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

OPPOSITION TO SECOND PETITION FOR WRIT OF MANDAMUS

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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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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Respondents respectfully request oral argument. The district court appropriately exercised its jurisdiction and applied well-settled, binding precedent to enter a temporary restraining order closely tailored to a fulsome factual record. Defendants-Petitioners seek an extraordinary remedy of mandamus for the second time in just days, notwithstanding the district court's direct application of this Court's guidance following Defendants-Petitioners' first petition for writ of mandamus in this case. Defendants-Petitioners' mischaracterization of the facts cannot justify yet another grant of the extraordinary remedy of mandamus. Telephonic or video oral argument is likely to assist the Court's resolution of these serious matters.

INTRODUCTION

Texas state officials, for the second time in just ten days, ask this Court to issue the extraordinary remedy of mandamus to allow the State of Texas to effectively ban abortions during the COVID-19 pandemic.[1] The district court, following this Court's prior instructions to scrutinize the factual record under the controlling legal framework and tailor any remedy to the specific circumstances, *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *12 (5th Cir. Apr. 7, 2020), correctly granted a narrowly tailored temporary restraining order ("Limited TRO") barring Defendants-Petitioners ("State Officials") from enforcing Governor Abbott's Executive Order GA-09 with respect to two limited categories of Plaintiffs-Respondents' ("Providers'") patients: those who because of their stage of pregnancy would be unable to obtain an abortion prior to the Executive Order's expiration, and those seeking medication abortion. For the patients in these categories, State Officials' threatened enforcement of the Executive Order infringes their constitutional right to abortion without serving Texas's interests in addressing COVID-19. This is not the rarest of circumstances where the district court "clearly

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

and indisputably erred," where its error is "irremediable on ordinary appeal," and where extraordinary relief is otherwise warranted.

As the district court's careful findings show, State Officials' stated interests—conserving hospital capacity and personal protective equipment ("PPE") and preventing transmission of COVID-19—are undermined, not served, by the Executive Order's application to the subset of patients covered by the Limited TRO. Further, contrary to State Officials' contention that Providers are seeking an abortion exception to the Governor's Executive Order, the record shows that it is State Officials who seek to single out abortion for disfavored treatment. As the district court found, physicians in Texas are continuing to provide obstetrical and gynecological procedures comparable to abortion in terms of PPE use or time-sensitivity, based on their professional medical judgment. State Officials would prevent abortion providers, and abortion providers alone, from exercising similar professional medical judgment about the health needs of their patients.

Petitioners' attempt to abuse the writ of mandamus, exploit the unprecedented public health crisis, and distort the facts carefully found by the district court in granting this narrow TRO does not justify this Court's extraordinary intervention. The writ of mandamus should be denied.

STATEMENT OF FACTS

Providers respectfully ask the Court to take judicial notice of the statement of facts in their opposition to State Officials' first petition for writ of mandamus.[2] Providers additionally offer the following abbreviated summary of subsequent factual developments, the district court's factual findings, and recent procedural history.

A. Guidance from the Texas Medical Board

On March 29, 2020, the Medical Board published updated guidance regarding the scheduling of elective surgeries and procedures in light of Governor Abbott's COVID-19 disaster declaration. 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) ("TMB Guidance"), http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17. The Medical Board explained that postponing nonurgent, elective cases would preserve PPE, ventilator availability, and ICU beds. *Id.* It defined "urgent or elective urgent" procedures as those where "there is a risk of patient deterioration or disease progression that is likely to occur if the procedure or surgery is not undertaken immediately and/or . . . is significantly

[2] Opp. to Pet. for Writ of Mandamus 3–10, *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 2, 2020) ("First Opp.").

delayed." *Id.* It stated that the Executive Order's prohibition "does not apply to office-based visits without surgeries or procedures." *Id.* Further, it explained that "[a] 'procedure' does not include physical examinations, noninvasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests." *Id.*

B. Abortion in Texas

Providers use two methods of providing abortion: medication abortion and procedural abortion. App.469. Medication abortion is not a surgery or procedure but rather, as detailed in prior briefing, a combination of two oral medications. *See* First Opp. 4–8; App.469. 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, 469. Procedural abortions must be performed in an ambulatory surgical center ("ASC") after eighteen weeks LMP, Tex. Health & Safety Code § 171.004, but there are no ASCs that provide abortion care outside of Texas's four largest metropolitan areas, App.470. At or after twenty-two weeks LMP, Texas law prohibits abortion except in exceptional circumstances. *See* Tex. Health & Safety Code § 171.044; App.470.

Although abortion is very safe, its risks increase with gestational age, as do the risks of pregnancy. App.86, 96, 105, 132, 412, 474. 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 "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."[3] App.474–75. In addition to increasing health risks, delayed access to abortion imposes financial and emotional costs on people with unwanted pregnancies, including the increased cost of the procedure as well as the pain of enduring the physical symptoms of pregnancy and the anxiety of not knowing when or if they will be able to obtain care. App. 86–87, 96, 104, 133, 158, 161, 163, 475.

C. PPE Use and Hospitalizations During Pregnancy

Medication abortion does not require the use of any PPE, as it simply involves providing a patient with pills. App.73, 86, 91, 100, 110, 117, 134, 157, 470. Procedural abortion may involve the use of PPE such as gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, hair covers, or shoe covers, depending on the circumstances. App.73–74, 86, 91–92, 100, 109, 117, 134, 157, 471. This is the same PPE that is used for prenatal care and for diagnostic tests in other areas of medicine, including during the COVID-19 crisis. App.368, 375, 472–73. Abortion providers generally do not use N95 masks, and the only physician

[3] 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.

associated with Providers to use an N95 mask since the beginning of the COVID-19 pandemic has been reusing the same mask over and over. App.472. For both prenatal care and abortion care, gloves are typically needed for transvaginal ultrasounds and laboratory exams but are not required for transabdominal ultrasounds. App.470–71.

Pregnant women prevented from accessing abortion remain pregnant, and thus still require medical care. This care includes multiple in-person visits throughout pregnancy that involve collection and testing of blood and urine as well as ultrasounds. App.363–65, 374–75, 407–08, 412–13, 472. Indeed, as the district court found, "[b]ecause individuals with ongoing pregnancies require more in-person healthcare, including lab tests and ultrasounds, at each stage of pregnancy than individuals who have previability abortions, delaying access to abortion will not conserve PPE." App.472.

Abortion patients rarely require hospitalization. App.92, 100, 470, 129, 470; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016). Although some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small and can generally be handled in an outpatient setting. App.129, 373, 470.

As compared to patients seeking abortion, "[i]ndividuals with ongoing pregnancies are more likely to seek treatment in a hospital—for a variety of conditions—than individuals who have pre-viability abortions." App.473. Indeed,

"[i]ndividuals who are delayed past the legal limit for abortion will have to deliver babies," and delivery, which "generally takes place in a hospital[,] . . . requires extensive use of PPE." App.473. Therefore, the district court concluded, "requiring patients to carry unwanted pregnancies to term will not conserve PPE or hospital resources." App.473; *see also* App.135, 366, 373–75, 414.

D. Impact of the Executive Order on Pregnant Patients in Texas

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) 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.

The Attorney General's interpretation of the Executive Order, which has been adopted by State Officials, serves as a credible threat of enforcement against Providers for the provision of any abortion. This has had a profound chilling effect on the provision of abortion care in Texas. App.468–69. As a result of the Executive Order and the threat of enforcement, Providers began cancelling hundreds of appointments the week of March 23. App.75, 84, 94, 103, 111, 119, 136, 156, 473.

Every day the Executive Order is in place, individuals seeking abortion are forced to attempt to travel to other states to obtain abortion if they have the means to do so, by car and by airplane, some as far away as Colorado and Georgia. App.258–59, 348–49, 355, 442–43, 473. Patients traveling to other states for

abortion care include patients seeking medication abortion. App.257–59, 473. This long-distance travel increases an individual's risk of contracting COVID-19. App.138, 258, 280, 311, 473.

Because Providers have already turned away hundreds of patients seeking abortion care, and will continue to do so if the Limited TRO is vacated, there will be a significant backlog of patients in urgent need of abortion care when the Executive Order expires. App.473–74. It will take Providers weeks to provide services to these patients, meaning that a significant number will face additional delays in accessing abortion even after the Executive Order's now month-long duration expires (even assuming the Order is not extended). App.474.

Patients delayed past ten weeks LMP are no longer eligible for a medication abortion in Texas. *See* Tex. Health & Safety Code § 171.063(a)(2). Patients who are delayed past eighteen weeks LMP are no longer eligible for an abortion at an abortion clinic in Texas and must obtain care from an ASC. *See* Tex. Health & Safety Code § 171.004. Patients delayed past twenty-two weeks LMP are no longer eligible to obtain an abortion in Texas at all, absent exceptional circumstances. *See id.* § 171.044. Indeed, as the district court found, "some patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the Executive Order has been in place." App.474 (emphasis in original); *see also* App.103, 349, 353–54, 442–44.

E. Recent Procedural History

As this Court is aware, the district court first issued a TRO in this case on March 30, 2020, enjoining the Executive Order as to both medication and procedural abortion. This Court subsequently granted an administrative stay of that TRO and then issued a writ of mandamus requiring its vacatur. *In re Abbott*, 2020 WL 1685929, at *2.

The Court concluded that mandamus was appropriate for three reasons. First, the Court held that the district court erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In the Court's view, under *Jacobson*, the district court "was empowered to decide only whether GA-09 lacks a 'real or substantial relation' to the public health crisis or whether it is 'beyond all question, a plain, palpable invasion' of the right to abortion." *In re Abbott*, 2020 WL 1685929, at *8 (citing *Jacobson*, 197 U.S. at 31).

Second, this Court rejected Providers' argument that the Executive Order operates as an "outright ban" on abortion. *Id.* at *10. Because it concluded the Order did not impose a previability ban, it held that the undue-burden balancing test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applies. *Id.* at *10–12. Given the overlay of *Jacobson*, this Court held that "*certain applications* of GA-09 may constitute an undue burden under *Casey*," where Providers can show, "'beyond question,' GA-09's burdens outweigh its

benefits in those situations." *Id.* at *9 (quoting *Jacobson*, 197 U.S. at 31) (emphasis added). Critically, this Court called into question two specific applications of the Executive Order: its application to medication abortion, given that, on the record previously before the district court, it was "unclear how PPE is consumed in medication abortions," *id.* at *11, and the Order's application to patients whose opportunity to obtain an abortion in Texas will be foreclosed entirely prior to April 22, *id.*

Third, this Court held that any determination whether the TRO served the public interest should "weigh the potential injury to the public health" from enjoining enforcement of the Executive Order. *Id.* at *12.

Throughout its opinion, this Court emphasized that the district court, so long as it relied on the legal standards described above, could "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access," and thus address the "validity of applying GA-09 in specific circumstances." *Id.* at *2. The Court acknowledged that other federal courts have recently enjoined state orders similar to Texas's, but distinguished those TROs on the grounds that they were "narrowly tailored and did not permit blanket provision of abortion." *Id.* at *5 n.18 (discussing TROs at issue in *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *1–2 (6th Cir. Apr. 6, 2020) (concluding that TRO would not "inflict irretrievable harms or consequences before it expires" where executive order

did not prevent medication abortion and where TRO authorized provision of abortion "deemed legally essential to preserve a woman's right to constitutionally protected access to abortions"); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700, at *3 (M.D. Ala. Apr. 3, 2020) (narrowing TRO in light of state's representations that challenged executive order authorized provision of abortion where the patient would otherwise "lose her right to lawfully seek an abortion in Alabama based on the [challenged] order's mandatory delays"); *S. Wind Women's Center LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2, 5–6 (W.D. Okla. Apr. 6, 2020) (entering TRO as to medication abortion and "requirements that effectively deny a right of access to abortion"), *appeal dismissed*, No. 20-6045 (10th Cir. Apr. 13, 2020) (per curiam); *accord Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1847128, at *15 (M.D. Ala. Apr. 12, 2020).

On remand, State Officials filed an opposed motion for an expedited briefing schedule in light of this Court's mandamus decision; their proposed schedule would have given Providers less than twenty-four hours to produce all further evidence on which they would rely in an evidentiary hearing. The district court, no doubt in an attempt to permit the parties sufficient time to build the evidentiary record to which this Court had alluded in its opinion, continued the April 13 preliminary injunction hearing and directed the parties to confer on a new schedule.

On April 8, 2020, based on the legal standards prescribed by this Court's decision and a factual record more robust than the one previously before the district court, Providers moved for a second, narrower TRO, which the district court granted. This TRO permitted patients in two narrow categories to obtain abortions: those seeking medication abortions, and those who, because of their stage of pregnancy, would be unable to obtain an abortion prior to the Executive Order's expiration. App.465–79. State Officials petitioned this Court for a second writ of mandamus and sought an emergency stay and administrative stay of the Limited TRO. This Court granted an administrative stay of the TRO except as to "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.'" Order Granting Partial Admin. Stay at 4; *In re Abbott*, No. 20-50296 (5th Cir. April 10, 2020) (per curiam).

Providers filed an emergency motion to vacate the administrative stay, Resps.' Emergency Mot. to Lift Partial Admin. Stay, *In re Abbott*, No. 20-50296 (5th Cir. April 10, 2020), which this Court denied, Order Denying Mot. to Lift Partial Admin. Stay, *In re Abbott*, No. 20-50296 (5th Cir. April 11, 2020) (per curiam). Providers then filed an emergency application with the United States Supreme Court to lift the administrative stay as applied to medication abortion. Emergency Application to

Justice Alito to Vacate Admin. Stay of TRO, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 19A-1019 (Sup. Ct. Apr. 11, 2020).

Yesterday, this Court denied State Officials' motion to stay the TRO as to medication abortions, noting that because the Court has "doubts about State Officials' showing as to medication abortion," the officials had "not made the requisite strong showing of entitlement to mandamus relief." Order Partially Dissolving Admin. Stay 4, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 13, 2020) (per curiam). The Limited TRO is set to expire on April 19 at 4:25 pm CST.

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 again in this case, State Officials must clear three exceptionally high bars for the second time. First, State Officials must show that the district court once again "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, State Officials 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 show that the district court clearly and indisputably erred in exercising its discretion to enter the Limited TRO. In granting the Limited TRO, the district court applied well-settled law to detailed factual findings as directed by this Court. Further, the district court explicitly addressed its clear jurisdiction to entertain the application for the Limited TRO.

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 district court correctly determined that Providers were likely to succeed on the merits of their constitutional claims and balanced the equitable factors in holding that the Limited TRO was warranted pending expedited review of Providers' motion for a preliminary injunction. App.464–79. As a result, State Officials cannot show, as required for a writ of mandamus, a clear and indisputable right to relief, nor could they meet even the standard applicable to an ordinary appeal, where such relief could be set aside only for abuse of discretion. *Central Hanover*, 135 F.2d at 595.

1. The District Court Properly Found Providers Are Likely to Succeed on the Merits.

As described in more detail below, the district court faithfully applied this Court's prior mandamus decision, including its discussion of *Jacobson* and *Casey*, to hold that Providers are likely to succeed on their claims challenging the Executive Order's prohibition on (1) medication abortion; and (2) procedural abortion for patients for whom abortion would be inaccessible after expiration of the Executive Order.

a. The District Court's Decision to Order a Second TRO and Make Findings of Fact for That Purpose Was Proper.

Defendants suggest that the district court erred by considering a second TRO without first holding an evidentiary hearing or permitting further factual development. But this Court expressly invited the district court to consider the possibility of appropriate relief for more narrow groups of patients based on careful factual findings. *In re Abbott*, 2020 WL 1685929, at *9. By definition, the district court's issuance of a TRO tailored in this way cannot run afoul of this Court's decision. *See id.* at *2 (directing the district court to make "targeted findings, based on competent evidence, about the effects of GA-09 on abortion access"). In these circumstances, the district court retained—and was correct to exercise—its broad equitable authority to consider Providers' second, more limited request for relief based on a far more developed record than the one supporting the first TRO. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (recognizing district courts' authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

Nor was there anything nefarious about the district court's adoption of some proposed findings of fact offered by Providers. *See* Second Pet. for Writ of Mandamus 3, 12, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 10, 2020) ("Pet."). "[E]ven when the trial judge adopts proposed findings verbatim, the findings are

those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985).

b. The District Court Correctly Held that the Executive Order Is Likely Unconstitutional as to Provision of Medication Abortion.

Even in a crisis, constitutional rights remain steadfast. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866). While the government has authority to "safeguard the public health and the public safety" in an emergency, the State may not—even while exercising that power—impose a restriction that is "a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 25, 31. The district court correctly weighed the evidence in holding that application of the Executive Order to medication abortion was likely unconstitutional under both *Jacobson* and *Casey*. And, as this Court recognized just yesterday, "Petitioners have not made the requisite strong showing of entitlement to mandamus relief" for medication abortion. Order Partially Dissolving Admin. Stay 5, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 13, 2020) (per curiam).

As applied to medication abortion, the Executive Order does not serve the State's asserted interests in reducing PPE use, conserving hospital capacity, or preventing COVID-19 exposure. Specifically, based on the evidentiary record, which includes 20 declarations submitted by Providers, the district court found that "[p]roviding medication abortion does not require the use of any PPE," while the

alternative—continuing the pregnancy—"will not conserve PPE." App.470, 472. The court also concluded that complications associated with medication abortion, including those requiring hospital care, are exceedingly rare, App.470; *see also Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315, and that (as is true with abortion generally) nearly all medication abortions are provided in outpatient facilities, not hospitals, App.470.[4] Far from "usurp[ing] the state's authority to craft emergency health measures," *In re Abbott*, 2020 WL 1685929, at *1, the district court followed the Supreme Court's mandate to "consider[] the evidence in the record—including expert evidence" and "weigh[] the asserted benefits against the burdens." *Whole Woman's Health*, 136 S. Ct. at 2310 (finding that the district court "did not simply substitute its own judgment for that of the legislature"). "[T]he 'Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.'" *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

In contrast, the district court concluded that individuals who remain pregnant "are more likely to seek treatment in a hospital" than individuals who have

[4] *See* 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 (in 2017, 99.8 percent of abortions among Texas residents in Texas were provided in abortion facilities or ASCs).

previability abortions. App.473. Moreover, the district court found that some patients are already traveling across state lines to obtain abortion care elsewhere, *id.*, including medication abortion, *id.*, therefore increasing the risk of exposure to COVID-19 relative to obtaining care closer to home. In light of this evidence, the Executive Order's prohibition on medication abortion lacks any "real or substantial relation" to the public health goals on which the State relies, and is "a plain, palpable invasion" of the right to abortion. *Jacobson*, 197 U.S. at 31.

While State Officials assert that medication abortion results in complications necessitating "surgical intervention" eight to fifteen percent of the time, App.182–83, the rates they cite are not for complications requiring hospitalization,[5] but rather are outdated figures referring to the incidence of medication abortions that are completed using aspiration. The very low rate of aspiration follow-up currently reported for the FDA-approved medication abortion regimen—follow-up care that takes five to ten minutes in an outpatient setting—only confirms that medication abortion utilizes less hospital capacity than ongoing pregnancy.[6] App.470; *see also*

[5] In fact, only 0.31 percent of medication abortions result in complications requiring hospitalization, surgery, or blood transfusion. App.129, 470.

[6] Pet'rs' Emergency Mot. to Stay TRO Pending Mandamus 4 & n.7, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 10, 2020); *see also* App.181 n.33 (citing U.S. Food & Drug Admin., Mifeprex 13 tbl.3 (rev. Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687 s020lbl.pdf (listing rate of 2.6 percent for "surgical intervention" due to ongoing pregnancy,

App.373. Hospital treatment related to an ongoing pregnancy is far more common. App.473; *see also* App.373 ("[A]t least twenty percent of pregnant patients will visit a hospital at some point prior to delivery, and some patients will visit the hospital for evaluation or treatment on multiple occasions.").

State Officials also assert that prohibiting medication abortion saves PPE because, under Texas law, a medication abortion must be preceded by an ultrasound and offered in conjunction with a follow-up visit. Tex. Health & Safety Code §§ 171.012, 171.063(e); Tex. Admin. Code § 139.53(b)(4); App.470. However, the record establishes that medication abortion, *including* any incidental lab work and diagnostic testing, requires the use of less PPE than the prenatal care required for a patient with an ongoing pregnancy. App.472; *see also* App.135, 373–74, 408, 414. In any event, as the district court found, the Texas Medical Board's own guidance makes clear that "physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests" are not "procedures" and are therefore not covered by the Executive Order. App.468; *see also* TMB Guidance.

Against the Executive Order's nonexistent benefits, the burden of the Order as applied to medication abortion patients is severe and ongoing. Even assuming the

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medical necessity, persistent or heavy bleeding after treatment, patient request, or incomplete expulsion)).

Executive Order is not extended beyond April 21, it subjects all patients to at least a month-long delay—a delay many orders of magnitude larger than the 24-hour delay permitted in *Casey*. App.35. Moreover, record evidence demonstrates that the Executive Order will, in fact, cause an even longer delay for these patients because abortion providers in Texas will not be capable of absorbing the full backlog of patients in need of abortion care after the Executive Order expires. App.474; *see also* App.349, 356–57. As noted, these delays will lead to greater health risks for pregnant individuals, force patients to travel to other states during a pandemic to obtain abortion care, and impose numerous other financial and emotional costs. Balanced against the Executive Order's illusory benefits as applied to medication abortion, these burdens are unquestionably "undue." *Casey*, 505 U.S. at 857.

In addition, the Executive Order, as interpreted by State officials, singles out medication abortion for differential treatment. *See Jacobson*, 197 U.S. at 26 (law justified on public safety grounds may not be "unreasonable, arbitrary, [or] oppressive"). State officials have identified no other oral medication they consider prohibited by the Executive Order, which on its face applies only to "surgeries and procedures." App.35. Moreover, the record shows that treatments comparable to medication abortion, and those other aspects of medical care that accompany it, are exempt from the Executive Order's requirements. *See* App.466, 473; *see also* App.375 (obstetric care like blood draws, ultrasounds, and other in-person

diagnostics still performed during prenatal visits); App.407–09 (ultrasound examinations still being performed for obstetrical patients). Meanwhile, Texas would deny medication abortion patients access to care altogether. Under these circumstances, the record demonstrates that Texas has used the COVID-19 crisis as a reason to target abortion—without sufficient justification—thus warranting judicial intervention.

c. The District Court Correctly Held that the Executive Order Is Likely Unconstitutional as to Patients for Whom Abortion Will Be Inaccessible After Expiration of the Executive Order.

For patients who will pass the gestational limit to access abortion from licensed abortion facilities and those who will exceed the gestational limit for abortion in Texas by the expiration of the Order, the Order operates not as a delay but as an outright ban. 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 has repeatedly reaffirmed this "essential holding" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846; *see also Whole Woman's Health*, 136 S. Ct. at 2320. This Court has consistently applied this case law to hold that states may not enact measures that prevent a woman from making the ultimate decision about whether to have an abortion. *See Jackson Women's Health Org. v.*

Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268 (5th Cir. 2019).

In refusing to administratively stay the Limited TRO for patients who will pass Texas's twenty-two-week LMP statutory gestational-age limit before the Executive Order expires, this Court recognized that the Executive Order operates as a ban for these patients. Similarly, patients whose pregnancies will reach eighteen weeks LMP by the Order's expiration, will become ineligible to have an abortion at a licensed abortion facility under Texas law, Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at ASCs, but there are no ASCs that provide abortion care outside of Texas' four largest metropolitan areas. *Whole Woman's Health*, 136 S. Ct. at 2316–18. For those patients unable to access care at an ASC, the Executive Order would have the effect of foreclosing the right to abortion altogether. *See id*. In these circumstances, it extends "beyond the . . . powers allotted to a state in a public health emergency," and should be enjoined. *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *5; *see also In re Abbott*, 2020 WL 1685929, at *9 (stating that Providers would have the opportunity to show that "certain applications of GA-09 *may* constitute an undue burden under *Casey*" such that those applications are "*beyond question*, in palpable conflict with the Constitution" (emphasis in original)).

Further, as the district court correctly concluded, there is no indication that the COVID-19 crisis, or the PPE shortage, will expire on April 22, 2020. App.281, 310, 466. Indeed, it is likely that the Governor will exercise his authority to "modify" the Executive Order, including by extending it, and may thus disallow abortions for an indefinite period. App.35. 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. App.476.

The evidence refutes State Officials' contention that patients harmed by this application of the Executive Order are "hypothetical." Patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the EO has been in place. App.103, 349, 353–54, 442–44, 474. Moreover, State Officials' own evidence shows that in 2017, approximately sixty abortions per week occurred at or after fifteen weeks LMP, and approximately fifteen per week occurred at or after eighteen weeks LMP. *See* App.222. Moreover, some of these patients are already traveling for care, thus being forced to endure contagion risks, only to obtain an abortion across state lines that uses the same PPE their abortion in Texas would have required. App.473; *see also* App.258–59 (describing patient's three-day trip to Colorado for abortion care); App.348 (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); App.355 (one out-of-state provider treated thirty abortion patients

from Texas in the week after the Attorney General's statement). Public health experts recognize that because of contagion risks, "the net effect of forcing patients to travel is to deplete both PPE and other hospital resources." App.311; *see also* App.280. Forcing patients to travel to other states to access abortion care is, accordingly, contrary to current recommendations against travel. App.104, 111, 138, 162–63, 280; *see also* App.311 (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").

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

The Executive Order is also unconstitutional as applied to these patients because it singles out abortion from comparable health care for disfavored treatment and is thus "arbitrary and oppressive." *In re Abbott*, 2020 WL 1685929, at *6. This Court concluded that the record before it did not include "evidence that GA-09 applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt from GA-09's requirements." *Id.* at *13. But as discussed, *see supra* Part I.A, the record before this Court now includes evidence that physicians, consistent with the TMB's guidance, are continuing to provide

obstetrical and gynecological procedures comparable to abortion in PPE use and/or time-sensitivity, based on their professional medical judgment. *See* App.368, 375, 473. Far from seeking an abortion exception, as State Officials contend, Providers simply seek limited relief requiring State Officials to treat abortion similarly to other comparable forms of care. *Cf. Robinson*, 2020 WL 1659700, at *3 (ordering that "[t]he reasonable medical judgment of abortion providers will be treated with the same respect and deference as the judgments of other medical providers" and that "decisions will not be singled out for adverse consequences because the services in question are abortions or abortion-related").

2. The District Court Correctly Determined That the Equitable Factors Justify a TRO.

The district court correctly determined that the equities justify a limited and narrowly tailored TRO—a determination that falls within that court's considerable discretion and that should not be disturbed here, especially given that the district court, in crafting its remedy, directly addressed the issues with the original TRO raised by this Court's Mandamus Order.

The "loss of [constitutional] freedoms . . . unquestionably constitutes irreparably injury" for temporary relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, the "disruption or denial of . . . patients' health care" caused by the Executive Order, *see supra* Part I.A.1.b–c, "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 State Officials, as the district court correctly held. App.477. Indeed, as the district court found, enforcing the Order against the categories of patients covered by the limited TRO is counterproductive because "individuals with ongoing pregnancies require more in-person healthcare, including lab tests and ultrasounds, at each stage of pregnancy than individuals who have previability abortions." App.472. Similarly, the TRO does not disserve the public interest. As the district court concluded, "the record demonstrates that entry of a temporary restraining order to restore abortion access would serve the State's interest in public health." App.477.

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

B. The District Court Did Not Err by Exercising its Authority to Enter a TRO.

Petitioners once again contend that a series of threshold issues—sovereign immunity, Article III standing, and third-party standing—should have precluded the district court's entry of a TRO. None of these arguments has merit.

First, State Officials contend the Governor and Attorney General lack authority to enforce the Executive Order, and thus have sovereign immunity from

suit.[7] Pet. 26. As the district court held, that is incorrect. App.475–76. The district court followed this Court's instruction to consider whether, for purposes of sovereign immunity, the governor and attorney general likely have "some connection" with enforcement of the Executive Order. App.475–76; *see also In re Abbott*, 2020 WL 1685929, at *5 n.17. As it explained, the Governor is responsible for adopting and maintaining the Order, consistent with statutory authority, and the Governor may modify, amend, or rescind the Order by the Order's own terms. Tex. Gov't Code Ann. § 418.012; App.475–76. Accordingly, the Executive Order causes ongoing injury to Providers and their patients because the Governor continues to exercise his authority to implement it. Similarly, the Attorney General has the authority to prosecute Providers, at the request of local prosecutors, for alleged violations of the Executive Order, and he has publicly threatened enforcement against abortion providers in particular. App.476. This case is thus not akin to *City of Austin v. Paxton* because here the Governor is imposing on Providers' some "compulsion or constraint." 943 F.3d 993, 1002 (5th Cir. 2019). The district court

[7] State Officials claim that the district court committed "obvious and irremediable error" by failing to dismiss the Governor and Attorney General, although they have not filed a motion to dismiss. Pet. 22. As this Court already recognized, however, State Officials remain free, at a later stage of this case, to file a motion to dismiss. *In re Abbott*, 2020 WL 1685929, at *5 n.17; Fed. R. Civ. P. 12(b)(1), (h)(3).

did not err in finding a sufficient connection between these officials and the challenged action's enforcement.[8]

Second, State Officials contend that Providers lack Article III standing to sue the Governor and Attorney General. This is also clearly incorrect because restraining these officials from exercising their authority to make the Executive Order applicable to the covered categories of patients, App.477–78, unequivocally redresses the injuries that Providers and their patients are experiencing as a result of the Executive Order, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Finally, State Officials again seek mandamus on the ground that the Providers lack third-party standing to bring claims on behalf of their abortion patients.[9] Pet. 25 n.18. As this Court already held, "Respondents have standing to sue on their own behalf because GA-09 'directly operates' against them." *In re Abbott*, 2020 WL 1685929, at *5 n.17; *see also* App.475 (citing this Court).

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[8] Regardless, as this Court has already held, "a justiciable controversy exists as to the Petitioner health officials, who may enforce the order's administrative penalties." *In re Abbott*, 2020 WL 1685929, at *5 n.17.

[9] For this reason, State Officials can no longer argue that Providers' claims are barred because 42 U.S.C. § 1983 does not provide a cause of action for an injury based on violation of a third-party's rights, *see* First Pet. for Writ of Mandamus 28–30, *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Mar. 30, 2020). In any event, that argument is baseless. Section 1983 itself contains no limitation. 42 U.S.C. § 1983. Moreover, abortion providers have traditionally brought constitutional challenges to abortion restrictions on behalf of their abortion patients pursuant to 42 U.S.C. § 1983. *See, e.g.*, *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).

II. Petitioners Would Not Be Denied A Remedy Absent Mandamus.

Independent of their obligation to show a clear entitlement to relief, State Officials 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*, 542 U.S. at 380–81. As the district court found, State Officials cannot show that they would suffer irreparable injury if the TRO takes effect for the short period of time preceding its expiration. Indeed, yesterday the Tenth Circuit rejected a direct appeal of a similar Oklahoma order, in part because the State's "rights will not be irretrievably lost absent immediate review." *S. Wind Women's Ctr. LLC*, No. 20-6045 (10th Cir. April 13, 2020) (per curiam) (holding that limited TRO preserving abortion access for specific categories of patients in Oklahoma during COVID-19 pandemic was not appealable).

As explained above, the Executive Order does not further public health as applied to medication abortion and the limited categories of procedural abortion at issue in the Limited TRO. In fact, continued imposition of the stay will do irreparable injury to public health by *increasing* demands for PPE and hospital resources. It will drive up the use of PPE and hospital capacity because at every stage of pregnancy, a pregnant person will need services that require the use of more PPE than abortion

does. App.472–73. In addition, the longer an abortion is delayed, the more PPE the abortion procedure itself will require. *See* App.469–72. Finally, in response to a continued stay, some patients will leave Texas—as some already have—to obtain abortions in other states, exposing them to greater risk of COVID-19 infection than seeking care locally. App.473; *see also* App.258–259, 348, 355, 442–43. For these same reasons, State Officials have failed to meet their burden of demonstrating that they would suffer irreparable injury in the absence of a stay.[10]

Finally, State Officials' own actions unnecessarily increase the amount of PPE currently required to provide abortion services in Texas. If State Officials 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 Providers from using telemedicine to provide medication abortion. *See, e.g.*, Tex. Occ. Code Ann. § 111.005(c); 25 Tex. Admin.

[10] This analysis applies equally to State Officials' assertion that the district court's error will be irremediable after the court's resolution of Providers' pending preliminary injunction motion.

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 State Officials 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. The Limited TRO will expire five days from now, on April 19. App.478. 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 at 295 n.7 (citation omitted). This is not such a case.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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*
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CERTIFICATE OF COMPLIANCE

This reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 7491 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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