

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

**OPPOSED MOTION TO RECALL MANDATE PENDING PETITION FOR
PANEL REHEARING/REHEARING EN BANC AND TO RECALL AND
STAY MANDATE PENDING FILING OF A PETITION FOR A WRIT OF
CERTIORARI**

PATRICK J. O'CONNELL
Law Offices of Patrick J.
O'Connell PLLC
5926 Balcones Dr., Ste. 220
Austin, Texas 78731
(512) 852-5918
pat@pjofca.com
Counsel for Plaintiffs-Respondents

[Additional counsel on inside
cover]

JULIE A. MURRAY
HANNAH SWANSON
Planned Parenthood Federation of America
1110 Vermont Ave., NW, Ste. 300
Washington, DC 20005
(202) 973-4800

JENNIFER SANDMAN
Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
*Counsel for Plaintiffs-Respondents Planned
Parenthood Center for Choice, Planned
Parenthood of Greater Texas Surgical
Health Services, and Planned Parenthood
South Texas Surgical Center*

Additional counsel:

STEPHANIE TOTI
RUPALI SHARMA
Lawyering Project
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083

*Counsel for Plaintiffs-Respondents
Whole Woman's Health and Whole
Woman's Health Alliance*

MOLLY DUANE
RABIA MUQADDAM
FRANCESCA COCUZZA
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3631

*Counsel for Plaintiffs-Respondents
Southwestern Women's Surgery
Center, Brookside Women's
Medical Center PA d/b/a Brookside
Women's Health Center and Austin
Women's Health Center, and Robin
Wallace, M.D.*

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.

Plaintiffs-Respondents	Counsel
<ol style="list-style-type: none"> 1. Planned Parenthood Center for Choice 2. Planned Parenthood of Greater Texas Surgical Health Services 3. Planned Parenthood South Texas Surgical Center 4. Whole Woman’s Health 5. Whole Woman’s Health Alliance 6. Southwestern Women’s Surgery Center 7. Brookside Women’s Medical Center PA d/b/a Brookside Women’s Health Center and Austin Women’s Health Center 8. Robin Wallace, M.D. 	<ol style="list-style-type: none"> 1. Law Offices of Patrick J. O’Connell PLLC (Patrick J. O’Connell) 2. Planned Parenthood Federation of America (Jennifer Sandman, Julie Murray, Richard Muniz, Hannah Swanson) 3. Center for Reproductive Rights (Molly Duane, Rabia Muqaddam, Francesca Cocuzza) 4. Lawyering Project (Stephanie Toti, Rupali Sharma)
Plaintiffs	Counsel
<ol style="list-style-type: none"> 1. Houston Women’s Clinic 2. Alamo City Surgery Center PLLC d/b/a Alamo Women’s Reproductive Services 3. Houston Women’s Reproductive Services 	<ol style="list-style-type: none"> 1. Law Offices of Patrick J. O’Connell PLLC (Patrick J. O’Connell) 2. ACLU Foundation of Texas, Inc. (Andre Segura, Anjali Salvador) 3. American Civil Liberties Union Foundation (Brigitte Amiri)

	<p>4. Center for Reproductive Rights (Molly Duane, Rabia Muqaddam, Francesca Cocuzza)</p>
<p>Defendants-Petitioners</p>	<p>Counsel</p>
<ol style="list-style-type: none"> 1. Greg Abbott, Governor of the State of Texas 2. Ken Paxton, Attorney General of Texas 3. Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission 4. Stephen Brint Carlton, Executive Director of the Texas Medical Board 5. Katherine A. Thomas, Executive Director of the Texas Board of Nursing 	<ol style="list-style-type: none"> 1. Office of the Attorney General of Texas (Kyle D. Hawkins, Jeffrey C. Mateer, Andrew B. Stephens, Heather G. Hacker, Benjamin S. Walton, Natalie D. Thompson, Beth E. Klusmann)
<p>Defendants</p>	<p>Counsel</p>
<ol style="list-style-type: none"> 1. Margaret Moore, District Attorney for Travis County 2. Joe Gonzales, Criminal District Attorney for Bexar County 3. John Creuzot, District Attorney for Dallas County 4. Jaime Esparza, District Attorney for El Paso County 5. Kim Ogg, Criminal District Attorney for Harris County 6. Ricardo Rodriguez, Jr., Criminal District Attorney for Hidalgo County 7. Barry Johnson, Criminal District Attorney for McLennan County 8. Sharen Wilson, Criminal District Attorney for Tarrant County 9. Brian Middleton, Criminal District Attorney for Fort Bend County 	<ol style="list-style-type: none"> 1. Office of the Dallas County District Attorney (John J. Butrus, Jr.) 2. Office of the Fort Bend County District Attorney (Justin C. Pfeiffer) 3. Office of the Attorney General of Texas (Adam Arthur Biggs)

Amici Curiae	Counsel
<ol style="list-style-type: none"> 1. Attorneys General of the States of Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia 2. American Center for Law and Justice 3. American Association of Pro-Life Obstetricians and Gynecologists; Texas Values; Indiana Family Institute; Family Heritage Alliance Action, South Dakota; Minnesota Family Council; Wisconsin Family Action; Alaska Family Action; California Family Council; Ohio Citizens for Community Values; Nebraska Family Alliance; Family Policy Institute of Washington; The Family Foundation (Kentucky); Louisiana Family Forum 4. American College of Obstetricians and Gynecologists; American Medical Association; American Academy of Family Physicians; American Academy of Nursing; American Academy of Pediatrics; AAGL; American College of Nurse-Midwives; American College of Osteopathic Obstetricians and Gynecologists; American College of Physicians; American Osteopathic Association; American Psychiatric Association; American Society of Reproductive Medicine; American Urogynecologic Society; North American Society for 	<ol style="list-style-type: none"> 1. Louisiana Department of Justice (Jeff Landry, Elizabeth Murrill, J. Scott St. John) 2. Lill Firm, P.C. (David S. Lill) 3. American Center for Law and Justice (Jay A. Sekulow, Edward L. White III, Jordan Sekulow, Stuart J. Roth, Erik M. Zimmerman, Benjamin P. Sisney, Olivia F. Summers, Christina A. Stierhoff) 4. Mitchell Law PLLC (Jonathan F. Mitchell) 5. Texas Values (Jonathan M. Saenz) 6. Mayer Brown (Nicole A. Saharsky, Kathleen S. Messinger) 7. American College of Obstetricians and Gynecologists (Skye L. Perryman) 8. Office of the New York State Attorney General (Letitia James, Barbara D. Underwood, Anisha S. Dasgupta, Laura Etlinger)

<p>Pediatric and Adolescent Gynecology; National Association of Nurse Practitioners in Women’s Health; Society of Family Planning; Society for Maternal-Fetal Medicine; Society of Gynecologic Oncology; Society of Gynecologic Surgeons; Society of OB/GYN Hospitalists</p> <p>5. Attorneys General of the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia</p>	
---	--

On April 20, 2020, this Court granted Defendants-Petitioners’ (“State Officials”) petition for a writ of mandamus for vacatur of the district court’s April 9, 2020, temporary restraining order (“Limited TRO”), which barred enforcement of Texas Governor Greg Abbott’s March 22, 2020, Executive Order GA-09 as to medication abortion and abortion for patients who would otherwise be prevented entirely from accessing abortion due to their stage of pregnancy and, for some, their likely inability to access abortion at one of Texas’s few ambulatory surgical centers. Plaintiffs-Respondents (“Providers”) respectfully move the Court to recall its mandate to permit Providers to file and this Court to consider a petition for panel rehearing and/or rehearing en banc, and further ask this Court to recall and stay its mandate to permit Providers to seek certiorari review from the U.S. Supreme Court.

BACKGROUND

As this Court is aware, on March 22, 2020, Governor Abbott issued an executive order barring “all surgeries and procedures that are not immediately medically necessary” in order to reduce the use of PPE for medical providers and hospital beds necessary to combat COVID-19. App.35. On March 30, 2020, the district court issued a TRO enjoining enforcement of the Executive Order as to both medication and procedural abortion. On April 7, 2020, a divided panel of this Court issued a writ of mandamus vacating the first TRO. *In re Abbott*, No. 20-50264, 2020

WL 1685929 (5th Cir. Apr. 7, 2020). As directed by this Court in its mandamus decision, *see id.* at *16, the mandate issued forthwith on April 7, 2020.

On remand, Providers sought a second, narrower TRO, which the district court granted on April 9, 2020. That Limited TRO enjoined enforcement of the Executive Order as to medication abortion and abortion for patients who would otherwise be prevented entirely from accessing abortion due to their stage of pregnancy and, for some, their likely inability to access abortion at one of Texas’s few ambulatory surgical centers. On April 20, 2020, a divided panel of this Court issued a second writ of mandamus, vacating much of the Limited TRO, and again directed that the mandate issue forthwith. *In re Abbott*, No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020).

Providers move the Court to recall its mandate in this case to permit Providers to file and this Court to consider a petition for rehearing and/or rehearing en banc of the April 20 decision. Providers further ask this Court to recall and stay the mandate to permit Providers to seek certiorari review from the U.S. Supreme Court.

ARGUMENT

I. The Court Should Recall the Mandate to Permit Rehearing

This Court has inherent power to recall its mandate “in extraordinary circumstances.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Once issued, a mandate will not be recalled “except to prevent injustice.” Fifth Cir. R. 41.2.

Recalling the mandate to permit consideration of Providers' petition for rehearing and/or rehearing en banc is necessary to prevent injustice here.

Ordinarily, to give the parties an opportunity to petition for panel rehearing or for rehearing en banc, the mandate will not issue until eight days after the time for filing a petition for rehearing expires, or after entry of an order denying the petition for rehearing. *See* Fifth Cir. R. 41 I.O.P.¹ A motion for panel rehearing or rehearing en banc is usually due fourteen days after entry of judgment. Fed. R. App. P. 40(a)(1). In this case, the mandate issued immediately upon issuance of the Court's mandamus decision, before Providers had an opportunity to seek panel rehearing or rehearing en banc.

This Court can and should recall the mandate to permit consideration of Providers' petition for rehearing and/or rehearing en banc. The Court has approved recalling the mandate to permit further appellate proceedings contemplated by the Federal Rules of Appellate Procedure and the Fifth Circuit's Rules and Internal Operating Procedures. In *BHTT Entertainment, Inc. v. Brickhouse Café & Lounge, L.L.C.*, this Court held that the clerk of the court could constructively recall the mandate by granting a motion to reinstate an appeal that the clerk had dismissed for lack of prosecution: "A motion to recall the mandate and a motion to reopen the case

¹ While Fifth Circuit Rule 41.4 provides that the mandate will issue forthwith "in actions denying mandamus relief," here, the Court *granted* mandamus relief.

have the same effect; they both ask this court to resurrect a matter it had finally disposed of. Thus, we conclude that the clerk had the power to recall the mandate here, that its order reopening the case did do so, and that we have appellate jurisdiction.” *BHTT Entertainment, Inc. v. Brickhouse Café & Lounge, L.L.C.*, 858 F.3d 310, 313–14 (5th Cir. 2017). As in *BHTT*, in this case recalling the mandate would permit appellate proceedings to resume in accordance with the procedures contemplated by the Federal Appellate and Fifth Circuit Rules.

Moreover, particularly given the ongoing, closely related litigation in the district court, recalling the mandate as to the second mandamus decision would not undermine the interest in repose that ordinarily counsels against doing so. *See* 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3938 (3d ed. updated Jan. 2017) (“[R]ecall would interfere with the more profound interests in repose if proceedings had apparently been terminated by the appellate decision.”).

II. The Court Should Recall and Stay the Mandate Pending Certiorari Review

Federal Rule of Appellate Procedure 41(d)(2) authorizes this Court to stay its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. Such a stay is appropriate when: (1) there is a reasonable probability that the Supreme Court will grant certiorari; (2) there is a significant possibility that the decision of the court of appeals will be reversed; and (3) it is likely that irreparable harm will occur in the absence of a stay. *See Baldwin v. Maggio*, 715 F.2d 152, 153

(5th Cir. 1983). All three factors are satisfied in this case. In turn, recall of the mandate is warranted to “prevent injustice.” *See* Fifth Cir. R. 41.2.

First, the Supreme Court will probably grant certiorari in this case because it will present the question whether a district court may partially enjoin a previability abortion ban during the COVID-19 pandemic when the court determines that the ban is not reasonably designed to protect public health. That question is currently at issue in other cases pending in the federal courts. In circumstances as time-sensitive and pressing as these, any conflict on this question among lower courts would warrant granting certiorari, even in the absence of a direct conflict among the courts of appeals or with decisions of this Court. *Cf. Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment in part “because of the disarray among the Federal District Courts”); *see also* Petition for Writ of Certiorari at 16, *U.S. Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2018) (No. 18-587) (observing, amidst division among courts of appeals and district courts, that “[o]nly this Court can resolve the conflict in the lower courts and provide much-needed clarity”). Where important constitutional issues are at stake, the Supreme Court will grant certiorari even absent a conflict among the lower courts. *See, e.g., June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (2019) (Nos. 18-1323, 18-1460); *N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 139 S. Ct. 1647 (2019) (No. 18-280). The drastic consequences of the Executive Order for public health,

women’s health, and the constitutional right to a previability abortion plainly present issues of national importance warranting the Supreme Court’s review.

In any event, here, the Court’s mandamus order conflicts with the Supreme Court’s clear mandates, as described in further detail below.

Second, there is a “significant possibility” that this Court’s decision will be reversed. *Baldwin*, 715 F.2d at 153. Such a significant possibility exists for several reasons. Most significantly, the panel opinion conflicts with Supreme Court precedent holding that the Due Process Clause of the Fourteenth Amendment protects a woman’s right to choose abortion, *Roe v. Wade*, 410 U.S. 113, 153–54 (1973), and prior to viability, a state has *no interest* sufficient to justify a ban on abortion, *id.* at 163–65; *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 871 (1992); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). It also conflicts with the undue-burden standard set forth in *Casey* and *Whole Woman’s Health* by requiring application of a modified undue-burden standard in a public health emergency. The panel’s determination not to apply these on-point precedents was plainly wrong.

Third, it is likely that irreparable harm will occur in the absence of a stay. Absent a stay, Providers will have no avenue in the short-term to avoid operation of a judicial decision that may bind them and their patients in the underlying case, and which may affect Providers’ rights in any enforcement actions brought for conduct

that the state deems a violation of Executive Order GA-09. Moreover, despite repeated attempts by Providers to ascertain the position of State Officials as to whether their past enforcement threats persist—most recently in a teleconference at 1:00 CT this afternoon—State Officials have declined to provide any clarity as to their views on Executive Order GA-15’s application to Providers. That executive order, which largely tracks the language of GA-09 at issue in this Court’s April 7 decision, save for a new exemption, will take effect tomorrow on April 22, 2020.

CONCLUSION

For the reasons set forth above, Providers respectfully request that this Court recall its mandate to permit consideration of Providers’ petition for rehearing and/or rehearing en banc and recall and stay the mandate to permit Providers to seek Supreme Court review.

Respectfully submitted,

/s/ Patrick J. O’Connell
PATRICK J. O’CONNELL
Law Offices of Patrick J.
O’Connell PLLC
5926 Balcones Dr., Ste. 220
Austin, Texas 78731
(512) 852-5918
pat@pjofca.com
Counsel for Plaintiffs-Respondents

/s/ Stephanie Toti
STEPHANIE TOTI

/s/ Julie A. Murray
JULIE A. MURRAY
HANNAH SWANSON
Planned Parenthood Federation of
America, Inc.
1110 Vermont Ave., NW, Ste. 300
Washington, DC 20005
(202) 973-4800
julie.murray@ppfa.org
hannah.swanson@ppfa.org

JENNIFER SANDMAN

RUPALI SHARMA
Lawyering Project
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083
stoti@lawyeringproject.org
rsharma@lawyeringproject.org
*Counsel for Plaintiffs-Respondents
Whole Woman's Health and Whole
Woman's Health Alliance*

Planned Parenthood Federation of
America, Inc.
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
jennifer.sandman@ppfa.org
*Counsel for Plaintiffs-Respondents
Planned Parenthood Center for
Choice, Planned Parenthood of
Greater Texas Surgical Health
Services, and Planned Parenthood
South Texas Surgical Center*

/s/ Molly Duane
MOLLY DUANE
RABIA MUQADDAM
FRANCESCA COCUZZA
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3631
mduane@reprorights.org
rmuqaddam@reprorights.org
fcocuzza@reprorights.org
*Counsel for Plaintiffs-Respondents
Southwestern Women's Surgery
Center and Brookside Women's
Medical Center PA d/b/a Brookside
Women's Health Center and Austin
Women's Health Center, and Robin
Wallace, M.D.*

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 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

**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 1,636 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.

/s/ Julie Murray
Julie Murray

Dated: April 21, 2020