IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al*.,

Plaintiffs,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al*.,

Defendants.

No. 1:20-cv-00323-LY

PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs file a second motion for a narrow temporary restraining order ("TRO") to enjoin Defendants from enforcing Executive Order GA-09, ECF No. 1-2, as that order applies to Plaintiffs' provision of (1) medication abortion; and (2) procedural abortion where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion entirely because (a) the patient's pregnancy would reach twenty-two weeks LMP by April 21, 2020; or (b) the patient's pregnancy would reach eighteen weeks LMP by April 21, 2020, thus requiring abortion care at an ambulatory surgical center ("ASC") and the patient is unlikely to be able to obtain an abortion at an ambulatory surgical center before the patient's pregnancy reaches the 22-week cutoff (hereinafter, abortion for "Covered Circumstances").[1]

[1] To the same extent, Plaintiffs also seek a TRO enjoining enforcement of the Texas Medical Board's ("Medical Board") emergency amendment to 22 Tex. Admin. Code § 187.57 ("Emergency Rule"). Plaintiffs discuss the Emergency Rule together with the Executive Order here and throughout. Pursuant to the Agreed Stipulation for Non-Enforcement Pending Final

Plaintiffs seek this narrow relief in light of the U.S. Court of Appeals for the Fifth Circuit's April 7, 2020, decision granting a writ of mandamus to vacate this Court's earlier TRO. *In re Greg Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) ("Slip Op."). The Fifth Circuit concluded that this Court erred in granting a TRO as applied to all medication and procedural abortion and in applying *Roe v. Wade*'s longstanding rule against previability abortion bans to assess Plaintiffs' likelihood of success on their substantive due-process claim.[2] The Court of Appeals nevertheless made clear that this Court, on remand, could still "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access," and thus address—under the legal standard set out in the Fifth Circuit's decision—the "validity of applying GA-09 in specific circumstances." Slip Op. at 3.

The Court of Appeals emphasized two circumstances in particular. The first is that the Executive Order contains an exception for procedures that "if performed under normal clinical standards 'would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster,'" and that this Court's TRO contained no findings about the use of PPE in medication abortion, *id.* at 19–20, 22. The second is that as-applied relief may be appropriate as to patients whose pregnancies will reach or exceed Texas's gestational age cut-off while abortion services remain suspended. *Id*. at 23.

Applying the Fifth Circuit's analysis, this Court should grant Plaintiffs' second motion for a narrow TRO addressing these two circumstances pending briefing and decision on Plaintiffs' broader preliminary injunction application. Plaintiffs are likely to prevail on their substantive due-

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Resolution, Att'ys' Fees, and Costs, ECF No. 25, Plaintiffs' motion does not apply to Defendant Brian Middleton, District Attorney of Fort Bend County, Texas.

[2] Plaintiffs dispute the correctness of the Fifth Circuit's decision but assume that it is controlling for purposes of this motion.

process claim that in the Covered Circumstances the Executive Order violates the patient's right to an abortion because, "beyond all question," *id.* at 12, 13, the burdens imposed by the Executive Order in those circumstances far outweigh any benefits of barring these patients from obtaining an abortion during the month-long Executive Order, and, because of clinic crowding, potentially for weeks thereafter even if the Executive Order itself is not extended. And as set forth in prior briefing, injunctive relief is urgently needed to prevent further irreparable harm to Plaintiffs' patients' health and rights. Plaintiffs have been forced to turn away hundreds of patients in need of abortion care for more than two weeks already, resulting in severe and ongoing harm to patients.

Plaintiffs respectfully request entry of a second TRO pending resolution of their motion for a preliminary injunction. In the alternative, Plaintiffs request expedited review of Plaintiffs' motion for a preliminary injunction. Plaintiffs intend to file additional briefing on their motion for preliminary injunction, providing further evidence and developing arguments responsive to the Fifth Circuit's mandamus opinion, and would request a hearing by Thursday, April 16.

State Defendants have advised that they will oppose this motion. For the Court's reference and in accordance with Local Rule CV-7(g), Plaintiffs attach a proposed temporary restraining order consistent with the relief sought here.

BACKGROUND

Plaintiffs incorporate by reference the facts as recited in their March 25, 2020, Motion for Temporary Restraining Order and/or Preliminary Injunction and Memorandum in Support, ECF No. 7; the declarations filed in support of that motion, ECF Nos. 7-1–7-9; the additional facts as recited in Plaintiffs' Supplemental Statement in Support of Motion for TRO, ECF No. 29; the declaration of Jane Doe filed March 30, 2020, ECF No. 29-1; the declarations filed as attachments to Plaintiffs' Notice of Supplemental Filing in Support of the Preliminary Injunction Motion, ECF

Nos. 49-1–49-9; and the declaration of Rashae Ward, filed herewith as Exhibit 20. Plaintiffs also offer the following recitation of the procedural history most pertinent to this second motion for a TRO:

This Court entered a TRO on March 30, 2020, enjoining Defendants from enforcing the Executive Order as banning all medication abortions and procedural abortions. The Court set a hearing for April 13, 2020, on Plaintiffs' pending motion for a preliminary injunction.

Defendants filed a petition for a writ of mandamus in the Fifth Circuit. They also filed a motion to stay the TRO pending resolution of the mandamus petition, or in the alternative, for an administrative stay. On March 31, 2020, a divided panel of the Fifth Circuit granted an administrative stay of the TRO. *In re Abbott*, No. 20-50264 (5th Cir. Mar. 31, 2020). On April 7, 2020, that same divided panel issued a writ of mandamus vacating this Court's earlier TRO. *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020). The majority concluded that mandamus was appropriate for three reasons.

First, the panel believed that this Court erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which the panel described as setting forth "the framework [that] govern[s]" the constitutionality of "emergency public health measures like GA-09." Slip Op. at 2. In the majority's view, under *Jacobson*, this Court "was empowered to decide only whether GA-09 lacks a 'real or substantial relation' to the public health crisis or whether it is 'beyond all question, a plain, palpable invasion' of the right to abortion." *Id.* at 16 (citing 197 U.S. at 31).

Second, the majority rejected Plaintiffs' argument that the Executive Order operates as an "outright ban" on abortion, instead viewing the Executive Order as a "temporary postponement" of access which operates only for some subset of abortions. *Id.* at 21. The Court of Appeals stated, for example, that the Executive Order exempts "'any procedure' that, if performed under normal

clinical standards, 'would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.'" *Id.* at 19. Because the Fifth Circuit concluded the Executive Order did not impose a previability ban, it held that the undue-burden balancing test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applies, Slip Op. at 21–24, requiring this Court to weigh the burdens that the Executive Order places on patients seeking abortion against the benefits of the Executive Order in furthering the state's goals of conserving PPE and resources for hospitals treating COVID-19 patients. Given the overlay of *Jacobson*, the majority held that "*certain applications* of GA-09 may constitute an undue burden under *Casey*," where Plaintiffs are able to "prove that, 'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at 18 (quoting *Jacobson*, 197 U.S. at 31) (emphasis added). And as noted above, the Fifth Circuit's analysis called into question two specific applications of the Executive Order: its application to medication abortion, given that the record is "unclear how PPE is consumed in medication abortions," *id.* at 22, and its application to patients whose opportunity to obtain an abortion in Texas will be foreclosed while services remain suspended. *Id*. at 23.

Third, the majority held that any determination whether the TRO served the public interest should "weigh the potential injury to the public health" from enjoining enforcement of the Executive Order. *Id.* at 25.

The Fifth Circuit declined to issue a writ of mandamus on other grounds raised by Defendants. It had no need to address the sovereign immunity of the Governor and Attorney General because "a justiciable controversy exists as to the [Defendant] health officials, who may enforce the order's administrative penalties." *Id.* at 8 n.17 (citing, *e.g.*, 22 Tex. Admin. Code

§ 187.57(b)).[3] The Court of Appeals also determined that Plaintiffs have "standing to sue on their own behalf because GA-09 'directly operates' against them." *Id*. (quoting *Planned Parenthood of Cen. Mo. v. Danforth*, 428 U.S. 52, 62 (1976)). It therefore did not reach the question whether Plaintiffs have third-party standing to sue on behalf of their patients.

Throughout its opinion, the majority emphasized the "limits of [its] decision, which [was] based only on the record before" it. *Id.* at 3. It acknowledged that this Court, so long as it relied on the Fifth Circuit's legal standard, could still "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access," and thus address the "validity of applying GA-09 in specific circumstances." *Id*. In this context, the Fifth Circuit acknowledged that other federal courts have recently enjoined state orders similar to Texas's Executive Order, but distinguished those TROs on the grounds that they were "narrowly tailored and did not permit blanket provision of abortion." *Id.* at 10 n.18 (discussing TROs at issue in *Preterm-Cleveland v. Att'y. Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *1–2 (6th Cir. Apr. 6, 2020) (holding that TRO was sufficiently "narrowly tailored" where it authorized provision of abortion "deemed legally essential to preserve a woman's right to constitutionally protected access to abortions" per the healthcare provider's "determin[ation], on a case-by-case basis, that the surgical procedure is medically indicated and cannot be delayed, based on the timing of pre-viability or other medical conditions"); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700, at *3 (M.D. Ala. Apr. 3, 2020) (narrowing TRO in light of state defendants' representations that challenged executive order authorized provision of abortion where provider determined that, in her

[3] The Court did, however, instruct that on remand, this Court "should 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)." Slip Op. at 8 n.17.

"reasonable medical judgment," the patient would otherwise "lose her right to lawfully seek an abortion in Alabama based on the [challenged] order's mandatory delays"); *S. Wind Women's Center LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2, 5–6 (W.D. Okla. Apr. 6, 2020) (entering TRO as to executive order's "imposi[tion of] requirements that effectively *deny* a right of access to abortion" because such requirements "imposed an 'undue burden' on abortion access" and were thus "'unreasonable,' 'arbitrary,' and 'oppressive'" in violation of *Jacobson*).

The Fifth Circuit also recognized that in evaluating Plaintiffs' need for relief this Court may ask whether a state's emergency measures "are pretextual—that is, arbitrary or oppressive," and thus run afoul of *Jacobson*. Slip Op. at 13. Although it concluded that the record before it did not include "evidence that GA-09 applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt from GA-09's requirements," *id.* at 26, it left open the possibility that Plaintiffs could rely on such evidence to seek narrower relief from this Court on remand.

ARGUMENT

To warrant relief, plaintiffs seeking a temporary restraining order must show: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the injury to the plaintiffs outweighs any harm that the TRO might cause the defendants; and (4) that granting the TRO will not disserve the public interest. *See*, *e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). Plaintiffs easily meet this standard with respect to their provision of abortion under the Covered Circumstances, even under the legal standard announced by the Fifth Circuit.

I. Plaintiffs Will Succeed on the Merits of Their Substantive Due-Process Claim as to Abortion in the Covered Circumstances

Under the Fifth Circuit panel's order granting Defendants' petition for writ of mandamus, "certain applications of GA-09 *may* constitute an undue burden under *Casey*" where, "'beyond question,' GA-09's burdens outweigh its benefits in those situations." Slip Op. at 18 (emphasis in original) (quoting *Jacobson*, 197 U.S. at 31). Plaintiffs have demonstrated that they are likely to succeed on their substantive due-process claim under this standard at least as to abortion in the Covered Circumstances.

A. The Executive Order Is Unconstitutional as to Plaintiffs' Provision of Medication Abortion

Temporarily restraining enforcement of the Executive Order as to medication abortion is consistent with the Fifth Circuit's order, *see id.* at 22, and supported by a recent, persuasive opinion by a sister court. Earlier this week, a district court entered a TRO preventing enforcement of Oklahoma's executive order as to medication abortion on the grounds that "the benefit to public health of the ban on medication abortions is minor and outweighed by the intrusion on Fourteenth Amendment rights caused by that ban," such that Oklahoma's executive order so applied violated *Jacobson*'s rule against "unreasonable," "arbitrary," and "oppressive" uses of the state's emergency powers. *See S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *2, 5 (quoting *Jacobson*, 197 U.S. at 31).

Moreover, under the balancing test required by the Fifth Circuit, the burdens of prohibiting medication abortion far outweigh its benefits in furthering the state's interests. Specifically, the prohibition on medication abortion will impose a severe burden on patients seeking this method of abortion in Texas. Because of Defendants' threatened application of the Executive Order to medication abortion, patients seeking medication abortion have been subjected to a month-long

delay, assuming the Order is not extended beyond April 21, 2020. Compl. Ex. B at 4, ECF No. 1-2. In Texas, medication abortion is only available until ten weeks LMP. Tex. Health & Safety Code § 171.063(a)(2). Further, record evidence demonstrates that the Executive Order will, in fact, cause an even longer delay for these patients because abortion providers in Texas will not be capable of absorbing the full backlog of patients in need of abortion care after the Executive Order expires. Johnson Decl. ¶ 12; Nguyen Decl. ¶ 23. Some medication patients who have the means to travel will be forced to seek access to medication abortion care in other states while the Executive Order remains in effect. Doe Decl. ¶¶ 12–27; Johnson Decl. ¶¶ 8–10; Nguyen Decl. ¶ 17; Ward Decl. ¶ 7.

On the other side of the scale, a ban on medication abortion does nothing to serve the Executive Order's purported goals. As to preserving hospital capacity, medication abortion is overwhelmingly safe. Levison Decl. ¶ 9; Schutt-Aine Decl. ¶¶ 12, 14. While Defendants assert without evidence that medication abortion frequently results in complications necessitating "surgery," the complication rates they cite are outdated and inconsistent with the best, current medical evidence. Levison Decl. ¶ 9. In general, complications associated with medication abortion—including those requiring hospital care—are exceedingly rare. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12, 2315 (2016). Nearly all abortions in Texas are provided in outpatient facilities, such as Plaintiffs' abortion facilities and ASCs, not hospitals,[4] and indeed almost all medication abortion patients choose to complete their abortion at home rather than in a medical facility of any kind. Further, the evidence demonstrates that individuals with ongoing

[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).

pregnancies are far more likely to require treatment in a hospital than individuals who have abortions. Chang Decl. ¶¶ 16–18; Levison Decl. ¶¶ 8–11.

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—does require PPE. Texas law does require that medication abortion be preceded by an ultrasound and be offered in conjunction with a confirmation visit. Tex. Health & Safety Code §§ 171.012, 171.063(e); Tex. Admin. Code § 139.53(b)(4); Barraza Decl. ¶ 7; Ferrigno Decl. ¶ 9; Hagstrom Miller Decl. ¶ 12; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶¶ 15, 23. But patients with ongoing pregnancies also require ultrasound examinations. Chang Decl. ¶¶ 11–12; Macones Decl. ¶ 12; Wood Decl. ¶ 14. And in any event, a transabdominal ultrasound and follow-up appointment are not procedures, and thus are not covered by the Executive Order. *See* Tex. Med. Bd., *Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic* (Mar. 29, 2020), http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17 ("TMB Guidance"); *see also* Levison Decl. ¶¶ 18–19 (saying that ultrasounds are still being performed during the COVID-19 pandemic); Macones Decl. ¶ 12 (same); Wood Decl. ¶ 14 (same). Although the Fifth Circuit held that the record underlying this Court's prior decision did not sufficiently address the extent to which an ultrasound might require PPE and constitute a procedure, that question is addressed in the record now before this Court. Transabdominal ultrasounds do not require the use of *any* PPE. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. Transvaginal ultrasounds require the use of one pair of non-sterile gloves, at most. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. And the Medical Board's published guidance concerning the Executive Order indicates that non-

invasive diagnostic tests—like ultrasound—are not procedures in the first place. TMB Guidance. 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 that are required for a patient with an ongoing pregnancy. Levison Decl. ¶¶ 12–14; Macones Decl. ¶ 20; Schutt-Aine Decl. ¶ 26.

Thus, Defendants' application of the Executive Order to medication abortion does not advance their asserted interests to a degree sufficient to justify the harm to patients from not being able to access abortion for a month or more. *See S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *2, 5 (quoting *Jacobson*, 197 U.S. at 31). Plaintiffs are therefore likely to succeed on their substantive due-process claim as to this category of patients.

In addition, Plaintiffs are separately likely to succeed on this claim because the record now demonstrates that the Executive Order, as interpreted by Defendants, in fact, "applies . . . differently" to this type of medication "than to any other." Slip Op. at 26. Indeed, Defendants have identified *no* other oral medication they consider prohibited by the Executive Order, which on its face applies only to "surgeries and procedures." *See* Compl. Ex. B at 4, ECF No. 1-2. Moreover, Plaintiffs have now presented evidence, which was not part of the record at the time this Court entered its TRO, showing that treatments "comparable" in terms of in-person contact and PPE use "are exempt from GA-09's requirements." Slip Op. at 26; Levison Decl. ¶¶ 18–19 (saying that obstetric care like blood draws, ultrasounds, and other in-person diagnostics are still performed during prenatal visits); Wood Decl. ¶¶ 9–11, 14, 16–17 (saying that ultrasound examinations are still being performed for obstetrical patients). Indeed, a person with an ongoing pregnancy can and must obtain routine prenatal care and testing even though it requires the use of more PPE than medication abortion. Chang Decl. ¶¶ 8, 12, 15; Levison Decl. ¶¶ 12–14. Under these

circumstances, the record demonstrates that "Texas has exploited the present crisis as a pretext to target abortion providers *sub silentio*," justifying judicial intervention. Slip Op. at 12, 26 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

B. The Executive Order Is Unconstitutional as to Patients for Whom Abortion Will Be Inaccessible After Expiration of the Order

Plaintiffs are similarly likely to prevail on their substantive due-process claim as applied to their provision of abortion to patients (1) whose pregnancies would exceed twenty-two weeks LMP—the statutory gestational-age limit for most legal abortion in Texas—by the expiration of the order, or (2) whose pregnancies would exceed eighteen weeks LMP by the expiration of the order and who are unlikely, in the judgment of the treating physician, to be able to access care at an ambulatory surgical center (in one of the four Texas metropolitan areas where abortions are provided) before the patient's pregnancy reaches the 22-week cutoff.

Even if the Executive Order does not operate as a substantial obstacle in all cases, the record demonstrates that it will do so at least as to many patients who will pass Texas's twenty-two week LMP statutory gestational-age limit before the Executive Order expires or whose pregnancies will, by the expiration of the order, reach eighteen weeks LMP, at which time the patient will be ineligible to have an abortion at a licensed abortion facility under Texas law. Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at ASCs, *id.*, but there are no ASCs that provide abortion care outside of Texas' four largest metropolitan areas, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016). Because the Executive Order as applied to abortion in those circumstances would have the effect of foreclosing the right to abortion for some patients altogether, *see id*. at 2316–18, as to those patients, it extends "beyond the reach of even the considerable powers allotted to a state in a public health emergency," and should be enjoined. *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *5;

see also Slip Op. at 18 (stating that Plaintiffs would have the opportunity to show that "certain applications of GA-09 that *may* constitute an undue burden under *Casey*" such that those applications are "*beyond question*, in palpable conflict with the Constitution" (emphasis in original)).

Contrary to Defendants' assertions earlier in this litigation, the existence of this subset of patients is not hypothetical. Record evidence demonstrates that some patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the EO has been in place. Hagstrom Miller Decl. ¶ 27; Johnson Decl. ¶ 10; Nguyen Decl. ¶¶ 7–8, 11; Ward Decl. ¶¶ 12–13, 16. Moreover, Defendants' own evidence shows that in 2017, 3,146 abortions were provided at or after fifteen weeks LMP (thirteen weeks post-fertilization), and 819 abortions occurred after eighteen weeks LMP (sixteen weeks post-fertilization). *See* Exs. in Supp. of Defs.' Resp. to Pls.' Mot. for TRO at 15, ECF No. 28-3.

For these patients, the Executive Order's month-long duration (even assuming the order is not extended and causes no further delay past its expiration) would result in a complete denial of abortion access, and thus constitutes a "plain, palpable invasion" of that fundamental right. Slip Op. at 12 (quoting *Jacobson*, 197 U.S. at 31); *id.* at 18–21 (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"); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (enjoining ban on abortions starting at six weeks); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) (enjoining ban on abortions starting at fifteen weeks).

Neither the Fifth Circuit nor Defendants maintain otherwise. In its mandamus decision, the Fifth Circuit acknowledged that the Executive Order might violate *Roe*, *Casey*, and *Jacobson* if it

operated as an "outright ban" on abortion. *See* Slip Op. at 18, 21. Similarly, in their mandamus filings before the Fifth Circuit, Defendants' only comment on these circumstances was to assert that such patients could seek as-applied relief, not that they were unentitled to such relief. *See* Pet. for Writ of Mandamus at 22 n.28, *In re Greg Abbott*, No. 20-50264 (5th Cir. March 30, 2020); Pet'rs' Emergency Mot. to Stay TRO Pending Mandamus at 14 n.18, *In re Greg Abbott*, No. 20-50264 (5th Cir. March 30, 2020).

The Executive Order is also unconstitutional as applied to these patients because it is pretextual and thus "arbitrary and oppressive." Slip Op. at 13. The Fifth Circuit concluded that the record before it did not include "evidence that GA-09 applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt from GA-09's requirements." *Id.* at 26. But as discussed, *see supra* Part I.A, the record before this Court now includes evidence that physicians are continuing to provide obstetrical and gynecological procedures comparable to abortion in PPE use and/or time-sensitivity, based on their professional medical judgment. *See* Chang Decl. ¶ 24; Levison Decl. ¶ 18. The Executive Order permits them to do so. Plaintiffs seek limited relief requiring Defendants to treat abortion similarly. *Cf. Robinson*, 2020 WL 1659700, at *3 (ordering that "[t]he reasonable medical judgment of abortion providers will be treated with the same respect and deference as the judgments of other medical providers. The decisions will not be singled out for adverse consequences because the services in question are abortions or abortion-related.").

II. Plaintiffs' Patients Will Suffer Irreparable Harm If the Executive Order Is Fully Enforced

As discussed above with respect to application of the undue-burden test, and as set forth more fully in the attached proposed temporary restraining order, Plaintiffs' patients will suffer

serious and irreparable harm in the absence of the more narrowly defined temporary relief sought here.

III. The Balance Of Harms And Public Interest Support Injunctive Relief

Plaintiffs' more narrowly tailored TRO request will serve the public interest and is favored by the balance of equities. As instructed by the Fifth Circuit, assessment of these factors involves, among other things, "weigh[ing] the potential injury to the public health" if Defendants are enjoined from enforcing the Executive Order as applied to the two narrow categories of abortion care at issue in this motion. Slip Op. at 25.

As is clear from the previous discussion of the benefits and burdens of the Executive Order under *Casey*'s undue-burden test, the Order will exacerbate rather than alleviate the public health crisis. Preventing patients in need of medication abortion from obtaining it will not save *any* PPE. Moreover, even assuming that Defendants are correct that some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small, Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12, and can generally be handled in an outpatient setting. In contrast, the number of Texas women in need of medication abortion who will be foreclosed from obtaining it will increase the demand for hospital capacity. Levison Decl. ¶¶ 8–10, 21; Macones Decl. ¶¶ 19–20; Schutt-Aine Decl. ¶ 26. And, as Defendants concede, some patients unable to obtain a medication abortion are traveling to other states during a pandemic, thus increasing the risk of COVID-19 transmission (and conserving no PPE). *See* Doe Decl. ¶¶ 9, 19–22. Accordingly, the record demonstrates that entry of the TRO to restore abortion access would *serve* the State's interest in public health. *See, e.g.*, Bassett Decl. ¶¶ 6–8; Levison Decl. ¶¶ 20–23; Sharfstein Decl. ¶¶ 9–12. That outcome, combined with the consideration of the interests of patients in need of care, weighs heavily in favor of entering a TRO.

CONCLUSION

For these reasons, this Court should grant Plaintiffs' second motion for a temporary restraining order enjoining enforcement of the Executive Order and Emergency Rule as to (1) medication abortion; and (2) procedural abortion where (a) based on the treating physician's medical judgment, the patients would be past the gestational age limit for an abortion in Texas (twenty-two weeks LMP) on April 22, 2020, and (b) based on the treating physician's medical judgment, the patient would be more than eighteen weeks LMP and therefore no longer be eligible to have an abortion in a licensed abortion facility in Texas on April 22, 2020, and the patient would be likely be unable to obtain care at an ASC at or after that time.

Dated: April 8, 2020

Respectfully submitted,

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2020, I filed a copy of the foregoing with this Court's CM/ECF system, which will serve a copy on the following individuals:

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EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLANNED PARENTHOOD CENTER FOR CHOICE; *et al.*,	)	
	)	CIVIL ACTION
Plaintiffs,	)	
	)	CASE NO. 1:20-cv-323-LY
v.	)	
	)	
GREG ABBOTT, in his official capacity as Governor; *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF RASHAE WARD

RASHAE WARD, hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Hotline Coordinator of Lilith Fund, an Austin-based nonprofit organization that has been providing direct financial assistance to Texans who want to end a pregnancy, but cannot afford the cost of an abortion. Lilith Fund has served over 10,000 people since its founding nearly twenty years ago.

2. As Hotline Coordinator, I: 1) respond to requests from people struggling to arrange the costs of terminating a pregnancy; 2) recruit, train, supervise and support over 20 volunteers to do so; 3) decide how to allocate our limited budget to clients each day; 4) work with peer organizations and abortion providers throughout Texas, and more recently the country, to help ensure our clients can complete their appointments; 5) collaborate with our Program Manager to address systemic challenges in our clients' lives, including unemployment, housing insecurity, and intimate partner violence; and 6) partner with our Statewide Coordinator to help interested clients

educate their communities about the importance of meaningful abortion access. I have served in this position for almost a year.

3. I provide the following testimony based on personal knowledge acquired through my service at Lilith Fund and review of the organization's business records.

Barriers to Abortion Access in Texas Before the Executive Order

4. Our callers, most of whom are parents, lack insurance coverage for abortion care except in extremely narrow circumstances. Consequently, they must pay for their care of-out-pocket. Last year, Lilith Fund received nearly 6,600 calls, served over 1,617 individuals, and distributed over $489,515. The average cost of an abortion for our callers was $1,230. Unfortunately, we are able to help only about a quarter of all callers and even for the callers we can help, we can seldom cover the full cost of their care.

5. To assess their needs, we ask each caller their gestational age and discuss their socioeconomic circumstances in detail. If we are able to help the caller with the cost of care, Lilith Fund sends a financial voucher to the abortion provider with whom the caller has scheduled an appointment and pays the provider after the patient receives care.

6. Lilith Fund tries to prioritize callers who have reached later gestational ages, both because they risk exceeding the cut-off for a legal abortion in Texas—22 weeks, as measured from the first day of the last menstrual period ("lmp")), or for an abortion provided in an abortion clinic, as opposed to an ambulatory surgery center ("ASC"), in the State—18 weeks lmp. There are few ASCs in Texas, all of them in metropolitan areas, so many of the clients who exceed 18 weeks lmp must travel lengthy distances to obtain care, which in turn increases the funds they need to raise beforehand, including transportation and childcare costs. Another reason we try to prioritize callers

at later gestational ages is that the costs of abortion care rise as a pregnancy progresses. The average gestational age of our clients is 13 weeks lmp.

7. Lilith Fund also tries to prioritize callers who have decided that medication abortion is more appropriate for them than procedural abortion, but who risk exceeding Texas's gestational age cut-off for that care, 10 weeks lmp. Given when some of our callers discover they are pregnant, and the time it can take someone living in poverty to raise money for unexpected extended travel, the State's requirement that most abortion patients make two trips to obtain care makes it especially difficult not to pass this window.

8. Likewise, Lilith Fund tries to prioritize callers contending with multiple hardships, including homelessness, incarceration, intimate partner violence, and physical or mental health issues. To serve these clients, we typically coordinate with organizations that offer practical support for obtaining an abortion, including assistance with transportation, lodging, and meals. We have a practice of following up with clients soon after their scheduled appointment. In some cases, we learn that the client never made it to the abortion provider because, even with organizational assistance, they were unable to meet the total costs of obtaining an abortion in Texas.

9. Collaborating with our Program Manager to continue serving clients after they have obtained abortion care has helped me understand these barriers, how they exacerbate one another, and how Texas abortion restrictions compound them, even more deeply. Last year, we connected 64 clients with food banks and programs offering job assistance, help paying utility bills, and free diapers. Similarly, partnering with our Statewide Coordinator to connect clients to support groups and story-telling campaigns has shown me how our clients carry the strain and indignity of struggling to terminate a pregnancy in Texas with them long after they obtain care.

10. As with the rest of the country, the COVID-19 crisis has challenged our clients in unprecedented ways. Many work in the food services industry. So, in addition to coping with serious illness among their families and communities, they are losing their jobs, including their health insurance, and facing eviction. One client recently worked to raise money for her abortion care for weeks only to have to use it for rent. And some clients are effectively stuck in abusive situations. Since January 2020, callers have tended to be further along in their pregnancies due to the increasing difficulty of making travel arrangements, particularly for long-distance travel. The average gestational age has increased from 13 weeks lmp to 16 weeks lmp. Lilith Fund has increased the average amount of its vouchers from $207 to $267 to help meet these challenges. Nevertheless, I struggle with decisions of how to allocate funds among callers now more than ever. All too many people need them, there are never enough, and the stakes could not be higher.

Impact of Executive Order on Abortion Access During the Pandemic

11. After Attorney General Paxton threatened to enforce Governor Abbott's Executive Order (EO) as an abortion ban, thirteen of our clients' appointments were cancelled. Thankfully, four clients were able to terminate their pregnancies during the less-than-24-hour-period when the State was unable to enforce the EO due to a legal decision.

12. At least ten of our clients have lost or will lose the ability to obtain an abortion in Texas because they will have exceeded 22 weeks lmp as of the EO's expiration date. As of today, these clients are traveling out of state during a pandemic to secure medical services they could otherwise obtain in Texas, and in some cases, their own communities. They will be forced to travel to incredibly far destinations because they offer the earliest opportunity to obtain critical healthcare. In fact, the average distance traveled by our clients has jumped from 158 miles in 2019 to 734 miles since the EO.

13. One client, who the EO pushed to 19 weeks lmp, recently traveled over 300 miles from Houston to Atlanta, Georgia, an epicenter of the COVID-19 outbreak, because she would be at the precipice of 22 weeks lmp when the EO expires. Without the EO, she would have been able to terminate her pregnancy 3 weeks earlier within 3 miles of her home. Likewise, eight clients at 23, 22, 22, 19, 19, 19, 19, and 20 weeks lmp have secured abortion appointments in Albuquerque, New Mexico. Given the limited availability of abortion appointments at later gestational ages throughout the country, Lilith Fund is working to build relationships with another abortion provider in New Mexico and one in Illinois, where Texans affected by the EO will likely seek care in future weeks as they too near the gestational cut-off for legal abortion in Texas.

14. Most of our clients are flying rather than driving out of state because the health risks involved in air travel have made it much more affordable—and our clients lack the privilege to choose the more expensive, but likely safer option of driving.

15. These journeys, fraught in ordinary times, would be impossible without ongoing financial and practical support from nonprofit organizations. This includes funding for abortions at later gestational ages; since the EO, the average cost of an abortion for our clients has skyrocketed from $1,230 to $2,689, a 118% increase. Thus, we have further increased the average amount of our vouchers from $267 to $363. Support also includes the rapid arrangement of transportation and lodging, including the bravery of volunteers risking their health and safety to drive abortion patients to and from unfamiliar airports, and reimbursement for gasoline.

16. At least one client, who is at 19 weeks lmp, and whose abortion appointment was scheduled in Houston before the EO, worries about raising the funds and coordinating the travel needed to make a lengthy trip during the public health crisis, even with organizational assistance.

She also agonizes about the risk of contracting COVID-19, and of exposing her fetus to the virus, if the trip is unsuccessful and she is forced to carry to term.

17. Indeed, many clients are wrestling with acute fear and anxiety over whether they will be able to complete such trips, all the while contending with symptoms of pregnancy, such as severe morning sickness. And they are frustrated and angry that their Government, while urging other Texans to stay home, is driving them into hotbeds for the virus and putting them at greater risk of contracting and transmitting COVID-19 to their loved ones.

Dated: April 8, 2020

/S/ Rashae Ward
Rashae Ward
Hotline Coordinator
Lilith Fund

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al.*, Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*, Defendants.	No. 1:20-cv-00323-LY

[PROPOSED] TEMPORARY RESTRAINING ORDER

Before the Court is Plaintiffs' Second Motion for a Temporary Restraining Order. Having considered the motion, the evidence in the record, the legal arguments made by all parties to date, and the Fifth Circuit's April 7, 2020, decision granting a writ of mandamus and directing this Court to vacate the temporary restraining order ("TRO") it entered on March 30, 2020, the Court has determined that good cause exists to grant the limited relief now requested by Plaintiffs.

The Court makes the following findings of fact:

1. On March 13, 2020, the United States declared a state of emergency and the State of Texas declared a state of disaster related to the COVID-19 pandemic. *See* Proclamation by the Governor of the State of Texas (Mar. 13, 2020)[1]; Proclamation No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020).

[1] *Available at* https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

2. On March 22, 2020, Governor Greg Abbott issued an executive order barring "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." Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster" (March 22, 2020) ("Executive Order") at 3.[2] That order further states that procedures that, "if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster" are exempt from the order. *Id*. The Executive Order remains in effect until 11:59 PM on April 21, 2020, unless Governor Abbott rescinds or modifies it. *Id.*

3. Federal officials and medical professionals expect the pandemic to last well beyond April 21, 2020. Schutt-Aine Decl. ¶ 40. The current shortage of personal protective equipment ("PPE") is expected to continue for the next three to four months. Sharfstein Decl. ¶ 13.

4. Failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both. Executive Order at 3 (citing Tex. Gov't Code § 418.173). Violation of the Executive Order may also give rise to disciplinary action against licensed healthcare providers by the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing. *See* 25 Tex. Admin. Code §§ 139.32(b)(6), 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (B)(10).

[2] *Available at* https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID19_hospital_capacity_IMAGE_03-22-2020.pdf.

5. On March 23, 2020, the Texas Attorney General issued a press release titled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight Covid-19 Pandemic." The press release stated that providing any abortion care (other than for an immediate medical emergency) would violate the Executive Order, and warned that "[t]hose who violate the governor's order will be met with the full force of the law." *Id.*

6. On March 24, 2020, the Texas Medical Board ("Medical Board") adopted an emergency rule ("Rule") to enforce the Executive Order. Under pre-existing law, the Medical Board can temporarily suspend or restrict a physician's license if the physician's "continuation in practice would constitute a continuing threat to the public welfare." 22 Tex. Admin. Code § 187.57(b). The Emergency Rule expands this basis for discipline to include "performance of a non-urgent elective surgery or procedure," and incorporates the terms of the Executive Order, requiring all licensed health care professionals to postpone all surgeries and procedures that are not immediately necessary. 22 Tex. Admin. Code § 187.57 (emergency regulation adopted Mar. 23, 2020).[3]

7. On March 29, 2020, the Medical Board published updated guidance regarding the scheduling of elective surgeries and procedures in light of Governor Abbott's COVID-19 disaster declaration. Tex. Med. Bd., Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020) ("TMB Guidance").[4] The Medical Board explained that postponing non-urgent elective cases would preserve PPE, ventilator availability,

[3] *Available at* https://tinyurl.com/v4pz99u.

[4] *Available at* http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17.

and ICU beds." *Id.* It defined "urgent or elective urgent" procedures as those where "there is a risk of patient deterioration or disease progression likely to occur if the procedure is not undertaken or is significantly delayed." *Id.* It noted that "the prohibition does not apply to office-based visits without surgeries or procedures." *Id.* Further, it explained that "[a] 'procedure' does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests." *Id.*

8. The Attorney General's interpretation of the Executive Order, which has been adopted by the State Defendants in litigation, creates a credible threat of enforcement against Plaintiffs and their agents for the provision of any abortion. This has had a profound chilling effect on the provision of abortion care in Texas. Plaintiffs and their agents have ceased providing nearly all abortion care as a result. Barraza Decl. ¶ 15; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶¶ 25–28; Hagstrom Miller ¶¶ 26–28; Klier Decl. ¶ 17; Lambrecht Decl. ¶¶ 18–20; Schutt-Aine ¶¶ 32–34; Wallace Decl. ¶ 9.

9. Plaintiffs use two methods of providing an abortion: medication abortion and procedural abortion. Schutt-Aine Decl. ¶ 12.

10. Medication abortion is not a surgery or procedure. It involves the patient ingesting a combination of two pills: mifepristone and misoprostol. Schutt-Aine Decl. ¶ 13. The patient takes the mifepristone in the health center and then, typically twenty-four to forty-eight hours later, takes the misoprostol at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. Schutt-Aine Decl. ¶ 13. Texas law restricts this method to the first ten weeks of pregnancy as measured from the first day of a pregnant person's last menstrual period ("LMP"). Tex. Health & Safety Code § 171.063. Plaintiffs provide medication abortion to that ten-week limit.

11. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Schutt-Aine Decl. ¶ 16. Early in pregnancy, procedural abortions are performed using a technique called aspiration, in which the clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus. Schutt-Aine Decl. ¶ 16. Beginning around fifteen weeks LMP, clinicians generally must use instruments to complete the procedure, a technique called dilation and evacuation ("D&E"). Later in the second trimester, the clinician may begin cervical dilation the day before the procedure itself, resulting in a two-day procedure. Schutt-Aine Decl. ¶ 16. Plaintiffs provide procedural abortion in both the first and second trimester. Procedural abortions may not be performed in an abortion clinic after eighteen weeks LMP. Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at ambulatory surgery centers ("ASCs"), *id.*, but there are no ASCs that provide abortion care outside of Texas' four largest metropolitan areas, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016).

12. Absent exceptional circumstances, Texas law prohibits abortion care altogether after twenty-two weeks LMP. *See* Tex. Health & Safety Code § 171.044.

13. Abortion patients rarely require hospitalization. Ferrigno Decl. ¶ 14; Hagstrom Miller Decl. ¶ 17; Schutt-Aine Decl. ¶ 12; *Whole Woman's Health*, 136 S. Ct. at 2311.

14. Although some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small and can generally be handled in an outpatient setting. Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12,

15. Providing medication abortion does not require the use of any PPE. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶ 10; Hagstrom Miller Decl. ¶ 13; Lambrecht Decl. ¶ 12; Klier Decl. ¶ 11; Schutt-Aine Decl. ¶ 25; Wallace Decl. ¶ 12.

16. Texas law requires an in-person consultation between patient and provider, which must include an ultrasound examination, prior to every abortion. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). For patients who reside within one hundred miles of the facility where the abortion will be performed, the consultation must occur at least twenty-four hours prior to the abortion procedure. *See id.* According to the Medical Board's guidance, "non-invasive diagnostic tests" such as ultrasounds are not procedures, and the prohibition contained in the Executive Order "does not apply to office-based visits without surgery or procedures." TMB Guidance. In any event, pre-procedure ultrasound examinations require minimal PPE. Use of PPE is not required at all for abdominal ultrasound examinations. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. For vaginal ultrasound examinations, doctors or ultrasound technicians typically wear only non-sterile gloves that are discarded after each scan. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. When laboratory testing is required, technicians likewise utilize only non-sterile gloves. Hagstrom Miller Decl. ¶ 14.

17. For procedural abortion, providers may use some or all of the following PPE items, depending on the circumstances: gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, hair covers, and shoe covers. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶¶ 10, 12; Hagstrom Miller Decl. ¶¶ 13, 15; Klier Decl. ¶ 11; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 25; Wallace Decl. ¶ 12.

18. Following a procedural abortion, the tissue removed from a patient is examined in a pathology laboratory. Ferrigno Decl. ¶ 12; Hagstrom Miller ¶ 15. This task is typically performed

by a single staff member who utilizes one washable gown per shift, either one disposable face shield per shift or one set of reusable goggles, one set of disposable shoe covers per shift, one disposable hair cap per shift, and one or more sets of non-sterile gloves. Hagstrom Miller ¶ 15. According to the Medical Board's guidance, "the performing of lab tests" is not subject to the Executive Order. TMB Guidance; *see also* Tex. Med. Ass'n, TMB Releases Emergency Rules: Non-Urgent Surgeries and Procedures, at 3, 6 (Mar. 29, 2020).[5]

19. Abortion providers generally do not use N95 masks. Only 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. Barraza Decl. ¶ 8; Ferrigno Decl. ¶ 13; Hagstrom Miller Decl. ¶ 16; Klier Decl. ¶ 6; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 27.

20. Pregnant individuals prevented from accessing abortion will still require medical care. Chang Decl. ¶ 8; Levison Decl. ¶ 8; Macones Decl. ¶ 10. Consistent with recommendations from ACOG and other medical authorities for providing obstetrical care during the COVID-19 pandemic, obstetricians are generally having two in-person visits with pregnant patients during the first-trimester and more frequent in-person visits during later trimesters. Chang Decl. ¶ 11; Levison Decl. ¶ 19; Macones Decl. ¶¶ 9–10; Wood Decl. ¶ 11. High-risk patients, including those with diabetes or high blood pressure, must have more frequent in-person visits. Chang Decl. ¶ 10; Levison Decl. ¶ 14; Macones Decl. ¶¶ 7, 10; Wood Decl. ¶¶ 11–12. Urine specimens are generally collected and tested at each in-person visit, and blood is sometimes collected and tested also. Chang Decl. ¶ 12; Levison Decl. ¶ 13; Macones Decl. ¶ 11; Wood Decl. ¶ 11. Additionally, obstetricians are generally performing at least one ultrasound during the first trimester and another

[5] *Available at* https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/Emergency%20rule%20guidance%20-%203.25%20Update.pdf.

one at 20 weeks LMP. Chang Decl. ¶¶ 11–12; Macones Decl. ¶ 12; Wood Decl. ¶ 14. High-risk patients will require more frequent ultrasounds. Macones Decl. ¶ 12; Wood Decl. ¶ 14.

21. Because individuals with ongoing pregnancies require more in-person healthcare—including lab tests and ultrasounds—at each stage of pregnancy than individuals who have pre-viability abortions, delaying access to abortion will not conserve PPE. Levison Decl. ¶¶ 12–14; Macones Decl. ¶ 20; Schutt-Aine Decl. ¶ 26.

22. Individuals with ongoing pregnancies are more likely to seek treatment in a hospital—for a variety of conditions—than individuals who have pre-viability abortions. Therefore, delaying access to abortion will not conserve hospital resources. Levison Decl. ¶¶ 8–11; Macones Decl. ¶ 19; Schutt-Aine Decl. ¶ 26; *Whole Woman's Health*, 136 S. Ct. at 2311.

23. Individuals who are delayed past the legal limit for abortion will have to deliver babies. Delivery generally takes place in a hospital and requires extensive use of PPE. Thus, requiring patients to carry unwanted pregnancies to term will not conserve PPE or hospital resources. Chang Decl. ¶¶ 16–17; Levison Decl. ¶¶ 9, 15–17; Macones Decl. ¶ 18; Schutt-Aine Decl. ¶ 26.

24. Physicians are continuing to provide obstetrical and gynecological procedures comparable to abortion in PPE use and/or time-sensitivity, based on their professional medical judgment. *See* Chang Decl. ¶ 24; Levison Decl. ¶ 18.

25. The inability to obtain abortion care in Texas as a result of the Executive Order is causing individuals with unwanted pregnancies who have the ability to travel to go to other states to obtain abortions. The record shows that these individuals are traveling by both car and airplane to places as far away as Colorado and Georgia. Doe Decl. ¶¶ 15–22; Johnson Decl. ¶¶ 8–10; Nguyen Decl. ¶ 17; Ward Decl. ¶¶ 12-14. This long-distance travel increases an individual's risk

of contracting COVID-19. Bassett Decl. ¶¶ 7–8; Schutt-Aine Decl. ¶ 37; Sharfstein Decl. ¶ 10; Doe Decl. ¶ 18. The record shows that patients traveling to other states for abortion care include patients seeking medication abortion. Doe Decl. ¶¶ 9, 19–22.

26. Plaintiffs have already had to turn away hundreds of patients seeking abortion care, and will have to turn away hundreds more absent entry of a TRO. Barraza Decl. ¶¶ 6, 15; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶¶ 26–28; Hagstrom Miller Decl. ¶¶ 27–28; Johnson Decl. ¶ 4; Klier Decl. ¶ 17; Lambrecht Decl. ¶¶ 18–20; Nguyen Decl. ¶ 8; Schutt-Aine Decl. ¶¶ 33–34; Wallace Decl. ¶ 9.

27. There will be significant pent-up need for abortion care when the Executive Order expires. It will take Plaintiffs weeks to resolve the resulting backlog of patients, meaning that a significant number of patients will face additional delays in accessing abortion even after the Executive Order's now month-long duration expires. Ferrigno Decl. ¶ 29; Hagstrom Miller Decl. ¶ 29; Johnson Decl. ¶ 12; Nguyen Decl. ¶ 23.

28. Patients delayed past 10 weeks LMP are no longer eligible for a medication abortion in Texas. *See* Tex. Health & Safety Code § 171.063(a)(2). Patients delayed past fourteen to sixteen weeks LMP are no longer eligible for an aspiration abortion, and must instead have a D&E, which is a lengthier and more complex procedure. Ferrigno Decl. ¶ 35; Hagstrom Miller Decl. ¶ 34; Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 16, 39. Patients who are delayed past eighteen weeks LMP are no longer eligible for an abortion at an abortion clinic in Texas and must obtain care from an ambulatory surgical center. *See* Tex. Health & Safety Code § 171.004. Patients delayed past twenty-two weeks LMP are no longer eligible to obtain an abortion in Texas at all, absent exceptional circumstances. *See* Tex. Health & Safety Code § 171.044. Declarations in the record demonstrate that some patients have *already* exceeded the gestational age limit to obtain an

abortion in Texas while the EO has been in place. Hagstrom Miller Decl. ¶ 27; Johnson Decl. ¶ 10; Nguyen Decl. ¶¶ 7–8, 11; Ward Decl. ¶¶ 12-13, 16.

29. The health risks associated with both pregnancy and abortion increase with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 22; Macones Decl. ¶ 8. As ACOG and other well-respected medical professional organizations have observed, specifically in relation to the COVID-19 pandemic, abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible." ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020);[6] Schutt-Aine Decl. ¶ 22; Sharfstein Decl. ¶ 8.

30. In addition to increasing health risks, delayed access to abortion imposes financial and emotional costs on people with unwanted pregnancies. The cost of an abortion increases with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 39. Further, people with ongoing pregnancies must cope with the physical symptoms of pregnancy, which often include morning sickness and weight gain; must struggle to conceal their pregnancies from abusive partners or family members; and must deal with the stress and anxiety of not knowing when—or if—they will be able to obtain an abortion. Connor Decl. ¶ 11; Ferrigno Decl. ¶ 34; Hagstrom Miller Decl. ¶ 33; Nguyen Decl. ¶¶ 10–14; Northcutt Decl. ¶¶ 5–6; Ward Decl. ¶¶ 16-17.

Based on these findings, the Court concludes that Plaintiffs are entitled to the requested TRO. In particular, the Court concludes that Plaintiffs are likely to succeed on the merits of their

[6] *Available at* https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

substantive due-process claim because, based on the Court's findings of fact, it is "'beyond question' . . . [that] GA-09's burdens outweigh its benefits as applied to Plaintiffs' provision of (1) medication abortion; and (2) procedural abortion where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion entirely because (a) the patient's pregnancy would reach twenty-two weeks LMP by April 21, 2020; or (b) the patient's pregnancy would reach eighteen weeks LMP by April 21, 2020, thus requiring abortion care at an ASC and in the judgment of the treating physician the patient is unlikely to be able to obtain an abortion at an ASC before the patient's pregnancy reaches the twenty-two-week cutoff. This Court therefore concludes that application of the Executive to these categories of abortion care violates the standards set forth in both *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

The Court further concludes that Plaintiffs have standing to bring their claim and that a justiciable controversy exists. *See* Slip Op. at 8 n.17. It also concludes for purposes of sovereign immunity that the Governor and Attorney General likely have "some connection with the enforcement of the [challenged] act." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). The Executive Order, by its own terms, may be "modified, amended, rescinded, or superseded" by the Governor, Executive Order at 3, consistent with the Governor's statutory authority, Tex. Gov't Code Ann. § 418.012. Similarly, the Attorney General has the authority to prosecute Plaintiffs and their agents, at the request of local prosecutors, for alleged violations of the Executive Order, Tex. Gov't Code Ann. § 402.028(a), and he has publicly threatened enforcement against abortion providers in particular.

The Court further concludes that Plaintiffs and their patients will suffer irreparable harm in the absence of a TRO; the balance of equities favors Plaintiffs; and entry of a TRO serves the

public interest. In particular, the record demonstrates that entry of the TRO to restore abortion access would *serve* the State's interest in public health. *See, e.g.*, Bassett Decl. ¶¶ 6–8; Levison Decl. ¶¶ 20–23; Sharfstein Decl. ¶¶ 9–12. Therefore,

IT IS ORDERED that Plaintiffs' Second Motion for a Temporary Restraining Order, filed on April 8, 2020, is **GRANTED**.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster," and the Texas Medical Board's emergency amendment to Title 22 Texas Administrative Code section 187.57, as a categorical ban on all abortions provided by Plaintiffs.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing the aforementioned Executive Order and Rule against Plaintiffs or agents of Plaintiffs who provide medication abortions.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing the aforementioned Executive Order and Rule against Plaintiffs or agents of Plaintiffs who provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be more than eighteen weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas on to obtain abortion care.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing the aforementioned Executive Order and Rule against Plaintiffs or agents of

Plaintiffs who provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas (twenty-two weeks LMP) on April 22, 2020.

IT IS FURTHER ORDERED that this Temporary Restraining Order shall expire on April ____, 2020, at _____. This order may be extended for good cause, pursuant to Federal Rule of Civil Procedure 65.

IT IS FURTHER ORDERED that a hearing on Plaintiffs' pending motion for a preliminary injunction shall be reset for April 16, 2020, at _____. Counsel and parties may call in to the Court's conference line at (877) 873-8017, with Access Code 7996289.

Plaintiffs shall not be required to post a bond. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

SIGNED at _____, this _____ day of April, 2020.

_____
HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE