

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

SOUTH WIND WOMEN’S CENTER LLC, )  
ET AL., )  
 )  
Plaintiffs, )  
 )  
vs. ) Case No. CIV-20-277-G  
 )  
J. KEVIN STITT, in his official capacity )  
as GOVERNOR OF OKLAHOMA, )  
ET AL., )  
 )  
Defendants. )

***AMICUS CURIAE* BRIEF OF FORTY-EIGHT MEMBERS OF THE  
OKLAHOMA SENATE AND OKLAHOMA HOUSE OF REPRESENTATIVES  
AND THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF  
DEFENDANTS**

JAY ALAN SEKULOW\*\*  
*Counsel of Record*  
STUART J. ROTH\*\*  
JORDAN SEKULOW\*\*  
BENJAMIN P. SISNEY\*  
OLIVIA F. SUMMERS\*\*  
CHRISTINA A. STIERHOFF\*\*  
AMERICAN CENTER FOR LAW & JUSTICE  
201 Maryland Avenue, NE  
Washington, DC 20002  
Tel.: 202-546-8890  
Email: [sekulow@aclj.org](mailto:sekulow@aclj.org)  
[bsisney@aclj.org](mailto:bsisney@aclj.org)  
*Counsel for Amici Curiae*

April 6, 2020

*\*Admitted to practice before this Court*

*\*\* Not admitted to practice before this Court*

## **CORPORATE DISCLOSURE STATEMENT**

The American Center for Law and Justice (ACLJ) is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

INTEREST OF *AMICI* .....1

INTRODUCTION .....3

ARGUMENT .....5

    I.    Constitutional Rights are Not Absolute .....5

    II.   The Governor’s Executive Order is Constitutional and Does Not  
          Permanently Diminish the Constitutional Rights of American  
          Citizens .....7

        a.  Background .....7

        b.  States have broad authority to protect those within their  
            borders.....9

        c.  Abortion providers do not fall within a narrow exception to  
            traditional State police powers.....13

        d.  Governor Stitt was acting within Oklahoma’s police powers  
            when enacting the Executive Order.....16

CONCLUSION .....18

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT .....19

CERTIFICATE OF SERVICE .....20

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b><i>Page(s)</i></b>
<i>A.A. v. Needville Indep. Sch. Dist.</i> , 611 F.3d 248 (5th Cir. 2010) .....	6
<i>Anaya v. Crossroads Managed Care Sys.</i> , 195 F.3d 584 (10th Cir. 1999).....	9, 11
<i>Beer Company v. Massachusetts</i> , 97 U.S. 25 (1877).....	12
<i>Browne v. City of Grand Junction</i> , 136 F. Supp. 3d 1276, (D. Colo. 2015).....	4
<i>Camuglia v. City of Albuquerque</i> , 375 F. Supp. 2d 1299 (D.N.M. 2005) .....	6
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) .....	5
<i>Clark v. City of Draper</i> , 168 F.3d 1185 (10th Cir. 1999) .....	6
<i>Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health</i> , 186 U.S. 380 (1902).....	10
<i>Contreras v. City of Chicago</i> , 920 F.Supp. 1370 (N.D. Ill. 1996).....	6
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	5
<i>Emerson v. Kan. City S. Ry. Co.</i> , 503 F.3d 1126 (10th Cir. 2007) .....	10
<i>Ex rel. Barmore v. Robertson</i> , 134 N.E. 815 (Ill. 1922).....	11
<i>Goldblatt v. Hempstead</i> , 369 U.S. 590 (1962).....	13
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007) .....	13, 15
<i>Hous. Chronicle Publ. Co. v. City of League City</i> , 488 F.3d 613 (5th Cir. 2007)...	4
<i>Jacobsen v. Massachusetts</i> , 197 U.S. 11 (1905).....	10
<i>Keystone Bituminous Coal Assoc. v. DeBenedictis</i> , 480 U.S. 470 (1987).....	9
<i>Lawton v. Steele</i> , 152 U.S. 133 (1894) .....	11
<i>Louisiana v. Texas</i> , 176 U.S. 1 (1900).....	16

<i>Mo., Kan. &amp; Tex. Ry. Co. v. Haber</i> , 169 U.S. 613 (1898).....	10
<i>Morgan Steamship Co. v. La. Board of Health</i> , 118 U.S. 455 (1886).....	16, 17
<i>New Orleans Gas Co. v. La. Lights Co.</i> , 115 U.S. 650 (1885).....	10
<i>Posadas de Puerto Rico Assocs. v. Tourism Co.</i> , 478 U.S. 328 (1986).....	4
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	6
<i>Railroad Co. v. Husen</i> , 95 U.S. 465 (1877).....	10
<i>Schenck v. Pro-Choice Network of W. N.Y.</i> , 519 U.S. 357 (1997) .....	3
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	5
<i>Union Dry Goods Co. v. Ga. Public Service Corp.</i> , 248 U.S. 372 (1919) .....	9, 11
<i>United States v. Shinnick</i> , 219 F. Supp. 789 (E.D.N.Y. 1963) .....	12
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	5
<b>Other Authorities:</b>	
U.S. CONST.....	3, 15
THE DECLARATION OF INDEPENDENCE (U.S. 1776) .....	2, 3

### INTEREST OF *AMICI*<sup>1</sup>

*Amici* are forty-eight (48) elected Members of the Oklahoma Senate and Oklahoma House of Representatives, including Members holding offices of leadership in both chambers.

*Amici* Members of the Oklahoma Senate submitting this Brief are Senate President *Pro Tempore* Greg Treat; Majority Floor Leader Kim David; David Bullard; Larry Boggs; Paul Scott; Dave Rader; Julie Daniel; Greg McCortney; Paul Rosino; Rob Standridge; Roland Peterson; Wayne Shaw; and, Casey Murdock.

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

*Amici* are involved in a wide variety of matters relating to this state-declared emergency and the Defendants' response thereto, including but not limited to communication with and assistance to constituents, the utilization of funds, and securing

---

<sup>1</sup>Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than the *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

the public welfare. The COVID-19 pandemic is an enormously dangerous situation impacting virtually every aspect of the lives of *amici* and their constituents. As such, they have an interest in the issues raised in this case.

The named Members of the Oklahoma Senate and Oklahoma House of Representatives have a direct interest in this case because the Court's disposition of the issues will affect the ability of *amici*'s constituents to access critical services, but also the ability of Oklahoma's executive offices to respond as effectively and efficiently as possible to the emergency. *Amici* Members of the Oklahoma Senate and Oklahoma House of Representatives work with and alongside the offices of Defendants in this case, but have a perspective to offer this Court which is inherently different than that of the Defendants.

*Amicus curiae*, 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 has also participated recently as *amicus* in other cases challenging similar orders by state executives. *See Dave Yost, Attorney General of Ohio, et al. v. Preterm-*

*Cleveland, et al.*, No. 20-3365 (6th Cir.); *In re: Gregg Abbott, et al.*, No. 20-50264 (5th Cir.).

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. Further, the ACLJ defends the lawful actions of state government officials taken to protect their citizenry from harm.

*Amici Curiae* Members of the Oklahoma Senate and House of Representatives and *amicus curiae* the ACLJ on behalf of itself and over 75,000 of its members, including over 1,200 residing in Oklahoma, submit this Brief in support of Defendants and urging the Court to deny the Plaintiffs' Motion for a Temporary Restraining order and/or Preliminary Injunction, which would improperly interfere with Defendant Governor Kevin Stitt's Executive Order and the application and enforcement thereof by all Defendants.

*Amici* submit this brief urging the Court to deny Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction [Doc. #16].

### 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. Protecting the public safety is undeniably a compelling state interest. *See, e.g., Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 375 (1997) (discussing “public safety and order” as a “significant” governmental

interest); *id.* at 376 (“‘public safety’ expresses a public right enforced by the government through its criminal laws and otherwise.”); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1292 (D. Colo. 2015) (“The Court does not question that ‘public safety’ is a compelling governmental interest.”); *Hous. Chronicle Publ. Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007) (protecting public safety is “a compelling interest at the heart of government’s function”); *see also, Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (“We have no difficulty in concluding that the Puerto Rico Legislature’s interest in the health, safety, and welfare of its citizens constitutes a ‘substantial’ governmental interest.”).

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 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 Plaintiffs argue that the government restriction at issue is a “*ban*” [*see* Plaintiff’s Motion, Doc. # 16, p. 20] on a constitutional right, it is no such thing. The Executive Order [Seventh Amended Executive Order 2020-07, Doc. # 38-1, p. 2] is a temporary suspension of activities, and it has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the people of Oklahoma, including their very

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, Executive Order 2020-07 temporarily suspending elective procedures, including abortions, in the State of Oklahoma 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 saving human life from an immediate harm.<sup>2</sup> The Supreme 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 (1945).

---

<sup>2</sup> *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).

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 Plaintiffs 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”).

This rationale applies in the context of Due Process rights, as well. *See Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999) (When the state must act quickly to protect public health or safety, a pre-deprivation hearing may not be required); *id.* at 1189-90 (recognizing “the government’s strong interest in public health and in the speedy resolution of rabies tests on the foxes”); *Camuglia v. City of Albuquerque*, 375 F. Supp. 2d 1299, 1310 (D.N.M. 2005) (state actor’s actions in suspending restaurant operator’s license “were in accord with his responsibility for protecting public health” pursuant to ordinance); *Contreras v. City of Chicago*, 920 F.Supp. 1370, 1393 (N.D. Ill. 1996) (“There can be little genuine dispute that where matters of public health or safety are involved, the State may act first and ask questions later without offending the Due Process Clause. Not even an informal hearing . . . must precede a deprivation undertaken to protect the public safety.”).

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 Executive Order 2020-07 are constitutionally sound.

## **II. The Governor’s Executive 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.<sup>3</sup> 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.”<sup>4</sup> Since the date of that proclamation, the number of Americans infected by the virus, and who have died because of the virus, has unfortunately increased dramatically.

Shortly thereafter, beginning March 15, 2020, Governor Stitt issued Executive Orders to mitigate the spread of COVID-19 in Oklahoma.

On March 27, 2020, Governor Stitt issued a press release and “clarified that any type of abortion services as defined in 63 O.S. § 1-730(A)(1) which are not a medical

---

<sup>3</sup> Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

<sup>4</sup> *Id.*

emergency as defined in 63 O.S. § 1-738.1 or otherwise necessary to prevent serious health risks to the unborn child’s mother are included in that Executive Order.”<sup>5</sup> In that same release, Governor Stitt clarified that “[t]his also includes routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures such as orthopedic surgeries.”<sup>6</sup> He gave the reason for these clarifications: “The rapid spread of COVID-19 has increased demands for hospital beds and has created a shortage of personal protective equipment (PPE) needed to protect health care professionals and stop transmission of the virus.”<sup>7</sup>

This Order concerning elective procedure postponement is currently in effect until April 30, 2020, pursuant to the Governor’s Seventh Amended Executive Order 2020-07. The date was extended because, “[o]n April 1, 2020, the 719th case of a novel corona virus (“COVID-19”), was confirmed in the State of Oklahoma.”<sup>8</sup> According to the Governor’s order of April 1, 2020:

As noted in a previous Executive Order, the United States Centers for Disease Control and Prevention has identified the potential public health threat posed by COVID-19 as “high” both globally and in the United States. In addition, on March 14, 2020, the President of the United States declared a national health emergency in the United States as a result of the national spread of COVID-19.

---

<sup>5</sup> Governor Stitt Clarifies Elective Surgeries and Procedures Suspended Under Executive Order, Press Release (Mar. 27, 2020), *available at* [https://www.governor.ok.gov/articles/press\\_releases/governor-stitt-clarifies-elective-surgeries](https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> J. Kevin Stitt, Office of the Gov., State of Oklahoma, Seventh Amended Executive Order, 2020-07 (Apr. 1, 2020), *available at* <https://www.sos.ok.gov/documents/executive/1926.pdf> [hereinafter *Seventh Amended Order*].

As COVID-19's impact continues to evolve, it is important to take measures to protect all Oklahomans against this threat. Therefore, I believe, after consultation with numerous health experts within my administration, it is now necessary to provide for the rendering of mutual assistance among the State and political subdivisions of the State and to cooperate with the Federal government with respect to carrying out emergency functions during the continuance of the State emergency pursuant to the provisions of the Oklahoma Emergency Management Act of 2003.<sup>9</sup>

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

As *Amici Curiae* Forty-Eight Members of the Oklahoma Senate and Oklahoma House of Representatives are uniquely aware, in times of emergency as well as times of peace, the States possess substantial police power to protect their residents' health and safety. As succinctly recognized by the Tenth Circuit, "[t]he state may exercise police power to maintain the health, safety and welfare of the public." *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 591 (10th Cir. 1999) (citing *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 479, 503 (1987)). Governor Stitt's order falls squarely within the constitutionally-recognized police powers of Oklahoma, and any temporary infringement of a right to elective abortion is necessary to protect the health, safety, and lives of *all* Oklahomans. 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*

---

<sup>9</sup> *Id.*

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[.]” *Railroad 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).

The Court made this same point in an earlier case:

[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.

*New Orleans Gas Co. v. La. Lights Co.*, 115 U.S. 650, 661 (1885); *see Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 389 (1902); *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) (in preemption case,

recognizing states and localities retain certain police powers to protect public health and safety). Quoting the Supreme Court, the Tenth Circuit similarly explained:

The term ‘police power’ connotes the time-tested conceptional limit of public encroachment upon private interests . . . . To justify the state in . . . . interposing its authority in behalf of the public, it must appear - First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

*Anaya*, 195 F.3d at 591 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594-95 (1962)).

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 “[p]olice 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 governor’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 Oklahoma and Governor Stitt. The ongoing crisis stemming from the COVID-19 pandemic presents not only a dire need for the continued protection of Oklahomans 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 text 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 other 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 Executive 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 Oklahoma citizens, Governor Stitt issued Executive Order 2020-07 on March 15, 2020, and a series of amendments and clarifications as the full scope of the crisis became more and more apparent. The Order applies equally to *all* licensed healthcare professionals and healthcare facilities in the State. The Order is effective until April 30, 2020, and requires that "Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 30, 2020."<sup>10</sup>

The Order is a temporary postponement 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 that time. It is not a "ban," nor does it single out abortion for disfavored treatment. Rather, the Order is a reasonable means of furthering the stated, critically important purpose of combatting the

---

<sup>10</sup> *Seventh Amended Order, supra* note 13.

“shortage of personal protective equipment (PPE) needed to protect health care professionals and stop transmission of the virus.”<sup>11</sup>

In *Gonzales*, 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 observed that it has “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Id.* But it held that “[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.” *Id.* at 164. Consequently, the Court determined that “[t]he medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.” *Id.*

The same principles apply here: the State of Oklahoma 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 Plaintiffs’ insistence on continuing to perform elective abortions will undoubtedly limit the necessary resources needed to treat COVID-19 patients. Plaintiffs fail to show that elective abortions are more beneficial to the public interest than adequately treating pandemic patients and protecting healthcare workers. As

---

<sup>11</sup> *Id.*

such, allowing those abortions to proceed amidst this crisis, against Governor Stitt's order, does not fall within a narrow exception to traditional State police powers.

**d. Governor Stitt was acting within Oklahoma's police powers when enacting the Executive Order.**

The situation presented by COVID-19 is not the first instance in which a governor was called upon to exercise the State's 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,<sup>12</sup> 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

---

<sup>12</sup> 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.

[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.

In sum, the Supreme Court has repeatedly given deference to State governors and their police powers in times of emergency. Therefore, *Amici Curiae* Forty-Eight Members of the Oklahoma Senate and Oklahoma House of Representatives urge this Court to also give deference to Governor Stitt and uphold his emergency order. As *Amici* Members are well aware, businesses across the State are suffering and sacrificing during this emergency. Abortion is, undeniably, a business; and that business should not be singled out for special treatment or status over all other business and over all other Oklahomans.

## CONCLUSION

For the foregoing reasons, *Amici Curiae* Forty-Eight Members of the Oklahoma Senate and Oklahoma House of Representatives, and *Amicus Curiae* the ACLJ, respectfully urges this Court to deny the Plaintiffs' errant motion.

DATED: April 6, 2020

Respectfully Submitted,

JAY ALAN SEKULOW\*\*

*Counsel of Record*

STUART J. ROTH\*\*

JORDAN SEKULOW\*\*

BENJAMIN P. SISNEY\*

OLIVIA F. SUMMERS\*\*

CHRISTINA A. STIERHOFF\*\*

AMERICAN CENTER FOR LAW & JUSTICE

201 Maryland Avenue, NE

Washington, DC 20002

Tel.: 202-546-8890

Email: [sekulow@aclj.org](mailto:sekulow@aclj.org)

[bsisney@aclj.org](mailto:bsisney@aclj.org)

*Counsel for Amici Curiae*

*\*Admitted to practice before this Court*

*\*\* Not admitted to practice before this Court*

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

### Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(g) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[x] this document contains 4786 words.

2. This document 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:

[x] this document has been prepared in a proportionally spaced typeface using Microsoft Word 13-point Times New Roman font.

Date: April 6, 2020

*/s/ Benjamin P. Sisney*  
BENJAMIN P. SISNEY (Okla. Bar # 21816)  
AMERICAN CENTER FOR LAW & JUSTICE  
201 Maryland Avenue, NE  
Washington, DC 20002  
Tel.: 202-546-8890  
Email: [bsisney@aclj.org](mailto:bsisney@aclj.org)

*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of April, 2020, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and was transmitted to those individuals receiving Notice of Electronic Filings in this matter.

*/s/ Benjamin P. Sisney*

BENJAMIN P. SISNEY (Okla. Bar # 21816)

AMERICAN CENTER FOR LAW & JUSTICE

201 Maryland Avenue, NE

Washington, DC 20002

Tel.: 202-546-8890

Email: [bsisney@aclj.org](mailto:bsisney@aclj.org)

*Counsel for Amici Curiae*