STATE OF TENNESSEE

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April 21, 2020

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Adams & Boyle, P.C. v. Slatery*, No. 20-5408

Dear Ms. Hunt:

Appellants respectfully submit this Rule 28(j) letter concerning *In re Abbott*, No. 20-50296, slip op. (5th Cir. Apr. 20, 2020). For the second time, the Fifth Circuit granted Texas mandamus relief from a TRO that barred Texas from applying GA-09 to abortions. Although the TRO at issue in the second mandamus petition was slightly narrower than the first, the district court still failed to apply *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and again reached "patently erroneous" results regarding whether and in what circumstances GA-09 could be constitutionally applied. *In re Abbott*, slip op. at 20. In doing so, the district court "usurped the state's authority to craft emergency public health measures." *Id.*

Especially relevant here, the Fifth Circuit held that the district court had once again improperly substituted its judgment for the State's regarding the effectiveness of GA-09. The district court's conclusion that applying GA-09 to abortions would not preserve PPE "ignored the entire point of a mitigation measure like GA-09," which is to "decrease[] [PPE] consumption *now*" to "prevent short-term exhaustion of critical medical resources." *Id.* at 26 (emphasis in original).

The district court also failed to narrowly tailor the TRO. It erroneously viewed GA-09 as a categorical ban on abortion rather than a "generally applicable postponement of PPE-consuming surgeries and procedures" with an exemption for medically necessary procedures. *Id.* at 9. And it erroneously granted relief to "women who would be 18 weeks LMP when GA-09 expires" when the record "fail[ed] to provide even an arguable basis to conclude" that applying GA-09 in those circumstances would constitute an undue burden. *Id.* at 34.

The upshot of the Fifth Circuit's recent decision is that Texas may enforce GA-09 against abortions except in one limited situation: when a patient "would be past the legal limit for an abortion in Texas" when GA-09 expires. *Id.* at 38. The narrow TRO that remains intact after the Fifth Circuit's decision bears no resemblance to the extraordinarily broad injunction the district court granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Appellants and a member of the Bar of this Court, certify that, on April 21, 2020, a copy of the foregoing Rule 28(j) letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 20, 2020

Lyle W. Cayce
Clerk

No. 20-50296

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

Petitioners

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

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.[1]

JENNIFER WALKER ELROD and STUART KYLE DUNCAN, Circuit Judges:

On April 7, 2020, we issued a writ of mandamus vacating the district court's temporary restraining order ("TRO")[2] that exempted abortions from GA-09, an emergency measure temporarily postponing non-essential medical procedures during the COVID-19 pandemic. *In re Abbott*, --- F.3d ---, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) (*Abbott II*). Two days later, on April 9, the district court entered a second TRO, exempting various categories of abortion

[1] Judge Dennis will file a partial dissenting opinion shortly.

[2] *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020) (*Abbott I*).

from GA-09. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020) (*Abbott III*). A flurry of litigation ensued, during which state officials again sought mandamus and we administratively stayed parts of the April 9 TRO.[3] Over this period—from April 7 to 20—Texas COVID-19 cases, hospitalizations, and deaths more than doubled.[4]

We now consider the mandamus petition directed to the April 9 TRO. We are persuaded by Petitioners' arguments that the district court, in the April 9 TRO, disregarded our mandate in *Abbott II*. The court again "fail[ed] to apply . . . the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)." *Abbott II*, 2020 WL 1685929, at *5. Moreover, the court again second-guessed the basic mitigation strategy underlying GA-09 (that is, the concept of "flattening the curve"), and also acted without knowing critical facts such as whether, during this pandemic, abortion providers do (or should) wear masks or other protective equipment when meeting with patients. Those errors led the district court to enter an overbroad TRO that exceeds its jurisdiction, reaches patently erroneous results, and usurps the state's authority to craft emergency public health measures "during the escalating COVID-19 pandemic." *Id.* at *1.

Once again, the dissenting opinion accuses the majority of treating abortion differently and once again it is wrong. At issue is whether abortion can be treated the same as other procedures under GA-09. It is the district

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[3] *See In re Abbott*, No. 20-50296, 2020 WL 1844644 (5th Cir. Apr. 10, 2020) (administratively staying TRO in part) (*Abbott IV*); *In re Abbott*, 2020 WL 1866010 (5th Cir. Apr. 13, 2020) (denying stay in part and lifting administrative stay in part) (*Abbott V*).

[4] *See* Tex. Dep't of State Health Servs., Texas Case Counts COVID-19, https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83 (last visited Apr. 20, 2020).

court that treated abortion differently, issuing back-to-back TROs that did not follow the law.

We therefore grant the writ in part and direct the district court to vacate these parts of the April 9 TRO:

- That part restraining enforcement of GA-09 as a "categorical ban on all abortions provided by Plaintiffs."
- That part restraining the Governor of Texas and the Attorney General.
- That part restraining enforcement of GA-09 as to medication abortions.
- That part restraining enforcement of GA-09 as to patients who would reach 18 weeks LMP[5] on the expiration date of GA-09 and who would be "unlikely" to be able to obtain abortion services in Texas.
- That part restraining enforcement of GA-09 after 11:59 p.m. on April 21, 2020.

We do not grant the writ, and therefore do not order vacatur, of that part of the TRO restraining GA-09 as to patients "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."

I.

We summarize the pertinent background, which we have chronicled in greater detail elsewhere. *See Abbott II*, 2020 WL 1685929, at *1–4; *Abbott IV*, 2020 WL 1844644, at *1–2. GA-09 is an emergency public health measure, issued by the Governor of Texas on March 22, 2020, that postpones non-essential surgeries and procedures until April 22 to combat the COVID-19 pandemic. It applies to all licensed healthcare providers in Texas, covers a broad range of procedures, does not mention abortion, and contains life-and-

[5] That is, eighteen weeks after the first day of a pregnant woman's last menstrual period.

health exceptions committed to a physician's judgment. Specifically, GA-09 requires healthcare professionals and facilities to:

> postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.[6]

The order does not apply to procedures that, if performed under accepted standards, "would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster."[7] GA-09 is enforceable by criminal and administrative penalties and expires at 11:59 p.m. on April 21, 2020.[8] *See Abbott II*, 2020 WL 1685929, at *2–4 & nn.10–12.

When ordering vacatur of the first TRO, we explained that Respondents' challenge to GA-09 must satisfy the standards in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Specifically, we held:

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

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[6] Tex. Exec. Order No. GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.

[7] *Id.*

[8] *Id.* On April 17, 2020, the Governor announced executive order GA-15, which becomes effective when GA-09 expires and continues until 11:59 p.m. on May 8, 2020. As discussed *infra*, GA-15 imposes similar—but not identical—requirements as those imposed by GA-09.

> courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30.

Abbott II, 2020 WL 1685929, at *7 (cleaned up). We also articulated how the *Jacobson* framework works with the *Casey* undue-burden analysis. *Id.* at *11 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). A court should "ask[ ] whether GA-09 imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic Texas now faces." *Id.* (quoting *Jacobson*, 197 U.S. at 31). We emphasized that this analysis would "require[ ] careful parsing of the evidence" and that "[t]hese are issues that the parties may pursue at the preliminary injunction stage, where Respondents will bear the burden to prove, by a clear showing, that they are entitled to relief . . . in any particular circumstance." *Id.* at *11–12 (cleaned up).

The day following our mandamus, April 8, 2020, the district court: (1) vacated its March 30 TRO; (2) cancelled the telephonic preliminary injunction hearing previously scheduled for April 13; and (3) ordered the parties to file a joint status report by April 15 outlining a schedule for a new preliminary injunction hearing on a yet-unannounced date. That same day, Respondents filed a new TRO application supported by one new declaration. The next day, April 9, the district court convened a brief telephone conference with the parties, during which the court declined to allow Petitioners either to file a responsive pleading or submit evidence opposing the application. In doing so, the court remarked to Petitioners, "[I]f I were to make a ruling that was unsatisfactory to the State defendants before then, then you may head back to the Circuit with it." Transcript of 4/9/20 Tele. Conf. at 14:39.

Later that day, the court issued a new TRO. *Abbott III*, 2020 WL 1815587. Adopting Respondents' proposed findings of fact and conclusions of law, *compare id.* at *1–7, *with* Proposed TRO, App. 445–57, this TRO restrains Petitioners from enforcing GA-09 as follows: (1) "as a categorical ban on all

abortions provided by Plaintiffs"; (2) as to "medication abortions"; (3) as to "procedural[9] abortion[s] [provided] to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care"; and (4) as to "procedural abortion[s] [provided] 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." *Abbott III*, 2020 WL 1815587, at *7.

On April 10, Petitioners again requested mandamus from our court, this time seeking vacatur of the April 9 TRO. On April 10, we administratively stayed the TRO except as to women who would reach 22 weeks LMP on April 22. *Abbott IV*, 2020 WL 1844644. On April 13, we denied an emergency stay, and lifted the administrative stay, as to that part of the TRO applying to medication abortions. *Abbott V*, 2020 WL 1866010.[10]

On April 14, the district court set a telephonic preliminary injunction hearing for April 29. Doc. 82. The court also extended the April 9 TRO—"in its entirety under the same terms and conditions except as modified by [our

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[9] "Procedural" abortions, the term used by Respondents and the district court, refers to what are more commonly called "surgical" abortions. *See*, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 175 (2007) (Ginsburg, J., dissenting) (referring to "surgical abortions") (quoting *Carhart v. Ashcroft*, 331 F. Supp.2d 805, 1011 (D. Neb. 2004), *aff'd*, 413 F.3d 791 (8th Cir. 2005)); *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000) (citing M. Paul et al., A Clinician's Guide to Medical and Surgical Abortion (1999)); *Casey*, 505 U.S. at 969 (Rehnquist, J., concurring in the judgment in part and dissenting in part) (referring to "any other surgical procedure except abortion") (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 517 (1989) (plurality opinion)); *see also*, *e.g.*, Brief for Petitioners at 33 n.64, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006398 (referring to "induced abortion" as a "surgical procedure[ ]").

[10] It is curious that the dissenting opinion accuses the majority of altering the availability for abortion six times. In the first place, it was back-to-back TROs following a mandamus that altered abortions availability. In the second place, the dissenting judge joined the denial of the stay as to medication abortions.

orders]"—until May 1, 2020, at 5:00 p.m. *Id.* The court stated there was "good cause" for extending the TRO "so that the court and parties have adequate time to prepare for [the April 29] hearing." *Id.*

On April 15, the Governor issued executive order GA-15, which becomes effective when GA-09 expires and continues until 11:59 p.m. on May 8, 2020. GA-15[11] is similar to GA-09, but has some textual differences as well as an additional exception for certain facilities.[12]

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[11] Here is the pertinent text of the two orders, with differences noted in italics:

GA-09: [A]ll licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not *immediately medically necessary* to correct a serious medical condition of, or to preserve the life of, a patient who without *immediate* performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

GA-15: All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not *medically necessary* to *diagnose or* correct a serious medical condition of, or to preserve the life of, a patient who without *timely* performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician[.]

See Tex. Exec. Order No. GA-15 (Apr. 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-15_hospital_capacity_COVID-19_ TRANS_04-17-2020.pdf. Because the TRO as issue in this petition only restrains enforcement of GA-09, we express no opinion on the effect, if any, of the different language in GA-15.

[12] The new exception applies to:

> any surgery or procedure performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission both: (1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and (2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster.

Id. Again, we express no opinion on the effect, if any, of this new exception on the issues in this litigation.

II.

Federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). That includes the writ of mandamus sought by Petitioners. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004); *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019). Mandamus is proper only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc) (quoting *Cheney*, 542 U.S. at 380). An "abuse of discretion" becomes a "clear abuse of discretion" when it "produce[s] a patently erroneous result." *Id.* at 310. The writ has issued "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations [and] where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate." *Will v. United States*, 389 U.S. 90, 95–96 (1967) (citing *Maryland v. Soper*, 270 U.S. 9 (1926) (federal-state relations) and *United States v. U.S. Dist. Ct.*, 334 U.S. 258 (1948) (effectuating appellate mandate)).

Before prescribing this strong medicine, "[w]e ask (1) whether the petitioner has demonstrated that it has no other adequate means to attain the relief it desires; (2) whether the petitioner's right to issuance of the writ is clear and indisputable; and (3) whether we, in the exercise of our discretion, are satisfied that the writ is appropriate under the circumstances." *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018) (quoting *Cheney*, 542 U.S. at 380–81) (cleaned up). "These hurdles, however demanding, are not insuperable. They simply reserve the writ for really extraordinary causes." *Gee*, 941 F.3d at 158 (cleaned up). In such cases, mandamus provides a "useful 'safety valve[ ]' for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558

U.S. 100, 111 (2009) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)).

As in *Abbott II*, we address each prong in turn, beginning with the second. *Abbott II*, 2020 1685929, at *5.

III.

A. Failure to Narrowly Tailor April 9 TRO

We first address two threshold errors in the April 9 TRO that demonstrate Petitioners' right to the writ. Because "the scope of injunctive relief is dictated by the extent of the violation established, [t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (cleaned up). The April 9 TRO fails this narrow tailoring requirement in two obvious ways.

First, the TRO enjoins enforcement of GA-09 "as a categorical ban on all abortions provided by Plaintiffs." *Abbott III*, 2020 WL 1815587, at *7. But GA-09 is obviously not a "categorical ban on all abortions." Because it expires on April 22, it is not a ban, but a generally applicable postponement of PPE-consuming surgeries and procedures. And as we have explained already, GA-09 facially exempts surgeries and procedures immediately necessary to "correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Abbott II*, 2020 WL 1685929, at *3. The district court reached its overbroad construction of GA-09 by referring to the Attorney General's "interpretation" in a "press release," which the court maintained "has been adopted by the State Defendants." *Abbott III*, 2020 WL 1815587, at *2. But *Abbott II* already found this chain of reasoning flawed. We found "no

reason to believe [the] press release has the force of law," and, in any event, the press release itself recognized GA-09 exempts abortions "medically necessary to preserve the life or health of the mother." *Abbott II*, 2020 WL 1685929, at *13 n.25. The district court also cited no evidence suggesting that the "State Defendants" have adopted its overreading of GA-09.

Second, as now extended to May 1, the April 9 TRO is not "narrowly tailor[ed]" to remedy any harm caused by GA-09 because it extends beyond the expiration of GA-09. *See John Doe #1*, 380 F.3d at 818. By its terms, GA-09 lasts "until 11:59 p.m. on April 21, 2020."[13] After that point, there will be no "actual case or controversy" between the parties, *John Doe #1*, 380 F.3d at 814 (citation omitted), and no enforcement of GA-09 for a court to restrain. The fact that the Governor has since announced that a new order—GA-15—will take effect on April 22 does nothing to change this conclusion, as the extended TRO at issue here applies only to GA-09. By purporting to restrain Petitioners past the expiration date of GA-09, the district court exceeded its jurisdiction. *See*, *e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (a federal court's judgment must award "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Likewise, "since the scope of injunctive relief is dictated by the extent of the violation established," the relief was overbroad because no violation can occur after 11:59 p.m. on April 21. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). We therefore conclude that Petitioners have demonstrated entitlement to the writ.

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[13] Tex. Exec. Order No. GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.

B. Failure to Dismiss Governor and Attorney General Under Eleventh Amendment

Petitioners also argue they are entitled to mandamus relief because the district court violated the Eleventh Amendment by purporting to enjoin the Governor and Attorney General. We agree. In *Abbott II*, we instructed the district court to "consider whether the Eleventh Amendment requires dismissal of the Governor or Attorney General because they lack any 'connection' to enforcing GA-09 under *Ex parte Young*, 209 U.S. 123 (1908)." *Abbott II*, 2020 WL 1685929, at *5 n.17 (citing *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 745–46 (5th Cir. 2014)). The district court's cursory analysis of this question in its April 9 TRO was wrong.

Ex parte Young allows suits for injunctive or declaratory relief against state officials, provided they have sufficient "connection" to enforcing an allegedly unconstitutional law. *City of Austin*, 943 F.3d at 997 (citing *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013)). Otherwise, the suit is effectively against the state itself and thus barred by the Eleventh Amendment and sovereign immunity. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Edelman v. Jordan*, 415 U.S. 651, 663–69 (1974). If the official sued is not "statutorily tasked with enforcing the challenged law," then the requisite connection is absent and "our *Young* analysis ends." *City of Austin*, 943 F.3d at 998 (citing *Morris*, 739 F.3d at 746).

As to the Governor, the district court reasoned he has "some connection" to GA-09 because of his "statutory authority [under] Texas Government Code § 418.012." *Abbott III*, 2020 WL 1815587, at *6 (cleaned up). But the cited section empowers the Governor to "issue," "amend," or "rescind" executive orders, not to "enforce" them. Tex. Gov't Code § 418.012. The power to

promulgate law is not the power to enforce it. *Cf. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (distinguishing between the Secretary of Labor's "powers to promulgate and to enforce national health and safety standards"). The April 9 TRO addresses only "enforcing" GA-09 against plaintiffs who provide certain abortion procedures. *Abbott III*, 2020 WL 1815587, at *7. And we have already explained that violating GA-09 may result in "administrative or criminal penalties," *Abbott II*, 2020 WL 1685929, at *3 n.12, enforced by health and law enforcement officials and not the Governor. Consequently, we hold the Governor lacks the required enforcement connection to GA-09 and may not be sued for injunctive relief under the Eleventh Amendment. *See Morris*, 739 F.3d at 746 (when challenged law "does not specially task [Texas] Governor . . . with its enforcement, or suggest that he will play any role at all in its enforcement," Governor "is not a proper defendant").

As to the Attorney General, the district court reasoned that he has "authority" to prosecute violations of GA-09 "at the request of local prosecutors," and that he has also "publicly threatened enforcement" against abortion providers. *Abbott III*, 2020 WL 1815587, at *6. Neither rationale establishes the Attorney General's "connection" to enforcing GA-09 for *Ex parte Young* purposes. Nothing in GA-09 tasks the Attorney General with enforcing it. Speculation that he might be asked by a local prosecutor to "assist" in enforcing GA-09, *see* Tex. Gov't Code § 402.028, is inadequate to support an *Ex parte Young* action against the Attorney General. *See City of Austin*, 943 F.3d at 1000 (evidence that Attorney General "*might* . . . bring a proceeding to enforce" the law insufficient under *Ex parte Young*). Nor does a "press release" by the Attorney General, *Abbott III*, 2020 WL 1815587, at *2, show authority to enforce GA-09 for *Ex parte Young* purposes. Here, the Attorney General did not even threaten to enforce GA-09 in the disputed press release. The release

warns that "[t]hose who violate the governor's order will be met with the full force of the law." App. 31. The Attorney General threatened that GA-09 *would be enforced*, not that *he* would enforce it. Moreover, our cases do not support the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes. *Cf.*, *e.g.*, *City of Austin*, 943 F.3d at 1001 (applying *Ex parte Young* exception because Attorney General sent "threatening letters" to enforce DTPA and was authorized to enforce that law) (discussing *NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 392–95 (5th Cir. 2015)). Consequently, we hold the Attorney General also lacks the required enforcement connection to GA-09 and may not be sued for injunctive relief under the Eleventh Amendment. *See City of Austin*, 943 F.3d at 1002.

Mandamus is appropriate to "control jurisdictional excesses," *Gee*, 941 F.3d at 158 (citation omitted), such as allowing suits against state officials in violation of the Eleventh Amendment and sovereign immunity. *See*, *e.g.*, *Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020) ("Under the Eleventh Amendment, federal courts lack jurisdiction over suits against nonconsenting states."); *Sissom v. Univ. of Tex. High Sch.*, 927 F.3d 343, 347 (5th Cir. 2019) ("[B]ecause the Eleventh Amendment textually divests federal courts of jurisdiction over states, it is indispensable to assessing this court's jurisdiction."). Petitioners have demonstrated a clear and indisputable right to the writ on this ground.

C. Failure to Follow *Abbott II* Mandate

Petitioners are also entitled to mandamus because the district court, in entering the April 9 TRO, failed to follow our mandate in *Abbott II*. Most obviously, we instructed the district court to analyze GA-09 under "the framework governing emergency exercises of state authority during a public health crisis, established . . . in *Jacobson*." *Abbott II*, 2020 WL 1685929, at *5.

We articulated the *Jacobson* framework, *id.* at *6–7, and emphasized that adhering to its narrow compass of judicial review is necessary to prevent courts from "second-guess[ing] the wisdom or efficacy" of emergency public health measures. *Id.* at *7. Yet the district court did not apply *Jacobson*: indeed, the court did not even state what *Jacobson*'s framework *is*, but instead merely cited *Jacobson* in passing in its conclusion. *See Abbott III*, 2020 WL 1815587, at *6 (stating only that applying GA-09 to certain abortion categories "violates the standards set forth in both [*Casey*] and [*Jacobson*])." That flatly contradicted our *Abbott II* mandate, which left no doubt that "[o]ur overriding consideration" was that any further proceedings "adhere to the controlling standards" in *Jacobson* "for adjudging the validity of emergency measures like [GA-09]." *Abbott II*, 2020 WL 1685929, at *2.

The April 9 TRO violated the "mandate rule," a particular manifestation of the law-of-the-case doctrine barring reexamination of issues already decided by an appellate court. *See United States v. Smith*, 814 F.3d 268, 273 (5th Cir. 2016). Under the mandate rule, a district court "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). Thus, this court has held that a district court violated the mandate rule when, after an appeal, a district court modified a consent decree "without holding a hearing and demanding a more developed factual record." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 437–38 (5th Cir. 2012) (*LULAC II*). Where a district court fails to fully implement the mandate, a party may seek a writ of mandamus to enforce compliance. *See Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002).

Our *Abbott II* opinion plainly expected, as a foundational premise for applying *Jacobson*, that the district court would allow the parties to adduce

additional evidence about the effects of GA-09 in specific circumstances. Our opinion made this impossible to miss. For example, we said that "[t]he district court has scheduled a telephonic preliminary injunction hearing for April 13, 2020, when *all parties* will presumably have the chance *to present evidence* on the validity of applying GA-09 in specific circumstances." *Abbott II*, 2020 WL 1685929, at *2 (emphases added). Following that adversarial hearing, we explained, "[t]he district court can *then* make targeted findings . . . about the effects of GA-09 on abortion access." *Id.* (emphasis added). We said the same thing a few pages later: despite finding no evidence in the record that GA-09 violated *Casey*, we stated that "Respondents will have the opportunity to show *at the upcoming preliminary injunction hearing* that certain applications of GA-09 *may*" violate *Casey* "if they *prove* that, 'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at *9 (first and third emphases added). Similarly, after canvassing the record, we declined to decide whether a more narrowly tailored injunction would satisfy *Jacobson* because "parties may pursue [those issues] *at the preliminary injunction stage*," then scheduled for April 13. *Id.* at *12 (emphasis added). And again: in assessing whether Respondents had any evidence showing GA-09 pretextually targeted abortion, we found "no evidence . . . [on] the record before us" of pretext, but stated that "Respondents will have the opportunity . . . to present *additional evidence* in conjunction with the district court's preliminary injunction hearing." *Id.* at *13 (emphasis added).

To be sure, the district court could have rescheduled the preliminary injunction hearing (as it now has done, to April 29) or afforded the parties some other way of presenting new evidence on the burdens and benefits of GA-09 in specific circumstances. But our opinion left no doubt that an additional evidentiary showing was necessary to properly apply *Jacobson* in particular circumstances. Among other gaps in the record, for example, was evidence

showing what PPE is being used in medication and surgical abortions *during the current pandemic*, or evidence showing the standard of care for those procedures during the pandemic. *See infra* Part III.D.1.a. Without any means of answering critical questions like those, the district court lacked any basis for finding, as *Jacobson* requires, that GA-09 lacks a "real or substantial relation" to the health crisis, or that "beyond all question" it "plain[ly]" violates *Casey*. *Abbott II*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31).

It is no answer to say that a TRO may be based on a one-sided evidentiary record. *See* Fed. R. Civ. P. 65(b)(1) (allowing issuance of TRO without notice); *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) (observing that TROs are "generally issued *ex parte* or after a hearing of a summary character"). Our plain instructions in *Abbott II* were that properly applying *Jacobson* to GA-09 required "additional evidence" targeted to specific circumstances. *Abbott II*, 2020 WL 1685929, at *13. It is also no answer to say that our decision did not tell the district court *not* to cancel the preliminary injunction hearing and enter a *different* TRO. The mandate rule requires the district court to "implement both the letter and the spirit of the appellate court's mandate." *Lee*, 358 F.3d at 321. Our decision mentioned the then-upcoming preliminary injunction hearing *seven* times as a forum for adducing evidence from both sides about specific applications of GA-09. *See Abbott II*, 2020 WL 1685929, at *2, *4 n.16, *8 n.19, *9, *11 n.24, *12, *13. The district court flouted both the letter and the spirit of our mandate by cancelling that adversarial hearing, convening a snap-TRO "hearing" at which one side was barred from offering evidence or argument, and then immediately issuing a new TRO based on evidence we had already ruled insufficient to show a violation of *Jacobson* and *Casey*. *See LULAC II*, 675 F.3d at 438.

The *LULAC* litigation provides helpful guidance. In *LULAC I*, this court vacated the modification of a consent decree because "the paucity of the record

in [that] case provided an insufficient basis for the district court to determine that modification was warranted." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011) (*LULAC I*). This court instructed that on remand, "the district court should permit supplemental filings and conduct proceedings, as necessary, to develop a sufficient record." *Id.* at 439–40. Yet on remand, the district court entered a new "temporary" modification of the consent decree, without "permit[ting] the parties to conduct discovery, or hold an evidentiary hearing to receive competing expert and lay testimony, or even offer [one party] a substantial opportunity to rebut the evidence that [the other parties] presented." *LULAC II*, 675 F.3d at 438. The *LULAC II* panel vacated that new "temporary" order, holding that "[b]y approving a modification of the Consent Decree without holding a hearing and demanding a more developed factual record, the district court failed to follow the 'letter and spirt' of the *LULAC I* mandate." *Id.* at 438.

So too here. After explaining that the factual record was insufficient to support the TRO in *Abbott I*, we instructed that after the "preliminary injunction hearing scheduled for April 13, 2020" at which the parties could "present additional evidence," *Abbott II*, 2020 WL 1685929, at *13, the district court could find that GA-09 constituted an undue burden if "beyond question" the law's burdens exceeded its benefits. *Id.* at *11. "The district court was required to do this analysis" the first time, we explained, and "that analysis would have required careful parsing of the evidence." *Id.* Yet on remand the district court entered a second TRO "without holding a hearing and demanding a more developed factual record." *See LULAC II*, 675 at 438. In doing so, "the

district court failed to follow the 'letter and spirit' of the" *Abbott II* mandate. *See id.*[14]

To be sure, Respondents suggest that the April 9 TRO is based on a "more robust" record than the one on which the district court based its March 30 TRO. But on critical points, which we analyze in more detail below, the April 9 TRO relied on the same ten declarations already before the district court when it issued the March 30 TRO.[15] Furthermore, after the March 30 TRO issued, Respondents filed supplemental declarations in the district court record—and then proceeded to use those declarations to defend against mandamus in our court.[16] In granting mandamus, we reviewed the record—including those

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[14] There is one minor distinction between this case and *LULAC*. As here, after the district court entered the second "temporary" modification of the order, the intervenor-appellant sought mandamus. *See LULAC II*, 675 F.3d at 437. Unlike here, however, the *LULAC II* panel denied the writ because the second order, though labeled "temporary," was "not a temporary restraining order," in substance, and could be appealed as a preliminary injunction. *See LULAC II*, 675 F.3d at 437 n.2 (citing *LULAC v. City of Boerne*, No. 12-50111, slip op. at 2–3). In this litigation, we held that this court lacked jurisdiction over an appeal of the extended April 9 order, concluding that it *was* in effect TRO. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. 12-50314, slip op. at 2. But that is a distinction without a difference: Mandamus is an appropriate remedy for violations of the mandate rule. *See Will*, 389 U.S. at 96 (explaining mandamus is appropriate where "necessary to confine a lower court to the terms of an appellate tribunal's mandate"); *Kapche*, 304 F.3d at 500 ("[T]he appropriate action at this point would appear to involve the issuance of a writ of mandamus, compelling the district court to comply with our prior mandate.").

[15] *Compare Abbott III*, 2020 WL 1815587, at *2–6 (relying, *inter alia*, on declarations from Barraza, Dewitt-Dick, Ferrigno, Hagstrom Miller, Klier, Lambrecht, Schutt-Aine, Wallace, Connor, and Jane Doe), *with Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. Nos. 7 & 29) (Mar. 25, 2020 & Mar. 30, 2020) (listing same declarations as exhibits to TRO application).

[16] *Compare Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. No. 49) (Apr. 2, 2020) (noting "supplemental filing" of declarations supporting preliminary injunction), *with Abbott II*, ECF 53 at 4, 6, 14, 17–21, 23 (5th Cir. Apr. 2, 2020) (No. 20-50264) (opposition to mandamus relying on supplemental declarations). Indeed, Respondents' opposition conceded that it "cite[s] to declarations filed in the district court on April 2, 2020," in support of its preliminary injunction motion. ECF 53 at 4 n.2 (citing Dist. Ct. Dkt. No. 49).

supplemental affidavits—and found the record before us failed to support the conclusion that GA-09 violates *Jacobson* and *Casey*.[17] The district court hardly answered *Abbott II*'s call for more evidence by relying on evidence we had already reviewed and found wanting. Moreover, we called for additional evidence from *both* sides. *See Abbott II*, 2020 WL 1685929, at *2 (emphasizing "all parties" would be able to "present evidence on the validity of applying GA-09 in specific circumstances"). Yet the district court barred Petitioners from proffering new evidence or argument with respect to the April 9 TRO.

Mandamus is justified to correct the district court's failure to follow our *Abbott II* mandate. *See*, *e.g.*, *Will v. United States*, 389 U.S. 90, 95–96 (1967) (explaining that "the writ [of mandamus] has been invoked . . . where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate"). This is all the more vital here because the failure to follow our mandate led the district court to "embarrass the executive arm of the Government" and "intru[de] . . . on a delicate area of federal-state relations." *Cheney*, 542 U.S. at 381 (cleaned up).[18] Here too, Petitioners have demonstrated their clear and indisputable right to the writ.

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[17] *See Abbott II*, 2020 WL 1685929, at *9 ("[I]t cannot be maintained on the record before us that GA-09 bears 'no real or substantial relation' to . . . the COVID-19 pandemic.") (quoting *Jacobson*, 197 U.S. at 31); *id.* at *11 & n.23–24 (noting conflicting evidence regarding whether abortion procedures consume PPE based on "[o]ur own review of the record"); *id.* at *13 ("[O]n this record, we see no evidence that GA-09 was meant to exploit the pandemic in order to ban abortion or . . . unreasonably delay abortions" (cleaned up)); *id.* ("Based on that record, we cannot say that GA-09 is a pretext for targeting abortion.").

[18] Curiously, and as a possible further indication that the district court failed to follow our *Abbott II* mandate, the April 9 TRO "incorporate[d] by reference" the conclusions of law from *Abbott I* that this court held were mistaken in *Abbott II*. *See Abbott III*, 2020 WL 1815587, at *7.

D. Patently Erroneous Results and Usurpation of the State's Authority to Craft Emergency Health Measures

Mandamus relief is also justified because the district court's failure to follow our *Abbott II* mandate led to patently erroneous results and usurped the state's authority to craft emergency public health measures. *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019) (cleaned up) (mandamus warranted where there has been a "usurpation of judicial power" or "a clear abuse of discretion that produces patently erroneous results"). We discuss these problems below, both to explain why we grant mandamus as to two of the three categories of abortion procedures restrained by the April 9 TRO, and also to provide guidance at the preliminary injunction stage.

1. The April 9 TRO Patently Erred by Exempting Medication Abortions from GA-09

There is no constitutional right to any particular abortion procedure. *Gonzales v. Carhart*, 550 U.S. 124, 164–65 (2007). Yet the district court bluntly concluded that GA-09's temporary postponement of one kind of early-abortion method—medication abortions—is "beyond question" a violation of *Casey*. *See Abbott III*, 2020 WL 1815587 at *6 (concluding, "based on the court's findings of fact, it is beyond question that [GA-09's] burdens outweigh the order's benefits as applied to . . . medication abortion"). Despite our instructions in *Abbott II*, the district court failed to compile a record that remotely justifies this conclusion. Indeed, the record before the district court—which we already reviewed in *Abbott II* and found inconclusive—does not provide the tools even to answer the pertinent factual question. That question is not, as the district court evidently thought, whether medication abortion consumes PPE during normal circumstances, but instead whether it does so under the pandemic conditions Texas faces and GA-09 addresses. As for the legal question, the district court's analysis fails to address why temporary postponement of one

type of early-abortion method is "beyond question" unconstitutional if it leaves open other means of obtaining an abortion. Restraining state officials from implementing an emergency health measure based on such findings is "a clear abuse of discretion that produces patently erroneous results." *Abbott II*, 2020 WL 1685929, at *5 (quoting *JPMorgan Chase*, 916 F.3d at 500 (cleaned up)).

a. Failure to consider PPE usage and standard of care during the pandemic

As a general matter, we observe that the regulation of medication abortion in Texas differs from some other states. In Texas, "[b]efore the physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug, the physician must examine the pregnant woman." Tex. Health & Safety Code § 171.063(c). During that examination, the patient must receive an ultrasound examination. Tex. Health & Safety Code § 171.012(a)(4). The physician cannot provide the patient an abortion until the second visit. *Id*. And the patient must schedule a follow-up appointment to ensure the abortion is complete. Tex. Health & Safety Code § 171.063(e)-(f); 25 Tex. Admin. Code 139.53(b)(4).[19]

The district court found, as a matter of fact, that "[p]roviding medication abortion does not require the use of any PPE." *Abbott III*, 2020 WL 1815587, at *3, ¶ 15. The pertinent question, however, is whether medication abortions require PPE *during the COVID-19 pandemic*. *See* GA-09 (stating that "a shortage of hospital capacity or [PPE] would hinder efforts to cope with the COVID-19 disaster"). Respondents submitted no evidence on that question: they neither stated what PPE they were consuming "during the COVID-19 disaster," nor submitted evidence establishing the standard of care for

[19] At the preliminary injunction stage, a relevant question is whether these acts ancillary to a medication abortion, such as the ultrasound or follow-up appointment, are to be considered when determining PPE usage.

medication abortions during the pandemic. Scour the twenty declarations Respondents submitted to support their claim. Does any testify that *during the current pandemic*, abortion providers are not wearing masks? No. Nor would one expect such a statement when everyday life now presents police officers, priests, mail carriers, grocery store cashiers, gas station attendants, and retail clerks wearing them every day.[20] The question, then, is not whether medication abortions consume PPE in normal times, but whether they consume PPE during a public health emergency involving a spreading contagion that places severe strains on medical resources. *See Abbott II*, 2020 WL 1685929, at *1. The record contains scant material to answer that question—certainly not to a degree to permit the conclusion that merely postponing medication abortions "beyond question" violates the right to abortion.

The April 9 TRO did not analyze PPE consumption for medication abortions during the COVID-19 pandemic. The district court, with one minor exception, relied exclusively on declarations that were before it when it issued the March 30 TRO. *See Abbott III*, 2020 WL 1815587 at *3, ¶¶ 10, 13, 15 (relying on prior declarations); *but see id.* ¶ 14 (relying on new declaration). In *Abbott II*, we explained that those declarations were "unclear" as to "how PPE is consumed in medication abortions." *See Abbott II,* 2020 WL 1685929 at *11. Those declarations did not, and still do not, speak to the question of PPE usage during the present public health emergency.

[20] For their part, Petitioners did submit evidence showing the standard of care may have changed and that abortion providers may be consuming more PPE because of COVID-19. *See, e.g.*, Harstad Decl. at ¶ 4, App. 230 ("Due to the current COVID-19 outbreak, the specific type of mask that is currently required is a N95 mask."). But our point is not to weigh the evidence. Rather, the point is to demonstrate that the record before the district court does not purport to answer the pertinent question about PPE use during the pandemic.

Moreover, there has been no consideration yet how the pandemic has affected the standard of care for abortion. No record evidence supports the contention—which provides the unstated premise of the district court's findings—that the standard of care for medication abortion during the COVID-19 is identical to the normal standard. Relatedly, the record does not establish what PPE abortion providers presently use to protect against the spread of the virus. Indeed, some record evidence indicates that reasonable abortion providers *would* change PPE usage during the pandemic. For instance, the state's infectious disease expert declared that "[n]ot wearing face masks and other PPE when caring for patients who are not under investigation for COVID 19 . . . exposes health care workers to transmission of infection" from asymptomatic patients. Marier Decl. ¶ 12, App. 242.

The declarations the district court cited (which are exclusively those of Respondents) consider medication abortion only during normal times. *Abbott III*, 2020 WL 1815587 at *3, ¶ 15. One physician describes a clinic's PPE usage during an "average week." Wallace Decl. ¶ 12. That says nothing about PPE usage during a pandemic. *Cf.* Klier Declaration ¶ 11, App. 110 ("*Before the COVID-19 outbreak*, Austin Women's used no PPE for medication abortion.") (emphasis added). And a declaration recently filed in the district court clarifies that at least one plaintiff began using surgical masks in response to COVID-19. *See* Rosenfeld Decl. ¶ 13 ("Since the COVID-19 outbreak began, Houston Women's Clinic has . . . provided our staff with surgical masks (not N95 respirators) . . . .").[21]

[21] Amici have submitted a report that one of the plaintiff clinics has been operating without sufficient PPE. *See* Amicus Brief of 19 States in Support of Petitioners at 16 n. 8 (citing Alex Caprariello, *Planned Parenthood employees laid off, claim it's retaliation for voicing concerns* (KXAN, Apr. 10, 2020), https://www.kxan.com/news/local/austin/planned-parenthood-employees-laid-off-claim-its-retaliation-for-voicing-concerns/) ("[The former staff

In sum, the relevant question is not what PPE is consumed during normal times but "during the COVID-19 disaster," as GA-09 states. *Cf. Abbott II*, 2020 WL 1685929 at *12 ("[T]he essence of equity is the ability to craft a particular injunction meeting the exigencies of a particular situation."). The failure even to consider that question—as well as to support its findings with record evidence—was patently erroneous.[22]

b. Usurping state authority to craft emergency health measures

As we explained before, *Jacobson* prohibits courts from "usurp[ing] the state's authority to craft measures responsive to a public health emergency." *See Abbott II*, 2020 WL 1685929, at *12. Courts have no authority to ask whether a "particular method [is]—perhaps, or possibly—not the best." *Jacobson*, 197 U.S. at 35. Instead, courts may ask only whether the state has acted in an "arbitrary, unreasonable manner." *Id.* at 28. During a pandemic emergency, public authorities must make numerous, complex judgment calls. GA-09 addresses one of the most vexing: how to prevent critical strains on medical resources during a surge in contagious disease. *Abbott II*, 2020 WL 1685929, at *1–2. Respondents have submitted declarations of infectious disease experts who believe GA-09 is profoundly misguided. *See, e.g.*, Bassett

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member] said there is not enough PPE at the clinics, workers are being forced to do non-essential work for patients in-person and they're not being offered paid sick leave if they come down with COVID-19 symptoms."). This may be relevant to assessing the benefits of GA-09 in combatting the spread of COVID-19.

[22] Additionally, Respondents concede medication abortions sometimes result in hospitalization. *See* App. 129. The FDA label for Mifeprex states that hospitalization "related to medical abortion" occurs in up to 0.6% of cases. App. 129–30 (describing use of Mifeprex); U.S. Food & Drug Admin., Mifeprex Label 17, Table 2, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf. Applying this figure to Petitioners' uncontested evidence that about 17,000 medication abortions were performed in Texas in 2017, *see* App. 222, medication abortions can be expected to result in slightly over 100 hospitalizations per year in Texas—or about two per week. In comparing the benefits and burdens of GA-09, the district court must weigh those hospitalizations against the delay in women obtaining a medication abortion.

Decl. ¶ 6–8, App. 311; Sharfstein Decl. ¶ 9–12, App. 280–81. Texas authorities believe, to the contrary, that GA-09 is critical to protect the state's citizens and has supported that view with its own medical experts. *See, e.g.*, Marier Decl. ¶ 12, App. 242. The Supreme Court, and this court, have already explained how to resolve such an impasse: "[I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities." *Abbott II*, 2020 WL 1685929, at *12 (citing *Jacobson*, 197 U.S. at 30); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570 (2019) (explaining, in context of different legal standard, that "the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make"). The district court's findings in support of the April 9 TRO failed to heed this basic constraint on judicial power.

In the April 9 TRO, as in the one before, the district court's weighing of the public interest substituted its own opinion for the judgment of the governing authorities. What we said before applies here:

> [T]he district court did little more than assert its own view of the effectiveness of GA-09. The district court did not provide any explanation of its conclusion that the public health benefits from an emergency measure like GA-09 are "outweighed" by any temporary loss of constitutional rights.

Abbott II, 2020 WL 1685929 at *12 (discussing *Abbott I*, 2020 WL 1502102 at *3). In the April 9 TRO, the district court concluded in cursory fashion that Plaintiffs and their patients would "suffer irreparable harm" absent a TRO, that the "balance of equities favors Plaintiffs" and that a TRO "serves the public interest." *Abbott III*, 2020 WL 1815587 at *6. The court added "that entry of a [TRO] to restore abortion access would *serve* the State's interest in public health." *Id*. We find the district court's approach as flawed this time as the last.

To begin with, the district court ignored the entire point of a mitigation measure like GA-09. The concept of "flattening the curve" has become all-too-familiar during the pandemic: as applied to GA-09, it means that delaying procedures *now* may prevent short-term exhaustion of critical medical resources. This is one stated goal of GA-09: it does not *prohibit* non-essential procedures, it *delays* them. As its findings show, however, the district court preferred to second-guess this strategy. For instance, the district court found that delaying abortion access "will not conserve PPE or hospital resources" because women will remain pregnant and thus consume more PPE in the long run. *See Abbott III*, 2020 WL 1815587 at *4, ¶¶ 20–23. But that is not a policy choice federal judges are permitted to make during a public health crisis, if ever.[23] Public authorities are entitled to make a different calculation to protect citizens: even *if* GA-09 may increase consumption of medical resources in the long run, decreasing consumption *now* will help weather the immediate surge of COVID-19 cases.[24] Instead of re-weighing the state's cost-benefit calculus, a federal court "must assume that, when [GA-09] was [issued], the [Governor of Texas] was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." *Jacobson*, 197 U.S. at 30. The district court patently erred by doing the opposite. *See Jacobson*, 197 U.S. at 31; *Abbott II*, 2020 WL 1685929, at *7.

Similarly, the district court found that GA-09 did not promote the public health, in part, because some women might travel to other states to obtain

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[23] Likewise, the dissenting opinion misunderstands the record regarding PPE use for pregnancy during the pandemic. Tests and visits have been reduced for pregnancy just as other medical diagnosis and well visits have.

[24] Nor did the district court consider that months will pass between the time when a woman can generally lawfully obtain an abortion (20-weeks gestation) and the full-term of a pregnancy (40-weeks gestation).

abortions. *See Abbott III*, 2020 WL 1815587 at *5, ¶ 25. But the evidence shows, as does common sense, that an emergency measure like GA-09 weighs heavily on people suffering all kinds of health issues. One physician declares she has postponed or canceled surgeries for "patients with possible uterine cancer and cervical cancer diagnoses who are in need of surgeries, as well as patients with heavy bleeding who need surgery but where we can temporarily control the bleeding with medication." Thompson Decl. ¶ 4, App. 235. It is possible that those patients too may travel to other states to obtain desired procedures.

Moreover, evidence that some women travel to other states to receive an abortion does not demonstrate that GA-09 increases the risk of COVID-19 transmission. Such a claim would require comparing the amount of travel that GA-09 has increased with the amount of travel it has reduced. That calculation is uncertain: One respondent provider declares that some women "come from over a hundred miles to receive care at our clinic." Dewitt-Dick Decl. ¶ 22, App. 87. Another testifies that patients at her clinic "hail from all over Texas." Ferrigno Decl. ¶ 30, App. 95.

A court *must* assume that the public health experts at the Texas Department of State Health Services—not to mention the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services—weighed these difficult trade-offs between medical care and public health. *Jacobson*, 197 U.S. at 30. Federal judges get no vote on the matter. As the Supreme Court instructed: "[N]o court . . . is justified in disregarding the action of the [Governor] simply because in its opinion that particular method was—perhaps, or possibly—not the best." *Jacobson*, 197 U.S. at 35 (cleaned up). The district court's disregard of that command usurped the power of the state in a public health emergency.

c. Failure to carefully parse record evidence

The April 9 TRO also failed to "careful[ly] pars[e] the evidence," as instructed by our previous mandate. *See Abbott* II, 2020 WL 1685929 at *11. For instance, the district court did not discuss, or even cite, a single declaration of submitted by Petitioners.[25] It did not explain why, to take a conspicuous example, it disregarded the declaration of the state's infectious disease expert. Nor did the district court mention the undisputed evidence that, "[i]f even one person providing care is carrying COVID-19 but not yet symptomatic, the results could be devastating if that person is not equipped with proper PPE." Abraham Decl. ¶ 4, App. 225. The district court did not explain whether it disagreed with this statement or thought it was inapplicable to abortion providers. Nor did the district court mention record evidence indicating that N95 masks are now required for surgical abortions to be performed safely. *See* Harstad Decl. ¶ 4.[26] We say this, not to make findings ourselves, but to show why the delicate inquiry in this case requires "careful parsing of the evidence." *Abbott II*, 2020 WL 1685929 at *11. A scalpel must be employed, not a rubber stamp.

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[25] As a general matter, Federal Rule of Civil Procedure 52 does not require "punctilious detail [or] slavish tracing of the claims issue by issue and witness by witness." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993).Certain classes of cases, however, require district courts to address contrary evidence. *See, e.g.*, *Houston v. Lafayette County, Miss.*, 56 F.3d 606, 612 (5th Cir.1995) (voting rights); *Lopez v. Current Director*, 807 F.2d 430, 434 (5th Cir.1987) (employment discrimination). Because we specifically required such an undertaking here, *Abbott II*, 2020 WL 1685929, at *11, the district court's failure to do so violated the mandate rule. *See LULAC*, 675 F.3d at 438.

[26] Consider another jarring incongruity regarding surgical abortions: Petitioners submitted a declaration from a physician stating that any physician performing a surgical abortion must use a face mask and that "[d]ue to the current COVID-19 outbreak, the specific type of mask that is currently required is a N95 mask." Harstad Decl. at ¶ 4, App. 230. This declaration is striking, in light of the district court's finding that "[o]nly one physician associated with Plaintiffs has used an N95 mask since the beginning of the COVID-19 pandemic, and that physician has been reusing the same mask over and over." *Abbott III*, 2020 WL 1815587 at *4, ¶ 19.

Moreover, the district court's wholesale adoption of Respondents' proposed findings resulted in findings that are not supported by the record. One example may suffice. The district court found that, "[a]lthough 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." *Abbott III*, 2020 WL 1815587, at *3, ¶ 14 (citing Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12). The Levinson paragraph cited speaks only to the frequency of hospitalization; it says nothing about how many medication abortions require follow-up aspiration. *See* App. 373. Nor does the cited Schutt-Aine paragraph provide any support for the frequency of follow-up aspiration. *See* App. 129. Schutt-Aine states that "[m]ajor complications—defined as complications requiring hospital admission, surgery or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases." App. 129 (citing Ushma Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology, 175 (2015)). But Figure 1 of the cited article clarifies that subsequent uterine aspirations (*i.e.*, surgical abortions) were not considered "surgery" within the meaning of the article. *See* Upadhyay, 125 Obstetrics & Gynecology at 176.

Petitioners, by contrast, submitted evidence demonstrating the rate of medication abortions resulting in incomplete abortions, which are treated either with a repeat dose of medication or aspiration.[27] In our court,

[27] *See* American College of Obstetricians and Gynecologists, Clinical Guidelines: Medical management of first-trimester abortion, 89 Contraception 148, 149 (2014), https://www.contraceptionjournal.org/article/S0010-7824(14)00026-2/pdf (estimating that 4–8% of mifepristone-induced abortions at seven weeks gestation, and more than 15% after seven weeks gestation, result in incomplete abortions).

Respondents contend those numbers are outdated.[28] Analysis of such conflicting evidence is hard; it requires careful parsing. We reach no conclusions on the point. District courts, who can make fact findings after adversarial hearings, are better suited to the task. Here, however, the district court declined to avail itself of those tools, instead cancelling the scheduled preliminary injunction hearing and issuing a second TRO that adopted all 30 of Respondents' proposed findings without citing or discussing a single declaration submitted by Petitioners. To be sure, a district court need not "recite every piece of evidence supporting its findings." *Schlesinger*, 2 F.3d at 139. But "the record must nevertheless support the district court's decision." *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). Here the record fails to do so.

The failure to parse the evidence led the district court to reach legally erroneous results in two respects. First, under *Whole Woman's Health v. Hellerstedt*, to determine whether a law "unduly burdens" the abortion right, a court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. 2292, 2309–10, 2319 (2016). The April 9 TRO does not meaningfully weigh either one. As noted, the order does not cite or discuss a single declaration submitted by Petitioners explaining the benefits of GA-09. Nor does the order articulate the burden of a delay or why that delay should be considered a "ban" on abortion. The record belies any such notion. Medication abortion is available until 10 weeks LMP, and surgical abortion until 22 weeks LMP. Given that GA-09 had only a 30-day duration, no woman would be pushed beyond the legal limit by a 30-day delay in obtaining a medication abortion. Moreover, health risks of a delay are

[28] *See* Opp. to Mandamus at 19 (citing U.S. Food & Drug Admin., Mifeprex 13 tbl.3 (rev. Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf).

mitigated because GA-09, by its terms, permits procedures that a patient's physician determines are "immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death." *Abbott II*, 2020 WL 1685929, at *10 (quoting GA-09). The district court factored none of this into its cursory analysis. That weighing of burdens versus benefits would be inadequate under *Hellerstedt* in normal circumstances. *A fortiori* it is inadequate under the *Jacobson* framework, which asks whether burdens outweigh the benefits "beyond question." 197 U.S. at 31. Moreover, as we have explained, the Supreme Court has approved "a wide variety of abortion regulations . . . that in practice can occasion real-world delays of several weeks." *Abbott II*, 2020 WL 1685929 at *10 (quoting *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (en banc) (mem.) (Kavanaugh, J., dissenting)). That leads us to the second legal error resulting from the district court's findings: they treat a medication abortion as an absolute right. But the constitutional right to abortion does not include the right to the abortion method of the woman's (or the physician's) choice. *Gonzales*, 550 U.S. at 164–65. On this record it was patently erroneous to find that a mere 30-day postponement of medication abortions "beyond question" violates *Casey*.

d. The *Pennhurst* doctrine.

We address an additional point that arose during our consideration of Petitioners' emergency stay motion, because it may become important as the litigation continues. In the April 9 TRO, the district court adopted Respondents' proposed fact finding that "[m]edication abortion is not a surgery or procedure." *Abbott III*, 2020 WL 1815587 at *3, ¶ 10; *cf.* ECF 56-2, Plaintiff's

Proposed Order ¶ 10 ("Medication abortion is not a surgery or procedure.").[29] When considering Petitioners' stay motion, we expressed uncertainty as to whether medication abortions were covered by GA-09, given ambiguity in the Texas Medical Board's guidance on the order. *See Abbott V*, 2020 WL 1866010, at *3. For that reason, we denied a stay as to the part of the TRO applicable to medication abortions, while "express[ing] no ultimate decision on the ongoing mandamus proceeding." *Id.* We have since benefitted from additional briefing on this issue. Given the lack of legal analysis in the April 9 order, we are unable to discern what impact the district court's finding had on its decision to grant the TRO. Going forward, however, we caution that any relief ordering a state official to comply with state law would be barred by the Pennhurst doctrine. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Under *Pennhurst*, a federal court may not grant "relief against state officials on the basis of state law." *Id.* at 106. A federal court may determine state officials' enforcement of state law violates a *federal* right, but it may not order state officials to conform their conduct to *state* law. *See*, *e.g.*, *Williams On Behalf of J.E. v. Reeves*, 19-60069, 2020 WL 1638411, at *7 (5th Cir. Apr. 2, 2020) (under *Pennhurst*, "the rule announced in *Ex parte Young* cannot be used to redress a state official's violation of state law"); *Hughes v. Savell*, 902 F.2d

[29] It is unclear how Respondents tie this contention (which revolves around the interpretation of GA-09) to their substantive due process claim, which is the only claim they pursued on their first and second applications for TROs. In any event, Respondents may develop their arguments further at the preliminary injunction stage, if they choose. Finally, based on this finding and others, the dissenting opinion, *infra* at 18–21, suggests that the April 9 TRO concludes that GA-09 was a "pretext" for targeting abortion. But we discern no such conclusion in the April 9 TRO. Instead, in its conclusions of law, the April 9 TRO merely states that GA-09's "burdens outweigh [its] benefits," *Abbott III*, 2020 WL 1815587 at *6, and makes no legal finding that GA-09 pretextually targets abortion over other medical procedures. Respondents, of course, may choose to develop such a claim at the preliminary injunction stage, but we do not find that legal issue presented by the April 9 TRO.

376, 378 (5th Cir. 1990) (*Pennhurst* bars "a claim that state officials violated *state* law in carrying out their official responsibilities").

To the extent the April 9 TRO finds that GA-09 violates *Casey* by postponing medication abortions, we have already explained that it patently erred. But to the extent the TRO might be construed to order relief on a claim that state officials failed to conform their actions to state law, the TRO would violate *Pennhurst*. State health officials, who are Petitioners here, insist that GA-09's postponement of "procedures" encompasses medication abortions. *Pennhurst* bars a federal court from considering a claim that those officials failed to comply with a proper interpretation of the state executive order. *See*, *e.g.*, *Hughes*, 902 F.3d at 378 (quoting *Pennhurst*, 465 U.S. at 106) (explaining that "instruct[ing] state officials on how to conform their conduct to state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment").[30] The district court should be aware of this issue in further proceedings.

2. The April 9 TRO Patently Erred by Exempting 18-Week Gestation from GA-09

We turn to the part of the April 9 TRO blocking application of GA-09 as to patients who "would reach 18 weeks LMP by April 21, 2020," and who, in a physician's judgment, are "unlikely to be able to obtain an abortion at an [ambulatory surgical center] before [her] pregnancy reaches the 22-week cutoff." *Abbott III*, 2020 WL 1815587, at *6. For those patients, the district court concluded GA-09 would amount to "an absolute ban on abortion" that

[30] Such a claim would need to be brought in state court. *Cf. Russell v. Harris Cty.*, CV H-19-226, 2020 WL 1866835, at *12 (S.D. Tex. Apr. 14, 2020) (abstaining, under *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), from hearing COVID-19 related equal protection and due process claims because there was "a pending state-court lawsuit challenging the Executive Order that raises questions about novel, uncertain issues of state law") (referring to *Tex. Crim. Def. Laws. Ass'n v. Abbott*, No. GN-20-002034, 459th District Court of Travis County, Texas (Apr. 8, 2020)).

violates *Casey*. *Id*. Once again, the district court's failure to apply the framework articulated in *Abbott II* led to a patently erroneous result that cannot be sustained on this record.

As we explained in *Abbott II*, a state emergency measure like GA-09 violates the right to abortion if it "has no real or substantial relation" to the public crisis "or is, beyond all question, a plain, palpable invasion of [*Casey*]." 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31). Here, we take the district court's conclusion to turn only on the second part of the analysis—whether GA-09 is "beyond all question" a violation of *Casey* to the extent it results in delaying a woman's pregnancy to 18 weeks LMP.

The district court's treatment of GA-09 as "an absolute ban on abortion" as applied to this category of women was obviously wrong. *Abbott III*, 2020 WL 1815587, at *6. A woman who would be 18 weeks LMP when GA-09 expires has up to four weeks to legally procure an abortion in Texas. No case we know of calls that an "absolute ban" on abortion. *Cf., e.g.*, *Casey*, 505 U.S. at 874 (explaining that "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure").

The district court may have had in mind an as-applied challenge to GA-09 on behalf of a woman facing this particular combination of circumstances. *See*, *e.g.*, *Gonzales*, 550 U.S. at 167 (explaining that "as-applied challenges" are "the proper manner to protect the health of the woman if it can be shown in discrete and well-defined instances" that particular procedures are required). That would require evidence of "discrete and well-defined instances" sufficient to support such a challenge, *id.*, but the district court cited none and we can find none in the record. Respondents attempt to bridge this gap by relying on a new affidavit from a hotline coordinator at an abortion-funding nonprofit. But that affidavit speaks only in general terms about women at later stages of

pregnancy and does not even attempt to identify any "discrete and well-defined instances" of a woman in the 18-week category sufficient to support an as-applied challenge here. *See* App. 439–44.

Respondents also speculate that, due to patient backlogs and the burden of traveling to one of the limited number of Texas ASCs, women in the 18-week category will not be able to obtain an abortion. Once again, this is the stuff of a possible as-applied challenge. But we know of no precedent saying that it violates *Casey* "beyond question" when a generally applicable emergency health measure causes backlogs and travel delays for women seeking abortion. In fact, even outside of a public health crisis, the Supreme Court has "recognize[d] that increased driving distances do not always constitute an 'undue burden.'" *Hellerstedt*, 136 S. Ct. at 2313 (quoting *Casey*, 505 U.S. at 885–87). To the contrary, the Court has treated increased travel distance only as one factor that—"when taken together with others" such as "the virtual absence of *any* health benefit"—could support a conclusion of undue burden under *Casey* on a particular record. *Id.* (emphasis added).

Perhaps in the context of a preliminary injunction hearing, Respondents will be able to adduce evidence to support an as-applied challenge to GA-09 (or its successor order, GA-15) along these lines. But the record presently before the district court fails to provide even an arguable basis to conclude that GA-09, as applied to women in the 18-week category, is "beyond all question, a plain, palpable invasion of [*Casey*]." *Abbott II*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31).

3. The April 9 TRO Did Not Patently Err by Exempting 22-Week Gestation from GA-09.

The district court also concluded that GA-09 "beyond question" violates *Casey* as applied to a woman who "would otherwise be denied access to abortion entirely because . . . [her] pregnancy would reach 22 weeks LMP" before GA-

09 expires. *Abbott III*, 2020 WL 1815587, at *6. While we harbor some doubts about the evidentiary basis for the district court's conclusion, we conclude that any error is not so clear and indisputable as to warrant mandamus.

Unlike the 18-week category, Respondents have adduced *some* evidence that they have clients who will reach 22 weeks LMP during the operation of GA-09. *See* App. 103, 353, 442. While this evidence is secondhand, and thus weak, we cannot conclude it was a "clear abuse of discretion" for the district court to rely on it at this early stage. *Abbott II*, 2020 WL 1685929, at *4. The district court concluded that GA-09's delay of non-essential medical procedures would operate as a permanent ban on abortion for women in this category, and that the order's burdens far outweighed its benefits as to those women. Again, given the weak evidence, we are not fully satisfied with this cursory conclusion. Further, it remains unclear whether GA-09's exception for "patient[s] who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences . . . as determined by the patient's physician," *id.* at *3, already covers women in these circumstances. But Petitioners' arguments do not convince us, at this early stage, that the district court's order enjoining GA-09 as to women who will reach 22 weeks LMP during the order's operation was so patently erroneous that mandamus is appropriate. *Cf. Gee*, 941 F.3d at 158 (noting that mandamus is only appropriate "for really extraordinary causes").

As a result, we conclude Petitioners have not shown entitlement to the writ of mandamus as to this part of the TRO.

* * *

To sum up, Petitioners have shown entitlement to the writ of mandamus as to the parts of the April 9 TRO that:

- restrain enforcement of GA-09 as a "categorical ban on all abortions provided by plaintiffs";

- restrain enforcement of GA-09 after 11:59 p.m. on April 21, 2020;
- restrain the Governor and Attorney General;
- restrain enforcement of GA-09 as to medication abortions;
- restrain enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

Petitioners have not demonstrated entitlement to the writ as to that part of the April 9 TRO that:

- restrains enforcement of GA-09 as to patients "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."

IV.

The other two requirements for mandamus relief are satisfied here. First, Petitioners "'have no other adequate means' to obtain the relief they seek." *Abbott II*, 2020 WL 1685929, at *13. TROs, unlike preliminary injunctions, are not appealable. *See Smith v. Grady*, 411 F.2d 181, 186 (5th Cir. 1969); *see also* 28 U.S.C. § 1292. Although Petitioners argued in their separate appeal that the TRO at issue here has the "actual content, purport, and effect" of a preliminary injunction, *Smith*, 411 F.2d at 186, we concluded otherwise and dismissed that appeal for lack of jurisdiction.

Second, for substantially the same reasons set out in *Abbott II*, "[w]e are persuaded that this petition presents an extraordinary case justifying issuance of the writ." *Abbott II*, 2020 WL 1685929, at *15. As we stated there,

> the current global pandemic has caused a serious, widespread, rapidly-escalating public health crisis in Texas. Petitioners' interest in protecting public health during such a time is at its zenith. In the unprecedented circumstances now facing our society, even a minor delay in fully implementing the state's emergency measures could have major ramifications . . . .

Id. The district's failure to apply *Jacobson* and its usurpation of the state's power by second-guessing "the wisdom and efficacy of [its] emergency

measures" are just as extraordinary now as they were on April 7. *Id.* Moreover, the issues addressed in this litigation "have an importance beyond the immediate case." *Id.* (quoting *Volkswagen*, 545 F.3d at 318).

"[W]e are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate." *Id.* (quoting *Volkswagen*, 545 F.3d at 319). We therefore exercise our discretion to grant mandamus relief.

CONCLUSION

The petition for writ of mandamus is GRANTED IN PART and DENIED IN PART.

The district court is directed to vacate any part of the April 9 TRO that (1) restrains enforcement of GA-09 as a "categorical ban on all abortions provided by Plaintiffs"; (2) restrains the Governor and Attorney General; (3) restrains enforcement of GA-09 after 11:59 p.m. on April 21, 2020; (4) restrains enforcement of GA-09 as to medication abortions; and (5) restrains enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

We do not grant the writ or direct vacatur as to that part of the April 9 TRO restraining enforcement of GA-09 as to patients "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."

Any portions of our April 10 administrative stay remaining in effect are LIFTED.

As indicated in *Abbott II*, any future appeals or mandamus petitions in this case will be directed to this panel and will be expedited. *See Gee*, 941 F.3d at 173; *In re First South Sav. Ass'n*, 820 F.2d 700, 716 (5th Cir. 1987).

The mandate shall issue forthwith.