No. 20-305

In the Supreme Court of the United States

PLANNED PARENTHOOD CENTER FOR CHOICE, ET AL., PETITIONERS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.

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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioners have asked this Court to vacate two mandamus opinions issued by the Fifth Circuit in April 2020—*In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (*Abbott I*), and *In re Abbott*, 956 F.3d 696 (5th Cir. 2020) (*Abbott II*). Each of those opinions applied a two-part test derived from this Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), to executive orders issued by the Governor of Texas in response to the COVID-19 pandemic. *Abbott II*, 956 F.3d at 704-05; *Abbott I*, 954 F.3d at 784. As explained in the State's brief in opposition, there are many reasons to deny Petitioners' request, including that vacatur would be useless given that the Fifth Circuit has largely adopted the holdings of the *Abbott* opinions in other cases. Br. in Opp. 26-27.

In reply, Petitioners argued that the Fifth Circuit had not yet explicitly used the two-part *Jacobson* test identified in the *Abbott* decisions in any other case; therefore, vacatur would serve a purpose by eliminating that precedent within the Circuit. Reply Br. 3-4. But the Fifth Circuit has now adopted the two-part *Jacobson* test outside of the *Abbott* decisions. In *Big Tyme Investments, LLC v. Edwards*, the Fifth Circuit held that "*Abbott* [*I*] and its application of *Jacobson* govern our review of emergency public health measures, regardless of the rights at stake." No. 20-30526, 2021 WL 118628, at *7 (5th Cir. Jan. 13, 2021). The court then proceeded to apply the two-part test to the equal-protection claims raised there, asking whether the Louisiana law at issue (1) lacked a "real or substantial relation" to the COVID-19 crisis, and (2) was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* (quoting *Abbott I*, 954 F.3d at 784 (quoting *Jacobson*, 197 U.S. at 31)).

As a result, the two-part *Jacobson* test is now the law of the circuit independent of the *Abbott* decisions, meaning that vacatur will accomplish nothing: Petitioners will still be bound by that test in any future lawsuit unless and until the en banc court or this Court rules otherwise.[1]

This further underscores the self-inflicted nature of the harm about which Petitioners complain. Had they promptly sought vacatur, the Fifth Circuit in *Big Tyme* might have approached the constitutional question with a blank slate. But instead, the Fifth Circuit and courts across the country have continued to rely on *Abbott I* (an additional 9 cases since the State filed its brief in opposition) and *Abbott II* (an additional 7 cases).[2] The *Abbott*

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[1] When considering vacatur for mootness, the merits of the underlying decisions are not at issue. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994). Yet Petitioners argue that this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), undermines the *Abbott* decisions' use of *Jacobson*. Reply Br. 2, 4-5. But citing *Roman Catholic Diocese*, the *Big Tyme* panel correctly noted that the second *Jacobson* prong merely "requires courts to consider the alleged constitutional harm, and then evaluate that harm in accordance with established principles of constitutional interpretation." 2021 WL 118628, at *8 (citing *Roman Catholic Diocese*, 141 S. Ct. at 70) (Gorsuch, J., concurring)). The panel properly reserved for a future case the full impact of *Roman Catholic Diocese* on circuit precedent. *Id.* at *7 n.11.

[2] *Abbott I*: *Big Tyme*, 2021 WL 118628, at *6-8; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 385 n.1 (5th Cir. 2020) (Ho, J., concurring); *Atwood v. Days*, No. CV-20-00623-PHX-JAT-JZB, 2021 WL 100860, at *8 (D. Ariz. Jan. 12, 2021); *Weisshaus v. Cuomo*, No. 20-CV-5826 (BMC), 2021 WL 103481, at *4 (E.D.N.Y. Jan. 11, 2021); *M. Rae, Inc. v. Wolf*, No. 1:20-CV-2366, 2020 WL 7642596, at *5 (M.D. Pa. Dec. 23, 2020); *Parker v. Wolf*, No. 20-CV-1601, 2020 WL 7295831, at *15 n.20 (M.D. Pa. Dec. 11, 2020); *Stewart v. Justice*, No. 3:20-CV-0611, 2020 WL 6937725, at *5 (S.D. W. Va.

decisions are ingrained Fifth Circuit precedent. Vacating them would not only be inequitable for the reasons outlined in the State's opposition, it would be useless. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("It is a traditional axiom of equity that a court of equity will not do a useless thing.").

Nov. 24, 2020); *Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 6777590, at *2 (D. Md. Nov. 18, 2020); *Blandino v. Eighth Jud. Dist. Ct.*, No. 82034-COA, 2021 WL 83336, at *2 (Nev. App. Jan. 7, 2021).

Abbott II: *Daves v. Dallas County*, No. 18-11368, 2020 WL 7693744, at *11 (5th Cir. Dec. 28, 2020); *Hernandez v. Grisham*, No. CIV 20-0942 JB\GBW, 2020 WL 7481741, at *49 (D.N.M. Dec. 18, 2020); *Am. Cruise Ferries, Inc. v. Vazquez Garced*, No. 20-1633 (DRD), 2020 WL 7786939, at *16 (D.P.R. Dec. 17, 2020); *El Papel LLC v. Inslee*, No. 2:20-CV-01323-RAJ-JRC, 2020 WL 8024348, at *6 (W.D. Wash. Dec. 2, 2020); *Nat'l Press Photographers Ass'n v. McCraw*, No. 1:19-CV-946-RP, 2020 WL 7029159, at *8 (W.D. Tex. Nov. 30, 2020); *El Bey v. Dominguez*, No. 2:20-CV-73-Z-BQ, 2020 WL 7658087, at *2 (N.D. Tex. Nov. 24, 2020); *Russell v. Harris County*, No. CV H-19-226, 2020 WL 6585708, at *18 (S.D. Tex. Nov. 10, 2020).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2021

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