No. 20-305

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

BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL AND HEALTH LAW SCHOLARS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are public health and constitutional law scholars who teach and write about courts' roles during public health emergencies, the relationship between individual rights and public health, and the relevance in today's world of *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). They have a shared inter-

[1] All parties were notified of *amici curiae's* intent to submit this brief at least 10 days before it was due and have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

est in identifying the appropriate standards for reviewing state actions that concern public health and individual rights. *Amici* have also written about how best to safeguard both public health and individual rights during the current coronavirus pandemic. *Amici* submit this brief to highlight the consequences associated with failing to vacate the decisions below. The Appendix contains a complete list of *amici*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1905, the Supreme Court held that States cannot "infringe any right granted or secured by" the Constitution even to protect public health, and even in times of crisis. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905). During the century-plus since then, this Court has handed down many decisions clarifying the scope of various individual rights, and has developed specific standards to determine when governmental actions abridge them, including strict scrutiny, the undue burden test, and rational-basis review. Today, when a State's claimed authority to act is alleged to conflict with individual rights, the Court uses these nuanced, rights-specific standards of review to analyze whether the state action is permissible.

Misreading *Jacobson*, a divided panel of the Fifth Circuit twice disregarded those established principles to uphold an executive order that used the COVID-19 pandemic as "pretext[]" to "reduce the number of abortions." Pet. App. 128a (Dennis, J., dissenting). Both times, it acted through the extraordinary relief of a writ of mandamus and without full development of the record. Then, just one day

after obtaining the second "favorable judgment," Governor Abbott replaced that executive order, "unilateral[ly]" mooting the case. *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018); Pet. 15. This Court should follow its "established practice" and vacate the decisions below. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This case became moot through no fault of Petitioners—"[t]he principal condition to which [the Court] ha[s] looked" in deciding whether to vacate the case. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). And vacatur is particularly appropriate for two additional reasons.

First, the Fifth Circuit got it wrong. It held that *Jacobson* mandates a universal, deferential standard of review for *all* constitutional rights during a public health crisis, discarding along the way 115 years of canonization of constitutional scrutiny and this Court's rights-specific tests. That holding conflicts with this Court's previous interpretations of *Jacobson*, splits from other circuits, and abrogates careful judicial review at the time it is needed most. And it adds nothing in return. Modern rights-specific standards of review are sufficiently flexible to accommodate States' heightened needs during a pandemic. Unsurprisingly, several Justices of this Court have called it a "mistake" to read *Jacobson* as the decisions below did. *See, e.g.*, *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, Thomas, and Kavanaugh, JJ., dissenting from denial of injunctive relief) ("it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic"). And had Respondents not unilateral-

ly mooted this case, the decisions below would likely have merited this Court's review.

Second, the panel majority's erroneous decisions have unleashed many others: At least four cases in the Fifth Circuit have already treated *Abbott* as binding, and more than thirty others have relied on it as persuasive authority in evaluating restrictions on First, Second, Fifth, Eighth, and Fourteenth Amendment rights. This is precisely what vacatur is meant to guard against—unreviewable decisions "spawning *** legal consequences" and "harm[ing]" parties through "preliminary" adjudication. *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (internal quotation marks and citation omitted). Vacatur is thus warranted to "clear[] the path for future relitigation" of these issues under the correct standard. *Id.* (quoting *Munsingwear*, 340 U.S. at 40).

Courts play an essential role in evaluating and, if necessary, constraining government powers during crises. The Fifth Circuit failed to do so, greenlighting the use of emergencies to permit unlimited constraints on constitutional rights. This Court should follow its "normal rule," *id.*, and vacate the decisions below.

ARGUMENT

"When 'a civil case *** has become moot while on its way [to this Court],' this Court's 'established practice'" is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Garza*, 138 S. Ct. at 1792 (quoting *Munsingwear*, 340 U.S. at 39). Of course, "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Id.* (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239

U.S. 466, 478 (1916)). Here, not only did "mootness occur through *** the 'unilateral action of the party who prevailed in the lower court'"—Governor Abbott, *Garza*, 138 S. Ct. at 1792 (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997)); *see* Pet. 10-12, 15-16—two circumstances of the case make vacatur particularly appropriate: First, the decisions below erred on the law, meaning this Court would likely have granted review and reversed if given the opportunity. Second, these unreviewed and unreviewable decisions have already spawned many others in the Fifth Circuit and beyond, trampling a wide swath of constitutional rights. This Court's intervention is urgently needed to prevent this outcome.

I. VACATUR IS APPROPRIATE BECAUSE THE FIFTH CIRCUIT MISINTERPRETED AND MISAPPLIED *JACOBSON*.

In the decisions below, the Fifth Circuit relied on *Jacobson*, a 115-year-old case specific to the vaccination context, to "narrow[] *** the scope of judicial authority to review rights-claims" during a "public health crisis" into nothingness. Pet. App. 14a. But *Jacobson* did not establish a universal standard of review for public health emergencies, nor was it intended to apply outside its specific factual context. Rather, it merely articulates the principle that neither individual liberty nor the State's right to regulate the public health are absolute—considerations modern doctrine fully accounts for. And while cert.-worthiness is not required for vacatur, *see* Pet. 18 n.3, the fact that the decisions below badly misinterpreted *Jacobson* in a manner that conflicts with the teachings of this Court and the

opinions of several Justices counsels in favor of vacatur: It will appropriately "strip" the *Abbott* decisions of their "binding effect," and "clear[] the path for future relitigation" of these issues, *Camreta*, 563 U.S. at 713 (internal quotation marks and citation omitted), thereby preserving "the rights of all parties," *Munsingwear*, 340 U.S. at 40.

A. *Jacobson* Does Not Displace Modern Rights-Based Tests, Even During A Public Health Emergency.

1. Although States can regulate matters affecting public health, safety, and welfare, this police power is not unlimited: "Th[e] Constitution, and the laws of the United States which shall be made in Pursuance thereof *** shall be the supreme Law of the Land." U.S. Const. art. VI. When courts evaluate States' exercises of police power, they must examine these limits. If the claimed power is reserved to the federal government, the state regulation is preempted; if the regulated right is protected by the Constitution and applies to the States, the state regulation must pass muster under the relevant degree of constitutional scrutiny.

This framework has been the same since the founding era, but historically, state public health regulations were rarely challenged by private individuals. As a result, courts had few opportunities to consider whether the Constitution meaningfully constrained state public health powers that could affect individual rights. Public health was "traditionally" seen primarily as a "matter[] of local concern" which States "had great latitude under their police powers to legislate." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks omitted).

Under the Commerce Clause, "the concept of public health" merely served "as a sorting device for determining which jurisdiction, federal or state, governed the matter at hand." Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 Am. J. Legal Hist. 476, 480 (1996); *see, e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Until Reconstruction, only one constitutional provision was seen as even "remotely relevant" to determining "how far governments could go in protecting the public health" in 1905: the Contracts Clause. Parmet, *supra*, at 479. But that had essentially been a paper tiger. *See id.* Lower courts were accordingly often "highly deferential" to public health regulations and typically reviewed only whether officials exceeded their jurisdiction or abused their authority. James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309, 326 (1998). When they did substantively review the rare individual challenge to a state public health regulation, courts generally drew "every reasonable presumption *** in the favor of [their] validity," though a 1900 case recognized an exception for a Fourteenth Amendment violation based on racial discrimination. *Id.* at 326, 328 (citing *Jew Ho* v. *Williamson*, 103 F. 10 (N.D. Cal. 1900)).

This is the background against which the Court decided *Jacobson* in 1905. *See Calvary Chapel Dayton Valley*, 140 S. Ct. at 2608 (Alito, Thomas, and Kavanaugh, JJ., dissenting from denial of injunctive relief) ("[l]anguage in *Jacobson* must be read in context"). Except for the National Quarantine Act of 1878, which shifted certain quarantine powers from

the States to the federal government, the federal government had only limited involvement with public health regulation. *See* Jerrold M. Michael, *The National Board of Health: 1879-1883*, 126 Pub. Health Reps. 123, 126 (2011). Congress did not pass its first "significant" public health law—the Food and Drug Act—until 1906. *Lohr*, 518 U.S. at 475. The New Deal was decades away. *Griswold* v. *Connecticut*, the Court's first significant decision concerning reproductive rights, would not be issued until 1965. 381 U.S. 479 (1965). And only in the second half of the twentieth century did the Court begin to enforce the Bill of Rights in earnest against the States and develop specific tests to determine whether the government impinged on those liberties. *See* Wendy K. Mariner *et al.*, Jacobson *v.* Massachusetts: *It's Not Your Great-Great-Grandfather's Public Health Law*, 95 Am. J. Pub. Health 581, 584-585 (2005).

2. Today, the object of the inquiry must be the constitutional right at issue. *See Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) ("[T]he developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs."). In the 115 years since *Jacobson*, this Court has recognized several nuanced, rights-specific standards of review to determine when state police power must yield to a particular constitutional right. The defining feature of these standards is that the regulation must survive heightened scrutiny and must be more tailored when it seeks to restrict constitutionally protected liberties. *See, e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2309

(2016) (abortion: "undue burden" (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 878 (1992) (plurality opinion))); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 235 (1995) (race: "narrowly tailored" to serve a "compelling governmental interest"); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) (free exercise: law that is not neutral or generally applicable must "be narrowly tailored" to "advance interests of the highest order" (discussing *Employment Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872 (1990) (internal quotation marks and citation omitted))).

Read in light of this subsequent doctrinal development, *Jacobson* establishes only that States can restrict civil liberties in times of crisis, subject to certain constitutional limits—nothing more. "[N]o rule prescribed by a state *** shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Jacobson*, 197 U.S. at 25; *id.* ("A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with *** any right which that instrument gives or secures."). Thus, courts cannot presume that state public health regulations are lawful or gloss over the issue of substantive review. Rather, they must ask, as in all contexts, whether the State has exceeded its power to regulate that particular right. *See Garcia*, 469 U.S. at 547-554 (overruling *Nat'l League of Cities* v. *Usery*, 426 U.S. 833, 833 (1976), which asked whether the challenged action was a traditional state "government[] function[]").

3. The Fifth Circuit jettisoned this long history of individual rights doctrine and instead concluded that the answer to whether a State has exceeded its regulatory power is found in just one sentence of *Jacobson*: an emergency regulation is unconstitutional only when it has "no real or substantial relation" to the State's public health goals or if it is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Pet. App. 15a-16a, 64a-65a (quoting *Jacobson*, 197 U.S. at 31); *see id.* at 99a. In its view, "courts may not second-guess the wisdom or efficacy of" emergency public health measures, except when they "lack basic exceptions for 'extreme cases'" or are pretextual. *Id.* at 16a, 64a-65a (quoting *Jacobson*, 197 U.S. at 38). In the Fifth Circuit, this Court's usual standard of review for abortion regulations issued during public health emergencies must therefore give way to this special *Jacobson* test. *Id.* at 16a-17a ("nothing in the Supreme Court's abortion cases suggests that abortion rights are somehow exempt from the *Jacobson* framework").

That is wrong. For one, the language the Fifth Circuit relied on—"substantial relation," "beyond all question"—is hardly the lodestar it claimed. Reading *Jacobson* in full reveals that the Court formulated many potential tests of state police power: It also asked whether the regulation was "unreasonable," "arbitrary," "oppressive," "inconsistent with the liberty which the Constitution" secures, "essential to the safety" of the community, or "necessary in order to protect the public health." *Jacobson*, 197 U.S. at 24, 26, 28. This plethora of formulations is consistent with the Court's emerging awareness that, to "give effect to the Constitution," the test must vary

according to the nature of the specific regulation and the right it impinged—an awareness that later crystallized in the modern standards of review, which subsumed *Jacobson*'s nascent expressions. *Id.* at 31. Today we locate the limits of state police power in those rights-specific doctrines.

For another, this "*Jacobson* above all else" approach conflicts with this Court's jurisprudence. Several Justices have recently explained that "[i]t is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2608 (Alito, Thomas, and Kavanaugh, JJ., dissenting from denial of injunctive relief); *see id.* at 2609 (Gorsuch, J., dissenting from denial of injunctive relief) (applying usual First Amendment principles during "a pandemic"); *see also S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in denial of injunctive relief) (noting the challenged "restrictions appear consistent with the Free Exercise Clause," as they "treat more leniently only dissimilar activities").

This is of a piece with the Court's prior decisions. For example, in *Kansas* v. *Hendricks*, this Court cited *Jacobson* solely for the unremarkable proposition that "[a]n individual's constitutionally protected interest in avoiding physical restraint may be overridden." 521 U.S. 346, 356-357 (1997). And in *Casey*, it relied on *Jacobson* to explain that the State does not have a "plenary override of individual liberty claims." 505 U.S. at 857 (plurality opinion). Nothing in these perfunctory references suggests an attempt

to "bake[]-in '*Jacobson* exceptions'" to the carefully calibrated "modern tiers of scrutiny." Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 193-194 (2020). Indeed, after citing *Jacobson*, both *Hendricks* and *Casey* went on to articulate a *heightened* standard of review. *Hendricks*, 521 U.S. at 356-358 (restricting State's power to civilly commit mentally ill individuals to "narrow circumstances" and to a "limited subclass of dangerous persons"); *Casey*, 505 U.S. at 877 (establishing the undue burden test). The notion that citations to *Jacobson* in cases like *Hendricks* and *Casey* is proof that a different standard controls during public health crises, *see* Pet. App. 16a-18a, lacks any textual basis, *see* Wiley & Vladeck, *supra*, at 14 ("[*Hendricks*] hardly establishes that modern doctrines of heightened scrutiny all have a *Jacobson* asterisk.").

Roe and *Gonzales* are not to the contrary. *Roe* v. *Wade* cited *Jacobson* for the uncontroversial proposition that privacy rights are not "unlimited." 410 U.S. 113, 154 (1973). And it went on to explain that, although "the right of personal privacy includes the abortion decision, *** this right is not unqualified and must be considered against important state interests in regulation." *Id.* In other words, *Roe*, like *Hendricks* and *Casey*, only relied on *Jacobson* to confirm that neither individual rights nor the States' power to regulate them are "absolute." *Id.* *Roe* never suggested that *Jacobson* somehow controls the application of that test in the abortion context. And *Gonzales* v. *Carhart* cited *Jacobson* only once, in a list of seven examples in which "[t]he Court has given state and federal legislatures wide discretion

to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. 124, 163 (2007). That hardly suggests—let alone mandates, as the Fifth Circuit claimed—that "the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*." Pet. App. 18a.

Nor does the fact that this Court has never squarely addressed "a state's postponement of some abortion procedures in response to a public health crisis" necessarily mean that *Jacobson* governs in such a situation. Pet. App. 17a-18a; *see id.* at 19a ("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."). This "Court has *never* said that *Jacobson* applies—to the exclusion of subsequently articulated doctrinal standards—to all constitutional rights." Wiley & Vladeck, *supra*, at 194. To hold otherwise would be a mistake. *See Calvary Chapel Dayton Valley*, 140 S. Ct. at 2608 (Alito, Thomas, and Kavanaugh, JJ., dissenting from denial of injunctive relief); *id.* at 2609 (Gorsuch, J., dissenting from denial of injunctive relief).

The bottom line is that *Jacobson*—like all cases—"must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox." *Id.* at 2608 (Alito, Thomas, and Kavanaugh, JJ., dissenting from denial of injunctive relief); *Adams & Boyle, P.C.* v. *Slatery III*, 956 F.3d 913, 927 (6th Cir. 2020) ("If *Jacobson* teaches us anything, it is that context matters."). *Jacobson* asked a narrow question:

Could a State penalize the decision not to be vaccinated? And the Court gave a narrow answer: "[T]he police power of a state must be held to embrace" that regulation, which was "necessary" to "protect the public health." 197 U.S. at 25, 27. Vaccination, the Court emphasized, directly accomplished that goal by combatting transmission of the disease. *Id.* at 35 ("vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries"); *see id.* at 23-24, 28. Jacobson's objections, meanwhile, amounted to "nothing more" than claims that the vaccination would be "distressing, inconvenient, or objectionable to some." *Id.* at 28. On *that* record, the Court held Massachusetts' measure justified "by the necessities of" Jacobson's particular "case." *Id.* at 28.

That is it. Nothing in *Jacobson* itself suggests that it applies outside the context of a vaccination requirement. And the *Jacobson* Court simply had no occasion to articulate a universal standard for evaluating public health regulations or to decide whether, on different facts, a State could use a separate—let alone more attenuated—measure to regulate a constitutional right of a different dimension for public health purposes or otherwise. *See Slatery*, 956 F.3d at 926 ("asking a person to get a vaccination, on penalty of a small fine, is a far cry from forcing a woman to carry an unwanted fetus against her will for weeks, much less all the way to term").

B. Modern Constitutional Tests Fully Accommodate States' Interests During A Pandemic.

Today's rights-specific standards of review, including the undue burden framework, are well-equipped to accommodate States' heightened interests during an epidemic. Far from handcuffing the State, they provide flexibility to navigate a crisis: They account for the importance of the constitutional right, the State's interest, and how directly the State's action furthers that interest. And, as explained, "[n]othing in *Jacobson* supports the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints *within* those standards." *S. Bay United Pentecostal Church* v. *Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting); *see also, e.g.*, *Bayley's Campground Inc.* v. *Mills*, No. 2:20-cv-00176-LEW, 2020 WL 2791797, at *8 (D. Me. May 29, 2020) ("Although *Jacobson* reflects that, when one weighs competing interests in the balance, the presence of a major public health crises is a very heavy weight indeed and scientific uncertainties about the best response will afford the state some additional leeway to err on the side of caution, it does not provide the standard of review for this case." (footnote omitted)).

Accordingly, courts have applied modern rights-based tests to a variety of COVID-19 measures. For example, *First Baptist Church* v. *Kelly* applied the standard *Smith*/*Lukumi* framework for free-exercise rights to evaluate whether a state order prohibiting mass gatherings impermissibly discriminated against religious organizations. *See* No. 20-1102-

JWB, 2020 WL 1910021, at *5 (D. Kan. Apr. 18, 2020); *see also, e.g.*, *Legacy Church*, *Inc.* v. *Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *30 (D.N.M. Apr. 17, 2020). *Hartman* v. *Acton* conducted the usual *Zinermon* balancing test to assess a bridal shop's claim that Ohio's stay-at-home order violated due process. No. 2:20-CV-1952, 2020 WL 1932896, at *9 (S.D. Ohio Apr. 21, 2020). *Commcan, Inc.* v. *Baker* used rational-basis review to analyze equal-protection challenges by members of an unprotected class to a state order designating their marijuana businesses as "non-essential." No. 2084CV00808-BLS2, 2020 WL 1903822, at *1, *5 (Mass. Super. Ct. Apr. 16, 2020). And *Bayley's Campground* applied this Court's "jurisprudence on the constitutional right to travel" to assess whether Maine could prohibit certain "non-Mainers" from entering the State. 2020 WL 2791797, at *8, *1.

Those pandemic measures that appropriately balance constitutional rights against the government's interests have survived review, including under strict scrutiny. In *Legacy Church*, for example, the court recognized that "Tenth Amendment police and public health powers are at a maximum" during "a major public health threat," examined New Mexico's ban on gatherings with that in mind, and rejected a freedom-of-assembly challenge because the ban was narrowly tailored to combat the health threat. 2020 WL 1905586, at *30; *see also Bayley's Campground*, 2020 WL 2791797, at *9 (holding that Maine's travel restrictions were "the least burdensome way to serve a compelling governmental interest"); *Ill. Republican Party* v. *Pritzker*, No. 20 C 3489, 2020 WL 3604106, at *3, *7 (N.D. Ill. July 2, 2020) (applying *Jacobson*, but holding in the alternative that COVID-19 con-

tent-based restrictions on speech were "narrowly tailored to further a compelling interest").

The right to abortion is no different. The undue burden test directs courts to "consider the burdens a law imposes on abortion access together with the benefits [it] confer[s]." *Hellerstedt*, 136 S. Ct. at 2309; *cf. June Med. Servs. L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) (explaining that, unless a regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion," it will be permissible if "reasonably related to a legitimate state interest" (internal quotation marks omitted)). That is, the *right* to an abortion remains unchanged in public health crises, but the test *incorporates* the heightened state interest during pandemics by prohibiting only burdens that are undue. *Slatery*, 956 F.3d at 927 (recognizing that access to abortion may not be "identical" "during a public health crisis," but rejecting "the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations").

Of course, some crisis measures will fail the applicable rights-specific test, but that "says far more about the challenged government action" than the correct standard of review. Wiley & Vladeck, *supra*, at 189. Restrictions that impose an *undue* burden—because, for example, they do not actually "conserve[] *** PPE" or would actually increase in-person contact—cannot survive constitutional scrutiny. Pet. App. 133a (Dennis, J., dissenting); *see also Slatery*, 956 F.3d at 926 (explaining that "a woman's right to a pre-viability abortion is a part of 'the

fundamental law'" and that imposing an undue burden on that right "constitutes 'beyond question, a plain, palpable invasion of rights secured by [that] fundamental law'" (alteration in original)).

By disregarding these principles, *Abbott* badly distorted established constitutional doctrine and triggered a circuit split among five Courts of Appeals. *See* Pet. 18-21. These were "legally consequential decision[s]." *Camreta*, 563 U.S. at 713. This Court should follow "the normal rule" and "strip[] [them] of [their] binding effect" through vacatur. *Id.* (quoting *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988)).

II. VACATUR IS NEEDED TO GUARD AGAINST LEGAL CONSEQUENCES ARISING FROM THE PRELIMINARY, UNREVIEWABLE DECISIONS BELOW.

A key "point" of vacatur is "to prevent [] unreviewable decision[s] 'from spawning *any* legal consequences.'" *Camreta*, 563 U.S. at 713 (emphasis added) (quoting *Munsingwear*, 340 U.S. at 40-41). But the Fifth Circuit's erroneous approach has already begun to take root: Courts within and without the Fifth Circuit have not only repeated *Abbott*'s broad pronouncements about *Jacobson*'s applicability, but have deployed the specific two-part test *Abbott* devised. And they have extended *Abbott* far beyond abortion rights. That further supports vacatur here.

1. Although some of the Fifth Circuit's rationale was specific to abortion, *see, e.g.*, Pet. App. at 17a-19a, the bottom line was clear: "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency," unless this Court has "specifically exempted" a

particular constitutional right "from its general [*Jacobson*] rule." *Id.* at 19a (emphasis added). And because that is not how this Court has understood or applied *Jacobson* in the past, *see supra*, pp. 7-10, that "exception" will never be triggered. Thus, in practice, the Fifth Circuit's flawed *Jacobson* test will "govern[] a state's emergency restriction of *any* individual right, not only the right to abortion." Pet. App. 3a n.1.

District courts in the Fifth Circuit have accordingly found themselves bound by *Abbott*'s flawed approach in a variety of cases. This includes challenges to restrictions on religious gatherings under the First Amendment, *Spell* v. *Edwards*, Civ. Action No. 20-00282-BAJ-EWD, 2020 WL 2509078, at *3 (M.D. La. May 15, 2020), *order vacated as moot*, 962 F.3d 175 (5th Cir. 2020); limitations on the on-site consumption of food and drinks at "bars" under the Equal Protection and Due Process Clauses, *910 E. Main LLC* v. *Edwards*, Case No. 6:20-CV-00965, 2020 WL 4929256, at *6 (W.D. La. Aug. 21, 2020); *4 Aces Enters., LLC* v. *Edwards*, Civ. Action No. 20-2150, 2020 WL 4747660, at *1 (E.D. La. Aug. 17, 2020); and prison conditions under the Eighth Amendment, *Payne* v. *Sutterfield*, No. 2:17-CV-211-Z-BR, 2020 WL 5237747, at *6 (N.D. Tex. Sept. 2, 2020).

Abbott, these courts explain, "precludes [them] from" applying "traditional doctrine *** during a pandemic." *4 Aces Enters.*, 2020 WL 4747660, at *1, *9; *see also 910 E. Main*, 2020 WL 4929256, at *6 ("The Court must thus address Plaintiffs' requested relief within contours of *Jacobson* and *Abbott*."); *Spell*, 2020 WL 2509078, at *2-3 (treating *Jacobson* as "controlling law" after *Abbott*). Worse still, these

courts feel bound to apply *Abbott*'s two-part *Jacobson* test to a tee, even though nothing in *Jacobson* prescribed such a rigid framework. *See supra*, pp. 11-12, 14-15. *910 E. Main*, for instance, limited its inquiry to "whether the government action challenged lacks a real or substantial relation to the crisis faced by the state" and "whether the executive orders are beyond question, in palpable conflict with the Constitution." 2020 WL 4929256, at *6 (internal quotation marks and citation omitted). This rigid framework will remain the law of the Fifth Circuit unless this Court intervenes and vacates the decisions below.

Because *Abbott* was one of the earliest cases to apply *Jacobson* to the COVID-19 pandemic, a host of courts outside the Fifth Circuit have relied on it as well. To date, at least thirty courts outside the Fifth Circuit have invoked *Abbott* to curtail basic constitutional rights, ranging from free exercise and assembly rights, to challenges to prison conditions. *E.g.*, *Feltz* v. *Bd. of Cty. Comm'rs of Cty. of Tulsa*, Case No. 18-CV-0298-CVE-JFJ, 2020 WL 2393855, at *14 (N.D. Okla. May 11, 2020) (relying on *Abbott* to justify "defer[ence] to state actions taken in times of emergency, even if they infringe on individual constitutional rights" in the context of a prisoner lawsuit); *Tabernacle Baptist Church, Inc. of Nicholasville* v. *Beshear*, Civ. No. 3:20-cv-00033-GFVT, 2020 WL 2305307, at *4 (E.D. Ky. May 8, 2020) (applying *Abbott*'s "distilled" test to free-exercise and free-assembly challenges).[2]

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[2] *See also, e.g.*, *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020); *Lebanon Valley Auto Racing Corp.* v. *Cuomo*, No. 1:20-

2. This proliferation of *Abbott*'s progeny has already undermined basic constitutional rights. Allowing the decisions below to stand will only magnify that result.

The Fifth Circuit was clear that its construction of *Jacobson* applies to restrictions on "*all* constitutional rights" during a pandemic. Pet. App. 19a (emphasis added). Given the proliferation of COVID-related regulations, Louisiana, Mississippi, and Texas may

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CV-0804 (LEK/TWD), 2020 WL 4596921, at *4 (N.D.N.Y. Aug. 11, 2020); *Tigges* v. *Northam*, Civ. Action No. 3:20-cv-410, 2020 WL 4197610, at *7 (E.D. Va. July 21, 2020); *Antietam Battlefield KOA* v. *Hogan*, Civ. Action No. CCB-20-1130, 2020 WL 2556496, at *5 (D. Md. May 20, 2020); *Amato* v. *Elicker*, No. 3:20-cv-464 (MPS), 2020 WL 2542788, at *10 (D. Conn. May 19, 2020); *Berean Baptist Church* v. *Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313, at *6 (E.D.N.C. May 16, 2020); *Calvary Chapel of Bangor* v. *Mills*, Dkt. No. 1:20-cv-00156-NT, 2020 WL 2310913, at *7 (D. Me. May 9, 2020); *SH3 Health Consulting, LLC* v. *Page*, No. 4:20-cv-00605 SRC, 2020 WL 2308444, at *6-7 (E.D. Mo. May 8, 2020); *Lawrence* v. *Colorado*, Civ. Action No. 1:20-cv-00862-DDD-SKC, 2020 WL 2737811, at *5 (D. Colo. Apr. 19, 2020).

Indeed, *Abbott*'s gravitational pull is so strong that district courts in the Sixth, Seventh, and Ninth Circuit continue to rely on it, despite recent circuit decisions declining to adopt that test. *See, e.g.*, *Whitsitt* v. *Newsom*, No. 2:20-cv-00691-JAM-CKD PS, 2020 WL 4818780, at *2 (E.D. Cal. Aug. 19, 2020); *Vill. of Orland Park* v. *Pritzker*, No. 20-cv-03528, 2020 WL 4430577, at *7 (N.D. Ill. Aug. 1, 2020); *Bannister* v. *Ige*, Civ. No. 20-00305 JAO-RT, 2020 WL 4209225, at *4 (D. Haw. July 22, 2020); *Local Spot, Inc.* v. *Lee*, No. 3:20-cv-00421, 2020 WL 3972747, at *2 (M.D. Tenn. July 14, 2020); *Carmichael* v. *Ige*, Civ. No. 20-00273 JAO-WRP, 2020 WL 3630738, at *5 (D. Haw. July 2, 2020); *Ill. Republican Party*, 2020 WL 3604106, at *3; *Ramsek* v. *Beshear*, Civ. No. 3:20-cv-00036-GFVT, 2020 WL 3446249, at *11 (E.D. Ky. June 24, 2020).

now unduly restrict the individual rights of more than 36 million people in a wide range of circumstances. *See, e.g.*, *4 Aces Enters.*, 2020 WL 4747660, at *1 (applying the *Abbott*/*Jacobson* framework to substantive due process, procedural due process, and equal protection challenges). This includes the right to abortion—which would undoubtedly prejudice Petitioners by precluding them from obtaining future injunctive relief. Pet. 17; *see Camreta*, 563 U.S. at 713.[3] And, taking their cue from *Abbott*, other jurisdictions can impose similar restrictions. *E.g.*, *SH3 Health Consulting*, 2020 WL 2308444, at *8-10 (applying *Abbott*'s "beyond all question" test to assembly, freedom of association, and due process challenges); *Gish* v. *Newsom*, Case No. EDVC 20-755 JGB (KKx), 2020 WL 1979970, at *4-5 (C.D. Cal. Apr. 23, 2020) (free exercise); *Ill. Republican Party*, 2020 WL 3604106, at *3-4 (free speech); *Altman* v. *Cnty. of Santa Clara*, Case No. 20-cv-02180-JST, 2020 WL 2850291, at *7-8 (N.D. Cal. June 2, 2020) (Second Amendment). Allowing the decisions below to stand may therefore pave the way for state officials across the country to use the pandemic as a

[3] Failure to vacate the decisions below would prejudice Petitioners even if future restrictions do not entirely preclude women from obtaining abortions. Restrictions that cause "longer waiting times," "increased crowding," and "delays in obtaining an abortion"—particularly in States like Texas and Louisiana, where abortion providers are already scarce—impose physical, emotional, and financial costs on patients and constitute undue burdens. *June Med.*, 140 S. Ct. at 2130 (plurality opinion) ("delays in obtaining an abortion" increase the risk of complications and may make non-invasive medication abortions "impossible").

"pretext[]" to curtail a wide range of constitutional rights. Pet. App. 128a (Dennis, J., dissenting).

All of this is precisely what *Munsingwear* sought to avoid. Indeed, this Court routinely vacates unreviewable decisions even where "there is no realistic possibility that the judgment could spawn *any* legal consequences." *Alabama* v. *Davis*, 446 U.S. 903, 904 (1980) (Stevens, J., dissenting from grant of certiorari) (emphasis added) (internal quotations marks and citations omitted). But where, as here, a preliminary, unreviewable decision has already bound the hands of a lower court, vacatur is not just an "established practice" but a "duty" of this Court. *Munsingwear*, 340 U.S. at 39-40 (internal quotations marks and citations omitted).

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The COVID-19 crisis is undeniably serious, but it cannot be allowed to serve as an excuse to abdicate the courts' judicial role. Indeed, the courts' role becomes all the more critical precisely *because* government exercises its power more expansively. And unnecessary discretion only "invite[s] abuse" and "endanger[s] guarantees of individual liberty." Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. Rev. 391, 399, 412 (2018); *see also Youngstown Sheet & Tube Co.* v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.").

The Fifth Circuit's failure to follow usual standards of review—and the precedent that can set—is especially dangerous because there is no end in sight to

the current crisis. What was meant to be a "temporary" deviation could easily give way to repeated invocation of "emergency," and repeated restrictions on constitutional liberties. *See* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 Yale L.J. F. 610, 611 & n.15 (2020) (summarizing the difficulty of terminating federally-declared emergencies). That is why it is particularly important for this Court to follow its usual practice and vacate the decisions below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be granted, and the decisions below should be vacated.

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APPENDIX

APPENDIX*

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