IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

PRETERM-CLEVELAND, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 1:19-cv-00360**
	:	
v.	:	**Judge Michael R. Barrett**
	:	
OHIO ATTORNEY GENERAL DAVE YOST, et al.,	:	
	:	
Defendant.	:	

DEFENDANTS OHIO DEPARTMENT OF HEALTH, STATE MEDICAL BOARD OF OHIO, AND OHIO ATTORNEY GENERAL DAVE YOST'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DOC. 42)

Respectfully submitted,

DAVE YOST
ATTORNEY GENERAL

s/ Heather L. Buchanan

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INTRODUCTION

We are certainly at war. I don't know any other way to describe it other than to say we are at war. . . In the time of war, we must make sacrifices. . . Right now, we are in a crucial time in this battle. What we do now will slow this invader so that our healthcare system will have time to treat those who have contracted COVID-19 and also have time to treat those who have other medical problems. Time is of the essence.

Ohio Governor Mike DeWine during a March 22, 2020, press conference[1] [2]

Ohio Department of Health Director Dr. Amy Acton and Ohio Governor Mike DeWine, in describing the effect of the COVID-19 virus, have frequently used the wartime analogy. This analogy is truly the only way to capture the scope and proportion of the crisis the COVID-19 virus has caused and how it has affected almost every aspect of every person's life. And, like other leaders during times of war, Dr. Acton has had to make tough decisions and ask that every entity, business, and citizen in Ohio make sacrifices.

Ohioans, like many in the world, have been ordered to stay at home except when conducting essential activities. We must maintain social distancing of at least six feet from any other person and we must not gather together in groups larger than ten people. All K-12 schools are closed. Many businesses have been shuttered or forced to significantly downsize. The loss of jobs is staggering. And every day, Ohioans are forced to cancel or stay home from momentous life events such as graduations, proms, and family reunions.

As great as these sacrifices are, no area is facing a grimmer and more urgent crisis than our healthcare system. As of this writing, Ohio has 5,148 confirmed COVID-19 cases, and 193 Ohioans have died for reasons attributed to the COVID-19 virus. There is

[1] Governor Mike DeWine COVID-19 Update, THE OHIO CHANNEL (Mar. 22, 2020), available at http://www.ohiochannel.org/video/governor-mike-dewine-3-22-2020-covid-19-update.

[2] All websites cited herein were last visited April 7, 2020.

understandably great concern over the healthcare capacity to treat each patient with severe symptoms.

Healthcare workers on the frontlines of battling the COVID-19 virus are facing dangerous shortages of personal protective equipment ("PPE"). PPE include items such as masks, gloves, surgical gowns, and other supplies that protect both healthcare workers and patients. Without PPE, healthcare workers face greater risk of contracting COVID-19, which risks their lives and the lives of patients who may acquire the virus from them, or who may not have healthcare workers available to treat them.

Against this backdrop, Dr. Acton has responded with extraordinary measures to save lives and preserve the precious resources of Ohio's healthcare system. One such measure, issued on March 17, 2020, declares that all non-essential or elective surgeries and procedures must be postponed. *See* Order to Delay Non-Essential Surgeries in the State of Ohio (Mar. 17, 2020), available at https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/order-to-limit and-or-prohibit-mass-gatherings-in-the-state-of-ohio (attached as Exhibit A). This order—hereinafter the "Director's Order"—has the stated purpose of preserving personal protective equipment ("PPE") "to protect our healthcare workforce during this unprecedented event."

Compliance with the Director's Order is critical. All surgeries and other medical procedures require some use of PPE. Every surgery and procedure that can be delayed—regardless of how minor or low risk—helps to conserve PPE and other precious medical resources. Without PPE, healthcare workers face a greater risk of contracting COVID-19. Healthcare workers can spread the virus to others, and are also at risk themselves of serious illness or death, removing them from the frontlines of the battle. The effect of the Director's

Order is that numerous elective surgeries and other medical procedures are being postponed, and doctors and patients alike are making sacrifices and difficult decisions about what surgeries and procedures are essential. But these decisions have the end goal of preserving PPE and other healthcare resources, and protecting healthcare providers from the risk of contracting COVID-19.

Despite the sacrifices that the Director's Order requires of many Ohioans, Plaintiffs have come to the Court to ask for an exception. Plaintiffs seek the "extraordinary and drastic remedy" of a preliminary injunction to enjoin enforcement of the Director's Order as applied to surgical abortions. Plaintiffs do not appear to dispute the crisis posed by the COVID-19 virus and also claim to be complying with the Director's Order. But by bringing this lawsuit, Plaintiffs ask the Court to re-write the Director's Order by inserting an exception for a type of procedure and provider, thereby overriding Dr. Acton's decision not to offer *any* type of surgery or procedure, or *any* type of provider.

But a different order is unnecessary. Plaintiffs have provided no evidence to show that that a delay on surgical abortions will render all, or even most, women who want an abortion unable to have one. The Director's Order bars only non-essential and elective surgeries. Thus, the Director's Order requires that abortion providers, like all other medical providers in Ohio, exercise patient-specific judgment when complying with the Order. This means doctors must perform medicinal abortions (rather than surgical abortions) where that option is safe and available. It also means that doctors must delay surgical abortions that can be delayed without jeopardizing the patient's ability to secure a pre-viability abortion. Abortion providers can perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights.

Regardless, the Court should reject Plaintiffs' motion for a preliminary injunction seeking a blanket exception for surgical abortions. Plaintiffs cannot establish a likelihood of success on the merits.

First, the Director's Order does not impose an undue burden on a women's right to an abortion under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as the purpose of the Order is not to put a substantial obstacle between a woman and the right. The Director's Order was issued with the sole purposes of protecting healthcare workers on the frontlines of the COVID-19 battle and is supported by ample facts demonstrating its necessity. Delaying non-essential surgeries and procedures *now* is critical to conserving PPE in the immediate near-term. The burden of delaying a surgical abortion is justified in these circumstances.

Second, the Director's Order was clearly not designed to strike at the right to an abortion itself. The Director's Order is generally-applicable and applies to *all* non-essential or elective surgeries and procedures unless they cannot be delayed without "undue risk to the current or future health of a patient." The Director's Order requires that abortion providers exercise the same case-specific judgment that is being asked of all other medical providers.

On balance of all of these factors, the Director's Order is constitutional. The Director's Order requires that abortion providers delay surgical abortions or perform medicinal abortions, when possible, for the purpose of protecting "our healthcare workforce during this unprecedented event." When all of society is making their small and large contributions to fight the pandemic—the cumulative effect of which may save thousands of lives—Plaintiffs offer no reason why elective abortion should not be treated just like everything else and subject to short-term delay.

Finally, the effect of the Director's Order on surgical abortions should be analyzed under the deferential standard of review articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate to prevent and respond to public health crises. The Fifth Circuit Court of Appeals recently applied this standard in upholding a non-essential surgery order in Texas. *In re Abbott*, No. 20-50264 (Apr. 7, 2020) (attached as Exhibit B). The *Abbott* court also relied on *Jacobson* to note that the authority to make decisions about the most effective measures for protecting the public against disease belongs to the legislative and executive branches of state government, not the judiciary.

For these reasons, Plaintiffs cannot carry their overwhelming burden pursuant to *Mazurek v. Armstrong*, 520 U.S. 968 (1997), and have failed to meet the exacting burden required to merit the extraordinary remedy of a preliminary injunction. The Court should reject Plaintiffs' attempt to override Dr. Acton's authority and her efforts to protect Ohioans in this time of unprecedented danger to public health.

FACTS AND BACKGROUND

A. THE COVID-19 VIRUS IS AN INTERNATIONAL PUBLIC HEALTH CRISIS

The novel coronavirus named COVID-19, which is caused by a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious illness or death.[3] First identified in Wuhan, China in late 2019, COVID-19 has since spread across the globe with rapid speed, reaching almost every nation and all 50 of

[3] Centers for Disease Control and Prevention, What You Need to Know About Coronavirus Disease 2019 (COVID-19), https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf.

the United States.[4] The rapid spread is due to the virus being easily transmissible and transmissible by asymptomatic carriers, which means that infected people can spread the virus without knowing it.[5] The virus has an incubation period of up to 14 days, during which "[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection."[6] The virus can remain on surfaces for many days, and patients may remain infectious for weeks after their symptoms subside.[7]

On March 11, 2020, the World Health Organization (WHO) officially declared COVID-19 to be a pandemic.[8] "A pandemic is a global outbreak of disease."[9] Pandemics result from the emergence of new viruses, as the lack of "pre-existing immunity" facilitates worldwide spread. *Id*. Over the past century, four pandemics have occurred as a result of influenza viruses, but this is the first known pandemic to be caused by a coronavirus. *Id*.

On March 13, 2020, U.S. President Donald Trump declared a national emergency due to the outbreak of COVID-19 in the United States, citing the WHO's pandemic designation

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[4] WORLD HEALTH ORGANIZATION, ROLLING UPDATES ON CORONAVIRUS DISEASE (COVID-19), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last updated April 3, 2020).

[5] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 73, (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2.

[6] David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 THE LANCET 542, 543 (2020).

[7] WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES *(COVID-19)*, https://www.who.int/news-room/q-a-detail/q-a-coronaviruses.

[8] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – *51*, (March 11, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10.

[9] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Situation Summary, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html

and 1,645 cases in the United States.[10] As of March 31, 2020, less than three weeks after the declaration of national emergency, the Center for Disease Control ("CDC") reported COVID-19 exists in every state in the U.S. with 186,101 cases and 2,860 deaths.[11]

The worldwide devastation and toll on human life is shocking. The White House coronavirus task force projects that 100,000–240,000 Americans may die as a result of COVID-19, even with mitigating measures such as social distancing.[12] To date, there have been over 79,000 deaths attributable to COVID-19, including 10,845 in the United States.[13]

B. OHIO TAKES EXTRAORDINARY MEASURES TO SAVE LIVES IN RESPONSE TO THE COVID-19 VIRUS

On March 9, 2020, Ohio Department of Health Director Dr. Amy Acton announced the first confirmed case of COVID-19 in Ohio, which "confirm[ed] the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio."[14] In response to the presence of this deadly disease in Ohio, Governor Mike DeWine declared a state of emergency the same day. *Id.*

As the Director of the Department of Health, Dr. Acton has extremely broad authority to regulate the spread of infectious diseases like COVID-19. Dr. Acton has "supervision on all matters relating to the preservation of the life and health of the people and [] ultimate authority in matters of quarantine and isolation." R.C. 3701.13. Dr. Acton may also "make

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[10] Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).
[11] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.
[12] Rick Noack, et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, WASHINGTON POST (Mar. 31, 2020), https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/.
[13] WORLD HEALTH ORGANIZATION, CORONAVIRUS (COVID-19), https://who.sprinklr.com/.
[14] Ohio Exec. Order No. 2020-01D (Mar. 9, 2020), https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d.

special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases. *Id*. And Dr. Acton "shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it." R.C. 3701.14(A).

Since March 12, 2020, Dr. Acton has made necessary use of her authority to slow the spread of COVID-19 in Ohio. First, she issued an order prohibiting mass gatherings in Ohio. *See* Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio (Mar. 12, 2020), available at https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-to-limitand-or-prohibit-mass-gatherings-in-the-state-of-ohio. The order defines a mass gathering as "any event or convening that brings together one hundred (100) or more persons in a single room or single space at the same time, such as an auditorium, stadium, arena, large conference room, meeting hall, theater, or any confined indoor or outdoor." *Id*. The order urged all persons to "maintain social distancing (approximately six feet away from other people) whenever possible." *Id*.

As the threat mounted, Dr. Acton took more aggressive steps, including closing K-12 schools in Ohio (many of which serve as polling places) until April, and eliminating visitor access to nursing homes. *See* Order the Closure of all K-12 Schools in Ohio (Mar. 14, 2020), available at https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/order-theclosure-of-all-k-12-school-in-the-state-of-ohio; Order to Limit Access to Ohio's Nursing Homes and Similar Facilities, available at https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/order-to-limit-access-to-ohios-nursing-homes-and-similarfacilities. It soon became clear that these orders were insufficient to slow the spread of COVID-19 in Ohio. So, on Sunday March 15,

2020, Dr. Acton closed restaurants for dine-in customers and shuttered Ohio's pubs and bars. *See* Order Limiting the Sale of Food and Beverages, Liquor, Wine, and Beer to Carry-Out and Delivery Only (Mar. 15, 2020), available at https://coronavirus.ohio.gov/wps/portal/gov/covid19/home/public-health-orders/health-director-order-limit-food-alcohol-sales-to-carry-outdelivery-only. Each order reiterated the need to maintain social distancing of six feet from other persons. *Id*.

On March 22, 2020, Dr. Acton announced a "stay at home" order limiting mass gatherings, closing schools, closing non-essential businesses, and ordering "all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence." *See* Order to Stay at Home (Mar. 22, 2020), available at https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf. This order also prohibits all gatherings of 10 or more people. *Id*. This order has recently been extended through May 1, 2020. *See* Ohio Exec. Order No. 2020-08D (Apr. 2, 2020).

C. COVID-19 HAS A DEVASTATING EFFECT ON THE HEALTHCARE SYSTEM, THE WORST OF WHICH HAS YET TO BE SEEN

The devastating effect of the COVID-19 virus on healthcare systems worldwide cannot be understated. The numbers of people who will need medical attention has the potential to overwhelm already taxed healthcare facilities.[15] To date, 29% of COVID-19 cases in Ohio have resulted in hospitalization. *See* Declaration of Dr. Mark Hurst, M.D., ¶ 5 (attached as Exhibit C). Shortages of critical medical supplies, medications for patients, and personal protective equipment ("PPE") for healthcare workers are of critical concern. *Id*. ¶¶ 4-7; Declaration of Benjamin Robison, MPH, ¶ 3 (attached as Exhibit D).

[15] *Situation Summary*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, recently warned that the outbreak could kill 100,000– 240,000 Americans.[16] Other officials warn of shortages of PPE used to protect healthcare providers and prevent the spread of infections.[17] On April 1, federal officials confirmed the National Strategic Stockpile of PPE was nearly exhausted and the global supply chain for PPE had broken down. *Id*.

According to the WHO, "[t]he chronic global shortage of personal protective equipment is now one of the most urgent threats to our collective ability to save lives."[18] President Trump has since invoked the Defense Production Act to prioritize and allocate medical resources, to prevent hoarding of resources, and "to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators."[19] And the CDC issued detailed guidance on optimizing the supply of PPE under both contingency and crisis conditions.[20]

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[16] Rick Noack, et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, WASHINGTON POST (Mar. 31, 2020), https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/.

[17] N. Miroff, *Protective gear in national stockpile is nearly depleted, DHS officials say*, WASHINGTON POST (Apr. 1, 2020), https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3_story.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Strategies to Optimize the Supply of PPE and Equipment, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html (noting that shortages of PPE are "posing a tremendous challenge to the U.S. healthcare system because of the COVID-19 pandemic").

[18] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) – VIRTUAL PRESS CONFERENCE (Mar. 27, 2020), https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-27mar2020.pdf?sfvrsn=4b72eab2_2.

[19] Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 18403 (Apr. 1, 2020).

[20] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Strategies to Optimize the Supply of PPE and Equipment, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html.

Nurses and doctors on the frontlines of the COVID-19 battle are pleading for PPE.[21] And for good reason: despite going to great lengths to protect themselves, healthcare professionals have tested positive for the virus, and healthcare facilities have been identified as a vector for COVID-19 transmission.[22] In Ohio, healthcare workers comprise 20% of all COVID-19 cases.[23] Tragically, some have lost their lives.[24]

As the need to preserve PPE and other medical resources has grown more urgent, experts and specialists have recommended delaying non-essential and elective surgeries as a necessary response. The CDC issued guidance that healthcare providers should "delay all elective ambulatory provider visits" and "delay inpatient and outpatient elective surgical procedural cases."[25] The CDC explained that doing so "can preserve staff, personal protective equipment, and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic." *Id*. The Centers for Medicare and Medicaid Services ("CMS") also issued detailed recommendations for conserving

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[21] Kevin B. O'Reilly, *Plea to nation from doctors fighting COVID-19: #GetMePPE*, AM. MEDICAL ASS'N (Mar. 26, 2020), https://www.ama-assn.org/delivering-care/public-health/plea-nation-doctors-fighting-covid-19-getmeppe.

[22] Lenny Bernstein, et al, *Covid-19 hits doctors, nurses and EMTs, threatening health system*, WASHINGTON POST (Mar. 17, 2020), https://www.washingtonpost.com/health/covid-19-hits-doctors-nurses-emts-threatening-health-system/2020/03/17/f21147e8-67aa-11ea-b313-df458622c2cc_story.html.

[23] Ohio Dept. of Health, COVID-19 Key Metrics on Cases, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/key-metrics-cases/; Betty Lin-Fisher, *Hospital workers concerns as Ohio colleagues get sick*, AKRON BEACON JOURNAL (Mar. 24, 2020), https://www.beaconjournal.com/news/20200324/coronavirus-hospital-workers-concerned-as-ohio-colleagues-get-sick.

[24] *OSU Wexner employee dies due to coronavirus*, NBC4 (Mar. 30, 2020), https://www.nbc4i.com/community/health/coronavirus/osu-wexner-employee-dies-due-to-coronavirus/ (announcing that Jeannie Danker, Director of Radiology at OSU's Wexner Center, died of COVID-19).

[25] Centers for Disease Control and Prevention, Coronavirus (COVID-19): For Healthcare Professionals, https://www.cdc.gov/coronavirus/2019-ncov/hcp/index.html.

resources by limiting non-essential adult elective surgery and medical and surgical procedures, including all dental procedures.[26] Heeding that advice, healthcare providers have deferred a wide variety of procedures, even life-saving transplants.[27] To date, 35 states have issued directives or guidance on delaying non-essential surgeries and medical procedures.[28]

D. DIRECTOR ACTON ORDERS THE POSTPONEMENT OF NON-ESSENTIAL SURGERIES TO FIGHT COVID-19 AND PRESERVE HEALTHCARE EQUIPMENT AND RESOURCES AND PROTECT HEALTHCARE WORKERS, ALL WITH THE END GOAL OF SAVING LIVES

As of this writing, Ohio has 5,148 confirmed COVID-19 cases, and 193 Ohioans have died for reasons attributed to the COVID-19 virus.[29] These numbers are only climbing. Ohio State University's Infectious Diseases Institute projects that by the time the virus peaks in Ohio, 210,000 people will be infected, causing 4,200 deaths.[30]

In Ohio, numerous healthcare facilities are reporting shortages of PPE and other necessary equipment needed to respond to COVID-19.[31] Nurses working in hospitals in

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[26] Centers for Medicare & Medicaid Services, *Adult Elective Procedure Recommendations*, https://www.cms.gov/files/document/31820-cms-adult-elective-surgeryand- procedures-recommendations.pdf.

[27] Amy Dockser Marcus, *Coronavirus Threat Forces Longer Waits for Some Organ-Transplant Patients*, THE WALL STREET JOURNAL (Mar. 25, 2020), https://www.wsj.com/articles/coronavirus-threat-forces-longer-waits-forsome-organ-transplant-patients-11585137601.

[28] Ambulatory Surgery Center Association, *State Guidance on Elective Surgeries*, https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-state.

[29] Ohio Dept. of Health, COVID-19 Key Metrics on Cases, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/key-metrics-cases/

[30] Beth Burger & Rita Price, *Predicting coronavirus cases, deaths is tricky, but models improving, experts say*, THE COLUMBUS DISPATCH (Apr. 5, 2020), https://www.dispatch.com/news/20200405/predicting-coronavirus-cases-deaths-is-tricky-but-models-improving-experts-say.

[31] Max Filby, *Coronavirus: Health care workers fear protective gear shortage as Ohio cases climb*, THE COLUMBUS DISPATCH (Apr. 1, 2020)

Lorain and Columbus have stated that "they have been rationing masks in paper bags provided by their hospitals. Every shift they are supposed to reuse the mask from the paper bag with their name on it until the mask is deemed 'soiled.'"[32] Even a recent shipment from the federal stockpile has been deemed inadequate to fill Ohio's growing need for PPE.[33]

In response to the growing crisis, and in an effort to save as many lives as possible, on March 17, 2020, Dr. Acton issued a "Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio." Director's Order, Ex. A. Pursuant to the Director's Order, "all non-essential or elective surgeries and procedures that utilized [personal protective equipment] should not be conducted." *Id*. A "non-essential surgery is a "procedure that can be delayed without undue risk to the current or future health of a patient." *Id*. In determining whether a procedure is non-essential, physicians are urged to consider various factors, including but not limited to, the following examples, (1) "[t]hreat to the patient's life if surgery or procedure is not performed;" (2) "[t]hreat of permanent dysfunction of an extremity or organ system;" (3) "[r]isk of metastasis or progression of staging;" and (4) "[r]isk of rapidly worsening to severe symptoms (time sensitive)." *Id*. The Director's Order does not single out any type of procedure. *Id*.; Hurst Dec. ¶ 15, Ex. C. Rather, the Director's Order applies to *any* procedure that is non-essential or elective.

, https://www.dispatch.com/news/20200331/coronavirus-health-care-workers-fear-protective-gear-shortage-as-ohio-cases-climb.

[32] *Id.*

[33] Jim Woods, *Coronavirus: Federal shipment of personal protective equipment doesn't meet Ohio's need, Dr. Amy Acton says*, THE COLUMBUS DISPATCH (Apr. 1, 2020), https://www.dispatch.com/news/20200331/coronavirus-federal-shipment-of-personal-protective-equipment-doesnrsquot-meet-ohiorsquos-need-dr-amy-acton-says (Ohio received 271,450 N95 masks, 672,100 surgical masks, 131,808 face shields, 107,670 gowns, 483,575 pairs of gloves and 552 coveralls).

The purpose of the Director's Order is clear: delay "all non-essential or elective surgeries and procedures that utilized PPE." *Id*. All of the PPE that would have been used during non-essential and elective procedures are preserved as a result. Hurst Dec. ¶ 13, Ex. C; Robison Dec. ¶¶ 4-6, Ex. D. Thus, while Ohio waits for the cavalry to come with PPE supplies, its medical workers will not run out of their first line of defense from the deadly disease.

The Director's Order also helps reduce the number of individuals present in its hospitals and other medical facilities. *Id*. Reducing the number of people in hospitals and healthcare facilities helps preserve PPE and also means a lower likelihood that our physicians, nurses, EMTs, and others, including non-infected patients, may contract the disease.

After Dr. Acton issued this order, the Ohio Department of Health received complaints that Plaintiffs' clinics were continuing to perform elective abortions. *See* Declaration of Sharon Liner, M.D., Ex. F, Doc. No. 42-1, PAGEID# 807. The Ohio Attorney General's Office, therefore, sent letters instructing the clinics to stop performing non-essential and elective surgeries. *See id*.

E. PLAINTIFFS SUE TO ENJOIN ENFORCEMENT OF THE DIRECTOR'S ORDER AS TO SURGICAL ABORTIONS

Plaintiffs have sued to enjoin enforcement of the Director's Order as applied to *all* surgical abortions. Plaintiffs claim that "abortion care is essential because it cannot be delayed without risking the health and safety of the patient." Doc. 42, PAGEID# 740. Plaintiffs thus argue that all surgical abortions are essential and these procedures should be categorically exempt from the Director's Order.

Plaintiffs maintain that without an injunction that enjoins the Director's Order as to surgical abortions, patients who are not able to undergo a medical abortion, or for whom a

medical abortion is not available because they are over 10 weeks pregnant, would be denied their right to a pre-viability abortion. *Id*., PAGEID# 757. Plaintiffs claim that the Director's Order constitutes an undue burden under the United States Supreme Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. Notwithstanding these arguments, Plaintiffs claim that they are acting in compliance with the Director's Order. *Id*., PAGEID# 750.

The Court granted a temporary restraining order on March 30, 2020. Doc. 32, PAGEID# 862–69. In doing so, it predicted that "some [women] could be forced to forgo an abortion entirely and carry an unwanted pregnancy to term." *Id*., PAGEID# 868. While crediting that possibility, it doubted whether forcing the clinics (like all other healthcare providers) to cease elective surgeries would result in "any beneficial amount of net saving" in terms of medical resources. *Id*. Based on this analysis, the District Court determined that at least some surgical abortions are "legally essential." *Id*., PAGEID# 869. It enjoined the Director's Order in all its application to Plaintiffs, reasoning that they could decide for themselves whether to perform a surgical abortion. *Id*., PAGEID# 868–69. The Court indicated that the temporary restraining order lasts for fourteen days. *Id*.

The State appealed the Court's grant of a temporary restraining order to the Sixth Circuit Court of Appeals. Doc. 50, PAGEID # 1018. This Court subsequently denied the State's Motion to Stay the TRO Pending Appeal. Doc. 52, PAGEID# 1024. In so holding the Court noted that its temporary restraining order "clarifies when surgical abortions are essential: when they are necessary because of medical reasons (which implicate 'undue risk to the current or future health of the patient') or because of the timing vis-à-vis pre-viability (which the State concedes to be valid)." *Id*., PAGEID# 1022. The Court further held that it

agreed with the State that "'women can get a surgical abortion when necessary to save their lives or to prevent a serious health complication,'" and "if necessary to protect the mother's health." *Id.*, PAGEID# 1023.

The Sixth Circuit, in a 2-1 decision, dismissed the State's appeal, holding that it lacks jurisdiction in the case. Opinion and Order, Doc. 23, COA 20-3365. However, the Sixth Circuit did so only because it concluded that this Court's ruling on the temporary restraining order already interprets the Director's Order in a way that is consistent with the State's interpretation. *Id*. The Sixth Circuit thus rejected Plaintiffs' argument that every surgical abortion is "essential". *Id*.

LEGAL STANDARD

"[A] preliminary injunction is an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The movant "bears the burden of justifying such relief," and it is "never awarded as of right." *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015). Indeed, "the proof required is much more stringent than the proof required to survive a summary judgment motion." *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App'x 421, 425 (6th Cir. 2014) (quotation and alternation omitted). When determining whether to grant a party's request for such a remedy, district courts must balance four factors: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.'" *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (citation omitted).

ARGUMENT

I. PLAINTIFFS FAIL TO SHOW THAT THEY ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE DIRECTOR'S ORDER BECAUSE THE DIRECTOR'S ORDER IS CONSTITUTIONALLY-PERMISSIBLE.

The right to a pre-viability abortion is not "absolute:" no one has the right to "terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973). Even when no public health crisis exists, the state may regulate abortion to protect the public health. *Planned Parenthood v. Casey*, 505 U.S. 833, 852, 882 (1992) (24-hour reflection period was constitutionally permissible because, inter alia, it promotes mental health). A health regulation or order may burden abortion access—such as delaying or reducing the availability of abortions—so long as that "burden" is not "undue." *Id*. at 874.

Under *Casey*, a law imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 878. *Casey* made clear that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id*. at 876. Yet even if a state order "increas[es] the cost or decreas[es] the availability," or makes it "more difficult or more expensive to procure an abortion," that "cannot be enough to invalidate it" if the law serves a "valid purpose . . . not designed to strike at the right itself." *Id.* at 874 (emphasis added). Thus, states may ban certain abortion procedures, *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), or require patients to undertake steps that may delay their obtaining an abortion, *Casey*, 505 U.S. at 886, as long as they leave open reasonably available avenues for obtaining a pre-viability abortion.

In the context of a health-and-safety order, the question whether an otherwise-substantial burden is "undue"—whether it leaves open sufficient avenues for exercising the

right— requires balancing the benefits the order confers against the burden it imposes on abortion access. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). When analyzing such orders, courts "are not empowered to ignore or undervalue the governmental interests [the order] embodies." *Women's Med. Prof. Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003). The public health interests, in other words, must justify imposing a burden.

Here, any burden on abortion access, i.e., a temporary delay in obtaining a surgical abortion, is amply justified by the significant and life-saving benefits the Director's Order confers. *First*, the Director's Order delaying non-essential surgeries is a response to an unprecedented public health crisis that is still unfolding, for which there is strong factual basis. The Director's Order was issued with the sole goal of protecting "our healthcare workforce during this unprecedented event." Director's Order, Ex. A. Delaying non-essential or elective surgeries and procedures preserves PPE and other medical resources, and conserves hospital bed space, all of which are rapidly depleting by the day. The ordered delay also slows the spread of the virus by minimizing person-to-person contact in the places where those most vulnerable to the virus need to be: hospitals and medical facilities. It is clear that the purpose of the Director's Order is not to put a substantial obstacle between women and their right to an abortion.

Second, the Director's Order is not designed to strike (or even aimed) at the right to an abortion itself. Rather, it is generally-applicable and requires all doctors and providers to exercise professional judgment on when a surgery or procedure is essential. There is no exception for abortion providers, just as there is no exception for oncologists, radiologists, dentists, or any other specialty. As applied to abortion providers, the Director's Order means that doctors must delay surgical abortions that can be delayed without jeopardizing the

patient's ability to secure a pre-viability abortion. Doctors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Doctors remain free to perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights.

On balance of these factors, the burden imposed by the Director's Order—temporary delay of a surgical abortion—is constitutionally permissible. There is no constitutional violation in requiring abortion providers to delay abortions or alter their methods when doing so is necessary to protect healthcare workers during a worldwide public healthcare crisis. The effect of the Director's Order is not, as Plaintiffs allege, a complete ban on surgical abortion. Indeed, in some applications, the Director's Order will not burden abortion rights at all, let alone pose a "substantial obstacle." According to Plaintiffs, 56% of abortions in Ohio are surgical abortions, Liner Dec., No. 42-1, PAGEID# 776 ¶ 28. Thus, at least 44% of abortions will not be not be affected by the Director's Order.

Also, the Court should review the Director's Order under the deferential standard that applies to emergency measures taken by government officials. This standard gives state wide-latitude to regulate to prevent and respond to public health crises, even in ways that would otherwise not be constitutionally-permissible.

Finally, the effect of the Director's Order on surgical abortions should be analyzed under the deferential standard of review articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate as long as those measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." For the reasons stated below,

the Director's Order satisfies this standard, and is a proper exercise of the State's authority to regulate during a public health crisis.

Plaintiffs have not come close to carrying their burden of making a "clear showing" that when applied to them, the Director's Order violates the Constitution. *Mazurek*, 520 U.S. at 972. Accordingly, Defendants respectfully request that the Court deny Plaintiffs' Motion for a Preliminary Injunction and immediately dissolve the temporary restraining order.

A. DELAYING NON-ESSENTIAL SURGICAL ABORTIONS WILL RESULT IN SIGNIFICANT BENEFITS TO THE PUBLIC HEALTH THAT OUTWEIGH ANY RESULTING HARM.

Delay of non-essential surgical abortions will result in net saving of PPE. To be prepared to treat the numbers of people affected by the COVID-19 virus, it is essential that healthcare resources, including PPE, be conserved in every way possible. Medical procedures require the use of PPE like masks, gloves, and other materials that protect both healthcare workers and patients. Hurst Dec. ¶ 6, Ex. C. Use of PPE during the COVID-19 crisis is more critical than under normal circumstances because of the highly-contagious nature of the virus. *Id*. ¶ 6. The CDC has confirmed that the virus spreads easily and rapidly, and mainly from person-to-person contact. *Id*. ¶ 12; *see also* Director's Order, Ex. A. Spread of COVID-19 is compounded because a person who is asymptomatic may be able to spread the disease. Hurst Dec. ¶ 7. Thus, proper medical practice during this crisis requires extensive use of PPE. *Id*. ¶ 6.

However, the surging number of people requiring medical treatment is rapidly depleting supplies. *Id*. ¶¶ 4, 8. The current supply of PPE is insufficient to care for the large number of patients, and for the number of patients projected to need treatment. Robinson Dec. ¶ 3, Ex. D. The scarcity is complicated because of the scope of the problem nationwide; Ohio is competing with every other state in the nation that is also seeking this equipment. *Id*. ¶ 4.

Preservation of PPE is essential to protecting healthcare workers and a matter of life and death. Hurst Dec. ¶¶ 7-14, Ex. C. If healthcare providers—those on the frontlines of the COVID-19 battle—are left unprotected, they are left highly vulnerable to the virus. *Id*. ¶ 7. Large numbers of healthcare workers who are sick (or worse) as a result of the virus will cause an even greater strain on the healthcare system. *Id*.

Delaying non-essential surgeries and procedures *now* is critical to conserving PPE in the immediate near-term. Robison Dec. ¶ 6, Ex. D; Declaration of Brian Fowler, ¶ 5 (attached as Exhibit E). This ensures that, until producers of PPE can increase manufacturing to meet the rapidly-expanding demand, healthcare workers on the frontlines and those most in danger of contracting the virus are protected. *Id*. If these efforts are successful and supplies sufficiently increase, there will be enough PPE for use even in non-essential and elective surgeries.

Plaintiffs claim that continued pregnancy requires greater use of healthcare resources than abortion, and thus delaying an abortion results in more use of PPE in the long run. Doc. 42, PAGEID# 759. But the Director's Order is not based on a long-run strategy. The critical time is *now*. The Director's Order is predicated on the need for PPE in the near-term, and that PPE production will increase sufficient to cover the surgical abortions that were delayed. If production is slower than hoped for, it still benefits the State to do what it can to try to preserve PPE in the near-term to address the current, immediate shortage.

Plaintiffs concede that a physician performing a surgical abortion would use PPE, but they maintain that their use is "minimal." Doc. 42, PageID# 746. But this argument overlooks the cumulative effect of the Director's Order applying to *all* non-essential and elective surgeries. Individually, all non-essential and elective procedures use only a small fraction of the

state's supply of PPE, but cumulatively these procedures have a great impact on the overall supply. Hurst Dec. ¶ 16, Ex. C. Plaintiffs cite to no evidence to refute, or even address this fundamental fact. They complain only of the burden that the Director's Order purportedly places upon then, but ignore the other side of the balance that they are required by *Hellerstedt* to address: the benefit that the Director's Order confers. *See Hellerstedt*, 136 S. Ct. 2292.

Plaintiffs instead offer their own self-serving declarations regarding how much PPE is "too much". But these tone-deaf declarations completely fail to address the cumulative effect that unnecessary PPE usage will have on the supply available the other health care workers on the front lines of Ohio's COVID-19 fight. The opinion of Plaintiffs and Plaintiffs' declarants on how much PPE usage is "too much" cannot be substituted for doctors or specialists who actually work in this area and are actually qualified to render such opinions. Plaintiffs cannot tip the *Hellerstedt* balance in their favor by failing to provide any credible evidence regarding one side of its equation.

The Director's Order is based on CDC recommendations on what actions are necessary to slow the spread of the COVID-19 virus and how to best protect healthcare workers. These scientifically-supported Orders are entitled to a greater degree of deference on this critical public health issue than are Plaintiffs' opinions regarding how much PPE they ought to be able to use. Even if Plaintiffs' declarants were specialists in the area of controlling and reacting to a pandemic, they are neither answerable to the community for their decisions nor are they responsible to the people for the consequences, as public officials are.[34]

[34] Plaintiffs have not offered declarants who are qualified to opine on these issues. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue."). Declarants Liner, Krishen, and Haskell are only family practice

So, although Plaintiffs can opine as to how much PPE they want, Dr. Acton is responsible for protecting the supply available for *all* doctors within the State of Ohio.

Delay of non-essential surgical abortions will conserve vital hospital resources and bed space. The Director's Order has the effect of preserving hospital resources, as the large number of persons requiring hospitalizations can cause tremendous strain on the healthcare system. Hurst Dec. ¶ 6, Ex. C. There is concern in Ohio about the capacity of hospitals to treat those with COVID-19 and the number of patients who will require hospital care. *Id*. ¶ 4. Postponing non-essential surgeries and procedures will help hospitals and other medical centers avoid being overtaxed. *Id*. ¶¶ 9-10.

Plaintiffs point out that carrying a pregnancy to term (or having a later abortion) will increase the need for hospital treatment "in the long run. Doc. 42, PAGEID## 759-60. Again, they miss the point. The Director's Order seeks to address the *immediate* need for resources and it benefits public health under the "flatten the curve" strategy: use of hospital resources now, while the pandemic is surging, will have a far greater cost on human life than use of hospital resources several months from now, when our healthcare system has greater capacity and lower demand. Hurst Dec. ¶¶ 10-12, 16, Ex. C; Robison Dec. ¶ 6, Ex. D; Fowler Dec. ¶ 5, Ex. E.

Plaintiffs also posit that complications from abortions are low and hospitalizations are rare, and thus this should not be a consideration. Doc. 42, PAGEID# 745; Liner Dec. No. 41-2, PAGEID# 774 ¶ 22. However, every medical procedure, no matter how routine, carries a

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physicians, Liner Dec, Doc. 42-1, ¶ 1; Krishen Dec., Doc. 42-3, ¶ 1; Haskell Dec., Doc. 42-4, ¶¶ 2–4, and declarant Burkons is an obstetrician-gynecologist, Burkons Dec., Doc. 42-5, ¶ 1. And Declarant France is a business manager, with no apparent medical expertise. France Dec., Doc. 42-2, ¶ 1.

level of risk. Indeed, many medical procedures that are low risk are being postponed because *any* complication that requires hospitalization or the use of hospital resources puts further strain on the already-taxed healthcare system in Ohio. Hurst Dec. ¶¶ 14-15, Ex. C. If every procedure that is "low risk" is exempt from the Director's Order, the cumulative effect would have a large and negative impact on hospital resources.

Delay of certain abortions will decrease personal interaction and contact, and prevent further viral spread. It is clear that "social distancing" and decreasing personal contact and interaction in every way possible slows the spread of COVID-19. The CDC has confirmed that the virus spreads easily and rapidly, and mainly from person-to-person contact. *Id*. ¶ 12; *see also* Director's Order, Ex. A. Spread of COVID-19 is compounded because a person who is asymptomatic may be able to spread the disease. Hurst Dec. ¶ 7, Ex. C. Specifically, delaying non-essential surgeries and procedures keeps people out of hospitals and clinics, where people who are the most at risk or immunocompromised are likely to be. *Id*. ¶ 13.

Far from supporting their claim for a blanket exemption, Plaintiffs' declarations make clear the Director's emergency order is necessary to protect the public: Plaintiffs perform thousands of abortions every year, which requires them to routinely consume significant quantities of PPE. This also raises a strong inference that the abortion providers have already treated patients with COVID-19 and, therefore have been exposed themselves. Liner Dec. No. 41-2, PAGEID# 776 ¶ 29 (2,561 surgical and 769 medication abortions performed in 2019). If surgical procedures, including abortions, are not delayed until production can meet demand, all of these additional risks of potential new infections will compound hundreds or thousands of times.

Plaintiffs claim that they have taken precautionary measures to limit the spread, but even if partially effective, the risk to society is still increased by all these interpersonal interactions. Plaintiffs are not entitled to be the only surgery provider in Ohio who gets an exemption from the Director's Order by simply promising to be careful. Every business or activity—or clinic that performs elective procedures—can claim they are taking precautionary measures so they should not be regulated; by that logic, the State's attempt to "flatten the curve" would utterly collapse.

B. THE DIRECTOR'S ORDER IS GENERALLY-APPLICABLE AND APPLIES TO ALL PROCEDURES AND PROVIDERS; IT IS NOT DESIGNED TO STRIKE AT THE ABORTION RIGHT ITSELF.

The plain language of the Director's Order applies to *all* non-essential or elective surgeries and procedures unless they cannot be delayed without "undue risk to the current or future health of a patient." Director's Order, Ex. A. The Director's Order does not single out abortion procedures or women seeking abortions; it applies to every physician and every clinic in Ohio, providing any sort of medical services. It also applies to every medical procedure—women seeking abortions are being treated no differently than anyone seeking Lasik, a face-lift, or any other non-essential medical procedure at this time. The Director's Order is clearly not "designed to strike at the right itself." *Casey*, 505 U.S. at 874.

Rather, the Director's Order requires that abortion providers, as well as all other providers, exercise patient-specific judgment. This means that doctors must delay surgical abortions that can be delayed without jeopardizing the patient's ability to secure a pre-viability abortion. Doctors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Abortion providers can perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be

delayed without jeopardizing the patient's abortion rights. And, the Director's Order bars only non-essential and elective surgeries. For example, in cases where abortion providers can safely induce an abortion with medication, requiring them to do so instead of performing a surgical abortion is no burden at all. Thus, in some applications, the Director's Order will not burden a woman's right to an abortion in any way, let alone "substantial[ly]." *Casey*, 505 U.S. at 877. According to Plaintiffs, 56% of abortions in Ohio are surgical abortions, thus at least 44% of abortions will not be not be affected by the Director's Order. Liner Dec., No. 42-1, PAGEID# 776 ¶ 28.

A blanket exemption for all surgical abortions, as Plaintiffs seek, is unnecessary and dangerous during the current COVID-19 pandemic. Providers across the state are responsibly exercising the required case-specific judgment and making difficult decisions about what surgeries and procedures are essential. Allowing Plaintiffs to be exempted and continue with business as usual opens the door for other exceptions, which eventually negates the purpose of the delay. In other words, the exception will swallow the rule. This position is consistent with the recommendation of the American College of Surgeons, which emphasizes that "[p]lans for case triage should avoid blanket policies and instead rely on data and expert opinion from qualified clinicians and administrators, with a site-specific granular understanding of the medical and logistical issues in play." *COVID-19: Guidance for Triage of Non-Emergency Surgical Procedures*, AM. COLLEGE OF SURGEONS (Mar. 17, 2020), available at https://www.facs.org/covid-19/clinical-guidance/triage.

An injunction mandating a blanket exemption for surgical abortions is not constitutionally sound. Defendants are not obligated to facilitate abortions by carving out exceptions to generally-applicable health and safety regulations such as the Director's Order. Also, "the law need not

give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. It follows, then, that the Director's Order does not run afoul of *Casey* by requiring that abortion clinics and doctors operate under the same rules as everyone else.

Our Constitution permits the states to require everyone, including abortion providers, to do their part to stop the spread of a deadly, fast-spreading disease. That means Ohio may halt elective surgeries to preserve PPE for those responding to COVID-19. And it means that Ohio may apply this generally applicable order to abortion providers as well, requiring them to perform abortions without surgery and to delay surgical abortions where possible. That is all the Director's Order does.

C. THE DIRECTOR'S ORDER SHOULD BE REVIEWED UNDER THE DEFERENTIAL STANDARD THAT APPLIES TO EMERGENCY MEASURES TAKEN BY GOVERNMENT OFFICIALS.

The effect of the Director's Order on surgical abortions should be analyzed under the deferential standard of review articulated under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This standard applies to emergency measures taken by government officials and gives states wide latitude to regulate as long as those measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id*. at 31. This standard applies with equal force to abortion. Under *Jacobson*, the Director's Order is a proper exercise of the State's authority to regulate during a public health crisis.

In *Jacobson*, the Court upheld a mandatory vaccination requirement for citizens of Cambridge, Massachusetts, as the city sought to battle the smallpox epidemic. *Id.* Notably, the Court showed the government great deference and found that such actions should only be

struck down when they are "unreasonable" or "arbitrary." *Id.* at 28; *see also Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) ("governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency[]"). In other words, a court's review of the constitutionality of an emergency order promoting the public health "is limited to a determination whether the [executive's] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to [prevent the spread of disease.]" (alteration in original) *Avino* at 109, citing *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971).

In a case similar to this one, the Fifth Circuit Court of Appeals applied the *Jacobson* standard and granted a writ of mandamus, which vacated the district court's temporary restraining order and reinstated the Texas Governor's order postponing non-essential surgeries and procedures. *In re Abbott*, Ex. B. In *Abbott*, abortion providers sued to enjoin the order, asserting that it should not apply to abortions. *Id.* at p. 6. The district court issued a temporary restraining order, finding that the governor's order prohibited all abortions. *Id.* Texas officials filed a mandamus action with the Fifth Circuit, which was granted. *Id.* at p. 1.

Relying on *Jacobson*, the court held that "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' *Id*. at p. 13 (citing *Jacobson*, 197 U.S. at 28, 30). Because the Supreme Court "has consistently cited *Jacobson* in its abortion decisions," nothing in abortion precedent "suggests that abortion rights are somehow exempt from the *Jacobson* framework." *Id*. Thus, all

constitutional rights—including abortion—may be reasonably restricted to combat a public health emergency. *Id*. at p. 15.

The *Abbott* court also cautioned against courts second-guessing "the wisdom or efficacy" of the state's emergency measures. *Id*. at p. 13. Courts should decline to substitute its judgment for that of the governing state authorities "if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities." *Id*. at p. 25; *see also* Amici Br. of Alabama, et al., Doc. 20-1, COA 20-3365, p. 19 (relying on *Jacobson*, federal courts should "hesitate before intervening" on the issue of the scope of the Director's Order because courts "are unsuited to second-guess health official's recommendations").

The Director's Order must be given the same deference. There is no question that the Director's Order was "taken in good faith" in the face of the COVID-19 pandemic. Second, for the reasons state above, the Director's Order is supported by facts and issued for the sole purpose of protecting "our healthcare workforce during this unprecedented event." Director's Order, Ex. A. There are ample facts showing that enforcing the Director's Order as to non-essential surgical abortions promotes conservation of PPE. Plaintiffs offer no evidence to the contrary. And, although there may be a "burden" to those patients who must delay a surgical abortion as a result of the Director's Order, "fundamental rights * * * may be temporarily limited or suspended[]" in times of emergency. *Avino*, 91 F.3d at 109. "The right to abortion is no exception." *Abbott*, Ex. B at p. 2.

II. THE BALANCE OF HARM WEIGHS IN FAVOR OF THE STATE

Plaintiffs have not shown irreparable harm. At bottom, any harm that results from the Director's Order is a *delay* in seeking a surgical abortion. Under the Director's Order abortion providers must perform medicinal abortions (rather than surgical abortions) where that option is safe and available. Abortions that can be delayed should be delayed, but doctors can still perform surgical abortions necessary for a mother's health or life, and also surgical abortions that cannot be delayed without jeopardizing the patient's abortion rights. Thus, the Director's Order will burden a woman's right to an abortion only to the extent a surgical abortion is, based on the professional judgment of the provider, delayed.

Plaintiffs, in fact, concede that they are complying the with Director's Order. Plaintiffs even state that their doctors "always determine the appropriate course of care for any patient on a case-by-case basis," and their amended policies as a result of the Director's Order "did no result in any change to Plaintiffs' provision of care." Doc. 42, PAGEID# 751.

Nor have Plaintiffs have made any allegation that a particular patient will not be able to receive an abortion based on the Director's Order. Any such patient could, of course, seek as-applied relief, a far narrower demand than the blanket exemption for all surgical abortions that Plaintiffs seek.

There is, of course, *some* degree of harm from delaying a medical procedure. But Plaintiffs have not shown that this delay is any more harmful than the delay than other Ohioans are experiencing. Doctors and patients across the state are coping with these harms for the benefit of the public good. Indeed, countless individuals and businesses are experiencing harm right now because of job losses and the temporary slowing of business.

Every person and entity are making sacrifices to curb the spread of this deadly virus. Abortion providers and those seeking abortions can reasonably be expected to do the same.

In contrast, enjoining the Director's Order as Plaintiffs request will put Ohioans, and specifically healthcare workers on the frontlines of battling the COVID-19 virus, in peril. To be clear, compliance with the Director's Order is a matter of life and death. Neither Plaintiffs nor the Court should second-guess the judgment of Dr. Acton and public-health experts who made the difficult decision to delay all non-essential surgeries and procedures. Such a measure was not taken lightly. And enjoining the Director's Order will cause far-reaching, irreparable harm to Ohio: it will operate to deplete PPE and other medical resources and contribute to higher exposure and death rates.

Any blanket exception to the Director's Order that the Court agrees to carve out will also be harmful to the State. The measures outlined in the Director's Order are cumulative and work only when adhered to strictly, and by everyone. An exception would negate the purpose of the Director's Order and undercut the State's ability to respond to an emergency to protect the public health. To explain this point better, throughout the COVID-19 crisis Dr. Acton has used the analogy of swiss cheese to describe the necessity of cumulative layers of intervention: "If you look at each layer individually, you can hold up the cheese and see that it has holes in it. But if you stack the layers on top of each other and hold them up—many of the holes will be covered by different layers." Governor Mike DeWine COVID-19 Update, THE OHIO CHANNEL (Mar. 13, 2020), available at http://www.ohiochannel.org/video/governor-mike-dewine-3-13-2020-covid-19-update. The Director's Order on non-essential surgeries works in conjunction with the "stay at home" and prohibition on large gatherings, to cumulatively fight against the COVID-19 virus. All of

these actions add up to collectively slowing the spread of the virus and protecting healthcare workers. An exception to one order affects the value and success of all of the other orders and measures in place.

An exception for one type of provider or procedure could also open the floodgates of litigation, empowering providers or patients to challenge the Director's Order and ask for differential treatment. Instead of fighting the COVID-19 virus during the short and precious time we have before the impact of the virus peaks, the State will be fighting to keep its orders intact in court, to the detriment of the public it is trying to protect.

Finally, at first blush, it might seem that the State would have no interest in fighting an injunction that enjoins Dr. Acton's Order only in circumstances to which it does not apply. But the State has an immensely strong interest in avoiding such an injunction. The reason is this: Plaintiffs are seeking to enjoin an Order with which they claim to be complying and that they do not need to enjoin. And, they are seeking attorneys' fees for their trouble. Thus, if the plaintiffs win preliminary relief, and if the case is then mooted before final judgment or reversal on appeal, Plaintiffs may be eligible for attorney's fees. *See Planned Parenthood Southwest. Ohio Region v. DeWine*, 931 F.3d 530, 542 (6th Cir. 2019), cert. pending sub nom. *Yost v. Planned Parenthood Southwest Ohio Region*, No. 19-677 (U.S.). So, the issuance of an injunction that Plaintiffs do not need is far from harmless. It risks needlessly draining the Ohio Department of Health's coffers at a time when its already scarce and shrinking resources must be dedicated to combating the COVID-19 pandemic. This risk is particularly magnified here, where Plaintiffs have staffed this case with ten attorneys who are seeking fees. The State of Ohio has an obligation to fight any order that has the potential to divert its resources

away from lifesaving COVID-19 testing, treatment and prevention, and to ten lawyers who obtained an unnecessary injunction. The harm to the entire State of Ohio is entirely too great.

Balancing the potential harm to Plaintiffs against the risk of harm to others and the public interest confirms that Plaintiffs' motion should be denied.

III. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

The interest Ohio's public officials have in minimizing the toll on human life from the COVID-19 cannot be understated. As explained throughout this brief, every person is being asked to make sacrifices to help curb the COVID-19 pandemic, and each of us has been burdened in some way through the various policies and orders over the past few weeks. But there is no question that *all* will benefit from the current restrictions.

In cases involving a constitutional challenge to a state law, the public interest lies in a correct application of the relevant federal constitutional and statutory provisions, "and ultimately … upon the will of the people of [the state] being effected in accordance with [state] law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). The public interest thus supports allowing the Director's Order to go into effect. The fact that the Director's Order addresses urgent needs in light of a deadly pandemic only heightens the public interest.

CONCLUSION

For the reasons set forth above, Plaintiffs' request for a preliminary injunction enjoining the Director's Order as to all surgical abortions should be denied. At this critical time, everyone, including abortion providers, must do their part to stop the spread of a deadly, fast-spreading disease. It is constitutionally-permissible for Ohio to halt non-essential and elective surgeries to preserve PPE in the interest of protecting healthcare workers who are on

the frontlines of battling the COVID-19 virus. The Director's Order applies to abortion providers, requiring them to perform abortions without surgery, and to delay surgical abortions, where possible. That is all the Director's Order does, and it should be allowed to stand as-written.

Respectfully submitted,

DAVE YOST
ATTORNEY GENERAL

s/ Heather L. Buchanan

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

s/ Heather L. Buchanan
HEATHER L. BUCHANAN (0083032)
Assistant Attorney General

Exhibit A

Director's Non-Essential Surgery Order

Ohio Department of Health

Mike DeWine, Governor
Jon Husted, Lt. Governor

Amy Acton, M.D., MPH, Director

RE: Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders…for preventing the spread of contagious or infectious diseases" and for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio, **ORDER** the following:

1. Effective 5:00 p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.

2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:

    a. Threat to the patient's life if surgery or procedure is not performed;
    b. Threat of permanent dysfunction of an extremity or organ system;
    c. Risk of metastasis or progression of staging; or
    d. Risk of rapidly worsening to severe symptoms (time sensitive)

3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.

4. Each hospital and outpatient surgery or procedure provider, whether public, private, or nonprofit, shall establish an internal governance structure to ensure the principles outlined above are followed.

5. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

This Order takes into consideration and is consistent with the Ohio Hospital Association's *Implementing Guidelines for the Management of Non-Essential Surgeries and Procedures Throughout Ohio* dated March 16, 2020.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person

coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term

care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

On March 15, 2020, the Ohio Department of Health issued a Director's Order closing polling stations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (50 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, upon guidance from the U.S. Surgeon General, American College of Surgeons and numerous other public health experts, I hereby **ORDER,** beginning at 5:00 p.m. Wednesday, March 18, 2020 all non-essential surgeries and procedures are cancelled. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include: threat to the patient's life if surgery or procedure is not performed; Threat of permanent dysfunction of an extremity or organ system; risk of metastasis or progression of staging; or risk of rapidly worsening to severe symptoms (time sensitive). Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required. Each hospital and outpatient surgery or procedure provider shall establish an internal governance structure to ensure the principles outlined above are followed. The Order is issued for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

Amy Acton MD MPH

March 17, 2020

Amy Acton, MD, MPH
Director of Health

Exhibit B

In re Abbott, Case No. 20-50264
U.S. Court of the Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 7, 2020
Lyle W. Cayce
Clerk

No. 20-50264

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

Petitioners

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

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

To preserve critical medical resources during the escalating COVID-19 pandemic, on March 22, 2020, the Governor of Texas issued executive order GA-09, which postpones non-essential surgeries and procedures until 11:59 p.m. on April 21, 2020. Reading GA-09 as an "outright ban" on pre-viability abortions, on March 30 the district court issued a temporary restraining order ("TRO") against GA-09 as applied to abortion procedures. At the request of Texas officials, we temporarily stayed the TRO while considering their petition for a writ of mandamus directing vacatur of the TRO. We now grant the writ.

The "drastic and extraordinary" remedy of mandamus is warranted for several reasons. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019) (citation omitted).

First, the district court ignored the framework governing emergency public health measures like GA-09. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). "[U]nder the pressure of great dangers," constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Id.* at 29. That settled rule allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home. The right to abortion is no exception. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Jacobson*); *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (same); *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (same).[1]

Second, the district court's result was patently wrong. Instead of applying *Jacobson*, the court wrongly declared GA-09 an "outright ban" on pre-viability abortions and exempted all abortion procedures from its scope. The court also failed to apply *Casey*'s undue-burden analysis and thus failed to balance GA-09's temporary burdens on abortion against its benefits in thwarting a public health crisis.

Third, the district court usurped the state's authority to craft emergency health measures. Instead, the court substituted its own view of the efficacy of applying GA-09 to abortion. But "[i]t is no part of the function of a court" to

[1] Our dissenting colleague suggests our decision "follows not because of the law or facts, but because of the subject matter of this case." Dissent at 3. That is wrong. As explained below, *infra* III.A.1, *Jacobson* governs a state's emergency restriction of *any* individual right, not only the right to abortion. The same analysis would apply, for example, to an emergency restriction on gathering in large groups for public worship during an epidemic. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.").

decide which measures are "likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30.

In sum, given the extraordinary nature of these errors, the escalating spread of COVID-19, and the state's critical interest in protecting the public health, we find the requirements for issuing the writ satisfied. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

We emphasize the limits of our decision, which is based only on the record before us. The district court has scheduled a telephonic preliminary injunction hearing for April 13, 2020, when all parties will presumably have the chance to present evidence on the validity of applying GA-09 in specific circumstances. The district court can then make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access. Our overriding consideration here, however, is that those proceedings adhere to the controlling standards, established by the Supreme Court over a century ago, for adjudging the validity of emergency measures like the one before us.

Accordingly, we grant a writ of mandamus directing the district court to vacate its TRO of March 30, 2020.

I.

As all are painfully aware, our nation faces a public health emergency caused by the exponential spread of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2. As of April 6, 2020, over 330,000 cases have been confirmed across the United States, with over 8,900 dead.[2] The virus is "spreading very easily and sustainably"[3] throughout the country, with cases

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[2] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 6, 2020).

[3] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited April 6, 2020).

confirmed in all fifty states, the District of Columbia, and several territories.[4] Over the past two weeks, confirmed cases in the United States have increased by over 2,000%.[5] Federal projections estimate that, even with mitigation efforts, between 100,000 and 240,000 people in the United States could die.[6] In Texas, the virus has spread rapidly over the past two weeks and is predicted to continue spreading exponentially in the coming days and weeks.

On March 13, 2020, the President declared a national state of emergency, and the Governor of Texas declared a state of disaster.[7] Six days later, the Texas Health and Human Services Executive Commissioner declared a public health disaster because the virus "poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas."[8] As the district court in this case acknowledged, "Texas faces it[s] worst public health emergency in over a century."

The surge of COVID-19 cases causes mounting strains on healthcare systems, including critical shortages of doctors, nurses, hospital beds, medical

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[4] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 6, 2020).

[5] *Id.* On March 19, 2020, the CDC reports that there were 15,219 diagnosed cases in the United States, excluding cases among persons repatriated to the United States from China and Japan. *Id.* By April 6, 2020, the number of cases reported has risen to 330,891. *Id.*

[6] Rick Noack, et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, WASHINGTON POST (Mar. 31, 2020), https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/.

[7] *See* Proc. No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020); Tex. Proc. of Mar. 13, 2020, https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

[8] Tex. Proc. of Mar. 19, 2020, https://gov.texas.gov/uploads/files/press/DECLARATION_of_public_health_disaster_Dr_Hellerstedt_03-19-2020.pdf.

equipment, and personal protective equipment ("PPE").[9] The executive order at issue here, GA-09, responds to this crisis. Issued by the Governor of Texas on March 22, 2020, GA-09 applies to all licensed healthcare professionals and facilities in Texas and requires that they:

> postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.[10]

Importantly, the order "shall not apply to any procedure 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."[11] Failure to comply with the order may result in administrative or criminal penalties, including "a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both."[12] The order automatically expires after 11:59 p.m. on April 21, 2020, but can be modified, amended, or superseded.

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[9] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Strategies for Optimizing the Supply of Facemasks, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html (last visited April 6, 2020); Megan L. Ranney, M.D., M.P.H., et al., *Critical Supply Sources—The Need for Ventilators and Personal Protective Equipment during the COVID-19 Pandemic*, NEW ENG. J. OF MED. (Mar. 25, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2006141?query=featured_coronavirus.

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

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

[12] Tex. Exec. Order No. GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf (citing Tex. Gov't Code § 418.173); *see also* 25 Tex. Admin. Code § 139.32(b)(6); 25 Tex. Admin. Code § 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); 22 Tex. Admin. Code § 185.57(c) (Mar. 23, 2020); Tex. Occ. Code § 164.051(a)(2); Tex. Occ. Code § 164.051(a)(6); Tex. Occ. Code § 301.452(b)(3); Tex. Occ. Code § 301.452(b)(10).

On March 25, 2020, various Texas abortion providers[13] ("Respondents") filed suit in federal district court against multiple Texas officials, including the Governor, Attorney General, three state health officials, and nine District Attorneys ("Petitioners"[14]). Respondents brought substantive due process and equal protection claims and sought to enjoin enforcement of GA-09, as well as the Texas Medical Board's Emergency Rule implementing the order. *See* 22 Tex. Admin. Code § 187.57(c) (Mar. 23, 2020). Simultaneously, Respondents sought a temporary restraining order ("TRO") or a preliminary injunction, based only on their due process claim. Following a March 26 conference call, the district court gave Petitioners until March 30 at 9:00 a.m. to respond, which they did. Later that same day, the district court entered a TRO.

In the TRO, the district court agreed that "Texas faces it[s] worst public health emergency in over a century," and also that "[GA-09], as written, does not exceed the governor's power to deal with the emergency." Nonetheless, the court interpreted GA-09 as "effectively banning all abortions before viability." The court reasoned that, because "no interest" can justify such an "outright ban" on pre-viability abortions, GA-09 contravenes Supreme Court and Fifth Circuit precedent. The TRO therefore prohibits all defendants, including

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[13] Plaintiffs are Texas abortion providers 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, 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. Plaintiffs purport to sue on behalf of themselves, their staff, physicians, nurses, and patients.

[14] Petitioners here do not include the defendant District Attorneys.

Petitioners, from enforcing GA-09 and the emergency rule "as applied to medication abortions and procedural[15] abortions." App. 267–68, 270.[16]

On the evening of March 30, 2020, Petitioners filed a petition for writ of mandamus in our court, requesting that we direct the district court to vacate the TRO. Petitioners simultaneously sought an emergency stay of the TRO, as well as a temporary administrative stay, while the court considered their request. On March 31, 2020, we temporarily stayed the TRO and set an expedited briefing schedule.

II.

Federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). That includes the writ of mandamus sought by Petitioners. *See Cheney*, 542 U.S. at 380; *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019). Mandamus is proper only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc) (quoting *Cheney*, 542 U.S. at 380). Before prescribing this strong medicine, "we ask (1) whether the

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

[16] The TRO is scheduled to expire at 3:00 p.m. on April 13, 2020. The district court has scheduled a telephonic hearing on Plaintiffs' request for a preliminary injunction for 9:30 a.m. that same day. App. 271. Our references to "App." throughout this opinion are to the appendix to the mandamus petition. *See* ECF 3 (5th Cir. No. 20-50264).

petitioner has demonstrated that it has no other adequate means to attain the relief it desires; (2) whether the petitioner's right to issuance of the writ is clear and indisputable; and (3) whether we, in the exercise of our discretion, are satisfied that the writ is appropriate under the circumstances." *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018) (quoting *Cheney*, 542 U.S. at 380–81) (cleaned up). "These hurdles, however demanding, are not insuperable. They simply reserve the writ for really extraordinary causes." *Gee*, 941 F.3d at 158 (cleaned up). In such a case, mandamus provides a "useful 'safety valve[]' for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)).

III.

Petitioners claim they satisfy all three mandamus prongs and are therefore entitled to the writ. As to the first prong, they argue mandamus is proper for obtaining relief, even from a non-appealable TRO, when the stakes are "extraordinarily time-sensitive." ECF 2 at 30–31. As to the second prong, Petitioners contend the district court "clearly and indisputably erred" by ruling that abortion is an absolute right which cannot be curtailed even in the midst of a public health emergency.[17] *Id.* at 11–24. Finally, as to the third prong,

[17] Alternatively under prong two, Petitioners assert that (1) no justiciable controversy exists as to the Governor and Attorney General because they lack authority to enforce GA-09, and (2) Respondents lack third-party standing to sue on behalf of their patients. We decline to grant relief on these grounds. First, quite apart from the Governor and Attorney General, a justiciable controversy exists as to the Petitioner health officials, who may enforce the order's administrative penalties. *See*, *e.g.*, 22 Tex. Admin. Code § 187.57(b). On remand, however, the district 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). *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019); *see also Morris v. Livingston*, 739 F.3d 740, 745–46 (5th Cir. 2014). Second, Respondents have standing to sue on their own behalf because GA-09 "directly operates" against them. *Planned Parenthood of Cen. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (cleaned up). We therefore need not consider at this time whether Respondents may sue on

Petitioners argue mandamus is proper because "[t]he longer [Respondents] are allowed to perform elective procedures—consuming scarce PPE, increasing hospitalizations, and potentially spreading the virus to countless individuals—the longer it will take to flatten the curve in Texas, meaning more illnesses, more hospitalizations, and more deaths." *Id.* at 31. We address each prong in turn, beginning with the second.

A.

We first address the second mandamus prong—whether entitlement to the writ is "clear and indisputable"—because it is central to our analysis. *See*, *e.g.*, *Volkswagen*, 545 F.3d at 311 (beginning with second prong because it "captures the essence of the disputed issue"). "In recognition of the extraordinary nature of the writ, we require more than showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015). Rather, a petitioner has a clear and indisputable right to the writ only when there has been a "usurpation of judicial power" or "a clear abuse of discretion that produces patently erroneous results." *JPMorgan Chase*, 916 F.3d at 500 (cleaned up); *see also Gee*, 941 F.3d at 159; *Lloyd's Register*, 780 F.3d at 290. Usurpation of judicial power occurs when courts act beyond their jurisdiction or fail to act when they have a duty to do so. *Will v. United States*, 389 U.S. 90, 95 (1967). But it also occurs in other situations. The Supreme Court has sanctioned use of the writ "to restrain a lower court when its actions would threaten the separation of powers by 'embarrassing the executive arm of the Government,' or result in the 'intrusion by the federal judiciary on a delicate area of federal-state relations.'" *Cheney*, 542 U.S. at 381 (citing *Will*,

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behalf of their patients. We note that the Supreme Court recently granted a certiorari petition raising this third-party standing issue. *See Russo v. June Med. Servs.*, No. 18-1460.

389 U.S. at 95; *Ex parte Peru,* 318 U.S. 578, 588 (1943); *Maryland v. Soper (No. 1),* 270 U.S. 9 (1926)) (cleaned up).

We conclude Petitioners have shown "a clear and indisputable right to issuance of the writ." *Volkswagen*, 545 F.3d at 311. In issuing the TRO, the district court clearly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). This extraordinary error allowed the district court to create a blanket exception for a common medical procedure—abortion—that falls squarely within Texas's generally-applicable emergency measure issued in response to the COVID-19 pandemic. This was a patently erroneous result. In addition, the court usurped the power of the governing state authority when it passed judgment on the wisdom and efficacy of that emergency measure, something squarely foreclosed by *Jacobson*.[18]

1.

In *Jacobson*, the Supreme Court considered a claim that the state's compulsory vaccination law—enacted amidst a growing smallpox epidemic in Cambridge, Massachusetts—violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best."

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[18] This case differs from *Preterm-Cleveland v. Atty. Gen. of Ohio*, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020), which declined to review a TRO against Ohio's non-essential-surgeries order. Ohio appealed on the basis that the TRO "threaten[ed] to inflict irretrievable harms." *Id.* at *1. Observing the TRO was "narrowly tailored" and did not permit "blanket" provision of abortions, the majority concluded that the TRO would not inflict irreparable harms and thus that it lacked jurisdiction over the appeal. *Id.* at *1–2. By contrast, here Petitioners seek not appeal but mandamus, a drastic remedy that we nonetheless find appropriate. Moreover, the TRO here is not "narrowly tailored" but exempts all abortions from GA-09. The TRO's broad sweep also distinguishes this case from recent district court decisions in Alabama and Oklahoma. *See Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020); *South Wind Women's Center v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020).

Id. at 26. The Court rejected this claim. Famously, it explained that the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. In describing a state's police power to combat an epidemic, the Court explained:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

The Supreme Court has repeatedly acknowledged this principle. *See, e.g.*, *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (recognizing that "the state may interfere wherever the public interests demand it" and "discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests"); *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 393 (1902) (upholding Louisiana's right to quarantine passengers aboard vessel—even where all were healthy—against a Fourteenth Amendment challenge); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease"); *United States v. Caltex*, 344 U.S. 149, 154 (1952) (acknowledging that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved").

To be sure, individual rights secured by the Constitution do not disappear during a public health crisis, but the Court plainly stated that rights

could be reasonably restricted during those times. *Jacobson*, 197 U.S. at 29. Importantly, the Court narrowly described the scope of judicial authority to review rights-claims under these circumstances: review is "only" available

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects*, or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*.

Id. at 31 (emphasis added). Elsewhere, the Court similarly described this review as asking whether power had been exercised in an "arbitrary, unreasonable manner," *id.* at 28, or through "arbitrary and oppressive" regulations, *id.* at 38. *Accord Lawton*, 152 U.S. at 137 ("To justify the state in thus interposing its [police power] in behalf of the public, it must appear [1] that the interests of the public generally . . . require such interference; and [2] that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").

Jacobson did emphasize, however, that even an emergency mandate must include a medical exception for "[e]xtreme cases." 197 U.S. at 38. Thus, the vaccination mandate could not have applied to an adult where vaccination would exacerbate a "particular condition of his health or body." *Id.* at 38–39. In such a case, the judiciary would be "competent to interfere and protect the health and life of the individual concerned." *Id.* at 39. At the same time, *Jacobson* disclaimed any judicial power to second-guess the state's policy choices in crafting emergency public health measures: "Smallpox being prevalent and increasing at Cambridge, the court would *usurp the functions of another branch of government* if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Jacobson*, 197 U.S. at 28 (emphasis added); *see also id.* at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most

effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain.").

The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. *Id.* at 38. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30.

Jacobson remains good law. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997) (recognizing Fourteenth Amendment liberties may be restrained even in civil contexts, relying on *Jacobson*); *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (rejecting, based on *Jacobson*, a § 1983 lawsuit concerning 80-hour quarantine of nurse returning from treating Ebola patients in Sierra Leone). And, most importantly for the present case, nothing in the Supreme Court's abortion cases suggests that abortion rights are somehow exempt from the *Jacobson* framework. Quite the contrary, the Court has consistently cited *Jacobson* in its abortion decisions.

In *Roe v. Wade*, the Supreme Court announced for the first time that an expectant mother has a constitutional right to an abortion. 410 U.S. 113. Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed this right and established the current standard for abortion restrictions. 505 U.S. 833. *Casey* recognized that after a fetus is viable, states may ban abortion outright, except for pregnancies that endanger the mother's life or health. *Id.* at 846 (plurality opinion). After *Casey*, there remain

two constitutional restrictions on states' ability to regulate abortion. First, states "may not prohibit any woman from making the ultimate decision to terminate" a pre-viability pregnancy. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Casey*, 505 U.S. at 879 (plurality opinion)). In other words, states may not impose outright bans on pre-viability abortions. *See Jackson Women's Health Org. v. Dobbs* [*Jackson II*], 945 F.3d 265, 273 (5th Cir. 2019). Second, states "may not impose" on the right "an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Id.* (quoting *Casey*, 505 U.S. at 878 (plurality opinion)); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (explaining "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes of abortion access together with the benefits those laws confer").

None of these cases, so far as we are aware, involved a state's postponement of some abortion procedures in response to a public health crisis—the context in which *Jacobson* plainly applies. But three of the Court's principal abortion cases—*Roe*, *Casey*, and *Carhart*—cite *Jacobson* with approval and without suggesting that abortion rights are somehow exempt from its framework. In *Roe*, the Supreme Court cited *Jacobson* as one example of the Court's refusal to recognize an "unlimited right to do with one's body as one pleases." 410 U.S. at 154 (citing *Jacobson*, 197 U.S. 11). The Court reasoned that the right to abortion "is not unqualified and must be considered against important state interests in regulation." *Id.* Similarly, in *Casey*, the plurality cited *Jacobson* as one example of the Court's balance between "personal autonomy and bodily integrity" on one hand and "governmental power to mandate medical treatment or to bar its rejection" on the other. 505 U.S. at 857 (citing *Jacobson*, 197 U.S. at 24–30). Finally, in the course of upholding a federal restriction on certain abortion methods in *Carhart*, the

Court cited *Jacobson* to show it had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 163 (citing *Jacobson*, 197 U.S. at 30–31).

By all accounts, then, the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*. Respondents all but concede this point, offering no discernible argument that *Jacobson* has been superseded or is otherwise inapplicable during a public health crisis such as the COVID-19 pandemic. *See* ECF 53 at 16. The district court, however, failed to recognize *Jacobson*'s long-established framework. While acknowledging that "Texas faces it[s] worst public health emergency in over a century," the court treated that fact as entirely irrelevant. Indeed, the court explicitly refused to consider how the Supreme Court's abortion cases apply to generally-applicable emergency health measures, saying it would "not speculate on whether the Supreme Court included a silent 'except-in-a-national-emergency clause' in its previous writings on the issue." App. 268.

That analysis is backwards: *Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. We could avoid applying *Jacobson* here only if the Supreme Court had specifically exempted abortion rights from its general rule. It has never done so. To the contrary, the Court has repeatedly cited *Jacobson* in abortion cases without once suggesting that abortion is the only right exempt from limitation during a public health emergency. In sum, by refusing even to consider *Jacobson*—the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures—the district court "clearly and indisputably erred." *JPMorgan Chase*, 916 F.3d at 500 (quoting *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000)) (emphasis omitted). Under our precedents, that alone is enough to satisfy the second

mandamus prong. *See Itron*, 883 F.3d at 568 (petitioners had a "clear and indisputable right to the writ" because failure to apply the proper legal standard was "obvious" error); *see also In re Ford Motor Co.*, 591 F.3d 406, 415 (5th Cir. 2009) (granting writ where "[i]t was patently erroneous for the [district] court to ignore . . . binding precedent").

2.

Moreover, the district court's refusal to acknowledge or apply *Jacobson*'s legal framework produced a "patently erroneous" result. *JPMorgan Chase*, 916 F.3d at 500 (quoting *Lloyd's Register*, 780 F.3d at 290). Under *Jacobson*, the district court was empowered to decide only whether GA-09 lacks a "real or substantial relation" to the public health crisis or whether it is "beyond all question, a plain, palpable invasion" of the right to abortion. 197 U.S. at 31. On the record before us, the answer to both questions is no, but the district court did not even ask them. Instead, the court bluntly declared GA-09 an "outright ban" on pre-viability abortions and exempted all abortion procedures, in whatever circumstances, from the scope of this emergency public health measure. That was a patently erroneous result.[19]

a.

The first *Jacobson* inquiry asks whether GA-09 lacks a "real or substantial relation" to the crisis Texas faces. *Id.* The answer is obvious: the district court itself conceded that GA-09 is a valid emergency response to the COVID-19 pandemic. The court recognized, as does everyone involved, that

[19] Although not necessary to our decision, we note that the district court purported to enjoin GA-09 as to *all* abortion providers in Texas. But Respondents are only a subset of Texas abortion providers and did not sue as class representatives. The district court lacked authority to enjoin enforcement of GA-09 as to anyone other than the named plaintiffs. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (explaining "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"). The district court should be mindful of this limitation on federal jurisdiction at the preliminary injunction stage.

Texas faces a public health crisis of unprecedented magnitude and that GA-09 "does not exceed the governor's power to deal with the emergency." App. 268. Our own review of the record easily confirms that conclusion. GA-09 is supported by findings that (1) "a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster," and (2) "hospital capacity and personal protective equipment are being depleted by surgeries and procedures that are not medically necessary to correct a serious medical condition or to preserve the life of a patient." App. 34. The order also references, and reinforces, the Governor's prior executive order, GA-08, "aimed at slowing the spread of COVID-19." *Id.*[20] Accordingly, GA-09 instructs licensed health care professionals and facilities to postpone non-essential surgeries and procedures until 11:59 p.m. on April 21, 2020. App. 35. For their part, Respondents appear to concede the validity of GA-09 as a general matter: they recognize that Texas faces an "unprecedented public health crisis" and that "[g]overnment officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE." ECF 53 at 3.

To be sure, GA-09 is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as

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[20] Tex. Exec. Order No. GA-08 (Mar. 19, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL _03-19-2020_1.pdf. The dissent is therefore mistaken that GA-09 "was not adopted to serve th[e] interest" in preventing the spread of COVID-19. Dissent at 12.

appropriate and even necessary responses to the present crisis. So, too, GA-09. As the state's infectious disease expert points out, "[g]iven the risk of transmission in health care settings" there is "a sound basis for limiting all surgeries except those that are immediately medically necessary so as to prevent the spread of COVID 19." App. 242. In sum, it cannot be maintained on the record before us that GA-09 bears "no real or substantial relation" to the state's goal of protecting public health in the face of the COVID-19 pandemic. *Jacobson*, 197 U.S. at 31.

b.

The second *Jacobson* inquiry asks whether GA-09 is "*beyond question*, in palpable conflict with the Constitution." *Id.* (emphasis added). The district court, while not framing the question in those terms, evidently thought the answer was yes. But the court reached that conclusion only by grossly misreading GA-09 as an "outright ban" on all pre-viability abortions. Properly understood, GA-09 merely postpones certain non-essential abortions, an emergency measure that does not plainly violate *Casey* in the context of an escalating public health crisis. As we explain below, however, Respondents will have the opportunity to show at the upcoming preliminary injunction hearing that certain applications of GA-09 *may* constitute an undue burden under *Casey*, if they prove that, "beyond question," GA-09's burdens outweigh its benefits in those situations. *See Hellerstedt*, 136 S. Ct. at 2309.

To begin with, the district court's central (and only) premise—that GA-09 is an "outright ban" on all pre-viability abortions—is plainly wrong. The court reasoned that GA-09 was by definition invalid in light of our decisions in *Jackson II* and *Jackson III*, which recognize states cannot ban pre-viability abortions. App. 267–68. But GA-09 only delays certain non-essential abortions. GA-09 thus differs from the regulations in *Jackson II* and *III* in three key respects. First, GA-09 expires on April 21, 2020, three weeks after its effective

date. Tex. Gov't Code Ann. § 418.012. Second, GA-09 includes an emergency exception for the mother's life and health, based on the determination of the administering physician. App. 30; App. 35. Third, GA-09 contains a separate exception for "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." App. 35. These characteristics, which the district court failed to mention,[21] place GA-09 in stark contrast with the restrictions in *Jackson II* and *III*.

Jackson II invalidated Mississippi's ban on abortions after fifteen weeks, with narrow exceptions for "medical emergenc[ies]" and "severe fetal abnormalit[ies]." 945 F.3d at 269 (citations omitted). The state "conceded that it had identified no medical evidence that a fetus would be viable at 15 weeks." *Id.* at 270. We invalidated the law as "a prohibition on pre-viability abortion." *Id.* at 272–73. Mississippi also enacted Senate Bill 2116, which criminalized abortion "after a 'fetal heartbeat has been detected,'" *Jackson Women's Health Org. v. Dobbs [Jackson III]*, 951 F.3d 246, 248 (5th Cir. 2020) (citation omitted), something that "can occur anywhere between six and twelve weeks." *Id.* The only exceptions were for "death of, or serious risk of 'substantial and irreversible' bodily injury to" the mother. *Id.* (citation omitted). We invalidated the law in a one-page per curiam opinion relying principally on *Jackson II*. *Id.*

Mississippi's now-invalid laws are quite different from GA-09. First, both were permanent, whereas GA-09 expires in just a few weeks.[22] The expiration

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[21] The district court's only allusion to the scope of GA-09 was its statement that the order "either bans all *non-emergency* abortions in Texas or bans all *non-emergency* abortions in Texas starting at 10 weeks of pregnancy." App. 267–68 (emphasis added). But the district court did not mention GA-09's expiration date, nor cite, quote, or discuss GA-09's exceptions.

[22] Respondents imply that GA-09 is effectively indefinite in duration. For example, they claim that "[f]or many women, the denial of access to abortion will be permanent . . . given the uncertain duration of the emergency." But the district court did not temporarily restrain some indefinite regulation; it restrained GA-09, which by all accounts expires on

date makes GA-09 a delay, not a ban, and also shows GA-09 is reasonably tailored to the present crisis. "The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes," even those—such as parental consent laws—that "in practice can occasion real-world delays of several weeks." *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (en banc) (mem.) (Kavanaugh, J., dissenting). Second, Mississippi's laws contained narrower medical exceptions than GA-09. The fifteen-week ban exempted only "medical emergenc[ies]" and "severe fetal abnormalit[ies]." *Jackson II*, 945 F.3d at 269. The fetal-heartbeat law exempted only abortions that would prevent the mother's death or "substantial and irreversible" bodily injury. *Jackson III*, 951 F.3d at 248. GA-09, by contrast, contains a broader exception: it allows procedures that are "immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death." App. 35. It also separately exempts procedures that, if performed under accepted clinical standards, would not deplete needed medical resources. *Id.*

GA-09 also vests far more discretion in physicians to determine whether the life-or-health exception is met. The fifteen-week ban in *Jackson II* required a "good faith clinical judgment" of a medical emergency, Miss. Code Ann. § 41-41-191(3)(j), and the physician's "reasonable medical judgment" of a qualifying fetal abnormality, *id.* § 41-41-191(3)(h). The fetal-heartbeat law required the physician to "declare in writing, under penalty of perjury," that the abortion

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April 21, 2020. App. 35. If anything, Respondents' concern about the indefinite duration "of the emergency" serves to strengthen Petitioners' position that "extraordinary measures" must be taken now to mitigate the "'exponential increase' in COVID-19 cases . . . expected over the next few days and weeks." ECF 2 at 6.

met the exception, *id.* § 41-41-34.1(2)(b)(ii). Here, GA-09 merely states that the health exception attaches "as determined by the patient's physician." App. 35. There are no statutory requirements confining the physician's judgment, and the physician need not report his determination to the state.

Properly understood, then, GA-09 is a temporary postponement of all non-essential medical procedures, including abortion, subject to facially broad exceptions. Because that does not constitute anything like an "outright ban" on pre-viability abortion, GA-09 "cannot be affirmed to be, *beyond question*, in palpable conflict with the Constitution." *Jacobson*, 197 U.S. at 31 (emphasis added). As already discussed, the Supreme Court's abortion cases have repeatedly cited *Jacobson* to demarcate the limits states may place on abortion. *See Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 857; *Carhart*, 550 U.S. at 163. GA-09 is, without question, one such limit. The order is a concededly valid public health measure that applies to "all surgeries and procedures," App. 35, does not single out abortion, and merely has the effect of delaying certain non-essential abortions. Moreover, the order has an exemption for serious medical conditions, comporting with *Jacobson*'s requirement that health measures "protect the health and life" of susceptible individuals. *Jacobson*, 197 U.S. at 39. Indeed, the exemption in GA-09 goes well beyond the exceptions for "[e]xtreme cases" *Jacobson* discussed. *Id.* In sum, *Jacobson* offers no basis for the district court's conclusion that abortion rights merit an across-the-board exemption from an measure like GA-09. To find otherwise "would practically strip the [executive] department of its function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37.

Moreover, due to its mistaken view that GA-09 "bans" pre-viability abortions, the district court failed to analyze GA-09 under *Casey*'s undue-burden test. App. 268. This was error. Under *Casey*, courts must ask whether an abortion restriction is "undue," which requires "consider[ing] the burdens a

law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2310, 2309–10 (discussing *Casey*, 505 U.S. at 887–98). The district court was required to do this analysis—that is, it should have asked whether GA-09 imposes burdens on abortion that "beyond question" exceed its benefits in combating the epidemic Texas now faces. *Jacobson*, 197 U.S. at 31. But that analysis would have required careful parsing of the evidence. *See Hellerstedt*, 136 S. Ct. at 2310 (*Casey* "place[s] considerable weight upon evidence . . . presented in judicial proceedings"). Any consideration of the evidence, however, is entirely absent from the district court's order.

For example, the district court did not consider whether different methods of abortion may consume PPE differently. Our own review of the record, at this preliminary stage, reveals considerable evidence that surgical abortions consume PPE.[23] By contrast, the record is unclear how PPE is consumed in medication abortions.[24] Nor did the district court consider

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[23] For instance, Respondents' complaint states that clinicians use "gloves, a surgical mask, and protective eyewear" for surgical abortions. *See* Complaint at ¶ 54 (App. 17). Their declarations similarly attest that surgical abortions consume sterile and non-sterile gloves, masks, gowns, and shoe covers. *See* Southwestern Declaration ¶ 19, App. 86; Fort Worth and McAllen Declaration ¶ 10, App. 91–92; PPGTSHS Declaration, ¶ 12, App. 117; Austin Women's Declaration ¶ 11, App. 110. Second-trimester abortions require more extensive PPE, including face shields. *See, e.g.,* Southwestern Declaration ¶ 19, App. 86; Austin Women's Declaration ¶ 11, App. 110. After a surgical abortion, a provider examines the fetal tissue in a pathology laboratory, which requires a gown, face shield or goggles, shoe covers, and gloves. *See* Fort Worth and McAllen Declaration ¶ 12, App. 092; WWHA Austin Declaration ¶ 15, App. 100.

[24] Respondents assert PPE is not used in "providing the pills" for medication abortions, ECF 53 at 31, whereas Petitioners counter that, for medication abortions, Texas requires a physical examination, ultrasound, and follow-up visits—all of which consume PPE. ECF 67 at 7–8; ECF 2 at 17–18. *See also* Tex. Health & Safety Code § 171.063(c) (requiring physician to examine pregnant woman before prescribing "an abortion-inducing drug"); Tex. Health & Safety Code § 171.012(a)(4) (requiring patient receive ultrasound during initial examination); Tex. Health & Safety Code § 171.063(e)–(f) (requiring follow-up appointment to ensure abortion complete); 25 Tex. Admin. Code 139.53(b)(4) (same). Petitioners also point out that some number of medication abortions result in incomplete abortions that require

whether Respondents could prove that GA-09 infringes abortion rights in specific contexts. For example, in their stay opposition, Respondents argue that GA-09 cannot apply to "patients whose pregnancies will, before the expiration of the stay, reach or exceed twenty-two weeks LMP ["last menstrual period"], the gestational point at which abortion may no longer be provided in Texas." ECF 30 at 21 (brackets added). As Petitioners point out, if competent evidence shows that a woman is in that position, nothing prevents her from seeking as-applied relief. ECF 2 at 22 n.28.

We do not decide at this stage, however, whether an injunction narrowly tailored to particular circumstances would pass muster under the *Jacobson* framework. *See*, *e.g.*, *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) ("A district court abuses its discretion if it does not narrowly tailor an injunction to remedy the specific action which gives rise to the order." (citation and internal quotations omitted)). These are issues that the parties may pursue at the preliminary injunction stage, where Respondents will bear the burden to prove, "by a clear showing," that they are entitled to relief. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Wright, Miller, & Kane, Fed. Prac. & Proc. § 2948 (2nd ed. 1995)); *cf. Ayotte v. Planned Parenthood*, 546 U.S. 320, 331 (2006) (injunction should be tailored to "[o]nly [the] few applications" of challenged statute that "would present a constitutional problem"). Our overarching point here is that the district court did not even apply *Casey*'s undue-burden test and thus failed to weigh GA-09's

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hospitalization. ECF 2 at 18; ECF 67 at 7–8; *see also* American College of Obstetricians and Gynecologists, Clinical Guidelines: Medical management of first-trimester abortion, 89 Contraception 148, 149 (2014), https://www.contraceptionjournal.org/article/S0010-7824(14)00026-2/pdf (estimating "efficacy" of medication abortions using mifepristone). The dissent appears to accept at face value Respondents' representations about how medication abortions consume PPE. *See* Dissent at 11. We think that evidentiary determination is better left to the district court at the preliminary injunction stage.

benefits and burdens in any particular circumstance. The district court therefore lacked any basis for declaring that GA-09 constitutes an across-the-board violation of *Casey*.

In sum, based on this record we conclude that GA-09—an emergency measure that postpones certain non-essential abortions during an epidemic—does not "beyond question" violate the constitutional right to abortion. *Jacobson*, 197 U.S. at 31.

3.

Finally, the district court's extraordinary failure to evaluate GA-09 under the *Jacobson* framework also usurped the state's authority to craft measures responsive to a public health emergency. Such judicial encroachment intrudes on the duties of the "executive arm of Government" and "on a delicate area of federal-state relations," further bolstering Texas's right to issuance of the writ. *Cheney*, 542 U.S. at 381.

In addressing the fourth and final TRO factor—whether a TRO would disserve the public interest—the district court did little more than assert its own view of the effectiveness of GA-09. The district court did not provide any explanation of its conclusion that the public health benefits from an emergency measure like GA-09 are "outweighed" by any temporary loss of constitutional rights. Instead, the court rotely concluded that all injunctions vindicating constitutional rights serve the public interest and that a TRO would "continue the *status quo*." App. 270. With respect, that blinks reality. The *status quo* Texas faces, along with the rest of the nation, is a public health crisis that is making once-in-a-lifetime demands on citizens, government, industry, and the medical profession. Where there is a *status quo* to preserve, it is certainly true that an injunction does "not disserve the public interest [if] it will prevent constitutional deprivations." *Jackson Women's Health Org. v. Currier [Jackson I]*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). But the essence of equity is the ability

to craft a particular injunction meeting the exigencies of a particular situation. "Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Thus, a court must at the very least weigh the potential injury to the public health when it considers enjoining state officers from enforcing emergency public health laws. A single conclusory statement that does not explain this balancing falls far short.

Instead of doing any of this, the district court substituted its *ipse dixit* for the Governor's reasoned judgment, bluntly concluding that "[t]he benefits of a limited potential reduction in the use of some personal protective equipment by abortion providers is outweighed by the harm of eliminating abortion access in the midst of a pandemic that increases the risks of continuing an unwanted pregnancy." App. 270. Respondents—as well as our dissenting colleague—share this view. ECF 53 at 2, 17–21; Dissent at 11–12.

As *Jacobson* repeatedly instructs, however, if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. "It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. Such authority properly belongs to the legislative and executive branches of the governing authority. In light of the massive and rapidly-escalating threat posed by the COVID-19 pandemic, "the court would *usurp the functions of another branch of government* if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 28 (emphasis added). The district court's order contravened this principle; Respondents and the dissenting opinion invite us to do the same. We decline to engage in such "unwarranted judicial action." *Will*, 389 U.S. at 95.

To be sure, the judiciary is not completely sidelined in a public health crisis. We have already explained that Respondents may seek more targeted relief, if they can prove their entitlement to it, at the preliminary injunction stage. Additionally, a court may inquire whether Texas has exploited the present crisis as a pretext to target abortion providers *sub silentio*. *See Lawton*, 152 U.S. at 137. Respondents make allegations to that effect, contending that Petitioners are using GA-09 "to exploit the COVID-19 pandemic to achieve their longtime goal of banning abortion in Texas." ECF 53 at 1. Nonetheless, on this record, we see no evidence that GA-09 was meant to exploit the pandemic in order to ban abortion or was crafted "as some kind of ruse to unreasonably delay . . . abortion[s] past the point where a safe abortion could occur." *Garza*, 874 F.3d at 753 n.3 (Kavanaugh, J., dissenting). To the contrary, GA-09 applies to a whole host of medical procedures and regulates abortions evenhandedly with those other procedures. The order itself does not even mention abortion—or any other particular procedure—at all. Instead, it refers broadly to "all surgeries or procedures" that meet its criteria.[25] Respondents point to no evidence that GA-09 applies any differently to abortions than to any other procedure. Nor do they cite any comparable procedures that are exempt from GA-09's requirements. On the other hand, Petitioners produce evidence that myriad other procedures are affected just as abortions are. For example, Petitioners offer a declaration from Dr. Timothy Harstad, M.D., who testified that some cosmetic, bariatric, orthopedic, and gynecologic procedures

[25] The district court relied heavily on the Attorney General's press release of March 23, 2020, which clarified that in the Attorney General's view, the GA-09 "includ[es] abortion providers." App. 31, 264–65. But the district court gave no reason to believe this press release has the force of law. And, in any event, the press release also reads the order to apply "to all surgeries and procedures[,] . . . including routine dermatological, ophthalmological, and dental procedures, as well as . . . orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." App. 30.

"are being suspended" alongside abortions. App. 230–31. Petitioners also point to the fact that the Centers for Medicare & Medicaid Services have recommended postponing several other critical procedures, including endoscopies and colonoscopies, and even some oncological and cardiovascular procedures for low-risk patients.[26] This evidence undermines Respondents' contention that GA-09 exploits the present crisis to ban abortion. Respondents will have the opportunity, of course, to present additional evidence in conjunction with the district court's preliminary injunction hearing scheduled for April 13, 2020. Our decision, however, must be limited to the record before us. Based on that record, we cannot say that GA-09 is a pretext for targeting abortion.

The district court, for its part, did not even purport to engage in the sort of limited pretext inquiry contemplated by cases like *Jacobson* and *Lawton*. Instead, the district court overstepped its proper role and imposed its own judgment about how the COVID-19 pandemic should be handled with respect to abortion.[27] This was a usurpation of the state's power. *Will*, 389 U.S. at 95.

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[26] *See* CMS Adult Elective Surgery and Procedures Recommendations, https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf (last visited April 6, 2020).

[27] Likewise, the dissent contends that "[r]estricting contact between abortion providers and their patients cannot further the goals of GA-09 if the same order permits in-person contact between providers and patients in other settings." Dissent at 13. But this is true of all surgeries and procedures. Nonetheless, in part to "limit[ ] exposure of patients and staff to the virus that causes COVID-19," CMS recommends postponing "non-essential surgeries and other procedures." *See* CMS Adult Elective Surgery and Procedures Reccomendations (Mar. 15, 2020), https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf. GA-09 notes that it follows recommendations from "the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services." And the state's infectious disease expert said that the risk of spreading the virus is real, "especially in the health care setting due to the proximity." Marier Declaration ¶ 6, App. 240. We reiterate that *Jacobson* commands that it is not the court's role "to determine which one of two modes [i]s likely to be most effective for the protection of the public against disease." 197 U.S. at 30.

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In sum, based on the record before us, we conclude that Petitioners have a clear and indisputable right to issuance of the writ, satisfying the second mandamus prong. *Itron*, 883 F.3d at 567.

B.

We now consider whether Petitioners have shown they "have no other adequate means" to obtain the relief they seek. *Cheney*, 542 U.S. at 380. This requirement is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380–81. Mandamus is generally unavailable for review of "district court decisions that, while not immediately appealable, can be reviewed at some juncture." *In re Crystal Power Co.*, 641 F.3d 82, 83 (5th Cir. 2011). "[F]or an appeal to be an inadequate remedy, there must be 'some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.'" *Depuy Orthopaedics*, 870 F.3d at 353 (quoting *Lloyd's Register*, 780 F.3d at 289). In other words, the error claimed must be "truly irremediable on ordinary appeal." *JPMorgan Chase*, 916 F.3d at 499 (cleaned up) (quoting *Depuy*, 870 F.3d at 352–53).

Given the surging tide of COVID-19 cases and deaths, Petitioners have made this showing. In mill-run cases, it might be a sufficient remedy to simply wait until the expiration of the TRO, and then appeal an adverse preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). In other cases, a surety bond may ensure that a party wrongfully enjoined can be compensated for any injury caused. *See* Fed. R. Civ. P. 65(c).

Those methods would be woefully inadequate here. The TRO is set to expire April 13, 2020, two weeks from the date it issued. App. 271. But time is of the essence when it comes to preventing the spread of COVID-19 and conserving medical resources critically needed to care for patients. To illustrate the speed at which the pandemic has been unfolding: As of March 20 there

were, per the WHO's daily report, 234,073 confirmed cases of COVID-19 and 9,840 deaths.[28] As of April 6, there were 1,210,956 confirmed cases, and 67,954 deaths.[29] As of April 1, Texas had 4,544 cases; by April 6, the number had risen to 7,359 cases.[30] That number will undoubtedly rise substantially in coming days absent successful preventative measures. As the Dallas Morning News wrote on April 1: "The greatest number of cases will come in about a 10-day period that will begin soon."[31] On April 2, Respondents conceded that "[g]overnment officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE[.]" ECF 53 at 3. Respondents also concede that surgical abortions consume PPE, such as "gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, and . . . shoe covers." *Id.* at 6. Moreover, abortion is a common procedure: the evidence shows 53,843 total abortions—36,793 of those surgical—were performed in Texas in 2017. App. 222. In sum, were Petitioners required to wait and appeal an adverse preliminary injunction, the harms from a broad suspension of GA-09 for all abortion procedures could not "be put back in the bottle." *Volkswagen*, 545 F.3d at 319.

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[28] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 60 (March 20, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200320-sitrep-60-covid-19.pdf?sfvrsn=d2bb4f1f_2.

[29] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 77 (April 6, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200406-sitrep-77-covid-19.pdf?sfvrsn=21d1e632_2.

[30] Johns Hopkins University & Medicine Coronavirus Resource Center, Coronavirus COVID-10 Global Cases, https://coronavirus.jhu.edu/map.html (last visited April 6, 2020).

[31] Steven Gjerstad, *U.S. cases of COVID-19 will peak in a couple of weeks; Only social distancing will break the virus*, DALLAS MORNING NEWS (April 1, 2020), https://www.dallasnews.com/opinion/commentary/2020/04/01/us-cases-of-covid-19-will-peak-in-a-couple-of-weeks-only-social-distancing-will-break-the-virus/

The error would be "truly irremediable" through ordinary appeal. *JPMorgan Chase*, 916 F.3d at 499 (cleaned up).[32]

We therefore conclude no other adequate means exist for Petitioners to obtain the relief they seek, thus satisfying the first mandamus prong.

C.

Finally, we must decide whether to exercise our discretion to issue the writ. *See Gee*, 941 F.3d at 170. "Discretion is involved in defining both the circumstances that justify exercise of writ power and also the reasons that may justify denial of a writ even though the circumstances might justify a grant." 16 WRIGHT & MILLER, *supra*, § 3933. "The longstanding view is that discretion to issue the writs should be exercised only in special cases . . . ." *Id.*

We are persuaded that this petition presents an extraordinary case justifying issuance of the writ. First, as we have noted, the current global pandemic has caused a serious, widespread, rapidly-escalating public health crisis in Texas. Petitioners' interest in protecting public health during such a time is at its zenith. In the unprecedented circumstances now facing our society, even a minor delay in fully implementing the state's emergency measures could have major ramifications because, as the evidence shows, an

[32] Federal courts of appeals have issued writs of mandamus to vacate TROs in a number of less-urgent scenarios. *See, e.g.*, *In re King World Prods., Inc.*, 898 F.2d 56 (6th Cir. 1990) (vacating TRO enjoining news organization from broadcasting video recording); *Truck Drivers Local Union No. 807, Int'l Bhd. of Teamsters v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976) (vacating TRO enjoining Board from conducting unfair labor practice proceedings); *O'Neill v. Battisti*, 472 F.2d 789 (6th Cir. 1972) (vacating TRO enjoining Ohio Supreme Court from enforcing its own disciplinary order or taking further disciplinary action against state judge). *A fortiori*, mandamus is an appropriate mechanism for challenging the TRO in the present case, which restrains Petitioners from fully implementing emergency public health measures in a time of unprecedented crisis.

"exponential increase in COVID-19 cases is expected over the next few days and weeks." App. 224–25. It is hard to imagine a more urgent situation.

Second, the district court's refusal to acknowledge the governing framework from *Jacobson* was a clear abuse of discretion that produced a patently erroneous result: bestowing on abortion providers a blanket exemption from a generally-applicable emergency public health measure. Not stopping there, the district court usurped the power of state authorities by passing judgment on the wisdom and efficacy of those emergency measures. These are "extraordinary" errors. *See Volkswagen*, 545 F.3d at 318.

Third, "writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." *Id.* at 319. While unclear how long the current crisis will last, it is probable that other legal disputes will arise pitting claims of private rights against the states' authority to preserve public health and safety. Indeed, 34 states plus the District of Columbia have filed amicus briefs in this case, demonstrating the widespread importance of the issues involved. We also view the "sheer magnitude" of the district court's error and its effect on the state's ongoing emergency efforts to slow COVID-19 as evidence that the "safety valve" of mandamus is appropriate. *Itron*, 883 F.3d at 568–69 (cleaned up).

Lastly, we note that this case is distinguishable from our recent decisions in *Gee* and *JPMorgan Chase*, where, in our discretion, we declined to issue writs of mandamus. In *Gee*, we concluded that, even though the district court clearly abused its discretion in failing to undertake the required jurisdictional analysis, mandamus was nevertheless not required because (1) it was unclear what result the district court would reach once it performed the correct analysis, and (2) many of the petitioner's arguments went beyond jurisdiction and challenged the plaintiffs' theory on the merits. *See* 941 F.3d at 170. In light of those considerations, we deemed it imprudent to issue the writ. *Id.* In

JPMorgan Chase, we concluded that the district court's error, while significant, was not "clear and indisputable" because it "followed numerous others" who had made the same mistake. 916 F.3d at 504.

We confront vastly different circumstances here. To begin with, unlike in *Gee*, the district court addressed the merits of Respondents' claim, though it did so in a manner that overlooked the controlling framework and produced patently erroneous results. *See Volkswagen*, 545 F.3d at 319. Given the severe time constraints here, we do not have the luxury to wait and see what approach the district court might take on the merits. Second, unlike in *JPMorgan Chase*, the district court's decision here did not align with "numerous" other courts which had confronted the same issue. To the contrary, the district court cited not a single case addressing restrictions on abortion during a public health crisis. Therefore, "we are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate." *Volkswagen*, 545 F.3d at 319.

For those reasons, we exercise our discretion to issue a writ of mandamus. *See Cheney*, 542 U.S. at 381.

IV.

The petition for writ of mandamus is GRANTED, directing the district court to vacate the TRO entered on March 30, 2020. Petitioners' emergency motion to stay the TRO pending resolution of their mandamus petition is DENIED AS MOOT. Our temporary stay of March 31, 2020, is LIFTED. Any future appeals or mandamus petitions in this case will be directed to this panel and will be expedited. *Gee*, 941 F.3d at 173; *In re First South Sav. Ass'n*, 820 F.2d 700, 716 (5th Cir. 1987). The mandate shall issue forthwith.

JAMES L. DENNIS, dissenting.

Eight days ago, the district court temporarily restrained Texas's temporary ban of all medication abortions and procedural abortions. "The benefits of a limited potential reduction in the use of some personal protective equipment by abortion providers," the district court explained, "is outweighed by the harm of eliminating abortion access in the midst of a pandemic that increases the risks of continuing an unwanted pregnancy, as well as the risks of travelling to other states in search of time-sensitive medical care." Other states, including Oklahoma,[1] Alabama,[2] and Ohio,[3] have attempted to limit a woman's access to abortion during the COVID-19 pandemic. Thus far, none of those attempts has been successful in the face of a constitutional challenge, either in the district courts or on appeal. *South Wind Women's Center LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2 (W.D. Okla. Apr. 6, 2020) ("[W]hile the current public health emergency allows the state of Oklahoma to impose some of the cited measures *delaying* abortion procedures, it has acted in an 'unreasonable,' 'arbitrary' and 'oppressive' way—and imposed an 'undue

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[1] Okla. Exec. Order No. 2020-07 (Mar. 24, 2020), https://www.sos.ok.gov/documents/executive/1919.pdf; Press Release, Office of the Oklahoma Governor, Governor Stitt Clarifies Elective Surgeries and Procedures Suspended under Executive Order (Mar. 27, 2020), https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries ("[A]ny type of abortion services . . . which are not a medical emergency . . . or otherwise necessary to prevent serious health risks to the unborn child's mother are included in that Executive Order.")

[2] Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (Mar. 27, 2020), https://governor.alabama.gov/assets/2020/03/Amended-Statewide-Social-Distancing-SHO-Order-3.27.2020-FINAL.pdf; *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1520243, at *1 (M.D. Ala. Mar. 30, 2020) (explaining that the Alabama state's attorney "in his oral representations on the record, took the position that the March 27 order requires the postponement of *any* abortion that is not medically necessary to protect the life or health of the mother").

[3] Ohio Department of Health, RE: Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio (Mar. 17, 2020); *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, slip op. at 2-3 (S.D. Ohio Mar. 30, 2020) (stating that Ohio's attorney general sent letters to abortion providers citing the Director's Order and they must "immediately stop performing non-essential and elective surgical abortions").

burden' on abortion access—in imposing requirements that effectively *deny* a right of access to abortion. Further, the court concludes 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."); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1520243, at *2 (M.D. Ala. Mar. 30, 2020) ("Because Alabama law imposes time limits on when women can obtain abortions, the March 27 order is likely to fully prevent some women from exercising their right to obtain an abortion. And for those women who, despite the mandatory postponement, are able to vindicate their right, the required delay may pose an undue burden that is not justified by the State's purported rationales."); *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, slip op. at 7 (S.D. Ohio Mar. 30, 2020) ("Defendants have not demonstrated to the Court, at this point, that Plaintiffs' performance of these surgical procedures will result in any beneficial amount of net saving of PPE in Ohio such that the net saving of PPE outweighs the harm of eliminating abortion."), *appeal dismissed*, No. 20-3365 (6th Cir. Apr. 6, 2020). The American College of Obstetricians and Gynecologists released a statement that "abortion should not be categorized" as a "procedure[] that can be delayed during the COVID-19 pandemic."[4] The statement emphasized, as the district court did, that abortion is "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible."

Today, the majority concludes that allowing women in Texas access to time-sensitive reproductive healthcare, a right supported by almost 50 years of Supreme Court precedent, was a "patently erroneous" result that must be

[4] *Joint Statement on Abortion Access During the COVID-19 Outbreak*, THE AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGISTS (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

remedied by "one of the most potent weapons in the judicial arsenal." *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 504 (5th Cir. 2019) (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Unfortunately, this is a recurring phenomenon in this Circuit in which a result follows not because of the law or facts, but because of the subject matter of this case. *See June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 835 (5th Cir. 2018) ("[W]hen abortion shows up, application of the rules of law grows opaque." (Higginbotham, J., dissenting)), *cert. granted*, 140 S. Ct. 35 (2019)). For the reasons that follow, I dissent.

I.

On March 22, 2020, Texas Governor Greg Abbott signed Executive Order GA-09 ("GA-09") to expand hospital bed capacity as the state responds to the COVID-19 virus. The Executive Order, which "ha[s] the force and effect of law," TEX. GOV'T CODE ANN. § 418.012 (West 2019), states that until 11:59 p.m. on April 21, 2020,

> [a]ll licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.[5]

The Executive Order exempts "any procedure 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."

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

The day after the Governor signed GA-09, Texas Attorney General Ken Paxton issued a news release stating that GA-09's prohibition on medically unnecessary surgeries and procedures "applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including . . . any type of abortion that is not medically necessary to preserve the life or health of the mother."[6] The release states that "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time." Paxton emphasized that "[n]o one is exempt from the governor's executive order on medically unnecessary surgeries and procedures, including abortion providers," and "[t]hose who violate the governor's order will be met with the full force of the law."

Several organizations that provide abortion services in Texas and a board-certified family medicine physician who provides abortion care (collectively, "Respondents") brought an action in the Western District of Texas under 42 U.S.C. § 1983, challenging GA-09 and the Texas Medical Board's emergency amendment to Title 22 Texas Administrative Code section 187.57, which imposes the same requirements. Respondents moved for a temporary restraining order ("TRO") to enjoin enforcement of GA-09 and the Emergency Rule insofar as they purport to ban all medication abortions and procedural abortions, as the attorney general's news release suggests.

I include this explanation not to reiterate the procedural history the majority has already explained, but to emphasize what exactly we are reviewing. Respondents brought a constitutional challenge to GA-09, and

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[6] News Release, Office of the Texas Attorney General, 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 (Mar. 23, 2020), https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all.

though the attorney general's interpretation of that order constitutes the crux of the constitutional issues present in this case, it is GA-09 and only GA-09 that we are interpreting. The majority agrees that the attorney general's news release interpreting GA-09 is not legally binding. Maj. Op. at 25 n.22. The attorney general cannot modify the text of the governor's executive order through his news release; only the governor has the power to "issue executive orders . . . [that] have the force and effect of law." TEX. GOV'T CODE ANN. § 418.012. And GA-09 grants abortion providers the power to determine whether a procedure is "immediately medically necessary to correct a serious medical condition of . . . a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences." It also permits an exception for any abortion 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."

The attorney general's news release interprets GA-09 to ban "any type of abortion that is not medically necessary to preserve the life or health of the mother," regardless, apparently, of whether such a procedure (1) in the view of the patient's physician, is immediately medically necessary and would put a patient at risk for serious adverse medical consequences if not performed, or (2) would fall under GA-09's exception for procedures that do not utilize PPE or deplete hospital capacity.

II.

The district court granted Respondents' TRO, halting enforcement of GA-09 insofar as it bans all procedural and medication abortions. Petitioners seek a writ of mandamus to remedy what they describe as a "clearly and indisputably erroneous" decision. The Supreme Court and this court have repeatedly emphasized that mandamus is an "extraordinary remedy" to be

exercised only in "exceptional circumstances." *See Cheney*, 542 U.S. at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)); *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 288, 294 (5th Cir. 2015); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309, 311 (5th Cir. 2008). To obtain relief, Petitioners "must do more than prove merely that the court erred." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). "The traditional use of the writ . . . has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (alteration omitted) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). Its use is justified in "only exceptional circumstances amounting to a judicial 'usurpation of power,' or a 'clear abuse of discretion.'" *Id.* (quoting *Will*, 389 U.S. at 95; *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

Mandamus relief generally requires that (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (internal quotation marks and citations omitted).

Under the "clear and indisputable" prong, *id.*, Petitioners must show the district court's determination was a "clear abuse[] of discretion that produce[d] patently erroneous results." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d at 290 (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d at 312). Both conditions—clear abuse of discretion and a patently erroneous result—must be met to obtain mandamus relief. *See id.*

The majority concludes that the district court clearly erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and

its result, allowing medication and procedural abortions to proceed, was patently erroneous. It also concludes that "the court usurped the power of the governing state authority when it passed judgment on the wisdom and efficacy of those emergency measures, something squarely foreclosed by *Jacobson*." Maj. Op. at 9-10. For several reasons, the majority is wrong.

III.

In *Jacobson*, the city of Cambridge, Massachusetts, pursuant to state statute, passed a regulation requiring all of its citizens to receive a smallpox vaccination to combat a smallpox outbreak. 197 U.S. at 12. Jacobson challenged the regulation, arguing that it violated his Fourteenth Amendment right "to care for his own body and health in such a way as to him seems best." *Id.* at 26. The Court explained that the state's action in compelling vaccination was an exercise of its police power, which "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25. In rejecting Jacobson's constitutional challenge, the Court explained "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others." *Id.* at 26-27. The Court explained, however, that individual rights are not gutted during a crisis: Courts have a duty to review a state's exercise of their police power where the state's action (1) goes "beyond the necessity of the case, and, under the guise of exerting a police power . . . violate[s] rights secured by the Constitution," (2) "has no real or substantial relation to" "protect[ing] the public health, the public morals, or the public safety," or (3) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 28, 30. *Jacobson*, then, stands for the proposition that a state by its legislature may utilize its police power to enact laws to protect the public health and safety,

even though such laws may impose restraints on citizens' liberties, so long as that regulation is "justified by the necessities of the case" and does not violate rights secured by the Constitution "under the guise of exerting a police power." *Id.* at 28-29.

A.

This case is clearly distinguishable from *Jacobson*. There, the city required its citizens to get a smallpox vaccine to stop the spread of a smallpox outbreak. The measure adopted by the city related directly to the public health crisis—every citizen who did not receive the vaccine could actively spread the disease, and therefore mandatory vaccination actively curbed the disease's spread. The thread connecting GA-09 to combatting COVID-19 is more attenuated—premised not on the idea that abortion providers are spreading the virus, but that their continuing operation requires the use of resources that should be conserved and made available to healthcare workers fighting the outbreak. This reasoning requires the additional link that those PPE resources denied to abortion providers are indeed conserved, are significant in amount, and can realistically be reallocated to healthcare workers fighting COVID-19, a showing that Petitioners have not made.

B.

The majority claims that "*Jacobson* disclaimed any judicial power to second-guess the policy choices made by the state in crafting emergency public health measures." Maj. Op. at 12. But the Court did not conclude that an emergency situation deprives courts of their duty and power to uphold the constitution—quite the opposite, in fact.

The Court in *Jacobson* determined that the Massachusetts law should not be invalidated because "[s]mallpox being prevalent and increasing in Cambridge, the court would *usurp the functions of another branch of government* if it adjudged, as a matter of law, that the mode adopted under the

sanction of the state, to protect the people at large was arbitrary, and not justified *by the necessities of the case*." *Jacobson*, 197 U.S. at 28 (emphases added). The Court certainly did not disclaim any power to so rule, under appropriate circumstances, however, explaining:

> We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Id. The Court in *Jacobson* also explained that it had previously "recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, [and] health . . . within its limits." *Id.* (citing *Hannibal & St. J.R. Co. v. Husen*, 95 U. S. 465, 471-73 (1877)). While states have the right to pass such laws, the Court explained, the courts have a "duty to hold . . . invalid" laws that "went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution." *Id.*

Thus, the Court clearly anticipated that courts would exercise judicial oversight over a state's decision to restrict personal liberties during emergencies. *See id.* *Jacobson* merely acknowledged that what is reasonable during an emergency is different from what is reasonable under normal circumstances, and that courts must not act as super-executives in an emergency. Given the language of *Jacobson*, then, the Court was concerned with both what the majority focuses on—the state's ability to adequately protect its citizens during a public health crisis—and what the majority ignores—the courts' ability to protect citizens' constitutional rights when

states attempt to unjustifiably seize and wield power in the name of the health and safety.

Therefore, *Jacobson* reaffirms the district court's duty, and our duty, "to hold [GA-09] invalid" if it (1) goes "beyond the necessity of the case, and, under the guise of exerting a police power . . . violate[s] rights secured by the Constitution," (2) "has no real or substantial relation to" "protect[ing] the public health, the public morals, or the public safety," or (3) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *See id.* at 28, 30.

IV.

After concluding that the district court clearly abused its discretion in not relying on *Jacobson*, the majority determines that this error produced a patently erroneous result. Maj. Op. at 15-23. The majority claims that the district court's conclusion that GA-09 amounts to a previability ban is patently erroneous. Maj. Op. at 17. In my view, this "conclusion" does not accurately characterize the "result" of the district court's order. *See In re Volkswagen of Am., Inc.*, 545 F.3d at 310 ("[W]e only will grant mandamus relief when such errors produce a patently erroneous *result*." (emphasis added)). The result of the district court's order is to uphold women's rights to abortions and to allow medical and procedural abortions to proceed. That result is not patently erroneous and therefore does not warrant mandamus relief. Contrary to the majority's view, nothing in *Jacobson* or any of the Supreme Court's cases requires a different result.

A.

The goals of GA-09 are furthered by restricting abortions, according to Petitioners, because abortions: (1) "reduce[] the scarce supply of PPE available to healthcare providers treating COVID-19 patients," (2) "result[] in the

hospitalization of women," reducing hospital capacity for COVID-19 patients, and (3) "contribute[] to the spread of the COVID-19 virus."

Though GA-09 does not define PPE, Respondents explain that the term is generally understood to refer to N95 respirators, surgical masks, non-sterile and sterile gloves, and disposable protective eyewear, gowns, and hair and shoe covers. In response to Petitioners' argument that abortions will deplete PPE necessary for healthcare providers treating COVID-19 patients, Respondents contend that abortions utilize little or no PPE and that abortions are time-sensitive procedures.

Regarding the first point, whether an abortion takes no PPE or some PPE depends on the type of procedure. Procedural abortions in Texas are single-day procedures that, unlike surgeries, require no hospital bed, incision, general anesthesia, or sterile field. During the procedure, the providers use PPE such as gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, and hair and shoe covers. Most Respondents do not have N95 respirators, and those that do have only a small supply that they rarely, if ever, use. Medication abortions, which involve only taking medications by mouth, require no PPE to administer the medication, and may require the use of gloves only at pre- and post-procedure appointments, depending on the circumstances. Petitioners identify no other treatment through oral medication that would be affected by GA-09.

Moreover, Respondents point out that Petitioners' PPE conservation argument mistakenly assumes that a patient unable to obtain an abortion will not otherwise need medical care that requires the consumption of PPE. Pregnant patients who cannot access abortion require prenatal care and must often undergo unplanned hospital visits. And to the extent patients are prevented from obtaining abortions altogether, childbirth and delivery require exponentially more PPE than an abortion. Denying pregnant patients access

to abortion now may simply change the purpose for which the PPE is used, without any surplus that is able to be reallocated to healthcare workers treating COVID-19 patients. Other pregnant patients with the resources to do so may choose to seek abortions outside of Texas—a result clearly contrary to Texas's purported goal of avoiding the spread of the virus. GA-09 has already led patients to travel to other states to obtain abortion care in a pandemic, exposing patients and third parties to infection risks. One out-of-state physician stated that he treated 30 abortion patients from Texas in the week after the attorney general's statement.

Petitioners also argue that the abortion restrictions are necessary to preserve hospital capacity, while Respondents point out that legal abortions are safe and almost never require hospitalization, and abortion care is substantially less likely to lead to hospitalization than caring for a patient with respect to full term pregnancy, childbirth, and post-natal care.

Finally, Petitioners argue that GA-09 as understood to ban all abortions provides the benefit of restricting contact between patients, medical staff, and physicians to help prevent the spread of COVID-19. While this may be true, the language of GA-09 reveals that it was not adopted to serve this interest. GA-09 exempts "any procedure . . . that would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." It excludes all forms of medical care save "surgeries and procedures," and therefore does not contemplate restricting any other type of medical care that results in contact between providers and patients. Restricting contact between abortion providers and their patients cannot further the goals of GA-09 if the same order permits in-person contact between providers and patients in other settings.

Petitioners suggest that, in addition to these reasons, "Plaintiffs have identified no substantial burdens that will result from delaying elective

abortions in accordance with [GA-09]." The majority agrees, concluding that "the expiration date makes GA-09 a delay, not a ban." Maj. Op. at 19. But it is painfully obvious that a delayed abortion procedure could easily amount to a total denial of that constitutional right: If currently scheduled abortions are postponed, many women will miss the small window of opportunity they have to access a legal abortion. Texas generally prohibits abortion after twenty-two weeks from the first day of the pregnant person's last menstrual period ("LMP"), *see* TEX. HEALTH & SAFETY CODE § 171.044, and therefore GA-09 has the potential to deny a woman's constitutional right to an abortion where that right will lapse during the duration of GA-09. A woman has only a small window of opportunity to exercise her constitutional right to choose, and therefore Petitioners' action in further narrowing that window will present a burden in many cases.

B.

First, prohibiting abortions for patients whose pregnancies will, before the expiration of GA-09, reach or exceed twenty-two weeks, the gestational point at which abortion may no longer be provided in Texas, represents "a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. Even if such state action is successful in conserving the minimal PPE utilized in such procedures, as applied to this group of people, the state's action constitutes an outright ban on previability abortion, which is "beyond question, in palpable conflict with the Constitution." *Id.*; *id.* at 28 (explaining that a state's police power "might be exercised . . . in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons"); *see Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Insofar as GA-09 applies to this group of women, then, the district court's result in allowing abortions to

proceed was not patently erroneous. *See In re Lloyd's Register N. Am., Inc.*, 780 F.3d at 290.

Second, insofar as GA-09 bans procedural and medication abortions generally, this act "has no real or substantial relation to" Petitioners' stated goal of conserving PPE and maintaining access to hospital beds and therefore it goes "beyond the necessity of the case, and, under the guise of exerting a police power . . . violate[s] rights secured by the Constitution." *See Jacobson*, 197 U.S. at 28, 31. In particular, abortions require minimal PPE (and medication abortions require no PPE to administer the medication), do not require the use of N95 respirator masks, and rarely require hospitalization. And as Respondents point out, the medical resources conserved by prohibiting abortions would simply be otherwise consumed through prenatal care by women forced to continue their pregnancies or incentivize women to travel out of state to obtain abortions, facilitating the spread of the virus. Finally, even assuming that delayed abortions in fact conserve PPE, Respondents have not demonstrated how the PPE could realistically be reallocated to healthcare workers fighting COVID-19.

Petitioners have, therefore, failed to establish that the district court "reached a patently erroneous result" in temporarily restricting Texas's ability to enforce GA-09 insofar as it bans all procedural and medication abortions. *See In re Lloyd's Register N. Am., Inc.*, 780 F.3d at 290. Mandamus relief should be denied.

* * *

The district court's result was supported by nearly 50 years of Supreme Court precedent protecting a woman's right to choose, and as such I would not conclude that it was patently erroneous. In a time where panic and fear already consume our daily lives, the majority's opinion inflicts further panic and fear on women in Texas by depriving them, without justification, of their

constitutional rights, exposing them to the risks of continuing an unwanted pregnancy, as well as the risks of travelling to other states in search of time-sensitive medical care.

I respectfully but emphatically dissent.

Exhibit C

Declaration Mark Hurst, ODH Medical Director

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRETERM-CLEVELAND, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 1:19-cv-00360**
	:	
v.	:	
	:	
OHIO ATTORNEY GENERAL DAVE YOST, et al.	:	
	:	
Defendants.	:	

DECLARATION OF MARK HURST, M.D.

1. I am over 18 years of age, competent to testify in this case, and have personal knowledge of the facts in this declaration.

2. My name is Mark Hurst, and I am the Medical Director at the Ohio Department of Health. My duties include providing clinical consultation to programs at the Ohio Department of Health. I have been in this position since June, 2019. Prior to my appointment to Medical Director, I worked for the Ohio Department of Mental Health and Addiction Services. I was previously Interim Medical Director for at the Ohio Department of Health from December 2016 until November of 2018.

3. I received my Medical Degree from Medical College of Ohio, now known as University of Toledo College of Medicine, in 1985. I completed my residency at Ohio State University Hospital in Psychiatry, and I am Board Certified in Psychiatry and Addiction Psychiatry.

4. COVID-19 has created a crisis for Ohio's healthcare system. A further exponential increase of COVID-19 cases is expected in the coming weeks, threatening the ability of healthcare systems in Ohio to adequately respond to the disease and to other care.

5. In Ohio, 29% of cases of COVID-19 have resulted in hospitalization as of April 7, 2020.

6. An increase in COVID-19 cases can create a surge of patients who require hospitalization, which threatens the availability of personal protective equipment ("PPE") and could overwhelm the capacity of the healthcare system. Required PPE includes gloves, gowns, face/eye protections, N95 masks, and surgical masks. Proper medical practice during this crisis requires extensive use of PPE.

7. It is critical that all healthcare personnel have adequate PPE because this disease due to both symptomatic and asymptomatic patients. Personnel without adequate PPE could unknowingly transmit the disease to many other healthy individuals before becoming symptomatic or contract the disease from others that are not showing symptoms of the disease. If large numbers of healthcare personnel are left unprotected and become sick or die from the virus, that will cause an even greater strain on the healthcare system.

8. The current crisis has already started creating a shortage of PPE in Ohio, and the Ohio Department of Health has received many requests for PPE from facilities in the State.

9. In order to mitigate the shortage, Ohio must decrease the use of PPE throughout the state. Because all healthcare personnel should be using PPE during this crisis due to both the symptomatic and asymptomatic nature of the disease, all medical facilities should eliminate other personal interactions between staff and patients to the fullest extent possible. These drastic measures are essential to limit the demand on PPE so that sufficient supplies are available to address COVID-19.

10. Ohio must also reduce demand on other hospital resources to prepare for the continued increase of COVID-19 cases. In the next phase, Ohio will need to surge its hospital resources to address the crisis. This surge will involve increasing the capacity of existing hospitals, the number of licensed providers, and the amount of PPE available for use. Ohio

can only successfully surge hospital resources when needed if Ohio preserves and reallocates existing resources during the mitigation stage to prepare for the surge.

11. The CDC has issued guidance on optimizing the supply of PPE, and the Centers for Medicare and Medicaid Services ("CMS") has issued recommendations, providing as follows:

> To aggressively address COVID-19, CMS recognizes that conservation of critical healthcare resources is essential, in addition to limiting exposure of patients and staff to the virus that causes COVID-19. CMS also recognizes the importance of reducing burdens on the existing health system and maintaining services while keeping patients and providers safe. CMS, in collaboration with medical societies and associations, recently created recommendations to postpone non-essential surgeries and other procedures. This document provides recommendations to limit those medical services that could be deferred, such as non-emergent, elective treatment, and preventive medical services for patients of all ages."

See https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf.

12. Based on the looming threats from COVID-19 to PPE and the capacity of the healthcare system, and in accordance with the guidance provided by the CDC and CMS, on March 17, 2020, the director of the Ohio Department of Health, Dr. Amy Acton, issued an order temporarily delaying all non-essential or elective surgeries that could decrease the availability of PPE or hospital capacity needed to address the COVID-19 crisis.

13. This Order applies to all non-essential or elective procedures, as it is important to limit the use of scarce PPE that could be reserved for COVID-19 healthcare providers and to avoid unnecessary gatherings of people given the need for social distancing. Delaying non-essential and elective procedures will prevent people from being in hospitals and clinics where at-risk immunocompromised patients may be.

14. Further, non-essential or elective procedures, even if low risk, could result in complications requiring further treatment and hospitalization, thus adding a further strain on Ohio's

healthcare system and the supply of PPE. It is thus critical to prevent as many unnecessary hospitalizations as possible.

15. No particular type of procedure is categorically postponed. The Order contains a non-exhaustive list of examples that a physician may consider, e.g., threat to the patient's life, to determine if surgery or procedure should be performed.

16. The Order is one of many measures the Ohio Department of Health and the State of Ohio are taking to "flatten the curve" and save lives. These measures work cumulatively, and collectively will make a strong impact on curbing this virus.

17. I declare under penalty of perjury that the foregoing is true and correct.

18. Executed on this 8th day of April, 2020.

/s/ *Mark Hurst, MD*

Mark Hurst, M.D.
Medical Director
Ohio Department of Health
Columbus, Ohio

Exhibit D

Declaration of Benjamin Robison, MPH

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

PRETERM-CLEVELAND, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 1:19-cv-00360**
	:	
v.	:	**Judge Michael R. Barrett**
	:	
OHIO ATTORNEY GENERAL DAVE YOST, et al.,	:	
	:	
Defendant.	:	

DECLARATION OF BENJAMIN ROBISON, MPH

I, Benjamin Robison, declare the following:

1. I have a Masters of Public Health degree and have worked at the Ohio Department of Health ("ODH") since September 2015. Outside of COVID-19, I lead the agency's plan development and implementation in response to emergencies. During COVID-19, I am supporting ODH operations at the State Emergency Operations Center ("EOC"), with responsibilities that include allocation of personal protective equipment ("PPE") supplies and medical surge planning.

2. Medical procedures require the use of PPE like masks, gloves, and other materials that protect both healthcare workers and patients. In addition, PPE is also used by law enforcement, emergency medical service and fire department personnel, and long-term care facilities such as nursing homes.

3. The current supply of PPE in Ohio is insufficient to care for the number of patients in Ohio projected to need treatment for Covid-19. There is a direct correlation between the number of new infections and the rate at which PPE is used.

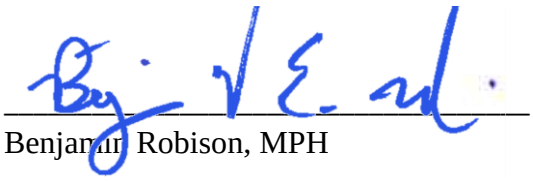
4. There is limited ability to obtain additional PPE due to an international shortage of PPE. Ohio is competing with not only other states and the federal government, but other countries for PPE.

5. Healthcare providers are taking measures to conserve PPE. The purpose of the Director's March 17, 2020 Order prohibiting non-essential surgeries was to preserve PPE.

6. All measures taken now to conserve PPE have the benefit of allowing more PPE to be available to healthcare workers as the number of Covid-19 infections continue to increase. Conserving PPE now will allow time for production and manufacturing of PPE to catch up with the current increase in demand.

7. I declare under penalty of perjury that the foregoing is true and correct.

8. Executed this 8th day of April, 2020.



Benjamin Robison, MPH

Exhibit E

Declaration of Brian Fowler, ODH Chief Data Officer

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

PRETERM-CLEVELAND, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 1:19-cv-00360**
	:	
v.	:	**Judge Michael R. Barrett**
	:	
OHIO ATTORNEY GENERAL DAVE YOST, et al.,	:	
	:	
Defendant.	:	

DECLARATION OF BRIAN FOWLER

I, Brian Fowler, declare the following:

1. I am the Chief Data Officer/Chief of Informatics and Data Management at the Ohio Department of Health. I have served in this role since 2016. I also am head of the analytical team at the Emergency Operations Center ("EOC"). Prior to this, I have served as an Epidemiologist and as a Supervisory Epidemiologist for the Ohio Department of Health since 2000.

2. I received a Bachelor of Arts in biology from Kalamazoo College. I have a Masters in Public Health, with a specialty in epidemiology/public health, from The Ohio State University.

3. I work with the epidemiologists at The Ohio State University that create the modeling for the spread of the COVID-19 virus in Ohio. The modeling showed that if no mitigation measures were taken, there would have been a sharp rise in COVID-19 infection over a short period of time.

4. The modeling also showed that mitigation measures, i.e., social distancing, have slowed the infection rate and lowered the expected number of infections. By slowing the infection rate, this had decreased the daily usage of personal protective equipment ("PPE") required to protect healthcare workers.

5. Other mitigation measures have been taken to conserve PPE, including Dr. Acton's order delaying non-essential and elective surgeries. These mitigation measures are necessary to conserve PPE in the short term and allow manufacturers and suppliers to replenish the PPE supply. If these measures are taken now it will have an impact on protecting healthcare workers in the immediacy of the crisis.

6. I declare under penalty of perjury that the foregoing is true and correct.

7. Executed this 8th day of April, 2020.

Recoverable Signature

X Brian Fowler

Brian Fowler
Chief Data Officer
Signed by: e7060731-6704-4710-8801-ad905771c0de

Brian Fowler
Ohio Department of Health
Columbus, Ohio