No. 20-5408
In the United States Court of Appeals for the Sixth Circuit

ADAMS & BOYLE, P.C., *et al*,
Plaintiffs-Appellees

v.

HERBERT H. SLATERY III, Attorney General and Reporter, *et al,*
Defendants-Appellants

On Appeal from the U.S. District Court, Middle District of Tennessee
No. 3:15-cv-00705

BRIEF OF THE STATES OF KENTUCKY, LOUISIANA, ALABAMA, ALASKA, ARKANSAS, IDAHO, INDIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS' EMERGENCY PETITION FOR REHEARING EN BANC AND ADMINISTRATIVE STAY

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INTEREST OF *AMICI*[1]

The *amici* States of Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia are engaged in responding to the COVID-19 pandemic. With some state-by-state variation, they review, defend, and enforce a wide variety of matters during a state-declared emergency.

The *amici* States have a strong interest in this case because its outcome profoundly and immediately affects both the rule of law and States' ability to enforce reasonable, non-arbitrary public-health orders during this pandemic. *Amici* have an interest in defending good-faith and non-arbitrary actions designed to save lives.

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

ARGUMENT

I. Rehearing en banc exists for precisely this kind of case.

A case should be reheard by the en banc Sixth Circuit when it "involves a question of exceptional importance," Fed. R. App. P. 35(a)(2), and the panel decision amounts to "a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent," 6 Cir. I.O.P. 35(a). It is difficult to imagine a case that better fits this bill than the present one.

The ultimate question at issue here is the extent to which a State—Tennessee, in this instance—can adopt reasonable and non-arbitrary emergency measures to stop the spread of the COVID-19 virus, a once-in-a-century pandemic. This question is of the utmost importance.

The Governor of Tennessee has addressed the pandemic by—among other things—issuing a neutrally applicable executive order calling for a three-week postponement of *all* elective medical procedures in the interest of slowing the spread of COVID-19, freeing up capacity in hospitals, and prioritizing the use of critical personal protective equipment for doctors and nurses treating patients of the virus. In affirming an injunction against the application of this order to abortion

clinics, the panel majority improperly minimized the public health threat facing Tennessee and other states, and also committed multiple legal errors that warrant en banc review. Specifically, the panel majority's decision misapplied the controlling Supreme Court precedent of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), substituted its own policy judgment for that of Tennessee's public health officials and elected policymakers, and generally threatened the delicate balance of power in our system of federalism by showing insufficient regard for Tennessee's sovereign interests to respond to the crisis in a reasonable and non-arbitrary manner. *See Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1001 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc) (finding en banc review to be warranted by a decision in contravention of fundamental federalism principles). On top of this trifecta of constitutional errors, the panel decision also created a conflict with the decisions of the Fifth and Eighth Circuits. *See In re Rutledge*, __ F.3d __, No. 20-1791, 2020 WL 1933122 (8th Cir. Apr. 22, 2020); *In re Abbott*, __ F.3d __, No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

These errors are not small matters. Rather, the panel majority's decision will affect how States in this Circuit continue to respond to the COVID-19 pandemic—a public health crisis that might not completely abate for some time—as well as future crises. And, given the lack of respect that the panel majority's decision showed to States' sovereign interests, it will essentially turn the federal courts in this Circuit into the overseers of States' reasonable and non-arbitrary emergency responses.

II. The district court and the panel majority failed to apply controlling Supreme Court precedent correctly.

States have great leeway in responding to situations of extreme emergency. The district court and the panel majority failed to appreciate this, and, as a result, they failed to apply the correct legal standard—or at least to apply that standard correctly.

The leeway granted to States in emergencies stems from the recognition that—in extreme situations—temporary restrictions that are reasonable and non-arbitrary can be necessary to prevent "liberty itself [from being] lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). In other words, States' broad authority to deal with emergencies is part and parcel with the notion that the United States is a land of *ordered* liberty, not *unrestrained* liberty.

Of course, as Judge Thapar's panel dissent correctly pointed out, States' leeway to deal with emergencies—great though it may be—is not unlimited. *See* Slip op. at 28 (Thapar, J., dissenting). In the well-known case of *Jacobson v. Massachusetts*, the Court established the enduring framework for evaluating the constitutionality of emergency measures taken in response to public health crises. *Jacobson* implicitly acknowledged that states have expanded, temporary authority when dealing with true emergencies, holding that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." 197 U.S. at 27. But, *Jacobson* also recognized that while a state's authority might be greater in emergencies, it is not unlimited. Specifically, an emergency restriction on citizens is unconstitutional when it has "no real or substantial relation" to addressing the emergency, or is "beyond all question, a plain, palpable invasion of rights secured by [the Constitution]." *Id.* at 31 (citations omitted). In other words, *reasonable* measures that have a real and substantial relation to the emergency are constitutional, but "arbitrary and oppressive" measures

are not.[2] *Id.* at 38.

The Tennessee executive order at issue in this case easily meets the *Jacobson* standard. Inexplicably, however, the district court failed to even mention this standard, much less attempt to apply it.[3] And, while the panel majority at least acknowledged the *Jacobson* standard, it did not apply it faithfully. Most notably, the panel majority concluded that the Tennessee executive order does not have a real and substantial relation to the State's public health goals because—in the panel majority's view—postponing elective abortions would only save a "paltry" amount of personal protective equipment, and abortions carry little risk of COVID-19 transmission because they involve only a "limited amount

[2] For example, a state cannot attempt to stem the spread of an infectious disease by shutting down religious services that are conducted responsibly and in compliance with neutral social-distancing measures while arbitrarily allowing other establishments, like retail stores, to remain open to the public. *See On Fire Christian Center, Inc. v. Fischer*, __ F. Supp. 3d __, Civil Action No. 3:20-CV-264-JRW, 2020 WL 1820249, at *6–*7 (W.D. Ky. Apr. 11, 2020). Likewise, a state cannot pretextually squelch dissent and protest by arbitrarily excluding citizens from certain public fora.

[3] In an order entered on April 21, 2020, the district court denied Tennessee's motion for a stay pending appeal. The district court expressly cited *Jacobson* in that order, but it did little more than pay lip service to the case. *See* Doc. 252.

of in-person contact." Slip op. at 16. In other words, the panel majority substituted its own policy judgment for that of Tennessee's elected policymakers. In doing so, it acted directly contrary to *Jacobson*'s instruction that it is "no part of the function of a court or a jury to determine which one of two modes [is] likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30; *see also* Slip op. at 29 (Thapar, J., dissenting) (quoting *Jacobson*, 197 U.S. at 30). The panel majority was not at liberty to second-guess the wisdom of the reasonable and non-arbitrary policy decisions of the Tennessee officials who were elected by Tennessee voters to make those decisions.

The recent decisions on this very issue from the Fifth and Eighth Circuits further demonstrate the errors of the district court and the panel majority. *See In re Rutledge*, 2020 WL 1933122; *In re Abbott*, 2020 WL 1911216 ("*Abbott II*"); *In re Abbott*, 954 F.3d 772 ("*Abbott I*"). At issue in these cases are executive orders in Texas and Arkansas that are almost identical to the Tennessee executive order at issue here. Summarizing *Jacobson* in *Abbott I*, the Fifth Circuit articulated the applicable standard:

> 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.

954 F.3d at 784–85 (quotations and citations omitted); *see also In re Rutledge*, 2020 WL 1933122, at *5 (quoting *Abbott I*, 954 F.3d at 784–85). Under this standard, the Fifth and Eighth Circuits found that a temporary postponement of elective abortions is a permissible response to the COVID-19 pandemic. The panel majority erred in failing to follow suit, and its error is one of exceptional public importance, especially given that the current pandemic might not completely abate for some time.

III. The district court's and panel majority's decisions gravely threaten state authority to protect public health.

Federalism is one of the bedrock principles of our Republic. The constitutional design established by the Founders places a limited number of issues within the realm of federal control and leaves the remainder for the states to govern. Among the most important of the issues left to the states is the police power, which is the authority to enact reasonable, non-arbitrary regulations to protect the public health and

safety. *See Jacobson*, 197 U.S. at 25. In times of emergency, this power takes on special importance. In such circumstances, state officials' emergency police-power decisions are not subject to being second-guessed by federal courts so long as the state officials' decisions are reasonable, non-arbitrary, and unoppressive. Federal courts simply are not equipped or authorized to judge the wisdom of those decisions. Specifically, a federal court is not "justified in disregarding the action of the [Governor] simply because in its opinion that particular method was—perhaps, or possibly—not the best." *Abbott II*, 2020 WL 1911216, at *13 (quoting *Jacobson*, 197 U.S. at 35). But that is essentially what the district court and the panel majority did in this case. And, in doing so, they failed to show adequate respect for Tennessee's police power and effectively usurped that power for the federal courts. *See id.*

The panel majority's approach to the *Jacobson* standard will essentially turn the federal courts in this Circuit into the overseers of all aspects of the States' reasonable and non-arbitrary emergency responses, thereby undermining the States' ability to exercise their own police power. Indeed, it effectively appropriates that power to a branch of the federal government, which is obviously inappropriate because no part of

the federal government has any general police power. *See* U.S. Const. amend. X; *see also* The Federalist No. 45, at 260–61 (James Madison) (Clinton Rossiter ed., 1961, reprinted 1999).

CONCLUSION

The Court should grant the Appellants' emergency petition for en banc review to correct the precedent-setting errors of exceptional public importance contained in the panel majority's decision, and it should also grant an administrative stay of the district court's preliminary injunction while it considers the Appellants' petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because the brief contains 1,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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