

No. 20-11401

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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YASHICA ROBINSON, M.D., et al.,  
*Plaintiffs-Appellees,*

v.

STEVEN MARSHALL, in his official capacity as Alabama Attorney General, et al.,  
*Defendants-Appellants.*

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Appeal from the United States District Court for the Middle District of Alabama  
No. 2:19-cv-365 (Thompson, J.)

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**BRIEF FOR NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,  
FEMINIST MAJORITY FOUNDATION, LEGAL MOMENTUM, AND 18  
OTHER WOMEN’S RIGHTS AND CIVIL RIGHTS ORGANIZATIONS AS  
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN  
OPPOSITION TO THE EMERGENCY STAY MOTION**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11th Cir. R. 26.1-1 and 26.1-2, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

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20-11401, *Robinson, et al. v. Marshall, Attorney General, State of Ala, et al.*

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- National Coalition Against Domestic Violence, *amicus curiae*
- National Council of Jewish Women, *amicus curiae*
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Respectfully submitted this 21st day of April, 2020.

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## **INTEREST OF AMICI CURIAE**

*Amici* are organizations dedicated to the promotion and protection of women's rights and civil rights, as detailed in their Motion for Leave to File. A complete list of *amici* is at Appendix A.

## INTRODUCTION

COVID-19 is an emergency that warrants emergency measures. It cannot, however, be used as pretext for attacking a constitutional right. Yet that is exactly what Alabama’s COVID-19 Executive Order (the “State’s Order” or “Order”) does. Under the guise of a generally applicable restriction on non-emergency medical services, the Order poses a palpable threat that healthcare providers who determine that an abortion should go forward will be criminally prosecuted. In an environment where government processes and enforcement discretion have routinely been weaponized to target abortion providers, the few remaining providers in Alabama face an untenable choice between serving their patients and risking bad-faith criminal prosecution. For Alabama women,<sup>1</sup> the result is an undue burden on their constitutional rights.

This chilling effect is real and immediate: the Order has already hindered the availability of abortion for Alabama women during this pandemic. In doing so, the Order disproportionately harms marginalized communities, including low-income communities, women of color—in particular, Black women—minors, the LGBTQIA+ community, and victims of domestic and sexual violence.

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<sup>1</sup> *Amici* recognize not everyone who obtains or needs an abortion identifies as a woman. *Amici* further recognize the Order also disproportionately impacts other historically marginalized communities not specifically addressed within this brief.

The district court properly assessed the Order’s impact in its “real-world context.”<sup>2</sup> It took seriously the health crisis facing the State, issuing a narrowly tailored injunction that protects both public health during the pandemic and a constitutionally-protected right. The district court provided the “clear, enforceable standard” that the State has been unable—or unwilling—to articulate.<sup>3</sup> The injunction should not be stayed.

### ARGUMENT

**I. WITHOUT THE DISTRICT COURT’S “CLEAR, ENFORCEABLE STANDARD,” ABORTION PROVIDERS WOULD REASONABLY FEAR THE UNEVEN APPLICATION OF THE ORDER, SEVERELY BURDENING THE CONSTITUTIONAL RIGHTS OF WOMEN.**

*Casey* warned that “[l]iberty must not be extinguished for want of a line that is clear.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992). Yet here, the State has been anything but clear, offering evasive and contradictory accounts of what procedures it means to restrict. As *amici* well know, when it comes to abortion, purportedly neutral government processes are abused with regularity. Providers in Alabama have every reason to fear that their reasonable medical judgments will land them in criminal jeopardy. For patients, delaying abortion care can have serious health consequences, and often an abortion delayed

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<sup>2</sup> Opinion at 36, Dkt. 137 (“Opinion”).

<sup>3</sup> *Id.* at 49.

is an abortion denied. The district court correctly supplied the “clear, enforceable standard” that was missing from the State’s Order.<sup>4</sup>

**A. The State’s Order Gives Public Officials Discretion to Second-Guess and Impose Criminal Penalties on Healthcare Providers.**

The Order postpones “all dental, medical and surgical procedures” subject to narrow exceptions for emergency treatments, to avoid serious harm from an underlying condition, and for ongoing and active treatments.<sup>5</sup> As the district court recognized, the State has “put forth several divergent interpretations of the [Order’s] medical restrictions.”<sup>6</sup> It has stated that a provider’s medical judgment “is not conclusive proof that the procedure meets one of the exceptions.”<sup>7</sup> And it has refused to recognize “[t]he fact that a delay would render a procedure unavailable” as sufficient, instead stating cryptically it “could be relevant.”<sup>8</sup>

What this means is anyone’s guess. The only point on which the State has been clear is that it intends to subject providers’ medical judgments to discretionary review by non-medical governmental actors. And if these reviewers disagree with a provider’s medical judgment, the consequence is criminal

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

<sup>5</sup> State’s Order at 4, Dkt. 79 Ex. B.

<sup>6</sup> Opinion at 20.

<sup>7</sup> Dkt. 111 at 12-13; Dkt. 120 at 2.

<sup>8</sup> Dkt. 120 at 3.

prosecution.<sup>9</sup> This does not provide the “fair notice of what is prohibited” necessary to impose a criminal penalty. *United States v. Williams*, 553 U. S. 285, 304 (2008). Indeed, criminal prohibitions that are so open-ended that they invite “selective law enforcement” present a classic case of unconstitutional vagueness. *Smith v. Goguen*, 415 U.S. 566, 576 (1974). Here, that vagueness threatens to foreclose a fundamental right.

**B. Abortion Providers Have Faced Harassment and Targeting Through the Machinery of Government.**

On its face, the Order applies to all “dental, medical or surgical procedures.”<sup>10</sup> However, abortion providers are differently situated than other healthcare providers. They already operate in a climate of threats and violence from anti-abortion activists.<sup>11</sup> On top of that, public officials who oppose abortion wield extraordinary power to burden and intimidate abortion providers.<sup>12</sup> As the district court noted, this power “is no secret to any provider in Alabama—it is

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> State’s Order at 4.

<sup>11</sup> See, e.g., Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015), <https://nyti.ms/2RP53VK> (describing a bombing at an Alabama clinic that killed a police officer and disfigured and partially blinded a nurse); 2018 FMF National Clinic Violence Survey, <https://bit.ly/3cC29eO> (reporting that 52% of responding clinics experienced targeted threats and intimidation directed at doctors and staff including death threats, stalking, and harassing emails).

<sup>12</sup> See David S. Cohen & Krysten Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 105-06 (Oxford University Press 2015).

evident when she opens the newspaper, drives by a group of protestors at a clinic, or learns that another piece of legislation concerning abortion has been enacted.”<sup>13</sup>

Providers in Alabama have come to expect that they will be unfairly targeted for harassment and intimidation through laws specifically targeting them and their clinics,<sup>14</sup> and through seemingly neutral government processes:

- **Complaints to, and investigations by, public health officials.** Oversight functions of public health authorities are regularly exploited to harass abortion providers. For example, abortion clinics in Alabama have been singled out for “inconsistent and arbitrary inspections” by the Department of Health.<sup>15</sup> One administrator reported, “it’s overwhelming because we never know how [regulations] are going to be interpreted. One time everything’s in order and the next time they change . . . [s]o you’re really at their mercy.”<sup>16</sup>
- **Zoning ordinances.** Since 2013, at least nine cities have attempted to use local zoning ordinances to shutter abortion clinics.<sup>17</sup> Even the Alabama state

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<sup>13</sup> Opinion at 49.

<sup>14</sup> See *Targeted Regulation of Abortion Providers*, Guttmacher Institute (Apr. 1, 2020), <https://bit.ly/2RQsf0Y>.

<sup>15</sup> Center for Reproductive Rights, *Defending Human Rights* (2009), at 51, <https://bit.ly/3brgdId>.

<sup>16</sup> *Id.*

<sup>17</sup> Rachel Wells, *Abortion Rights Foes Have Weaponized Zoning Regulations. Here’s How*, Rewire.News (Apr. 18, 2019), <https://bit.ly/2xAx90f>.

legislature has tried to weaponize zoning laws by passing a law that would have prohibited the issuance or renewal of licenses for abortion clinics located within 2,000 feet of a K-8 public school; this law would have closed two of the then-five clinics in the state.<sup>18</sup>

- **Building code and facility licensing requirements.** Statewide building codes and facility licensing requirements are also commonly used to harass abortion providers.<sup>19</sup> For example, in 2013, Alabama’s state legislature passed a law requiring abortion clinics to meet the same building, equipment, and staffing standards as ambulatory surgical centers.<sup>20</sup> Among other things, it required widening doors and hallways to accommodate gurneys.<sup>21</sup> The law, which had no medical basis<sup>22</sup> and was later found to be

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<sup>18</sup> Letitia Stein, *New Alabama law could shutter two abortion clinics near schools*, Reuters (May 12, 2016), <https://reut.rs/3auRgdG>; *see also* *W. Ala. Women’s Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1249 (M.D. Ala. 2017), *aff’d*, 900 F.3d 1310 (11th Cir. 2018).

<sup>19</sup> *See, e.g.*, Rosemary Westwood, *How State Health Departments are Closing Abortion Clinics: Five Key Takeaways*, Pacific Standard (Jul. 31, 2019), <https://bit.ly/2VrspTP>; Sarah McCammon & Sam Gringlas, *Missouri Could Soon Become 1st State Without A Clinic That Performs Abortions*, NPR Illinois (May 28, 2019), <https://bit.ly/3bn8EiC> (reporting that state officials in Missouri refused to renew the license of the state’s only abortion clinic until several providers submitted to questioning that could lead to criminal consequences).

<sup>20</sup> Erik Eckhol, *Alabama Legislature Passes New Limits on Abortion Clinics*, N.Y. Times (Apr. 3, 2013), <https://nyti.ms/2RTRDaX>.

<sup>21</sup> *Id.*

<sup>22</sup> *See* ACOG, *FAQs Induced Abortion*, <https://bit.ly/2RSzuue>.



unconstitutional,<sup>23</sup> forced the only clinic serving north Alabama to close while it worked to come into compliance.<sup>24</sup>

- **Criminal investigations and prosecutions.** State officials and anti-abortion activists in Alabama have recently gone so far as to pass legislation criminalizing abortion. Indeed, the law that was the basis of the original legal challenge in this case—Alabama’s Human Life Protection Act (2019)—demonstrates the State’s objective to criminally prosecute abortion providers.<sup>25</sup> Alabama’s efforts reflect a common tactic to use criminal procedures to harass and intimidate abortion providers.<sup>26</sup>

This clear historical record of harassment and abuse of legal process is reflected in Dr. Robinson’s experience in Alabama. State authorities passed a zoning ordinance that forced Dr. Robinson’s clinic to change buildings.<sup>27</sup>

Protestors filed complaints against her clinic with the Department of Public Health

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<sup>23</sup> *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1332 (M.D. Ala.).

<sup>24</sup> Drew Galloway, *Alabama Women’s Center to surrender license, close downtown facility*, WHNT News 19 (Jun. 24, 2014), <https://bit.ly/3eAVkw7>; Drew Galloway, *Huntsville abortion clinic reopens after securing approval from health officials*, WHNT News 19 (Oct. 25, 2014), <https://bit.ly/3cwOd60>.

<sup>25</sup> See Alabama HB 314 (making abortion a felony offense, punishable by a sentence of imprisonment from 10 to 99 years (or life)).

<sup>26</sup> See, e.g., Associated Press, *Abortion foes use 19th-century law for help*, NBC News (Jan. 17, 2008), <https://nbcnews.to/34POsGE> (describing how anti-abortion activists twice used a law allowing grand juries to be impaneled by citizen petition to target a provider with criminal investigations and charges).

<sup>27</sup> 4/6/2020 Hearing Transcript 165:8-15 (“Tr.”).

and the State Attorney General, leading to investigations of the clinic, even though no other type of medical practice in Alabama has been subjected to investigations as a result of such routine complaints.<sup>28</sup> And protestors have regularly called the police to Dr. Robinson's clinic and posted on social media asking others to do the same.<sup>29</sup>

**C. State Officials Will Use the Order to Limit Abortion Services in Alabama.**

This history confirms that unfair, selective enforcement of the State's Order is not a hypothetical concern—it is virtually inevitable. The State's cryptic and conflicting interpretations have already had a chilling effect: abortion providers have been forced to cancel appointments because they fear selective prosecution.<sup>30</sup>

Anti-abortion activists are, at the same time, exploiting the pandemic to pressure state officials to close Alabama abortion clinics, including Dr. Robinson's.<sup>31</sup> The Department of Public Health has already succumbed to the pressure, requiring abortion providers, but not other healthcare providers, to submit written procedures and protocols in place during the COVID-19 outbreak.<sup>32</sup>

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<sup>28</sup> Tr. 122:13-25; 123:1-6.

<sup>29</sup> Tr. 121:3-9.

<sup>30</sup> Gray Decl. ¶18, Dkt. 73.

<sup>31</sup> Tr. 121:12-21 (describing activists calling the Attorney General, Governor, and other public officials demanding that the clinic cease providing abortions during the pandemic).

<sup>32</sup> Tr. 121:22-122:6.

After giving the State repeated chances to address this problem, the district court did what the State could or would not do: it articulated a “clear, enforceable standard.”<sup>33</sup> That the State would seek emergency relief against this modest clarification confirms why abortion providers need it. Without it, the constitutional rights of women will be denied.

## **II. THE STATE’S ORDER DISPROPORTIONATELY IMPACTS MARGINALIZED WOMEN.**

The Order must be reviewed by considering the substantial obstacle to abortion care it creates for the people “most burdened by it.” *Casey*, 505 U.S. at 886–87. Tragically, the State’s pretextual use of the COVID-19 pandemic will disproportionately burden and harm Alabamians who are among the hardest hit: low-income women, women of color, minors, and victims of domestic and sexual violence, among other marginalized groups.

### **A. The State’s Order Disproportionately Harms Low-Income Communities, Women of Color, Minors, and the LGBTQIA+ Community.**

It is well-documented that restrictions on abortion access disproportionately harm low-income women and their families, women of color—particularly Black women—minors, and the LGBTQIA+ community. Nationwide, 75% of women seeking abortions are low-income, nearly half live below the federal poverty line,

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<sup>33</sup> Opinion at 49.

and 61% are women of color.<sup>34</sup> In Alabama, 60% of abortions are sought by Black women,<sup>35</sup> and the majority of women seeking abortion care at Dr. Robinson's clinic are low-income.<sup>36</sup> For minors, additional restrictions can be devastating, as they often are unable to seek care until later in their pregnancies and have fewer financial resources.<sup>37</sup> Additional restrictions on abortion disproportionately burden these groups.<sup>38</sup>

Rather than mitigating the risk of COVID-19 exposure to marginalized populations, the Order increases it. COVID-19 is already disproportionately harming these same communities.<sup>39</sup> In Alabama, the Black community already accounts for 37% of confirmed cases and a shocking 52% of deaths from COVID-19, even though they make up only 27% of the state population.<sup>40</sup> If women in these marginalized groups are forced to postpone abortion services or carry

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<sup>34</sup> Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), <https://bit.ly/3apXZFE>.

<sup>35</sup> Kaiser Family Foundation, *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence: Alabama*, <https://bit.ly/3bkA23I>.

<sup>36</sup> Tr. 91:4-10.

<sup>37</sup> Defending Human Rights at 88, <https://bit.ly/3brgdId>.

<sup>38</sup> Heather Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – and the Women They Serve – in the Crosshairs*, Guttmacher Institute, 2014, <https://bit.ly/2VoTl6q>.

<sup>39</sup> See Max Fisher, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. Times (Mar. 15, 2020), <https://nyti.ms/2zafEEa>.

<sup>40</sup> See *Characteristics of Laboratory-Confirmed Cases of COVID-19*, Alabama Public Health (Apr. 18, 2020), <https://bit.ly/2wRdLvk>.

pregnancies to term, they will have more—not fewer—interactions with medical providers, resulting in *increased* risk of exposure to COVID-19, and greater risk of pregnancy-related harm: Alabama already ranks third in the nation in maternal death rates,<sup>41</sup> and Black women in Alabama are nearly five times more likely to die from pregnancy related causes than white women.<sup>42</sup> Further, COVID-19’s disproportionate economic impact on low-income women will make it harder to access any healthcare, especially while contending with the economic hardship of a forced pregnancy.<sup>43</sup>

**B. The State’s Order Harms Victims and Survivors of Domestic and Sexual Violence.**

Since the imposition of stay-at-home orders, reported instances of intimate partner violence have surged.<sup>44</sup> Domestic and sexual violence are frequently the reason women seek abortion services. Yet for victims of domestic and sexual violence, rescheduling or postponing visits is particularly burdensome because an

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<sup>41</sup> Tr. 40:1-4.

<sup>42</sup> See Opinion at 41 (“A typical uncomplicated pregnancy will require multiple prenatal appointments and delivery.”); see also *Maternal Mortality Facts & Figures: Alabama*, Society for Maternal Fetal Medicine (Dec. 4 2018), <https://go.aws/2VptsU2>.

<sup>43</sup> Kim Hart, *The coronavirus pandemic threatens low-wage jobs*, Axios (Apr. 8, 2020), <https://bit.ly/2Vov2FV>.

<sup>44</sup> See Sara MacNeil, *Challenges of domestic violence worsen amid coronavirus pandemic*, Montgomery Advertiser (Apr. 7, 2020), <https://bit.ly/2VpfXU>; Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. Times (Apr. 6, 2020), <https://nyti.ms/2wRf5yi>.

abusive partner may impose restrictions or surveil their movements.<sup>45</sup> Further, forced pregnancy can keep victims in contact with violent partners, increasing their risk of harm.<sup>46</sup> These women need more flexibility in receiving care, not less.<sup>47</sup> *See Casey*, 505 U.S. at 893–94 (recognizing that spousal consent requirement for victims of domestic and sexual violence poses “a substantial obstacle” to abortion). The Order’s restrictions on access to abortion are an undue burden on these and all Alabama women.

### **CONCLUSION**

The State’s stay request should be denied.

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<sup>45</sup> World Health Organization, *World Report on Violence and Health: Chapter 4, Violence by Intimate Partners*, 89 (2002), <https://bit.ly/2XOA6Vo>.

<sup>46</sup> Sarah Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, *BMC Medicine* (2014), <https://bit.ly/2Vot1JG>.

<sup>47</sup> Tr. 91:11-22.

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