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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Respondents' opposition is most notable for what it omits. Respondents ("state officials") do not dispute that the issues addressed below are moot, and that when an appeal becomes moot "while on its way" to this Court, the normal practice is to "vacate the judgment below." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). They also do not rebut the showing by petitioners ("the providers") that the issues in this case are critically important and likely would have merited this Court's review absent mootness.

State officials instead stake their opposition on three incorrect propositions. First, they wrongly argue that vacatur would be useless because the Fifth Circuit has adopted elsewhere the key holdings below, and that it is in the public interest to maintain the

underlying decisions so that other courts may rely on them. While certain holdings of the *Abbott* orders threaten to tie the providers' hands in future cases, the Fifth Circuit has not yet adopted those holdings in other cases in ways that would do so: The *Abbott* orders alone jeopardize the providers' future claims. Moreover, this Court's recent order in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020) (per curiam), has changed the legal landscape with respect to pandemic restrictions alleged to violate constitutional rights. If the decisions below were not moot, it would be appropriate for the Court to grant the petition, vacate the decisions, and remand the case for further proceedings in light of *Roman Catholic Diocese*. Accordingly, regardless whether it was once plausible to say that the months-old *Abbott* decisions were "canonical," Opp'n at 1, that assertion is plainly not true today, and vacatur alone is appropriate.

Second, state officials argue that vacatur is unwarranted because the providers voluntarily abandoned review of the decisions below. To do so, they misrepresent a key fact: The providers filed motions to recall and stay both mandates, both of which referred to an intent to seek rehearing en banc and certiorari review, the day after the second mandamus decision. Contrary to state officials' representation, those motions were pending at the time GA-09 was replaced. These and other good-faith efforts by the providers to litigate their claims more than demonstrate their equitable entitlement to vacatur, consistent with this Court's normal practice.

Third, state officials argue that vacatur would be inequitable because the providers waited too long to seek it. As they concede, however, the petition for certiorari was timely under this Court's orders, and no

further decisions have been rendered in the case. Moreover, even if the providers sought vacatur last April, the Court would not have considered the petition until long after the issuance of most other decisions citing the orders below.

The petition should be granted, the judgments vacated, and the case remanded for dismissal of the moot claim.

ARGUMENT

I. VACATUR SERVES THE PUBLIC INTEREST AND REMAINS EFFECTIVE RELIEF.

State officials contend that vacatur would be "useless" because the "challenged decisions have been adopted in other Fifth Circuit cases." Opp'n at 13, 26. They also assert the public interest favors preserving the decisions because other courts have relied on them, making the months-old decisions "canonical" and "engrained." *Id.* at 1. These arguments were meritless when made and are wholly unconvincing after *Roman Catholic Diocese*, 592 U.S. ___.

First, the Fifth Circuit has not incorporated the *Abbott* holdings into other circuit precedent that would bind the providers even if *Abbott I* and *II*, Pet. App. 1a–139a, were vacated. Although the court of appeals has cited *Abbott I* in four decisions outside of this case, none adopts *Abbott I*'s misguided standard based on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). For example, *Marlowe v. LeBlanc*, 810 F. App'x 302 (5th Cir. 2020) (per curiam), an unpublished decision, cited *Abbott I* for a basic proposition regarding irreparable harm, *id.* at 306 n.4, and is, in any event, "not precedent," 5th Cir. R. 47.5.4. *See also Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 142 (5th Cir. 2020) (describing district

court's application of *Abbott I* to sovereign immunity defense without reaching that issue on appeal); *Valentine v. Collier*, 960 F.3d 707, 708 n.1 (5th Cir. 2020) (per curiam) (citing *Abbott I* for judicial notice of COVID-19 statistics); *Valentine v. Collier*, 956 F.3d 797, 803–04 (5th Cir. 2020) (per curiam) (citing *Abbott I*'s reference to COVID-19 as a "massive and rapidly-escalating threat").[1]

Similarly, while the Fifth Circuit has cited *Abbott II* in a few election-law cases involving sovereign immunity, none has involved the same set of statutory provisions at issue here, or comparable enforcement threats. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179–81 (5th Cir. 2020); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 & nn.18 & 20, 468 n.25 (5th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400–01 (5th Cir. 2020). Accordingly, but for *Abbott II*, providers would remain free to challenge future assertions of sovereign immunity by the governor and attorney general with respect to pandemic-related restrictions on abortion. *See Tex. Democratic Party*, 978 F.3d at 179 (holding that sovereign immunity depends on a "provision-by-provision" analysis of the enforcement scheme).

Second, state officials wrongly assert that the public interest favors preserving the orders because they are "seminal" decisions on constitutional rights during a pandemic. Opp'n at 32. This Court's recent decision in *Roman Catholic Diocese*, 592 U.S. ___,

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[1] In two other cases, concurring opinions cited *Abbott I* in footnotes. *See Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, No. 17-50282, 2020 WL 6867212, at *29 n.1 (5th Cir. Nov. 23, 2020) (en banc) (Ho, J., concurring); *Spell v. Edwards*, 962 F.3d 175, 181 n.1 (5th Cir. 2020) (Ho, J., concurring).

makes clear this rationale is unpersuasive. In that case, the Court granted temporary injunctive relief against a pandemic-related restriction on religious attendance. Without citing *Jacobson*, it concluded that the restriction was unlikely to survive strict scrutiny under the traditional constitutional test for religious-exercise claims. *Compare id.* at ___ (slip op., at 2–3), *with* Pet. App. 2a–3a n.1 (*Abbott I* stating that "*Jacobson* governs a state's emergency restriction of *any* individual right," including "[t]he right to practice religion freely"). Justice Gorsuch concurred, emphasizing that "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Roman Catholic Diocese*, 592 U.S. ___, ___ (Gorsuch, J., concurring) (slip op., at 4). Even the dissents, though disagreeing with the outcome, did not rely on *Jacobson* to support denying relief. *See id.* at ___ (Roberts, C.J., dissenting); *id.* at ___ (Breyer, J., dissenting); *id.* at ___ (Sotomayor, J., dissenting); *see also Harvest Rock Church, Inc. v. Newsom*, 592 U.S. ___ (2020) (mem.) (vacating district court's denial of injunctive relief request involving a pandemic restriction and remanding for reconsideration in light of *Roman Catholic Diocese*). *Roman Catholic Diocese* clearly calls into question the *Jacobson* standard created by the Fifth Circuit in *Abbott I* and modified in *Abbott II*, and it, therefore, eliminates whatever value the decisions below might have had.

Finally, state officials are wrong that vacatur here would require vacatur of all decisions involving COVID-19 measures that expire before this Court's review, or of any decisions involving temporary restraining orders (TROs), such as those in prior-restraint challenges. Opp'n at 22–23. This Court has

held, and providers acknowledge, that vacatur is an equitable remedy whose availability depends on the factual circumstances. *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); *see also, e.g.*, *S. Wind Women's Ctr. LLC v. Stitt*, 808 F. App'x 677, 681 (10th Cir. 2020) (per curiam) (declining to vacate a TRO where preclusion was deemed unlikely). Moreover, in many constitutional cases, including those involving COVID-19 restrictions, plaintiffs seek damages or contend that a violation is likely to recur. In these circumstances, some or all claims could survive a restriction's expiration, such that future court decisions could revisit issues that might otherwise have become moot. *See, e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

II. THE PROVIDERS DID NOT ABANDON REVIEW OF THE DECISIONS BELOW.

State officials argue that vacatur is inequitable because the providers voluntarily "step[ped] off the statutory path" for appellate review. Opp'n at 23 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994)). However, they misrepresent the steps that the providers *did* take and offer farfetched scenarios for further review. In fact, the providers' litigation conduct was reasonable throughout the month-long proceedings. Pet. App. 140a–150a; 154a–171a. It was state officials who twice disrupted "the orderly operation of the federal judicial system" to seek the extraordinary remedy of mandamus to challenge two TROs. *Bancorp*, 513 U.S. at 27.

As an initial matter, although state officials assert that the providers should have sought further appellate review after April 7, 2020, when *Abbott I* was issued, the providers cannot be faulted for seeking urgent relief through a second TRO based on their understanding of the evidentiary and legal showing required by *Abbott I*. The decision's full ramifications became clear only two weeks later, when *Abbott II* significantly modified *Abbott I*'s requirements. As Judge Dennis observed, *Abbott II* "move[d] the goal posts and chastise[d] the district court for not abiding by a series of phantom instructions" that were "found nowhere" in *Abbott I*. Pet. App. 106a. Those "phantom instructions" came only one day before GA-09 was replaced.

When the Fifth Circuit issued *Abbott II* (and modified *Abbott I* sub silentio) on April 20, 2020, the providers moved quickly to seek review. State officials wrongly claim that the providers waited until "April 22, 2020, after the expiration of GA-09," to ask the Fifth Circuit to recall and stay the first and second mandates. Opp'n at 11. In fact, the providers filed those motions on April 21, 2020, while GA-09 remained in effect. Mot. to Recall Mandate, *In re Abbott I*, No. 20-50264 (5th Cir. Apr. 21, 2020); Mot. to Recall Mandate, *In re Abbott II*, No. 20-50296 (5th Cir. Apr. 21, 2020). Those motions, though later denied, Pet. App. 197a–200a, remained pending when GA-09 was replaced by GA-15, and they referred to the providers' plans to petition for rehearing en banc or certiorari review.

State officials claim that providers had to do still more by filing an emergency application in this Court in the less than 36 hours between *Abbott II*'s issuance and GA-09's expected replacement, and that the

application could have been resolved in that time. That suggestion is pure fancy. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (emergency application denied 4 days after filing); *Democratic Nat'l Comm. v. Wis. State Legislature*, 592 U.S. ___ (2020) (denied 12 days after filing); *Roman Catholic Diocese*, 592 U.S. ___ (granted 13 days after filing); Emergency Appl. to J. Alito to Vacate Admin. Stay of TRO, *Planned Parenthood Center for Choice v. Abbott*, No. 19A1019 (U.S. Apr. 11, 2020) (withdrawn as moot 2 days after filing, at which time no response had been requested).

In any event, the providers' good-faith efforts show that they did not abandon further review. This Court should therefore vacate the underlying decisions, just as it did in *Garza*, 138 S. Ct. 1790, which involved a nearly identical procedural posture, and numerous other cases. *See* Pet. at 14; *see also, e.g.*, *Constand v. Cosby*, 833 F.3d 405, 413 (3d Cir. 2016) (vacating order where party's stay request came "too late to prevent" harm to be avoided but where the timing was not "part of any attempt to manipulate the judicial system"); *Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (vacating order where the losing party's petition for rehearing en banc was pending when mootness occurred). Although state officials contend that *Garza* rested on bad-faith conduct by the party prevailing in the court of appeals, *Garza* in fact had no need to "delve into th[is] factual dispute[]" to "answer the *Munsingwear* question." 138 S. Ct. at 1793.

Contrary to state officials' suggestion, the providers' efforts bear no resemblance to conduct that "may disentitle" a party "to the [equitable] relief he seeks." *Bancorp*, 513 U.S. at 25 (internal quotation omitted) (denying vacatur where the losing party settled the

underlying claims). *Mahoney v. Babbitt*, 113 F.3d 219 (D.C. Cir. 1997), declined to vacate an order enjoining officials from making arrests during a parade because the officials followed the order, *id.* at 224, without making any "attempt whatsoever" to stay its application, *Constand*, 833 F.3d at 413. *Blankenship v. Blackwell*, 429 F.3d 254 (6th Cir. 2005), refused to vacate an order where the losing parties waited "more than seven months to bring" their claim and encouraged "dishonest[]" representations that delayed judicial resolution. *Id.* at 258–59. In contrast, the providers sought a TRO two days after the enforcement threat, and they vigorously litigated over GA-09 to its end. Barred from further review through no fault of their own, the providers are entitled to vacatur of the decisions below.

III. THE TIMING OF THE PETITION FOR CERTIORARI IS IRRELEVANT.

State officials argue that vacatur is unwarranted because the providers should have filed their petition for certiorari last April, after GA-09 was replaced. In reliance on *Munsingwear*, 340 U.S. at 41, they contend that the providers "slept on their rights" by instead filing this September. Opp'n at 16.

This argument has no merit. Far from supporting state officials' position, *Munsingwear* confirms that vacatur is warranted. In *Munsingwear*, the Court held that a judgment that became moot on appeal nevertheless had preclusive effect in later proceedings because the losing party had acquiesced in dismissal of the earlier appeal without seeking vacatur. 340 U.S. at 40. The Court refused to do "what by orderly procedure [the losing party] could have done for itself" had

that party sought to vacate the earlier judgment. *Id.* at 41.

The providers are doing precisely what the losing party should have done in *Munsingwear*, and there is nothing inequitable about vacatur given the timing of their petition for certiorari. As state officials concede, the petition was timely under this Court's orders. Opp'n at 16; Order, 589 U.S. ___ (Mar. 19, 2020). State officials cite no support, and the providers are aware of none, for denying equitable relief because (in state officials' view) the providers could have moved even more quickly.

In addition, although state officials suggest that the petition's timing shows the providers "accept[ed]" the Fifth Circuit decisions, Opp'n at 16, they cannot point to any legal consequences from those decisions to which the providers have been subjected since last April. No court has entered substantive orders in the case since that time. State officials have not filed an answer or moved to dismiss. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. filed Mar. 25, 2020).[2] In addition, Governor Abbott has not issued further executive orders giving rise to new claims that might be governed by the underlying decisions.

Developments in other cases also do not demonstrate that the providers have acquiesced in the decisions below. As discussed in Part I, state officials

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[2] Despite state officials' inaction, they now argue that *providers* should have dismissed their moot claim. Opp'n at 12. Even if the providers had done so, however, there is little doubt the officials would still oppose vacatur, arguing that dismissal was equivalent to acquiescence in the decisions below.

are simply wrong that the Fifth Circuit has incorporated the *Abbott* holdings into other circuit precedent in ways that would bind the providers, nor could out-of-circuit decisions have that same effect.

Even if the development of other case law were relevant, that case law would not have been materially different if the providers had petitioned for certiorari earlier. Had the providers petitioned by April 27, 2020, one week after *Abbott II*, this Court would not have considered that petition until September 29, 2020, at the earliest.[3] The vast majority of cases citing the *Abbott* decisions did so before then. *See* Opp'n at 18–19 nn.11–13. The same is true for each of the abortion-related COVID-19 decisions that state officials cite, *see In re Rutledge*, 956 F.3d 1018 (8th Cir. Apr. 22, 2020); *Robinson v. Att'y Gen.*, 957 F.3d 1171 (11th Cir. Apr. 23, 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. Apr. 24, 2020) *petition for cert. filed*, No. 20-482 (U.S. Oct. 8, 2020) (seeking vacatur), and each of the decisions on which the providers relied to demonstrate a circuit split, *see* Pet. at 18–21 (citing *In re Rutledge*, 956 F.3d 1018; *Roberts v. Neace*, 958 F.3d 409 (6th Cir. May 9, 2020) (per curiam); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. May 22, 2020); *Elim Rom. Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. June 16, 2020)). Moreover, state officials sought and received a 30-day extension to respond to the providers' petition, and they could have done so had the petition been filed last April, ensuring the Court would not consider the petition until this fall.

[3] Estimates are based on case distribution schedules and assume standard filing times.

For these reasons, the providers' use of the time allotted by this Court to petition for certiorari is irrelevant to whether vacatur is warranted.

CONCLUSION

The petition for certiorari should be granted, the decisions below vacated, and the case remanded for dismissal of the moot claim.[4]

Respectfully submitted,

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[4] Providers respectfully submit that full briefing and oral argument are unnecessary given the well-established precedent supporting vacatur.