No. 20-3365

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVE YOST,
ATTORNEY GENERAL OF OHIO, et al.,
Defendants-Appellants,
v.
PRETERM-CLEVELAND, et al.,
Plaintiffs-Appellees.

Appeal from the United States District Court for the
Southern District of Ohio, Western Division, Case No. 1:19-cv-00360
Honorable Michael R. Barrett, Presiding

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLANTS' MOTION TO STAY AND URGING REVERSAL. FILED WITH CONSENT.

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April 3, 2020

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit
Case Number: No. 20-3365 Case Name: Dave Yost, Attorney General of Ohio, et al. v. Preterm- Cleveland, et al.

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Pursuant to 6th Cir. R. 26.1, the American Center for Law and Justice, *amicus curiae*, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   The American Center for Law and Justice is unaware of any.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus, the American Center for Law and Justice ("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); *Van Orden v. Perry*, 545 U.S. 677 (2005).

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. The ACLJ and its members submit this brief in support of Appellants

[1] All parties to this appeal consented to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

urging the Court to stay and reverse the temporary restraining order entered against them, which enjoins Appellants from enforcing the Order from the Director of Ohio's Department of Health ("Director's Order")[2] on non-essential surgeries and procedures.

INTRODUCTION

One of the most essential and fundamental purposes of our constitutional system of government, if not the most essential and fundamental, is to protect the lives of Americans from threats, whether foreign or domestic. As this Court has noted, "protecting the health, safety, and welfare of citizens . . . represents a compelling government interest." *Johnson v. City of Cincinnati*, 310 F. 3d 484, 502 (6th Cir. 2002). Furthermore, the Supreme Court has plainly stated that when a "clear and present danger" of an "immediate threat to public safety" exist, "the power of the state to prevent or punish is obvious." *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940).

Although the federal and State constitutions set forth numerous individual rights that may not be infringed upon without a compelling (or other very important) reason, none of these rights are *absolute*. Law, history, and common sense all recognize that one's exercise of individual liberty may rarely, if ever, extend so far

[2] Ohio Dep't of Health, *Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio* (Mar. 17, 2020).

as to put the lives, health, or property of others in serious jeopardy. That is the root of the core issue in the case at hand: whether a right (here, the abortion right first recognized by the Supreme Court in 1973) is "absolute" such that a State government has no ability to temporarily interfere with the exercise of that right as a necessary means of addressing a deadly pandemic. While Appellees argue that the government restriction at issue is a "*ban*" on a constitutional right, it is no such thing. The Director's Order is a temporary suspension of activities with a definitive end to the suspension, and it has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the American people, including saving their lives. Governments across the country, and the world, are taking drastic, necessary measures in order to stem the tide of countless thousands of deaths. Thus, the Director's Order temporarily suspending abortions in the State of Ohio in order to alleviate unnecessary strain on its health system and to preserve personal protective equipment ("PPE") for those health workers working to combat the COVID-19 pandemic is constitutional.

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.[3] The Court has stated that there is a "duty our system [of government] places on this Court to say where the individual's freedom ends and the State's power begins." *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

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. *Cf. A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 267 n.74 (5th Cir. 2010) (health and safety interests are sufficient "to justify inroads into a student's free expression").

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[3] *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("[T]he Second Amendment . . . right was not unlimited, just as the First Amendment's right of free speech was not."); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (holding that the Free Exercise Clause protects two distinct freedoms: the freedom to believe and the freedom to act; the latter is not absolute).

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 Director's Order are constitutionally sound.

II. The Director's Order is Constitutional and Does Not Permanently Diminish the Constitutional Rights of American Citizens.

a. Background

Today, our country faces a crisis the level of which is unlike any it has faced in many decades. On March 13, 2020, President Trump declared a national emergency in response to the grave threat posed by the COVID-19 epidemic occurring not only in the United States, but across the globe.[4] In his proclamation, President Trump stated: "As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability."[5] Since the date of that proclamation, the

[4] Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).
[5] *Id.*

number of Americans infected by the virus, and who have died because of the virus, has unfortunately increased dramatically.

Shortly thereafter, on March 17, 2020, Dr. Amy Acton, Director of the Ohio Department of Health, issued an order to mitigate the spread of COVID-19 in Ohio after the Governor declared a State of Emergency.[6] The Ohio Department of Health "is a cabinet-level agency, meaning the director reports to the governor and serves as a member of the Executive Branch of Ohio's government" with the responsibility "to protect and improve the health of all Ohioans by preventing disease, promoting good health and assuring access to quality care.[7]" Director Acton issued her proclamation pursuant to her authority under R.C. 3701.13 to "'make special orders . . . for preventing the spread of contagious or infectious diseases'" and to "preserv[e] personal protective equipment (PPE) and critical hospital capacity and resources within Ohio."[8]

b. States have broad authority to protect those within their borders.

In times of emergency as well as times of peace, the States possess substantial police power to protect their residents' health and safety. The Director's Order falls squarely within the constitutionally-recognized police powers of Ohio, and any

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[6] Ohio Dep't of Health, *Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio* (Mar. 17, 2020).

[7] Ohio Dep't of Health, *Who We Are: About Us*, OHIO.GOV, https://odh.ohio.gov/wps/portal/gov/odh/about-us.

[8] Director's Order, *supra* note 6.

temporary infringement of a right to abortion is necessary to protect the health, safety, and lives of *all* Ohioans. Where the safety of all citizens conflicts with the rights of some, the safety of all must prevail. *See Union Dry Goods Co. v. Ga. Public Service Corp.*, 248 U.S. 372, 375 (1919).

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). "Real liberty for all" does not exist in a vacuum, where one person may exercise his or her rights to the injury of others. *Id.*

Furthermore, the Supreme Court has concluded that "[p]ersons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State[]." *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877); *see also Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 628-29 (1898)

(noting that the States never surrendered their police powers to the federal government) (internal emphasis added); *New Orleans Gas Co. v. La. Lights Co.*, 115 U.S. 650, 661 (1885) ("[T]he police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control[] everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. . . . In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government."); *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 389 (1902).

Police powers authorize a variety of actions that can be taken by State authorities. For example, the Court in *Lawton v. Steele* concluded that mandatory vaccinations were constitutional, 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." 152 U.S. 133, 136 (1894).

When there is a question as to the validity of a State's order, "[t]he presumption of law is in favor of the validity of the order. . . ." *Union Dry Goods Co.,* 248 U.S. at 374-75. For example, in *Ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922), the Supreme Court of Illinois denied habeas corpus relief for a

woman quarantined as an asymptomatic carrier of typhoid and concluded that the need to protect the public surpasses any individual liberty interests. The court there emphasized with regard to public health:

> Among all the objects sought to be secured by governmental laws *none is more important than the preservation of public health*. The duty to preserve the public health finds ample support in *the police power*, which is *inherent in the state*, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction equal protection of the laws, *were not intended to limit the subjects upon which the police power of a state may lawfully be asserted*. . . .

Id. (internal citations omitted) (emphasis added).

In other cases, such as *United States v. Shinnick*, 219 F. Supp. 789, 790 (E.D.N.Y. 1963), the courts have found that where a State's actions were in "good faith," they were constitutional. *Id.* at 791 (holding that a woman could be quarantined when she was unable to provide proof of vaccination against smallpox after having traveled to Sweden, a smallpox-infected area). In the case of *Beer Company v. Massachusetts*, 97 U.S. 25, 33 (1877), the Court noted that "[w]hatever differences of opinion may exist as to the extent and boundaries of the police power . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to preservation of good order and public morals."

Abortion, while residing in the tension between morality and health, still squarely rests within the State police power of Ohio. The ongoing crisis stemming

from the COVID-19 pandemic presents not only a dire need for the continued protection of Ohioans and, indeed, of all United States citizens, 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.

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

Even if, hypothetically, there were a handful of fundamental rights that were so important that they ought to trump the government's ability to effectively contain a global pandemic, the abortion right—which did not even exist a half-century ago—would not come close to making the cut.

Abortion is not a right enshrined in the actual language of the Constitution. In 1973, the Supreme Court held in *Roe v. Wade* that abortion is a right protected, at least to a certain extent, by the federal Constitution. 410 U.S. 113 (1973). 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); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). 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*, 550 U.S. at 157, 163. In *Casey*, the Court created a balancing test under which "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, 505 U.S. at 877; reaffirmed in *Gonzales*, 550 U.S. at 146.

In sum, the Court has clearly established that there can be constitutional limits on abortion; in order words, abortion is not a right superior to any other right. While the Court in *Casey* was specifically addressing the government's ability to promote respect for the life of the unborn, that principle applies to the lives of those who have been born, and continues throughout every stage of life. Thus, if the government may place restrictions on abortion to protect the lives of the unborn, it follows that it may also place restrictions on abortion to save the lives of the born.

The Director's Order does not constitute a substantial obstacle to a woman's right to choose abortion. In an effort to combat the COVID-19 pandemic threatening Ohio citizens, the Director's Order was issued on March 17, 2020. The Order applies equally to *all* licensed healthcare professionals and healthcare facilities in the State. The Order is effective until the pandemic no longer exists, and requires that

> all non-essential or elective surgeries and procedures that utilized PPE should not be conducted. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of the patient. Examples of criteria to consider include: a. Threat to the patient's life if surgery or procedure is not performed.[9]

The Order is a temporary suspension of elective procedures, equally applied to all licensed healthcare professionals and healthcare facilities, and thus equally affecting any person who would ordinarily elect to have a surgery or procedure during those four weeks. It is not a "ban," nor does it single out abortion for disfavored treatment. Rather, the Order is a reasonable means of furthering the critically important purpose of combatting the shortage of hospital capacity or personal protective equipment which would hinder efforts to cope with the COVID-19 disaster.

In *Gonzales v. Carhart*, the Court noted 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

[9] Ohio Dep't of Health, *Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio* (Mar. 17, 2020).

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: the State of Ohio has ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that temporarily halting elective procedures will help to save lives. The COVID-19 pandemic is claiming countless lives across the country—and will continue to do so for the foreseeable future—and Appellees' insistence on continuing to perform elective abortions will undoubtedly limit the necessary resources needed to treat COVID-19 patients. Appellees cannot show that elective abortions are more beneficial to the public interest than adequately treating pandemic patients and protecting healthcare workers. As such, allowing abortions to proceed amidst this crisis, against the Director's Order, does not fall within a narrow exception to traditional State police powers.

d. Director Acton was acting within Ohio's police powers when enacting the Order.

The situation presented by COVID-19 would not be the first instance in which a State entity was called upon to exercise its police powers in a time of medical crisis. For example, in *Louisiana v. Texas*, 176 U.S. 1, 13 (1900), the governor of Texas placed an embargo on Louisiana, prohibiting all individuals and common carriers from entering Texas, due to an outbreak of Yellow Fever. *Id.* at 19. While

the Court dismissed the case for lack of subject matter jurisdiction,[10] it noted that "*quarantine laws belong to that class of state legislation which is valid until displaced by Congress,* and . . . such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government." *Id.* at 20-21 (emphasis added). The Court also stated that "it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment." *Id.* at 23.

In giving its reasoning, the Court quoted the case of *Morgan Steamship Co. v. La. Board of Health*, 118 U.S. 455 (1886), in which the Court upheld fees that were collected as part of a quarantine system provided by Louisiana statute for protection of the people from infectious and contagious diseases that may have been transferred by the vessels. *Id.* In that decision, the Court stated that

> [t]he matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Id. at 465.

[10] The controversy was not between the two States directly, as required for original jurisdiction under U.S. CONST. art. III, § 2, because Louisiana brought the suit on behalf of its citizens and not itself. *Id.* at 23.

In sum, the Supreme Court has repeatedly given deference to State entities and their police powers in times of emergency. Therefore, this Court should also give deference to the State of Ohio and uphold the Director's Order.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully asks this Court to grant Appellant's motion for stay and direct the district court to vacate the temporary restraining order entered on March 30, 2020.

DATED: April 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(g) because it contains 3,645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6th Cir. R. 25(f)(2), I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit on April 3, 2020, using CM/ECF. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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