No. 20-482

IN THE

Supreme Court of the United States

HERBERT H. SLATERY III, ET AL.,
Petitioners,

v.

ADAMS & BOYLE, P.C., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The court of appeals held that an executive order issued by the Governor of Tennessee in connection with the COVID-19 pandemic, which had the effect of banning all abortions after 11 weeks of pregnancy, was unconstitutional as applied to those procedures. On April 30, 2020, the executive order expired, rendering the case moot.

The question presented is whether this Court should vacate the court of appeals' judgment pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

CORPORATE DISCLOSURE STATEMENT

Respondents Adams & Boyle, P.C., Memphis Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, and Knoxville Center for Reproductive Health do not have parent corporations. No publicly held corporation owns ten percent or more of any Respondent's stock.

Adams & Boyle, P.C., is no longer a plaintiff and has been replaced by Bristol Regional Women's Center P.C. This replacement occurred after the case was closed in the Sixth Circuit. *See* Dist. Ct. Dkt. No. 267 (granting plaintiffs' unopposed motion on June 29, 2020 to replace Adams & Boyle, P.C., with Bristol Regional Women's Center P.C.). Bristol Regional Women's Center P.C. does not have a parent corporation and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

In the spring of 2020, the Governor of Tennessee issued an executive order to respond to the COVID-19 pandemic. The executive order, EO-25, had the effect of banning all abortions after 11 weeks of pregnancy in the State, forcing many patients to travel hundreds of miles across state lines to obtain care—in the midst of a global pandemic—and others to remain pregnant against their will. The order imposed significant health, financial, and emotional costs on patients in Tennessee, and precluded some from having an abortion altogether.

The district court and court of appeals correctly found that EO-25 likely violated the constitutional

rights of patients in Tennessee seeking abortion services, and that the order did not serve the State's asserted goals. The State permitted EO-25 to expire on April 30, 2020, and now seeks vacatur of the judgment below pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Notably, the State does *not* request that this Court grant plenary review to consider the constitutional questions on the merits.

This is one of two pending petitions for certiorari concerning executive orders banning abortions that were issued during the COVID-19 pandemic but expired before challenges to those orders could reach this Court. The other is *Planned Parenthood Center for Choice* v. *Abbott*, No. 20-305 (U.S. Sept. 9, 2020). In that case, the Fifth Circuit twice issued writs of mandamus keeping a Texas executive order analogous to EO-25 in place in full or in part. Before the Texas abortion providers could seek review of those decisions, their appeal was rendered moot when the Governor of Texas replaced the challenged executive order with a new executive order that did not have the same effect on abortion access. The providers there, like the State here, filed a petition for certiorari seeking vacatur pursuant to *Munsingwear*, on the ground that the expiration of the executive order rendered the appeals moot.

There is an important difference between the two petitions, however. In *Abbott*, the providers (the parties seeking vacatur) had no role in causing their appeal to become moot. To the contrary, the mootness was caused by the party that *prevailed* below, making vacatur the only equitable result. Here, by contrast, the equities do not require vacatur in the same way, because the State of Tennessee (the party seeking vacatur) voluntarily relinquished its right to appeal on the

merits by permitting the executive order to expire. Accordingly, no unfairness to the State would result from permitting the court of appeals' decision to stand.

Given the difference in the equities, it would be appropriate for the Court to deny the petition here while granting the petition in *Abbott* and vacating the court of appeals decisions in that case on grounds of mootness. Nonetheless, the providers in this case recognize that the two cases are somewhat similar, the legal landscape may have changed since the decisions here and in *Abbott* were issued, and the Court has in the past vacated as moot court of appeals decisions concerning executive orders that expired prior to review. Accordingly, the Court may choose to vacate the judgment below and in *Abbott* on grounds of mootness.

STATEMENT

A. The COVID-19 Pandemic And EO-25

On April 8, 2020, Tennessee Governor Bill Lee issued EO-25, which stated that "[a]ll healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent." App. 7a. Elective and non-urgent procedures were defined as "those procedures that can be delayed until the expiration of this Order because they are not required to provide life-sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or to prevent rapid deterioration or serious adverse consequences to a patient's physical condition if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider." App. 7a-8a. The stated purpose of EO-25 was to "preserv[e] personal protective equipment [PPE] for emergency

and essential needs and prevent[] community spread of COVID-19." App. 7a. EO-25 took effect on April 9, 2020 and was set to expire on April 30, 2020. App. 56a.

EO-25 banned virtually all procedural (*i.e.*, non-medication) abortions—the only abortion care available after 11 weeks of pregnancy—while the executive order was in effect. EO-25 delayed this time-sensitive care for all patients by at least three weeks, forcing some to obtain longer, more complex procedures that entailed greater risk of complications, and outright banning abortion for those pushed beyond the gestational limit at which abortions are permitted in the State. This abortion ban was imposed despite the fact that the providers had taken measures, consistent with the recommendations of the Centers for Disease Control and Prevention, to use only minimal PPE and to prevent community spread while continuing to ensure timely access to constitutionally protected abortion care for their patients.

B. This Litigation

1. Respondents, who are health care providers offering abortion services in Tennessee, challenged EO-25 on the ground that it violated their patients' constitutional rights, and sought preliminary injunctive relief.[1]

By orders dated April 17 and 21, 2020, the district court enjoined EO-25's application to procedural abortions and denied the State's motion for a stay pending

[1] Rather than file a separate case, respondents moved to supplement the complaint in a preexisting, related case that had been pending in the district court challenging a different abortion restriction in Tennessee.

appeal. App. 52a-78a. The court found that EO-25 would significantly delay patients' access to abortion and prevent some from obtaining such care altogether. App. 61a-67a. The court further found that, while EO-25 was in effect, abortions were unavailable in Tennessee for women who were past 11 weeks of pregnancy and for women whose pregnancies were at earlier gestational stages for whom a medication abortion was contraindicated. App. 63a. After finding the benefits of EO-25's ban on procedural abortions to be speculative and the burdens imposed on patients' constitutional right to abortion significant, the district court concluded that preliminary injunctive relief was warranted. *See* App. 61a-68a, 78a.

2. A divided panel of the court of appeals affirmed, but narrowed the injunction. While fully recognizing the magnitude of the public emergency, the majority held that the State's need for "flexibility" in managing a public health crisis is no basis to subvert "well-established constitutional rights." App. 4a. Finding that EO-25 would function, at best, as a "'delaying regulation'" and, at worst, as an "outright ban on previability abortion," the panel held that EO-25 "would unquestionably be verboten" under this Court's precedents in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992). App. 21a.

The panel went on to assess patients' constitutional interests within the framework of *Jacobson* v. *Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and concluded that *Jacobson* did not "substantially alter" its reasoning. App. 24a. Given that "the State has never, at any point in this litigation, attempted to support its policy choice with expert or medical evidence" and

indeed "every serious medical or public health organization to have considered the issue has said the opposite," the panel held that there was no "'real' and 'substantial' relation" between the abortion ban and "the state's public health goals." App. 24a-26a. Further, the panel explained, "the notion that COVID-19 has … demoted *Roe* and *Casey* to second-class rights … is incompatible … with *Jacobson*[.]" App. 26a.

The panel further agreed with the district court that the remaining factors supported the grant of injunctive relief. App. 28a-31a. However, the panel modified the injunction to apply to three limited categories of patients: (1) those who were likely at risk of losing access to abortion altogether, (2) those who would likely be forced to have a two-day versus one-day procedure, and (3) those who would likely be forced to undergo a lengthier, riskier, and more complex procedure that typically occurs at 14-15 weeks and later. App. 31a-34a.

Judge Thapar dissented. App. 34a-50a.

3. On April 26, 2020, just four days before EO-25 was set to expire, the State sought rehearing en banc. On April 30, 2020, despite the pendency of its petition for rehearing, the State permitted EO-25 to expire. On May 14, 2020, the Sixth Circuit denied the State's petition for rehearing en banc. App. 79a-80a. Five months later, the State filed this petition seeking vacatur of the panel's judgment. Petitioners do not request that this Court grant plenary review to consider the constitutional questions on the merits.

C. The *Abbott* Litigation

On March 22, 2020, Texas Governor Greg Abbott issued Executive Order GA-09, which banned nearly all

abortions in the State, including medication abortions. *See In re Abbott*, 956 F.3d 696, 703-706 (5th Cir. 2020) ("*Abbott II*"). A group of Texas health care providers filed suit challenging the constitutionality of GA-09 and sought preliminary injunctive relief from that order as applied to abortions.

On April 7, 2020, the district court entered a temporary restraining order enjoining enforcement of GA-09, *Planned Parenthood Center for Choice* v. *Abbott*, 450 F. Supp. 3d 753 (W.D. Tex. 2020), which a divided panel of the Fifth Circuit vacated on a writ of mandamus, *In re Abbott*, 954 F.3d 772, 778-779 (5th Cir. 2020). The district court issued a second temporary restraining order enjoining enforcement of GA-09—this time in a narrower set of circumstances—on April 9, 2020, *Planned Parenthood Center for Choice* v. *Abbott*, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020). The same divided panel largely vacated that order. *Abbott II*, 956 F.3d at 704 (vacating order except as to those patients "who … would be past the legal limit for an abortion in Texas … on April 22, 2020").

On April 21, 2020, Governor Abbott replaced GA-09 with a new executive order that permitted the Texas providers to resume providing abortion services, thus rendering the providers' claims for injunctive relief moot.[2] The Texas providers then filed a petition in this Court seeking vacatur of the Fifth Circuit's judgments pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Pet. for Cert., *Planned Parenthood Center for Choice* v. *Abbott*, No. 20-305 (U.S. Sept. 9, 2020). That petition is pending before this Court.

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[2] Texas E.O. GA-15, https://bit.ly/33WxQ0C.

ARGUMENT

When an appeal becomes moot "while on its way" to this Court, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 & n.2 (1950). However, as this Court recently reaffirmed, "not every moot case will warrant vacatur." *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam). Rather, vacatur is an "equitable remedy," the propriety of which depends on the circumstances of the individual case. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994); *see also Garza*, 138 S. Ct. at 1792 ("Because [vacatur] is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case." (internal quoting marks and citation omitted)).

In deciding whether vacatur is appropriate, the most salient factor is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24. That is because vacatur is an equitable remedy that must be employed to achieve a fair result. A party whose ability to appeal an adverse judgment "is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below" "ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25. But the same considerations do not require vacatur when the moving party itself caused the appeal to become moot. Under those circumstances, the losing party's right to appeal is not frustrated, but voluntarily relinquished. *See id.* (noting that a losing party, through his actions, may "voluntarily forfeit[] his legal remedy by the ordinary processes of appeal or certiorari" and

thereby "surrender[] his claim to the equitable remedy of vacatur").

The State's petition here and the pending petition for certiorari in *Abbott* both seek vacatur pursuant to *Munsingwear*. The circumstances are in some respects quite similar. The executive orders issued in Tennessee and in Texas had a similar practical effect—banning constitutionally protected abortions while the executive orders were in effect. Providers in both instances brought lawsuits challenging the executive orders on constitutional grounds. The district courts in both cases entered orders enjoining enforcement of the executive orders in whole or in part. The courts of appeals in both cases issued decisions concerning the propriety of those orders. And in both cases, before the losing party was able to seek this Court's review, the executive order expired or was replaced, after which the losing party sought vacatur from this Court.

There is, however, an important difference between the two petitions. In *Abbott*, the parties seeking vacatur—the health care providers—played no role in causing their appeal to become moot. Indeed, it was Texas, the party that prevailed before the court of appeals, that caused the appeal to become moot by replacing the challenged executive order. Here, by contrast, the party seeking vacatur in this Court—Tennessee—itself "caused the mootness" through its own "voluntary action," by permitting EO-25 to expire. *U.S. Bancorp*, 513 U.S. at 24.[3]

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[3] As petitioners in *Abbott* explain in their reply brief (at 4-5, No. 20-305), the decisions of the Fifth Circuit in that case are particularly questionable, and therefore warrant vacatur, because of this Court's intervening decision in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87 (U.S. Nov. 25, 2020) (per curiam).

Accordingly, in this case—unlike *Abbott*—it would be appropriate for the Court to follow its established practice of denying vacatur when the mootness was at the hands of the party seeking vacatur. This is not a case where the State's right to appellate review was "prevented through happenstance." *Munsingwear*, 340 U.S. at 40. And certainly the mootness was not caused by "the unilateral action of the party who prevailed [in the lower court]"—the providers. *U.S. Bancorp*, 513 U.S. at 25. To the contrary, the providers have acted diligently to protect the constitutional rights of their patients throughout this litigation.

Petitioners posit that "the decision below could adversely affect the State in th[e] ongoing litigation" concerning "Tennessee's waiting-period law" as well as "other litigation" between respondents and the State. Pet. 28. (The challenge to EO-25 was brought by supplementing the complaint in a preexisting lawsuit concerning a separate Tennessee abortion restriction, and that lawsuit remains ongoing even though the injunctive relief claims concerning the enforcement of EO-25

That decision, which also concerned burdens imposed on constitutional rights during a public health emergency, made clear that, "even in a pandemic, the Constitution cannot be put away and forgotten." *Id.*, slip op. 5 (Gorsuch, J., concurring); *see also id.* at 4 ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so."). The decision of the Sixth Circuit in this case does not present the same concern, because it is fully in accord with this Court's reiteration in *Roman Catholic Diocese of Brooklyn* of the need to protect constitutional rights even during an emergency. Nonetheless, should the Court vacate the judgment in this case, and should similar abortion bans be put in place in the future, lower courts can assess the validity of such bans in light of *Roman Catholic Diocese* as well as decades of precedent affirming patients' constitutional right to abortions.

have become moot.) This concern is entirely speculative, and, in any event, it is not clear how a decision preliminarily enjoining an executive order that is no longer in place could affect the litigation of claims concerning "unrelated abortion laws." Pet. 28 n.5.

For these reasons, it would be appropriate for the Court to simply deny the petition in this case, while vacating the judgments in *Abbott*. However, respondents recognize that this case and *Abbott* are similar in many respects, and that the Court has in the past vacated as moot court of appeals decisions concerning executive orders that expired prior to review. *See* Pet. 25-26. Respondents further recognize that equal treatment of similar cases serves the public interest in an "orderly operation of the federal judicial system." *U.S. Bancorp*, 513 U.S. at 27. Accordingly, the Court may choose to vacate the judgments of the court of appeals in this case and in *Abbott* on the ground of mootness and remand the case.

CONCLUSION

It would be appropriate for the Court to deny the petition for certiorari, but the Court may choose to vacate the judgment of the court of appeals on grounds of mootness and remand the case.

Respectfully submitted.

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