

No. 20-50296

**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

**RESPONDENTS' EMERGENCY MOTION
TO LIFT PARTIAL ADMINISTRATIVE STAY**

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CERTIFICATE OF INTERESTED PERSONS

No. 20-50296, *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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Vermont, Virginia, Washington, and the District of Columbia	
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	iii
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	viii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	8
CERTIFICATE OF SERVICE	10
CERTIFICATION OF COMPLIANCE WITH RULE 27.3	10
CERTIFICATE OF COMPLIANCE WITH TYPE-FACE AND VOLUME LIMITATIONS	11

TABLE OF AUTHORITIES

Cases

<i>In re Greg Abbott</i> , No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020)	3, 6
<i>Jacobson v. Commonwealth of Massachusetts</i> , 197 U.S. 11, 31 (1905)	3, 5
<i>Preterm-Cleveland v. Att’y. Gen. of Ohio</i> , No. 1:19-cv-00360-MRB, slip op. (S.D. Ohio Mar. 30, 2020)	7
<i>Preterm-Cleveland v. Att’y. Gen. of Ohio</i> , No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020)	8
<i>Robinson v. Marshall</i> , No. 2:19cv365-MHT, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020) ..	7
<i>S. Wind Women’s Ctr. LLC v. Stitt</i> , No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020) 5, 7	
<i>Whole Woman’s Health v. Hellerstedt</i> , 136 S. Ct. 2292 (2016)	6

Statutes

Tex. Health & Safety Code § 171.044	2, 6
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Other Authorities

Defendants Ohio Dep’t of Health, State Med. Bd. of Ohio, and Ohio Att’y Gen. Dave Yost’s Response to Plaintiffs’ Motion for Preliminary Injunction at 27, <i>Preterm-Cleveland v. Att’y Gen. of Ohio</i> , No. 1:19- cv-00360 (S.D. Ohio Apr. 8, 2020), ECF No. 59	7
Tex. Med. Bd., Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent, Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020).....	4

INTRODUCTION

On April 10, 2020, Defendants-Petitioners (“State Officials”) filed an emergency motion for an administrative stay of the district court’s limited temporary restraining order (“Limited TRO”), which partially enjoined enforcement of a Texas executive order that State Officials interpret to prohibit nearly all abortions during the COVID-19 pandemic. Without awaiting an opposition from Plaintiffs-Respondents (“Providers”), this Court granted the motion in part and entered an administrative stay with no formal expiration date of key portions of the Limited TRO.

Providers file this emergency motion to lift the administrative stay. On remand, responding directly to this Court’s guidance, the district court issued a narrow TRO tailored to the record before it (which contains evidence not before the district court at the time of its prior TRO). This Limited TRO temporarily blocks enforcement of Texas Governor Greg Abbott’s March 22, 2020, Executive Order GA-09 (“Executive Order”) only as to (1) medication abortion and (2) abortion for patients who would otherwise be prevented from accessing that care before expiration of the Executive Order, as described more specifically in the Limited TRO. Immediate dissolution of the administrative stay is necessary to prevent severe and lasting harm to Providers’ patients and public health.

Respondents have conferred with Petitioners, who indicate that they oppose this motion.

ARGUMENT

The administrative stay is at odds with the district court’s express finding that the Limited TRO is *necessary* to prevent irreparable harm to Providers’ patients who have been unable to obtain abortions since the Executive Order went into effect on March 22, 2020. Providers have already turned away hundreds of patients seeking abortion care, including during a previous week-long administrative stay entered by this Court to resolve State Officials’ first petition for a writ of mandamus. They will turn away hundreds more in the coming days if this Court does not lift its latest administrative stay. App.473–74.

Those patients will include individuals likely or certain to lose their right to obtain an abortion in the State of Texas by the time the Executive Order expires, even assuming the order is not extended, because the patients’ pregnancies will exceed eighteen weeks LMP by April 22, 2020, and, in the judgment of their medical providers, they will likely be unable to access care at one of the few ambulatory surgical centers (“ASCs”) in Texas.¹ Those patients will also include those seeking

¹ Tex. Health & Safety Code § 171.044. This statute bans most abortion after twenty weeks post-fertilization. Fertilization generally occurs about two weeks after the first day of the pregnant patient’s last menstrual period (“LMP”), so twenty weeks post-fertilization equates to roughly twenty-two weeks LMP.

a medication abortion, which is not a “procedure” under the Executive Order and, as the district court found, does not require the use of PPE.

There is no basis for State Officials’ claim that mandamus is appropriate here. As Providers would describe in an opposition to that petition, the district court correctly applied this Court’s previous mandamus order. Under that decision, certain applications of the Executive Order may amount to an undue burden under *Planned Parenthood Southeast Pennsylvania v. Casey* where, “‘beyond question,’ the Executive Order’s burdens outweigh its benefits in those situations.” *In re Greg Abbott*, No. 20-50264, 2020 WL 1685929, at *9 (5th Cir. Apr. 7, 2020) (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)). This Court’s mandamus order expressly recognized that the Executive Order contains an exception for procedures that “‘if performed under normal clinical standards ‘would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster,’” and stated that the district court’s prior, broad TRO contained no findings about the use of PPE in medication abortion. *Id.* at *9, *11. It also recognized that relief may be appropriate for patients whose pregnancies will reach or exceed a point after which abortion services would be unavailable in Texas. *Id.* at *11. The district court correctly concluded that Providers are likely to meet the standard set forth in this Court’s mandamus order as to abortion in the limited circumstances at issue here.

First, the record demonstrates that medication abortion is not a “procedure” and requires no PPE, App.73, 86, 91, 100, 110, 117, 129–30, 134, 157, 469–70, so it does not cause any of the problems addressed by the Executive Order, which on its face applies only to “surgeries and procedures.” App.35; *see also* Tex. Med. Bd., Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent, Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020).² The record further shows that complications from medication abortion are exceedingly rare, and follow-up aspiration procedures, where necessary, can almost always be performed in an outpatient setting. App.129, 373, 470. The district court also found that the ultrasounds and ancillary services attendant to medication abortion are not “procedures” governed by the Executive Order based on Defendant Texas Medical Board’s own guidance document, and that, in any event, the PPE used at this stage of pregnancy is greater for individuals who remain pregnant than for those who have an abortion. App.470, 472–73. In addition, it found that Texas obstetricians are continuing to provide in-person visits to pregnant patients, including ultrasounds and other ancillary services. App.472.

² Available at <http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17>.

As to the burdens of the Executive Order as applied to medication abortion, the district court found, based on the evidentiary record, that the health risks associated with both pregnancy and abortion increase with gestational age. App.474. The district court likewise found, based on the record, that people with ongoing pregnancies must cope with the physical symptoms of pregnancy; must struggle to conceal their pregnancies from abusive partners or family members; and must deal with the stress and anxiety of not knowing when—or if—they will be able to obtain an abortion. App.475. The district court also found that the Executive Order is causing individuals who have the ability to travel to go to other states to obtain abortions. The record shows that these individuals, including individuals seeking medication abortion, are traveling by both car and airplane to places as far away as Colorado and Georgia, at odds with the recommendations of public health officials. App.473.

The district court was correct that the burdens the Executive Order imposes on these individuals, *beyond all doubt*, outweigh any benefits that the Executive Order may confer. *See S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2, 5 (W.D. Okla. Apr. 6, 2020) (quoting *Jacobson*, 197 U.S. at 31) (“[T]he benefit to public health of the ban on medication abortions is minor and outweighed by the intrusion on Fourteenth Amendment rights caused by that ban.”). There is no error in the district court’s conclusion in this regard.

Second, the Executive Order undeniably operates as an undue burden as to people whose pregnancies will, by expiration of the Executive Order, reach eighteen weeks LMP and who, in the judgment of their physician, would not be able to access abortion care at one of the State’s few ASCs. At that point, outpatient procedural abortions may only be performed at ASCs,³ but there are no ASCs that provide abortion care outside of Texas’s four largest metropolitan areas. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016). Accordingly, patients who are unable to obtain care at an ASC after eighteen weeks LMP will be denied an abortion entirely. Because the Executive Order as applied to abortion in those circumstances would have the effect of foreclosing the right to abortion altogether, *see id.* at 2316–18, it “constitute[s] an undue burden under *Casey*” and is, “*beyond question*, in palpable conflict with the Constitution,” *In re Greg Abbott*, 2020 WL 1685929, at *10.

The district court’s Limited TRO grants relief in these limited circumstances only, and for a limited time: it expires in just over a week, on April 19, 2020. As the district court expressly found, again in response to this Court’s previous decision, the Executive Order as applied to this limited subset of patients does not serve public health. Indeed, based on the declarations of Texas obstetrician-gynecologists and national public-health experts, the district court found that entry of the Limited TRO

³ Tex. Health & Safety Code § 171.004.

to restore some abortion access would *serve* Texas’s interest in public health. App.477. This is because patients denied access to medication abortion and procedural abortion later in pregnancy will consume more PPE and hospital resources by remaining pregnant than if they receive abortions.⁴

Finally, Providers request that this Court lift the administrative stay because the stay’s result—permitting Texas officials to impose the most extreme abortion restriction in the country—is at odds with the decisions of every district court to consider these issues and enter relief. Those other courts have enjoined application of “essential surgery” executive orders to abortion in circumstances similar to those at issue in this case,⁵ and a sister circuit has concluded that such relief would not “inflict irretrievable harms or consequences before the TRO expires.” *Preterm-Cleveland v. Att’y. Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *1–2 (6th Cir.

⁴ Indeed, in enforcing a similar executive order, Ohio recognized the public health need to allow medication abortions and abortions for patients close to a gestational-age cutoff. *See* Defendants Ohio Dep’t of Health, State Med. Bd. of Ohio, and Ohio Att’y Gen. Dave Yost’s Response to Plaintiffs’ Motion for Preliminary Injunction at 27, *Preterm-Cleveland v. Att’y Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Apr. 8, 2020), ECF No. 59 (“Doctors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Doctors remain free to perform surgical abortions necessary for a mother’s health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient’s abortion rights.”)

⁵ *See generally Preterm-Cleveland v. Att’y. Gen. of Ohio*, No. 1:19-cv-00360-MRB, slip op. (S.D. Ohio Mar. 30, 2020); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020); *S. Wind Women’s Center LLC v. Stitt*, 2020 WL 1677094.

Apr. 6, 2020). Meanwhile, the administrative stay is already causing irreparable harm to the health and rights of hundreds of Texans, and will exacerbate the spread of COVID-19 by forcing people to travel out of state for care that the TRO would allow them to obtain safely closer to home.

CONCLUSION

For the foregoing reasons, this Court should lift the administrative stay without delay. Given the nature of the harms imposed by the stay, Respondents request a decision on their emergency motion by April 10, 2020.

Dated: April 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Petitioners are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Julie Murray
Julie Murray

CERTIFICATION OF COMPLIANCE WITH RULE 27.3

In compliance with Fifth Circuit Rule 27.3, I certify the following:

- Before filing this motion, counsel for Respondents contacted the clerk's office and opposing counsel to advise them of Respondents' intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible, but no later than 9 p.m. Central Time, Friday, April 10, 2020.
- True and correct copies of relevant orders and other documents are included in the Appendix to Petitioners' petition for writ of mandamus.
- This motion is being served at the same time it is being filed.

/s/ Julie Murray
Julie Murray

**CERTIFICATE OF COMPLIANCE WITH TYPE-FACE
AND VOLUME LIMITATIONS**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,759 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 10, 2020

/s/ Julie Murray
Julie Murray