OFFICE OF THE ATTORNEY GENERAL
STATE OF OKLAHOMA

April 10, 2020

Christopher K. Wolpert
Clerk, U.S. Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, CO 80257
VIA ECF FILING

Re: *South Wind et al. v. Stitt et al.*, No. 20-6045

Dear Mr. Wolpert:

Pursuant to Fed. R. App. P. 28(j), attached is a recent decision from the U.S. Court of Appeals for the Fifth Circuit addressing the same subject matter as the above-captioned case. Appellees' response to Appellants' pending motion for stay of the challenged Temporary Restraining Order advised the court of a similar TRO in Texas. Appellees' Opp. Emergency Mot. Stay at 14 n.12. The attached order from the Fifth Circuit stayed the Texas court's TRO in part. *See* Exhibit 1.

Respectfully submitted,

/s/ Mithun Mansinghani

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Counsel for Appellants

Exhibit 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-50296

In re: GREG ABBOTT, in his official capacity as Governor of Texas; KEN PAXTON, in his official capacity as Attorney General of Texas; PHIL WILSON, in his official capacity as Acting Executive Commissioner of the Texas Health and Human Services Commission; STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board; KATHERINE A. THOMAS, in her official capacity as the Executive Director of the Texas Board of Nursing,

Petitioners

Petition for Writ of Mandamus
to the United States District Court
for the Western District of Texas

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

On April 7, 2020, we issued a writ of mandamus directing the district court to vacate its temporary restraining order ("TRO") that exempted abortion procedures from GA-09, an emergency executive order issued on March 22 by the Governor of Texas postponing certain non-essential medical procedures for three weeks during the escalating COVID-19 pandemic. *See In re Abbott*, --- F.3d ---, 2020 WL 1685929 (5th Cir. April 7, 2020). As we explained, GA-09 sought to preserve critical medical resources and slow the spread of a pandemic during what the district court itself recognized was Texas's "worst public health emergency in over a century." *Id.* at *1, 4, 9. We further explained that GA-09 "is a concededly valid public health measure that applies to all

'surgeries and procedures,' does not single out abortion, and . . . has an exemption for serious medical conditions." *Id.* at *10.

In our opinion, we emphasized that the district court had "scheduled a telephonic preliminary injunction hearing for April 13, 2020, when all parties will presumably have the chance to present evidence on the validity of applying GA-09 in specific circumstances." *Id.* at *2. The evidence presented at this hearing, we said, would allow the district court to make "targeted findings, based on competent evidence, about the effects of GA-09 on abortion access." *Id.* We emphasized that "those proceedings" must "adhere to the controlling standards, established by the Supreme Court over a century ago, for adjudging the validity of emergency measures like [GA-09]." *Id.* As we stated in our opinion, those "controlling" standards come from the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *In re Abbott,* 2020 WL 1685929, at *1, 6–7. Having already painstakingly explained those standards in our opinion, we reiterate our holding:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. *Id.* at 38. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30.

In re Abbott, 2020 WL 1685929, at *7 (cleaned up).

We also articulated how the *Jacobson* framework would apply to the *Casey* undue-burden analysis. *Id.* at *11 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). We explained that this analysis "ask[s] whether GA-09 imposes burdens on abortion that 'beyond question' exceed its

benefits in combating the epidemic Texas now faces." *Id.* (quoting *Jacobson*, 197 U.S. at 31). We explained further that this analysis would "require[] careful parsing of the evidence," and we noted some of the conflicting evidence in the record. *Id.* But we emphasized that "[t]hese are issues that the parties may pursue at the preliminary injunction stage, where Respondents will bear the burden to prove, by a clear showing, that they are entitled to relief . . . in any particular circumstance." *Id.* at *12 (cleaned up).

The day following our mandamus, April 8, 2020, the district court did the following: (1) it vacated its March 30 TRO (Doc. 54); (2) it cancelled the telephonic preliminary injunction hearing previously scheduled for April 13 (Doc. 54); and (3) it ordered the parties to confer and propose a status report before April 15 setting out the parties' agreement on procedures and a schedule for a new preliminary injunction hearing on a yet-unannounced date (Doc. 58).

Also on April 8, plaintiffs filed in the district court a new application for TRO supported only by one additional declaration (Doc. 56). The next day, April 9, the district court—without allowing defendants either to file a pleading or to submit evidence in opposition to the TRO application—entered an order granting plaintiffs a TRO (Doc. 63). The new TRO enjoins all defendants from enforcing GA-09 against Plaintiffs or their agents in the following ways: (1) it enjoins enforcement of GA-09 "as a categorical ban on all abortions provided by Plaintiffs"; (2) it enjoins enforcement as to providing "medication abortions"; (3) it enjoins enforcement as to providing "procedural abortion[s] to any patient who, based on the treating physicians' medical judgment, would be more than 18 weeks LMP ["last menstrual period"] on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care"; and, finally (4) it enjoins enforcement as to providing "procedural abortion[s] to any patient who, based on the treating physician's medical judgment, would

be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020." (Doc. 63, at 14–15).

Texas officials have now filed a petition for writ of mandamus seeking vacatur of the April 9 TRO, as well as an emergency motion for stay of the TRO and a temporary administrative stay of the TRO.

IT IS ORDERED that the motion for temporary administrative stay of the district court's order of April 9, 2020 (Doc. 63) is GRANTED, until further order of this court, to allow sufficient time to consider the mandamus petition and emergency stay motion. This stay operates against the April 9 TRO in all respects EXCEPT that part of the TRO applying to "any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020" (Doc. 63, at 15). Our stay does not operate against that part of the April 9 TRO.*

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the emergency stay motion no later than Saturday, April 11, 2020, at 8:00 p.m. Any reply by petitioners is due no later than Monday, April 13, 2020, at noon.

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the petition for writ of mandamus no later than Tuesday, April 14, 2020, at 2:00 p.m. Any reply by petitioners is due no later than Wednesday, April 15, 2020, at 2:00 p.m.

* Judge Dennis dissents, in part, because he would not stay any part of the district court's April 9 TRO.