IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

YASHICA ROBINSON M.D., et al.,	§	
	§	
Plaintiffs,	§	
	§	Civil Action No. 2:19-cv-365-MHT-JTA
v.	§	
	§	
STEVEN MARSHALL, in his official capacity as Alabama Attorney General, et al.,	§	
	§	
Defendants.	§	

STATEMENT OF INTEREST
OF THE STATE OF ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, TENNESSEE, UTAH, AND WEST VIRGINIA

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BACKGROUND

In the span of only two weeks, the COVID-19 virus has upended life as most people know it. Louisiana has gone from one confirmed case on March 9 to 3,540 active cases and 151 deaths on March 29, with a tenfold increase in only *10 days*.[1] The Governor of Louisiana is standing up a 1,000 bed field hospital in a New Orleans convention center, while health care personnel face the real possibility of systemic collapse of the health care system.[2]

Washington, New Jersey, Michigan, and Illinois are experiencing exponential growth in COVID19 cases. Other states are on similar tracks. As of Sunday, March 29, the United States had registered approximately 125,000 COVID-19 infections and 2,200 deaths.[3] Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Disease and a now-familiar face to Americans everywhere, warned that the outbreak could kill 100,000–200,000 Americans. Officials throughout the country are warning of shortages of personal protective equipment ("PPE") used to protect healthcare providers and prevent the spread of infections.

COVID-19 appears to be transmissible by asymptomatic and presymptomatic carriers.[4] The virus has an incubation period of up to 14 days, during which "[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection."[5] The virus can remain on surfaces many days[6], and patients may remain infectious for weeks after their symptoms subside.[7] Not surprisingly, healthcare professionals have tested positive

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[1] http://ldh.la.gov/Coronavirus/
[2] https://www.wwltv.com/article/news/health/coronavirus/1000-beds-at-convention-center-field-hospital-to-help-with-surge-capacity/289-d8a4bfc1-ffa6-4124-a545-40961d5fd64d
[3] https://www.reuters.com/article/us-health-coronavirus-usa/us-virus-deaths-could-reach-200000-fauci-warns-as-medical-supplies-run-short-idUSKBN21G0ME
[4] https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s_cid=mm6912e3_w
[5] https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30374-3/fulltext
[6] https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s_cid=mm6912e3_w
[7] https://www.thelancet.com/journals/langas/article/PIIS2468-1253(20)30083-2/fulltext

even while going to great lengths to protect themselves,[8] and healthcare facilities have been identified as a vector for COVID-19 transmission.[9]

Citing the grave threat posed by the epidemic, the President declared a national emergency March 13, 2020.[10] He then invoked the Defense Production Act to prioritize and allocate medical resources, to prevent hoarding of resources, and "to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators."[11] At the same time, the Centers for Disease Control and Prevention ("CDC") issued guidance that healthcare providers should "delay all elective ambulatory provider visits" and "delay inpatient and outpatient elective surgical procedural cases."[12] The CDC explained that doing so "can preserve staff, personal protective equipment, and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic." Indeed, the CDC issued detailed guidance on optimizing the supply of PPE under both contingency and crisis conditions.[13] The Centers for Medicare and Medicaid Services ("CMS") issued detailed recommendations, prefaced as:

> To aggressively address COVID-19, CMS recognizes that conservation of critical resources such as ventilators and Personal Protective Equipment (PPE) is essential, as well as limiting exposure of patients and staff to the SARS-CoV-2 virus. Attached is guidance to limit non-essential adult elective surgery and medical and surgical procedures, including all dental procedures. These considerations will assist in the management of vital healthcare resources during this public health emergency.[14]

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[8] https://www.ajc.com/news/state--regional-govt--politics/nine-doctors-positive-for-coronavirus-according-gupta/2pBtOgGO0ibyUgGX0wAR4O/

[9] https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080

[10] https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/

[11] https://www.whitehouse.gov/presidential-actions/eo-delegating-additional-authority-dpa-respect-health-medical-resources-respond-spread-covid-19/

[12] https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/index.html

[13] https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html

[14] https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf

The CMS concern with PPE shortages was palpable: it noted even "dental procedures use PPE," and "to reduce the risk of spread and to preserve PPE, we are recommending that all non-essential dental exams and procedures be postponed until further notice." Heeding that advice, healthcare providers have deferred a wide variety of procedures, even life-saving transplants.[15]

Consistent with the declaration of a national emergency, Alabama's Governor declared a state of emergency in connection with the COVID-19 pandemic.[16] On March 27, 2020, in amending an earlier order, the State Health Officer certified that "the appearance of COVID-19 in the State poses the potential of widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number of people" and "the State Board of Health has designated COVID-19 to be a disease of epidemic potential, a threat to the health and welfare of the public, or otherwise of public health importance."[17]

In light of the state of emergency, and in reliance on guidance issued by the CDC, the State Health Officer prohibited gatherings of more than 10 people,[18] closing schools, entertainment venues, retail stores, and beaches,[19] and postponing non-emergency medical care.[20] The March 27 order provided that "all dental, medical, or surgical procedures shall be postponed until further notice," with exceptions made for

> Dental, medical, or surgical procedures necessary to treat an emergency medical condition. For purposes of this order, "emergency medical condition" is defined as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected by a person's licensed medical provider to result in placing the health of the person in serious jeopardy or causing serious impairment to bodily functions or serious dysfunction of bodily organs.

[15] https://www.wsj.com/articles/coronavirus-threat-forces-longer-waits-for-some-organ-transplant-patients-11585137601
[16] https://governor.alabama.gov/newsroom/2020/03/state-of-emergency-coronavirus-covid-19/
[17] https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-032720.pdf
[18] *Id.*
[19] *Id.*
[20] *Id.*

> [And] Dental, medical, or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment.[21]

ARGUMENT

I. STATES HAVE VAST POWER TO PROTECT THE PUBLIC FROM EPIDEMICS.

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) ("[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."); *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879) ("There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. The rights of necessity are a part of the law.").

Jacobson v. Massachusetts, 197 U.S. 11 (1905), is instructive. In *Jacobson*, Massachusetts authorized a board of health to require vaccination "if, in its opinion, it is necessary for the public health or safety." *Id.* at 12-13. Reciting that "smallpox . . . was prevalent to some extent in the city of Cambridge, and the disease was increasing," the city of Cambridge adopted a mandatory vaccination regulation. *Id.* at 12-13, 27-28. Jacobsen was convicted for refusing to be vaccinated. *Id.* at 21. The Supreme Court rejected his Fourteenth Amendment challenge, explaining that "[u]pon the principle

[21] *Id.*

of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Pointing to the State's authority to conscript for military service and to forcibly quarantine its citizens, the Court held that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to . . . restraint." *Id.* at 29. The Court acknowledged the "power of a local community to protect itself against an epidemic . . . might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere[.]" *Id.* at 28. But where the existence of the emergency was undisputed, the Court declined to "usurp the functions of another branch of government" by reweighing the risks and benefits of the emergency action. *Id.* at 27-28, 36-37.

Similarly, in *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902), the Supreme Court upheld a geographic quarantine of several parishes around New Orleans. That quarantine sought to "exclude healthy persons from a locality infested with a contagious or infectious disease." *Id.* at 385. "The object in view was to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same." *Id.* The quarantine was held not to violate the Fourteenth Amendment. *Id.* at 387, 393.

The United States has thankfully had limited experience with epidemics for over 100 years. *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016), for example, is one of only a handful of postwar cases addressing the power of a State to quarantine. But that case makes clear that *Jacobson* and *Compagnie Francaise* remain good law. In *Hickox*, a nurse who returned to New Jersey after caring for ebola patients was quarantined and sued State officials alleging Fourth and Fourteenth

Amendment violations. *Id.* at 584. The court began by pragmatically observing "[t]he State is entitled to some latitude . . . in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease." *Id.* at 584. The court then explained that although "the federal government has the power to declare and enforce a quarantine," it generally plays "a supportive role, with the States taking the lead in quarantine matters." *Id.* at 590-91.

With respect to ebola, the CDC had issued guidance that healthcare workers who had provided care to ebola victims were at higher risk for viral exposure and suggested that "additional precautions may be recommended." *Id.* at 590. Ms. Hickox was detained pursuant to an executive order by the New Jersey Governor that was consistent with the CDC's guidance. *Id.* at 585, 591. The court rejected Hickox's contention "that she wore protective gear and took appropriate measures to prevent the spread of disease." *Id.* "The authorities were not required . . . to take it on faith that Ms. Hickox had been 100% compliant, or the measures 100% effective." *Id.* Citing *Jacobsen*, and *Compagnie Francaise*, the court found no unconstitutionality. *Id.* at 591-94. It concluded that "[t]o permit these constitutional claims to go forward . . . would be a judicial second-guessing of the discretionary judgments of public health officials acting within the scope of their (and not [the court's]) expertise." *Id.* at 594.

That the States' vast power to deal with epidemics has been repeatedly upheld 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." Even as to fundamental rights, "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Where the government's interests are sufficiently compelling, even the

most fundamental rights will yield. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited."); *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (upholding civil commitment of persons who pose a danger to others); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.").[22]

II. PLAINTIFFS ARE NOT ENTITLED TO A CATEGORICAL EXEMPTION FROM EMERGENCY RULES, ISSUED UNDER RAPIDLY-DEVELOPING EMERGENCY CONDITIONS, THAT THREATEN THE HEALTH AND SAFETY OF MILLIONS.

Plaintiffs concede COVID-19 "has reached every state in the country," and that "[f]ederal and state officials and medical professionals expect a surge of infections that will test the limits of an increasingly burdened health care system." Mem. of Law in Support of TRO, at 4. They further concede that their abortion clinics use PPE, including both gloves and, during the COVID-19 epidemic, masks. Robinson Decl. (Ex. 1, at 5) ¶ 32. Plaintiffs concede that the CMS has recommended considering the effect of any medical action on supply of PPE, out of fear of shortages. Mem. of Law in Support of TRO, at 15. Plaintiffs nevertheless ask this Court to "usurp the functions of another branch of government," *Jacobson,* 197 U.S. at 28, by reweighing the risks and benefits of Governor Ivey's emergency declaration and the March 27 Order issued by the State Health Officer. That the court cannot do. *Id.* at 28, 39.

Plaintiffs spend pages rehashing the existence of a right to abortion and demand a blanket exemption—not granted for any other provider or procedure—from a facially neutral regulation that is applicable to all surgeries and medical procedures.[23] That regulation complies with *Jacobson*,

[22] This Court has already found that a fundamental right must yield to the public interests: it has twice continued various criminal proceedings after finding continuances due to COVID-19 outweigh a defendant's right to a speedy trial.

[23] *Jacobson* contemplates individual, as-applied challenges even to emergency public health orders. 197 U.S. at 38-39. Modern abortion law is in accord. *See generally Ayotte v. Planned Parenthood of N. New*

197 U.S. at 38-39, and provides a full exception for emergency procedures. Plaintiffs nevertheless insist they are entitled to an extraordinary exception and that *their* judgment should override the judgment of subject matter experts at *every level of government* that the health of the public as a whole, medical provider health, and PPE should be protected and conserved, together with the judgment that delaying medical procedures will protect the public from the spread of a deadly disease.

Professional bodies have emphasized that patient-specific judgment is what the situation requires. The American College of Surgeons emphasizes that "[p]lans for case triage should avoid blanket policies and instead rely on data and expert opinion from qualified clinicians and administrators, with a site-specific granular understanding of the medical and logistical issues in play."[24] And while doctors all over the country are responsibly exercising such case-specific judgment, Plaintiffs' doctors apparently contend they cannot be required to exercise patient-specific judgment as to the medical necessity of an abortion. That conclusion is not only medically unsupportable, but also irresponsible and dangerous.

III. THIS CASE POSES A GRAVE THREAT TO STATE AUTHORITY TO PROTECT PUBLIC HEALTH.

This case is not occurring in isolation. Almost all states have issued similar emergency restrictions on medical procedures that are not immediately medically necessary. At the same time, our States are experiencing this disaster at different levels of development. Governors, in consultation with public health experts and federal experts, simply must have the flexibility to address the rapidly changing needs in each of their states. The federal judiciary, moreover, is uniquely unsuited to the task it is being asked to undertake—second-guessing the judgment of

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England, 546 U.S. 320 (2006). Plaintiffs do not pursue that option, and instead pursue a broad challenge that is adverse to the interest of at least any patient who would be able to pursue such an individual challenge. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004) (third party standing vitiated by potential conflict of interest).

[24] https://www.facs.org/covid-19/clinical-guidance/triage

infectious disease experts, public health system and state disaster managers, and officials expressly tasked with protecting the health and safety of their state's residents from a deadly contagious virus.

Plaintiffs specifically ask this Court to interfere in Alabama's decisions on the basis of weak evidence that actually demonstrates the threat to the clinics patients, staff, and the public as a whole. Plaintiff Yashica Robinson works at a clinic which provided 1,939 abortions in 2019, of which 1,207 were surgical abortions. Robinson Decl. (Ex. 1, at 5) ¶ 14. Yet she insists that the clinic does not use significant amounts of PPE. *See, e.g.*, Robinson Decl. ¶ 30 ("Neither medication nor surgical abortion requires extensive amounts of PPE"); ¶ 31 ("We do not use N-95 masks to perform abortions"), raising concerns about the adequacy of staff and patient protection. Later in her declaration, however, Robinson admits that surgical abortions do require some PPE, such that increased surgical abortions will require "correspondingly greater amounts of clinician-patient contact and PPE." Robinson Decl. ¶ 47.

Given her volume of patients, Robinson (and the other Plaintiffs) have likely treated at least some individuals infected with COVID-19, even if asymptomatic. Far from providing grounds for an exception to Alabama's public health order, Plaintiffs declarations prove they should not be performing any procedures while a deadly virus is spreading through the nation.[25] Abortion procedures will indeed drain medical resources required to fight this pandemic.

Regardless, in the middle of *responding* to this threat as it unfolds, States should not be required to provide blanket exclusions to public health orders when such exclusions undoubtedly threaten the public as a whole, and no federal court should assume that grave responsibility. 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.

[25] Plaintiffs declarations are from individuals who are not experts in epidemiology or infectious disease and who offer no opinions on these issues. Their backgrounds and training are insufficient to even compare with the expert opinions of State and Federal public health officials responding to the pandemic.

CONCLUSION

Plaintiffs invite this Court on a perilous journey. They challenge emergency orders issued by the Governor and State Health Officer of Alabama under conditions expressly authorized by Alabama law, when state government powers are at a zenith, and to address a grave threat to public health. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring). Plaintiffs nevertheless ask this Court to permit medical procedures that, in the judgment of both State and Federal experts, risk further spreading a deadly epidemic. This Court should decline that request.

Dated April 14, 2020

Respectfully submitted,

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