No. 20-6045

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SOUTH WIND WOMEN'S CENTER LLC, D/B/A/ TRUST WOMEN OKLAHOMA CITY, *on behalf of itself, its physicians and staff, and its patients, et al.*,

Plaintiffs-Appellees,

v.

J. KEVIN STITT, *in his official capacity as* Governor of Oklahoma, *et al.*,

Defendants-Appellants.

On appeal from the United States District Court
for the Western District of Oklahoma
The Hon. Charles Goodwin, No. 5:20-CV-277-G

BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH DAKOTA, SOUTH CAROLINA, TEXAS, TENNESSEE, AND WEST VIRGINIA AS *AMICUS CURIAE in support of* OKLAHOMA'S

MOTION TO STAY TEMPORARY RESTRAINING ORDER PENDING APPEAL AND, ALTERNATIVELY, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF THIS MOTION

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INTEREST OF AMICI

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

The *amici* States are directly 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 rare emergency underlying this case—the pandemic spread of COVID-19—is an enormously dangerous situation affecting virtually every aspect of American life.

The *amici* States have a strong interest in this case because its outcome will profoundly and immediately affect States' ability to enforce gubernatorial executive orders and public-health orders during this rapidly developing pandemic. *Amici* can provide the Court with a better understanding of the breadth and depth of this existential fight.

SUMMARY OF ARGUMENT

By constitutional design, federal courts are removed from responsibility for day-to-day public-health decisions during disasters such as pandemics—and from the consequences of those difficult decisions. Instead, States and their elected officials bear constitutional responsibility for those decisions and their consequences. The daily-growing COVID-19 death toll acutely illustrates why no federal court should assume the grave responsibility of substituting its judgment for the considered judgment of

Governors and their expert public-health advisors during an emergency. Yet the district court did exactly that, in direct contravention of Supreme Court precedent.

This Court should immediately stay the district court's temporary restraining order because the district court neither interpreted nor applied the law correctly; the Plaintiffs' evidence was wholly insufficient; and the ruling causes immediate irreparable harm not only to Oklahoma, but to all states engaged in this fight. It was well within Oklahoma's power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary.

According to statistics kept by Johns Hopkins University, 16,267 Americans have died from COVID-19 as of April 9, 2020.[1] That number climbs daily. Every day, governors report numbers: people who are infected, people who have died, people who have been hospitalized, and people who are in ICU. States are counting stocks of personal protective equipment (PPE), ICU beds, and ventilators, fearing they will run out. Convention centers and parks have been transformed into field hospitals.[2] States are taking unprecedented action to protect people from the COVID-19 threat. Amici

[1] Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited Apr. 9, 2020 at 4:14 p.m.).

[2] T. Pearce, Emergency Field Hospitals Popping Up Across the Country for Corona Virus Patients, https://www.washingtonexaminer.com/news/emergency-field-hospitals-popping-up-around-the-country-for-coronavirus-patients

have an interest in defending these good-faith and nonarbitrary actions designed to save American lives.

ARGUMENT

I. A STAY IS PROPER BECAUSE OKLAHOMA IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS.

The States' police power "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 U.S. 133, 136 (1894). "The power to protect the public health lies at the heart of [that] power." *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1096-97 (D.C. Cir. 1968). Indeed, protection of the public health "has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations." *Id.*

And where necessity warrants, States may go further still. *See, e.g.*, *United States v. Caltex*, 349 U.S. 149 , 154 (1953); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879). The Supreme Court has long-recognized the scope of the state's power is at its zenith during an emergency, and it is "not within the power of the federal court to usurp the functions of another branch of government" by reweighing the risks and benefits of emergency actions. *Jacobson*, 197 U.S. at 27-28, 36-37; *see also, Compagnie Francaise*, 186 U.S. 380 (holding quarantine around New

Orleans did not violate the Fourteenth Amendment even as applied to healthy individuals). The United States thankfully has had limited experience with epidemics during the last 100 years, but *Jacobson* and *Compagnie Francaise* remain good law. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997) (recognizing Fourteenth Amendment liberties may be restrained even in civil contexts, relying on *Jacobson); Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (State is entitled to latitude in its prophylactic efforts to contain incurable and often fatal disease.)

The States' vast power to deal with epidemics is unsurprising. The Fourteenth Amendment does not ban the deprivation of any right; rather, it provides that no State shall "deprive any person of life, liberty, or property without due process of law." The Supreme Court has made clear that even fundamental rights may yield in the face of a sufficiently compelling government interest. *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (Second Amendment); *Michigan v. Fisher*, 558 U.S. 45 (2009) (Fourth Amendment); *Hendricks*, 521 U.S. at 366 (civil commitment); *Zemel v. Rusk*, 381 U.S. 1, 14-17 (1965) (substantive due process right to travel).

The district court gave only lip service to precedent requiring deference to the State's judgment. Instead, it incorrectly re-wrote the Governor's executive order to grant broad exceptions that undermine the order's effect and substituted its own judgment about how to protect Oklahomans.

Nothing in *Roe v. Wade,* 410 U.S. 113 (1973), permitted the district court to substitute its judgment for that of officials charged with responding to a pandemic, or exempts abortion providers from compliance with generally applicable public-health orders in the face of a grave public-health crisis. Indeed, *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1993), and *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), all *cite* to *Jacobson* for the long-held proposition that in certain circumstances state interests may be compelling enough override individual rights. And none of those cases involved a state's postponement of some abortion procedures in response to a public-health crisis—the context of *Jacobson*. To the contrary, in *Roe*, the Supreme Court cited *Jacobson* as an example of the Court's refusal to recognize an "unlimited right to do with one's body as one pleases." 410 U.S. at 154. Likewise in *Casey*, the plurality cited *Jacobson* as an example of the Court's balance between "personal autonomy and bodily integrity" and "governmental power to mandate medical treatment or to bar its rejection." 505 U.S. at 857. And in *Carhart*, the Court cited *Jacobson* to show it had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 163.

Roe, *Casey*, and *Carhart* not only do not raise abortion rights above all other constitutional rights, but they affirm abortion rights are *not* exempt from *Jacobson's* framework. Thus, "by all accounts, then, the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*." *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir. April 7, 2020)

(granting mandamus and ordering district court to vacate TRO creating an abortion-specific carve out to Texas public-health order).

II. THE DISTRICT COURT WAS CLEARLY WRONG TO CARVE OUT EXCEPTIONS TO OKLAHOMA'S ORDER BASED UPON THE TESTIMONY OF INDIVIDUALS WHO ARE NOT QUALIFIED TO SECOND-GUESS STATE OFFICIALS.

Plaintiffs contended, and the district court apparently agreed, that their judgment should override the judgment of subject matter experts at every level of government. In short, Plaintiffs asked the district court to "usurp the functions of another branch of government," *Jacobson,* 197 U.S. at 28, by reweighing the risks and benefits of Governor Stitt's emergency order. That is precisely what *Jacobson* forbids.

The Governor and his advisors make decisions based upon the input of a wide variety of other federal, state, and local officials—including the President of the United States, the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, and the federal COVID-19 Task Force—while also evaluating related consequences. Plaintiffs, in contrast, offer self-interested declarations by non-experts who bear no responsibility to the public for the consequences. The two business manager declarants — Julie Burkhart and Brandon Hill — have no medical expertise. Dr. Burns apparently never completed a residency. Burns Decl. ¶¶ 2-3. And Dr. Schivone is a gynecologist. Schivone Decl. Exh. 1. Not one is qualified to opine on the risk the novel COVID-19 virus poses to their patients or the public, much less

substitute their judgment for that of officials tasked with protecting the general public health. *See Ralston v. Smith & Newphew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue."); *see also Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp. 2d 1287, 1293 (N.D. Okla. 2000) (rejecting contention that a "medical degree is qualification enough"). At most, they offer a generalized *ipse dixit* on the individualized risk of abortion under ordinary circumstances—and current circumstances are anything but ordinary. And in any event, they not only do not have the same information as Oklahoma officials tasked with responding to the epidemic, they do not bear responsibility for the potentially deadly consequences of their *ipse dixit* opinions.

Plaintiffs concede the current threat is serious and it "will test the limits of the healthcare system [that is] already facing a shortage of [PPE] for healthcare providers." Mem. (ECF 16) at 4. Indeed, Plaintiffs admit "***[t]he rate of infection is skyrocketing***." *Id.* at 7 (emphasis added). Yet Plaintiffs use "minimal" PPE, raising grave concerns that they are spreading the virus. CHPPGP, for example, reuses the same PPE in multiple procedures over the course of a day. Hill Decl. (ECF 16-7) ¶ 10. Dr. Schivone travels 500 miles between St. Louis and Oklahoma City, which she admits "carries significant health risks because [a traveler] may be exposed to the virus along the way." Schivone Decl. (ECF 16-4) ¶¶ 4, 34. Disturbingly, as Dr. Schivone recognizes, the risk is not only to her, but to "the community . . . who may be exposed to the virus"

by her, *e.g.*, her patients. *Id.* at ¶ 34; *see also* Burns Decl. (ECF 16-5) ¶ 35 (declaring that "interstate travel" "increases the likelihood that [the traveler] may be exposed to COVID-19"). The district court clearly erred by relying on these unqualified and insufficient opinions as a basis to re-write the Governor's order.

III. THE COURT'S RULING GRAVELY THREATENS STATE AUTHORITY TO PROTECT PUBLIC HEALTH.

The district court's exceptions to the Governor's order threaten to expose more people to COVID-19 and undermine Oklahoma's efforts to stop its spread. But the harm caused by second guessing state officials during an ongoing pandemic response goes well beyond those exceptions. The court's action broadly undermines compliance, thereby prolonging the epidemic and increasing death tolls. There is no effective remedy for this harm. This is precisely why the Supreme Court—and virtually every state court to ever consider the issue—recognizes that state power is at its zenith during an epidemic. Spotty compliance by those who claim special exemptions contributes to higher exposure and death rates and encourages additional noncompliance.

This case is not occurring in isolation. Governors and their public health experts must have the flexibility to address the rapidly changing needs in each of their states. Almost every state has now issued similar emergency restrictions on medical procedures that are not immediately medically necessary. The district court nevertheless overruled Oklahoma's decisions based on evidence that actually demonstrates a threat to the

plaintiffs' patients, staff, and the public. Plaintiffs' declarations proved they should not be performing *any* procedures while a deadly virus is spreading through the nation.

Our constitutional structure vests state officials with the duty and power to protect the public and address the downstream consequences of their carefully calibrated decisions. The federal judiciary is uniquely unsuited to second-guessing the judgment of infectious disease experts, public-health officials, and state disaster managers. Upholding exceptions to the Governor's orders for Oklahoma abortion providers only further undermines efforts to obtain compliance from other segments of society. Plaintiffs' claims of exceptionalism underscores the challenge states face in stemming the spread of the virus.

Federal district courts should not be hailing senior state officials into court in the middle of an emergency, re-writing state public health orders based on a limited factual record, and creating exclusions that threaten the public as a whole. It was well within the State's power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary.

CONCLUSION

The district court substituted its judgment for that of state public-health officials based upon a flawed interpretation and application of Supreme Court jurisprudence and a factually deficient record. It re-wrote emergency orders issued by the Governor of Oklahoma under conditions expressly authorized by Oklahoma law, when his powers are at a zenith, and that were issued to address an undisputed grave threat to

public health. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). The district court legally and factually erred by permitting exceptions for elective medical procedures that, in the judgment of both State and Federal experts, pose a risk to the public, staff, and patients and compete with the State itself for critical resources. This Court should grant the stay.

Respectfully submitted,

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I. Certificate of Compliance With Rule 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because:

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s/ Tyler R. Green

II. ECF Certifications

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;

2. hard copies of the foregoing brief required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and

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s/ Tyler R. Green

III. Certificate of Service

I hereby certify that on 9 April 2020, a true, correct, and complete copy of the foregoing Brief of 18 States as *Amici* Curiae in support of Oklahoma's Motion to Stay Temporary Restraining Order Pending Appeal and, Alternatively, for a Temporary Administrative Stay Pending Consideration of this Motion was filed with the Court and served on all counsel of record via the Court's ECF system.

s/Tyler R. Green