

No. 20-50314

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED
PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES;
PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; WHOLE
WOMAN'S HEALTH; WHOLE WOMAN'S HEALTH ALLIANCE; SOUTH-
WESTERN WOMEN'S SURGERY CENTER; BROOKSIDE WOMEN'S
MEDICAL CENTER, P.A., doing business as Brookside Women's Health
Center and Austin Women's Health Center; ROBIN WALLACE, M.D., M.A.S.;
and HOUSTON WOMEN'S CLINIC

Plaintiffs-Appellees,

v.

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,

Defendants-Appellants.

On Appeal from the United States District Court,
Western District of Texas, Austin Division, No. 1:20-cv-00323-LY

**OPPOSITION TO APPELLANTS' EMERGENCY MOTION
TO STAY TEMPORARY RESTRAINING ORDER PENDING APPEAL
AND OPPOSITION TO MOTION FOR ADMINISTRATIVE STAY**

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

[Additional counsel on inside
cover]

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

Additional counsel:

STEPHANIE TOTI
RUPALI SHARMA
Lawyering Project
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083
*Counsel for Plaintiffs-Appellees Whole
Woman's Health and Whole Woman's
Health Alliance*

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

MOLLY DUANE
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3631
*Counsel for Plaintiffs-Appellees
Southwestern Women's Surgery Center,
Brookside Women's Medical Center PA
d/b/a Brookside Women's Health
Center and Austin Women's Health
Center, and Robin Wallace, M.D.*

ANJALI SALVADOR
ANDRE SEGURA
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Tel. (713) 942-8146
asalvador@aclutx.org
asegura@aclutx.org

BRIGITTE AMIRI
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2600
bamiri@aclu.org
*Counsel for Plaintiff-Appellee Houston
Women's Clinic*

CERTIFICATE OF INTERESTED PERSONS

No. 20-50314, *Planned Parenthood Center for Choice v. Abbott*

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

Plaintiffs-Appellees	Counsel
<ol style="list-style-type: none"> 1. Planned Parenthood Center for Choice 2. Planned Parenthood of Greater Texas Surgical Health Services 3. Planned Parenthood South Texas Surgical Center 4. Whole Woman’s Health 5. Whole Woman’s Health Alliance 6. Southwestern Women’s Surgery Center 7. Brookside Women’s Medical Center PA d/b/a Brookside Women’s Health Center and Austin Women’s Health Center 8. Robin Wallace, M.D. 9. Houston Women’s Clinic 	<ol style="list-style-type: none"> 1. Law Offices of Patrick J. O’Connell PLLC (Patrick J. O’Connell) 2. Planned Parenthood Federation of America (Jennifer Sandman, Julie Murray, Richard Muniz, Hannah Swanson) 3. Center for Reproductive Rights (Molly Duane, Rabia Muqaddam, Francesca Cocuzza) 4. Lawyering Project (Stephanie Toti, Rupali Sharma) 5. ACLU Foundation of Texas, Inc. (Anjali Salvador, Andre Segura) 6. American Civil Liberties Union Foundation (Brigitte Amiri)

Defendants-Petitioners	Counsel
<ol style="list-style-type: none"> 1. Greg Abbott, Governor of the State of Texas 2. Ken Paxton, Attorney General of Texas 3. Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission 4. Stephen Brint Carlton, Executive Director of the Texas Medical Board 5. Katherine A. Thomas, Executive Director of the Texas Board of Nursing 	<ol style="list-style-type: none"> 1. Office of the Attorney General of Texas (Kyle D. Hawkins, Jeffrey C. Mateer, Ryan L. Bangert, Darren McCarty, Thomas A. Albright, Andrew B. Stephens, Benjamin S. Walton, Heather G. Hacker, Beth Klusmann, Natalie D. Thompson)
Defendants	Counsel
<ol style="list-style-type: none"> 1. Margaret Moore, District Attorney for Travis County 2. Joe Gonzales, Criminal District Attorney for Bexar County 3. John Creuzot, District Attorney for Dallas County 4. Jaime Esparza, District Attorney for El Paso County 5. Kim Ogg, Criminal District Attorney for Harris County 6. Ricardo Rodriguez, Jr., Criminal District Attorney for Hidalgo County 7. Barry Johnson, Criminal District Attorney for McLennan County 8. Sharen Wilson, Criminal District Attorney for Tarrant County 9. Brian Middleton, Criminal District Attorney for Fort Bend County 	<ol style="list-style-type: none"> 1. Office of the Dallas County District Attorney (John J. Butrus, Jr.) 2. Office of the Fort Bend County District Attorney (Justin C. Pfeiffer)
Amici Curiae	Counsel
<ol style="list-style-type: none"> 1. Attorneys General of the States of Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, 	<ol style="list-style-type: none"> 1. Louisiana Department of Justice (Jeff Landry, Elizabeth Murrill, J. Scott St. John)

<p>Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia</p> <p>2. American Center for Law and Justice</p> <p>3. American Association of Pro-Life Obstetricians and Gynecologists; Texas Values; Indiana Family Institute; Family Heritage Alliance Action, South Dakota; Minnesota Family Council; Wisconsin Family Action; Alaska Family Action; California Family Council; Ohio Citizens for Community Values; Nebraska Family Alliance; Family Policy Institute of Washington; The Family Foundation (Kentucky); Louisiana Family Forum</p> <p>4. American College of Obstetricians and Gynecologists; American Medical Association; American Academy of Family Physicians; American Academy of Nursing; American Academy of Pediatrics; AAGL; American College of Nurse-Midwives; American College of Osteopathic Obstetricians and Gynecologists; American College of Physicians; American Osteopathic Association; American Psychiatric Association; American Society of Reproductive Medicine; American Urogynecologic Society; North American Society for Pediatric and Adolescent Gynecology; National Association of Nurse Practitioners in Women's Health; Society of Family Planning; Society for Maternal-Fetal Medicine; Society of Gynecologic Oncology; Society of</p>	<p>2. Lill Firm, P.C. (David S. Lill)</p> <p>3. American Center for Law and Justice (Jay A. Sekulow, Edward L. White III, Jordan Sekulow, Stuart J. Roth, Erik M. Zimmerman, Benjamin P. Sisney, Olivia F. Summers, Christina A. Stierhoff)</p> <p>4. Mitchell Law PLLC (Jonathan F. Mitchell)</p> <p>5. Texas Values (Jonathan M. Saenz)</p> <p>6. Mayer Brown (Nicole A. Saharsky, Kathleen S. Messinger)</p> <p>7. American College of Obstetricians and Gynecologists (Skye L. Perryman)</p> <p>8. Office of the New York State Attorney General (Letitia James, Barbara D. Underwood, Anisha S. Dasgupta, Laura Etlinger)</p>
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<p>Gynecologic Surgeons; Society of OB/GYN Hospitalists</p> <p>5. Attorneys General of the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia</p>	
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INTRODUCTION

Defendants-Appellants, State officials in Texas (“State Officials”), ask this Court for the third time in just over two weeks to stay a temporary restraining order preventing full or partial enforcement of Governor Abbott’s March 22, 2020, Executive Order as it applies to the provision of abortion. In their latest quest, State Officials argue that this Court should combine the district court’s narrow temporary restraining order entered April 9, 2020 (the “limited TRO”) and the April 13, 2020, order extending the limited TRO (collectively, the “extension order”) and treat them collectively as a preliminary injunction subject to appeal as of right under 28 U.S.C. § 1292. They do so despite the fact that the district court has already scheduled a preliminary injunction hearing for April 29 for consideration of these issues on a fuller evidentiary record, and that schedule is *faster* than the one requested by State officials.

This Court should deny the motion to stay. First, it plainly lacks jurisdiction over State Officials’ appeal because the district court’s extension order is not in form or effect a preliminary injunction. Moreover, State Officials cannot meet the high bar to justify a stay of the extension order. The district court right concluded that any benefits of the Executive Order were, beyond question, outweighed by the burdens imposed on medication abortion patients and patients who will lose their right to obtain an abortion by the time the Executive Order expires. That factual

determination was based on record evidence and is consistent with this Court's previous mandamus order; indeed, this Court already correctly denied prior stay motions as to medication abortion and patients who will pass twenty-two weeks of pregnancy prior to the Executive Order's expiration. Moreover, other equitable considerations strongly favor denying the motion to stay pending appeal, including the fact that hundreds of Texans have been turned away from abortion care, and many more will follow if State Officials have their way. As in their last stay request, State Officials now seek license to go beyond what any other state in the nation has been permitted to do in response to COVID-19, and far beyond what the Constitution allows. Their request should be denied.

BACKGROUND

Plaintiffs-Appellees ("Providers") respectfully ask the Court to take judicial notice of the statement of facts in their opposition to State Officials' first emergency motion for a stay pending mandamus.¹ Providers additionally offer the following abbreviated summary of the district court's factual findings and recent procedural history.

¹ Opposition to Petitioners' Emergency Motion to Stay TRO Pending Mandamus at 2–9, *In re Abbott*, No. 20-50264 (5th Cir. April 1, 2020). See *MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 587 (5th Cir. 1985) ("A court may take judicial notice of related proceedings and records in cases before the same court.").

A. Abortion in Texas

Abortion is extremely safe, complications from abortion are rare, and those complications seldom result in hospitalization. *See* App.470; Brief of ACOG et al. as *Amici Curiae* in Opposition to the Petition for a Writ of Mandamus, *In re Abbott*, No 20-50264 (5th Cir. Apr. 2, 2020) (“ACOG Br.”) at 6–7; *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12, 2315 (2016). Still, the health risks associated with obtaining an abortion, as well as the health risks from pregnancy itself, increase with gestational age. App.86–87, 96, 105, 132–133, 412. As ACOG and others have observed, “abortion is . . . a time-sensitive [service] for which a delay may increase the risks [to patients] or potentially make it completely inaccessible.” ACOG Br. at 9. Delays also result in higher financial and emotional costs. App.475; *see also* App.86–87, 96, 104, 133, 158, 161, 162–163.

In Texas, abortion is illegal except in narrow circumstances beyond twenty-two weeks of pregnancy, as dated from the first day of the patient’s last menstrual period (“LMP”). Tex. Health & Safety Code § 171.044. Providers offer abortion services exclusively at outpatient facilities. App.469–70; *see also* App.74, 117, 135, 154. Some are licensed as ambulatory surgical centers (“ASCs”), which may provide abortion up to twenty-two weeks LMP, but most are licensed as abortion facilities, which may provide abortion only up to eighteen weeks LMP. App.470; *see also*

App.72, 82, 90–91, 98–99, 107, 126, 154, 469–70; Tex. Health & Safety Code § 171.004. No ASCs provide abortion care outside of Texas’s four largest metropolitan areas. App.470.

Providers offer abortion using two main methods: medication abortion and procedural abortion. App.469. Medication abortion is not a “procedure” at all; the patient simply ingests two medications. App.469. The patient takes the first medication at a health center and then generally takes the second medication twenty-four to forty-eight hours later at a location of her choosing, after which she expels the pregnancy in a process similar to a miscarriage. *Id.* The clinician uses no PPE to hand the medication to the patient. App.470. Medication abortion is legally available in Texas only up to ten weeks LMP. Tex. Health & Safety Code § 171.063(a)(2). Medication abortion is the only treatment using oral medications that State Officials have suggested is governed by the Executive Order, which on its face applies only to “surgeries and procedures.” App.470; *see also* App.35.

Procedural abortion, although sometimes referred to as “surgical abortion,” requires no incision, general anesthesia, or sterile field. App.469–70. For most procedural abortions in Texas, a patient sees either one or two clinicians, who each wear minimal PPE similar to that used in many medical offices. App.471. N95 masks are generally not used. App.472. Providers are aware of only one physician among their staff who has used a single N95 mask to provide abortion in Texas since the

beginning of the COVID-19 pandemic. App.472.

People prevented from accessing abortion still require medical care related to pregnancy. This care includes multiple in-person visits involving blood draws, physical exams, and ultrasounds. App.363–65, 374–75, 407–08, 412–13, 472. Because individuals with ongoing pregnancies require more in-person healthcare at each stage of pregnancy than individuals who have previability abortions, delaying access to abortion does not conserve PPE. App.472. Similarly, “[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.472.

Each day the Executive Order is in place, individuals seeking abortion are forced to travel by car or airplane to other states to obtain abortion, some as far away as Colorado and Georgia. App.348–49, 355, 442–43, 473. This long-distance travel increases the risk of contracting COVID-19. App.138, 311, 473.

Because Providers have already turned away hundreds of patients due to the Executive Order, and will continue to do so if the extension order is stayed, a significant backlog of patients will urgently need abortion care when the Executive Order expires. App.473–74. It will take Providers weeks to see these patients, meaning that patients 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. 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.

B. 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 issued a writ of mandamus vacating that first TRO. *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020).

On remand, the district court continued the April 13 preliminary injunction hearing that had been scheduled and directed the parties to agree to a new briefing schedule and hearing date, bearing in mind the court's expectation that Governor Abbott would extend the Executive Order past April 21, 2020. App.460-61. Providers then moved for a second, narrower TRO based on this Court's decision in *Abbott* and the more fulsome record they had compiled after the district court entered its first TRO. The district court granted the limited TRO on April 9, 2020. App.465–79.

The following morning, State Officials petitioned this Court for a second writ of mandamus and sought an emergency stay and administrative stay of the limited TRO. That evening, 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 Admin. Stay at 4, *In*

re Abbott, No. 20-50296 (5th Cir. Apr. 10, 2020) (per curiam). This Court later denied the motion to stay as to the limited TRO’s application to medication abortion as well.

On April 14, the district court entered an order extending the expiration date of the limited TRO from April 19 to May 1. It also set a preliminary injunction hearing for April 29. These actions were in accord with the parties’ joint status report submitted a day earlier, in which the state sought urged the district court to hold a hearing on the preliminary injunction no *earlier* than April 30, 2020.

Following questions from this Court as to the extension order’s jurisdictional implications, State Officials then filed their notice of appeal from the extension order.

ARGUMENT

To warrant a stay, State Officials must demonstrate: (1) a likelihood of success on the merits of their appeal; (2) irreparable injury absent a stay; (3) a stay would not substantially harm other parties; and (4) a stay serves the public interest. *Nken v. Holder*, 556 U.S. 418, 425–26, 434 (2009) (citations omitted).

I. This Court Lacks Jurisdiction Over The Appeal

State officials contend that the extension order, although labeled a “temporary restraining order,” should nevertheless be treated as a preliminary injunction subject to immediate appeal based on its “actual content, purport, and effect.” Appellant’s

Opposed Emergency Mot. to Stay Pending Appeal (“Stay Mot.”) at 9 (quoting *Smith v. Gandy*, 411 F.2d 181, 186 (5th Cir. 1969)). To the contrary, nothing about the extension order warrants displacing the “general rule” that “orders granting [or] . . . modifying . . . temporary restraining orders are not appealable” under 28 U.S.C. § 1292(a)(1) “as orders respecting injunctions.” Wright & Miller, *Federal Practice & Procedure* § 3922.1 (3d ed. 2014).

1. The length of the extension order is well within the time limit permitted by Federal Rule of Civil Procedure 65(b)(2). Rule 65 imposes a fourteen-day time limit on TROs, but allows district courts to extend a TRO “for good cause” for a “like period.” Fed. R. Civ. P. 65(b)(2). Accordingly, a TRO may be in effect for up to 28 days. *See* Wright & Miller, *Federal Practice and Procedure* § 2962. Here, the limited TRO was entered on April 9 and set to expire on April 19; the extension order added only twelve days—to May 1, 2020—to the TRO’s duration, for a total of twenty-two days.

State Officials contend that the district court was prohibited from issuing an extension longer than the initial period of time set in the limited TRO. But they cite no authority for that proposition, it is not required by Rule 65’s plain language, and it makes no sense. Were State Officials correct, judges would have perverse incentives to set initial TROs as long as possible by statute, to protect their ability to

extend those TROs for the same period of time if needed in the future. That is precisely the opposite of what this Court should encourage.

2. State Officials also contend that the duration of the extended order, when combined with the two previous TROs, exceeds the 28-day limit for TROs set by Rule 65 and therefore functions as a preliminary injunction. *See* Stay Mot. at 11. State Officials cite no authority for combining the time periods of substantially different TROs in this way. And they ignore the fact that since March 29, when the district issued its first TRO, State Officials have in fact been restrained from enforcing any part of the Executive Order for less than a week.

3. Contrary to State Officials' suggestion, the district court correctly identified good cause for the extension on the record, as required by Rule 65. The district court explained that it was extending the limited TRO to allow the court and parties adequate time to prepare for the April 29 preliminary injunction hearing, and it did so in the context of a broader scheduling order that made plain why that extension was necessary. *See* Order Extending Order Granting Pls.' Second Mot. for TRO and Scheduling Order for Pls.' Mot. for PI at 2, ECF No. 82, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Apr. 14, 2020) ("Extension Order"). The district court's attempt to "preserve the status quo" until the April 29 preliminary injunction hearing was clearly proper. 13 *Moore's Federal Practice* § 65.30 (2020).

State Officials’ argument that good cause does not support the extension is further belied by their own submissions and litigating conduct. On remand, State Officials resisted what they termed an “overly ambitious schedule [for the preliminary injunction], especially in light of the uncertainty before April 21, 2020.” Joint Status Report at 3, ECF No. 78, *Planned Parenthood Center for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. April 14, 2020). They argued that, to ensure the parties had “sufficient time to prepare and finalize both their briefing and their relevant evidence,” the district court should hold a hearing on the preliminary injunction no *earlier* than April 30, 2020. *Id.* at 2–3. In light of these statements, and State Officials’ copious filings in this Court on three separate occasions in just over two weeks, State Officials’ contention that the parties and district court have “had ample time for an adversarial hearing in which both sides are permitted to present evidence and substantive argument” strains credulity. Stay Mot. 10.²

4. Nothing in this Court’s precedent suggests that the district court’s extension of the second TRO effectively converted that action into a preliminary injunction. The order at issue in *Smith* is a far cry from the extension order here. In *Smith*, this Court treated an order as a preliminary injunction rather than a TRO

² State Officials’ contention that “they are happy to present briefing and evidence” on the second TRO application is beside the point. *Id.* The relevant question is whether State Officials have been prepared to participate in the preliminary injunction hearing that they fault the district court for not yet holding; their own statements make clear that the answer to that question is “no.”

because “the case was heard as for a preliminary injunction”; “the District Court specifically directed that said order ‘be considered by all persons as an injunction’”; and “[t]he parties were clearly enjoined . . . until such time as a final order should be entered.” *Id.* at 186. In contrast, Plaintiffs moved for a TRO specifically, App.420–35; the district court characterized the injunctive relief it granted as a TRO, both in its original order and in its order extending the relief, App.464–79; Extension Order, ECF No. 82; and the TRO, as extended, will remain in effect for at most twenty-two days, within the time limit that Rule 65(b)(2) prescribes.

State Officials’ reliance on *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414 (5th Cir. 1957), is similarly misplaced. *Connell* explains that “the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts.” *Id.* at 418. That clearly has not happened yet.

In sum, because the TRO entered by the district court in this case, as extended, continues to have the character and effect of a TRO, this Court lacks jurisdiction over the appeal and to enter the stay requested by State Officials. *See S. Wind Women’s Ctr. LLC v. Stitt*, No. 20-6045, 2020 WL 1860683, at *3 (10th Cir. Apr. 13, 2020) (per curiam) (declining to treat TRO relating to similar executive order as a preliminary injunction because “the matter remains pending before the district

court in [abortion providers’] request for a preliminary injunction” and “the court intends to promptly rule on the request for a preliminary injunction”).

II. State Officials Will Not Prevail On Their Appeal, Even If This Court Has Jurisdiction To Address It.

A. The district court complied in all respects with this Court’s prior orders.

State Officials contend that the district court disregarded this Court’s prior mandate in issuing its extension order. To the contrary, the district court correctly applied this Court’s decision in *In re Abbott*, 2020 WL 1685929, and the legal standard it set forth. Under that standard, a restriction on previability abortion during a public health emergency violates the substantive due process clause where, “‘beyond question,’ [the restriction’s] burdens outweigh its benefits.” *Id.* at *9 (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905)). This Court also emphasized that a restriction that “applies . . . differently” to abortion “than to any other,” *id.* at *13, would run afoul of *Jacobson*’s admonition that laws justified on public safety grounds may not be “unreasonable, arbitrary, [or] oppressive,” 197 U.S. at 26.

1. Medication abortion

The extension order as applied to medication abortion is consistent with this Court’s mandate because, “beyond a reasonable doubt,” *Jacobson*, 197 U.S. at 14, the burdens of prohibiting medication abortion outweigh its benefits in furthering

the state’s asserted interests, App.474. It also imposes an undue burden on access to abortion under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). Even if the Executive Order is not ultimately extended beyond April 21, 2020, its threatened enforcement absent a TRO subjects patients seeking medication abortion to weeks of delay, App.35,³ in addition to further delay following its expiration from “the significant pent-up need for abortion care.” App.474. Some medication abortion patients with the means to travel will be forced to seek access to medication abortion in other states. App.473; *see also* App.348–49, 355, 441. Those who cannot travel will, in many instances, be unable to obtain medication abortions after the Executive Order’s expiration (even if it is not extended) because their pregnancies will exceed 10 weeks LMP, and most women do not learn they are pregnant until 6 weeks LMP or later.

State Officials contend that this Court’s earlier order foreclosed factual findings made by the district court on remand as to medication abortion. *See* Stay Mot. at 14–15. But even if the record evidence in the earlier appeal was “unclear” as to PPE use for medication abortion, *see In re Abbott*, 2020 WL 1685929, at *11 & n.24, the district court found no such ambiguity on remand, when it considered for the first time ten declarations not before it when it entered the initial TRO. Further,

³ The assumption the Executive Order will not be extended is at odds with State Officials’ statement to this Court that Texas’s COVID-19 peak is not expected until April 29, 2020. *See* Stay Mot. at 2.

the district court’s factual findings were not in any way at odds with this Court’s acknowledgment in *Abbott* that medication abortions can result in hospitalizations. But *all* prescription medications have risks. The relevant question is whether the risks of medication abortion resulting in hospital care exceed the risks from remaining pregnant. They do not. App.473.

Accordingly, a ban on medication abortion does nothing to serve the Executive Order’s purported goals. Although Texas requires an ultrasound and physical examination prior to medication abortion, “individuals with ongoing pregnancies require more in-person healthcare, including lab tests and ultrasounds, at each stage” of pregnancy, App.472, and are more likely to “seek treatment in a hospital for a variety of conditions than individuals who have pre-viability abortions,” App.473. As a result, “delaying access to abortion will not conserve hospital resources.” *Id.*; *see also Whole Woman’s Health*, 136 S. Ct. at 2311.

The district court was also right to find that complications associated with medication abortion—including those requiring hospital care—are exceedingly rare. App.470 (finding that 0.31% rate of complications requiring hospitalization, surgery, or blood transfusion); *see also* App.129. Nearly all abortions in Texas are provided in outpatient facilities, such as Providers’ abortion facilities and ASCs, not

hospitals.⁴ App.469. 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 outdated figures referring to the incidence of medication abortions completed using aspiration. More recent data show that the modern medication regimen has an aspiration follow-up rate of 2.6%.⁵ For those patients, aspiration involves the same incision-free suction procedure used for early procedural abortion, which takes approximately five to ten minutes in an outpatient setting. App.470; *see also* App.129, 373. As the district court found, hospitalization resulting from ongoing pregnancy is far more common. App.472, 373.

Regarding the Executive Order’s second asserted interest—preserving PPE—medication abortion itself requires no PPE, while the patient’s only alternative to medication abortion—continuing the pregnancy or obtaining a procedural abortion later in pregnancy—does require PPE. App.470–73. Although Texas requires that medication abortion be preceded by an ultrasound, patients with ongoing pregnancies also require ultrasound examinations, App.470–71; *see also* App.364–

⁴ 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% of abortions among Texas residents in Texas were provided in abortion facilities or ASCs).

⁵ Pet’rs’ Emergency Mot. to Stay TRO Pending Mandamus at 4 & n.7; *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/2016/020687s0201b1.pdf).

65, 408, 413. And 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.450. Further, the record establishes that medication abortion, including any incidental lab work and diagnostic tests, requires the use of less PPE than the monthly diagnostic tests and ultrasounds required for a patient with an ongoing pregnancy. App.472; *see also, e.g.,* App.414. Contrary to State officials’ assertion, these levels of PPE use remain distinct even during the pandemic.

On this record, any benefit from State Officials’ application of the Executive Order to medication abortion is “beyond all question” outweighed by the severe harms imposed on patients unable to access medication abortion. *See S. Wind Women’s Ctr. LLC*, 2020 WL 1677094, at *2, 5. Providers are therefore likely to succeed on their substantive due-process claim as to this category of patients. This Court concluded just days ago that State Officials had not made a showing of likelihood of success on the merits sufficient to justify a stay of the district court’s TRO as to medication abortion pending mandamus, *see In re Abbott*, No. 20-50296, 2020 WL 1866010, at *2 (5th Cir. Apr. 13, 2020) (per curiam), and the record has not changed since then.

In addition, Providers are likely to succeed on their substantive due process

claim as to medication abortion because the Executive Order, as interpreted by State Officials, “applies . . . differently” to this type of medication “than to any other,” *In re Abbott*, 2020 WL 1685929, at *13, and is therefore “unreasonable, arbitrary, and oppressive.” *Jacobson*, 197 U.S. at 26. State Officials have identified *no* other oral medication they consider prohibited by the Executive Order. *See* App.35. Moreover, Providers have now presented evidence (not part of the record at the time the district court entered the prior TRO) showing that treatments “comparable” in terms of in-person contact and PPE use “are exempt from [the Executive Order’s] requirements.” *In re Abbott*, 2020 WL 1685929, at *13; App.473; *see also* App.375 (obstetric care like blood draws, ultrasounds, and other in-person diagnostics still being performed during prenatal visits); *accord* App.407–09.

2. *Patients for whom abortion will become inaccessible*

The district court was correct to conclude that Providers are likely to prevail on their substantive due-process claim as applied to abortion where, in the treating physician’s medical judgment, the patient would otherwise be denied access to abortion entirely by the time the Executive Order expires.

First, the record demonstrates that the Executive Order operates as an undue burden for all patients whose pregnancies will exceed Texas’s twenty-two week LMP gestational-age limit before the Executive Order expires. This Court’s denial of an administrative stay as to the second TRO’s application to these patients

supports that view. Order Granting Admin. Stay at 4, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 9, 2020) (per curiam).

Second, application of the Executive Order to patients whose pregnancies will, by the expiration of the order, reach eighteen weeks LMP, and who will then be unable to obtain an abortion at an ASC, likely constitutes an undue burden on individuals seeking abortion. There are no ASCs providing abortion care outside of four metropolitan areas, *Whole Woman's Health*, 136 S. Ct. at 2316, and as the district court found, even after the Executive Order expires, a significant number of patients will face additional delays in accessing abortion due to backlogs at Providers' health centers. App.474. Because the Executive Order as applied to abortion in those circumstances would foreclose the right to abortion for some patients altogether, *see id.* at 2316–18, as to those patients, it extends beyond the reach of the “powers allotted to a state in a public health emergency,” and the district court was right to enjoin it. *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *5.

State Officials assert that the extension order was unfounded because Providers have not identified “particular women” in need of injunctive relief. Stay Mot. 15. But hundreds of patients have been turned away from abortion care, including some patients who have already exceeded the gestational age limit to obtain an abortion in Texas because of the Executive Order. App.474; *see also* App.349, 353. State Officials' own evidence shows that in an average week,

approximately sixty abortions occur in Texas at or after fifteen weeks LMP, and approximately fifteen occur at or after eighteen weeks LMP. *See* App.222. The Executive Order’s month-long delay has pushed these patients into, respectively, requiring an abortion at an ASC in a select number of locations that some patients will be unable to reach, or being foreclosed from obtaining an abortion in Texas altogether.

For these patients, the Executive Order’s month-long duration results in a complete denial of abortion access, and thus constitutes a “plain, palpable invasion” of that fundamental right. *In re Abbott*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31); *id.* at *9–10 (contemplating that an “outright ban” would violate *Jacobson*); *see also Roe v. Wade*, 410 U.S. 113, 166 (1973); *Casey*, 505 U.S. at 846 (stating that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion”). State Officials’ extreme position to the contrary—asserting that the State’s police powers allow it to “‘proscribe’ abortion altogether” among this subset of patients, *see* Stay Mot. at 16—is at odds with bedrock law.

The Executive Order is also unconstitutional as applied to these patients because it is “arbitrary and oppressive.” *In re Abbott*, 2020 WL 1685929, at *7. Outside of abortion care, physicians are continuing to provide care comparable to abortion in PPE use and time-sensitivity, based on their professional medical judgment. App.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 healthcare. *Cf. Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700, at *3 (M.D. Ala. Apr. 3, 2020).

B. The District Court properly exercised its authority to enter the extension order.

State Officials ask this Court to intervene on appeal based on a slate of threshold arguments going to the district court’s jurisdiction and authority to enter the extension order. Those arguments are as unconvincing now as they were when this Court first considered them. First, Providers have standing to bring their claim and a justiciable controversy exists. App.475 (citing *In re Abbott*, 2020 WL 1685929, at *5 n.17). Second, 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.

III. State Officials Will Not Suffer Irreparable Harm Absent a Stay.

As explained above, the Executive Order does not further public health as applied to medication abortion and limited categories of procedural abortion at issue in the extension order. In fact, imposition of a stay will irreparably injure public health by *increasing* demands for PPE and hospital resources. Specifically, as the district court found, 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, 355, 348, 442–43.

IV. The Remaining Factors Favor Denial of the Stay

The balance of equities and public interest also weigh heavily against a stay. Some patients would no longer be able to obtain an abortion in Texas if a stay were issued. Issuance of a stay would also impose additional delay and other attendant burdens on *every* patient who could otherwise obtain a medication abortion under the limited TRO. *See supra* pp.11–12. Deprivation of these patients’ constitutional rights constitutes a profound and irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (2013).

Moreover, as the district court found, entry of the TRO “to restore abortion access would *serve* the State’s interest in public health.” App.477; *see supra* pp.12–15. Far from “usurp[ing] the state’s authority to craft emergency health measures,” *In re Abbott*, 2020 WL 1685929, at *1, the district court’s conclusion in this respect was consistent with its “independent constitutional duty to review factual findings where constitutional rights are at stake.” *Whole Woman’s Health*, 136 S. Ct. at 2310

(quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

CONCLUSION

Issuance of the requested stay would make Texas the only state in the country to enforce an interpretation of a COVID-19 executive order that categorically bars either medication abortion or abortion for patients who, because of their stage of pregnancy, will be unable to obtain an abortion after the executive order's expiration. No other court has allowed such an interpretation, and this Court should not be the first. The motion for a stay should be denied.

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Respectfully submitted,

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

/s/ Julie A. Murray
JULIE A. MURRAY
HANNAH SWANSON
Planned Parenthood Federation of
America, Inc.
1110 Vermont Ave., NW, Ste. 300
Washington, DC 20005
(202) 973-4800
julie.murray@ppfa.org
hannah.swanson@ppfa.org
Counsel for Plaintiffs-Appellees
Planned Parenthood Center for
Choice, Planned Parenthood of
Greater Texas Surgical Health
Services, and Planned Parenthood
South Texas Surgical Center

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

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

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

ANJALI SALVADOR
ANDRE SEGURA
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Tel. (713) 942-8146
asalvador@aclutx.org
asegura@aclutx.org

BRIGITTE AMIRI
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2600
bamiri@aclu.org
*Counsel for Plaintiff-Appellee
Houston Women's Clinic*

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Julie Murray
Julie Murray

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,189 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 16, 2020

/s/ Julie Murray
Julie Murray