IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

YASHICA ROBINSON, *et al.* Plaintiffs, v. STEVEN MARSHALL, in his official capacity as Attorney General of the State of Alabama, *et al*., Defendants.	)	CASE NO. 2:19-cv-00365-MHT-SMD

BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS

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Defendant Steve Marshall, sued in his official capacity as Alabama Attorney General, and Dr. Scott Harris, sued in his official capacity as State Health Officer, file this brief in support of their Partial Motion to Dismiss all claims from Plaintiffs' First Amended Complaint challenging the constitutionality of Dr. Harris's March 27 and April 3, 2020 orders ("the orders") requiring certain medical procedures to be postponed in response to the COVID-19 health crisis.

INTRODUCTION

This case began as a constitutional challenge to The Alabama Human Life Protection Act, Ala. Act 2019-189 (hereinafter "the Act"), under the abortion rights framework set out in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See* docs. 1, 1-1. But on March 30, 2020, Plaintiffs' filed an Emergency Motion to File a Supplemental Complaint to challenge the constitutionality of Dr. Harris's order requiring the postponement of medical procedures in response to COVID-19 as it relates to pre-viability abortions. *See* docs. 72, 72-1. The Court allowed Plaintiffs to file a First Amended Complaint and subsequently overruled Defendants' objection to the order granting Plaintiffs leave to amend. *See* docs. 78, 86, 145.

As a result, this case now encompasses two distinct constitutional claims: one involving the constitutionality of the Act under a straightforward application of *Roe* and *Casey*, and the second involving the constitutionality of Dr. Harris's completely unrelated orders under an emergency powers framework. Plaintiffs' constitutional challenge to Dr. Harris's orders fails to overcome threshold jurisdictional defects and also fails on the merits. Plaintiffs allege Dr. Harris's orders ban pre-viability abortions and seek an injunction preventing their enforcement as to pre-viability abortions. *See* doc. 79 at p. 38. Dr. Harris's orders do not ban pre-viability abortions but instead constitute valid emergency regulations issued under the State's police powers that apply

equally to all medical providers, not just abortion clinics. Accordingly, Plaintiffs are not entitled to the relief requested, and Defendants respectfully request that Plaintiffs' challenges to Dr. Harris's orders be dismissed.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully" and more than labels, conclusions, "formulaic recitation of the elements," or "naked assertions." *Id.* (citing *Twombly*, 550 U.S. at 555–57). Legal conclusions and mixed questions of law and fact do not receive the presumption of truth even at the pleading stage. *Id.*; *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003) ("[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." (quoting *Marsh v. Butler County*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001)) (alteration in original) (internal quotations omitted)). Further, "[a] complaint is subject to dismissal under Rule 12(b)(6) when its allegations on their face, show that an affirmative defense bars recovery on the claim." *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). On a motion to dismiss, "the court limits its consideration to the pleadings and exhibits attached thereto." *Thaeter v. Palm Beach Cty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006) (quoting *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (per curiam) (internal quotation marks omitted)).

"[A]s early as possible," a district court should resolve "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367, 1367 n.35 (11th Cir. 1997). Such

disputes "always present[] a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true." *Id.* at 1367 (citing *Mitchell v. Duval Cty. Sch. Bd.*, 107 F.3d 837, 838 n.1 (11th Cir. 1997)). A district court abuses its discretion by allowing nonmeritorious claims to proceed to discovery. *See id.* at 1367–68; *see also Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 ("Inasmuch as the complaint was insufficient as a matter of law to establish a *prima facie* case that the district court had jurisdiction, the district court abused its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue.").

FACTS

In March 2020, the United States declared a state of emergency and Governor Kay Ivey proclaimed a state of emergency in Alabama in response to the COVID-19 virus. Doc. 79 ¶ 38. Plaintiffs allege that as of midday on March 28, 2020, there were 644 confirmed COVID-19 cases in Alabama and 3 confirmed deaths. *Id.* ¶ 39. The Court may take judicial notice that as of midday April 27, 2020, there were 6,429 confirmed COVID-19 cases and 219 confirmed COVID-19 deaths.[1]

On March 19, 2020, Dr. Harris, pursuant to his authority to direct that conditions prejudicial to health in public places be abated, ALA. CODE § 22-2-14(4), issued an emergency order stating in part "effective immediately all elective dental and medical procedures shall be delayed." Doc. 79 ¶ 40. Dr. Harris stated at a press conference that same day that his order did not require medical offices to be closed but that "all elective procedures shall be delayed." *Id.* ¶ 41.

[1] *See Alabama Department of Public Health COVID-19 Data and Surveillance Dashboard*, ALA. DEP'T OF PUBLIC HEALTH, https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7 (last visited Apr. 27, 2020). For historical data on the spread of COVID-19 in Alabama derived from ADPH data, *see also Alabama coronavirus data and mapping dashboard*, ALA. POLITICAL REPORTER, https://www.alreporter.com/mapping-coronavirus-in-alabama/ (last visited Apr. 27, 2020).

He stated that "'elective' can be somewhat subjective" but referred medical providers to guidance on the Centers for Medicare & Medicaid Services ("CMS") website for "what could be considered an elective procedure." *Id.* The CMS elective surgery and procedures recommendations provided factors for medical providers to consider in determining whether to postpone a procedure, such as "[c]urrent and projected COVID-19 cases in the facility and region; Supply of [Personal Protective Equipment ("PPE")] to the facilities in the system; Staffing availability; Bed availability, especially intensive care unit (ICU) beds; Ventilator availability; Health and age of the patient, especially given the risks of concurrent COVID-19 infection during recovery; [and] Urgency of the procedure." *Id.* ¶ 42.

On March 20, 2020, Dr. Harris issued an amended order that did not alter the language concerning elective medical and surgical procedures. Doc. 79 ¶ 43. Plaintiffs allege that same day "counsel for Plaintiffs spoke to counsel for ADPH who confirmed that ADPH did not intend the Orders to apply to abortions." *Id.* ¶ 44. Plaintiffs allege that they took steps to prevent the spread of COVID-19 in their clinics, but they did not postpone any abortions in response to the March 20 order. *Id.* ¶¶ 46–47.

On March 27, 2020, Dr. Harris issued an amended order that required medical procedures to be postponed as follows:

> 7. Effective March 28, 2020 at 5:00 P.M., all dental, medical, or surgical procedures shall be postponed until further notice, subject to the following exceptions:
>
> a. Dental, medical, or surgical procedures necessary to treat an emergency medical condition. For purposes of this order, "emergency medical condition" is defined as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected by a person's licensed medical provider to result in placing the health of the person in

> serious jeopardy or causing serious impairment to bodily functions or serious dysfunction of bodily organs.
>
> b. Dental, medical, or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment.

Doc. 79 ¶ 50; Doc. 79-1, Ex. C, at 4.[2] Dr. Harris's March 27 order has been superseded by an April 3, 2020 order that contains identical language on postponing medical procedures. *See* doc. 109-1 at 11. The April 3 order is set to remain in effect until April 30, 2020, but states that prior to this date "a determination shall be made whether to extend this Order—or, if circumstances permit, to relax this Order." *Id.* The April 3 order was promulgated as an emergency rule, which is not set to expire for 120 days. ALA. ADMIN. CODE r. 420-4-1-.13 (Apr. 3, 2020) (emergency rule); *see* Doc. 109-1 at 1.

Plaintiffs allege that they requested clarification from ADPH on the order and "set[] forth the Plaintiffs' understanding that 'medication abortion is not a procedure within the terms of the order and that surgical abortion procedures fall within the exceptions.'" Doc. 79 ¶ 54. ADPH referred the request to the Office of the Attorney General who responded that "[a]s the order indicates, procedures are exempt from mandatory postponement only if they meet the criteria set out in 7a. or b," and referred Plaintiffs' counsel to the Attorney General's Guidance for Law Enforcement concerning the March 27 order. *Id.* ¶ 55.

The Attorney General's guidance states that violations of the ADPH Order are punishable as a misdemeanor under Alabama Code § 22-2-14, and that § 7 of the March 27 Order "applies to all healthcare facilities and providers, without exception," and that it "does not offer a total

[2] The documents submitted as exhibits to Plaintiffs' First Amended Complaint are adopted by reference and constitute a part of their pleading. *See* FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). The orders themselves are emergency rules that have the force of law.

exemption for any specific type of provider or clinic." Doc. 79-1, Ex. D. The guidance states that the order "provides exemptions from mandatory postponement only for two distinct classes of procedures: a) those necessary to treat an 'emergency medical condition'; and b) those necessary to avoid serious harm from an underlying condition or disease, or are necessary as part of a patient's ongoing and active treatment." *Id.*

ARGUMENT

Plaintiffs allege in Count I that because pre-viability abortions are not categorically exempt from the orders' mandatory postponement of all medical procedures that do not fit within the order's exceptions, the order violates the substantive due process right of their patients to be free from undue burdens to their access to pre-viability abortions. *See* doc. 79 ¶¶ 105–08, 129. They allege in Count II that the orders are unconstitutionally vague. *Id.* ¶ 131. They request a declaratory judgment that "the March 27 Order, as applied to pre-viability abortions, violates the Fourteenth Amendment to the United States Constitution" and request a permanent injunction restraining Defendants "from enforcing the March 27 Order to ban pre-viability abortions." *Id.* at 38. But nothing in the orders or the Attorney General's guidance interprets them to *ban* pre-viability abortions. Plaintiffs accordingly fail to state a claim for the relief requested, *i.e.*, a categorical exemption for pre-viability abortion.

I. Plaintiffs Lack Standing to Bring an As-Applied, Pre-Enforcement Challenge

Plaintiffs fail to meet their burden of making plausible allegations of threatened unconstitutional enforcement of the orders sufficient to invoke Article III standing. To have Article III standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (first citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); and then citing *Friends of the Earth, Inc. v. Laidlaw Envtl.*

Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). "The plaintiff[s], as the party invoking federal jurisdiction, bears the burden of establishing" their standing to sue. *Id.* Because a court lacks jurisdiction if a plaintiff lacks standing, "a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019).

Pre-enforcement challenges are "the exception," not the norm. *Am. Charities for Reasonable Fundraising Regulation, Inc., v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000). To establish standing to bring a pre-enforcement challenge, a plaintiff must "demonstrate that a 'credible threat of an injury exists,' not just a speculative threat which would be insufficient for Article III purposes." *Id.* (quoting *Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999)). "[T]his standard can be met by showing that either '(1) plaintiff was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution.'" *Id.* (quoting *Jacobs v. The Fla. Bar*, 50 F.3d 901, 904 (11th Cir. 1995)). If the plaintiff fails to make this showing, then the pre-enforcement challenge is not ripe for review. *See* id. at 1214–15.

Here, "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," and thus fail to make plausible allegations of threatened unconstitutional enforcement. *Iqbal*, 556 U.S. at 679. The only *factual* allegations Plaintiffs make are that the Attorney General would not confirm Plaintiffs' view that "medication abortion is not a procedure within the terms of the order and that surgical abortion procedures fall within the exceptions." Doc. 79 ¶ 54. The Attorney General stated what is evident from the plain language of the orders themselves, namely that "'procedures are exempt from mandatory postponement only if they meet the criteria set out in 7a. or b.'" *Id.* ¶ 55.

But the only credible threat of enforcement supported by these factual allegations is that Plaintiffs' provision of abortion services would be treated like any other medical, dental, or surgical procedure subject to Dr. Harris's orders. Plaintiffs cannot support any threat of unconstitutional conduct by Defendants based on allegations that Dr. Harris's order would be applied in a facially neutral, non-discriminatory manner. Nor can Plaintiffs rely on sheer speculation that Defendants' enforcement of Dr. Harris's orders will be motivated by animus against abortion providers. *See Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006) ("It is not enough that the [plaintiff]'s complaint sets forth facts from which we could imagine an injury sufficient to satisfy Article III's standing requirements." (internal quotation and citation omitted)).

Plaintiffs' remaining allegations, such as the allegation that Dr. Harris's orders are guilty of "targeting pre-viability abortion," (doc. 79 ¶ 110), are "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681; *see also id.* at 680–81 (holding allegations that government officials "knew of, condoned, and willfully and maliciously" subjected plaintiff to harsh conditions of confinement "as a matter of policy, solely on account" of his race and religion were "bare" and "conclusory" allegations "not entitled to be assumed true."). Since "[t]he party invoking federal jurisdiction bears the burden of establishing" standing, *Spokeo*, 136 S. Ct. at 547, Plaintiffs' threadbare allegations of threatened unconstitutional enforcement of Dr. Harris's order fail to satisfy their burden.

II. To the Extent Plaintiffs Seek an Order Requiring Defendants to Follow State Law in Enforcing Dr. Harris's Orders, Sovereign Immunity Deprives the Court of Jurisdiction to Order Such Relief

Plaintiffs repeatedly allege that Defendants are simply wrong in how they interpret Dr. Harris's order, and that abortions are always necessary under one of the exemptions contained in the orders. *See, e.g.*, doc. 79 ¶ 106 ("Pre-viability abortions are 'necessary to avoid serious harm from an underlying condition' because forcing anyone to continue a pregnancy against their will

threatens serious harm to their health, and therefore previability abortions fit within the exceptions to the March 27 Order"); ¶ 107 ("Medication abortions . . . are not medical or surgical 'procedures' within the meaning of the March 27 Order"); ¶ 108 ("Because the plain language of the March 27 Order should exempt pre-viability abortions, Plaintiffs have no way of knowing which pre-viability abortions are considered criminal acts under the March 27 Order.").

These allegations seek federal court imprimatur of Plaintiffs' interpretation of *state* law. "But when the claim of entitlement to relief is based on a violation of state law, sovereign immunity applies." *S&M Brands, Inc. v. Ga. ex rel. Carr*, 925 F.3d 1198, 1204 (11th Cir. 2019) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984)). Federal courts cannot hear claims against state officials for alleged violations of state law. *Pennhurst*, 465 U.S. at 121. Sovereign immunity bars such claims, no matter the form of relief sought, as nothing more than claims against the state itself. *Id.*; *see also Alexander v. Chattahoochee Valley Cmty. Coll.*, 325 F. Supp. 2d 1274, 1295 (M.D. Ala. 2004) ("Federal courts do not have jurisdiction to order state officials to comply with state law.") Plaintiffs cannot "boost the claim over the sovereign-immunity bar" with "conclusory allegations that the same conduct that violates state law also violates the U.S. Constitution." *S&M Brands*, 925 F.3d at 1204.

When Plaintiffs request a federal court order exempting pre-viability abortions from Dr. Harris's orders because "the plain language of the March 27 Order should exempt pre-viability abortions," their claim is that Defendants are not following state law. The Attorney General has issued guidance stating that Dr. Harris's order "does not offer a total exemption for any specific type of provider or clinic," but that all medical procedures are subject to mandatory postponement unless they fall within one of the two exceptions on a case-by-case basis. *See* doc. 79 ¶ 55; doc. 79-1, Ex. D.

Plaintiffs allege, in essence, that the Attorney General is mistaken, and that Dr. Harris's order contains a categorical exemption for pre-viability abortions. But the Court lacks jurisdiction to resolve this dispute or order corresponding injunctive relief because it turns on the interpretation and enforcement of state law. *See S&M Brands*, 925 F.3d at 1204 (stating that where "claim necessarily relied on a determination that state officials had not complied with state law," the claim was "barred by sovereign immunity."). The Fifth Circuit recently warned that *Pennhurst* deprived a district court of jurisdiction to second-guess Texas state health officials' determination that medication abortions were "procedures" subject to mandatory postponement in response to the COVID-19 health emergency. *See In re Abbott*, No. 20-50296, 2020 WL 1911216, at *15, __ F. 3d __ (5th Cir. Apr. 20, 2020) (*Abbott II*). Nor does the Court have the power to enjoin Defendants to follow *their own* understanding of how to enforce the orders. *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *4, __ F.3d __ (5th Cir. Apr. 22, 2020) (staying injunction that "largely overlap[ped]" with Texas officials' own policies notwithstanding district court's rationale that it would "promote compliance" with state policies since "*Pennhurst* plainly prohibits such an injunction"). Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.

Since "[s]tate sovereign immunity limits federal court jurisdiction," *S&M Brands*, 925 F.3d at 1204, the Court lacks jurisdiction to resolve Plaintiffs' claims based on proper interpretation of state law or to order Defendants to follow state law.

III. Plaintiffs' Substantive Due Process Claim in Count I Fails Because Dr. Harris's Orders Are Constitutional Exercises of the State's Police Powers in Response to an Emergency

Plaintiffs bring their substantive due process challenge to The Human Life Protection Act and Dr. Harris's orders together in a single count. *See* doc. 79 ¶¶ 128–29. This is telling, as

Plaintiffs assume *Casey*'s undue burden framework applies equally to a law that facially prohibits abortions, subject to two exceptions, and a facially neutral mandatory *postponement* of elective medical procedures issued in response to a public health emergency. But under the constitutional framework for evaluating a state's exercise of its emergency powers, Plaintiffs fail to state a claim in Count I as to Dr. Harris's orders.

As the Eleventh Circuit has held, "[i]n an emergency situation, fundamental rights . . . may be temporarily limited or suspended." *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Thus, while it may be that "[u]nder usual and normal circumstances and as a general proposition" the State may not require a woman to postpone an abortion by a few weeks if it is safe to do so, "the circumstances existing at th[is] time [a]re not usual, nor [a]re they normal." *Id.* Rather, in an emergency situation like the pandemic we now face, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." *Id.* The standard of review of a state's emergency order set forth in *Avino* is highly deferential, and "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 maintain order." *Id.*

The Supreme Court has also long recognized the importance of a state's emergency powers in decisions like *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). In passing on the constitutionality of a mandatory smallpox vaccination requirement, *Jacobson* stated "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29. The Court upheld the vaccination requirement because acting "[u]pon the principle of self-defense, of paramount necessity, a community has the

right to protect itself against an epidemic of disease which threatens the safety of its members"—even if that response comes at a cost to individual freedoms. *Id.* at 27. Thus, constitutional rights, such as the right to abortion, may be burdened in times of emergency. As the Supreme Court put it, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29.

As in *Avino*, the standard of review of a state's emergency powers in *Jacobson* is highly deferential. An emergency measure fails to pass constitutional muster under *Jacobson* only "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, *beyond all question*, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31 (emphasis added); *see also In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (*Abbott I*) (applying *Jacobson* to grant Texas emergency mandamus relief to vacate a TRO entered by the district court in response to the state's COVID-19 health orders).[3]

First, Dr. Harris's health order bears a "real or substantial relation" to the crisis the State faces. Dr. Harris's order bears a real and substantial relation to the State's need to preserve social distancing to prevent the spread of COVID-19, the State's need to conserve PPE for use by those treating COVID-19 patients, and the State's need to free up hospital resources in anticipation of a surge of COVID-19 patients. Plaintiffs allege on the face of the First Amended Complaint that these interests are served *specifically* by postponing the procedures performed at Plaintiffs' clinics that are not covered by the exceptions in the health orders. *See, e.g.*, doc. 79 ¶ 66 (acknowledging abortion can sometimes result in complications requiring hospitalization); ¶ 76 (acknowledging

[3] The Fifth Circuit stated in *Abbott I* that "*Jacobson* remains good law." *Abbott I*, 954 F.3d at 785.

that even medication abortion requires an in-person physical exam); ¶ 83 (acknowledging abortions performed at clinics use PPE).

Second, Plaintiffs cannot meet their burden under *Jacobson* of showing Dr. Harris's order is "*beyond all question*, in palpable conflict with the Constitution." *Jacobson*, 197 U.S. at 31 (emphasis added). What the Fifth Circuit found of the Texas order could well be said of Alabama's: "The order is a concededly valid public health measure that applies to all surgeries and procedures, does not single out abortion, and merely has the effect of delaying certain non-essential abortions. Moreover, the order has an exemption for serious medical conditions, comporting with *Jacobson*'s requirement that health measures 'protect the health and life' of susceptible individuals." *Abbott I*, 954 F.3d at 789 (quoting *Jacobson*, 197 U.S. at 39).[4]

Importantly, it is not enough for Plaintiffs to allege that the health order burdens their right to abortions, or even that such a burden would be found unlawful in normal times. The Supreme Court explained in *Planned Parenthood v. Casey* that states are generally prohibited from placing an "undue burden" on the right to obtain a pre-viability abortion, and that a law normally imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. 833, 878 (1992). But the Court also made clear that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id.* at 876. That is, even if a state regulation "increas[es] the cost or decreas[es] the availability," or otherwise makes it "more difficult or more expensive to procure an abortion," that "cannot be enough to invalidate it" *if the*

[4] For the same reasons that Dr. Harris's order satisfies both factors of the *Jacobson* analysis, it satisfies the standard under *Avino* that the order was "taken in good faith and whether there is some factual basis for the decisions that the restrictions . . . imposed were necessary to maintain order." *Avino*, 91 F.3d at 109.

law serves a "valid purpose . . . not designed to strike at the right itself." Id. at 874 (emphasis added).

Thus, if a law does present an obstacle to a woman's access to abortion, the next step is to "consider the burden a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Grafted into *Jacobson*'s framework, this burden balancing means that Plaintiffs must make plausible allegations that Dr. Harris's health order "imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic [Alabama] now faces." *Abbott I*, 954 F.3d at 790.

Plaintiffs' allegations fail to carry that burden—indeed, Plaintiffs' First Amended Complaint does not even acknowledge it must make such allegations as it assumes the orders must be evaluated as bans on pre-viability abortion under ordinary circumstances. Dr. Harris's order imposes only a temporary burden on abortion access by requiring providers to postpone procedures that, in their professional medical judgment, can safely be postponed. Delay of a few weeks for public health reasons does not amount to a total denial. *Cf. Casey*, 505 U.S. at 886. Nor does the health order single out Plaintiffs' patients. Rather, it applies to *every* physician and *every* clinic and *every* medical procedure in the State. Clearly the order is not "designed to strike at the right itself." *Id.*

As for the benefits of the health order, Plaintiffs cannot dispute the State's interests in preserving PPE and hospital capacity, as well as in promoting social distancing to reduce coronavirus's spread in the coming weeks. Plaintiffs' own First Amended Complaint alleges that their clinics use PPE, that abortion procedures can result in complications requiring further medical attention, and that healthcare providers at the clinics cannot maintain adequate distance from the

patients to ensure that they do not spread the virus to each new patient they see. *See* doc. 79 ¶¶ 66, 76, 83.

Plaintiffs have not shown that the temporary burden imposed on them "beyond all question" exceeds the benefits to the public health in light of the State's compelling need to preserve limited medical resources over the next few weeks. Thus, they fail to state a claim as to Count I.

IV. Plaintiffs Fail to State a Claim in Count II That the Order is Void for Vagueness

Plaintiffs allege in Count II of the First Amended Complaint that the March 27 order is void for vagueness. Doc.79 at ¶ 130–31. This claim also fails on the merits.

"To state a void-for-vagueness claim, the language of the [law] itself must be vague." *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th Cir. 2013) (quoting *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 387 (11th Cir. 1991)). Vagueness arises when a law either "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or even encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). "But 'perfect clarity and precise guidance have never been required.'" *Williams*, 553 U.S. at 304 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

A close case arising under a statute does not render it unconstitutionally vague. *Williams*, 553 U.S. at 306. One could imagine a close case "under virtually any statute." *Id.* But requiring proof beyond a reasonable doubt to support a conviction addresses any issues posed by such close cases. *Id.* Vagueness occurs not because of "the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.*

Further, laws that require application to real-world facts contrast significantly with the standardless statutory term held to be unconstitutionally vague in *Johnson v. United States*. *See* 135 S. Ct. 2551, 2557–59 (2015). In that case, the Supreme Court held the term "violent felony," defined in relevant part under the Armed Career Criminal Act as a crime that "involves conduct that presents a serious risk of physical injury to another," was unconstitutionally vague. *Id.* However, the central feature of the Court's vagueness analysis was that the Court's precedent required a judge to apply this definition "not to real-world facts or statutory elements," but rather "to a judicially imagined 'ordinary case' of a crime." *Id.* at 2557. The inability of a judge to consider the concrete facts of the underlying crime created a completely indeterminate standard. *Id.* at 2558. *See also Session v. Dimaya*, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (stating with respect to a statutory definition of "crime of violence" identical to that in *Johnson* that "[t]he statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.").

The Court in *Johnson* contrasted this abstract statutory definition with statutory terms that are applied to concrete situations as follows:

> As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash v. United States,* 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America v. Kentucky,* 234 U.S. 216, 223, 34 S. Ct. 853, 58 L. Ed. 1284 (1914).

135 S. Ct. at 2561.

The requirement for a medical provider—or even specifically an abortion provider—to conduct their practice according to a general standard does not make that standard vague. In a case decided the same day as *Roe v. Wade*, the Supreme Court held that restricting abortion to only those cases that doctors determined were "necessary" was not unconstitutionally vague. *Doe v. Bolton*, 410 U.S. 179, 191–92 (1973). Likewise, the Court similarly concluded in *United States v. Vuitch* that a District of Columbia statute outlawing abortion unless "necessary for the preservation of the mother's life or health" presented no vagueness problem because "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U.S. 62, 72 (1971). Additionally, citing *Bolton* and *Vuitch*, the Fifth Circuit held that a statute prohibiting doctors from dispensing controlled substances "other than in the course of his professional practice" did not present vagueness issues. *United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973).[5] A law is not vague merely because it requires a physician to "make a professional judgment as to whether a patient's condition is such" that it satisfies a particular standard. *Id.*

Plaintiffs' claim thus fails because the order need not provide "perfect clarity and precise guidance." *Williams*, 553 U.S. at 304 (quoting *Ward*, 491 U.S. at 794). Just because it may be difficult in some cases to determine whether an abortion falls into one of the two exceptions outlined in the order does not mean that those exceptions are vague. *Id.* at 306. Here, an abortion fits into an exception if it is necessary to treat an "emergency medical condition," "to avoid a serious harm from an underlying condition or disease," or if it is "necessary as part of a patient's ongoing and active treatment." Doc. 79-1, Ex. C at 4. These exceptions present an objective

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit Court of Appeals issued before the close of business on September 30, 1981.

standard—a prosecutor would need to show beyond a reasonable doubt that the particular factual circumstances of an abortion recipient did not fall into one of those categories. Although close cases could, in theory, arise even under these exceptions, there is no question about *what* exactly needs to be shown, and therefore no vagueness. *See Williams*, 553 U.S. at 306.

Although Plaintiffs allege that the orders are vague because they may be required to exercise their own professional judgment in determining whether a particular patient's abortion would fit into one of the exceptions, "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Johnson*, 135 S. Ct. at 2557 (quoting *Nash*, 229 U.S. at 377). Plaintiffs, like the abortion providers in *Bolton* and *Vuitch* and the prescribing doctor in *Collier*, have an objective standard to apply to their treatment. *See* 410 U.S. at 191–92; 402 U.S. at 72; 478 F.2d at 272. Asking them to apply their own medical judgment to a particular set of facts—something doctors do every day—does not render the orders unconstitutionally vague on their face. Accordingly, Count II of Plaintiffs' First Amended Complaint fails as a matter of law.[6]

CONCLUSION

For the reasons stated above, Defendants' Partial Motion to Dismiss should be granted, and the Court should dismiss all claims from Plaintiffs' First Amended Complaint challenging the constitutionality of Dr. Harris's March 27 and April 3 orders.

Respectfully submitted,

Steve Marshall,
Attorney General

[6] Defendants preserve their objection to the Court's order permitting Plaintiffs to supplement their complaint to add their challenge to the State's health orders to a separate challenge to the Alabama Human Life Protection Act. While both claims are related to abortion, they are governed by different case law and the resolution of one will not resolve the other. *See* doc. 86.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/ Brad A. Chynoweth
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