

No. 20-6055

---

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

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

v.

SOUTH WIND WOMEN'S CENTER, et al.,  
*Plaintiffs-Appellees.*

---

Appeal from the United States District Court  
for the Western District of Oklahoma  
Case No. 5:20-cv-277-G

---

***AMICUS CURIAE* BRIEF OF SIXTY-TWO MEMBERS OF THE  
OKLAHOMA SENATE AND HOUSE OF REPRESENTATIVES AND THE  
AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF  
APPELLANTS AND THE STAY OF THE PRELIMINARY INJUNCTION  
AND THE EXPEDITING OF THE APPEAL. FILED WITH CONSENT.**

EDWARD L. WHITE III\*  
ERIK M. ZIMMERMAN  
AMERICAN CENTER FOR LAW  
& JUSTICE



JAY ALAN SEKULOW\*  
*Counsel of Record*  
STUART J. ROTH\*  
JORDAN SEKULOW\*  
BENJAMIN P. SISNEY\*  
OLIVIA F. SUMMERS  
CHRISTINA A. STIERHOFF  
AMERICAN CENTER FOR LAW  
& JUSTICE



\* Admitted to Tenth Circuit Bar

April 23, 2020

*Counsel for Amici Curiae*

**STATEMENT OF PARTIES' CONSENT TO FILING  
PURSUANT TO FED. R. APP. P. 29(a)(2)**

Pursuant to Fed. R. App. P. 29(a)(2), the undersigned counsel states that all parties have consented to the filing of this brief.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel certifies that *amicus curiae*, American Center for Law and Justice, has no parent corporations and issues no stock.

**STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)**

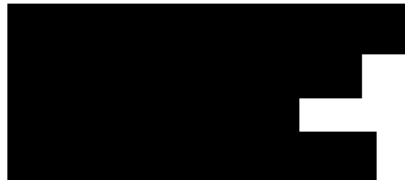
Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned further states:

- (i) No party's counsel authored the brief in whole or in part;
- (ii) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ Benjamin P. Sisney

BENJAMIN P. SISNEY\*

AMERICAN CENTER FOR LAW & JUSTICE



\*Admitted to Tenth Circuit Bar  
*Counsel for Amici Curiae*

## TABLE OF CONTENTS

|  |     |
|--|-----|
| STATEMENT OF PARTIES' CONSENT TO FILING .....  | ii  |
| CORPORATE DISCLOSURE STATEMENT .....   | ii  |
| STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E) .....  | ii  |
| TABLE OF CONTENTS.....   | iii |
| TABLE OF AUTHORITIES.....  | iv  |
| INTEREST OF <i>AMICI CURIAE</i> .....  | 1   |
| INTRODUCTION .....   | 4   |
| ARGUMENT .....   | 6   |
| I. Constitutional Rights Are Not Absolute .....  | 6   |
| II. The Executive Orders Are Constitutional And Do Not Permanently<br>Diminish The Constitutional Rights Of American Citizens..... | 6   |
| a. States have broad authority to protect those within their<br>borders.....   | 6   |
| b. Abortion providers do not fall within a narrow exception to traditional<br>State police powers.....                             | 9   |
| CONCLUSION .....   | 11  |
| CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT .....   | 12  |
| CERTIFICATE OF DIGITAL SUBMISSION .....  | 12  |
| CERTIFICATE OF SERVICE .....   | 13  |

## TABLE OF AUTHORITIES

| <b>Cases:</b>  | <b>Page(s):</b> |
|--|-----------------|
| <i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....   | 5               |
| <i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007) .....   | 9, 10           |
| <i>In re: Abbott</i> , No. 20-50264, 2020 U.S. App. LEXIS 10893<br>(5th Cir. Apr. 7, 2020) .....                 | 3, 5, 6, 7      |
| <i>In re: Rutledge</i> , No. 20-1791 (8th Cir. Apr. 17, 2020) .....  | 3, 4, 8         |
| <i>Jacobsen v. Massachusetts</i> , 197 U.S. 11 (1905).....   | 6, 7            |
| <i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> ,<br>508 U.S. 384 (1993) .....                       | 2               |
| <i>Lawton v. Steele</i> , 152 U.S. 133 (1894).....   | 7               |
| <i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992) .....   | 9               |
| <i>Pleasant Grove City v. Summum</i> , 555 U.S. 460 (2009).....  | 2               |
| <i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944) .....   | 5               |
| <i>Robinson v. Marshall</i> , No. 20-11401 (11th Cir. Apr. 16, 2020).....  | 3               |
| <i>Roe v. Wade</i> , 410 U.S. 113 (1973).....  | 9               |
| <i>S. Wind Women’s Ctr. v. Stitt</i> , No. 20-6045, 2020 U.S. App. LEXIS 12051<br>(10th Cir. Apr. 8, 2020) ..... | 3               |
| <i>Van Orden v. Perry</i> , 545 U.S. 677 (2005) .....  | 3               |
| <i>Whole Woman’s Health v. Hellerstedt</i> , 136 S. Ct. 2292 (2016) .....  | 2               |

## **INTEREST OF *AMICI CURIAE***

*Amici curiae* are sixty-two (62) elected Members of the Oklahoma Senate and Oklahoma House of Representatives, including Members holding offices of leadership in both chambers, and the American Center for Law and Justice (“ACLJ”).

*Amici* Members of the Oklahoma Senate are Senate President *Pro Tempore* Greg Treat, Majority Floor Leader Kim David, David Bullard, Larry Boggs, Paul Scott, Dave Rader, Julie Daniels, Greg McCortney, Paul Rosino, Rob Standridge, Roland Pederson, Wayne Shaw, Casey Murdock, Brent Howard, Michael Bergstrom, Roger Thompson, Lonnie Paxton, Mark Allen, Joe Newhouse, Marty Quinn, Gary Stanislawski, Ron Sharp, Chuck Hall, Adam Pugh, Dewayne Pemberton, John Haste, and James Leewright.

*Amici* Members of the Oklahoma House of Representatives are Majority Floor Leader Jon Echols, Jay Steagall, Tom Gann, Kevin West, Denise Crosswhite Hader, TJ Marti, Josh West, Brian Hill, Jim Olsen, Lewis Moore, Kevin McDugle, Marilyn Stark, Sean Roberts, Brad Boles, Randy Randleman, Tammy Townley, Mike Sanders, Kenton Patzkowsky, Garry Mize, Sheila Dills, Mark Vancuren, Tommy Hardin, Mark Lepak, Lonnie Sims, Tammy West, Jim Grego, David Smith, Chris Sneed, Dustin Roberts, Chris Kannady, Jeff Boatman, Nicole Miller, Trey Caldwell, Justin JJ Humphrey, and Rhonda Baker.

*Amici* legislators are involved in a wide variety of matters relating to Oklahoma's state-declared emergency and the Appellants' response thereto, including but not limited to communication with and assistance to constituents, the utilization of funds, and securing the public welfare. The COVID-19 pandemic is an enormously dangerous situation impacting virtually every aspect of the lives of *amici* and their constituents.

*Amici* legislators have a direct interest in this case because the Court's disposition of the issues will affect the ability of their constituents to access critical services, but also the ability of Oklahoma's executive offices to respond as effectively and efficiently as possible to the emergency. *Amici* work with and alongside the offices of Appellants and offer their perspective to this Court.

*Amicus*, the ACLJ, is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and State courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449

(2007). The ACLJ has participated as an *amicus curiae* in cases addressing issues similar to those this Court will be considering in the instant appeal. *E.g.*, *In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 7, 2020); *In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893 (8th Cir. Apr. 22, 2020); *S. Wind Women's Ctr. v. Stitt*, No. 20-6045, 2020 U.S. App. LEXIS 12051 (10th Cir. Apr. 8, 2020); *Robinson v. Marshall*, No. 20-11401 (11th Cir. Apr. 16, 2020).

The ACLJ is devoted to defending our God-given individual rights and liberties, including those enumerated by the Founding Fathers in the Declaration of Independence and the United States Constitution. The ACLJ is especially dedicated to defending the fundamental human right to life; without it, no other right or liberty can be enjoyed.

*Amici* Members of the Oklahoma Senate and House of Representatives and the ACLJ on behalf of itself and over 151,000 of its members, including over 3,000 Oklahoma residents, support Appellants and urge this Court to stay the preliminary injunction and consider the merits of Appellants' appeal on an expedited basis.

## INTRODUCTION

The enjoined Executive Orders<sup>1</sup> are not a “*ban*” on any constitutional right and do not favor one group over another. The Executive Orders are a temporary

---

<sup>1</sup> The Executive Orders preliminary enjoined by the district court are (1) Governor J. Kevin Stitt's Seventh Amended Executive Order No. 2020-07, (2) Attorney  
(Footnote continues on following page.)

suspension of activities with a definitive end to the suspension (currently set to expire on April 30, 2020) that apply equally to a variety of medical procedures and do not single out abortion. They have been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of Oklahomans and to help alleviate the unnecessary strain on the Oklahoma health system and to preserve personal protective equipment (“PPE”) for those healthcare workers combatting the COVID-19 pandemic.

The preliminary injunction here was entered in error. It improperly usurps the police power of Oklahoma to address the pandemic the State is facing, and it should be reversed as were the injunctions entered in Texas and in Arkansas against similar COVID-19 emergency measures. *In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893 (8th Cir. Apr. 22, 2020) (directing trial court to dissolve the TRO entered against Arkansas’s COVID-19 Emergency Measures); *In re: Abbott*, No. 20-50296, 2020 U.S. App. LEXIS 12616 (5th Cir. Apr. 20, 2020) (directing trial court to vacate the bulk of its TRO entered against Texas’s COVID-19 Executive Order).

*Amici* urge this Court to grant Appellants’ motion to stay the preliminary injunction as well as Appellants’ motion to expedite this appeal and consider the

---

General Mike Hunter’s Press Release explaining that violation of the Executive Order can be a misdemeanor, (3) Governor Stitt’s Second Amended Executive Order No. 2020-13, and (4) Governor Stitt’s Executive Memorandum No. 2020-02. Appellants’ Motion to Stay, Appendix at ECF pg. 1076.



merits of this appeal while the valid Executive Orders remain in full effect. Ultimately, the preliminary injunction should be reversed.

## **ARGUMENT**

### **I. Constitutional Rights Are Not Absolute.**

The Supreme Court has long recognized that constitutional rights – even ones determined to be fundamental – are not absolute and can be subject to regulation and restriction, especially when the government acts to protect a compelling government interest such as protecting Americans’ lives as here. *E.g., District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (constitutional rights are not unlimited).

Particularly relevant to the case at hand is the Supreme Court’s recognition that, although the freedom of religion is among the most fundamental of liberties, “[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease. . . .” *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). There is no reason why the abortion right asserted by Appellees should be given a special, much broader construction than the fundamental rights protected by the First Amendment, which would allow individuals to endanger the lives and safety of others. *See In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 at \*4 (5th Cir. Apr. 7, 2020) (noting that, in times where public safety may demand, a State may restrict rights and the “right to abortion is no exception”).

Broad protection should indeed be given to our sacred liberties, and Americans must remain ever vigilant and hold our government accountable to protect against the encroachment of those liberties. Yet, it should not be impossible for the government to do what is required to protect lives from a grave threat, the likes of which have not been seen in generations. The temporary, necessary restrictions imposed by the Executive Orders are constitutionally sound and should be allowed to remain in full effect while this Court considers the merits of Appellants' appeal. *See id.* at \*23 (explaining that temporary, but drastic government restrictions on rights, such as closing schools, prohibiting churches from holding public worship services, and medical limitations (even those involving abortion), that would be constitutionally intolerable during ordinary times are appropriate and necessary responses to the COVID-19 pandemic).

## **II. The Executive Orders Are Constitutional And Do Not Permanently Diminish The Constitutional Rights Of American Citizens.**

### **a. States have broad authority to protect those within their borders.**

While a global pandemic implicates the interests and powers of both the federal and State governments, the Supreme Court has “distinctly recognized the authority of a *State* to enact quarantine laws and ‘health laws of *every description*[.]’” *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905) (internal emphasis added). In fact, when Jacobsen argued that his Constitutional rights were

violated by the mandatory vaccination requirement imposed by Massachusetts, the Court went so far as to say that

the liberty secured by the Constitution of the United States to every person within its jurisdiction *does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint*. There are manifold restraints to which every person is necessarily subject for the common good.

*Id.* at 26 (internal emphasis added); *see also, e.g., Lawton v. Steele*, 152 U.S. 133, 136 (1894) (concluding that mandatory vaccinations were constitutional and stating that “[police powers are] 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”).

When, as here, there is a question as to the validity of such emergency measures, “[t]he presumption of law is in favor of the validity of the order. . . .” *Union Dry Goods Co. v. Ga. Public Service Corp.*, 248 U.S. 372, 374-75 (1919); *In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 at \*34 (*Jacobson* instructs that “if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities” and not to a court or jury); *accord In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893 at \*17-29. Here, the district court erred in not deferring to the well-reasoned judgment of Oklahoma in how to combat the pandemic and in reaching its own conclusions and limiting the effectiveness of the Executive Orders, which the district court even rewrote in part

by shortening their current expiration date from April 30th to April 24th with regard to surgical abortion. Appellants' Motion to Stay, Appendix at ECF pg. 1088; *see In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 at \*32 (explaining that pursuant to the Supreme Court's *Jacobson* decision courts may not "usurp[] the state's authority to craft measures responsive to a public health emergency"); *accord In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893 at \*17-29.

Abortion, as an issue of health, still squarely rests within Oklahoma's police power. The ongoing crisis stemming from the COVID-19 pandemic presents not only a dire need for the continued protection of Oklahomans and, indeed, everyone in the United States, but also creates a haze of medical uncertainty, of a kind not seen in this country for over a century. Thus, it is within the broad purview of State government to navigate the situation for the health and safety of its citizens. In light of the extraordinary deference courts have given to regulations enacted under State police powers, any exceptions to the above principles must be reserved for the most fundamental and expressly enumerated rights, which does not include abortion.

As the Eighth Circuit explained, under the Supreme Court's *Jacobson* decision, courts may review a "constitutional challenge to a government's response to a public health crisis only if the state's response lacks a real or substantial relation to the public health crisis or it is, beyond all question, a plain, palpable invasion of the right to abortion." *In re: Rutledge*, No. 20-1791, 2020 U.S. App. LEXIS 12893

at \*16 (internal quotation marks omitted). Oklahoma’s Executive Orders fail neither prong and this Court should stay the preliminary injunction pending its consideration of the merits of Appellants’ appeal on an expedited basis.

**b. Abortion providers do not fall within a narrow exception to traditional State police powers.**

Abortion is not a right enshrined in the actual language of the Constitution. In 1973, the Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a right protected, at least to a certain extent, by the federal Constitution. After *Roe*, the Court commented on this new constitutional right by stating that the Court’s rulings after *Roe* had “undervalue[d] the State’s interest in [protecting] potential life.” *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992). The Court has since ruled that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman,” and that the State has an “interest in promoting respect for human life *at all stages* in the pregnancy.” *Gonzales v. Carhart*, 550 U.S. 124, 157, 163 (2007). In sum, the Court has clearly established that there can be constitutional limits on abortion; in other words, abortion is not a right superior to any other right. Accordingly, if the government may place restrictions on abortion to protect the lives of the unborn, it follows that it may also place restrictions, as here, on abortion to save the lives of the born. As the Fifth Circuit pointed out, “[t]here is no constitutional right to any particular abortion procedure.” *In re: Abbott*, No. 20-50296, 2020 U.S. App. LEXIS 12616 at \*28.

In *Gonzales v. Carhart*, the Court explained that there was medical uncertainty regarding the Partial-Birth Abortion Ban Act of 2003 and whether it would impose a significant health risk on women. 550 U.S. at 163. The Court noted that it has “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Id.* Furthermore, it held that “[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.” *Id.* at 164. Consequently, the Court determined that “[t]he medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.” *Id.*

The same principles apply here: Oklahoma had ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that *temporarily* halting certain medical procedures, including abortions, will help save lives. The Executive Orders were enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the people of Oklahoma. They also help alleviate the unnecessary strain on the State’s health system and preserve personal protective equipment (“PPE”) for those healthcare workers combatting the COVID-19 pandemic. The Executive Orders are reasonable and generally applicable measures designed to fight the pandemic. They apply equally to various elective, non-emergency medical

procedures and do not single out abortion. As such, allowing abortions to proceed amidst this crisis, against the Executive Orders, does not fall within a narrow exception to traditional State police powers.

### CONCLUSION

As the Supreme Court has explained, courts should give deference to State entities and their police powers in times of emergency. The district court should have done so here rather than second-guess Oklahoma and enjoin (and even rewrite) the Executive Orders. *Amici curiae*, sixty-two Members of the Oklahoma Senate and House of Representatives and the ACLJ, respectfully request that this Court grant Appellants' motion to stay the preliminary injunction and motion to expedite this appeal. Ultimately, the preliminary injunction should be reversed.

Dated: April 23, 2020

Respectfully submitted,

EDWARD L. WHITE III\*  
ERIK M. ZIMMERMAN  
AMERICAN CENTER FOR LAW  
& JUSTICE

[REDACTED]

\*Admitted to Tenth Circuit Bar

*Counsel for Amici Curiae*

/s/ Benjamin P. Sisney  
JAY ALAN SEKULOW\*  
STUART J. ROTH\*  
JORDAN SEKULOW\*  
BENJAMIN P. SISNEY\*  
OLIVIA F. SUMMERS  
CHRISTINA A. STIERHOFF  
AMERICAN CENTER FOR LAW  
& JUSTICE

[REDACTED]