and/or Preliminary Injunction requests that the Court temporarily enjoin Defendants from enforcing the Director's Order in a way that would ban surgical abortion in Ohio. (Doc. 42).

The Court held two informal telephone conferences on March 30, 2020 pursuant to S.D. Ohio Civ. R. 65.1 and Plaintiffs advised the Court of their preference for an immediate ruling on their Motion for a Temporary Restraining Order as they have scheduled surgical abortion surgeries this week.

II. ANALYSIS

a. Standard of Review

i. Motion to File Supplemental Complaint

Rule 15(d) of the Federal Rules of Civil Procedure governs supplemental pleadings and permits a party to move to file, and the Court to permit, "a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." FED. R. CIV. P. 15(d). "Rule 15(d) aims 'to give the court broad discretion in allowing a supplemental pleading.'" *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016) (citing FED. R. CIV. P. 15(d) advisory committee's note to 1963 amendment).

ii. Motion for Temporary Restraining Order

Under Federal Rule of Civil Procedure 65, the purpose of a temporary restraining order is to preserve the status quo so that a reasoned resolution of a dispute may be had. *See, e.g.*, *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

In the Sixth Circuit, the standard for obtaining a temporary restraining order and the standard for obtaining a preliminary injunction are the same. *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007). In determining whether to grant or deny a temporary restraining order or a preliminary injunction, the Court must consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (per curiam) (en banc) (internal quotation

marks omitted). Due to the urgency of the situation, the Court will decide whether temporary injunctive relief is warranted based on Plaintiffs' Motion (Doc. 42), along with the affidavits and documents filed in the record as of the date of this Order, and the two telephonic conferences held on March 30, 2020. *See* FED. R. CIV. P. 65.

b. Holdings

i. Motion to File Supplemental Complaint

The facts in Plaintiffs' Initial Complaint (Doc. 1) are sufficiently related to the facts in Plaintiffs' proposed Supplemental Complaint (Doc. 41-1) such that the Court will allow Plaintiffs' supplemental pleading. *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625. The Court finds that the combination of the overlapping subject matter, the Court's familiarity with that subject matter, and the Court's prior entry of a Preliminary Injunction related to that subject matter favor allowing the supplemental pleading. *See id.*

ii. Motion for Temporary Restraining Order

The Court concludes, for the reasons required under Federal Rule of Civil Procedure 65(d), that Plaintiffs have shown (1) a likelihood of success on the merits of at least one of its claims; (2) that Plaintiffs and their patients will suffer irreparable harm if an injunction is not issued; (3) that the balance of harm favors Plaintiffs; and (4) that the public interest weighs in favor of granting a temporary restraining order. *See Hoover Transp. Servs., Inc. v. Frye*, 77 F. App'x 776, 781 (6th Cir. 2003) ("If [plaintiffs] can show a likelihood of success on the merits of any of the claims, an injunction may issue, subject to consideration of the other factors.").

The law is well-settled that women possess a fundamental constitutional right of access to abortions. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Yet the right to terminate

a pregnancy is not absolute: "[A] state may regulate abortion *before viability* as long as it does not impose an 'undue burden' on a woman's right to terminate her pregnancy." *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992) (emphasis added)). "[T]here 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the '*purpose or effect'* of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (quoting *Casey*, 505 U.S. at 878 (emphasis added in *Hellerstedt*)).

Defendant Yost's letters to Plaintiffs suggest his determination that surgical abortions are non-essential surgeries and thus are subject to the Director's Order. *See* (Doc. 42-1, PageID 807); (Doc. 42-2, PageID 820); (Doc. 42-4, PageID 845). Defendant Yost's statements and order in those letters, without more guidance, implicate Plaintiffs' patients' Fourteenth Amendment rights. In balancing the four relevant factors and at this stage in the proceedings, Plaintiffs have shown a likelihood of success on the merits on its claim that enforcement of the Director's Order as applied to surgical abortion procedures will result in an unconstitutional deprivation of Plaintiffs' patients' Fourteenth Amendment right to substantive due process because enforcement creates a substantial obstacle in the path of patients seeking pre-viability abortions, thus creating an undue burden on abortion access.

Turning to the factor of irreparable harm, Plaintiffs argue that their patients will suffer serious and irreparable harm in the absence of a temporary restraining order and/or preliminary injunction, as the Director's Order prevents Ohio women from exercising their

constitutional right to reproductive freedom as protected by the Fourteenth Amendment.[1] (Doc. 42). Inasmuch as this Court has determined that the Director's Order likely places an "undue burden" on a woman's right to choose a pre-viability abortion, and thus violates her right to privacy guaranteed by the Fourteenth Amendment, the Court further determine that its enforcement would, per se, inflict irreparable harm.

With regard to the remaining factors concerning harm to others and the public interest, Plaintiffs assert that their patients will suffer numerous irreparable harms without injunctive relief and, given the indeterminate length of the Director's Order, some could be forced to forgo an abortion entirely and carry an unwanted pregnancy to term. (Doc. 42). Defendants have not demonstrated to the Court, at this point, that Plaintiffs' performance of these surgical procedures will result in any beneficial amount of net saving of PPE in Ohio such that the net saving of PPE outweighs the harm of eliminating abortion. These favors weigh in Plaintiffs' favor. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012); *Jackson Womens' Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013).

Accordingly, a temporary restraining order is proper. In that regard, and understanding the novel intersection between the foregoing legal precedent in *Roe*, *Casey*, and *Hellerstedt* that emphasizes the Fourteenth Amendment's guarantee of the right to reproductive freedom and Ohio's interest in protecting its citizens during the evolving COVID-19 emergency, the Court holds that Plaintiff healthcare providers are to determine if a surgical abortion procedure can be safely postponed during the pre-viability

[1] While clinics and physicians do not possess a constitutional right to perform abortions, they have standing to assert constitutional challenges on behalf of their patients in the abortion context. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir. 2019).

stage to maximize healthcare resources to combat the COVID-19 pandemic. If a healthcare provider determines, on a case-by-case basis, that the surgical procedure is medically indicated and cannot be delayed, based on the timing of pre-viability or other medical conditions, said procedure is deemed legally essential to preserve a woman's right to constitutionally protected access to abortions.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Plaintiffs' Motion to File a Supplemental Complaint (Doc. 41) is **GRANTED**. It is further **ORDERED** that Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 42) is **GRANTED IN PART,** to the extent that it seeks a temporary restraining order, **and HELD IN ABEYANCE IN PART,** to the extent that it seeks a preliminary injunction. Specifically, it is hereby **ORDERED** that Defendant; Defendant's officers, agents, servants, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order are **TEMPORARILY RESTRAINED** from enforcing the Director's Order against Plaintiffs as described above.

This Temporary Restraining Order is effective upon entry and expires fourteen (14) days thereafter unless dissolved earlier or extended by the Court. There is no bond requirement. *See Molton Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (district court has discretion to issue preliminary injunction with no bond).

IT IS SO ORDERED.

_s/ Michael R. Barrett_____
Michael R. Barrett, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRETERM-CLEVELAND, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 1:19-cv-00360**
	:	
v.	:	
	:	**Judge Michael R. Barrett**
ATTORNEY GENERAL OF OHIO, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' NOTICE OF APPEAL AND REQUEST FOR STAY

Defendants, Ohio Attorney General Dave Yost, Ohio Department of Health, and the State Medical Board of Ohio in the above-captioned action hereby gives notice of their appeal to the United States Court of Appeals for the Sixth Circuit from the Temporary Restraining Order [Doc. 43] entered by the Court on March 30, 2020. Further, Defendants respectfully request that the Court issue a stay of its March 30, 2020 Order pending appeal pursuant to Fed. R. App. P. 8(1)(A).

This appeal is taken under 28 U.S.C. § 1292.

Respectfully submitted this 1st day of April, 2020.

Respectfully Submitted,

DAVE YOST
Ohio Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Heather L. Buchanan
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Assistant Attorney General