No. _____

In the Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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Appendix A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

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Filed: April 7, 2020

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]

[1] Our dissenting colleague suggests our decision "follows not because of the law or facts, but because of the subject matter of

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 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

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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.").

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 confirmed in all fifty states, the District of Columbia, and several territories.[4] Over the past two weeks, confirmed cases in the United

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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).

[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).

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."

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[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.

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

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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.

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.

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

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[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).

[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.

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 Petitioners, from enforcing GA-09 and the emergency rule "as applied to medication abortions and procedural[15] abortions."

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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),

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 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

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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).

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

[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

third prong, 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

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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 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.

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*, 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]

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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),

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." *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

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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).

> 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

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[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.

recognized, as does everyone involved, that 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

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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.

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 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

[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.

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 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

[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 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.

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 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

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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.

abortions.[24] Nor did the district court consider 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.

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[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 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.

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 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

[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.

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 "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 *Lawto*n. 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

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.'"

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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.

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;

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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.

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

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[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/

[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

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 "exponential increase in COVID-19 cases is

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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.

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]

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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

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 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

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"immediately stop performing non-essential and elective surgical abortions").

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 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.

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[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.

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."

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

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[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.

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.

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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.

Respondents brought a constitutional challenge to GA-09, and 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 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.'"

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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.

Appendix B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50296

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

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REVISED April 20, 2020

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

JENNIFER WALKER ELROD and STUART KYLE DUNCAN, Circuit Judges:

On April 7, 2020, we issued a writ of mandamus vacating the district court's temporary restraining order ("TRO")[1] that exempted abortions from GA-09, an emergency measure temporarily postponing non-essential medical procedures during the COVID-19 pandemic. *In re Abbott*, --- F.3d ---, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) (*Abbott II*). Two days later, on April 9, the district court entered a second TRO, exempting various categories of abortion om GA-09. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020) (*Abbott III*). A flurry of litigation ensued, during which state officials again sought mandamus and we administratively stayed parts of the April 9 TRO.[2] Over this period—from April 7 to 20—Texas COVID-19 cases, hospitalizations, and deaths more than doubled.[3]

We now consider the mandamus petition directed to the April 9 TRO. We are persuaded by Petitioners' arguments that the district court, in the April 9 TRO, disregarded our mandate in *Abbott II*. The court again

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[1] *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020) (*Abbott I*).

[2] *See In re Abbott*, No. 20-50296, 2020 WL 1844644 (5th Cir. Apr. 10, 2020) (administratively staying TRO in part) (*Abbott IV*); *In re Abbott*, 2020 WL 1866010 (5th Cir. Apr. 13, 2020) (denying stay in part and lifting administrative stay in part) (*Abbott V*).

[3] *See* Tex. Dep't of State Health Servs., Texas Case Counts COVID-19, https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9 cafc8b83 (last visited Apr. 20, 2020).

"fail[ed] to apply . . . 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)." *Abbott II*, 2020 WL 1685929, at *5. Moreover, the court again second-guessed the basic mitigation strategy underlying GA-09 (that is, the concept of "flattening the curve"), and also acted without knowing critical facts such as whether, during this pandemic, abortion providers do (or should) wear masks or other protective equipment when meeting with patients. Those errors led the district court to enter an overbroad TRO that exceeds its jurisdiction, reaches patently erroneous results, and usurps the state's authority to craft emergency public health measures "during the escalating COVID-19 pandemic." *Id.* at *1.

Once again, the dissenting opinion accuses the majority of treating abortion differently and once again it is wrong. At issue is whether abortion can be treated the same as other procedures under GA-09. It is the district court that treated abortion differently, issuing back-to-back TROs that did not follow the law.

We therefore grant the writ in part and direct the district court to vacate these parts of the April 9 TRO:

- That part restraining enforcement of GA-09 as a "categorical ban on all abortions provided by Plaintiffs."
- That part restraining the Governor of Texas and the Attorney General.
- That part restraining enforcement of GA-09 as to medication abortions.

- That part restraining enforcement of GA-09 as to patients who would reach 18 weeks LMP[4] on the expiration date of GA-09 and who would be "unlikely" to be able to obtain abortion services in Texas.
- That part restraining enforcement of GA-09 after 11:59 p.m. on April 21, 2020.

We do not grant the writ, and therefore do not order vacatur, of that part of the TRO restraining GA-09 as to patients "who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020."

I.

We summarize the pertinent background, which we have chronicled in greater detail elsewhere. *See Abbott II*, 2020 WL 1685929, at *1–4; *Abbott IV*, 2020 WL 1844644, at *1–2. GA-09 is an emergency public health measure, issued by the Governor of Texas on March 22, 2020, that postpones non-essential surgeries and procedures until April 22 to combat the COVID-19 pandemic. It applies to all licensed healthcare providers in Texas, covers a broad range of procedures, does not mention abortion, and contains life-and-health exceptions committed to a physician's judgment. Specifically, GA-09 requires healthcare professionals and facilities to:

> 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

[4] That is, eighteen weeks after the first day of a pregnant woman's last menstrual period.

> 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 order does not apply to procedures that, if performed under accepted standards, "would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster."[6] GA-09 is enforceable by criminal and administrative penalties and expires at 11:59 p.m. on April 21, 2020.[7] *See Abbott II*, 2020 WL 1685929, at *2–4 & nn.10–12.

When ordering vacatur of the first TRO, we explained that Respondents' challenge to GA-09 must satisfy the standards in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Specifically, we held:

> [W]hen 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." *Jacobson*, 197 U.S. at 31. Courts may ask whether the state's emergency measures lack basic exceptions for

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[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.

[6] *Id.*

[7] *Id.* On April 17, 2020, the Governor announced executive order GA-15, which becomes effective when GA-09 expires and continues until 11:59 p.m. on May 8, 2020. As discussed *infra*, GA-15 imposes similar—but not identical—requirements as those imposed by GA-09.

> "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.

Abbott II, 2020 WL 1685929, at *7 (cleaned up). We also articulated how the *Jacobson* framework works with the *Casey* undue-burden analysis. *Id.* at *11 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). A court should "ask[ ] whether GA-09 imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic Texas now faces." *Id.* (quoting *Jacobson*, 197 U.S. at 31). We emphasized that this analysis would "require[ ] careful parsing of the evidence" and that "[t]hese 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 . . . in any particular circumstance." *Id.* at *11–12 (cleaned up).

The day following our mandamus, April 8, 2020, the district court: (1) vacated its March 30 TRO; (2) cancelled the telephonic preliminary injunction hearing previously scheduled for April 13; and (3) ordered the parties to file a joint status report by April 15 outlining a schedule for a new preliminary injunction hearing on a yet-unannounced date. That same day, Respondents filed a new TRO application supported by one new declaration. The next day, April 9, the district court convened a brief telephone conference with the parties, during which the court declined to allow Petitioners either to file a responsive pleading or submit evidence opposing the application.

In doing so, the court remarked to Petitioners, "[I]f I were to make a ruling that was unsatisfactory to the State defendants before then, then you may head back to the Circuit with it." Transcript of 4/9/20 Tele. Conf. at 14:39.

Later that day, the court issued a new TRO. *Abbott III*, 2020 WL 1815587. Adopting Respondents' proposed findings of fact and conclusions of law, *compare id.* at *1–7, with Proposed TRO, App. 445–57, this TRO restrains Petitioners from enforcing GA-09 as follows: (1) "as a categorical ban on all abortions provided by Plaintiffs"; (2) as to "medication abortions"; (3) as to "procedural[8] abortion[s] [provided] to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care"; and (4) as to "procedural abortion[s] [provided] to any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks

[8] "Procedural" abortions, the term used by Respondents and the district court, refers to what are more commonly called "surgical" abortions. *See, e.g.*, *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)); *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000) (citing M. Paul et al., A Clinician's Guide to Medical and Surgical Abortion (1999)); *Casey*, 505 U.S. at 969 (Rehnquist, J., concurring in the judgment in part and dissenting in part) (referring to "any other surgical procedure except abortion") (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 517 (1989) (plurality opinion)); *see also*, e.g., Brief 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[ ]").

LMP—on April 22, 2020." *Abbott III*, 2020 WL 1815587, at *7.

On April 10, Petitioners again requested mandamus from our court, this time seeking vacatur of the April 9 TRO. On April 10, we administratively stayed the TRO except as to women who would reach 22 weeks LMP on April 22. *Abbott IV*, 2020 WL 1844644. On April 13, we denied an emergency stay, and lifted the administrative stay, as to that part of the TRO applying to medication abortions. *Abbott V*, 2020 WL 1866010.[9]

On April 14, the district court set a telephonic preliminary injunction hearing for April 29. Doc. 82. The court also extended the April 9 TRO—"in its entirety under the same terms and conditions except as modified by [our orders]"—until May 1, 2020, at 5:00 p.m. *Id.* The court stated there was "good cause" for extending the TRO "so that the court and parties have adequate time to prepare for [the April 29] hearing." *Id.*

On April 15, the Governor issued executive order GA-15, which becomes effective when GA-09 expires and continues until 11:59 p.m. on May 8, 2020. GA-15[10] is similar to GA-09, but has some textual

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[9] It is curious that the dissenting opinion accuses the majority of altering the availability for abortion six times. In the first place, it was back-to-back TROs following a mandamus that altered abortions availability. In the second place, the dissenting judge joined the denial of the stay as to medication abortions.

[10] Here is the pertinent text of the two orders, with differences noted in italics:

> GA-09: [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

differences as well as an additional exception for certain facilities.[11]

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

> 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.
>
> GA-15: All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not *medically necessary* to *diagnose or* correct a serious medical condition of, or to preserve the life of, a patient who without *timely* performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician[.]

See Tex. Exec. Order No. GA-15 (Apr. 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-15_hospital_capacity_COVID-19_TRANS_04-17-2020.pdf. Because the TRO as issue in this petition only restrains enforcement of GA-09, we express no opinion on the effect, if any, of the different language in GA-15.

[11] The new exception applies to:

> any surgery or procedure performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission both: (1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and (2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster.

Id. Again, we express no opinion on the effect, if any, of this new exception on the issues in this litigation.

U.S.C. § 1651(a). That includes the writ of mandamus sought by Petitioners. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004); *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). An "abuse of discretion" becomes a "clear abuse of discretion" when it "produce[s] a patently erroneous result." *Id.* at 310. The writ has issued "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations [and] where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate." *Will v. United States*, 389 U.S. 90, 95–96 (1967) (citing *Maryland v. Soper*, 270 U.S. 9 (1926) (federal-state relations) and *United States v. U.S. Dist. Ct.*, 334 U.S. 258 (1948) (effectuating appellate mandate)).

Before prescribing this strong medicine, "[w]e ask (1) whether the 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 cases, 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)).

As in *Abbott II*, we address each prong in turn, beginning with the second. *Abbott II*, 2020 1685929, at *5.

III.

A. Failure to Narrowly Tailor April 9 TRO

We first address two threshold errors in the April 9 TRO that demonstrate Petitioners' right to the writ. Because "the scope of injunctive relief is dictated by the extent of the violation established, [t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (cleaned up). The April 9 TRO fails this narrow tailoring requirement in two obvious ways.

First, the TRO enjoins enforcement of GA-09 "as a categorical ban on all abortions provided by Plaintiffs." *Abbott III*, 2020 WL 1815587, at *7. But GA-09 is obviously not a "categorical ban on all abortions." Because it expires on April 22, it is not a ban, but a generally applicable postponement of PPE-consuming surgeries and procedures. And as we have explained already, GA-09 facially exempts surgeries and procedures immediately 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." *Abbott II*, 2020 WL 1685929, at *3. The district court reached its overbroad construction of GA-09 by referring to the Attorney General's "interpretation" in a "press

release," which the court maintained "has been adopted by the State Defendants." *Abbott III*, 2020 WL 1815587, at *2. But *Abbott II* already found this chain of reasoning flawed. We found "no reason to believe [the] press release has the force of law," and, in any event, the press release itself recognized GA-09 exempts abortions "medically necessary to preserve the life or health of the mother." *Abbott II*, 2020 WL 1685929, at *13 n.25. The district court also cited no evidence suggesting that the "State Defendants" have adopted its overreading of GA-09.

Second, as now extended to May 1, the April 9 TRO is not "narrowly tailor[ed]" to remedy any harm caused by GA-09 because it extends beyond the expiration of GA-09. *See John Doe #1*, 380 F.3d at 818. By its terms, GA-09 lasts "until 11:59 p.m. on April 21, 2020."[12] After that point, there will be no "actual case or controversy" between the parties, *John Doe #1*, 380 F.3d at 814 (citation omitted), and no enforcement of GA-09 for a court to restrain. The fact that the Governor has since announced that a new order—GA-15—will take effect on April 22 does nothing to change this conclusion, as the extended TRO at issue here applies only to GA-09. By purporting to restrain Petitioners past the expiration date of GA-09, the district court exceeded its jurisdiction. *See*, *e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (a federal court's judgment must award "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (quoting *North Carolina*

[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.

v. Rice, 404 U.S. 244, 246 (1971)). Likewise, "since the scope of injunctive relief is dictated by the extent of the violation established," the relief was overbroad because no violation can occur after 11:59 p.m. on April 21. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). We therefore conclude that Petitioners have demonstrated entitlement to the writ.

B. Failure to Dismiss Governor and Attorney General Under Eleventh Amendment

Petitioners also argue they are entitled to mandamus relief because the district court violated the Eleventh Amendment by purporting to enjoin the Governor and Attorney General. We agree. In *Abbott II*, we instructed the district court to "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)." *Abbott II*, 2020 WL 1685929, at *5 n.17 (citing *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 745–46 (5th Cir. 2014)). The district court's cursory analysis of this question in its April 9 TRO was wrong.

Ex parte Young allows suits for injunctive or declaratory relief against state officials, provided they have sufficient "connection" to enforcing an allegedly unconstitutional law. *City of Austin*, 943 F.3d at 997 (citing *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013)). Otherwise, the suit is effectively against the state itself and thus barred by the Eleventh Amendment and sovereign immunity. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Edelman v. Jordan*, 415 U.S. 651, 663–69

(1974). If the official sued is not "statutorily tasked with enforcing the challenged law," then the requisite connection is absent and "our *Young* analysis ends." *City of Austin*, 943 F.3d at 998 (citing *Morris*, 739 F.3d at 746).

As to the Governor, the district court reasoned he has "some connection" to GA-09 because of his "statutory authority [under] Texas Government Code § 418.012." *Abbott III*, 2020 WL 1815587, at *6 (cleaned up). But the cited section empowers the Governor to "issue," "amend," or "rescind" executive orders, not to "enforce" them. Tex. Gov't Code § 418.012. The power to promulgate law is not the power to enforce it. *Cf. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (distinguishing between the Secretary of Labor's "powers to promulgate and to enforce national health and safety standards"). The April 9 TRO addresses only "enforcing" GA-09 against plaintiffs who provide certain abortion procedures. *Abbott III*, 2020 WL 1815587, at *7. And we have already explained that violating GA-09 may result in "administrative or criminal penalties," *Abbott II*, 2020 WL 1685929, at *3 n.12, enforced by health and law enforcement officials and not the Governor. Consequently, we hold the Governor lacks the required enforcement connection to GA-09 and may not be sued for injunctive relief under the Eleventh Amendment. *See Morris*, 739 F.3d at 746 (when challenged law "does not specially task [Texas] Governor . . . with its enforcement, or suggest that he will play any role at all in its enforcement," Governor "is not a proper defendant").

As to the Attorney General, the district court reasoned that he has "authority" to prosecute

violations of GA-09 "at the request of local prosecutors," and that he has also "publicly threatened enforcement" against abortion providers. *Abbott III*, 2020 WL 1815587, at *6. Neither rationale establishes the Attorney General's "connection" to enforcing GA-09 for *Ex parte Young* purposes. Nothing in GA-09 tasks the Attorney General with enforcing it. Speculation that he might be asked by a local prosecutor to "assist" in enforcing GA-09, *see* Tex. Gov't Code § 402.028, is inadequate to support an *Ex parte Young* action against the Attorney General. *See City of Austin*, 943 F.3d at 1000 (evidence that Attorney General "*might* . . . bring a proceeding to enforce" the law insufficient under *Ex parte Young*). Nor does a "press release" by the Attorney General, *Abbott III*, 2020 WL 1815587, at *2, show authority to enforce GA-09 for *Ex parte Young* purposes. Here, the Attorney General did not even threaten to enforce GA-09 in the disputed press release. The release warns that "[t]hose who violate the governor's order will be met with the full force of the law." App. 31. The Attorney General threatened that GA-09 would be enforced, not that he would enforce it. Moreover, our cases do not support the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes. *Cf.*, *e.g.*, *City of Austin*, 943 F.3d at 1001 (applying *Ex parte Young* exception because Attorney General sent "threatening letters" to enforce DTPA and was authorized to enforce that law) (discussing *NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 392–95 (5th Cir. 2015)). Consequently, we hold the Attorney General also lacks the required enforcement connection to GA-09 and may not be sued

for injunctive relief under the Eleventh Amendment. *See City of Austin*, 943 F.3d at 1002.

Mandamus is appropriate to "control jurisdictional excesses," *Gee*, 941 F.3d at 158 (citation omitted), such as allowing suits against state officials in violation of the Eleventh Amendment and sovereign immunity. *See*, *e.g.*, *Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020) ("Under the Eleventh Amendment, federal courts lack jurisdiction over suits against nonconsenting states."); *Sissom v. Univ. of Tex. High Sch.*, 927 F.3d 343, 347 (5th Cir. 2019) ("[B]ecause the Eleventh Amendment textually divests federal courts of jurisdiction over states, it is indispensable to assessing this court's jurisdiction."). Petitioners have demonstrated a clear and indisputable right to the writ on this ground.

C. Failure to Follow *Abbott II* Mandate

Petitioners are also entitled to mandamus because the district court, in entering the April 9 TRO, failed to follow our mandate in *Abbott II*. Most obviously, we instructed the district court to analyze GA-09 under "the framework governing emergency exercises of state authority during a public health crisis, established . . . in *Jacobson*." *Abbott II*, 2020 WL 1685929, at *5. We articulated the *Jacobson* framework, *id.* at *6–7, and emphasized that adhering to its narrow compass of judicial review is necessary to prevent courts from "second-guess[ing] the wisdom or efficacy" of emergency public health measures. *Id.* at *7. Yet the district court did not apply *Jacobson*: indeed, the court did not even state what *Jacobson*'s framework *is*, but instead merely cited *Jacobson* in passing in its conclusion. *See Abbott III*, 2020 WL 1815587, at *6 (stating only that applying GA-09 to

certain abortion categories "violates the standards set forth in both [*Casey*] and [*Jacobson*])." That flatly contradicted our *Abbott II* mandate, which left no doubt that "[o]ur overriding consideration" was that any further proceedings "adhere to the controlling standards" in *Jacobson* "for adjudging the validity of emergency measures like [GA-09]." *Abbott II*, 2020 WL 1685929, at *2.

The April 9 TRO violated the "mandate rule," a particular manifestation of the law-of-the-case doctrine barring reexamination of issues already decided by an appellate court. *See United States v. Smith*, 814 F.3d 268, 273 (5th Cir. 2016). Under the mandate rule, a district court "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). Thus, this court has held that a district court violated the mandate rule when, after an appeal, a district court modified a consent decree "without holding a hearing and demanding a more developed factual record." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 437–38 (5th Cir. 2012) (*LULAC II*). Where a district court fails to fully implement the mandate, a party may seek a writ of mandamus to enforce compliance. *See Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002).

Our *Abbott II* opinion plainly expected, as a foundational premise for applying *Jacobson*, that the district court would allow the parties to adduce additional evidence about the effects of GA-09 in specific circumstances. Our opinion made this

impossible to miss. For example, we said that "[t]he 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." *Abbott II*, 2020 WL 1685929, at *2 (emphases added). Following that adversarial hearing, we explained, "[t]he district court can *then* make targeted findings . . . about the effects of GA-09 on abortion access." *Id.* (emphasis added). We said the same thing a few pages later: despite finding no evidence in the record that GA-09 violated *Casey*, we stated that "Respondents will have the opportunity to show *at the upcoming preliminary injunction hearing* that certain applications of GA-09 *may*" violate *Casey* "if they *prove* that, 'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at *9 (first and third emphases added). Similarly, after canvassing the record, we declined to decide whether a more narrowly tailored injunction would satisfy *Jacobson* because "parties may pursue [those issues] *at the preliminary injunction stage*," then scheduled for April 13. *Id.* at *12 (emphasis added). And again: in assessing whether Respondents had any evidence showing GA-09 pretextually targeted abortion, we found "no evidence . . . [on] the record before us" of pretext, but stated that "Respondents will have the opportunity . . . to present *additional evidence* in conjunction with the district court's preliminary injunction hearing." *Id.* at *13 (emphasis added).

To be sure, the district court could have rescheduled the preliminary injunction hearing (as it now has done, to April 29) or afforded the parties some other way of presenting new evidence on the burdens and benefits of GA-09 in specific circumstances. But

our opinion left no doubt that an additional evidentiary showing was necessary to properly apply *Jacobson* in particular circumstances. Among other gaps in the record, for example, was evidence showing what PPE is being used in medication and surgical abortions *during the current pandemic*, or evidence showing the standard of care for those procedures during the pandemic. *See infra* Part III.D.1.a. Without any means of answering critical questions like those, the district court lacked any basis for finding, as *Jacobson* requires, that GA-09 lacks a "real or substantial relation" to the health crisis, or that "beyond all question" it "plain[ly]" violates *Casey*. *Abbott II*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31).

It is no answer to say that a TRO may be based on a one-sided evidentiary record. *See* Fed. R. Civ. P. 65(b)(1) (allowing issuance of TRO without notice); *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) (observing that TROs are "generally issued *ex parte* or after a hearing of a summary character"). Our plain instructions in *Abbott II* were that properly applying *Jacobson* to GA-09 required "additional evidence" targeted to specific circumstances. *Abbott II*, 2020 WL 1685929, at *13. It is also no answer to say that our decision did *not* tell the district court not to cancel the preliminary injunction hearing and enter a *different* TRO. The mandate rule requires the district court to "implement both the letter and the spirit of the appellate court's mandate." *Lee*, 358 F.3d at 321. Our decision mentioned the then-upcoming preliminary injunction hearing *seven* times as a forum for adducing evidence from both sides about specific applications of GA-09. *See Abbott II*, 2020 WL 1685929, at *2, *4 n.16, *8 n.19, *9, *11 n.24, *12, *13.

The district court flouted both the letter and the spirit of our mandate by cancelling that adversarial hearing, convening a snap-TRO "hearing" at which one side was barred from offering evidence or argument, and then immediately issuing a new TRO based on evidence we had already ruled insufficient to show a violation of *Jacobson* and *Casey*. *See LULAC II*, 675 F.3d at 438.

The *LULAC* litigation provides helpful guidance. In *LULAC I*, this court vacated the modification of a consent decree because "the paucity of the record in [that] case provided an insufficient basis for the district court to determine that modification was warranted." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011) (*LULAC I*). This court instructed that on remand, "the district court should permit supplemental filings and conduct proceedings, as necessary, to develop a sufficient record." *Id.* at 439–40. Yet on remand, the district court entered a new "temporary" modification of the consent decree, without "permit[ting] the parties to conduct discovery, or hold an evidentiary hearing to receive competing expert and lay testimony, or even offer [one party] a substantial opportunity to rebut the evidence that [the other parties] presented." *LULAC II*, 675 F.3d at 438. The *LULAC II* panel vacated that new "temporary" order, holding that "[b]y approving a modification of the Consent Decree without holding a hearing and demanding a more developed factual record, the district court failed to follow the 'letter and spirt' of the *LULAC I* mandate." *Id.* at 438.

So too here. After explaining that the factual record was insufficient to support the TRO in *Abbott*

I, we instructed that after the "preliminary injunction hearing scheduled for April 13, 2020" at which the parties could "present additional evidence," *Abbott II*, 2020 WL 1685929, at *13, the district court could find that GA-09 constituted an undue burden if "beyond question" the law's burdens exceeded its benefits. *Id.* at *11. "The district court was required to do this analysis" the first time, we explained, and "that analysis would have required careful parsing of the evidence." *Id.* Yet on remand the district court entered a second TRO "without holding a hearing and demanding a more developed factual record." *See LULAC II*, 675 at 438. In doing so, "the district court failed to follow the 'letter and spirit' of the" *Abbott II* mandate. *See id.*[13]

To be sure, Respondents suggest that the April 9 TRO is based on a "more robust" record than the one

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[13] There is one minor distinction between this case and *LULAC*. As here, after the district court entered the second "temporary" modification of the order, the intervenor-appellant sought mandamus. *See LULAC II*, 675 F.3d at 437. Unlike here, however, the *LULAC II* panel denied the writ because the second order, though labeled "temporary," was "not a temporary restraining order," in substance, and could be appealed as a preliminary injunction. *See LULAC II*, 675 F.3d at 437 n.2 (citing *LULAC v. City of Boerne*, No. 12-50111, slip op. at 2–3). In this litigation, we held that this court lacked jurisdiction over an appeal of the extended April 9 order, concluding that it *was* in effect TRO. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. 12-50314, slip op. at 2. But that is a distinction without a difference: Mandamus is an appropriate remedy for violations of the mandate rule. *See Will*, 389 U.S. at 96 (explaining mandamus is appropriate where "necessary to confine a lower court to the terms of an appellate tribunal's mandate"); *Kapche*, 304 F.3d at 500 ("[T]he appropriate action at this point would appear to involve the issuance of a writ of mandamus, compelling the district court to comply with our prior mandate.").

on which the district court based its March 30 TRO. But on critical points, which we analyze in more detail below, the April 9 TRO relied on the same ten declarations already before the district court when it issued the March 30 TRO.[14] Furthermore, after the March 30 TRO issued, Respondents filed supplemental declarations in the district court record—and then proceeded to use those declarations to defend against mandamus in our court.[15] In granting mandamus, we reviewed the record—including those supplemental affidavits—and found the record before us failed to support the conclusion that GA-09 violates *Jacobson* and *Casey*.[16] The district

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[14] *Compare Abbott III*, 2020 WL 1815587, at *2–6 (relying, *inter alia*, on declarations from Barraza, Dewitt-Dick, Ferrigno, Hagstrom Miller, Klier, Lambrecht, Schutt-Aine, Wallace, Connor, and Jane Doe), *with Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. Nos. 7 & 29) (Mar. 25, 2020 & Mar. 30, 2020) (listing same declarations as exhibits to TRO application).

[15] *Compare Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. No. 49) (Apr. 2, 2020) (noting "supplemental filing" of declarations supporting preliminary injunction), *with Abbott II*, ECF 53 at 4, 6, 14, 17–21, 23 (5th Cir. Apr. 2, 2020) (No. 20-50264) (opposition to mandamus relying on supplemental declarations). Indeed, Respondents' opposition conceded that it "cite[s] to declarations filed in the district court on April 2, 2020," in support of its preliminary injunction motion. ECF 53 at 4 n.2 (citing Dist. Ct. Dkt. No. 49).

[16] *See Abbott II*, 2020 WL 1685929, at *9 ("[I]t cannot be maintained on the record before us that GA-09 bears 'no real or substantial relation' to . . . the COVID-19 pandemic.") (quoting *Jacobson*, 197 U.S. at 31); *id.* at *11 & n.23–24 (noting conflicting evidence regarding whether abortion procedures consume PPE based on "[o]ur own review of the record"); *id.* at *13 ("[O]n this record, we see no evidence that GA-09 was meant to exploit the pandemic in order to ban abortion or . . . unreasonably delay

court hardly answered *Abbott II*'s call for more evidence by relying on evidence we had already reviewed and found wanting. Moreover, we called for additional evidence from both sides. *See Abbott II*, 2020 WL 1685929, at *2 (emphasizing "all parties" would be able to "present evidence on the validity of applying GA-09 in specific circumstances"). Yet the district court barred Petitioners from proffering new evidence or argument with respect to the April 9 TRO.

Mandamus is justified to correct the district court's failure to follow our *Abbott II* mandate. *See*, *e.g.*, *Will v. United States*, 389 U.S. 90, 95–96 (1967) (explaining that "the writ [of mandamus] has been invoked . . . where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate"). This is all the more vital here because the failure to follow our mandate led the district court to "embarrass the executive arm of the Government" and "intru[de] . . . on a delicate area of federal-state relations." *Cheney*, 542 U.S. at 381 (cleaned up).[17] Here too, Petitioners have demonstrated their clear and indisputable right to the writ.

D. Patently Erroneous Results and Usurpation of the State's Authority to Craft Emergency Health Measures

Mandamus relief is also justified because the district court's failure to follow our *Abbott II* mandate

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abortions" (cleaned up)); *id.* ("Based on that record, we cannot say that GA-09 is a pretext for targeting abortion.").

[17] Curiously, and as a possible further indication that the district court failed to follow our *Abbott II* mandate, the April 9 TRO "incorporate[d] by reference" the conclusions of law from *Abbott I* that this court held were mistaken in *Abbott II*. *See Abbott III*, 2020 WL 1815587, at *7.

led to patently erroneous results and usurped the state's authority to craft emergency public health measures. *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019) (cleaned up) (mandamus warranted where there has been a "usurpation of judicial power" or "a clear abuse of discretion that produces patently erroneous results"). We discuss these problems below, both to explain why we grant mandamus as to two of the three categories of abortion procedures restrained by the April 9 TRO, and also to provide guidance at the preliminary injunction stage.

1. The April 9 TRO Patently Erred by Exempting Medication Abortions from GA-09

There is no constitutional right to any particular abortion procedure. *Gonzales v. Carhart*, 550 U.S. 124, 164–65 (2007). Yet the district court bluntly concluded that GA-09's temporary postponement of one kind of early-abortion method—medication abortions—is "beyond question" a violation of *Casey*. *See Abbott III*, 2020 WL 1815587 at *6 (concluding, "based on the court's findings of fact, it is beyond question that [GA-09's] burdens outweigh the order's benefits as applied to . . . medication abortion"). Despite our instructions in *Abbott II*, the district court failed to compile a record that remotely justifies this conclusion. Indeed, the record before the district court—which we already reviewed in *Abbott II* and found inconclusive—does not provide the tools even to answer the pertinent factual question. That question is not, as the district court evidently thought, whether medication abortion consumes PPE during normal circumstances, but instead whether it does so under the pandemic conditions Texas faces and GA-09 addresses. As for the legal question, the district court's analysis fails to

address why temporary postponement of one type of early-abortion method is "beyond question" unconstitutional if it leaves open other means of obtaining an abortion. Restraining state officials from implementing an emergency health measure based on such findings is "a clear abuse of discretion that produces patently erroneous results." *Abbott II*, 2020 WL 1685929, at *5 (quoting *JPMorgan Chase*, 916 F.3d at 500 (cleaned up)).

a. Failure to consider PPE usage and standard of care during the pandemic

As a general matter, we observe that the regulation of medication abortion in Texas differs from some other states. In Texas, "[b]efore the physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug, the physician must examine the pregnant woman." Tex. Health & Safety Code § 171.063(c). During that examination, the patient must receive an ultrasound examination. Tex. Health & Safety Code § 171.012(a)(4). The physician cannot provide the patient an abortion until the second visit. *Id.* And the patient must schedule a follow-up appointment to ensure the abortion is complete. Tex. Health & Safety Code § 171.063(e)-(f); 25 Tex. Admin. Code 139.53(b)(4).[18]

The district court found, as a matter of fact, that "[p]roviding medication abortion does not require the use of any PPE." *Abbott III*, 2020 WL 1815587, at *3, ¶ 15. The pertinent question, however, is whether

[18] At the preliminary injunction stage, a relevant question is whether these acts ancillary to a medication abortion, such as the ultrasound or follow-up appointment, are to be considered when determining PPE usage.

medication abortions require PPE *during the COVID-19 pandemic*. *See* GA-09 (stating that "a shortage of hospital capacity or [PPE] would hinder efforts to cope with the COVID-19 disaster"). Respondents submitted no evidence on that question: they neither stated what PPE they were consuming "during the COVID-19 disaster," nor submitted evidence establishing the standard of care for medication abortions during the pandemic. Scour the twenty declarations Respondents submitted to support their claim. Does any testify that *during the current pandemic*, abortion providers are not wearing masks? No. Nor would one expect such a statement when everyday life now presents police officers, priests, mail carriers, grocery store cashiers, gas station attendants, and retail clerks wearing them every day.[19] The question, then, is not whether medication abortions consume PPE in normal times, but whether they consume PPE during a public health emergency involving a spreading contagion that places severe strains on medical resources. *See Abbott II*, 2020 WL 1685929, at *1. The record contains scant material to answer that question—certainly not to a degree to permit the conclusion that merely postponing medication abortions "beyond question" violates the right to abortion.

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[19] For their part, Petitioners did submit evidence showing the standard of care may have changed and that abortion providers may be consuming more PPE because of COVID-19. *See, e.g.*, Harstad Decl. at ¶ 4, App. 230 ("Due to the current COVID-19 outbreak, the specific type of mask that is currently required is a N95 mask."). But our point is not to weigh the evidence. Rather, the point is to demonstrate that the record before the district court does not purport to answer the pertinent question about PPE use during the pandemic.

The April 9 TRO did not analyze PPE consumption for medication abortions during the COVID-19 pandemic. The district court, with one minor exception, relied exclusively on declarations that were before it when it issued the March 30 TRO. *See Abbott III*, 2020 WL 1815587 at *3, ¶¶ 10, 13, 15 (relying on prior declarations); *but see id.* ¶ 14 (relying on new declaration). In *Abbott II*, we explained that those declarations were "unclear" as to "how PPE is consumed in medication abortions." *See Abbott II*, 2020 WL 1685929 at *11. Those declarations did not, and still do not, speak to the question of PPE usage during the present public health emergency.

Moreover, there has been no consideration yet how the pandemic has affected the standard of care for abortion. No record evidence supports the contention—which provides the unstated premise of the district court's findings—that the standard of care for medication abortion during the COVID-19 is identical to the normal standard. Relatedly, the record does not establish what PPE abortion providers presently use to protect against the spread of the virus. Indeed, some record evidence indicates that reasonable abortion providers *would* change PPE usage during the pandemic. For instance, the state's infectious disease expert declared that "[n]ot wearing face masks and other PPE when caring for patients who are not under investigation for COVID 19 . . . exposes health care workers to transmission of infection" from asymptomatic patients. Marier Decl. ¶ 12, App. 242.

The declarations the district court cited (which are exclusively those of Respondents) consider medication abortion only during normal times. *Abbott III*, 2020

WL 1815587 at *3, ¶ 15. One physician describes a clinic's PPE usage during an "average week." Wallace Decl. ¶ 12. That says nothing about PPE usage during a pandemic. *Cf.* Klier Declaration ¶ 11, App. 110 ("*Before the COVID-19 outbreak*, Austin Women's used no PPE for medication abortion.") (emphasis added). And a declaration recently filed in the district court clarifies that at least one plaintiff began using surgical masks in response to COVID-19. *See* Rosenfeld Decl. ¶ 13 ("Since the COVID-19 outbreak began, Houston Women's Clinic has . . . provided our staff with surgical masks (not N95 respirators) . . . .").[20]

In sum, the relevant question is not what PPE is consumed during normal times but "during the COVID-19 disaster," as GA-09 states. *Cf. Abbott II*, 2020 WL 1685929 at *12 ("[T]he essence of equity is the ability to craft a particular injunction meeting the exigencies of a particular situation."). The failure even to consider that question—as well as to support its

[20] Amici have submitted a report that one of the plaintiff clinics has been operating without sufficient PPE. *See* Amicus Brief of 19 States in Support of Petitioners at 16 n. 8 (citing Alex Caprariello, *Planned Parenthood employees laid off, claim it's retaliation for voicing concerns* (KXAN, Apr. 10, 2020), https://www.kxan.com/news/local/austin/planned-parenthood-employees-laid-off-claim-its-retaliation-for-voicing-concerns/) ("[The former staff member] said there is not enough PPE at the clinics, workers are being forced to do non-essential work for patients in-person and they're not being offered paid sick leave if they come down with COVID-19 symptoms.")). This may be relevant to assessing the benefits of GA-09 in combatting the spread of COVID-19.

findings with record evidence—was patently erroneous.[21]

b. Usurping state authority to craft emergency health measures

As we explained before, *Jacobson* prohibits courts from "usurp[ing] the state's authority to craft measures responsive to a public health emergency." *See Abbott II*, 2020 WL 1685929, at *12. Courts have no authority to ask whether a "particular method [is]—perhaps, or possibly—not the best." *Jacobson*, 197 U.S. at 35. Instead, courts may ask only whether the state has acted in an "arbitrary, unreasonable manner." *Id.* at 28. During a pandemic emergency, public authorities must make numerous, complex judgment calls. GA-09 addresses one of the most vexing: how to prevent critical strains on medical resources during a surge in contagious disease. *Abbott II*, 2020 WL 1685929, at *1–2. Respondents have submitted declarations of infectious disease experts who believe GA-09 is profoundly misguided. *See*, *e.g.*, Bassett Decl. ¶ 6–8, App. 311; Sharfstein Decl. ¶ 9–12, App. 280–81. Texas authorities believe, to the

[21] Additionally, Respondents concede medication abortions sometimes result in hospitalization. *See* App. 129. The FDA label for Mifeprex states that hospitalization "related to medical abortion" occurs in up to 0.6% of cases. App. 129–30 (describing use of Mifeprex); U.S. Food & Drug Admin., Mifeprex Label 17, Table 2, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf. Applying this figure to Petitioners' uncontested evidence that about 17,000 medication abortions were performed in Texas in 2017, *see* App. 222, medication abortions can be expected to result in slightly over 100 hospitalizations per year in Texas—or about two per week. In comparing the benefits and burdens of GA-09, the district court must weigh those hospitalizations against the delay in women obtaining a medication abortion.

contrary, that GA-09 is critical to protect the state's citizens and has supported that view with its own medical experts. *See*, *e.g.*, Marier Decl. ¶ 12, App. 242. The Supreme Court, and this court, have already explained how to resolve such an impasse: "[I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities." *Abbott II*, 2020 WL 1685929, at *12 (citing *Jacobson*, 197 U.S. at 30); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570 (2019) (explaining, in context of different legal standard, that "the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make"). The district court's findings in support of the April 9 TRO failed to heed this basic constraint on judicial power.

In the April 9 TRO, as in the one before, the district court's weighing of the public interest substituted its own opinion for the judgment of the governing authorities. What we said before applies here:

> [T]he 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.

Abbott II, 2020 WL 1685929 at *12 (discussing *Abbott I*, 2020 WL 1502102 at *3). In the April 9 TRO, the district court concluded in cursory fashion that Plaintiffs and their patients would "suffer irreparable harm" absent a TRO, that the "balance of equities favors Plaintiffs" and that a TRO "serves the public interest." *Abbott III*, 2020 WL 1815587 at *6. The

court added "that entry of a [TRO] to restore abortion access would *serve* the State's interest in public health." *Id.* We find the district court's approach as flawed this time as the last.

To begin with, the district court ignored the entire point of a mitigation measure like GA-09. The concept of "flattening the curve" has become all-too-familiar during the pandemic: as applied to GA-09, it means that delaying procedures *now* may prevent short-term exhaustion of critical medical resources. This is one stated goal of GA-09: it does not *prohibit* non-essential procedures, it *delays* them. As its findings show, however, the district court preferred to second-guess this strategy. For instance, the district court found that delaying abortion access "will not conserve PPE or hospital resources" because women will remain pregnant and thus consume more PPE in the long run. *See Abbott III*, 2020 WL 1815587 at *4, ¶¶ 20–23. But that is not a policy choice federal judges are permitted to make during a public health crisis, if ever.[22] Public authorities are entitled to make a different calculation to protect citizens: even *if* GA-09 may increase consumption of medical resources in the long run, decreasing consumption *now* will help weather the immediate surge of COVID-19 cases.[23] Instead of re-weighing the state's cost-benefit calculus, a federal court "must assume that, when [GA-09] was [issued],

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[22] Likewise, the dissenting opinion misunderstands the record regarding PPE use for pregnancy during the pandemic. Tests and visits have been reduced for pregnancy just as other medical diagnosis and well visits have.

[23] Nor did the district court consider that months will pass between the time when a woman can generally lawfully obtain an abortion (20-weeks gestation) and the full-term of a pregnancy (40-weeks gestation).

the [Governor of Texas] was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." *Jacobson*, 197 U.S. at 30. The district court patently erred by doing the opposite. *See Jacobson*, 197 U.S. at 31; *Abbott II*, 2020 WL 1685929, at *7.

Similarly, the district court found that GA-09 did not promote the public health, in part, because some women might travel to other states to obtain abortions. *See Abbott III*, 2020 WL 1815587 at *5, ¶ 25. But the evidence shows, as does common sense, that an emergency measure like GA-09 weighs heavily on people suffering all kinds of health issues. One physician declares she has postponed or canceled surgeries for "patients with possible uterine cancer and cervical cancer diagnoses who are in need of surgeries, as well as patients with heavy bleeding who need surgery but where we can temporarily control the bleeding with medication." Thompson Decl. ¶ 4, App. 235. It is possible that those patients too may travel to other states to obtain desired procedures.

Moreover, evidence that some women travel to other states to receive an abortion does not demonstrate that GA-09 increases the risk of COVID-19 transmission. Such a claim would require comparing the amount of travel that GA-09 has increased with the amount of travel it has reduced. That calculation is uncertain: One respondent provider declares that some women "come from over a hundred miles to receive care at our clinic." Dewitt-Dick Decl. ¶ 22, App. 87. Another testifies that patients at her clinic "hail from all over Texas." Ferrigno Decl. ¶ 30, App. 95.

A court *must* assume that the public health experts at the Texas Department of State Health Services—not to mention the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services—weighed these difficult trade-offs between medical care and public health. *Jacobson*, 197 U.S. at 30. Federal judges get no vote on the matter. As the Supreme Court instructed: "[N]o court . . . is justified in disregarding the action of the [Governor] simply because in its opinion that particular method was—perhaps, or possibly—not the best." *Jacobson*, 197 U.S. at 35 (cleaned up). The district court's disregard of that command usurped the power of the state in a public health emergency.

c. Failure to carefully parse record evidence

The April 9 TRO also failed to "careful[ly] pars[e] the evidence," as instructed by our previous mandate. *See Abbott II*, 2020 WL 1685929 at *11. For instance, the district court did not discuss, or even cite, a single declaration of submitted by Petitioners.[24] It did not explain why, to take a conspicuous example, it disregarded the declaration of the state's infectious disease expert. Nor did the district court mention the undisputed evidence that, "[i]f even one person

[24] As a general matter, Federal Rule of Civil Procedure 52 does not require "punctilious detail [or] slavish tracing of the claims issue by issue and witness by witness." *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir.1993). Certain classes of cases, however, require district courts to address contrary evidence. *See, e.g.*, *Houston v. Lafayette County*, Miss., 56 F.3d 606, 612 (5th Cir.1995) (voting rights); *Lopez v. Current Director*, 807 F.2d 430, 434 (5th Cir.1987) (employment discrimination). Because we specifically required such an undertaking here, *Abbott II*, 2020 WL 1685929, at *11, the district court's failure to do so violated the mandate rule. *See LULAC*, 675 F.3d at 438.

providing care is carrying COVID-19 but not yet symptomatic, the results could be devastating if that person is not equipped with proper PPE." Abraham Decl. ¶ 4, App. 225. The district court did not explain whether it disagreed with this statement or thought it was inapplicable to abortion providers. Nor did the district court mention record evidence indicating that N95 masks are now required for surgical abortions to be performed safely. *See* Harstad Decl. ¶ 4.[25] We say this, not to make findings ourselves, but to show why the delicate inquiry in this case requires "careful parsing of the evidence." *Abbott II*, 2020 WL 1685929 at *11. A scalpel must be employed, not a rubber stamp.

Moreover, the district court's wholesale adoption of Respondents' proposed findings resulted in findings that are not supported by the record. One example may suffice. The district court found that, "[a]lthough some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small and can generally be handled in an outpatient setting." *Abbott III*, 2020 WL 1815587, at *3, ¶ 14 (citing Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12). The Levinson paragraph cited speaks only to

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[25] Consider another jarring incongruity regarding surgical abortions: Petitioners submitted a declaration from a physician stating that any physician performing a surgical abortion must use a face mask and that "[d]ue to the current COVID-19 outbreak, the specific type of mask that is currently required is a N95 mask." Harstad Decl. at ¶ 4, App. 230. This declaration is striking, in light of the district court's finding that "[o]nly one physician associated with Plaintiffs has used an N95 mask since the beginning of the COVID-19 pandemic, and that physician has been reusing the same mask over and over." *Abbott III*, 2020 WL 1815587 at *4, ¶ 19.

the frequency of hospitalization; it says nothing about how many medication abortions require follow-up aspiration. *See* App. 373. Nor does the cited Schutt-Aine paragraph provide any support for the frequency of follow-up aspiration. *See* App. 129. Schutt-Aine states that "[m]ajor complications—defined as complications requiring hospital admission, surgery or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases." App. 129 (citing Ushma Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology, 175 (2015)). But Figure 1 of the cited article clarifies that subsequent uterine aspirations (i.e., surgical abortions) were not considered "surgery" within the meaning of the article. *See* Upadhyay, 125 Obstetrics & Gynecology at 176.

Petitioners, by contrast, submitted evidence demonstrating the rate of medication abortions resulting in incomplete abortions, which are treated either with a repeat dose of medication or aspiration.[26] In our court, Respondents contend those numbers are outdated.[27] Analysis of such conflicting evidence is hard; it requires careful parsing. We reach no conclusions on the point. District courts, who can

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[26] *See* 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 that 4–8% of mifepristone-induced abortions at seven weeks gestation, and more than 15% after seven weeks gestation, result in incomplete abortions).

[27] *See* Opp. to Mandamus at 19 (citing U.S. Food & Drug Admin., Mifeprex 13 tbl.3 (rev. Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf).

make fact findings after adversarial hearings, are better suited to the task. Here, however, the district court declined to avail itself of those tools, instead cancelling the scheduled preliminary injunction hearing and issuing a second TRO that adopted all 30 of Respondents' proposed findings without citing or discussing a single declaration submitted by Petitioners. To be sure, a district court need not "recite every piece of evidence supporting its findings." *Schlesinger*, 2 F.3d at 139. But "the record must nevertheless support the district court's decision." *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). Here the record fails to do so.

The failure to parse the evidence led the district court to reach legally erroneous results in two respects. First, under *Whole Woman's Health v. Hellerstedt*, to determine whether a law "unduly burdens" the abortion right, a court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. 2292, 2309–10, 2319 (2016). The April 9 TRO does not meaningfully weigh either one. As noted, the order does not cite or discuss a single declaration submitted by Petitioners explaining the benefits of GA-09. Nor does the order articulate the burden of a delay or why that delay should be considered a "ban" on abortion. The record belies any such notion. Medication abortion is available until 10 weeks LMP, and surgical abortion until 22 weeks LMP. Given that GA-09 had only a 30-day duration, no woman would be pushed beyond the legal limit by a 30-day delay in obtaining a medication abortion. Moreover, health risks of a delay are mitigated because GA-09, by its terms, permits procedures that a patient's physician determines 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." *Abbott II*, 2020 WL 1685929, at *10 (quoting GA-09). The district court factored none of this into its cursory analysis. That weighing of burdens versus benefits would be inadequate under *Hellerstedt* in normal circumstances. *A fortiori* it is inadequate under the *Jacobson* framework, which asks whether burdens outweigh the benefits "beyond question." 197 U.S. at 31. Moreover, as we have explained, the Supreme Court has approved "a wide variety of abortion regulations . . . that in practice can occasion real-world delays of several weeks." *Abbott II*, 2020 WL 1685929 at *10 (quoting *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (en banc) (mem.) (Kavanaugh, J., dissenting)). That leads us to the second legal error resulting from the district court's findings: they treat a medication abortion as an absolute right. But the constitutional right to abortion does not include the right to the abortion method of the woman's (or the physician's) choice. *Gonzales*, 550 U.S. at 164–65. On this record it was patently erroneous to find that a mere 30-day postponement of medication abortions "beyond question" violates *Casey*.

d. The *Pennhurst* doctrine.

We address an additional point that arose during our consideration of Petitioners' emergency stay motion, because it may become important as the litigation continues. In the April 9 TRO, the district court adopted Respondents' proposed fact finding that "[m]edication abortion is not a surgery or procedure."

Abbott III, 2020 WL 1815587 at *3, ¶ 10; *cf.* ECF 56-2, Plaintiff's Proposed Order ¶ 10 ("Medication abortion is not a surgery or procedure.").[28] When considering Petitioners' stay motion, we expressed uncertainty as to whether medication abortions were covered by GA-09, given ambiguity in the Texas Medical Board's guidance on the order. *See Abbott V*, 2020 WL 1866010, at *3. For that reason, we denied a stay as to the part of the TRO applicable to medication abortions, while "express[ing] no ultimate decision on the ongoing mandamus proceeding." *Id.* We have since benefitted from additional briefing on this issue. Given the lack of legal analysis in the April 9 order, we are unable to discern what impact the district court's finding had on its decision to grant the TRO. Going forward, however, we caution that any relief ordering a state official to comply with state law would be barred by the Pennhurst doctrine. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

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[28] It is unclear how Respondents tie this contention (which revolves around the interpretation of GA-09) to their substantive due process claim, which is the only claim they pursued on their first and second applications for TROs. In any event, Respondents may develop their arguments further at the preliminary injunction stage, if they choose. Finally, based on this finding and others, the dissenting opinion, *infra* at 18–21, suggests that the April 9 TRO concludes that GA-09 was a "pretext" for targeting abortion. But we discern no such conclusion in the April 9 TRO. Instead, in its conclusions of law, the April 9 TRO merely states that GA-09's "burdens outweigh [its] benefits," *Abbott III*, 2020 WL 1815587 at *6, and makes no legal finding that GA-09 pretextually targets abortion over other medical procedures. Respondents, of course, may choose to develop such a claim at the preliminary injunction stage, but we do not find that legal issue presented by the April 9 TRO.

Under *Pennhurst*, a federal court may not grant "relief against state officials on the basis of state law." *Id.* at 106. A federal court may determine state officials' enforcement of state law violates a *federal* right, but it may not order state officials to conform their conduct to *state* law. *See*, *e.g.*, *Williams On Behalf of J.E. v. Reeves*, 19-60069, 2020 WL 1638411, at *7 (5th Cir. Apr. 2, 2020) (under *Pennhurst*, "the rule announced in *Ex parte Young* cannot be used to redress a state official's violation of state law"); *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990) (*Pennhurst* bars "a claim that state officials violated state law in carrying out their official responsibilities").

To the extent the April 9 TRO finds that GA-09 violates *Casey* by postponing medication abortions, we have already explained that it patently erred. But to the extent the TRO might be construed to order relief on a claim that state officials failed to conform their actions to state law, the TRO would violate Pennhurst. State health officials, who are Petitioners here, insist that GA-09's postponement of "procedures" encompasses medication abortions. Pennhurst bars a federal court from considering a claim that those officials failed to comply with a proper interpretation of the state executive order. *See*, *e.g.*, Hughes, 902 F.3d at 378 (quoting Pennhurst, 465 U.S. at 106) (explaining that "instruct[ing] state officials on how to conform their conduct to state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment").[29] The

[29] Such a claim would need to be brought in state court. *Cf. Russell v. Harris Cty.*, CV H-19-226, 2020 WL 1866835, at *12 (S.D. Tex. Apr. 14, 2020) (abstaining, under *R.R. Comm'n v.*

district court should be aware of this issue in further proceedings.

2. The April 9 TRO Patently Erred by Exempting 18-Week Gestation from GA-09

We turn to the part of the April 9 TRO blocking application of GA-09 as to patients who "would reach 18 weeks LMP by April 21, 2020," and who, in a physician's judgment, are "unlikely to be able to obtain an abortion at an [ambulatory surgical center] before [her] pregnancy reaches the 22-week cutoff." *Abbott III*, 2020 WL 1815587, at *6. For those patients, the district court concluded GA-09 would amount to "an absolute ban on abortion" that violates *Casey*. *Id.* Once again, the district court's failure to apply the framework articulated in *Abbott II* led to a patently erroneous result that cannot be sustained on this record.

As we explained in *Abbott II*, a state emergency measure like GA-09 violates the right to abortion if it "has no real or substantial relation" to the public crisis "or is, beyond all question, a plain, palpable invasion of [*Casey*]." 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31). Here, we take the district court's conclusion to turn only on the second part of the analysis—whether GA-09 is "beyond all question" a violation of *Casey* to the extent it results in delaying a woman's pregnancy to 18 weeks LMP.

Pullman Co., 312 U.S. 496 (1941), from hearing COVID-19 related equal protection and due process claims because there was "a pending state-court lawsuit challenging the Executive Order that raises questions about novel, uncertain issues of state law") (referring to *Tex. Crim. Def. Laws. Ass'n v. Abbott*, No. GN-20-002034, 459th District Court of Travis County, Texas (Apr. 8, 2020)).

The district court's treatment of GA-09 as "an absolute ban on abortion" as applied to this category of women was obviously wrong. *Abbott III*, 2020 WL 1815587, at *6. A woman who would be 18 weeks LMP when GA-09 expires has up to four weeks to legally procure an abortion in Texas. No case we know of calls that an "absolute ban" on abortion. *Cf.*, *e.g.*, *Casey*, 505 U.S. at 874 (explaining that "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure").

The district court may have had in mind an as-applied challenge to GA-09 on behalf of a woman facing this particular combination of circumstances. *See*, *e.g.*, *Gonzales*, 550 U.S. at 167 (explaining that "as-applied challenges" are "the proper manner to protect the health of the woman if it can be shown in discrete and well-defined instances" that particular procedures are required). That would require evidence of "discrete and well-defined instances" sufficient to support such a challenge, *id.*, but the district court cited none and we can find none in the record. Respondents attempt to bridge this gap by relying on a new affidavit from a hotline coordinator at an abortion-funding nonprofit. But that affidavit speaks only in general terms about women at later stages of pregnancy and does not even attempt to identify any "discrete and well-defined instances" of a woman in the 18-week category sufficient to support an as-applied challenge here. *See* App. 439–44.

Respondents also speculate that, due to patient backlogs and the burden of traveling to one of the limited number of Texas ASCs, women in the 18-week

category will not be able to obtain an abortion. Once again, this is the stuff of a possible as-applied challenge. But we know of no precedent saying that it violates *Casey* "beyond question" when a generally applicable emergency health measure causes backlogs and travel delays for women seeking abortion. In fact, even outside of a public health crisis, the Supreme Court has "recognize[d] that increased driving distances do not always constitute an 'undue burden.'" *Hellerstedt*, 136 S. Ct. at 2313 (quoting *Casey*, 505 U.S. at 885–87). To the contrary, the Court has treated increased travel distance only as one factor that—"when taken together with others" such as "the virtual absence of *any* health benefit"—could support a conclusion of undue burden under *Casey* on a particular record. *Id.* (emphasis added).

Perhaps in the context of a preliminary injunction hearing, Respondents will be able to adduce evidence to support an as-applied challenge to GA-09 (or its successor order, GA-15) along these lines. But the record presently before the district court fails to provide even an arguable basis to conclude that GA-09, as applied to women in the 18-week category, is "beyond all question, a plain, palpable invasion of [*Casey*]." *Abbott II*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31).

3. The April 9 TRO Did Not Patently Err by Exempting 22-Week Gestation from GA-09.

The district court also concluded that GA-09 "beyond question" violates *Casey* as applied to a woman who "would otherwise be denied access to abortion entirely because . . . [her] pregnancy would reach 22 weeks LMP" before GA-09 expires. *Abbott III*, 2020 WL 1815587, at *6. While we harbor some doubts

about the evidentiary basis for the district court's conclusion, we conclude that any error is not so clear and indisputable as to warrant mandamus.

Unlike the 18-week category, Respondents have adduced *some* evidence that they have clients who will reach 22 weeks LMP during the operation of GA-09. *See* App. 103, 353, 442. While this evidence is secondhand, and thus weak, we cannot conclude it was a "clear abuse of discretion" for the district court to rely on it at this early stage. *Abbott II*, 2020 WL 1685929, at *4. The district court concluded that GA-09's delay of non-essential medical procedures would operate as a permanent ban on abortion for women in this category, and that the order's burdens far outweighed its benefits as to those women. Again, given the weak evidence, we are not fully satisfied with this cursory conclusion. Further, it remains unclear whether GA-09's exception for "patient[s] who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences . . . as determined by the patient's physician," *id.* at *3, already covers women in these circumstances. But Petitioners' arguments do not convince us, at this early stage, that the district court's order enjoining GA-09 as to women who will reach 22 weeks LMP during the order's operation was so patently erroneous that mandamus is appropriate. *Cf. Gee*, 941 F.3d at 158 (noting that mandamus is only appropriate "for really extraordinary causes").

As a result, we conclude Petitioners have not shown entitlement to the writ of mandamus as to this part of the TRO.

* * *

To sum up, Petitioners have shown entitlement to the writ of mandamus as to the parts of the April 9 TRO that:

- restrain enforcement of GA-09 as a "categorical ban on all abortions provided by plaintiffs";
- restrain enforcement of GA-09 after 11:59 p.m. on April 21, 2020;
- restrain the Governor and Attorney General;
- restrain enforcement of GA-09 as to medication abortions;
- restrain enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

Petitioners have not demonstrated entitlement to the writ as to that part of the April 9 TRO that:

- restrains enforcement of GA-09 as to patients "who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020."

IV.

The other two requirements for mandamus relief are satisfied here. First, Petitioners "'have no other adequate means' to obtain the relief they seek." *Abbott II*, 2020 WL 1685929, at *13. TROs, unlike preliminary injunctions, are not appealable. *See Smith v. Grady*, 411 F.2d 181, 186 (5th Cir. 1969); *see also* 28 U.S.C. § 1292. Although Petitioners argued in their separate appeal that the TRO at issue here has the "actual content, purport, and effect" of a preliminary injunction, *Smith*, 411 F.2d at 186, we

concluded otherwise and dismissed that appeal for lack of jurisdiction.

Second, for substantially the same reasons set out in *Abbott II*, "[w]e are persuaded that this petition presents an extraordinary case justifying issuance of the writ." *Abbott II*, 2020 WL 1685929, at *15. As we stated there,

> 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 . . . .

Id. The district's failure to apply *Jacobson* and its usurpation of the state's power by second-guessing "the wisdom and efficacy of [its] emergency measures" are just as extraordinary now as they were on April 7. *Id.* Moreover, the issues addressed in this litigation "have an importance beyond the immediate case." *Id.* (quoting *Volkswagen*, 545 F.3d at 318).

"[W]e are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate." *Id.* (quoting *Volkswagen*, 545 F.3d at 319). We therefore exercise our discretion to grant mandamus relief.

CONCLUSION

The petition for writ of mandamus is GRANTED IN PART and DENIED IN PART.

The district court is directed to vacate any part of the April 9 TRO that (1) restrains enforcement of GA-

09 as a "categorical ban on all abortions provided by Plaintiffs"; (2) restrains the Governor and Attorney General; (3) restrains enforcement of GA-09 after 11:59 p.m. on April 21, 2020; (4) restrains enforcement of GA-09 as to medication abortions; and (5) restrains enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

We do not grant the writ or direct vacatur as to that part of the April 9 TRO restraining enforcement of GA-09 as to patients "who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020."

Any portions of our April 10 administrative stay remaining in effect are LIFTED.

As indicated in *Abbott II*, any future appeals or mandamus petitions in this case will be directed to this panel and will be expedited. *See 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, Circuit Judge, dissenting in part.

For the second time in as many weeks, the majority invokes the "drastic and extraordinary remed[y]" of mandamus, *Ex parte Fahey*, 332 U.S. 258, 259 (1947), simply to second guess the district court's reasonable evaluation of the evidence and to interfere with its inherent power to control the proceedings before it. In so doing, the majority once again places us at odds with seemingly every other federal court to have considered whether the need to conserve hospital capacity and personal protective equipment ("PPE") during the current COVID-19 pandemic can justify so drastically curtailing the constitutional right to an abortion. *See In re Abbott*, No. 20-50264, 2020 WL 1685929, at *16 (5th Cir. Apr. 7, 2020) (*Abbott II*) (Dennis, J., dissenting) (collecting cases).[1] This second ruling is particularly inappropriate because, although the district court properly fulfilled this court's previous mandate—unwarranted though the mandate may have been—the majority now moves the goal posts and chastises the district court for not abiding by a series of phantom instructions that can be found nowhere in its previous order. At bottom, the majority simply disagrees with the district court's decisions on

[1] Indeed, in the interim between this case and our last decision, one of our sister circuits has explicitly rejected the proposition that a very similar temporary restraining order (TRO) to the one at issue here would work such irreparable harm that bypassing the normal appeals process was appropriate. *See S. Wind Women's Ctr. LLC v. Stitt*, No. 20-6045, 2020 WL 1860683, at *2-3 (10th Cir. Apr. 13, 2020); *see also id.* at 3 (Lucero, J., concurring) (observing that where—as here—the State failed to present any evidence that abortion procedures would result in a shortage of PPE or hospital capacity needed for the COVID-19 response, it failed to establish that the TRO had irreparable consequences).

matters that are squarely within its discretion. This is not a proper use of "one of the most potent weapons in the judicial arsenal." *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)).

This Circuit thus once again does not apply the applicable rules of law because of the subject matter of the case, and, equally troubling, ignores the words of its own ruling from less than two weeks ago. I again echo the words of a colleague in dissent in a case now before the United States Supreme Court: "It is apparent that when abortion comes on stage it shadows the role of settled judicial rules." *June Med. Services L.L.C. v. Gee*, 905 F.3d 787, 816 (5th Cir. 2018) (Higginbotham, J., dissenting), *cert. granted*, 140 S. Ct. 35, 204 L. Ed. 2d 1193 (2019).

I.

The facts and procedural history of this case have been documented in detail in our previous decision. *See In re Abbott*, No. 20-50264, 2020 WL 1685929 at *1-4 (5th Cir. Apr. 7, 2020) (*Abbott II*); *id.* at *17 (Dennis, J., dissenting). To briefly recount, on March 22, 2020, the Governor of Texas issued executive order GA-09 in response to the current COVID-19 pandemic and the accompanying shortage of personal protective equipment ("PPE") and hospital capacity. GA-09 requires all Texas healthcare providers to

> 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.

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 order contains an exception for "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the [PPE] needed to cope with the COVID-19 disaster." *Id.* Violations of GA-09 are punishable by criminal penalties and, by virtue of a subsequent emergency rule with identical requirements that was issued by the Texas Medical Board, *see* 22 Tex. Admin. Code § 187.57, may effectively result in the suspension or restriction of a practitioner's license.[2] By its terms, GA-09 remains in effect until 11:59 p.m. on April 21, 2020.

The day after GA-09 was issued, the Texas Attorney General released a press release stating, among other things, that GA-09 applied to "any kind of abortion that is not medically necessary to preserve the life and health of the mother," and that "[t]hose who violate the governor's order will be met with the full force of the law." App. at 31.[3] The Respondents, who provide abortion services in Texas, filed suit in district court under 42 U.S.C. § 1983 against the Petitioners, who are various state officials. The Respondents asserted that the application of GA-09 to

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[2] Because the requirements of GA-09 and the emergency rule are coextensive, all parties to this litigation have consistently referred to them collectively as GA-09, and this opinion will follow suit.

[3] References to "App." in this opinion refer to the appendix to the mandamus petition. *See* ECF 4 (5th Cir. No. 20-50296).

prohibit abortion violated, *inter alia*, substantive due process. The Respondents sought to enjoin the Petitioners from enforcing GA-09 as applied to abortion, and, after reviewing argument and evidence on the point from both parties, the district court issued a temporary restraining order ("TRO") doing just that. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020).

Before the district court could hold a scheduled hearing on whether to issue a longer preliminary injunction, the Petitioners filed a petition for mandamus with this court, and on April 7, the majority granted the petition and ordered that the district court vacate its TRO. *Abbott II*, 2020 WL 1685929 at *16. The Respondents then moved for a second, more limited TRO in the district court, which the court granted. *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1815587, at *7 (W.D. Tex. Apr. 9, 2020) (*Abbott III*). The second TRO restrained the Petitioners from enforcing GA-09 (1) "as a categorical ban on all abortions provided by [the Respondents]"; (2) as a prohibition on "medication abortions"; (3) as a prohibition on "procedural abortion[s] [for] any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP[4] on April 22, 2020, and [who are] likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care" ("the 18-week category"); and (4) as a prohibition on "procedural abortion[s] [for] any patient who, based on the

[4] LMP refers to the length of time that has passed since the first day of a pregnant woman's last menstrual period. *See* Tex. Health & Safety Code § 171.063.

treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020" ("the 22-week category"). *Id.* The Petitioners filed a second petition for a writ of mandamus with this court the following day.

II.

Petitioners once again ask that we direct the district court to vacate its TRO. As noted, mandamus is an "extraordinary remedy" that should only issue 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). It is not sufficient for the petitioners to prove simply "that the court erred." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). Rather, 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[s] must satisfy the burden of showing that [their] 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." *Cheney*, 542 U.S. at 380-81 (internal quotation marks and citations omitted).

The "clear and indisputable" prong of this test is not met here. That the Petitioners' right to relief is indeed disputable should be evident by the very existence of this dissent and the many other courts that have concluded that relief is not warranted in

very similar circumstances. But I will elaborate. To establish a clear and indisputable right to relief, the Petitioners must show that the district court not only committed a "clear abuse[] of discretion," but also that the abuse "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). Neither precondition is met here.

A.

The majority asserts that the district court abused its discretion in several ways. None of these assertions warrants mandamus relief.

1.

The majority first engages in what would appear to be an academic exercise, concluding that the district court erred by restraining the Petitioners' conduct in ways that apparently had no practical impact even under the majority's reasoning. Mandamus relief cannot be warranted to fix a mistake that is of no consequence.

To start, the majority faults the district court for restraining the Petitioners from enforcing GA-09 "as a categorical ban on all abortions" because it does not interpret GA-09 to be a categorical ban on all abortions. Majority at 9 (citing *Abbott III*, 2020 WL 1815587, at *7). As the majority acknowledges, however, a federal court may determine that a state official's purported enforcement of state law would violate a federal right, and this principle applies regardless of whether that enforcement is a correct interpretation of the state law. Majority at 31; *See Louise B. v. Coluatti*, 606 F.2d 392, 399 (3d Cir. 1979) ("To put the matter more bluntly, where a state

violates federal law, it is no better off because it also violates its own law."). Whether GA-09 actually *is* a categorical ban on abortions under state law is therefore irrelevant. If the district court correctly found a credible threat that the Petitioners would enforce GA-09 as a categorical ban on abortion, that factual finding is sufficient to restrain such enforcement as a violation of a federal constitutional right. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (stating that when "plaintiffs face a credible threat of enforcement," they "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief" (internal quotations omitted)).

But as I said, this discussion is academic. By restraining the Petitioners from enforcing GA-09 as to medication abortions and those abortions falling into the 18-week and 22-week categories, the district court's TRO also necessarily prevented the Petitioners from enforcing GA-09 as a categorical ban on abortions. Neither the Petitioners nor the majority identify any possible conduct that would violate the "categorical ban" prohibition in the district court's order that would not also violate the prohibition on enforcing GA-09 against providers of medication abortions or those that provide abortions that fall into the 18-week or 22-week categories. Quite simply, the TRO's prohibition on enforcing GA-09 "as a categorical ban on all abortions" has no independent effect; it does not burden the Petitioners because it does not alter the Petitioners' rights or responsibilities in any way. Accordingly, even if correct regarding the error, the majority's decision to order this portion of the order vacated also does not change the rights and responsibilities of any party and serves no purpose but

to point out the district court's purported mistake. Invoking "one of the most potent weapons in the judicial arsenal," *In re JPMorgan Chase*, 916 F.3d at 504, simply to correct an alleged legal error with no practical consequences is inappropriate. Indeed, we have explicitly stated that mandamus is not warranted upon a showing "merely that the court erred." *Occidental Petroleum Corp.*, 217 F.3d at 295. The Petitioners and the majority have not demonstrated how the district court's purported error on this point could produce "patently erroneous results," *In re Volkswagen of Am., Inc.*, 545 F.3d at 312, when, as a practical matter, it does not produce any results at all.

Similarly, the majority concludes that, because the district court restrained the enforcement of GA-09 past its nominal April 22 expiration date, the district court abused its discretion by not narrowly tailoring its TRO to end when the executive order potentially expired. Majority at 9-10. But the majority fully acknowledges that, following GA-09's expiration, there will be "no enforcement of GA-09 for a court to restrain," Majority at 10, and so the district court's TRO will have no effect on the Petitioners after the executive order expires. By contrast, under the majority's reasoning, had GA-09 been extended, the district court would have had to again extend its TRO in order to maintain the status quo until the scheduled preliminary injunction hearing—something that it is not even clear the district court would have authority to do under FED. R. CIV. P. 65(b)(2), which some authorities have held limits a district court to *one* TRO

extension.[5] *See Clements Wire & Mfg. Co. v. N. L. R. B.*, 589 F.2d 894, 896 (5th Cir. 1979) (stating that TROs "must expire not later than 20 days after issuance," when Rule 65(b) imposed a 10-day time limit); *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 (4th Cir. 2006) (stating "a TRO is limited in duration to 10 days plus *one* 10–day extension" under the former time limit (emphasis added)). The extension of the TRO was a reasonable action by the district court that was well within its discretion—either its TRO would be harmless and would not affect any rights or responsibilities after GA-09's expiration, or it would be appropriately tailored to its purpose. We now know that, fortunately, GA-09 will indeed expire on April 22,[6] and the majority's order will not wreak the harm that it might have had GA-09 been extended and the district court been left with a gap between the expiration of the TRO and the preliminary injunction hearing that it may arguably have been powerless to fill. But again, the majority utilizes mandamus, a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes,'" *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. at 259–60), simply to correct what it wrongly perceives to be a run-of-the-mill legal error that the majority acknowledges has no practical consequences.

The majority next concludes that the district court erred by failing to dismiss the Texas Governor and Attorney General and by restraining them from

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[5] The district court already extended its second TRO once on April 14. *See Planned Parenthood Center for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. No. 82) (Apr. 14, 2020).

[6] *See* Tex. Exec. Order No. GA-15 (Apr. 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA15_hospital_capacity_COVID-19_TRANS_04-17-2020.pdf.

enforcing GA-09 in the proscribed manner because neither officer has the "connection" to enforcement of GA-09 needed to overcome sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908). Majority at 10-13. With respect to the Attorney General, the majority concludes that neither the fact that Texas law permits the Attorney General to participate in prosecutions for violations of GA-09, *see* TEX. GOV'T CODE § 402.028, nor that the Attorney General publicly singled out abortion providers for potential enforcement; stated that GA-09 prohibits all abortion except in the case of a medical emergency; and threatened that "[t]hose who violate the governor's order will be met with the full force of the law," App. at 30, are sufficient to establish a connection to GA-09 enforcement. Our cases have not explicitly held as much, and indeed we have previously stated that authority and a willingness to enforce a law can be inferred by an official's threats to do so. *City of Austin v. Paxton*, 943 F.3d 993, 1001 (5th Cir. 2019) ("[T]he fact that Paxton sent letters threatening enforcement of the DTPA makes it clear that he had not only the authority to enforce the DTPA, but was also constraining the manufacturer's activities, in that it faced possible prosecution if it continued to make and distribute its products."). It is difficult to see, then, how the district court's preliminary[7] determination that the Attorney General had a connection to enforcement was so

[7] Notably, the Petitioners have not at any point filed a motion to dismiss the Respondents' claims against the Governor and Attorney General, instead raising their jurisdictional arguments only in opposition to the TRO. Had one been filed, the denial of the motion would have been immediately appealable, *see Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009), obviating any need for mandamus on this point.

contrary to established law as to constitute a "clear abuse of discretion," *In re Volkswagen of Am., Inc.*, 545 F.3d at 312, and thereby justify this court's extraordinary intervention on this point.

But even assuming *arguendo* that the majority is correct, the sum effect of restraining the Governor and Attorney General from enforcing GA-09 would be nil if they lack any authority to enforce GA-09 in the first place. Thus, the majority acts again to use the "drastic and extraordinary remedy" of mandamus, where it at most has little, if any, practical effect. *Fahey*, 332 U.S. at 259.

I therefore disagree that mandamus is appropriate with respect to any of these alleged errors.

2.

Next the majority concludes that the district court violated the "mandate rule" by not following the instructions issued in *Abbott II*. Majority at 14 (citing *United States v. Smith*, 814 F.3d 268, 273 (5th Cir. 2016)). But a review of the district court's substantive and procedural decisions makes clear that the court complied fully with the majority's previous directives.

a.

The majority first argues that the district court failed to apply the legal framework that the majority previously derived from *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Majority at 13. This is contradicted by the district court's plain statement that applying GA-09 to the classes of abortions identified in its TRO "violates the standards set forth in both [*Casey*] and [*Jacobson*]." *Abbott III*, 2020 WL 1815587. The majority appears to regard

this as only a formalistic recitation. On the contrary, the district courts' findings and conclusions makes clear that it properly considered each step of the majority's framework.

Specifically, the test the majority previously formulated required the district court to determine (1) whether applying GA-09 to the abortions at issue[8] lacks a "real or substantial relation" to the current public health crisis, and (2) whether the benefits of applying GA-09 to these abortions are "beyond all question" outweighed by its burden on the constitutional right to an abortion, thus creating an undue burden under *Casey*. *Abbott II*, 2020 WL 1685929, at *7, *9. The district court faithfully made findings and conclusions tied to both steps of this analysis.

With respect to the first, the majority stated in its previous opinion that the district court should "inquire whether Texas has exploited the present

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[8] In its previous decision, the majority without explanation chose to analyze whether GA-09 *as a whole* had a real or substantial relation to the current public health crisis, notwithstanding the fact that the Respondents were not challenging GA-09 as a whole, nor had the district court enjoined all applications of GA-09. As discussed in more detail below, the proper focus should have been whether the *application of GA-09 to abortions* bore any real or substantial connection to the current public health crisis. *See Jacobson*, 197 U.S. at 28 ("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*." (emphases added)).

crisis as a pretext to target abortion providers *sub silentio*." *Id.* at *13 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). On this point, the district court found that "[m]edication abortion is not a surgery or procedure" within conventional definitions of the terms and that "[p]roviding medication abortion does not require the use of any PPE," which would suggest that it is not covered by the plain language of the prohibition within GA-09. *Abbott III*, 2020 WL 1815587, at *3. And the court found that "[p]hysicians are continuing to provide [other] obstetrical and gynecological procedures comparable to abortion in PPE use or time-sensitivity, based on their professional medical judgment" without hinderance from GA-09. *Id.* at *5. And, though this significantly overlaps with the second prong of the majority's test, the district court made extensive findings as to why applying GA-09 to abortions "will not conserve PPE" and "will not conserve hospital resources"—the two explicitly stated goals of the executive order. *Id.* at *4. These findings all suggest that the application of GA-09 to abortions—particularly medication abortions—is pretextual and not motivated by any desire to conserve PPE or hospital capacity, meaning it lacks a "real or substantial relation" to the current public health crisis under the framework the majority instructed the district court to employ. *Abbott II*, 2020 WL 1685929, at *7.

The district court's analysis is even more explicit at the second stage of the inquiry in which the majority instructed it to weigh the benefits of applying GA-09 to abortions against the burden on the constitutional right to an abortion. *Id.* at *9. As stated, the district court made a range of findings indicating that applying GA-09 to abortions not only would not

result in a public health benefit but in fact would be a net drain on PPE and hospital capacity and would be otherwise harmful to public health. The court made specific findings as to how much and what kind of PPE are consumed during the performance of medication and procedural abortions and their surrounding services, as well as the frequency with which complications require hospitalization with each method. *Abbott III*, 2020 WL 1815587, at *3-4. The court then compared this figure to the amount of each resource typically consumed by a woman continuing a pregnancy and found that substantially more of each resource is consumed "at each stage of the [continued] pregnancy" than in a pre-viability abortion.[9] *Id.* at *4. And the district court noted that continuing a pregnancy requires significantly more "in-person healthcare" and that many women denied an abortion by GA-09 are traveling out-of-state to obtain one, increasing their risk of contracting COVID-19. *Id.* at *4-5.

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[9] The majority now faults the district court for not explicitly stating that its findings were with regard to how much of each resource are being consumed *during the current COVID-19 pandemic*. Majority at 20-23. As discussed in more detail below, this is an incorrect reading of the district court's order, *see Abbott II*, 2020 WL 1685929, at *4 (noting the amount of N95 masks the physicians associated with the Respondents had used "since the beginning of the COVID-19 pandemic" and citing the "recommendations from the American College of Obstetricians and Gynecologists ('ACOG') and other medical authorities for providing obstetrical care *during the COVID-19 pandemic*" (emphasis added)), and the majority mistakenly insists on punctilious formality rather than making reasonable inferences from the evidence and the district court's findings. For now, suffice it to say that this new requirement can be found nowhere in the majority's previous order.

The district court then made a variety of findings regarding the burden that applying GA-09 to the classes of abortion at issue placed on the constitutional right to abortion. The court found that the Respondents had "turned away hundreds of patients seeking abortion care," and that "[t]here will be significant pent-up need for abortion care when the Executive Order expires," resulting in further delays. *Id.* at *5. The court noted that progressively more invasive techniques are required to perform an abortion the longer that it is delayed. *Id.* And the court found that the health risks, financial costs, and emotional cost of an abortion increases with gestational age, meaning the delays make abortions riskier and more cost prohibitive. *Id.* at *5-6. The court also found that for many women, the delay would result in them being effectively denied a legal right to an abortion in Texas, either because they would exceed the 22-week maximum legal limit or they would reach a gestational age at which they were legally required to go to a facility that they did not have access to in order to receive an abortion. *Id.*

The district court then weighed these benefits and burdens against each other, just as the majority instructed, and concluded that "based on the court's findings of fact, it is beyond question that the Executive Order's burdens outweigh the order's benefits as applied" to the classes of abortion at issue. *Id.* at *6. And in doing so, it explicitly relied *Jacobson*.

It is one thing for the majority to disagree with the district court's findings or its weighing of the relative benefits and burdens of applying GA-09 to these abortions (though, as will be discussed, the majority is wrong to do so). But it is simply inaccurate for the

majority to conclude that the district court disregarded its instructions to apply a legal framework that it is abundantly clear the district court in fact applied. I therefore disagree that the district court violated the mandate rule in this respect and, therefore, that mandamus is appropriate to correct the supposed error.

b.

The majority next reprimands the district court for entering a TRO at all. Majority at 14-19. The majority seems to have wanted the district court to instead proceed directly to an adversarial hearing on a preliminary injunction without issuing another TRO to preserve the status quo until that hearing could be held. This requirement is stated nowhere in the previous mandamus order and cannot be reconciled with the principle that district courts have broad discretion in ordering their affairs. To be sure, the majority made several references to the sort of evidence that could be adduced and arguments that could be made at an upcoming preliminary injunction hearing. *See*, *e.g.*, *Abbott II*, 2020 WL 1685929, at *2 ("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."); *id.* at *9 ("Respondents will have the opportunity to show at the upcoming preliminary injunction hearing that certain applications of GA-09 may" violate *Casey*); *id.* at *12 ("These are issues that parties may pursue at the preliminary injunction stage[.]"). But even assuming arguendo these off-hand comments could be construed as a directive to hold a preliminary injunction

hearing—they obviously cannot—at no point did the majority suggest the district court was not permitted to issue a TRO to prevent irreparable harm in the interim until a hearing could be held.

Nor is it clear by what authority the majority would have imposed such a restriction if it *had* been contained in the previous mandamus order. It is well established that "[d]istrict courts have broad discretion to evaluate the irreparability of alleged harm and to make determinations regarding the propriety of injunctive relief." *Wagner v. Taylor*, 836 F.2d 566, 575–76 (D.C. Cir. 1987). This broad discretion extends to "manag[ing] the timing and process for entry of all interlocutory injunctions—both TROs and preliminary injunctions[.]" *Ciena Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000).

The majority and the Petitioners make much of the fact that the district court did not permit the Petitioners to "respond [to the second TRO motion] in writing" before entering the second TRO. Transcript of 4/9/20 Tele. Conf. at 14:39; *see* Majority at 18 ("Moreover, we called for additional evidence from both sides."). But as the majority acknowledges, the district court was not required to do so, as the Rules explicitly allow a TRO to be entered *ex parte*. Majority at 14 (citing Fed. R. Civ. P. 65(b)(1)). Further, the Petitioners had already been permitted to make argument and introduce evidence in response to the Respondents' first motion for a TRO. *See Planned Parenthood Center for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex.) (Dkt. No. 30) (March 30, 2020). It was not an abuse of the district court's discretion for it to conclude that, given the time constraints and the potential for irreparable harm that had been

established, it was imprudent to wait for further argument or evidence from the Petitioners before entering a TRO to preserve the status quo until the preliminary injunction hearing. All that was required was that "the opposing party [be] given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the [preliminary] injunction should not issue." *Ciena Corp.*, 203 F.3d at 319. The Petitioners would have had that opportunity at the rescheduled preliminary injunction hearing, and they could have filed a motion to dissolve the TRO with accompanying exhibits at any time under Rule 65(b)(4) if they truly believed that time was of the essence such that they could not wait for the hearing.[10] Instead, they filed the present motion for mandamus.

The majority alternately argues that the district court defied the mandate by entering a TRO on essentially the same record that the previous mandamus order found was inadequate to support a TRO. Majority at 14-19. This is simply inaccurate. Following the district court's first March 30 TRO order, which was based on ten declarations submitted by the Respondents, the Respondents filed nine additional declarations as supplements to their

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[10] Petitioners' failure to do so, together with their stated resistance to "an overly ambitious schedule" in the latest status report filed with the district court in which they requested that the preliminary injunction hearing be held no earlier than April 30, Abbott, No. 1:20-cv-00323-LY (Dkt. No. 78) at 3 (Apr. 14, 2020), conflicts with any assertion that time truly is so of the essence that Petitioners had "no other adequate means to attain the relief [they] desire[]," as is required for a grant of mandamus. *Occidental Petroleum Corp.*, 217 F.3d at 380.

motion for a preliminary injunction. *See Abbott*, No. 1:20-cv-00323-LY (Dkt. No. 49) (April 2, 2020). And the Respondents included a new tenth declaration with their second motion for a TRO. *See Abbott*, No. 1:20-cv-00323-LY (Dkt. No. 56) (April 8, 2020). The district court thus had twice the number of declarations filed by the Respondents before it when it entered its second TRO than when it entered its first.

In an attempt to overcome the fact that the record was clearly substantially more developed when the district court entered its second TRO, the majority argues that the Respondents cited to the supplemental declarations in their opposition to the Petitioners last mandamus petition, and so these declarations were included in the record that the majority reviewed and declared insufficient. Majority at 17-18. But the majority's last mandamus order commented only on "the record before us." *Abbott II*, 2020 WL 1685929, at *9. The fact that the Respondents cited to additional declarations in their briefing is of no moment. The additional declarations were not included in the appendix filed with the previous mandamus petition and they were not before the district court when it made the decision we reviewed. Further, the majority did not explicitly take judicial notice of the additional declarations, and the contents of the declarations are not the type of indisputable information suitable for judicial notice in any event. *See Gov't of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) (noting that Federal Rule of Evidence 201, which permits judicial notice only of generally known facts or those that can be readily determined from an indisputably reliable source, applies at every stage of a proceeding). There was no

reason for the district court—or anyone, for that matter—to assume the supplemental declarations were included in the majority's review of "the record before us" that resulted in its conclusion that the evidence was inadequate. *Abbott II*, 2020 WL 1685929, at *9. Indeed, if the additional declarations were included in that review, the majority's statement was arguably an improper advisory opinion on matters not before the court because the sufficiency of those declarations had no bearing on whether the district court's previous decision was correct at the time it was made. *Cf. United States v. Marine Shale Processors*, 81 F.3d 1329, 1352 (5th Cir. 1996) (declining to give an advisory opinion on matters that did not affect the issues before it and that could be litigated in a later proceeding); *Henry v. Dep't of Hous. & Urban Dev. (HUD), Washington, D. C.*, 451 F.2d 355, 356 (8th Cir. 1971) (noting that the court could not give an advisory opinion as to the validity of a different complaint that was not the complaint the district court dismissed).

In sum, the district court considered new evidence just as the majority instructed, and it applied the legal framework that the majority prescribed. The majority is thus wrong to now hold that the district court failed to fulfill the majority's previous mandate simply because it did not meet new additional requirements that were not stated in the majority's order, and I therefore disagree that this supposed defiance warrants mandamus.

B.

That the district court did not commit a clear abuse of discretion is sufficient reason on its own to deny mandamus. *See 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). But mandamus is also not warranted because, contrary to the majority's contention, the district court's analysis did not lead to patently erroneous results. Assuming *arguendo* that the majority's interpretation of *Jacobson* is correct and the standard it articulated applies here, restraining the enforcement of GA-09 as a prohibition on the classes of abortion at issue was appropriate if (1) that enforcement is "pretextual—that is, arbitrary or oppressive" because it "has no real or substantial connection" to protecting public health during the COVID-19 epidemic; or (2) if that enforcement is "'beyond all question, a plain, palpable invasion' of the [constitutional] right to abortion." *Abbott II*, 2020 WL 1685929, at *7, *8 (quoting *Jacobson*, 197 U.S. at 31). There is ample evidence in the record to support the conclusion that both of these requirements are met with respect to the applications of GA-09 the district court restrained through its second TRO, and the majority's disagreement with the district court's reasonable evaluation of this evidence does not make the TRO palpably erroneous.

As an initial matter, the majority breezes past the pretext prong of its test, barely even mentioning it in its analysis of the results of the district court's reasoning. This is likely because, in its previous order, the majority without explanation elected to analyze this question as whether GA-09 *as a whole* had a real or substantial relation to the current public health crisis, and so was able to easily conclude that it did. *See id.* at *8 ("The answer is obvious: the district court itself conceded that GA-09 is a valid emergency response to the COVID-19 pandemic."). But this is the wrong focus of the inquiry. The Respondents were not

challenging GA-09 as a whole, nor had the district court enjoined all applications of GA-09. The Respondents had challenged, and the district court had restrained, the *application of GA-09 to abortions*, and *Jacobson* itself makes clear that the question should not have been whether "GA-09 is a pretext for targeting abortion." *Id.* at *13. It should have been whether the enforcement of GA-09, a concededly valid public health measure, was being used as a pretext to target abortions by state actors motivated by hostility to abortion rights. *See Jacobson*, 197 U.S. at 28 ("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*." (emphases added)). Indeed, to hold otherwise would sanction the use of valid public health measures as tools for the arbitrary deprivation of any number of constitutional rights, regardless of the logical efficacy of applying the measure in that manner or even whether the enforcement was in fact motivated by a desire to further public health. *See*, *e.g.*, *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *2 (W.D. Ky. Apr. 11, 2020) (finding that a ban on public gatherings during the pandemic, which would obviously be a valid public heath measure, was unconstitutional when used to prevent a drive-through Easter Sunday church service in which parishioners remained in their cars and had no

direct personal contact (quoting *Jacobson*, 197 U.S. 11, 31 (1905)).

Considered in this light, there was sufficient evidence in the record to conclude that the enforcement of GA-09 as a prohibition on all three of the classes of abortion at issue was pretextual and motivated not by a desire to advance public health, but rather to reduce the number of abortions performed for its own sake. To begin with, as the district court determined and as the majority acknowledged in a previous order in this case, *see In re Abbott*, No. 20-50296, 2020 WL 1866010 (5th Cir. Apr. 13, 2020), medication abortion, which in itself consists entirely of providing a patient with two sets of oral medication, is not a "surgery or procedure" under either the conventional definitions of those terms or the meaning assigned to them in informal guidance from the Texas Medical Board. *See* TEXAS MEDICAL BOARD, *Frequently Asked Questions (FAQs) Regarding Non-Urgent, Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic* (Mar. 29, 2020), https//www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17 (last visited Apr. 19, 2020). And, as a wide range of declarations in the record establish, medication abortion consumes no PPE whatsoever when considered in isolation without the preceding ultrasound or post-abortion tests that Texas law requires. *See* App. at 73, 86, 91-92, 100, 110, 117, 134, 157. Medication abortion therefore does not appear to fall within the facial, plain meaning of GA-09's prohibition on non-urgent elective "surgery or procedures," and if it did, it would seem to fall into the exception for "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] Texas Executive 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 Petitioners' stated desire to nonetheless enforce the order against the providers of medication abortion raises a strong inference that the enforcement against abortion providers more generally is pretextual and motivated by hostility to abortion rights. Further supporting this inference are multiple declarations from practicing physicians stating that GA-09 is not being enforced to prohibit many obstetrical and gynecological procedures that consume as much or more PPE and hospital capacity than the categories of abortion at issue here, suggesting that abortions were being singled out for differential treatment. *See* App. at 368, 373-74. And, as discussed in more detail below, there is substantial evidence in the record that enforcing GA-09 against these categories of abortion leads to a net loss of PPE and hospital capacity because the amount of each resource consumed at

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[11] The majority theorizes that, because the district court found that medication abortion is not a surgery or procedure within the meaning of GA-09, its TRO might be construed as enjoining state officials to comply with state law, which would violate principles of sovereign immunity. Majority at 30-31 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). But "[a]scertaining state law is a far cry from compelling state officials to comply with it." *Williams ex rel. J.E. v. Reeves*, No. 19-60069, 2020 WL 1638411, at *7 (5th Cir. Apr. 2, 2020) (quoting *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985)). To the extent the district court interpreted GA-09 and considered that the Petitioners were likely improperly enforcing it in determining whether the enforcement was pretextual, it did nothing improper.

every stage of a continued pregnancy is greater than the amount consumed in the performance of a medication or procedural abortion. *See* App. at 135, 372-74, 414.

Based on this evidence, the district court could reasonably conclude at the TRO stage that Petitioner's enforcement of GA-09 as a prohibition against the categories of abortion at issue here was "pretextual" and had "no real or substantial connection" to protecting public health during the COVID-19 epidemic. *Abbott II*, 2020 WL 1685929, at *7, *8 (quoting *Jacobson*, 197 U.S. at 31). Under the majority's framework, this fact alone is enough to demonstrate that the district court's determinations did not produce "patently erroneous results" as required for the issuance of mandamus. *See 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). But the majority doubly errs because there was also ample evidence to conclude that enforcement of GA-09 against each of these categories of abortion fails the second prong of its test by being "'beyond all question, a plain, palpable invasion' of the [constitutional] right to abortion." *Abbott II*, 2020 WL 1685929, at *7, *8 (quoting *Jacobson*, 197 U.S. at 31). I will consider the two classes of abortions the majority vacates the TRO with respect to in turn.

1.

The majority first considers whether the evidence was sufficient for a district court to reasonably conclude that enforcing GA-09 against providers of medication abortion "beyond all question" violated the constitutional right to an abortion. Majority at 19-31. The majority begins by asserting that the district

court considered only the relative consumption of PPE associated with medication abortions under normal circumstances and asserts that there is no evidence documenting PPE usage rates during the current pandemic. Majority at 20-23.

First, it is worth reiterating that the majority's previous order did not include a directive to the district court to specify that findings it was making regarding relative usage were about rates during the current pandemic. The majority now changes the rules in order to find error where there is none. Its new requirement is based solely on the majority's own supposition that, during the current pandemic, there is PPE used during medication abortions that would not otherwise be used by abortion providers furnishing other healthcare services, and that this increase shifts the balance between the relative benefits and burdens of applying GA-09 to prohibit medication abortions. There is no evidence for the majority's supposition.

In support of its contention that the rate of PPE usage has likely changed, the majority points to a declaration by an infectious disease expert that states "[n]ot wearing face masks and other PPE when caring for patients who are not under investigation for COVID 19 . . . exposes health care workers to transmission of infection" from asymptomatic patients. Majority at 22. But there is no indication that the abortion providers would not wear the same amount of PPE "caring for patients" in ways other than providing abortion. The majority fails to make the simple logical inference that, if medication abortion requires no PPE under normal conditions, it requires no *more* PPE than would be used by medical

staff providing other services under pandemic conditions. For the majority's premise to be correct, one would have to assume that abortion providers only (or at least primarily) provide abortion services and would not fill canceled abortion appointment slots with appointments for other medical services that would bring them into personal contact with patients at a similar frequency.[12]

Even assuming *arguendo* that medication abortions do consume more PPE in a pandemic, the pertinent question is not whether prohibiting medication abortion prevents the use of some marginal amount of PPE. It is whether it creates a net benefit that outweighs its burden on the constitutional right to abortion. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). As I stated before, there was no evidence in the record suggesting that any PPE purchased by or in the possession of abortion providers that would be conserved by applying GA-09 to abortions could be redirected to the COVID-19 response, nor have the majority or Petitioners articulated any logical way in which this could be so. *Abbott II*, 2020 WL 1685929, at *22 (Dennis, J., dissenting). Moreover, there are multiple declarations in the record from health care professionals documenting that any increase in PPE

[12] According to Planned Parenthood's website, in addition to abortion services, the organization provides health services associated with emergency contraception, general preventative healthcare, testing and treatment for HIV and other sexually transmitted diseases, LGBT services, fertility treatments, treatment for sexual dysfunction, pregnancy testing and associated services, pelvic exams, and cancer screenings. *See* Our Services, Planned Parenthood, https://www.plannedparenthood.org/get-care/our-services (last visited Apr. 20, 2020).

consumption from medication abortion during the pandemic is more than matched by an increase in PPE consumption from the necessary medical services associated with continuing a pregnancy. *See*, *e.g.*, App. at 135 ("By comparison, *even if a provider of prenatal care reduces the scheduling of such care during the COVID-19 outbreak*, it will still involve use of masks, sterile gloves, and potentially other PPE during multiple visits. A patient continuing pregnancy will thus require significantly more PPE than a patient presenting for abortion."); App. at 375 (stating that "most prenatal and postpartum care is continuing" during the COVID-19 pandemic and cannot be done remotely before concluding that "requiring people to continue unwanted pregnancies utilizes more PPE and more hospital resources than abortion care"). Thus, there is more than sufficient evidentiary support to conclude that applying COVID-19 to prohibit medication abortions does not preserve PPE *during the current pandemic*.

The majority attempts to overcome this basic conclusion by asserting that the state made a policy judgment that it was more important to conserve PPE in the near term than the long term in order to "flatten the curve." Majority at 25. But this ignores the evidence that continuing a pregnancy results in more PPE usage at *every* stage of the pregnancy than is typically used in an abortion of any sort. *See* App. at 414 ("[T]he imaging and laboratory tests alone needed during early pregnancy require the use of more PPE than is typically used in connection with an abortion.") There is thus ample evidentiary support to conclude that applying GA-09 to medication abortions results in no conservation of PPE in the short or long term.

Similar evidence exists with respect to hospital capacity; when a pregnancy is continued, more hospital beds and resources are consumed than when a woman obtains a pre-viability abortion, and there is no indication that the current pandemic has changed this. *See*, *e.g.*, App. at 375. And significant evidence supports a conclusion that women who are unable to obtain an abortion because of GA-09 will travel out of state to obtain one, increasing their risk of contracting COVID-19 and spreading it to others.[13] *See*, *e.g.*, App. at 258-59, 311. Thus, this is not an instance in which the district court made a "choice . . . between two reasonable responses to a public crisis," that should have been "left to the governing state authorities." *Abbott II*, 2020 WL 1685929, at *12 (citing *Jacobson*, 197 U.S. at 30). This is an instance in which the district court logically concluded that applying GA-09 to medication abortions was not reasonable because it produced *no* public health benefit, and indeed, was detrimental to achieving even its ostensible goals. And against this total lack of a benefit, there is substantial evidence that applying GA-09 to prohibit medication abortions posed a significant burden on the constitutional right to abortion, including by increasing the health risks, financial costs, and emotional toll associated with obtaining an abortion. It was thus entirely reasonable for the district court to

[13] The majority's unsupported supposition that similar travel might occur as a result of any medical procedures being postponed, Majority at 26, is particularly misplaced. There is no evidence that any other delayed medical service increases in cost and health risk if delayed in the same manner as an abortion, nor that there exists a legal deadline by which such procedures must be procured comparable to Texas's ban on post 22-week abortions.

conclude that the benefits of applying GA-09 to medication abortions are "beyond all question" outweighed by its burden on the constitutional right to an abortion, *Abbott II*, 2020 WL 1685929, at *7, *9, thereby creating an unconstitutional undue burden under *Casey*.

The majority faults the district court for not citing to the Petitioners' exhibits purportedly containing contrary evidence on some of these points, calling this a failure to "carefully parse the evidence." Majority at 26-30. But "[i]t is the province of the district court to weigh conflicting evidence," including by choosing which evidence to credit and which evidence to discount. *R. S. by & through Ruth B. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 337 (5th Cir. 2020). It is not our role to second guess what would appear to be a reasonable evaluation of the evidence under commonplace circumstances, let alone on mandamus review. There is thus no basis to conclude that the district court's reasoning produced "patently erroneous results" as to medication abortions. *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).

2.

The majority similarly concludes that the district court's reasoning led to a patently erroneous result with regard to the TRO's blocking application of GA-09 to those abortions in the 18-week category—that is, those abortions for women who would exceed the maximum gestational age to legally have an abortion other than in an ambulatory surgical center by the expiration of the executive order and who would, in their physicians' judgment, be unable to obtain an abortion at one of these centers. Majority at 32-34.

The majority first criticizes the district court for categorizing the application of GA-09 to women in this 18-week category as an "absolute ban on abortion" because, it contends, women falling into this category can, theoretically, still legally obtain an abortion. Majority at 32 (quoting *Abbott III*, 2020 WL 1815587, at *6). The majority's argument is based on a theoretical legal possibility that is a practical impossibility. Many women in this category will not be able to obtain an abortion for a number of reasons. In reality, there are no ambulatory surgical centers that provide abortion care outside of Texas's four largest metropolitan areas, *see Hellerstedt*, 136 S. Ct. at 2316, and thus many women in rural areas of Texas would need to secure transportation over a great distance and lodging in a metropolitan area in order to undergo the two-day procedure necessary for an abortion after the 18-week mark. *See* App. at 130-31. For many this will not be possible due to time constraints, financial limitations, health reasons, or any number of other factors. And there is evidence that, because of the buildup of need for abortion care during the time GA-09 is in effect, the delays associated with the resulting backlog may prevent many women who will be past the 18-week mark upon the expiration of the executive order from obtaining an abortion before the 22-week legal cutoff.[14] *See*, *e.g.*, App. at 95. For these women, GA-09 is for all intents and purposes an absolute ban on abortion. And the majority offers no authority for the prospect that a law that theoretically leaves a legal path to abortion cannot as a practical matter

[14] This is especially true because the 18-week category contains even women that will be only one or a few days shy of the 22-week legal cutoff for an abortion when GA-09 expires.

function as the sort of absolute ban that violates "the essential holding of *Roe v. Wade*," *Casey*, 505 U.S. at 846.

In light of the balancing test for identifying an undue burden set forth in *Casey*, 505 U.S. at 874, and *Hellerstedt*, 136 S. Ct. at 2310, the outright ban on previability abortion might be thought of as the ultimate burden on the constitutional right to abortion which no benefit or interest yet identified can outweigh. In that case, a law that nominally allows abortion but places it functionally out of reach for a class of women is only slightly less of a burden, and it stands to reason that a truly compelling benefit would be required to justify it.

We need not speculate what that benefit might be, though, because on the evidence in the record, it was reasonable for the district court to conclude that applying GA-09 to prohibit this class of abortions offered *no* benefit at all. Much of the evidence already recounted concerned not only the relative consumption of PPE and hospital capacity between a medication abortion and a continued pregnancy, but rather any pre-viability abortion and a continued pregnancy. *See*, *e.g.*, App. at 135 ("By comparison, even if a provider of prenatal care reduces the scheduling of such care during the COVID-19 outbreak, it will still involve use of masks, sterile gloves, and potentially other PPE during multiple visits. A patient continuing pregnancy will thus require significantly more PPE than a patient presenting for abortion."); App. at 375 (stating that "most prenatal and postpartum care is continuing" during the COVID-19 pandemic and cannot be done remotely before concluding that "requiring people to

continue unwanted pregnancies utilizes more PPE and more hospital resources than abortion care").

It is true that, as the majority notes, the Supreme Court acknowledged that "increased driving distances do not always constitute an 'undue burden.'" *Hellerstedt*, 136 S. Ct. at 2313. But the district court's conclusion was not based on increased driving distance alone. The distance was "one additional burden, which, when taken together" with the forced postponement of abortion care, which created a significant backlog of need with a "virtual absence of any health benefit," *id.*, "beyond question" constituted an undue burden, *Abbott II*, 2020 WL 1685929, at *11. This conclusion was a reasonable interpretation of the evidence, and it therefore did not produce palpably erroneous results such that mandamus is appropriate.[15]

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[15] The majority determines that the district court did not patently err by enjoining the enforcement of GA-09 against abortions in the 22-week category. Majority at 34-35. I agree that the district court did not patently err and that mandamus is not warranted. However, I disagree with the majority's characterization of the evidence of women who would be denied abortions in this category as "second-hand" and "weak." Majority at 34. *Contra* App. at 103 (declaration from CEO of nonprofit operator of an abortion clinic stating from personal knowledge that her clinic canceled two appointments with women who will be past the 22-week legal limit for an abortion by the expiration of GA-09); App at 349 (declaration from general manager of surgical center stating from personal knowledge that at least three of the patients whose appointments were canceled will be past the 22-week legal limit for abortion by the expiration of GA-09); App. at 353 (declaration from senior director of ambulatory surgical center stating from personal knowledge that, based on ultrasound dating, at least three of the appointments the clinic canceled were for women who will be beyond the legal gestational age limit to obtain an abortion by the expiration of GA-09); App.

CONCLUSION

The present case is an excellent demonstration of the dangers of using the extraordinary remedy of mandamus to overmanage matters that are properly left to a district court's discretion. In part because of the decisions of this court, the legality of abortion in Texas has changed no less than six times since the beginning of the COVID-19 pandemic. This court has expended substantial time and judicial resources in an effort to prevent interference with the state's pandemic response at a most urgent time, only to instead contribute to a confusion that is likely more disruptive than the alleged harm it sought to prevent. Even today's order will have little practical effect other than to briefly change the legality once more. Under GA-15, which takes effect at midnight on April 22, abortion legality in Texas will apparently change for an eighth time, as the Respondents have represented that all of their abortion care will fall into the new exception that exempts services provided by heath facilities that certify they will not draw upon any public supply of PPE.

The majority again concludes that mandamus is appropriate to correct what it perceives as rampant abuses of discretion by the district court that produced patently erroneous results. As I have said, I strongly disagree with the majority's critique of the district court's work, and I do not believe that this case warrants mandamus relief. I therefore once again respectfully but emphatically dissent.

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at 442 (declaration from employ of abortion financial assistance fund stating from personal knowledge that at least ten of the funds clients will be past the 22-week gestational age limit for an abortion by the expiration of GA-09).

Appendix C

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

No. A-20-CV-323-LY

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, ROBIN WALLACE, M.D., M.A.S.,

PLAINTIFFS,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, KEN PAXTON, ATTORNEY GENERAL OF TEXAS, PHIL WILSON ACTING EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, STEPHEN BRINT CARLTON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, KATHERINE A. THOMAS, EXECUTIVE DIRECTOR OF THE

TEXAS BOARD OF NURSING, EACH IN THEIR OFFICIAL CAPACITY, AND MARGARET MOORE, DISTRICT ATTORNEY FOR TRAVIS COUNTY, JOE GONZALES, CRIMINAL DISTRICT ATTORNEY FOR BEXAR COUNTY, JAIME ESPARZA, DISTRICT ATTORNEY FOR EL PASO COUNTY, JOHN CREUZOT, DISTRICT ATTORNEY FOR DALLAS COUNTY, SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY TARRANT COUNTY, RICARDO RODRIGUEZ, JR., CRIMINAL DISTRICT ATTORNEY FOR HIDALGO COUNTY, BARRY JOHNSON, CRIMINAL DISTRICT ATTORNEY FOR MCLENNAN COUNTY, KIM OGG, CRIMINAL DISTRICT ATTORNEY FOR HARRIS COUNTY, AND BRIAN MIDDLETON CRIMINAL DISTRICT ATTORNEY FOR FORT BEND COUNTY, EACH IN THEIR OFFICIAL CAPACITY,

DEFENDANTS.

Filed: March 30, 2020

ORDER GRANTING PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER

Before the court is the above styled and numbered cause. Plaintiffs include several licensed abortion facilities, Robin Wallace, a board-certified family medicine physician who provides abortion care and is co-medical director at Southwestern Women's Surgery Center, who bring this action on behalf of herself and

her patients, and other organizations that provide abortion services in the State of Texas. Plaintiffs bring this constitutional challenge, pursuant to Title 42 United States Code section 1983, following the publication of a March 23, 2020 press release by the Texas attorney general titled, "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic."[1] The press release interprets the governor of Texas's "Executive Order GA-09 relating to hospital capacity during the COVID-19 disaster" ("Executive Order") signed March 22, 2020.[2] To the extent the attorney general's interpretation is consistent with the Executive Order, Plaintiffs challenge the Executive Order itself. Plaintiffs also challenge the Texas Medical Board's emergency amendment to Title 22 Texas Administrative Code section 187.57 ("Emergency Rule"), which imposes the same requirements as the Executive Order.[3] The Executive Order remains in

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[1] *Available at* https://www.texasattorneygeneral.gov/news/releases/health-care-professions-and-facilities-including-abortion-providers-must-immediately-stop-all.

[2] *Available at* https://gov.texas.gov/news/post/govorner-abbott-issues-executive-order-increasing-hospital-capacity-announces-supply-chain-strike-force-for COVID-19-response. Under the Emergency Management Chapter of the Texas Government Code, "the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law." Tex. Gov't Code Ann. § 418.012 (West 2019).

[3] *Available at* https://tinyurl.com/v4pz99u. On March 24, 2020, the Texas Medical Board adopted an emergency rule to enforce the Executive Order. Under preexisting law, the Texas Medical Board could temporarily suspend or restrict a physician's license if the physician's "continuation in practice

effect until 11:59 PM on April 21, 2020, at the earliest, or until the governor rescinds or modifies it.

Pending now before the court is Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction filed March 25, 2020 (Clerk's Document No. 7). The court held a telephone conference on March 26, 2020, at which Plaintiffs and several Defendants participated by counsel. The court granted the State Defendants'[4] request to file a written response to the motion. The State Defendants responded March 30, 2020 (Clerk's Document No. 30), and Plaintiffs filed a Supplemental Statement In Support of Motion For Temporary Restraining Order the same day (Clerk's Document No. 29).

Plaintiffs argue that they have shown they are entitled to a temporary restraining order following the attorney general's press release. Plaintiffs interpret the press release as "suggesting that [the attorney general] believes continuing to provide *any* abortion care (other than for an immediate medical emergency) would violate the Executive Order, and as a warning

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would constitute a continuing threat to the public welfare." 22 Tex. Admin. Code § 187.57(b). The Emergency Rule expands this basis for discipline to include "performance of a non-urgent elective surgery or procedure."

Because the Emergency Rule contains the same requirements to postpone surgeries and procedures that are not immediately necessary, Plaintiffs discuss the Emergency Rule together with the Executive Order.

[4] Defendants Greg Abbott, Governor of Texas, Ken Paxton, Attorney General of Texas, Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission, Stephen Brint Carlton, Executive Director of the Texas Medical Board, Katherine A. Thomas, Executive Director of the Texas Board of Nursing, each in their official capacity, are referred to as "State Defendants."

to abortion providers that '[t]hose who violate the [Executive O]rder will be met with the full force of the law.' " The Executive Order provides that failure to comply is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both fine and confinement. *See* Tex. Gov't Code Ann. § 418.173 (West 2019) ("Penalty for Violation of Emergency Management Plan"). These criminal penalties also trigger administrative enforcement provisions for the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing, each of which is authorized to pursue disciplinary action against licensees who violate criminal laws. *See* 25 Tex. Admin. Code §§ 139.32(b)(6), 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (b)(10).

Plaintiffs move for a temporary restraining order that restrains Defendants and their employees, agents, successors, and all others acting in concert or participating with them from enforcing the Executive Order and the Texas Medical Board's Emergency Rule as banning all medication abortions and procedural abortions.

The court, having considered the pleadings, the motion and supporting exhibits, the response, the applicable law, and arguments of counsel, finds and concludes for the specific reasons required under Federal Rule of Civil Procedure 65(d) and Local Rule 65.01, that Plaintiffs have shown (1) a likelihood of success on the merits, (2) that they will suffer irreparable harm if temporary relief is not granted, (3) that the injury to Plaintiffs outweighs any harm the temporary relief might cause Defendants; and (4) that

a temporary restraining order will not disserve the public interest. *See*, *e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) ("*Jackson I*"); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

Substantial likelihood of success on the merits

Specifically, the court finds that Plaintiffs have established a substantial likelihood of success on the merits of their claim that the Executive Order, as interpreted by the attorney general, violates Plaintiffs' patients' Fourteenth Amendment rights, which derive from the Bill of Rights, by effectively banning all abortions before viability. *See Planned Parenthood v. Casey*, 505 U.S. 833, 848-49, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (citing *Griswold v. Conn.*, 381 U.S. 479, 481-82, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Roe v. Wade*, 410 U.S. 113, 153-54, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)). The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a woman's right to choose abortion, *Roe v. Wade*, 410 U.S. 113, 153-54, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and before fetal viability outside the womb, a state has no interest sufficient to justify an outright ban on abortions. *Roe*, 410 U.S. at 163-65, 93 S.Ct. 705; *see also Casey*, 505 U.S. at 846, 871, 112 S.Ct. 2791 (1992) (reaffirming *Roe*'s "central principle" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion"); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) ("*Jackson III*"); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268-69 (5th Cir. 2019) ("*Jackson II*").

Under the attorney general's interpretation, the Executive Order either bans all non-emergency abortions in Texas or bans all non-emergency abortions in Texas starting at 10 weeks of pregnancy, and even earlier among patients for whom medication abortion is not appropriate. Either interpretation amounts to a previability ban which contravenes Supreme Court precedent, including *Roe*. *See*, *e.g.*, *Jackson III*, 951 F.3d at 248 (*ban* on abortions starting at six weeks). Previability abortion bans are "unconstitutional under Supreme Court precedent without resort to the undue burden balancing test." *Id.* States "may regulate abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions." *Jackson II*, 945 F.3d at 269.

The State Defendants well describe the emergency facing this country at the present time. They do not overstate when they say, "Texas faces it worst public health emergency in over a century." The Executive Order, as written, does not exceed the governor's power to deal with the emergency. But the attorney general's interpretation of that order constitutes the threat of criminal penalties against those whose interpretation differs. Yes, the attorney general is not the enforcer of those penalties, but many of those who are charged with enforcement are named as defendants in this action. The court takes notice that the opinion or notion of the attorney general as to the breadth of a law, even if expressed informally, carries great weight with those who must enforce it.

Regarding a woman's right to a pre-fetal-viability abortion, the Supreme Court has spoken clearly. There can be no outright ban on such a procedure.

This court will not speculate on whether the Supreme Court included a silent "except-in-a-national-emergency clause" in its previous writings on the issue. Only the Supreme Court may restrict the breadth of its rulings. The court will not predict what the Supreme Court will do if this case reaches that Court. For now, the State Defendants, and perhaps the others, agree that the Executive Order bans all pre-fetal-viability abortions. This is inconsistent with Supreme Court precedent. Plaintiffs have demonstrated a strong likelihood of success on the merits of their action.

Plaintiffs will suffer irreparable harm

Plaintiffs' patients will suffer serious and irreparable harm in the absence of a temporary restraining order. The attorney general's interpretation of the Executive Order prevents Texas women from exercising what the Supreme Court has declared is their fundamental constitutional right to terminate a pregnancy before a fetus is viable. It is well established that, upon a plaintiff's demonstrating a constitutional violation, no further irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981).

The threatened injury to Plaintiffs outweigh any damage the temporary restraining order may cause Defendants

A delay in obtaining abortion care causes irreparable harm by "result[ing] in the progression of

a pregnancy to a stage at which an abortion would be less safe, and eventually illegal." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013). This "disruption or denial of . . . patients' health care cannot be undone after a trial on the merits." *Planned Parenthood of Kan. v. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018). For some patients, such a delay will deprive them of any access to abortion. *See* Tex. Health & Safety Code Ann. § 171.044 (West 2017) (prohibiting abortions after 20 or more weeks post-fertilization age). The court finds that the threatened injury to Plaintiffs outweighs any damage the temporary restraining order may cause Defendants.

Temporary restraining order will not disserve the public interest

"The grant of an injunction will not disserve the public interest ... when an injunction is designed to avoid constitutional deprivations." *Jackson's Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd*, 760 F.3d 448 (5th Cir. 2014). Plaintiffs' requested relief will essentially continue the status quo, tipping the balance of equities toward Plaintiffs and serving the public interest. *Id.*; *United States v. Tex.*, 508 F.2d 98, 101 (5th Cir. 1975). The 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, as well as the risks of travelling to other states in search of time-sensitive medical care. The court finds that a temporary restraining order will not disserve the public interest.

The court concludes that Plaintiffs have shown that they are entitled to a temporary restraining order. Therefore,

IT IS ORDERED that Plaintiffs' Motion for Temporary Restraining Order filed March 25, 2020 (Clerk's Document No. 7) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster," and the Texas Medical Board's emergency amendment to Title 22 Texas Administrative Code section 187.57, as applied to medication abortions and procedural abortions.[5]

IT IS FURTHER ORDERED that this Temporary Restraining Order shall expire on April 13, 2020 at 3:00 p.m. This order may be extended for good cause, pursuant to Federal Rule of Civil Procedure 65.

Plaintiffs have also moved for a preliminary injunction. Therefore,

IT IS ORDERED that the hearing on Plaintiffs' motion for a preliminary injunction is set for a telephonic hearing on April 13, 2020 at 9:30 a.m. Counsel and parties may call in to the court's conference line at (877) 873-8017, with Access Code 7996289.

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[5] Pursuant to an Agreed Stipulation for Non-Enforcement Pending Final Resolution, Attorneys Fees and Costs filed March 28, 2020 (Clerk's Document No. 25) this order does not apply to Defendant Brian Middleton, Criminal District Attorney for Fort Bend County.

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

SIGNED at 3:00 p.m., this 30th day of March, 2020.

/s/ Lee Yeakel

LEE YEAKEL

UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

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Filed: March 31, 2020

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the district court's order of March 30, 2020 (Dkt. No. 40) is TEMPORARILY STAYED until further order of this court to allow this court sufficient time to consider petitioners' emergency motion for stay and petition for writ of mandamus.

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the emergency motion for stay no later than Wednesday, April 1, 2020, at 8:00 a.m. Any reply by petitioners is due no later than Wednesday, April 1, 2020, at 8:00 p.m.

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the petition for writ of mandamus no later than Thursday, April 2, 2020, at 8 p.m. Any reply by petitioners is due no later than Friday, April 3, 2020, at 5 p.m.

IT IS FURTHER ORDERED that the filing of an amicus brief by States, Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia, is allowed.

JAMES L. DENNIS, Circuit Judge, dissenting:

A federal judge has already concluded that irreparable harm would flow from allowing the Executive Order to prohibit abortions during this critical time. I would deny the stay. Moreover, I write separately to make clear that, per the Executive Order, "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" is exempt.

Appendix E

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

No. A-20-CV-323-LY

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, ROBIN WALLACE, M.D., M.A.S.,

PLAINTIFFS,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, KEN PAXTON, ATTORNEY GENERAL OF TEXAS, PHIL WILSON ACTING EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, STEPHEN BRINT CARLTON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, KATHERINE A. THOMAS, EXECUTIVE DIRECTOR OF THE

TEXAS BOARD OF NURSING, EACH IN THEIR OFFICIAL CAPACITY, AND MARGARET MOORE, DISTRICT ATTORNEY FOR TRAVIS COUNTY, JOE GONZALES, CRIMINAL DISTRICT ATTORNEY FOR BEXAR COUNTY, JAIME ESPARZA, DISTRICT ATTORNEY FOR EL PASO COUNTY, JOHN CREUZOT, DISTRICT ATTORNEY FOR DALLAS COUNTY, SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY TARRANT COUNTY, RICARDO RODRIGUEZ, JR., CRIMINAL DISTRICT ATTORNEY FOR HIDALGO COUNTY, BARRY JOHNSON, CRIMINAL DISTRICT ATTORNEY FOR MCLENNAN COUNTY, KIM OGG, CRIMINAL DISTRICT ATTORNEY FOR HARRIS COUNTY, AND BRIAN MIDDLETON CRIMINAL DISTRICT ATTORNEY FOR FORT BEND COUNTY, EACH IN THEIR OFFICIAL CAPACITY,

DEFENDANTS.

Filed: April 9, 2020

ORDER GRANTING PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER

Before the court is Plaintiffs' Second Motion for a Temporary Restraining Order and Memorandum in Support (Dkt. #56). Having considered the motion, the evidence in the record, the legal arguments made by all parties to date, and the opinion, order, and writ of

mandamus issued by the United States Court of Appeals for the Fifth Circuit April 7, 2020, *In re Abbott*, No. 20-50264 2020 WL 1685929 (5th Cir. April 7, 2020), the court again considers whether Plaintiffs are entitled to temporary relief limiting the scope of Executive Order GA-09 issued by the governor of Texas on March 22, 2020.

Accompanying Plaintiffs' motion are proposed findings of fact and conclusions of law. The proposed findings and conclusions carefully and painstakingly track the evidence before the court regarding both of Plaintiffs' motions for temporary relief and the applicable law. The court has reviewed and considered these proposed findings and conclusions and determined that they are, in substantial part, accurate and in concurrence with court's own review of the evidence and the law. The court will, therefore, adopt the bulk of the proposed findings and conclusions as its own.

The court makes the following findings of fact:

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

2. On March 22, 2020, the governor issued an executive order barring "all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve

[1] *Available* at https://gov.texas.gov/uploads/files/press/DISASTER_covidl9_disaster_proclamation_IMAGE_03-13-2020.pdf.

the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster" (March 22, 2020) ("Executive Order") at 3.[2] The Executive Order further states that procedures that, "if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster" are exempt from the order. *Id.* The Executive Order remains in effect until 11:59 PM on April 21, 2020, unless the governor rescinds or modifies it. *Id.*

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

4. Failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both. Executive Order at 3 (citing Tex. Gov't Code § 418.173). Violation of the Executive Order may also give rise to disciplinary action against licensed health-care providers by the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing. *See* 25 Tex. Admin. Code

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

§§ 139.32(b)(6), 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (B)(10).

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

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

7. On March 29, 2020, the Medical Board published updated guidance regarding the scheduling

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

of elective surgeries and procedures in light of the Executive Order. Tex. Med. Bd., Updated Texas Medical Board [ ] Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020) ("Medical Board Guidance").[4] The Medical Board explained that postponing non-urgent elective cases would preserve PPE, ventilator availability, and [intensive-care-unit] beds." It defined "urgent or elective urgent" procedures as those where "there is a risk of patient deterioration or disease progression likely to occur if the procedure is not undertaken or is significantly delayed." The Medical Board noted that "the prohibition does not apply to office-based visits without surgeries or procedures." Further, the Medical Board explained that "[a] 'procedure' does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests."

8. The attorney general's interpretation of the Executive Order, which has been adopted by the State Defendants,[5] creates a credible threat of enforcement against Plaintiffs and their agents for the provision of any abortion. This has had a profound chilling effect on the provision of abortion care in Texas. Plaintiffs

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

[5] Defendants Greg Abbott, Governor of Texas, Ken Paxton, Attorney General of Texas, Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission, Stephen Brint Carlton, Executive Director of the Texas Medical Board, Katherine A. Thomas, Executive Director of the Texas Board of Nursing, each in their official capacity, are referred to as "State Defendants."

and their agents have ceased providing nearly all abortion care as a result. Barraza Decl. ¶ 15; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶¶ 25–28; Hagstrom Miller ¶¶ 26–28; Klier Decl. ¶ 17; Lambrecht Decl. ¶¶ 18–20; Schutt-Aine ¶¶ 32–34; Wallace Decl. ¶ 9.

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

10. Medication abortion is not a surgery or procedure. It involves the patient ingesting a combination of two pills: mifepristone and misoprostol. Schutt-Aine Decl. ¶ 13. The patient takes the mifepristone in the health center and then, typically 24 to 48 hours later, takes the misoprostol at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. Schutt-Aine Decl. ¶ 13. Texas law restricts this method to the first 10 weeks of pregnancy as measured from the first day of a pregnant woman's last menstrual period ("LMP"). Tex. Health & Safety Code § 171.063. Plaintiffs provide medication abortion up to the 10-week limit.

11. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Schutt-Aine Decl. ¶ 16. Early in pregnancy, procedural abortions are performed using a technique called aspiration, in which a clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus. Schutt-Aine Decl. ¶ 16. Beginning around 15 weeks LMP, the clinician generally must use instruments to complete the procedure, a technique

called dilation and evacuation ("D&E"). Later in the second trimester of pregnancy, the clinician may begin cervical dilation the day before the procedure itself, resulting in a two-day procedure. Schutt-Aine Decl. ¶ 16. Plaintiffs provide procedural abortion in both the first and second trimester. Procedural abortions may not be performed in an abortion clinic after 18 weeks LMP. Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at an ambulatory surgery center ("ASC"), *id.*, but there are no ASCs that provide abortion care outside of Texas's four largest metropolitan areas, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016).

12. Absent exceptional circumstances, Texas law prohibits abortion care altogether after 22 weeks LMP. *See* Tex. Health & Safety Code § 171.044.

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

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

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

16. Texas law requires an in-person consultation between patient and provider, which must include an

ultrasound examination, before every abortion. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). For patients who reside within 100 miles of the facility where the abortion will be performed, the consultation must occur at least 24 hours prior to the abortion procedure. *See id.* According to the Medical Board, "non-invasive diagnostic tests" such as ultrasounds are not procedures, and the prohibition contained in the Executive Order "does not apply to office-based visits without surgery or procedures." Medical Board Guidance. In any event, pre-procedure ultrasound examinations require minimal PPE. Use of PPE is not required at all for abdominal ultrasound examinations. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. For vaginal ultrasound examinations, doctors or ultrasound technicians typically wear only non-sterile gloves that are discarded after each scan. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. When laboratory testing is required, technicians likewise utilize only non-sterile gloves. Hagstrom Miller Decl. ¶ 14.

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

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

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

19. Abortion providers generally do not use N95 masks. Only one physician associated with Plaintiffs has used an N95 mask since the beginning of the COVID-19 pandemic, and that physician has been reusing the same mask over and over. Barraza Decl. ¶ 8; Ferrigno Decl. ¶ 13; Hagstrom Miller Decl. ¶ 16; Klier Decl. ¶ 6; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 27.

20. Pregnant women prevented from accessing abortion will still require medical care. Chang Decl. ¶ 8; Levison Decl. ¶ 8; Macones Decl. ¶ 10. Consistent with recommendations from the American College of Obstetricians and Gynecologists ("ACOG") and other medical authorities for providing obstetrical care during the COVID-19 pandemic, obstetricians are generally having two in-person visits with pregnant patients during the first-trimester and more frequent in-person visits during later trimesters. Chang Decl. ¶ 11; Levison Decl. ¶ 19; Macones Decl. ¶¶ 9–10; Wood Decl. ¶ 11. High-risk patients, including those

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

with diabetes or high blood pressure, must have more frequent in-person visits. Chang Decl. ¶ 10; Levison Decl. ¶ 14; Macones Decl. ¶¶ 7, 10; Wood Decl. ¶¶ 11–12. Urine specimens are generally collected and tested at each in-person visit, and blood is sometimes collected and tested also. Chang Decl. ¶ 12; Levison Decl. ¶ 13; Macones Decl. ¶ 11; Wood Decl. ¶ 11. Additionally, obstetricians are generally performing at least one ultrasound during the first trimester and another one at 20 weeks LMP. Chang Decl. ¶¶ 11–12; Macones Decl. ¶ 12; Wood Decl. ¶ 14. High-risk patients will require more frequent ultrasounds. Macones Decl. ¶ 12; Wood Decl. ¶ 14.

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

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

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

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

25. The inability to obtain abortion care in Texas as a result of the Executive Order is causing individuals with unwanted pregnancies who have the ability to travel to go to other states to obtain abortions. The record shows that these individuals are traveling by both car and airplane to places as far away as Colorado and Georgia. Doe Decl. ¶¶ 15–22; Johnson Decl. ¶¶ 8–10; Nguyen Decl. ¶ 17; Ward Decl. ¶¶ 12–14. This long-distance travel increases an individual's risk of contracting COVID-19. Bassett Decl. ¶¶ 7–8; Schutt-Aine Decl. ¶ 37; Sharfstein Decl. ¶ 10; Doe Decl. ¶ 18. The record shows that patients traveling to other states for abortion care include patients seeking medication abortion. Doe Decl. ¶¶ 9, 19–22.

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

27. There will be significant pent-up need for abortion care when the Executive Order expires. It will take Plaintiffs weeks to resolve the resulting backlog of patients, meaning that a significant number of patients will face additional delays in accessing abortion even after the Executive Order's

now month-long duration expires. Ferrigno Decl. ¶ 29; Hagstrom Miller Decl. ¶ 29; Johnson Decl. ¶ 12; Nguyen Decl. ¶ 23.

28. Patients delayed past 10 weeks LMP are no longer eligible for a medication abortion in Texas. *See* Tex. Health & Safety Code § 171.063(a)(2). Patients delayed past 14 to 16 weeks LMP are no longer eligible for an aspiration abortion, and must instead have a D&E, which is a lengthier and more complex procedure. Ferrigno Decl. ¶ 35; Hagstrom Miller Decl. ¶ 34; Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 16, 39. Patients who are delayed past 18 weeks LMP are no longer eligible for an abortion at an abortion clinic in Texas and must obtain care from an ASC. *See* Tex. Health & Safety Code § 171.004. Patients delayed past 22 weeks LMP are no longer eligible to obtain an abortion in Texas at all, absent exceptional circumstances. *See* Tex. Health & Safety Code § 171.044. Declarations in the record demonstrate that some patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the Executive Order has been in place. Hagstrom Miller Decl. ¶ 27; Johnson Decl. ¶ 10; Nguyen Decl. ¶¶ 7–8, 11; Ward Decl. ¶¶ 12–13, 16.

29. The health risks associated with both pregnancy and abortion increase with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 22; Macones Decl. ¶ 8. As ACOG and other well-respected medical professional organizations have observed, specifically in relation to the COVID-19 pandemic, abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the

risks [to patients] or potentially make it completely inaccessible." ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020);[7] Schutt-Aine Decl. ¶ 22; Sharfstein Decl. ¶ 8.

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

31. The court incorporates by reference the findings of fact contained in the court's March 30, 2020 Order Granting Plaintiffs' Request for Temporary Restraining Order. *Planned Parenthood Center for Choice v. Abbott*, 1:20-CV-323-LY (W.D. Tex. Mar. 30, 2020).

The court makes the following conclusions of law:

1. Plaintiffs have standing to bring their claim and a justiciable controversy exists. *See In re Abbott*, No.

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

20-50264, slip op. at 8 n.17, 2020 WL 1685929 (5th Cir. Apr. 7, 2020). For purposes of sovereign immunity, the governor and attorney general likely have "some connection with the governor, Executive Order at 3, consistent with the governor's statutory authority, Tex. Gov't Code Ann. § 418.012. Similarly, the attorney general has the authority to prosecute Plaintiffs and their agents, at the request of local prosecutors, for alleged violations of the Executive Order, Tex. Gov't Code Ann. § 402.028(a), and he has publicly threatened enforcement against abortion providers in particular.

2. Plaintiffs are entitled to the requested temporary restraining order. In particular, the court concludes that Plaintiffs are likely to succeed on the merits of their substantive due-process claim because, based on the court's findings of fact, it is beyond question that the Executive Order's burdens outweigh the order's benefits as applied to Plaintiffs' provision of (1) medication abortion; and (2) procedural abortion where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion entirely because (a) the patient's pregnancy would reach 22 weeks LMP by April 21, 2020; or (b) the patient's pregnancy would reach 18 weeks LMP by April 21, 2020, thus requiring abortion care at an ASC and, in the judgment of the treating physician, the patient is unlikely to be able to obtain an abortion at an ASC before the patient's pregnancy reaches the 22-week cutoff. The court therefore concludes that application of the Executive Order to these categories of abortion care violates the standards set forth in both *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

To women in these categories, the Executive Order is an absolute ban on abortion. When a temporary delay reaches 22 weeks LMP, the ban is not temporary, it is absolute. A ban within a limited period becomes a total ban when that period expires. As a minimum, this is an undue burden on a woman's right to a previability abortion.

limited period becomes a total ban when that period expires. As a minimum, this is an undue burden on a woman's right to a previability abortion.

3. Plaintiffs and their patients will suffer irreparable harm in the absence of a temporary restraining order; the balance of equities favors Plaintiffs; and entry of a temporary restraining order serves the public interest. In particular, the record demonstrates that entry of a temporary restraining order to restore abortion access would *serve* the State's interest in public health. *See*, *e.g.*, Bassett Decl. ¶¶ 6–8; Levison Decl. ¶¶ 20–23; Sharfstein Decl. ¶¶ 9–12.

4. The court incorporates by reference the conclusions of law contained in the court's March 30, 2020 Order Granting Plaintiffs' Request for Temporary Restraining Order. *Planned Parenthood Center of Choice*, No. 1:20-CV-323-LY (W.D. Tex. Mar. 30, 2020).

Therefore,

IT IS ORDERED that Plaintiffs' Second Motion for Temporary Restraining Order (Dkt. #56), filed April 8, 2020, is **GRANTED**.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others

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

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide medication abortions.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be past

the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020.

IT IS FURTHER ORDERED that this Temporary Restraining Order shall expire on April 19, 2020, at 4:25 pm. This order may be extended for good cause, pursuant to Federal Rule of Civil Procedure 65.

Pursuant to an Agreed Stipulation for Non-Enforcement Pending Final Resolution, Attorneys Fees and Costs filed March 28, 2020 (Clerk's Dkt. #25) this order does not apply to Defendant Brian Middleton, Criminal District Attorney for Fort Bend County.

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

This court's April 8, 2020 Order (Dkt. #58) is not affected by this order, and the parties shall continue to comply with the April 8 order.

SIGNED this 9th day of April, 2020 at 4:25 p.m.

/s/ Lee Yeakel

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50296

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

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Filed: April 10, 2020

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

On April 7, 2020, we issued a writ of mandamus directing the district court to vacate its temporary restraining order ("TRO") that exempted abortion procedures from GA-09, an emergency executive order issued on March 22 by the Governor of Texas postponing certain non-essential medical procedures for three weeks during the escalating COVID-19 pandemic. *See In re Abbott*, --- F.3d ---, 2020 WL 1685929 (5th Cir. April 7, 2020). As we explained, GA-09 sought to preserve critical medical resources and slow the spread of a pandemic during what the district court itself recognized was Texas's "worst public health emergency in over a century." *Id.* at *1, 4, 9. We further explained that GA-09 "is a concededly valid public health measure that applies to all 'surgeries and procedures,' does not single out abortion, and . . . has an exemption for serious medical conditions." *Id.* at *10.

In our opinion, we emphasized that the district court had "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." *Id.* at *2. The evidence presented at this hearing, we said, would allow the district court to make "targeted findings, based on competent evidence, about the effects of GA-09 on abortion access." *Id.* We emphasized that "those proceedings" must "adhere to the controlling standards, established by the Supreme Court over a century ago, for adjudging the validity of emergency measures like [GA-09]." *Id.* As we stated in our opinion, those "controlling" standards come from the Supreme

Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *In re Abbott*, 2020 WL 1685929, at *1, 6–7. Having already painstakingly explained those standards in our opinion, we reiterate our holding:

> [W]hen 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." *Jacobson*, 197 U.S. 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.

In re Abbott, 2020 WL 1685929, at *7 (cleaned up).

We also articulated how the Jacobson framework would apply to the Casey undue-burden analysis. *Id.* at *11 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). We explained that this analysis "ask[s] whether GA-09 imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic Texas now faces." *Id.* (quoting *Jacobson*, 197 U.S. at 31). We explained further that this analysis would "require[] careful parsing of the evidence," and we noted some of the conflicting evidence in the record. *Id.* But we emphasized that "[t]hese 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 . . . in any particular circumstance." *Id.* at *12 (cleaned up).

The day following our mandamus, April 8, 2020, the district court did the following: (1) it vacated its March 30 TRO (Doc. 54); (2) it cancelled the telephonic preliminary injunction hearing previously scheduled for April 13 (Doc. 54); and (3) it ordered the parties to confer and propose a status report before April 15 setting out the parties' agreement on procedures and a schedule for a new preliminary injunction hearing on a yet-unannounced date (Doc. 58).

Also on April 8, plaintiffs filed in the district court a new application for TRO supported only by one additional declaration (Doc. 56). The next day, April 9, the district court—without allowing defendants either to file a pleading or to submit evidence in opposition to the TRO application—entered an order granting plaintiffs a TRO (Doc. 63). The new TRO enjoins all defendants from enforcing GA-09 against Plaintiffs or their agents in the following ways: (1) it enjoins enforcement of GA-09 "as a categorical ban on all abortions provided by Plaintiffs"; (2) it enjoins enforcement as to providing "medication abortions"; (3) it enjoins enforcement as to providing "procedural abortion[s] to any patient who, based on the treating physicians' medical judgment, would be more than 18 weeks LMP ["last menstrual period"] on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care"; and, finally (4) it enjoins enforcement as to providing "procedural abortion[s] to any patient who, based on the treating physician's medical judgment, would be

past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020." (Doc. 63, at 14–15).

Texas officials have now filed a petition for writ of mandamus seeking vacatur of the April 9 TRO, as well as an emergency motion for stay of the TRO and a temporary administrative stay of the TRO.

IT IS ORDERED that the motion for temporary administrative stay of the district court's order of April 9, 2020 (Doc. 63) is GRANTED, until further order of this court, to allow sufficient time to consider the mandamus petition and emergency stay motion. This stay operates against the April 9 TRO in all respects EXCEPT that part of the TRO applying to "any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020" (Doc. 63, at 15). Our stay does not operate against that part of the April 9 TRO.*

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the emergency stay motion no later than Saturday, April 11, 2020, at 8:00 p.m. Any reply by petitioners is due no later than Monday, April 13, 2020, at noon.

IT IS FURTHER ORDERED that plaintiffs-respondents be directed to file a response to the petition for writ of mandamus no later than Tuesday, April 14, 2020, at 2:00 p.m. Any reply by petitioners is due no later than Wednesday, April 15, 2020, at 2:00 p.m.

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* Judge Dennis dissents, in part, because he would not stay any part of the district court's April 9 TRO.

Appendix G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50296

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

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Filed: April 11, 2020

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

On April 10, 2020, we entered a partial administrative stay of the district court's April 9 temporary restraining order ("TRO") against the Texas Governor's emergency executive order, GA-09. In our previous mandamus opinion, we explained that GA-09 seeks to preserve critical medical resources and slow the spread of the COVID-19 pandemic by postponing certain non-essential medical procedures for three weeks until April 21, 2020. *In re Abbott*, --- F.3d ---, 2020 WL 1685929, at *1 (5th Cir. Apr. 7, 2020). We further explained that GA-09 "is a concededly valid public health measure that applies to all 'surgeries and procedures,' does not single out abortion, and . . . has an exemption for serious medical conditions." *Id.* at *1. The district court's April 9 TRO restrains operation of GA-09 as to three specific categories of abortion procedures: (1) medication abortions; (2) abortions for women who would be more that 18 weeks LMP ["last menstrual period"] on April 22, 2020; and (3) abortions for women who would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020. Doc. 63. On April 10, Texas officials sought mandamus relief in our court, as well as filing motions for emergency stay of the TRO and for a temporary administrative stay of the TRO pending our consideration of the mandamus petition and emergency stay motion. Later that same day, we granted a partial administrative stay of the April 9 TRO. Our stay expressly does not apply to the third category of abortions in the TRO—namely, abortions for women who would on April 22 be past the legal limit for abortions in Texas. *See In re Abbott*, No. 20-50296, ECF 12 at 4 (5th Cir. Apr. 10, 2020). We simultaneously ordered expedited briefing on the

emergency stay motion to be completed by Monday, April 13 at noon, and expedited briefing on the mandamus petition to be completed by Wednesday, April 15 at 2:00 pm. *Id.*

Our dissenting colleague insists there is something untoward in our entering a temporary administrative stay here. That is incorrect. Entering temporary administrative stays so that a panel may consider expedited briefing in emergency cases is a routine practice in our court. *See, e.g., M.D. by Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018) (granting "temporary, administrative stay . . . to provide sufficient time to receive any opposition and fairly consider whether a formal stay pending appeal should issue or whether this temporary stay should be dissolved") (Dennis, Southwick, and Higginson, JJ.). This routine action falls within the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Moreover, as we have explained, the panel has ordered expedited briefing on the underlying stay motion and mandamus petitions that will be completed by Monday and Wednesday of next week, respectively. The merits issues discussed by the dissenting opinion will be more appropriately addressed in the context of those expedited proceedings.

IT IS ORDERED that respondents' emergency motion to lift the partial administrative stay entered by this Court on April 10, 2020, is DENIED.

JAMES L. DENNIS, Circuit Judge, dissenting.

I would grant the motion to lift the administrative stay. As the petitioners note, the authority to administratively stay a lower court order while this court considers a matter is within our inherent discretionary powers, and the standard for its use is only that it is warranted in our reasoned judgment. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). So too then is the power to lift such a stay, and I believe doing so is warranted here.

The district court in this case reviewed the evidence and made detailed factual findings as to why applying the Executive Order to the classes of abortion at issue here would not preserve personal protective equipment or hospital capacity. Indeed, the district court found that doing so would have a net negative effect on the conservation of both resources and on the overall effort to combat the COVID-19 pandemic. By contrast, the district court found that temporarily barring the respondents from performing these procedures would permanently deny many people the fundamental bodily autonomy to which they are constitutionally entitled and subject many more to greatly increased financial costs and elevated risk to their health, safety, and general well-being. Based on my preliminary review, these findings are not clearly erroneous—the record is replete with accounts of the devastating effect the Executive Order has already had on these people's lives, many of whom were already experiencing great personal and economic hardship as a result of the pandemic.

Thus, the administrative stay does not operate simply to preserve the status quo to facilitate our review of the lower court decision. Instead, the risk

that it will inflict—and is currently inflicting—real, tangible harm far outweighs the risk that harm may result from leaving the district court's order in effect while we decide the petitioners' emergency motion for a stay on the merits. I therefore respectfully dissent.

Appendix H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50296

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

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Filed: April 13, 2020

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

On April 10, 2020, Petitioners filed an emergency motion to stay the district court's order (Doc. 63) temporarily restraining executive order GA-09, pending our consideration of their mandamus petition. Having addressed emergency motions concerning GA-09 more than once in the past week, we refer readers to our description of this fast-moving litigation elsewhere. *See In re Abbott*, --- F.3d ---, 2020 WL 1685929, at *2–4 (5th Cir. Apr. 7, 2020) (*Abbott II*). For present purposes, suffice it to say that GA-09 is an emergency public health measure, issued by the Governor of Texas on March 22, 2020, that postpones non-essential surgeries and procedures until April 22 in the face of the COVID-19 pandemic. *Id.* at *2–3. GA-09 applies to a broad range of procedures, does not mention abortion, and contains exceptions for procedures immediately necessary to preserve the life or health of patients. *Id.* at *3, 9-10. GA-09 is enforceable by both criminal and administrative penalties and is currently set to expire after 11:59 p.m. on April 21, 2020. *Id.* at *3.

On March 30, the district court entered a TRO against GA-09 as applied to all abortion procedures. *Planned Parenthood Ctr. for Choice et al. v. Abbott*, 2020 WL 1502102, at *4 (W.D. Tex. Mar. 30, 2020) (*Abbott I*). We administratively stayed that TRO on March 31 and, on April 7, we issued a writ of mandamus directing the district court to vacate its TRO. *Abbott II*, 2020 WL 1685929, at *2. In doing so, we explained that the challenge to GA-09 must be analyzed under the controlling legal standards set forth in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *See Abbott II*, 2020 WL 1685929,

at *2. We emphasized that our decision was based only on the record before us, and that both sides would presumably have a chance to present evidence concerning narrower remedies at a preliminary injunction hearing then scheduled for April 13. *Id.* at *2.

The next day, April 8, the district court vacated its TRO and cancelled the April 13 preliminary injunction hearing. Doc. 54. The district court stated it "anticipates that the governor will extend or amend and extend [GA-09] to a date past April 21, 2020," and that "[i]t makes no sense to take up the request for [a] preliminary injunction until the parties and the court have the benefit of any subsequent order." Doc. 58 at 3. The district court therefore ordered the parties to confer and agree to a schedule and procedures for the yet-undetermined preliminary injunction hearing. *Id.*

That same day Respondents sought another TRO, which the district court granted the next day, April 9, following a brief telephone hearing at which Petitioners were not allowed to present evidence or file an opposition. Transcr. of 4/9/20 Tel. Conf. at 14:39; *Planned Parenthood Ctr. for Choice v. Abbott*, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020) (*Abbott III*). The April 9 TRO prevents GA-09 from applying, until April 19, to three categories of abortion: (1) medication abortions; (2) abortions for women who would be more than 18 weeks LMP ("last menstrual period") by April 22 and unable to reach an ambulatory surgical center; and (3) abortions for women who would be past Texas's legal limit—22 weeks LMP—for abortion by April 22. *Abbott III*, 2020 WL 1815587, at *7. On April 10, Petitioners sought another writ of mandamus from our court, as well as an emergency stay. Later that

day, we granted a partial administrative stay of the TRO, except as to the part applying to women who would be 22 weeks LMP by April 22. We expedited briefing on both the emergency stay motion and the mandamus petition.

We now consider Petitioners' motion for emergency stay of the April 9 TRO as it applies to the provision of medication abortions. Four factors guide our analysis: (1) whether Petitioners have made a strong showing of entitlement to mandamus; (2) whether Petitioners will be irreparably harmed absent a stay; (3) whether other parties will be substantially harmed by a stay; and (4) the public interest. *See Nken v. Holder*, 556 U.S. 418, 426 (2009); *ODonnell v. Goodhart*, 900 F.3d 220, 223 (5th Cir. 2018). "The first two factors are the most critical." *ODonnell*, 900 F.3d at 223 (citing *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016)).

The first inquiry is whether Petitioners have made a strong showing they are entitled to mandamus. *Nken*, 556 U.S. at 426. To be entitled to mandamus relief, Petitioners must demonstrate, inter alia, "a clear abuse of discretion that produces patently erroneous results." *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019) (cleaned up). We have serious concerns about whether the district court's April 9 TRO adhered to our order in Abbott II. For example, despite citing the decision once, the TRO does not discuss or apply "the framework governing emergency public health measures like GA-09," established by the Supreme Court in Jacobson. *Abbott II*, 2020 WL 1685929, at *1. Nor does the TRO appear to "careful[ly] pars[e] . . . the evidence," *id.* at *11, developed after a hearing at which "all parties [would]

presumably have the chance to present evidence on the validity of applying GA-09 in specific circumstances," *id.* at *2—something our decision emphasized.[1] Finally, the TRO persists in "usurp[ing] the state's authority to craft emergency health measures" by "substitut[ing] [the court's] own view of the efficacy of applying GA-09 to abortion." *Id.* at *1; *cf. Abbott III*, 2020 WL 1815587, at *4 (finding "delaying access to abortion will not conserve [personal protective equipment]" "[b]ecause individuals with ongoing pregnancies require more in-person healthcare . . . than individuals who have previability abortions").

Conversely, however, we have doubts about Petitioners' showing as to medication abortions. As to that category, Respondents argue that medication abortions are not covered by GA-09 because neither dispensing medication nor ancillary diagnostic elements (such as a physical examination or ultrasound) qualify as "procedures." Guidance by the Texas Medical Board may support this interpretation of the order.[2] Furthermore, the parties' helpful

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[1] *See*, *e.g.*, *id.* at *2 (noting "[t]he district court has scheduled a telephonic preliminary injunction hearing for April 13, 2020," after which the court could "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access"); *id.* at *12 (noting that the question of a narrowly tailored injunction could be pursued by "the parties . . . at the preliminary injunction stage"); *id.* at *13 (noting that "Respondents will have the opportunity, of course, to present additional evidence" on pretext "in conjunction with the district court's preliminary injunction hearing scheduled for April 13, 2020").

[2] *See* Texas Medical Board, Frequently Asked Questions Regarding Non-Urgent, Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic

written responses to our questions did not settle whether GA-09 applies to medication abortions. Given the ambiguity in the record, we conclude on the briefing and record before us that Petitioners have not made the requisite strong showing of entitlement to mandamus relief. Because a failure on that first inquiry is sufficient to deny the stay, we need not proceed to the remaining prongs.

We express no ultimate decision on the ongoing mandamus proceeding or on the remaining aspects of the emergency stay motion.

***

IT IS ORDERED that Petitioners' emergency motion to stay the district court's April 9 TRO is DENIED as to medication abortions. We also DISSOLVE the temporary administrative stay as it applies to medication abortions.

JAMES L. DENNIS, Circuit Judge, concurring.

I concur in the majority's conclusion that the petitioners have failed to make a strong showing that they are entitled to mandamus with respect to medication abortions. The petitioners' stated desire to enforce GA-09 against medication abortions despite the executive order's apparent inapplicability is a strong indication that the enforcement is pretextual and does not bear a "'real or substantial relation' to the public health crisis" we are experiencing. *In re*

(Mar. 29, 2020), http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17 (explaining "[a] 'procedure' [under GA-09] does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests").

Abbott, --- F.3d ---, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (quoting in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

I disagree, however, with the majority's unnecessary critique of the district court's decision. I believe the district court properly exercised its inherent authority "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases" in choosing to issue a second TRO rather than to immediately proceed to a hearing on a preliminary injunction as the majority suggested in its last mandamus opinion. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–631 (1962)). Further, far from "usurp[ing] the state's authority to craft emergency health measures" by "substitut[ing] [the court's] own view of the efficacy of applying GA-09 to abortion," I believe the court properly considered the evidence to determine whether "beyond question, GA-09's burdens outweigh its benefits" when applied to medication abortions, as the majority previously instructed. *Abbott*, 2020 WL 1685929, at *1, 9 (internal quotations omitted).

Accordingly, I concur only in the denial of the petitioner's emergency motion as it applies to medication abortions and to the corresponding dissolving of the administrative stay.

Appendix I

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

No. A-20-CV-323-LY

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, ROBIN WALLACE, M.D., M.A.S., AND HOUSTON WOMEN'S CLINIC,

PLAINTIFFS,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, KEN PAXTON, ATTORNEY GENERAL OF TEXAS, PHIL WILSON ACTING EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, STEPHEN BRINT CARLTON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, KATHERINE A. THOMAS, EXECUTIVE DIRECTOR OF THE

TEXAS BOARD OF NURSING, EACH IN THEIR OFFICIAL CAPACITY, AND MARGARET MOORE, DISTRICT ATTORNEY FOR TRAVIS COUNTY, JOE GONZALES, CRIMINAL DISTRICT ATTORNEY FOR BEXAR COUNTY, JAIME ESPARZA, DISTRICT ATTORNEY FOR EL PASO COUNTY, JOHN CREUZOT, DISTRICT ATTORNEY FOR DALLAS COUNTY, SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY TARRANT COUNTY, RICARDO RODRIGUEZ, JR., CRIMINAL DISTRICT ATTORNEY FOR HIDALGO COUNTY, BARRY JOHNSON, CRIMINAL DISTRICT ATTORNEY FOR MCLENNAN COUNTY, KIM OGG, CRIMINAL DISTRICT ATTORNEY FOR HARRIS COUNTY, AND BRIAN MIDDLETON CRIMINAL DISTRICT ATTORNEY FOR FORT BEND COUNTY, EACH IN THEIR OFFICIAL CAPACITY,

DEFENDANTS.

Filed: April 14, 2020

ORDER EXTENDING ORDER GRANTING PLAINTIFFS' SECOND MOTION FOR TEMPORARY RESTRAINING ORDER AND SCHEDULING ORDER FOR PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before the court in the above styled and numbered cause is the parties' Joint Status Report filed this day (Clerk's Doc. #78). The court finds there is good cause

to schedule Plaintiffs' Motion for Preliminary Injunction (Clerk's Doc. #7) for hearing and to extend the existing temporary restraining order so that the court and parties have adequate time to prepare for that hearing.

IT IS ORDERED that the Order Granting Plaintiffs' Second Motion For Temporary Restraining Order entered April 9, 2020 (Clerk's Doc. #63), is **EXTENDED in its entirety under its same terms and conditions except as MODIFIED** by the orders of the United States Court of Appeals for the Fifth Circuit rendered April 10, 2020, and April 13, 2020, **until 5:00 p.m. on May 1, 2020.** *See* Fed. R. Civ. P. 65(b)(2).

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction is set for **a telephonic hearing on April 29, 2020, at 9:30 a.m.** Each side will have one hour. As agreed by the parties, there will be no live testimony at the hearing. The court will consider the parties' declarations, affidavits, designations, and exhibits ("supporting evidence"), as well as any stipulations of the parties.

IT IS FURTHER ORDERED that any party desiring the court to consider previously filed briefing or supporting evidence shall specifically designate the briefing or supporting evidence at the time the party files its first brief described below.

IT IS FURTHER ORDERED that:

Plaintiffs may serve and file additional briefing, limited to 25 pages, and any additional supporting evidence **on or before April 17, 2020, at 5:00 p.m.**

Defendants may serve and file a response brief, limited to 25 pages, and any additional supporting

evidence **on or before April 21, 2020, at 5:00 p.m.** In the response brief, Defendants may address any extension, modification, or superseding order related to the governor's Executive Order No. GA-09.

Plaintiffs may serve and file a reply brief, limited to 10 pages, with any supporting evidence and may address any extension, modification, or superseding order related to the governor's Executive Order No. GA-09 **on or before April 23, 2020, at 5:00 p.m.**

Defendants may serve and file a rebuttal brief, limited to 10 pages, with any supporting evidence **on or before April 24, 2020, at 5:00 p.m.**

The parties may file Stipulations of Fact **on or before April 24, 2020, at 5:00 p.m.**

The parties shall file detailed Proposed Findings of Fact and Conclusions of Law **on or before April 27, 2020, at 5:00 p.m.** The parties should not presume that the court will allow amendments or supplements.

SIGNED this 14th day of April, 2020.

/s/ Lee Yeakel

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Appendix J

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

No. A-20-CV-323-LY

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, ROBIN WALLACE, M.D., M.A.S., ALAMO CITY SURGERY CENTER PLLC D/B/A ALAMO WOMEN'S REPRODUCTIVE SERVICES, AND HOUSTON WOMEN'S CLINIC,

PLAINTIFFS,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, KEN PAXTON, ATTORNEY GENERAL OF TEXAS, PHIL WILSON ACTING EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, STEPHEN BRINT CARLTON, EXECUTIVE DIRECTOR OF THE

TEXAS MEDICAL BOARD, KATHERINE A. THOMAS, EXECUTIVE DIRECTOR OF THE TEXAS BOARD OF NURSING, EACH IN THEIR OFFICIAL CAPACITY, AND MARGARET MOORE, DISTRICT ATTORNEY FOR TRAVIS COUNTY, JOE GONZALES, CRIMINAL DISTRICT ATTORNEY FOR BEXAR COUNTY, JAIME ESPARZA, DISTRICT ATTORNEY FOR EL PASO COUNTY, JOHN CREUZOT, DISTRICT ATTORNEY FOR DALLAS COUNTY, SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY TARRANT COUNTY, RICARDO RODRIGUEZ, JR., CRIMINAL DISTRICT ATTORNEY FOR HIDALGO COUNTY, BARRY JOHNSON, CRIMINAL DISTRICT ATTORNEY FOR MCLENNAN COUNTY, KIM OGG, CRIMINAL DISTRICT ATTORNEY FOR HARRIS COUNTY, AND BRIAN MIDDLETON CRIMINAL DISTRICT ATTORNEY FOR FORT BEND COUNTY, EACH IN THEIR OFFICIAL CAPACITY,

DEFENDANTS.

Filed: April 21, 2020

ORDER

On April 9, 2020, this court entered an Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order (Dkt. #63). On April 20, 2020, the United States Court of Appeals for the Fifth Circuit

issued an opinion on several Defendants' request for a writ of mandamus and directed this court to

> vacate any part of the April 9 TRO that (1) restrains enforcement of GA-09 as a "categorical ban on all abortions provided by Plaintiffs;" (2) restrains the Governor and Attorney General; (3) restrains enforcement of GA-09 after 11:59 p.m. on April 21, 2020; (4) restrains enforcement of GA-09 as to medication abortions; and (5) restrains enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

In re Abbott, No. 20-50296 (April 20, 2020). Solely because of the circuit court's order, this court **VACATES** only the following portions of the court's April 9, 2020 Order:

any part of the April 9 TRO that (1) restrains enforcement of GA.09 as a "categorical ban on all abortions provided by Plaintiffs;" (2) restrains the Governor and Attorney General; (3) restrains enforcement of GA-09 after 11:59 p.m. on April 21, 2020; (4) restrains enforcement of GA-09 as to medication abortions; and (5) restrains enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be "unlikely" to obtain abortion services in Texas.

In all other respects, the court's April 9, 2020 order remains in full force and effect.

SIGNED this 21st day of April, 2020.

/s/ Lee Yeakel

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Appendix K

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

---

Filed: April 22, 2020

ORDER:

IT IS ORDERED that Respondents' opposed motion to recall the mandate pending petition for rehearing/rehearing en banc and to stay the mandate

pending filing of a petition for a writ of certiorari is DENIED.

/s/ Stuart Kyle Duncan

STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

Appendix L

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50296

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

---

Filed: April 22, 2020

ORDER:

IT IS ORDERED that Respondents' opposed motion to recall the mandate pending petition for rehearing/rehearing en banc and to stay the mandate

pending filing of a petition for a writ of certiorari is DENIED.

/s/ Stuart Kyle Duncan
STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

Appendix M

Executive Order
BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
March 22, 2020

EXECUTIVE ORDER
GA 09

Relating to hospital capacity during the COVID-19 disaster.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, the Texas Department of State Health Services has determined that, as of March 19, 2020, COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, on March 19, 2020, I issued an executive order in accordance with the President's Coronavirus Guidelines for America, as promulgated by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC), and mandated

certain obligations for Texans that are aimed at slowing the spread of COVID- 19; and

WHEREAS, a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster; and

WHEREAS, 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, contrary to recommendations from the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services; and

WHEREAS, various hospital licensing requirements would stand in the way of implementing increased occupancy in the event of surge needs for hospital capacity due to COVID-19; and

WHEREAS, the "governor is responsible for meeting . . . the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and the legislature has given the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders . . . hav[ing] the force and effect of law;" and

WHEREAS, under Section 418.016(a), the "governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster;" and

WHEREAS, under Section 418.173, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable by a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement.

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order that, beginning now and continuing until 11:59 p.m. on April 21, 2020, all 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;

PROVIDED, however, that this prohibition 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.

At the request of the Texas Health and Human Services Commission, I hereby suspend the following provisions to the extent necessary to implement increased occupancy in the event of surge needs for hospital capacity due to COVID-19:

25 TAC Sec. 133.162(d)(4)(A)(iii)(I);

25 TAC Sec. l33.163(t)(1)(A)(i)(II)–(III);

25 TAC Sec. l33.163(f)(1)(B)(i)(III)–(IV);

25 TAC Sec. 133.163(m)(1)(B)(ii);

25 TAC Sec. 133.163(t)(1)(B)(iii)–(iv);

25 TAC Sec. 133.l63(t)(1)(C);

25 TAC Sec. 133.l63(t)(5)(B)–(C); and

any other pertinent regulations or statutes, upon written approval of the Office of the Governor.

This executive order shall remain in effect and in full force until 11:59 p.m. on April 21, 2020, unless it is modified, amended, rescinded, or superseded by me or by a succeeding governor.

Given under my hand this the 22nd day of March, 2020.

/s/ Greg Abbott

GREG ABBOTT
Governor

ATTESTED BY:

/s/ Ruth R. Hughs

RUTH R. HUGHS
Secretary of State

KEN PAXTON
Attorney General *of* Texas
(https://www.texasattorneygeneral.gov/)

March 23, 2020

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

Texas Attorney General Ken Paxton today warned all licensed health care professionals and all licensed health care facilities, including abortion providers, that, pursuant to Executive Order GA 09 issued by Gov. Greg Abbott, they must postpone all surgeries and procedures that are not immediately medically necessary.

On Saturday, Gov. Abbott issued an executive order that "all 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." This prohibition applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically

necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.

The COVID-19 pandemic has increased demands for hospital beds and has created a shortage of personal protective equipment needed to protect health care professionals and stop transmission of the virus. Postponing surgeries and procedures that are not immediately medically necessary will ensure that hospital beds are available for those suffering from COVID-19 and that PPEs are available for health care professionals. Failure 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.

> **"We must work together as Texans to stop the spread of COVID-19 and ensure that our health care professionals and facilities have all the resources they need to fight the virus at this time," said Attorney General Paxton. "No one is exempt from the governor's executive order on medically unnecessary surgeries and procedures, including abortion providers. Those who violate the governor's order will be met with the full force of the law."**

For information on the spread or treatment of Coronavirus (COVID-19), please visit the Texas Department of State Health Services (https://dshs.texas.gov/coronavirus/) website.

Texas Register

TITLE 22	EXAMINING BOARDS
PART 9	TEXAS MEDICAL BOARD
CHAPTER 187	PROCEDURAL RULES
SUBCHAPTER F	TEMPORARY SUSPENSION AND RESTRICTION PROCEEDINGS
RULE §187.57	Charge of the Disciplinary Panel
ISSUE	04/03/2020
ACTION	Emergency

Preamble Texas Admin Code Rule

(a) The disciplinary panel shall determine from the evidence or information presented to it whether a person's continuation in practice constitutes a continuing threat to the public welfare.

(b) If the disciplinary panel determines that a person's continuation in practice would constitute a continuing threat to the public welfare, the disciplinary panel shall temporarily suspend or restrict the license of that person.

(c) In accordance with the Act, §151.002(a)(2), "continuing threat to the public welfare," means a real danger to the health of a physician's patients or the public caused through the physician's lack of competence, impaired status, performance of a non-

urgent elective surgery or procedure, or failure to care adequately for the physician's patients. A real danger exists if patients have an exposure to or risk of injury that is not merely abstract, hypothetical or remote and is based on actual actions or inactions of the physician. Information that the physician has committed similar actions or inactions in the past shall be considered by the disciplinary panel.

(1) For purposes of this rule all licensed health care professionals 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.

(2) Provided, however, that this prohibition 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.

(d) The disciplinary panel may also temporarily restrict or suspend a license of a person upon proof that a person has been arrested for an offense under:

(1) Section 22.011(a)(2), Penal Code (sexual assault of a child);

(2) Section 22.021(a)(1)(B), Penal Code (aggravated sexual assault of a child);

(3) Section 21.02, Penal Code (continuous sexual abuse of a young child or children); or

(4) Section 21.11, Penal Code (indecency with a child).

The agency certifies that legal counsel has reviewed the emergency adoption and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 23, 2020

TRD-202001217

Scott Freshour

General Counsel

Texas Medical Board

Effective date: March 23, 2020

Expiration date: July 20, 2020

For further information, please call: (512) 305-7016

Due Process and Equal Protection Clauses

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.