

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

PRETERM-CLEVELAND, et al., :
 :
 Plaintiffs, : **Case No. 1:19-cv-00360**
 :
 v. : **Judge Michael R. Barrett**
 :
 OHIO ATTORNEY GENERAL DAVE YOST, et al., :
 :
 Defendant. :

**DEFENDANTS OHIO DEPARTMENT OF HEALTH, STATE MEDICAL BOARD OF
OHIO, AND OHIO ATTORNEY GENERAL DAVE YOST’S RESPONSE TO
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION (DOC. 42)**

Respectfully submitted,

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INTRODUCTION

We are certainly at war. I don't know any other way to describe it other than to say we are at war. . . In the time of war, we must make sacrifices. . . Right now, we are in a crucial time in this battle. What we do now will slow this invader so that our healthcare system will have time to treat those who have contracted COVID-19 and also have time to treat those who have other medical problems. Time is of the essence.

Ohio Governor Mike DeWine during a March 22, 2020, press conference¹²

Ohio Department of Health Director Dr. Amy Acton and Ohio Governor Mike DeWine, in describing the effect of the COVID-19 virus, have frequently used the wartime analogy. This analogy is truly the only way to capture the scope and proportion of the crisis the COVID-19 virus has caused and how it has affected almost every aspect of every person's life. And, like other leaders during times of war, Dr. Acton has had to make tough decisions and ask that every entity, business, and citizen in Ohio make sacrifices.

Ohioans, like many in the world, have been ordered to stay at home except when conducting essential activities. We must maintain social distancing of at least six feet from any other person and we must not gather together in groups larger than ten people. All K-12 schools are closed. Many businesses have been shuttered or forced to significantly downsize. The loss of jobs is staggering. And every day, Ohioans are forced to cancel or stay home from momentous life events such as graduations, proms, and family reunions.

As great as these sacrifices are, no area is facing a grimmer and more urgent crisis than our healthcare system. As of this writing, Ohio has 5,148 confirmed COVID-19 cases, and 193 Ohioans have died for reasons attributed to the COVID-19 virus. There is

¹ Governor Mike DeWine COVID-19 Update, THE OHIO CHANNEL (Mar. 22, 2020), available at <http://www.ohiochannel.org/video/governor-mike-dewine-3-22-2020-covid-19-update>.

² All websites cited herein were last visited April 7, 2020.

understandably great concern over the healthcare capacity to treat each patient with severe symptoms.

Healthcare workers on the frontlines of battling the COVID-19 virus are facing dangerous shortages of personal protective equipment (“PPE”). PPE include items such as masks, gloves, surgical gowns, and other supplies that protect both healthcare workers and patients. Without PPE, healthcare workers face greater risk of contracting COVID-19, which risks their lives and the lives of patients who may acquire the virus from them, or who may not have healthcare workers available to treat them.

Against this backdrop, Dr. Acton has responded with extraordinary measures to save lives and preserve the precious resources of Ohio’s healthcare system. One such measure, issued on March 17, 2020, declares that all non-essential or elective surgeries and procedures must be postponed. *See* Order to Delay Non-Essential Surgeries in the State of Ohio (Mar. 17, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/order-to-limit-and-or-prohibit-mass-gatherings-in-the-state-of-ohio> (attached as Exhibit A). This order—hereinafter the “Director’s Order”—has the stated purpose of preserving personal protective equipment (“PPE”) “to protect our healthcare workforce during this unprecedented event.”

Compliance with the Director’s Order is critical. All surgeries and other medical procedures require some use of PPE. Every surgery and procedure that can be delayed—regardless of how minor or low risk—helps to conserve PPE and other precious medical resources. Without PPE, healthcare workers face a greater risk of contracting COVID-19. Healthcare workers can spread the virus to others, and are also at risk themselves of serious illness or death, removing them from the frontlines of the battle. The effect of the Director’s

Order is that numerous elective surgeries and other medical procedures are being postponed, and doctors and patients alike are making sacrifices and difficult decisions about what surgeries and procedures are essential. But these decisions have the end goal of preserving PPE and other healthcare resources, and protecting healthcare providers from the risk of contracting COVID-19.

Despite the sacrifices that the Director's Order requires of many Ohioans, Plaintiffs have come to the Court to ask for an exception. Plaintiffs seek the "extraordinary and drastic remedy" of a preliminary injunction to enjoin enforcement of the Director's Order as applied to surgical abortions. Plaintiffs do not appear to dispute the crisis posed by the COVID-19 virus and also claim to be complying with the Director's Order. But by bringing this lawsuit, Plaintiffs ask the Court to re-write the Director's Order by inserting an exception for a type of procedure and provider, thereby overriding Dr. Acton's decision not to offer *any* type of surgery or procedure, or *any* type of provider.

But a different order is unnecessary. Plaintiffs have provided no evidence to show that that a delay on surgical abortions will render all, or even most, women who want an abortion unable to have one. The Director's Order bars only non-essential and elective surgeries. Thus, the Director's Order requires that abortion providers, like all other medical providers in Ohio, exercise patient-specific judgment when complying with the Order. This means doctors must perform medicinal abortions (rather than surgical abortions) where that option is safe and available. It also means that doctors must delay surgical abortions that can be delayed without jeopardizing the patient's ability to secure a pre-viability abortion. Abortion providers can perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights.

Regardless, the Court should reject Plaintiffs' motion for a preliminary injunction seeking a blanket exception for surgical abortions. Plaintiffs cannot establish a likelihood of success on the merits.

First, the Director's Order does not impose an undue burden on a women's right to an abortion under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as the purpose of the Order is not to put a substantial obstacle between a woman and the right. The Director's Order was issued with the sole purposes of protecting healthcare workers on the frontlines of the COVID-19 battle and is supported by ample facts demonstrating its necessity. Delaying non-essential surgeries and procedures *now* is critical to conserving PPE in the immediate near-term. The burden of delaying a surgical abortion is justified in these circumstances.

Second, the Director's Order was clearly not designed to strike at the right to an abortion itself. The Director's Order is generally-applicable and applies to *all* non-essential or elective surgeries and procedures unless they cannot be delayed without "undue risk to the current or future health of a patient." The Director's Order requires that abortion providers exercise the same case-specific judgment that is being asked of all other medical providers.

On balance of all of these factors, the Director's Order is constitutional. The Director's Order requires that abortion providers delay surgical abortions or perform medicinal abortions, when possible, for the purpose of protecting "our healthcare workforce during this unprecedented event." When all of society is making their small and large contributions to fight the pandemic—the cumulative effect of which may save thousands of lives—Plaintiffs offer no reason why elective abortion should not be treated just like everything else and subject to short-term delay.

Finally, the effect of the Director's Order on surgical abortions should be analyzed under the deferential standard of review articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate to prevent and respond to public health crises. The Fifth Circuit Court of Appeals recently applied this standard in upholding a non-essential surgery order in Texas. *In re Abbott*, No. 20-50264 (Apr. 7, 2020) (attached as Exhibit B). The *Abbott* court also relied on *Jacobson* to note that the authority to make decisions about the most effective measures for protecting the public against disease belongs to the legislative and executive branches of state government, not the judiciary.

For these reasons, Plaintiffs cannot carry their overwhelming burden pursuant to *Mazurek v. Armstrong*, 520 U.S. 968 (1997), and have failed to meet the exacting burden required to merit the extraordinary remedy of a preliminary injunction. The Court should reject Plaintiffs' attempt to override Dr. Acton's authority and her efforts to protect Ohioans in this time of unprecedented danger to public health.

FACTS AND BACKGROUND

A. THE COVID-19 VIRUS IS AN INTERNATIONAL PUBLIC HEALTH CRISIS

The novel coronavirus named COVID-19, which is caused by a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious illness or death.³ First identified in Wuhan, China in late 2019, COVID-19 has since spread across the globe with rapid speed, reaching almost every nation and all 50 of

³ Centers for Disease Control and Prevention, What You Need to Know About Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

the United States.⁴ The rapid spread is due to the virus being easily transmissible and transmissible by asymptomatic carriers, which means that infected people can spread the virus without knowing it.⁵ 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.”⁶ The virus can remain on surfaces for many days, and patients may remain infectious for weeks after their symptoms subside.⁷

On March 11, 2020, the World Health Organization (WHO) officially declared COVID-19 to be a pandemic.⁸ “A pandemic is a global outbreak of disease.”⁹ Pandemics result from the emergence of new viruses, as the lack of “pre-existing immunity” facilitates worldwide spread. *Id.* Over the past century, four pandemics have occurred as a result of influenza viruses, but this is the first known pandemic to be caused by a coronavirus. *Id.*

On March 13, 2020, U.S. President Donald Trump declared a national emergency due to the outbreak of COVID-19 in the United States, citing the WHO’s pandemic designation

⁴ WORLD HEALTH ORGANIZATION, ROLLING UPDATES ON CORONAVIRUS DISEASE (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated April 3, 2020).

⁵ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 73, (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2.

⁶ David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 THE LANCET 542, 543 (2020).

⁷WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES (*COVID-19*), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

⁸ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 51, (March 11, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10.

⁹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Situation Summary, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

and 1,645 cases in the United States.¹⁰ As of March 31, 2020, less than three weeks after the declaration of national emergency, the Center for Disease Control (“CDC”) reported COVID-19 exists in every state in the U.S. with 186,101 cases and 2,860 deaths.¹¹

The worldwide devastation and toll on human life is shocking. The White House coronavirus task force projects that 100,000–240,000 Americans may die as a result of COVID-19, even with mitigating measures such as social distancing.¹² To date, there have been over 79,000 deaths attributable to COVID-19, including 10,845 in the United States.¹³

B. OHIO TAKES EXTRAORDINARY MEASURES TO SAVE LIVES IN RESPONSE TO THE COVID-19 VIRUS

On March 9, 2020, Ohio Department of Health Director Dr. Amy Acton announced the first confirmed case of COVID-19 in Ohio, which “confirm[ed] the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.”¹⁴ In response to the presence of this deadly disease in Ohio, Governor Mike DeWine declared a state of emergency the same day. *Id.*

As the Director of the Department of Health, Dr. Acton has extremely broad authority to regulate the spread of infectious diseases like COVID-19. Dr. Acton has “supervision on all matters relating to the preservation of the life and health of the people and [] ultimate authority in matters of quarantine and isolation.” R.C. 3701.13. Dr. Acton may also “make

¹⁰ Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

¹¹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹² Rick Noack, et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, WASHINGTON POST (Mar. 31, 2020), <https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/>.

¹³ WORLD HEALTH ORGANIZATION, CORONAVIRUS (COVID-19), <https://who.sprinklr.com/>.

¹⁴ Ohio Exec. Order No. 2020-01D (Mar. 9, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d>.

special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases. *Id.* And Dr. Acton “shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it.” R.C. 3701.14(A).

Since March 12, 2020, Dr. Acton has made necessary use of her authority to slow the spread of COVID-19 in Ohio. First, she issued an order prohibiting mass gatherings in Ohio. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio (Mar. 12, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limitand-or-prohibit-mass-gatherings-in-the-state-of-ohio>. The order defines a mass gathering as “any event or convening that brings together one hundred (100) or more persons in a single room or single space at the same time, such as an auditorium, stadium, arena, large conference room, meeting hall, theater, or any confined indoor or outdoor.” *Id.* The order urged all persons to “maintain social distancing (approximately six feet away from other people) whenever possible.” *Id.*

As the threat mounted, Dr. Acton took more aggressive steps, including closing K-12 schools in Ohio (many of which serve as polling places) until April, and eliminating visitor access to nursing homes. *See* Order the Closure of all K-12 Schools in Ohio (Mar. 14, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-the-closure-of-all-k-12-school-in-the-state-of-ohio>; Order to Limit Access to Ohio’s Nursing Homes and Similar Facilities, available at <https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/order-to-limit-access-to-ohios-nursing-homes-and-similar-facilities>. It soon became clear that these orders were insufficient to slow the spread of COVID-19 in Ohio. So, on Sunday March 15,

2020, Dr. Acton closed restaurants for dine-in customers and shuttered Ohio’s pubs and bars. *See* Order Limiting the Sale of Food and Beverages, Liquor, Wine, and Beer to Carry-Out and Delivery Only (Mar. 15, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/health-director-order-limit-food-alcohol-sales-to-carry-outdelivery-only>. Each order reiterated the need to maintain social distancing of six feet from other persons. *Id.*

On March 22, 2020, Dr. Acton announced a “stay at home” order limiting mass gatherings, closing schools, closing non-essential businesses, and ordering “all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence.” *See* Order to Stay at Home (Mar. 22, 2020), available at <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf>. This order also prohibits all gatherings of 10 or more people. *Id.* This order has recently been extended through May 1, 2020. *See* Ohio Exec. Order No. 2020-08D (Apr. 2, 2020).

C. COVID-19 HAS A DEVASTATING EFFECT ON THE HEALTHCARE SYSTEM, THE WORST OF WHICH HAS YET TO BE SEEN

The devastating effect of the COVID-19 virus on healthcare systems worldwide cannot be understated. The numbers of people who will need medical attention has the potential to overwhelm already taxed healthcare facilities.¹⁵ To date, 29% of COVID-19 cases in Ohio have resulted in hospitalization. *See* Declaration of Dr. Mark Hurst, M.D., ¶ 5 (attached as Exhibit C). Shortages of critical medical supplies, medications for patients, and personal protective equipment (“PPE”) for healthcare workers are of critical concern. *Id.* ¶¶ 4-7; Declaration of Benjamin Robison, MPH, ¶ 3 (attached as Exhibit D).

¹⁵*Situation Summary*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, recently warned that the outbreak could kill 100,000– 240,000 Americans.¹⁶ Other officials warn of shortages of PPE used to protect healthcare providers and prevent the spread of infections.¹⁷ On April 1, federal officials confirmed the National Strategic Stockpile of PPE was nearly exhausted and the global supply chain for PPE had broken down. *Id.*

According to the WHO, “[t]he chronic global shortage of personal protective equipment is now one of the most urgent threats to our collective ability to save lives.”¹⁸ President Trump has since 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.”¹⁹ And the CDC issued detailed guidance on optimizing the supply of PPE under both contingency and crisis conditions.²⁰

¹⁶ Rick Noack, et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, WASHINGTON POST (Mar. 31, 2020), <https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/>.

¹⁷ N. Miroff, *Protective gear in national stockpile is nearly depleted, DHS officials say*, WASHINGTON POST (Apr. 1, 2020), https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3_story.html; Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Strategies to Optimize the Supply of PPE and Equipment*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html> (noting that shortages of PPE are “posing a tremendous challenge to the U.S. healthcare system because of the COVID-19 pandemic”).

¹⁸ WORLD HEALTH ORGANIZATION, *CORONAVIRUS DISEASE 2019 (COVID-19) – VIRTUAL PRESS CONFERENCE* (Mar. 27, 2020), https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-27mar2020.pdf?sfvrsn=4b72eab2_2.

¹⁹ *Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19*, 85 Fed. Reg. 18403 (Apr. 1, 2020).

²⁰ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Strategies to Optimize the Supply of PPE and Equipment*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html>.

Nurses and doctors on the frontlines of the COVID-19 battle are pleading for PPE.²¹ And for good reason: despite going to great lengths to protect themselves, healthcare professionals have tested positive for the virus, and healthcare facilities have been identified as a vector for COVID-19 transmission.²² In Ohio, healthcare workers comprise 20% of all COVID-19 cases.²³ Tragically, some have lost their lives.²⁴

As the need to preserve PPE and other medical resources has grown more urgent, experts and specialists have recommended delaying non-essential and elective surgeries as a necessary response. The CDC issued guidance that healthcare providers should “delay all elective ambulatory provider visits” and “delay inpatient and outpatient elective surgical procedural cases.”²⁵ 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.” *Id.* The Centers for Medicare and Medicaid Services (“CMS”) also issued detailed recommendations for conserving

²¹ Kevin B. O'Reilly, *Plea to nation from doctors fighting COVID-19: #GetMePPE*, AM. MEDICAL ASS'N (Mar. 26, 2020), <https://www.ama-assn.org/delivering-care/public-health/plea-nation-doctors-fighting-covid-19-getmeppe>.

²² Lenny Bernstein, et al, *Covid-19 hits doctors, nurses and EMTs, threatening health system*, WASHINGTON POST (Mar. 17, 2020), https://www.washingtonpost.com/health/covid-19-hits-doctors-nurses-emts-threatening-health-system/2020/03/17/f21147e8-67aa-11ea-b313-df458622c2cc_story.html.

²³ Ohio Dept. of Health, *COVID-19 Key Metrics on Cases*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/key-metrics-cases/>; Betty Lin-Fisher, *Hospital workers concerns as Ohio colleagues get sick*, AKRON BEACON JOURNAL (Mar. 24, 2020), <https://www.beaconjournal.com/news/20200324/coronavirus-hospital-workers-concerned-as-ohio-colleagues-get-sick>.

²⁴ *OSU Wexner employee dies due to coronavirus*, NBC4 (Mar. 30, 2020), <https://www.nbc4i.com/community/health/coronavirus/osu-wexner-employee-dies-due-to-coronavirus/> (announcing that Jeannie Danker, Director of Radiology at OSU's Wexner Center, died of COVID-19).

²⁵ Centers for Disease Control and Prevention, *Coronavirus (COVID-19): For Healthcare Professionals*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/index.html>.

resources by limiting non-essential adult elective surgery and medical and surgical procedures, including all dental procedures.²⁶ Heeding that advice, healthcare providers have deferred a wide variety of procedures, even life-saving transplants.²⁷ To date, 35 states have issued directives or guidance on delaying non-essential surgeries and medical procedures.²⁸

D. DIRECTOR ACTON ORDERS THE POSTPONEMENT OF NON-ESSENTIAL SURGERIES TO FIGHT COVID-19 AND PRESERVE HEALTHCARE EQUIPMENT AND RESOURCES AND PROTECT HEALTHCARE WORKERS, ALL WITH THE END GOAL OF SAVING LIVES

As of this writing, Ohio has 5,148 confirmed COVID-19 cases, and 193 Ohioans have died for reasons attributed to the COVID-19 virus.²⁹ These numbers are only climbing. Ohio State University's Infectious Diseases Institute projects that by the time the virus peaks in Ohio, 210,000 people will be infected, causing 4,200 deaths.³⁰

In Ohio, numerous healthcare facilities are reporting shortages of PPE and other necessary equipment needed to respond to COVID-19.³¹ Nurses working in hospitals in

²⁶ Centers for Medicare & Medicaid Services, *Adult Elective Procedure Recommendations*, <https://www.cms.gov/files/document/31820-cms-adult-elective-surgeryand-procedures-recommendations.pdf>.

²⁷ Amy Dockser Marcus, *Coronavirus Threat Forces Longer Waits for Some Organ-Transplant Patients*, THE WALL STREET JOURNAL (Mar. 25, 2020), <https://www.wsj.com/articles/coronavirus-threat-forces-longer-waits-for-some-organ-transplant-patients-11585137601>.

²⁸ Ambulatory Surgery Center Association, *State Guidance on Elective Surgeries*, <https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-state>.

²⁹ Ohio Dept. of Health, *COVID-19 Key Metrics on Cases*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/key-metrics-cases/>

³⁰ Beth Burger & Rita Price, *Predicting coronavirus cases, deaths is tricky, but models improving, experts say*, THE COLUMBUS DISPATCH (Apr. 5, 2020), <https://www.dispatch.com/news/20200405/predicting-coronavirus-cases-deaths-is-tricky-but-models-improving-experts-say>.

³¹ Max Filby, *Coronavirus: Health care workers fear protective gear shortage as Ohio cases climb*, THE COLUMBUS DISPATCH (Apr. 1, 2020)

Lorain and Columbus have stated that “they have been rationing masks in paper bags provided by their hospitals. Every shift they are supposed to reuse the mask from the paper bag with their name on it until the mask is deemed ‘soiled.’”³² Even a recent shipment from the federal stockpile has been deemed inadequate to fill Ohio’s growing need for PPE.³³

In response to the growing crisis, and in an effort to save as many lives as possible, on March 17, 2020, Dr. Acton issued a “Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio.” Director’s Order, Ex. A. Pursuant to the Director’s Order, “all non-essential or elective surgeries and procedures that utilized [personal protective equipment] should not be conducted.” *Id.* A “non-essential surgery is a “procedure that can be delayed without undue risk to the current or future health of a patient.” *Id.* In determining whether a procedure is non-essential, physicians are urged to consider various factors, including but not limited to, the following examples, (1) “[t]hreat to the patient's life if surgery or procedure is not performed;” (2) “[t]hreat of permanent dysfunction of an extremity or organ system;” (3) “[r]isk of metastasis or progression of staging;” and (4) “[r]isk of rapidly worsening to severe symptoms (time sensitive).” *Id.* The Director’s Order does not single out any type of procedure. *Id.*; Hurst Dec. ¶ 15, Ex. C. Rather, the Director’s Order applies to *any* procedure that is non-essential or elective.

, <https://www.dispatch.com/news/20200331/coronavirus-health-care-workers-fear-protective-gear-shortage-as-ohio-cases-climb>.

³² *Id.*

³³ Jim Woods, *Coronavirus: Federal shipment of personal protective equipment doesn't meet Ohio's need, Dr. Amy Acton says*, THE COLUMBUS DISPATCH (Apr. 1, 2020), <https://www.dispatch.com/news/20200331/coronavirus-federal-shipment-of-personal-protective-equipment-doesnrsquot-meet-ohiorsquos-need-dr-amy-acton-says> (Ohio received 271,450 N95 masks, 672,100 surgical masks, 131,808 face shields, 107,670 gowns, 483,575 pairs of gloves and 552 coveralls).

The purpose of the Director's Order is clear: delay "all non-essential or elective surgeries and procedures that utilized PPE." *Id.* All of the PPE that would have been used during non-essential and elective procedures are preserved as a result. Hurst Dec. ¶ 13, Ex. C; Robison Dec. ¶¶ 4-6, Ex. D. Thus, while Ohio waits for the cavalry to come with PPE supplies, its medical workers will not run out of their first line of defense from the deadly disease.

The Director's Order also helps reduce the number of individuals present in its hospitals and other medical facilities. *Id.* Reducing the number of people in hospitals and healthcare facilities helps preserve PPE and also means a lower likelihood that our physicians, nurses, EMTs, and others, including non-infected patients, may contract the disease.

After Dr. Acton issued this order, the Ohio Department of Health received complaints that Plaintiffs' clinics were continuing to perform elective abortions. *See* Declaration of Sharon Liner, M.D., Ex. F, Doc. No. 42-1, PAGEID# 807. The Ohio Attorney General's Office, therefore, sent letters instructing the clinics to stop performing non-essential and elective surgeries. *See id.*

E. PLAINTIFFS SUE TO ENJOIN ENFORCEMENT OF THE DIRECTOR'S ORDER AS TO SURGICAL ABORTIONS

Plaintiffs have sued to enjoin enforcement of the Director's Order as applied to *all* surgical abortions. Plaintiffs claim that "abortion care is essential because it cannot be delayed without risking the health and safety of the patient." Doc. 42, PAGEID# 740. Plaintiffs thus argue that all surgical abortions are essential and these procedures should be categorically exempt from the Director's Order.

Plaintiffs maintain that without an injunction that enjoins the Director's Order as to surgical abortions, patients who are not able to undergo a medical abortion, or for whom a

medical abortion is not available because they are over 10 weeks pregnant, would be denied their right to a pre-viability abortion. *Id.*, PAGEID# 757. Plaintiffs claim that the Director’s Order constitutes an undue burden under the United States Supreme Court’s opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id.* Notwithstanding these arguments, Plaintiffs claim that they are acting in compliance with the Director’s Order. *Id.*, PAGEID# 750.

The Court granted a temporary restraining order on March 30, 2020. Doc. 32, PAGEID# 862–69. In doing so, it predicted that “some [women] could be forced to forgo an abortion entirely and carry an unwanted pregnancy to term.” *Id.*, PAGEID# 868. While crediting that possibility, it doubted whether forcing the clinics (like all other healthcare providers) to cease elective surgeries would result in “any beneficial amount of net saving” in terms of medical resources. *Id.* Based on this analysis, the District Court determined that at least some surgical abortions are “legally essential.” *Id.*, PAGEID# 869. It enjoined the Director’s Order in all its application to Plaintiffs, reasoning that they could decide for themselves whether to perform a surgical abortion. *Id.*, PAGEID# 868–69. The Court indicated that the temporary restraining order lasts for fourteen days. *Id.*

The State appealed the Court’s grant of a temporary restraining order to the Sixth Circuit Court of Appeals. Doc. 50, PAGEID # 1018. This Court subsequently denied the State’s Motion to Stay the TRO Pending Appeal. Doc. 52, PAGEID# 1024. In so holding the Court noted that its temporary restraining order “clarifies when surgical abortions are essential: when they are necessary because of medical reasons (which implicate ‘undue risk to the current or future health of the patient’) or because of the timing vis-à-vis pre-viability (which the State concedes to be valid).” *Id.*, PAGEID# 1022. The Court further held that it

agreed with the State that “women can get a surgical abortion when necessary to save their lives or to prevent a serious health complication,” and “if necessary to protect the mother’s health.” *Id.*, PAGEID# 1023.

The Sixth Circuit, in a 2-1 decision, dismissed the State’s appeal, holding that it lacks jurisdiction in the case. Opinion and Order, Doc. 23, COA 20-3365. However, the Sixth Circuit did so only because it concluded that this Court’s ruling on the temporary restraining order already interprets the Director’s Order in a way that is consistent with the State’s interpretation. *Id.* The Sixth Circuit thus rejected Plaintiffs’ argument that every surgical abortion is “essential”. *Id.*

LEGAL STANDARD

“[A] preliminary injunction is an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The movant “bears the burden of justifying such relief,” and it is “never awarded as of right.” *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015). Indeed, “the proof required is much more stringent than the proof required to survive a summary judgment motion.” *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App’x 421, 425 (6th Cir. 2014) (quotation and alternation omitted). When determining whether to grant a party’s request for such a remedy, district courts must balance four factors: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (citation omitted).

ARGUMENT

I. PLAINTIFFS FAIL TO SHOW THAT THEY ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE DIRECTOR'S ORDER BECAUSE THE DIRECTOR'S ORDER IS CONSTITUTIONALLY-PERMISSIBLE.

The right to a pre-viability abortion is not “absolute:” no one has the right to “terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.” *Roe v. Wade*, 410 U.S. 113, 153 (1973). Even when no public health crisis exists, the state may regulate abortion to protect the public health. *Planned Parenthood v. Casey*, 505 U.S. 833, 852, 882 (1992) (24-hour reflection period was constitutionally permissible because, inter alia, it promotes mental health). A health regulation or order may burden abortion access—such as delaying or reducing the availability of abortions—so long as that “burden” is not “undue.” *Id.* at 874.

Under *Casey*, a law imposes an “undue burden” when it places “a substantial obstacle in the path of a woman seeking an abortion.” 505 U.S. at 878. *Casey* made clear that “[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue.” *Id.* at 876. Yet even if a state order “increas[es] the cost or decreas[es] the availability,” or makes it “more difficult or more expensive to procure an abortion,” that “cannot be enough to invalidate it” if the law serves a “valid purpose . . . not designed to strike at the right itself.” *Id.* at 874 (emphasis added). Thus, states may ban certain abortion procedures, *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), or require patients to undertake steps that may delay their obtaining an abortion, *Casey*, 505 U.S. at 886, as long as they leave open reasonably available avenues for obtaining a pre-viability abortion.

In the context of a health-and-safety order, the question whether an otherwise-substantial burden is “undue”—whether it leaves open sufficient avenues for exercising the

right— requires balancing the benefits the order confers against the burden it imposes on abortion access. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). When analyzing such orders, courts “are not empowered to ignore or undervalue the governmental interests [the order] embodies.” *Women’s Med. Prof. Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003). The public health interests, in other words, must justify imposing a burden.

Here, any burden on abortion access, i.e., a temporary delay in obtaining a surgical abortion, is amply justified by the significant and life-saving benefits the Director’s Order confers. *First*, the Director’s Order delaying non-essential surgeries is a response to an unprecedented public health crisis that is still unfolding, for which there is strong factual basis. The Director’s Order was issued with the sole goal of protecting “our healthcare workforce during this unprecedented event.” Director’s Order, Ex. A. Delaying non-essential or elective surgeries and procedures preserves PPE and other medical resources, and conserves hospital bed space, all of which are rapidly depleting by the day. The ordered delay also slows the spread of the virus by minimizing person-to-person contact in the places where those most vulnerable to the virus need to be: hospitals and medical facilities. It is clear that the purpose of the Director’s Order is not to put a substantial obstacle between women and their right to an abortion.

Second, the Director’s Order is not designed to strike (or even aimed) at the right to an abortion itself. Rather, it is generally-applicable and requires all doctors and providers to exercise professional judgment on when a surgery or procedure is essential. There is no exception for abortion providers, just as there is no exception for oncologists, radiologists, dentists, or any other specialty. As applied to abortion providers, the Director’s Order means that doctors must delay surgical abortions that can be delayed without jeopardizing the

patient's ability to secure a pre-viability abortion. Doctors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Doctors remain free to perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights.

On balance of these factors, the burden imposed by the Director's Order—temporary delay of a surgical abortion—is constitutionally permissible. There is no constitutional violation in requiring abortion providers to delay abortions or alter their methods when doing so is necessary to protect healthcare workers during a worldwide public healthcare crisis. The effect of the Director's Order is not, as Plaintiffs allege, a complete ban on surgical abortion. Indeed, in some applications, the Director's Order will not burden abortion rights at all, let alone pose a "substantial obstacle." According to Plaintiffs, 56% of abortions in Ohio are surgical abortions, Liner Dec., No. 42-1, PAGEID# 776 ¶ 28. Thus, at least 44% of abortions will not be not be affected by the Director's Order.

Also, the Court should review the Director's Order under the deferential standard that applies to emergency measures taken by government officials. This standard gives state wide-latitude to regulate to prevent and respond to public health crises, even in ways that would otherwise not be constitutionally-permissible.

Finally, the effect of the Director's Order on surgical abortions should be analyzed under the deferential standard of review articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate as long as those 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." For the reasons stated below,

the Director's Order satisfies this standard, and is a proper exercise of the State's authority to regulate during a public health crisis.

Plaintiffs have not come close to carrying their burden of making a "clear showing" that when applied to them, the Director's Order violates the Constitution. *Mazurek*, 520 U.S. at 972. Accordingly, Defendants respectfully request that the Court deny Plaintiffs' Motion for a Preliminary Injunction and immediately dissolve the temporary restraining order.

A. DELAYING NON-ESSENTIAL SURGICAL ABORTIONS WILL RESULT IN SIGNIFICANT BENEFITS TO THE PUBLIC HEALTH THAT OUTWEIGH ANY RESULTING HARM.

Delay of non-essential surgical abortions will result in net saving of PPE. To be prepared to treat the numbers of people affected by the COVID-19 virus, it is essential that healthcare resources, including PPE, be conserved in every way possible. Medical procedures require the use of PPE like masks, gloves, and other materials that protect both healthcare workers and patients. Hurst Dec. ¶ 6, Ex. C. Use of PPE during the COVID-19 crisis is more critical than under normal circumstances because of the highly-contagious nature of the virus. *Id.* ¶ 6. The CDC has confirmed that the virus spreads easily and rapidly, and mainly from person-to-person contact. *Id.* ¶ 12; *see also* Director's Order, Ex. A. Spread of COVID-19 is compounded because a person who is asymptomatic may be able to spread the disease. Hurst Dec. ¶ 7. Thus, proper medical practice during this crisis requires extensive use of PPE. *Id.* ¶ 6.

However, the surging number of people requiring medical treatment is rapidly depleting supplies. *Id.* ¶¶ 4, 8. The current supply of PPE is insufficient to care for the large number of patients, and for the number of patients projected to need treatment. Robinson Dec. ¶ 3, Ex. D. The scarcity is complicated because of the scope of the problem nationwide; Ohio is competing with every other state in the nation that is also seeking this equipment. *Id.* ¶ 4.

Preservation of PPE is essential to protecting healthcare workers and a matter of life and death. Hurst Dec. ¶¶ 7-14, Ex. C. If healthcare providers—those on the frontlines of the COVID-19 battle—are left unprotected, they are left highly vulnerable to the virus. *Id.* ¶ 7. Large numbers of healthcare workers who are sick (or worse) as a result of the virus will cause an even greater strain on the healthcare system. *Id.*

Delaying non-essential surgeries and procedures *now* is critical to conserving PPE in the immediate near-term. Robison Dec. ¶ 6, Ex. D; Declaration of Brian Fowler, ¶ 5 (attached as Exhibit E). This ensures that, until producers of PPE can increase manufacturing to meet the rapidly-expanding demand, healthcare workers on the frontlines and those most in danger of contracting the virus are protected. *Id.* If these efforts are successful and supplies sufficiently increase, there will be enough PPE for use even in non-essential and elective surgeries.

Plaintiffs claim that continued pregnancy requires greater use of healthcare resources than abortion, and thus delaying an abortion results in more use of PPE in the long run. Doc. 42, PAGEID# 759. But the Director's Order is not based on a long-run strategy. The critical time is *now*. The Director's Order is predicated on the need for PPE in the near-term, and that PPE production will increase sufficient to cover the surgical abortions that were delayed. If production is slower than hoped for, it still benefits the State to do what it can to try to preserve PPE in the near-term to address the current, immediate shortage.

Plaintiffs concede that a physician performing a surgical abortion would use PPE, but they maintain that their use is "minimal." Doc. 42, PageID# 746. But this argument overlooks the cumulative effect of the Director's Order applying to *all* non-essential and elective surgeries. Individually, all non-essential and elective procedures use only a small fraction of the

state's supply of PPE, but cumulatively these procedures have a great impact on the overall supply. Hurst Dec. ¶ 16, Ex. C. Plaintiffs cite to no evidence to refute, or even address this fundamental fact. They complain only of the burden that the Director's Order purportedly places upon them, but ignore the other side of the balance that they are required by *Hellerstedt* to address: the benefit that the Director's Order confers. *See Hellerstedt*, 136 S. Ct. 2292.

Plaintiffs instead offer their own self-serving declarations regarding how much PPE is "too much". But these tone-deaf declarations completely fail to address the cumulative effect that unnecessary PPE usage will have on the supply available to the other health care workers on the front lines of Ohio's COVID-19 fight. The opinion of Plaintiffs and Plaintiffs' declarants on how much PPE usage is "too much" cannot be substituted for doctors or specialists who actually work in this area and are actually qualified to render such opinions. Plaintiffs cannot tip the *Hellerstedt* balance in their favor by failing to provide any credible evidence regarding one side of its equation.

The Director's Order is based on CDC recommendations on what actions are necessary to slow the spread of the COVID-19 virus and how to best protect healthcare workers. These scientifically-supported Orders are entitled to a greater degree of deference on this critical public health issue than are Plaintiffs' opinions regarding how much PPE they ought to be able to use. Even if Plaintiffs' declarants were specialists in the area of controlling and reacting to a pandemic, they are neither answerable to the community for their decisions nor are they responsible to the people for the consequences, as public officials are.³⁴

³⁴ Plaintiffs have not offered declarants who are qualified to opine on these issues. *See Ralston v. Smith & Nephew 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."). Declarants Liner, Krishen, and Haskell are only family practice

So, although Plaintiffs can opine as to how much PPE they want, Dr. Acton is responsible for protecting the supply available for *all* doctors within the State of Ohio.

Delay of non-essential surgical abortions will conserve vital hospital resources and bed space. The Director's Order has the effect of preserving hospital resources, as the large number of persons requiring hospitalizations can cause tremendous strain on the healthcare system. Hurst Dec. ¶ 6, Ex. C. There is concern in Ohio about the capacity of hospitals to treat those with COVID-19 and the number of patients who will require hospital care. *Id.* ¶ 4. Postponing non-essential surgeries and procedures will help hospitals and other medical centers avoid being overtaxed. *Id.* ¶¶ 9-10.

Plaintiffs point out that carrying a pregnancy to term (or having a later abortion) will increase the need for hospital treatment “in the long run. Doc. 42, PAGEID## 759-60. Again, they miss the point. The Director's Order seeks to address the *immediate* need for resources and it benefits public health under the “flatten the curve” strategy: use of hospital resources now, while the pandemic is surging, will have a far greater cost on human life than use of hospital resources several months from now, when our healthcare system has greater capacity and lower demand. Hurst Dec. ¶¶ 10-12, 16, Ex. C; Robison Dec. ¶ 6, Ex. D; Fowler Dec. ¶ 5, Ex. E.

Plaintiffs also posit that complications from abortions are low and hospitalizations are rare, and thus this should not be a consideration. Doc. 42, PAGEID# 745; Liner Dec. No. 41-2, PAGEID# 774 ¶ 22. However, every medical procedure, no matter how routine, carries a

physicians, Liner Dec, Doc. 42-1, ¶ 1; Krishen Dec., Doc. 42-3, ¶ 1; Haskell Dec., Doc. 42-4, ¶¶ 2-4, and declarant Burkons is an obstetrician-gynecologist, Burkons Dec., Doc. 42-5, ¶ 1. And Declarant France is a business manager, with no apparent medical expertise. France Dec., Doc. 42-2, ¶ 1.

level of risk. Indeed, many medical procedures that are low risk are being postponed because *any* complication that requires hospitalization or the use of hospital resources puts further strain on the already-taxed healthcare system in Ohio. Hurst Dec. ¶¶ 14-15, Ex. C. If every procedure that is “low risk” is exempt from the Director’s Order, the cumulative effect would have a large and negative impact on hospital resources.

Delay of certain abortions will decrease personal interaction and contact, and prevent further viral spread. It is clear that “social distancing” and decreasing personal contact and interaction in every way possible slows the spread of COVID-19. The CDC has confirmed that the virus spreads easily and rapidly, and mainly from person-to-person contact. *Id.* ¶ 12; *see also* Director’s Order, Ex. A. Spread of COVID-19 is compounded because a person who is asymptomatic may be able to spread the disease. Hurst Dec. ¶ 7, Ex. C. Specifically, delaying non-essential surgeries and procedures keeps people out of hospitals and clinics, where people who are the most at risk or immunocompromised are likely to be. *Id.* ¶ 13.

Far from supporting their claim for a blanket exemption, Plaintiffs’ declarations make clear the Director’s emergency order is necessary to protect the public: Plaintiffs perform thousands of abortions every year, which requires them to routinely consume significant quantities of PPE. This also raises a strong inference that the abortion providers have already treated patients with COVID-19 and, therefore have been exposed themselves. Liner Dec. No. 41-2, PAGEID# 776 ¶ 29 (2,561 surgical and 769 medication abortions performed in 2019). If surgical procedures, including abortions, are not delayed until production can meet demand, all of these additional risks of potential new infections will compound hundreds or thousands of times.

Plaintiffs claim that they have taken precautionary measures to limit the spread, but even if partially effective, the risk to society is still increased by all these interpersonal interactions. Plaintiffs are not entitled to be the only surgery provider in Ohio who gets an exemption from the Director's Order by simply promising to be careful. Every business or activity—or clinic that performs elective procedures—can claim they are taking precautionary measures so they should not be regulated; by that logic, the State's attempt to “flatten the curve” would utterly collapse.

B. THE DIRECTOR'S ORDER IS GENERALLY-APPLICABLE AND APPLIES TO ALL PROCEDURES AND PROVIDERS; IT IS NOT DESIGNED TO STRIKE AT THE ABORTION RIGHT ITSELF.

The plain language of the Director's Order applies to *all* non-essential or elective surgeries and procedures unless they cannot be delayed without “undue risk to the current or future health of a patient.” Director's Order, Ex. A. The Director's Order does not single out abortion procedures or women seeking abortions; it applies to every physician and every clinic in Ohio, providing any sort of medical services. It also applies to every medical procedure—women seeking abortions are being treated no differently than anyone seeking Lasik, a face-lift, or any other non-essential medical procedure at this time. The Director's Order is clearly not “designed to strike at the right itself.” *Casey*, 505 U.S. at 874.

Rather, the Director's Order requires that abortion providers, as well as all other providers, exercise patient-specific judgment. This means that doctors must delay surgical abortions that can be delayed without jeopardizing the patient's ability to secure a pre-viability abortion. Doctors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Abortion providers can perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be

delayed without jeopardizing the patient’s abortion rights. And, the Director’s Order bars only non-essential and elective surgeries. For example, in cases where abortion providers can safely induce an abortion with medication, requiring them to do so instead of performing a surgical abortion is no burden at all. Thus, in some applications, the Director’s Order will not burden a woman’s right to an abortion in any way, let alone “substantial[ly].” *Casey*, 505 U.S. at 877. According to Plaintiffs, 56% of abortions in Ohio are surgical abortions, thus at least 44% of abortions will not be not be affected by the Director’s Order. Liner Dec., No. 42-1, PAGEID# 776 ¶ 28.

A blanket exemption for all surgical abortions, as Plaintiffs seek, is unnecessary and dangerous during the current COVID-19 pandemic. Providers across the state are responsibly exercising the required case-specific judgment and making difficult decisions about what surgeries and procedures are essential. Allowing Plaintiffs to be exempted and continue with business as usual opens the door for other exceptions, which eventually negates the purpose of the delay. In other words, the exception will swallow the rule. This position is consistent with the recommendation of the American College of Surgeons, which 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.” *COVID-19: Guidance for Triage of Non-Emergency Surgical Procedures*, AM. COLLEGE OF SURGEONS (Mar. 17, 2020), available at <https://www.facs.org/covid-19/clinical-guidance/triage>.

An injunction mandating a blanket exemption for surgical abortions is not constitutionally sound. Defendants are not obligated to facilitate abortions by carving out exceptions to generally-applicable health and safety regulations such as the Director’s Order. Also, “the law need not

give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.” *Gonzales*, 550 U.S. at 163. It follows, then, that the Director’s Order does not run afoul of *Casey* by requiring that abortion clinics and doctors operate under the same rules as everyone else.

Our Constitution permits the states to require everyone, including abortion providers, to do their part to stop the spread of a deadly, fast-spreading disease. That means Ohio may halt elective surgeries to preserve PPE for those responding to COVID-19. And it means that Ohio may apply this generally applicable order to abortion providers as well, requiring them to perform abortions without surgery and to delay surgical abortions where possible. That is all the Director’s Order does.

C. THE DIRECTOR’S ORDER SHOULD BE REVIEWED UNDER THE DEFERENTIAL STANDARD THAT APPLIES TO EMERGENCY MEASURES TAKEN BY GOVERNMENT OFFICIALS.

The effect of the Director’s Order on surgical abortions should be analyzed under the deferential standard of review articulated under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate as long as those 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.” *Id.* at 31. This standard applies with equal force to abortion. Under *Jacobson*, the Director’s Order is a proper exercise of the State’s authority to regulate during a public health crisis.

In *Jacobson*, the Court upheld a mandatory vaccination requirement for citizens of Cambridge, Massachusetts, as the city sought to battle the smallpox epidemic. *Id.* Notably, the Court showed the government great deference and found that such actions should only be

struck down when they are “unreasonable” or “arbitrary.” *Id.* at 28; *see also Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (“governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency[.]”). In other words, a court’s review of the constitutionality of an emergency order promoting the public health “is limited to a determination whether the [executive’s] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to [prevent the spread of disease.]” (alteration in original) *Avino* at 109, citing *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971).

In a case similar to this one, the Fifth Circuit Court of Appeals applied the *Jacobson* standard and granted a writ of mandamus, which vacated the district court’s temporary restraining order and reinstated the Texas Governor’s order postponing non-essential surgeries and procedures. *In re Abbott*, Ex. B. In *Abbott*, abortion providers sued to enjoin the order, asserting that it should not apply to abortions. *Id.* at p. 6. The district court issued a temporary restraining order, finding that the governor’s order prohibited all abortions. *Id.* Texas officials filed a mandamus action with the Fifth Circuit, which was granted. *Id.* at p. 1.

Relying on *Jacobson*, the court held that “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.’” *Id.* at p. 13 (citing *Jacobson*, 197 U.S. at 28, 30). Because the Supreme Court “has consistently cited *Jacobson* in its abortion decisions,” nothing in abortion precedent “suggests that abortion rights are somehow exempt from the *Jacobson* framework.” *Id.* Thus, all

constitutional rights—including abortion—may be reasonably restricted to combat a public health emergency. *Id.* at p. 15.

The *Abbott* court also cautioned against courts second-guessing “the wisdom or efficacy” of the state’s emergency measures. *Id.* at p. 13. Courts should decline to substitute its judgment for that of the governing state authorities “if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities.” *Id.* at p. 25; *see also* Amici Br. of Alabama, et al., Doc. 20-1, COA 20-3365, p. 19 (relying on *Jacobson*, federal courts should “hesitate before intervening” on the issue of the scope of the Director’s Order because courts “are unsuited to second-guess health official’s recommendations”).

The Director’s Order must be given the same deference. There is no question that the Director’s Order was “taken in good faith” in the face of the COVID-19 pandemic. Second, for the reasons state above, the Director’s Order is supported by facts and issued for the sole purpose of protecting “our healthcare workforce during this unprecedented event.” Director’s Order, Ex. A. There are ample facts showing that enforcing the Director’s Order as to non-essential surgical abortions promotes conservation of PPE. Plaintiffs offer no evidence to the contrary. And, although there may be a “burden” to those patients who must delay a surgical abortion as a result of the Director’s Order, “fundamental rights * * * may be temporarily limited or suspended[]” in times of emergency. *Avino*, 91 F.3d at 109. “The right to abortion is no exception.” *Abbott*, Ex. B at p. 2.

II. THE BALANCE OF HARM WEIGHS IN FAVOR OF THE STATE

Plaintiffs have not shown irreparable harm. At bottom, any harm that results from the Director's Order is a *delay* in seeking a surgical abortion. Under the Director's Order abortion providers must perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Abortions that can be delayed should be delayed, but doctors can still perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights. Thus, the Director's Order will burden a woman's right to an abortion only to the extent a surgical abortion is, based on the professional judgment of the provider, delayed.

Plaintiffs, in fact, concede that they are complying the with Director's Order. Plaintiffs even state that their doctors "always determine the appropriate course of care for any patient on a case-by-case basis," and their amended policies as a result of the Director's Order "did no result in any change to Plaintiffs' provision of care." Doc. 42, PAGEID# 751.

Nor have Plaintiffs have made any allegation that a particular patient will not be able to receive an abortion based on the Director's Order. Any such patient could, of course, seek as-applied relief, a far narrower demand than the blanket exemption for all surgical abortions that Plaintiffs seek.

There is, of course, *some* degree of harm from delaying a medical procedure. But Plaintiffs have not shown that this delay is any more harmful than the delay than other Ohioans are experiencing. Doctors and patients across the state are coping with these harms for the benefit of the public good. Indeed, countless individuals and businesses are experiencing harm right now because of job losses and the temporary slowing of business.

Every person and entity are making sacrifices to curb the spread of this deadly virus. Abortion providers and those seeking abortions can reasonably be expected to do the same.

In contrast, enjoining the Director's Order as Plaintiffs request will put Ohioans, and specifically healthcare workers on the frontlines of battling the COVID-19 virus, in peril. To be clear, compliance with the Director's Order is a matter of life and death. Neither Plaintiffs nor the Court should second-guess the judgment of Dr. Acton and public-health experts who made the difficult decision to delay all non-essential surgeries and procedures. Such a measure was not taken lightly. And enjoining the Director's Order will cause far-reaching, irreparable harm to Ohio: it will operate to deplete PPE and other medical resources and contribute to higher exposure and death rates.

Any blanket exception to the Director's Order that the Court agrees to carve out will also be harmful to the State. The measures outlined in the Director's Order are cumulative and work only when adhered to strictly, and by everyone. An exception would negate the purpose of the Director's Order and undercut the State's ability to respond to an emergency to protect the public health. To explain this point better, throughout the COVID-19 crisis Dr. Acton has used the analogy of swiss cheese to describe the necessity of cumulative layers of intervention: "If you look at each layer individually, you can hold up the cheese and see that it has holes in it. But if you stack the layers on top of each other and hold them up—many of the holes will be covered by different layers." Governor Mike DeWine COVID-19 Update, THE OHIO CHANNEL (Mar. 13, 2020), available at <http://www.ohiochannel.org/video/governor-mike-dewine-3-13-2020-covid-19-update>. The Director's Order on non-essential surgeries works in conjunction with the "stay at home" and prohibition on large gatherings, to cumulatively fight against the COVID-19 virus. All of

these actions add up to collectively slowing the spread of the virus and protecting healthcare workers. An exception to one order affects the value and success of all of the other orders and measures in place.

An exception for one type of provider or procedure could also open the floodgates of litigation, empowering providers or patients to challenge the Director's Order and ask for differential treatment. Instead of fighting the COVID-19 virus during the short and precious time we have before the impact of the virus peaks, the State will be fighting to keep its orders intact in court, to the detriment of the public it is trying to protect.

Finally, at first blush, it might seem that the State would have no interest in fighting an injunction that enjoins Dr. Acton's Order only in circumstances to which it does not apply. But the State has an immensely strong interest in avoiding such an injunction. The reason is this: Plaintiffs are seeking to enjoin an Order with which they claim to be complying and that they do not need to enjoin. And, they are seeking attorneys' fees for their trouble. Thus, if the plaintiffs win preliminary relief, and if the case is then mooted before final judgment or reversal on appeal, Plaintiffs may be eligible for attorney's fees. *See Planned Parenthood Southwest Ohio Region v. DeWine*, 931 F.3d 530, 542 (6th Cir. 2019), cert. pending sub nom. *Yost v. Planned Parenthood Southwest Ohio Region*, No. 19-677 (U.S.). So, the issuance of an injunction that Plaintiffs do not need is far from harmless. It risks needlessly draining the Ohio Department of Health's coffers at a time when its already scarce and shrinking resources must be dedicated to combating the COVID-19 pandemic. This risk is particularly magnified here, where Plaintiffs have staffed this case with ten attorneys who are seeking fees. The State of Ohio has an obligation to fight any order that has the potential to divert its resources

away from lifesaving COVID-19 testing, treatment and prevention, and to ten lawyers who obtained an unnecessary injunction. The harm to the entire State of Ohio is entirely too great.

Balancing the potential harm to Plaintiffs against the risk of harm to others and the public interest confirms that Plaintiffs' motion should be denied.

III. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

The interest Ohio's public officials have in minimizing the toll on human life from the COVID-19 cannot be understated. As explained throughout this brief, every person is being asked to make sacrifices to help curb the COVID-19 pandemic, and each of us has been burdened in some way through the various policies and orders over the past few weeks. But there is no question that *all* will benefit from the current restrictions.

In cases involving a constitutional challenge to a state law, the public interest lies in a correct application of the relevant federal constitutional and statutory provisions, "and ultimately ... upon the will of the people of [the state] being effected in accordance with [state] law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). The public interest thus supports allowing the Director's Order to go into effect. The fact that the Director's Order addresses urgent needs in light of a deadly pandemic only heightens the public interest.

CONCLUSION

For the reasons set forth above, Plaintiffs' request for a preliminary injunction enjoining the Director's Order as to all surgical abortions should be denied. At this critical time, everyone, including abortion providers, must do their part to stop the spread of a deadly, fast-spreading disease. It is constitutionally-permissible for Ohio to halt non-essential and elective surgeries to preserve PPE in the interest of protecting healthcare workers who are on

the frontlines of battling the COVID-19 virus. The Director's Order applies to abortion providers, requiring them to perform abortions without surgery, and to delay surgical abortions, where possible. That is all the Director's Order does, and it should be allowed to stand as-written.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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