No. 20-50264

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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; and KATHERINE A. THOMAS, in her official capacity as Executive Director of the Texas Board of Nursing.

On Petition for a Writ of Mandamus from the United States District Court,
Western District of Texas, Austin Division
No. 1:20-cv-00323-LY

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

No. 20-50264, In re Greg Abbott, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Respondents respectfully request oral argument. The district court appropriately exercised its jurisdiction and applied well-settled, binding precedent in entering a temporary restraining order. Defendants-Petitioners seek to assert a novel theory that the constitutional right to abortion may be suspended during a public health emergency. Reliance on a theory that runs counter to longstanding precedent from the Supreme Court and this Court cannot justify the extraordinary remedy of mandamus. Telephonic or video oral argument is likely to assist the Court's resolution of these serious matters.

INTRODUCTION

In the midst of a public health emergency, Texas has once again singled out abortion from all other essential, time-sensitive healthcare services. In threatening to enforce Governor Greg Abbott's March 22, 2020, Executive Order to effectuate an outright ban on most abortion during the pandemic, Petitioners[1] seek to exploit the COVID-19 pandemic to achieve their longtime goal of banning abortion in Texas. The district court, acknowledging that an outright ban on abortion is inconsistent with longstanding Supreme Court precedent, and that Respondents' patients would be irreparably harmed absent emergency relief, correctly granted a temporary restraining order ("TRO") barring Petitioners from enforcing the Executive Order to prohibit most abortions in Texas.

Petitioners now seek the extraordinary remedy of mandamus to vacate the TRO, before the district court has even had the opportunity to rule on Respondents' pending request for preliminary injunctive relief. Mandamus may be granted only in the rarest of circumstances: when the district court "clearly and indisputably erred," where its error is "irremediable on ordinary appeal," and where this Court determines such extraordinary relief is warranted. Petitioners cannot meet that high bar. The district court did not err, much less indisputably so, in concluding that

[1] Respondents sought injunctive relief against various state officials and local prosecutors in all counties where Respondents perform abortions. Only the state officials have petitioned for mandamus.

Respondents—providers of essential health care services, including abortion services, in Texas—are likely to succeed on their constitutional claims and their patients would be irreparably harmed absent a TRO. As the court explained, Supreme Court precedent makes clear that no state interest can justify an outright ban on abortion—precisely what Petitioners attempt to achieve here.

Moreover, Petitioners' stated interest—conserving hospital capacity and personal protective equipment (PPE) in order to fight COVID-19 and preventing transmission—is not served by applying the Executive Order to abortion providers. Abortion services require little to no PPE and rarely result in hospitalization, and curtailing abortion access exacerbates the spread of COVID-19 by forcing patients to travel to other states to obtain abortion care.

Respondents' patients will be irreparably harmed absent a TRO. As the record demonstrates, using the Executive Order to ban abortions will deprive Texans of access to abortions and will impose on them the health risks associated with carrying a pregnancy to term against their will. For many women, the denial of access to abortion will be permanent, especially given the uncertain duration of the emergency; they will not be able to obtain abortions later in their pregnancy. For women who might be able to obtain access to abortion weeks or months hence, or by traveling to another state, enforcement of the Executive Order will impose unnecessary health risks associated with delay and travel, in addition to a host of

other burdens. For those reasons, the district court was correct in concluding that a TRO was justified. And even if the district court erred in reaching this conclusion, the error can be remedied at the preliminary injunction hearing scheduled for April 13, or on an appeal (as of right) from a preliminary injunction that is entered.

Petitioners' attempt to exploit the unprecedented public health crisis and distort the facts about abortion does not justify extraordinary intervention by this Court. The petition should be denied.

STATEMENT OF FACTS

A. The Governor's Executive Order

In March 2020, the United States declared a state of emergency and Texas declared a state of disaster related to the COVID-19 pandemic. Government officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE, particularly N95 masks.

On March 22, 2020, Governor Abbott issued an executive order barring "all surgeries and procedures that are not immediately medically necessary," effective immediately in order to reduce the use of PPE for medical providers and hospital beds necessary to combat COVID-19. App.35. The Executive Order has the "force and effect of law." Tex. Gov't Code Ann. §418.012. Although the Executive Order does not define PPE, that term is generally understood to refer to N95 respirators, surgical masks, non-sterile and sterile gloves, and disposable protective eyewear,

disposable gowns, hair covers, and shoe covers. The Executive Order exempts procedures that "would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." App.35. The Executive Order on its face applies only to "surgeries and procedures." *Id.*

The Executive Order remains in effect until 11:59 PM on April 21, 2020, or until Governor Abbott rescinds or modifies it. App.35. Experts expect the pandemic to last for a year or eighteen months. They expect the current shortage of PPE to continue for the next three or four months. Basset Decl. ¶5; Sharfstein Decl. ¶13.[2]

Failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both. App.35. These criminal penalties may in turn trigger administrative enforcement by the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing, which are authorized to pursue disciplinary action against licensees who violate criminal laws.

B. Abortion in Texas

There are two main methods of abortion: medication abortion and procedural abortion. App.129. Both methods are effective in terminating a pregnancy. App.129. Medication abortion is not a "procedure." Rather, for medication abortion, the

[2] Respondents cite to declarations filed in the district court on April 2, 2020, in support of their preliminary injunction motion. Dist. Ct. ECF No. 49.

patient ingests a combination of two pills: mifepristone and misoprostol. App.129-130. The patient takes the mifepristone at a health center and then, twenty-four to forty-eight hours later, takes the misoprostol at a location of her choosing, most often at home, after which she expels the pregnancy in a manner similar to a miscarriage. App.129-130. Although medication abortion is safe and effective through eleven weeks as measured from the first day of a pregnant woman's last menstrual period ("LMP"), Texas law restricts this method to the first ten weeks LMP. Health care providers, including Respondents, provide medication abortion to that ten-week limit.

Though sometimes referred to as "surgical abortion," procedural abortion is not what is commonly understood as "surgery"; it requires no incision, general anesthesia, or sterile field. App.130-131. For early procedural abortion, the clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus ("aspiration abortion"). App.130-131. Beginning around fifteen weeks LMP, clinicians generally must use instruments to complete the procedure ("dilation and evacuation" or "D&E"). For abortions later in the second trimester, the clinician may begin cervical dilation the day before the procedure itself, so the patient must come in twice. App.130-131. For some patients, medication abortion is contraindicated and a procedural abortion is safer, such as when the patient has an allergy to the medications. App.131. Respondents provide procedural abortion in both the first and

second trimester. At or after twenty-two weeks LMP, Texas law prohibits abortion except in narrow circumstances. *See* Tex. Health & Safety Code Ann. §171.044.

Neither method of abortion requires extensive PPE. For medication abortion, providing the pills does not require the use of any PPE. App.73, 86, 91, 100, 110, 117, 134, 157. For procedural abortion, Respondents use PPE such as gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, and hair shoe covers. App.73-74, 86, 91-92, 100, 110, 117, 134, 157. Most Respondents do not have N95 respirators, and those that do have only a small supply that they rarely, if ever, use. App.74, 92, 100, 109, 117, 135. Gloves are typically needed for transvaginal ultrasounds and laboratory exams but are not required for transabdominal ultrasounds.

Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. App.86-87, 133, 161. Patients must schedule an appointment (or several), gather the resources to pay for the abortion and related costs, App.86-87, 133, 161, and arrange transportation, time off work, and possibly child care, often without any access to paid sick leave from work. App.86-87, 95, 133, 161, 162-163. Delays result in higher financial and emotional costs to the patient. App.86-87, 96, 104, 133, 158, 161, 162-163.

Meanwhile, Texas legal restrictions on abortion, among the most onerous in the country, impose burdens that weigh even more heavily during the current

pandemic and also undermine Petitioners' stated goal of preserving PPE. For example, Texas law requires most patients to make at least two in-person appointments for an abortion, even though most patients could obtain care just as safely in one visit,[3] and mandates medically unnecessary ultrasounds.[4]

Although abortion is very safe, its risks increase with gestational age, as do the risks of pregnancy. App.86-87, 96, 105, 132-133; Macones Decl. ¶8. As the American College of Obstetricians & Gynecologists ("ACOG") and other respected medical professional organizations have observed, specifically as to the COVID-19 pandemic, abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[5] Indeed, while much is unknown about COVID-19, including whether it can complicate pregnancy, some pregnant people may be exposed to additional health risks from the disease. Levison Decl. ¶22.[6]

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[3] Tex. Health & Safety Code Ann. § 171.012 (mandating that patients receive an ultrasound at least twenty-four hours before an abortion procedure).

[4] *Id*.

[5] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

[6] *See* ACOG, *Practice Advisory - Novel Coronavirus 2019 (COVID-19)* (last updated Mar. 13, 2020), https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019.

During the pandemic, Respondents are committed to doing their part to "flatten the curve," protect patients and staff, and minimize the use of PPE. Even before the Executive Order, Respondents had taken numerous steps to these ends, for example, by limiting the number of individuals present for any procedure who would require PPE, and by curtailing other non-abortion services that can safely be delayed, such as annual well-person visits and routine STI tests. App.74, 84, 95, 110, 117-118, 135-136, 157. Respondents also took extensive precautions to reduce the possibility of COVID-19 infection among patients and staff. App.74-75, 84-85, 92-93, 101, 110-111, 117-118, 135-136, 157.

However, consistent with expert guidance,[7] Respondents intend to continue offering abortion care during the pandemic if legally permitted to do so. As ACOG and others have acknowledged, abortion cannot be delayed during the pandemic as "a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[8]

C. The Enforcement Threat and This Litigation

On March 23, 2020, Attorney General Paxton issued a press release stating that provision of *any* abortion care (other than for an immediate medical emergency)

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[7] *See also* Ambulatory Surgery Ctr. Ass'n, COVID-19: Guidance for ASCs on Necessary Surgeries (last updated Mar. 19, 2020), https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-guidance.

[8] ACOG et al., *supra* note 5.

would violate the Executive Order, and warning that "[t]hose who violate the governor's order will be met with the full force of the law." App.31. Respondents sought clarification from the Attorney General's office as to whether he believed the Executive Order applied to medication abortion as well as procedural abortion, despite that the Executive Order on its face applies only to "surgeries and procedures." The office provided no such clarification. In light of the Attorney General's enforcement threat and the serious criminal and other penalties specified in the Executive Order, Respondents, their physicians, and staff stopped providing almost all abortion care and began cancelling hundreds of appointments the week of March 23.

To protect their patients' access to care, Respondents brought suit in district court against Texas's Governor, the Attorney General, the Acting Executive Commissioner of the Texas Health and Human Service Commission, and the Directors of the state medical and nursing boards, along with the local prosecutors in each Texas county where Providers offer abortion care, alleging violations of the Due Process and Equal Protection Clauses of the U.S. Constitution. Respondents sought a TRO and preliminary injunctive relief.

After holding a status conference and reviewing State officials' opposition to the TRO motion, the district court entered a TRO on March 30, 2020. It found that Respondents had "established a substantial likelihood of success on the merits of

their claim that the Executive Order, as interpreted by the attorney general, violates Providers' patients' Fourteenth Amendment rights … by effectively banning abortions before viability." App.267. The court further observed that "[t]he Due Process Clause … protects a woman's right to choose abortion, and before fetal viability outside the womb, a state has *no interest* sufficient to justify an outright ban on abortions." *Id.* The court likewise concluded that absent a TRO, Respondents' patients would "suffer serious and irreparable harm" from delayed access to abortion services, and that some would be denied abortions altogether, if their pregnancies advanced to a stage at which abortion would be less safe or illegal, resulting in a denial of their constitutional rights; that harm outweighed any harm to Petitioners; and the preservation of Respondents' patients' constitutional rights served the public interest. App.269-270. The court set a hearing for April 13, 2020 on Respondents' pending motion for a preliminary injunction.

Within hours, Petitioners filed with this Court a petition for writ of mandamus and a motion to stay the TRO pending resolution of that petition. The following day, this Court issued a temporary stay to allow time to consider the motion for stay and petition for writ of mandamus. On April 1, 2020, Respondents filed an opposition to Petitioners' stay motion and Petitioners filed a reply.

ARGUMENT

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). Mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted). Given the extraordinary nature of this remedy, "the Court of Appeals may exercise its power to issue the writ *only* upon a finding of exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney*, 542 U.S. at 390 (emphasis added) (internal quotation marks omitted).

To obtain the writ, Petitioners must clear three exceptionally high bars. First, Petitioners must show that the district court "clearly and indisputably erred." *In re Occidental Petrol. Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). That showing is particularly demanding where, as here, mandamus is sought with respect to a decision committed to the discretion of the trial court, including the power to issue a TRO. Second, Petitioners must show they have "no other adequate means to attain … relief." *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019). Third, even in the exceptionally rare scenario in which the first two prerequisites are met,

this Court, in the exercise of its discretion, must be satisfied that the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

Petitioners cannot satisfy any of those requirements.

I. The District Court Did Not Clearly And Indisputably Err

Petitioners cannot even come close to showing that the district court clearly and indisputably erred in applying fully settled law and exercising its discretion to enter a TRO. If anything, the pandemic strengthens the interest in deferring to the district court's discretion, as that court is in the best position to evaluate the evidence before it. Moreover, although the court did not address Respondents' jurisdictional arguments in detail, it plainly had jurisdiction to entertain Respondents' application, and Respondents have standing to maintain their claims.

A. The District Court Properly Exercised Its Discretion To Enter A TRO

The decision to enter a TRO is committed to "the sound discretion of the trial court." *Prendergast v. N.Y. Tel. Co.*, 262 U.S. 43, 50 (1923); *Cent. Hanover Bank & Tr. Co. v. Callaway*, 135 F.2d 592, 595 (5th Cir. 1943) (same). The court below correctly recited the applicable standard, determined at the threshold that Respondents were likely to succeed on the merits of their constitutional claims, and balanced the required equitable factors in holding that a TRO was warranted pending expedited review of Respondents' motion for a preliminary injunction. App.263-271. Even in an ordinary appeal, such provisional relief could be set aside only for

abuse of discretion, *Central Hanover*, 135 F.2d at 595; on mandamus, Petitioners are all but foreclosed from showing a clear and indisputable right to relief.

i. The court properly found Respondents are likely to succeed on the merits.

The district court correctly held that Respondents are likely to succeed on their claims that an outright ban on abortion during the COVID-19 pandemic—as at any other time—is unconstitutional. In *Roe v. Wade*, the Supreme Court drew a clear line that has endured to this day: prior to fetal viability, states may not ban abortion. 410 U.S. 113, 163-66 (1973). The Supreme Court affirmed this "essential holding" twenty-five years ago in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, stating that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." 505 U.S. 833, 846 (1992). The Court has repeatedly reaffirmed *Roe*'s central principle, including as recently as 2016. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

This Court has consistently applied this case law to hold that states may not enact measures that ban all or nearly all pre-viability abortions, including twice in the last six months. *See Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (*per curiam*) (*Jackson III*) (holding pre-viability abortion bans are "unconstitutional under Supreme Court precedent without resort to the undue burden balancing test," and striking down a ban on abortions as early as six weeks with exceptions); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268 (5th Cir.

2019) (*Jackson II*) (holding "[s]tates may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions," and striking down ban on pre-viability abortions at fifteen weeks with exceptions).

The district court correctly concluded that the Executive Order amounts to a pre-viability abortion ban, in contravention of this well-established precedent. App.267-268. Petitioners even state that the Executive Order is an outright prohibition on abortion. *See* Pet.17 ("the EO unambiguously prohibits … abortions). That *Roe* applies here does not mean that the right to privacy encompassing the right to abortion before viability is "absolute." Rather, the Court in *Roe*, and later in *Casey*, already struck the balance between the state's interest in regulating abortion and the patient's interest in autonomy and liberty. They attempt to downplay the sweeping nature of the prohibition by characterizing it as a mere "delay" on abortions "until the public-health crisis has passed." Pet.15. But the COVID-19 crisis continues with no clear end in sight; experts expect it to last far longer than the current three weeks of the Executive Order. Basset Decl. ¶5; Sharfstein Decl. ¶13. The Governor has the authority to "modify" the Executive Order, including by extending it, and may thus disallow abortions for an indefinite period. App.35. And Respondents' evidence demonstrates that even the current ban will create a backlog of patients seeking care and in turn cause even further delay, such that most patients

would ultimately be delayed multiple additional weeks beyond the ban's end. Nguyen Decl. ¶22; Johnson Decl. ¶12. An indefinite "delay," which will operate for the foreseeable future, is nothing less than a ban for a pregnant person whose ability to obtain an abortion is measured in weeks.

Petitioners argue that *Casey*'s ruling was based on the state's interest in *fetal* life, while the current COVID-19 health crisis concerns "*everyone's* lives." Pet.14. But in *Casey*, where the state professed an interest in both fetal life and individual health, the Court concluded that *neither* was strong enough to justify a pre-viability prohibition on abortion, consistent with *Roe*'s bright line. 505 U.S. at 878. This Court recently confirmed that critical principle, explaining that "[p]rohibitions on pre-viability abortions … are unconstitutional *regardless of the State's interests* because a State may not prohibit *any woman* from making the ultimate decision." *Jackson II*, 945 F.3d at 273 (emphasis added); *id*. at 271 ("[N]o state interest can justify a pre-viability abortion ban.").

Jackson Women's Health Organization v. Currier, 760 F.3d 448, 458 (5th Cir. 2014), does not compel a different result. Pet.11, 14. *Jackson* did not concern a pre-viability *ban* on abortion like the Executive Order, but a purported *regulation* subject to the undue-burden standard. In fact, *Jackson* simply applied the undue-burden standard established in *Casey* and recently reaffirmed in *Whole Woman's Health*:

that an abortion regulation is unconstitutional unless evidence shows that its benefits outweigh its burdens on patients' access to abortion.

Furthermore, the Supreme Court has never recognized, in the words of the district court, the kind of "silent except-in-a-national-emergency" exception to the abortion right that the Petitioners urge here, Pet.11-12, and "[o]nly the Supreme Court may restrict the breadth of its rulings." App.268. While no one disputes that a state may take steps to protect its people from the spread of disease, it may not eviscerate constitutional rights along the way. As the Supreme Court has made clear, constitutional rights cannot be suspended in times of emergency. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-121 (1866). The Fourteenth Amendment's protections apply now, as ever.

Even accepting that a different constitutional standard applies during public health crises, Respondents would be equally likely to prevail under *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). There, the Court upheld a mandatory smallpox vaccination law as a valid exercise of the state's police powers. Far from justifying Texas's action here, *Jacobson* emphasizes that if a State's action "purporting to have been enacted to protect the public health … 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, it is the duty of the courts to so

adjudge, and thereby give effect to the Constitution," 197 U.S. at 31, as the cases cited by Petitioners acknowledge. *See* Pet.12.

The record clearly shows that using the Executive Order to ban abortion has no "real or substantial relation" to the State's public health goals. Petitioners argue that the ban is necessary to (1) prevent use of PPE available to healthcare providers treating COVID-19 patients, (2) reduce hospitalizations, and (3) help avoid the spread of the COVID-19 virus. Pet.16. But as leading public health experts recognize, a pre-viability abortion ban does not advance these interests and, in fact, aggravates rather than alleviates public health concerns. Bassett Decl. ¶¶6-7; Sharfstein Decl. ¶¶9-13.

First, the reality is that very little, if any, PPE would actually be conserved by banning or restricting abortion. *No* PPE is used to provide the medications involved in medication abortion. App.73, 86, 91, 100, 110, 117, 119, 130, 134, 137, 157. And most procedural abortions in Texas are single-day procedures, where a patient encounters either one or two clinicians, who each wear minimal PPE. App.85, 100, 110, 134.

Petitioners largely ignore these facts, arguing that Providers' use of some PPE in abortion care, however small, justifies the outright ban. But Petitioners falsely assume that a patient unable to obtain an abortion will not otherwise need medical care. While that may be true for patients with certain other medical conditions who

are turned away from care during the pandemic, that is simply not true for pregnant women. To the contrary, the Executive Order has *already* led patients to fly or drive long distances to other states to obtain abortion care in a pandemic, which uses as much, if not more, PPE, and exposes patients and third parties to greater risk of infection than seeking care locally. App.258-259 (describing patient's three-day trip to Colorado last week for abortion care); Nguyen Decl. ¶17 (one out-of-state provider treated 30 abortion patients from Texas in the week after the Attorney General's statement); Johnson Decl. ¶ ¶8-9 (at least four patients denied care at one health center flew to Colorado for care, and another three drove roughly eleven hours to New Mexico). Public health experts recognize that because of these contagion risks, "the net effect of forcing patients to travel is to deplete both PPE and other hospital resources." Bassett Decl. ¶7; *see also* Sharfstein Decl. ¶10. And where the need to travel delays these patients' abortion access, more PPE will also be used for the abortion procedure itself. For example, an abortion in the middle of the second trimester or later, patients may be forced to undergo a two-day procedure, which would mean two consecutive trips to a health center; twice as much contact with health care providers; and at least twice the amount of PPE used—for a total of three visits (including one for the initial ultrasound typically required at least 24 hours before care). *See, e.g.*, App.119. Similarly, patients forced by Petitioners to delay

their abortion past ten weeks LMP will lose the option of a medication abortion, whose medications can be administered without PPE.

Patients denied an abortion remain pregnant, and thus continue to need healthcare, including emergency hospital care in some circumstances. Pregnant women require prenatal care for their own health and the health of their pregnancy. Such care will use equivalent if not more PPE than abortion. App.134-135, 137. Moreover, regardless of the length of time the Executive Order is in place, at least some patients will likely be prevented from obtaining abortions altogether. Childbirth and delivery require orders of magnitude more PPE than an abortion—even for uncomplicated vaginal deliveries, let alone delivery by C-section, which occurs commonly. Levison Dec. ¶¶15-16.

Petitioners also make the opposite point—that if Respondents do not use PPE in providing abortion services, then they are putting their patients in danger from increased risk of COVID-19 exposure. Abortion providers follow all standards and recommendations for care, in general and during COVID crisis, to ensure the safety of patients and providers. There is simply no basis to single out abortion services—and indeed ban almost all of them—to ensure proper use of PPE.

Finally, although abortion care, like many forms of medical care, carries risks, it is substantially less likely to lead to hospitalization than carrying to pregnancy.

App.135.[9] Indeed, one in five pregnant women will visit a hospital during the pregnancy, prior to delivery. Levinson Dec. ¶10.

As to the second interest asserted by Petitioners—preservation of hospital capacity—legal abortion is safe and almost never requires hospitalization. Nearly all abortions in Texas (including all performed by Respondents) are provided in outpatient facilities, such as Respondents' abortion facilities and ambulatory surgical centers, not hospitals.[10] Complications from both medication and procedural abortion are rare. *Whole Woman's Health*, 136 S. Ct. at 2311-2312, 2315. Moreover, when they occur they can usually be managed in an outpatient clinic setting, either at the time of the abortion or in a follow-up visit.

Although Petitioners argue that abortions will cause *some* hospital admissions—by their estimates, between two and four admissions per week in the entire state, Pet.17, which has approximately 407 hospitals, App.176 n.24—their assertion ignores the obvious fact that patients turned away from abortion care do

[9] *See also* Cunningham et al., *Association Between Maternal Comorbidities and Emergency Department Use Among a National Sample of Commercially Insured Pregnant Women*, 24 Acad. Emergency Med. 940 (2017) (20% of pregnant women in a large study visited the emergency department at least once during pregnancy, and of those, twenty-nine percent visited twice or more).

[10] Tex. Health & Human Servs., *Induced Terminations of Pregnancy, 2017 Selected Characteristics of Induced Terminations of Pregnancy (2018)*, https://hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics.

not stop needing medical care. They remain pregnant, and many will require hospital care at least once prior to labor and childbirth. App.135.

The Executive Order also fails to serve Petitioners' third asserted interest: reducing the spread of COVID-19. Singling out abortion will likely exacerbate the spread of COVID-19 by forcing patients to travel to other states to access abortion care, contrary to current recommendations against travel. App.104, 111, 138, 162-163; Bassett Decl. ¶6 (former New York City Department of Health and Mental Hygiene Commissioner concluding that Texas's implementation of the Executive Order is "profoundly misguided as a public health measure aimed at conserving … PPE and hospital resources."); Sharfstein Decl. ¶¶9-10.

For all of these reasons, the Executive Order, as applied to abortion, does not evince a plausible, let alone "real or substantial relation" to Petitioners' asserted public health goals, as required in *Jacobson*, and the district court was well within its discretion to enter a TRO.

ii. The Order imposes an undue burden on abortion.

Because the Executive Order operates as a pre-viability abortion ban, this Court need not look further; however, even applying the undue-burden test, Respondents would certainly succeed on the merits. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a

nonviable fetus." *Casey*, 505 U.S. at 877. A restriction that, "while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health*, 136 S. Ct. at 2309 (alteration in original). As the Supreme Court has held, "*Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2298.

Enforcement of the Executive Order does not just burden individuals seeking an abortion—it prevents them from obtaining an abortion in Texas at least through April 21, 2020, App.35, and if the COVID-19 crisis continues as predicted, potentially for months. These restrictions will substantially burden all patients seeking abortion in Texas and will prevent at least some patients from obtaining an abortion at all as the delay will push them past the legal limit for an abortion in Texas. Even if some patients are able to obtain an abortion on April 21 (and the evidence indicates most will not, even if the Order is not extended), the "risk of a serious complication" to them from abortion "increases with weeks' gestation." Nat'l Acads. of Scis. Eng'g & Med., *The Safety & Quality of Abortion Care in the United States* 77-78 (2018); *see also* App.96, 104-105, 111, 138-139. And for some patients, delay will increase the invasiveness of the required abortion procedure, from a five-to-ten minute aspiration-only procedure to a technically more complicated two-day procedure, requiring greater cervical dilation and instruments,

and more PPE. Accordingly, the Executive Order overwhelmingly burdens and harms individuals seeking an abortion.

These significant harms vastly outweigh any potential benefits that Petitioners may gain from banning most abortions in the state. App.16. As explained, a pre-viability abortion ban is more likely to aggravate than alleviate public health concerns. Again, abortion care requires minimal PPE, while patients forced to continue their pregnancies will need to seek additional healthcare for pregnancy complications, routine prenatal care, and labor and delivery. Others will—and have—traveled out of state to obtain needed abortion care, with risks to their and others' health and in contravention of the single most effective way to "flatten the curve" and slow COVID-19 contagion. Bassett Decl. ¶7.

In sum, the burdens of the ban vastly outweigh the illusory benefits that Petitioners assert. Respondents are likely to succeed on the merits of their claim, regardless of the standard applied.

iii. The district court correctly determined that the equitable factors justify a TRO.

The district court correctly determined that the equities justify a TRO—a determination that falls within that court's considerable discretion and that should not be disturbed here.

First, as the district court observed, the "loss of [constitutional] freedoms … unquestionably constitutes irreparably injury" for temporary relief. App.269

(quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Executive Order prohibits patients from exercising their constitutional right to abortion before viability, and places an unconstitutional undue burden on the right. As the district court concluded, the constitutional injury alone supports the grant of a TRO. *Id.* Further, the enforcement of the Executive Order to ban almost all abortions in Texas will significantly delay, and in some cases prevent, access to this essential healthcare with potentially serious health consequences for patients. This "disruption or denial of … patients' health care cannot be undone after a trial on the merits." *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (internal quotation marks omitted).

These significant harms are not outweighed by any harm to Petitioners, as the district court correctly held. App. 269. Indeed, allowing individuals to receive earlier, safe abortion care will reduce burdens on the healthcare system during this crisis while promoting patients' health. Finally, the TRO does not disserve the public interest. As the district court concluded, "[t]he benefits of a limited potential reduction in the use of some [PPE] by abortion providers is outweighed by the harm of eliminating abortion access in the midst of a pandemic that increases the risks of continuing an unwanted pregnancy, [and] the risks of travelling to other states in search of time-sensitive medical care." App.270.

For all these reasons, the district court did not err—much less clearly and indisputably—in granting a TRO against the Executive Order.

B. The District Court did not err by exercising its authority to enter a TRO.

Petitioners contend that a series of threshold issues—Article III standing, third-party standing, and sovereign immunity—should have precluded the district court's entry of a TRO. But courts, including this Court, routinely exercise their authority to consider abortion providers' challenges to abortion restrictions under precisely the circumstances of this case. The district court was correct to do so here.

First, Petitioners contend the Governor and Attorney General lack authority to enforce the Executive Order, and thus have sovereign immunity from suit. Pet. 26. That is incorrect. The Executive Order, by its own terms, may be "modified, amended, rescinded, or superseded" by the Governor, App.35, consistent with the Governor's statutory authority, Tex. Gov't Code Ann. § 418.012. Accordingly, the Executive Order causes ongoing injury to Respondents and their patients solely because the Governor continues to exercise his authority to implement it. And restraining the Governor from exercising his authority to make the Executive Order applicable to "medication and procedural abortions," App.270 (TRO order), unequivocally redresses the injuries that Respondents and their patients are experiencing as a result of the Executive Order, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Similarly, the Attorney General has the authority to

prosecute Respondents and their agents, at the request of local prosecutors, for alleged violations of the Executive Order. Tex. Gov't Code Ann. §402.028(a); App.8. Respondents' argument that the threat of enforcement is speculative is belied the Attorney General's own press release, in which he repeatedly threatened enforcement against abortion providers in particular. App.29-31.[11]

Petitioners' reliance on *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019), is misplaced. There, the court held that for *Ex parte Young* to apply, the state official, "by virtue of his office," must have "some connection with the enforcement of the [challenged] act"—in other words, that the state official has the ability to "compel or constrain" regulated parties' conduct. *Id.* at 997-998 (citation omitted). Petitioners claim that they do not enforce the Executive Order themselves, but that is not what *City of Austin* requires—rather, they need only have "*some connection*" to enforcement. Thus, as the court explained, suits against the Attorney General are proper where, for example, he has "sent letters threatening enforcement of [a

[11] Even if Petitioners were correct that the district court lacks jurisdiction over the Governor and Attorney General, its entry of a TRO against them could not possibly warrant the extraordinary remedy of mandamus because those officials have other means to obtain relief. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008). Most obviously, they can raise this argument at the scheduled hearing on a preliminary injunction, which is just days away. They can also file a motion to dismiss Respondents' claims. *See* Fed. R. Civ. P. 12(b)(1), (h)(3). And in the meantime, in their telling, they should suffer no harm: an order directing the Governor and Attorney General not to enforce an Executive Order that they assert they cannot enforce anyway is harmless.

statute],” making “clear that he had not only the authority to enforce the [statute], but was also constraining the [regulated party’s] activities, in that it faced possible prosecution if it continued to” take actions forbidden by that statute. *Id.* at 1001 (discussing *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393 (5th Cir. 2015)).

The Attorney General has done the same thing here, stating in a press release that provision of any abortion care would violate the Executive Order and warning that “[t]hose who violate the governor’s order will be met with the full force of the law.” App.31. And while the plaintiff in *City of Austin* “face[d] no threat of criminal prosecution,” 943 F.3d at 1002, failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both. App.35. That fact distinguishes this case from *City of Austin* and confirms the Attorney General’s connection to the challenged ordinance’s enforcement. Likewise, the Governor, by virtue of his unilateral authority to modify or extend the Executive Order, surely has the power to “constrain” Respondents’ conduct.

Second, Petitioners seek mandamus on the ground that the Providers do not have third-party standing to bring claims on behalf of their patients seeking abortion care (a prudential consideration). More than four decades of controlling precedent says the opposite. *See, e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*,

748 F.3d 583, 589 n.9 (5th Cir. 2014) (concerning physicians who provide abortions). In fact, so does Texas. *See* Texas *et al*. Amicus Br. 10 & n.4, *Gee v. June Med. Servs.*, No. 18-1460 (Sup. Ct.) (recognizing that "many lower courts," including the Fifth Circuit, "routinely assume … that abortion doctors meet the close-relationship and hindrance requirements in all challenges to abortion regulations"). Where, as here, enforcement of the Executive Order against Respondents "would result indirectly in the violation of third parties' rights,'" *Respondents* clearly have standing. *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (citation omitted).[12]

Third, Petitioners contend that Respondents cannot bring their claims because 42 U.S.C. §1983 "does not provide a cause of action to plaintiffs claiming an injury based on the violation of a third party's rights." Pet.28. They are incorrect. While §1983 provides that a state actor "shall be liable to the party injured," it says nothing about who may bring the action and, specifically, whether a plaintiff with third-party standing to represent that injured party may bring a §1983 action on her behalf. Litigants who have third-party standing to assert others' rights may champion those rights in an action under § 1983. *See, e.g.*, *L.A. Police Dep't v. United Reporting*

[12] Petitioners' reliance on *In re Gee* to support their third-party standing argument is puzzling. There, the Court acknowledged that the practice of allowing abortion providers to sue on their patients' behalf "continues today." 941 F.3d 153, 165 (5th Cir. 2019).

Publ'g Corp., 528 U.S. 32, 39-40 (1999) (confirming that §1983 is available to litigants asserting third parties' First Amendment rights). In the abortion context in particular, the Supreme Court has considered and reached the merits in multiple § 1983 actions brought by abortion providers on their patients' behalf, including as recently as 2016. *See Whole Woman's Health*, 136 S. Ct. at 2301; *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794 (7th Cir. 2013) (noting "the cases are legion that allow an abortion provider, such as [Plaintiffs], to sue to enjoin as violations of federal law (hence litigable under 42 U.S.C. § 1983) state laws that restrict abortion"). None of the cases cited by the State Defendants hold otherwise. In two of the cases—*Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986) and *Conn v. Gabbert*, 526 U.S. 286 (1999)—third-party standing was never asserted. And in the third, *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011), this Court rejected a claim of third-party standing because it was, in fact, not enough like the lead case establishing abortion providers' third-party standing. Thus, the district court's entry of the TRO was proper.

II. Petitioners Would Not Be Denied A Remedy Absent Mandamus

Independent of their obligation to show a clear entitlement to relief, Petitioners must also show that allowing the normal litigation and appeal process to play out would effectively deny them a remedy. *See Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). This requirement "ensure[s] that the writ

will not be used as a substitute for the regular appeals process." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-381 (2004). Here, Petitioners have not shown that they would suffer irreparable injury if the TRO is allowed go into effect for the short period of time preceding its expiration, nor could they do so.

Petitioners do not identify harm that could not be remedied in the ordinary course of proceedings. This is unsurprising given the procedural posture: this Court and its sister circuits almost never issue a writ of mandamus as to a TRO because a TRO is, by its nature, transitory. It automatically expires at the end of the statutory period and, if replaced by a preliminary injunction, is subject to an immediate interlocutory appeal under 28 U.S.C. §1292(a). Accordingly, the aggrieved party has an immediate opportunity to remedy its harm through the ordinary appellate process. *See, e.g.*, *Wilson v. U.S. Dist. Ct. for N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998) (denying mandamus review of TRO staying prisoner's execution where "[t]he district court has scheduled a full show cause hearing on issuance of a preliminary injunction for December 3, 1998, which is less than three weeks hence. That order will be fully reviewable on appeal and expedited proceedings may be requested.").

The district court will hold a hearing on the preliminary injunction motion in just over a week. If a preliminary injunction is granted, Petitioners have an immediate right to appeal. This Court should allow the district court to hear the important issues at stake in this matter and, as in the normal course, reserve its review

for if and when a preliminary injunction issues. *See In re Sch. Asbestos Litig.*, 977 F.2d 764, 772 (3d Cir. 1992) (mandamus is "disfavored because its broad use would threaten the [congressional] policy against piecemeal appeals").

Respondents recognize that these are not normal times, but this fact cautions *against* resort to the extraordinary remedy of mandamus, not in favor of it. Petitioners argue that immediate action is required of this Court to conserve PPE and hospital capacity and to prevent further spread of COVID-19. Pet.31. However, as explained above in Part I, Petitioners have *not* shown that the TRO impedes the shared public health goals of mitigating the spread of COVID-19. To the contrary, the evidence shows that the TRO would further public health. Providing the pills needed for medication abortions (available up to 10 weeks gestation in Texas) require no PPE. Even surgical abortions require minimal PPE. On the other hand, forcing patients to continue pregnancies will likely place additional burdens on healthcare resources, as patients will need to seek prenatal care, potentially deal with pregnancy complications or complications from underlying health conditions exacerbated by pregnancy, and, for some patients who are delayed beyond the legal limit for abortion, undergo labor and delivery. Other patients will seek care out of state (many already have), which contributes to viral transmission. Additionally, legal abortion is safe and almost never requires hospitalization. On balance, then,

the provision of abortion care is likely to *reduce* the need for patients to turn to hospitals for care, supporting both *patient* health and *public* health.

Finally, Petitioners' own actions unnecessarily increase the amount of PPE currently required to provide abortion services in Texas. If Petitioners want to reduce the use of PPE involved in the provision of abortion services, they could waive medically unnecessary abortion restrictions such as mandated extra in-person visits prior to the abortion, the unnecessary gestational age limit for medication abortion, and ultrasound requirements. Notably, to respond to the pandemic, the State has suspended restrictions on telemedicine generally, 28 Tex. Admin. Code §35.1 (emergency regulation adopted Mar. 17, 2020), but has not suspended the existing restrictions barring Respondents from using telemedicine to provide medication abortion. *See, e.g.*, Tex. Occ. Code Ann. §111.005(c); 25 Tex. Admin Code §139.53(b)(4). Instead, it has banned abortion and sought emergency relief from this Court at the expense of Texans in need of this healthcare.

III. Mandamus is Not Appropriate In These Circumstances.

Even if Petitioners could establish the first two elements for mandamus relief, which they cannot, this Court should exercise its discretion to determine that mandamus is not appropriate. Mandamus relief is only appropriate when the trial court has "exceeded its jurisdiction" or "has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Occidental*

Petrol. Corp., 217 F.3d 293, 295 n.7 (5th Cir. 2000). That is certainly not the case here where the district court had jurisdiction and applied well-settled precedent in granting the TRO. *See U.S. v. Comeaux*, 954 F.2d 255, 261 (5th Cir. 1992) (mandamus not appropriate where "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction") (citation omitted). The COVID-19 crisis does not compel a different result.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Mandamus. In the alternative, the Providers respectfully request that the Court deny the Petition as to (1) the provision of medication abortion and (2) the provision of procedural abortion to patients whose pregnancies will, before the expiration of the TRO, reach or exceed 22 weeks LMP, the gestational limit at which abortion may be provided in Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 2, 2020, this response was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13.

CERTIFICATE OF COMPLIANCE

This reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 7,784 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count).

/s/ *Julie Murray*

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