No. 20-50296

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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; and KATHERINE A. THOMAS, in her official capacity as Executive Director of the Texas Board of Nursing.

On Petition for a Writ of Mandamus from the United States District Court, Western District of Texas, Austin Division
No. 1:20-cv-00323-LY

OPPOSITION TO PETITIONERS' EMERGENCY MOTION TO STAY TEMPORARY RESTRAINING ORDER PENDING MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

No. 20-50296, *In re Greg Abbott, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

Following this Court's April 7, 2020, order granting a writ of mandamus, Plaintiffs-Respondents ("Providers") filed a second motion for a narrow temporary restraining order ("Limited TRO") to enjoin application of Texas Governor Greg Abbott's March 22, 2020, Executive Order GA-09 ("Executive Order"). The district court made extensive factual findings based on the record before it (including ten declarations not previously considered by the district court) and adhered to the legal standard set forth in this Court's April 7, 2020, order.[1]

In particular, the district court's Limited TRO hews closely to the circumstances identified by this Court as raising issues distinct from those raised by a restriction on abortion more broadly: provision of medication abortion and abortion to patients who, because of their stage of pregnancy, otherwise will not be able to obtain abortions in Texas prior to the Executive Order's expiration. The district court found that Providers were likely to succeed on their substantive due-process claim in those limited circumstances because the benefits of the Executive Order's restrictions on abortion in those circumstances were, beyond doubt, outweighed by the substantial burdens imposed on patients, and by the resulting irreparable harm.

[1] Although Petitioners now object to some of these declarations on hearsay grounds, the district court was permitted to rely on hearsay at this expedited stage of the proceedings. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

By requesting a stay of the Limited TRO, Defendants-Petitioners ("State Officials") seek license to go beyond what any other state in the nation has been permitted to do in response to COVID-19, and far beyond what the Constitution allows. Their request should be denied.

BACKGROUND

Providers respectfully ask the Court to take judicial notice of the statement of facts in their opposition to State Officials' first emergency motion for a stay pending mandamus.[2] Providers additionally offer the following abbreviated summary of the district court's factual findings and recent procedural history.

I. Abortion in Texas

Leading medical professional organizations, including the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG"), have advised states not to categorize abortion as a "procedure[] that can be delayed during the COVID-19 pandemic" given its critical nature, even if those states are requiring postponement of non-time-sensitive health care during the crisis. App.474–75. Specifically, "[t]here is no evidence that prohibiting abortions during the pandemic will mitigate PPE shortages or promote public health and safety." Brief

[2] Opposition to Petitioners' Emergency Motion to Stay TRO Pending Mandamus at 2–9, *In re Abbott*, No. 20-50264 (5th Cir. April 1, 2020). *See MacMillan Bloedel Ltd. v. Flintkote Co*., 760 F.2d 580, 587 (5th Cir. 1985) ("A court may take judicial notice of related proceedings and records in cases before the same court.").

of ACOG et al. as *Amici Curiae* in Opposition to the Petition for a Writ of Mandamus at 4, *In re Abbott*, No 20-50264 (5th Cir. Apr. 2, 2020) ("ACOG Br.").

Abortion is extremely safe, complications from abortion are rare, and those complications seldom result in hospitalization. *See* App.470; ACOG Br. at 6–7; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12, 2315 (2016). Still, the health risks associated with obtaining an abortion, as well as the health risks from pregnancy itself, increase with gestational age. App.86–87, 96, 105, 132–133, 412. As ACOG and others have observed, "abortion is . . . a time-sensitive [service] for which a delay may increase the risks [to patients] or potentially make it completely inaccessible." ACOG Br. at 9. Delays also result in higher financial and emotional costs. App.475; *see also* App.86–87, 96, 104, 133, 158, 161, 162–163.

In Texas, abortion is illegal except in narrow circumstances beyond twenty-two weeks of pregnancy, as dated from the first day of the patient's last menstrual period ("LMP"). Tex. Health & Safety Code § 171.044. It is almost universally provided in an outpatient, non-hospital setting. App.469–70; *see also* App.61. Providers offer abortion services exclusively at outpatient facilities. App.469–70; *see also* App.74, 117, 135, 154. Some are licensed as ambulatory surgical centers ("ASCs"), which may provide abortion up to twenty-two weeks LMP, but most are licensed as abortion facilities, which may provide abortion only up to eighteen weeks LMP. App.470; *see also* App.72, 82, 90–91, 98–99, 107, 126, 154, 469–70; Tex.

Health & Safety Code § 171.004. No ASCs provide abortion care outside of Texas's four largest metropolitan areas. App.470.

Providers offer abortion using two main methods: medication abortion and procedural abortion. App.469. Medication abortion is not a "procedure" at all; the patient simply ingests two medications. App.469. The patient takes the first medication at a health center and then generally takes the second medication twenty-four to forty-eight hours later at a location of her choosing, after which she expels the pregnancy in a process similar to a miscarriage. *Id*. The clinician uses no PPE to hand the medication to the patient. App.470. While medication abortion is commonly provided up to eleven weeks LMP, it is only legally available in Texas up to ten weeks LMP. Tex. Health & Safety Code § 171.063(a)(2). Medication abortion is the only treatment using oral medications that State Officials have suggested is governed by the Executive Order, which on its face applies only to "surgeries and procedures." App.470; *see also* App.35.

Procedural abortion, although sometimes referred to as "surgical abortion," requires no incision, general anesthesia, or sterile field. App.469–70. For early procedural abortion, the clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus ("aspiration abortion"). App.130, 469. Beginning around fifteen weeks LMP, clinicians generally must use instruments to complete the procedure ("dilation and evacuation" or "D&E"). For abortions later in

the second trimester, the clinician may begin cervical dilation the day before the procedure itself, so the patient must come in twice. App.131, 469. For most procedural abortions in Texas, a patient sees either one or two clinicians, who each wear minimal PPE similar to that used in many medical offices. App.471. N95 masks are generally not used. App.472. In fact, Providers are aware of only one physician among their staff who has used a single N95 mask to provide abortion in Texas since the beginning of the COVID-19 pandemic. App.472.

People prevented from accessing abortion still require medical care related to pregnancy. This care includes multiple in-person visits involving blood draws, physical exams, and ultrasounds. App.363–65, 374–75, 407–08, 412–13, 472. Because individuals with ongoing pregnancies require more in-person healthcare at each stage of pregnancy than individuals who have previability abortions, delaying access to abortion does not conserve PPE. App.472. Similarly, "[i]ndividuals with ongoing pregnancies are more likely to seek treatment in a hospital—for a variety of conditions—than individuals who have pre-viability abortions." App.472. Labor and delivery, which "generally takes place in a hospital[,] . . . requires extensive use of PPE." App.473.

Each day the Executive Order is in place, individuals seeking abortion are forced to travel by car or airplane to other states to obtain abortion, some as far away

as Colorado and Georgia. App.348–49, 355, 442–43, 473. This long-distance travel increases the risk of contracting COVID-19. App.138, 311, 473.

Because Providers have already turned away hundreds of patients due to the Executive Order, and will continue to do so if the Limited TRO remains stayed, a significant backlog of patients will urgently need abortion care when the Executive Order expires. App.473–74. It will take Providers weeks to see these patients, meaning that patients will face additional delays in accessing abortion even after the Executive Order's now month-long duration expires (even assuming the Order is not extended). App.474. Some patients have already exceeded the gestational age limit to obtain an abortion in Texas while the Executive Order has been in place. App.474.

II. Recent Procedural History

As this Court is aware, the district court first issued a TRO in this case on March 30, 2020, enjoining the Executive Order as to both medication and procedural abortion. On March 31, 2020, this Court granted an administrative stay of that TRO. On April 7, 2020, a divided panel of this Court issued a writ of mandamus vacating the first TRO. *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020).

The Court concluded that mandamus was appropriate for three reasons. First, the Court held that the district court erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In the Court's view, 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." *In re Abbott*, 2020 WL 1685929, at *8 (citing 197 U.S. at 31).

Second, this Court rejected Providers' argument that the Executive Order operates as an "outright ban" on abortion. *Id.* at *10. Because it concluded the Order did not impose a previability ban, it held that the undue-burden balancing test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applies, *id.* at *10–12. Given the overlay of *Jacobson*, this Court held that "*certain applications* of GA-09 may constitute an undue burden under *Casey*," where Providers can show, "'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at *9 (quoting *Jacobson*, 197 U.S. at 31) (emphasis added). Critically, this Court called into question two specific applications of the Executive Order: its application to medication abortion, given that, on the record previously before the district court, it was "unclear how PPE is consumed in medication abortions," *id.* at *11, and its application to patients whose opportunity to obtain an abortion in Texas will be foreclosed entirely prior to April 22, *id*.

Third, this Court held that any determination whether the TRO served the public interest should "weigh the potential injury to the public health" from enjoining enforcement of the Executive Order. *Id.* at *12.

Throughout its opinion, this Court emphasized that the district court, so long as it relied on the legal standards described above, could "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access," and thus address the "validity of applying GA-09 in specific circumstances." *Id*. at *2. The Court acknowledged that other federal courts have recently enjoined state orders similar to Texas's, but distinguished those TROs on the grounds that they were "narrowly tailored and did not permit blanket provision of abortion." *Id.* at *5 n.18 (discussing TROs at issue in *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *1-2 (6th Cir. Apr. 6, 2020) (concluding that TRO would not "inflict irretrievable harms or consequences before it expires" where executive order did not prevent medication abortion and where TRO authorized provision of abortion "deemed legally essential to preserve a woman's right to constitutionally protected access to abortions"); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700, at *3 (M.D. Ala. Apr. 3, 2020) (narrowing TRO in light of state's representations that challenged executive order authorized provision of abortion where the patient would otherwise "lose her right to lawfully seek an abortion in Alabama based on the [challenged] order's mandatory delays"); *S. Wind Women's Center LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *2, 5-6 (W.D. Okla. Apr. 6, 2020) (entering TRO as to medication abortion and "requirements that effectively deny a right of access to abortion")).

On remand, in response to State Officials' request for a briefing schedule in light of this Court's mandamus decision, the district court continued the April 13 preliminary injunction hearing. The district court directed the parties to agree to a briefing schedule and a plan to conduct the hearing "under the restraints currently burdening" such proceedings, bearing in mind the court's expectation that Governor Abbott would extend the Executive Order past April 21, 2020, and that "[i]t makes no sense to take up the request for preliminary injunction until the parties and the court have the benefit of any subsequent order." App.460–61.

On April 8, 2020, based on the legal standards prescribed by this Court's decision and the enhanced factual record, Providers moved for a second, narrower TRO. The district court granted the Limited TRO on April 9, 2020. App.465–79. The following morning, State Officials petitioned this Court for a second writ of mandamus and sought an emergency stay and administrative stay of the Limited TRO. That evening, this Court granted an administrative stay of the TRO except as to "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.'" Order Granting Admin. Stay at 4, *In re Abbott*, No. 20-50296 (5th Cir. April 9, 2020) (per curiam). Providers' motion to vacate the administrative stay is fully briefed as of 5 p.m. CT April 11, 2020, and remains pending.

ARGUMENT

To warrant a stay of the Limited TRO, State Officials must demonstrate: (1) "a strong showing" that they are likely to succeed on their petition for writ of mandamus; (2) that they are likely to suffer irreparable injury absent a stay; (3) that Providers and their patients will not be substantially harmed by a stay; and (4) that granting the stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 425–26, 434 (2009) (citations omitted). As Providers will describe in more detail in their opposition to State Officials' second mandamus petition, State Officials do not come close to clearing that high bar.

I. State Officials Will Not Prevail in Their Petition for a Writ of Mandamus

State Officials cannot possibly demonstrate that they are likely to prevail on their pending petition for a second writ of mandamus as to the Limited TRO. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). State Officials must clear the exceptionally high bars of showing (1) a "clear and indisputable right" to the writ and (2) "no other adequate means" to obtain relief. *Id.* at 380–81. They cannot do so here.

A. The district court correctly concluded that Providers are likely to succeed on the merits of their substantive due-process claim as to abortion in the limited circumstances.

This Court's previous order specified that the undue-burden test under *Casey*,

505 U.S. at 878 (plurality opinion) and *Whole Woman's Health*, 136 S. Ct. at 2309, could be met where, "'beyond question,' GA-09's burdens outweigh its benefits." *In re Abbott*, 2020 WL 1685929, at *9 (quoting *Jacobson*, 197 U.S. at 31). The district court was correct to conclude that Providers are likely to succeed under this standard as to abortion in the circumstances described below. At a minimum, any error in the district court's preliminary application of the governing legal principles to underlying facts is not so clear that Petitioners are "indisputably" entitled to the writ.

1. *The Executive Order is unconstitutional as to Providers' provision of medication abortion.*

Temporarily restraining enforcement of the Executive Order as to Providers' provision of medication abortion is consistent with this Court's order because, "beyond a reasonable doubt," *Jacobson*, 197 U.S. at 14, the burdens of prohibiting medication abortion outweigh its benefits in furthering the state's asserted interests, App.474. Specifically, the prohibition on medication abortion will impose a severe burden on patients seeking this method of abortion in Texas. Because of State Officials' threatened application of the Executive Order to medication abortion, patients seeking medication abortion have been subjected to up to a month-long delay, even assuming the Executive Order is not extended beyond April 21, 2020.

App.35.[3] And, as the district court concluded, that delay will continue for weeks after the Executive Order's expiration, given "the significant pent-up need for abortion care." App.474. Some medication abortion patients who have the means to travel will continue to be forced to seek access to medication abortion in other states while the Executive Order remains in effect. App.473; *see also* App.348–49, 355, 441. Those who cannot travel will, in many instances, be unable to obtain medication abortions after the Executive Order's expiration because, in Texas, medication abortion is only available until ten weeks LMP. Tex. Health & Safety Code § 171.063(a)(2); *see also* App.222 (showing share of abortions that occur before ten weeks LMP in Texas).

On the other side of the scale, a ban on medication abortion does nothing to serve the Executive Order's purported goals. As the district court correctly concluded based on substantial evidence before it, medication abortion does not require the use of PPE. App.470. Although Texas requires an ultrasound and physical examination prior to medication abortion, the Executive Order does not apply to this care per the guidance of the Texas Medical Board; in fact, this type of care is necessary—and *ongoing*—in the context of prenatal visits. App.472.

[3] The assumption that the Executive Order will not be extended is now even harder to justify, given State Officials' statement in their motion for a stay before this Court that Texas's peak hospital usage related to COVID-19 is not expected to occur until April 22, 2020. Stay Mot. at 3.

The district court correctly concluded that "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." App.472. Moreover, "[i]ndividuals with ongoing pregnancies are more likely to seek treatment in a hospital for a variety of conditions than individuals who have pre-viability abortions." App.473. "Therefore, delaying access to abortion will not conserve hospital resources." *Id.*; *see also Whole Woman's Health*, 136 S. Ct. at 2311.

The district court was also correct in concluding that complications associated with medication abortion—including those requiring hospital care—are exceedingly rare. App.470. Nearly all abortions in Texas are provided in outpatient facilities, such as Providers' abortion facilities and ASCs, not hospitals.[4] App.469. While State Officials assert that medication abortion results in complications necessitating "surgical intervention" eight to fifteen percent of the time, App.182–83, the rates they cite are not for complications requiring hospitalization,[5] but rather are outdated figures referring to the incidence of medication abortions that are completed using

[4] Tex. Health & Human Servs., *Induced Terminations of Pregnancy, 2017 Selected Characteristics of Induced Terminations of Pregnancy (2018)*, https://hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics (in 2017, 99.8% of abortions among Texas residents in Texas were provided in abortion facilities or ASCs).

[5] In fact, only 0.31% of medication abortions result in complications requiring hospitalization, surgery, or blood transfusion. App.470; *see also* App.129.

aspiration. More current data shows that the modern medication regimen—described on the drug label approved by the U.S. Food and Drug Administration and used by Providers—has an aspiration follow-up rate of 2.6%.[6] For those patients, aspiration involves the same incision-free suction procedure used for early procedural abortions; it takes approximately five to ten minutes in an outpatient setting. App.470; *see also* App.129, 373. Hospitalization resulting from ongoing pregnancy is far more common. App.472, 373 ("[A]t least twenty percent of pregnant patients will visit a hospital at some point prior to delivery, and some patients will visit the hospital for evaluation or treatment on multiple occasions.").

Regarding the Executive Order's second asserted interest—preserving PPE—medication abortion itself requires no PPE, while the patient's only alternative to medication abortion—continuing the pregnancy or obtaining a procedural abortion later in pregnancy—does require PPE. App.470–73. Although Texas law requires that medication abortion be preceded by an ultrasound, Tex. Health & Safety Code §§ 171.012, 171.063(e); Tex. Admin. Code § 139.53(b)(4); App.470, patients with ongoing pregnancies also require ultrasound examinations, App.470–71; *see also*

[6] Pet'rs' Emergency Mot. to Stay TRO Pending Mandamus at 4 & n.7; *see also* App.181 n.33 (citing U.S. Food & Drug Admin., Mifeprex 13 tbl.3 (rev. Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (listing rate of 2.6% for "surgical intervention" due to ongoing pregnancy, medical necessity, persistent or heavy bleeding after treatment, patient request, or incomplete expulsion)).

App.364–65, 408, 413. In any event, as the district court found, the Texas Medical Board's own guidance makes clear that "physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests" are not "procedures," and are therefore not covered by the Executive Order. App.450. Further, the record establishes that medication abortion, including any incidental lab work and diagnostic tests, requires the use of less PPE than the monthly diagnostic tests and ultrasounds required for a patient with an ongoing pregnancy. App.472; *see also, e.g.*, App.414.

On this record, any benefit from State Officials' application of the Executive Order to medication abortion is "beyond all question" outweighed by the severe harms imposed on patients unable to access medication abortion for the duration of the Executive Order. *See S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *2, 5.[7] Providers are therefore likely to succeed on their substantive due-process claim as to this category of patients.

In addition, Providers are separately likely to succeed on this claim because the Executive Order, as interpreted by State Officials, in fact, "applies . . .

[7] Notably, in enforcing a similar executive order, Ohio's Department of Health stated that "[d]octors should perform medicinal abortions (rather than surgical abortions) where that option is safe and available" in order to conserve PPE. Defendants Ohio Dep't of Health, State Med. Bd. of Ohio, and Ohio Att'y Gen. Dave Yost's Response to Plantiffs' Motion for Preliminary Injunction at 18–19, *Preterm-Cleveland v. Att'y Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Apr. 8, 2020), ECF No. 59.

differently" to this type of medication "than to any other." *In re Abbott*, 2020 WL 1685929, at *13; *see also Jacobson*, 197 U.S. at 26 (law justified on public safety grounds may not be "unreasonable, arbitrary, [or] oppressive"). State Officials have identified *no* other oral medication they consider prohibited by the Executive Order, which on its face applies only to "surgeries and procedures." *See* App.35. Moreover, Providers have now presented evidence (not part of the record at the time the district court entered the prior TRO) showing that treatments "comparable" in terms of in-person contact and PPE use "are exempt from [the Executive Order's] requirements." *In re Abbott*, 2020 WL 1685929, at *13; App.473; *see also* App.375 (obstetric care like blood draws, ultrasounds, and other in-person diagnostics still being performed during prenatal visits); App.407–09 (ultrasound examinations still being performed for obstetrical patients). This evidence shows that the Order's application to medication abortion is "pretextual—that is, arbitrary or oppressive." *In re Abbott*, 2020 WL 1685929, at *7 (citing *Jacobson*, 197 U.S. at 38).

2. *The Executive Order is unconstitutional as to patients for whom abortion will be inaccessible after expiration of the order.*

The district court was correct to conclude that Providers are likely to prevail on their substantive due-process claim as applied to their provision of abortion where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion entirely.

First, the record demonstrates that the Executive Order operates as an undue burden for all patients whose pregnancies will exceed Texas's twenty-two week LMP gestational-age limit before the Executive Order expires. This Court's denial of an administrative stay as to the second TRO's application to these patients supports that view. Order Granting Admin. Stay at 4, *In re Abbott*, No. 20-50296 (5th Cir. April 9, 2020) (per curiam).

Second, the district court was correct to conclude that application of the Executive Order to patients whose pregnancies will, by the expiration of the order, reach eighteen weeks LMP, and who will then be unable to obtain an abortion at an ASC, likely constitutes an undue burden on individuals seeking abortion. There are no ASCs that provide abortion care outside of Texas's four largest metropolitan areas, *Whole Woman's Health*, 136 S. Ct. at 2316, and as the district court found, even after the Executive Order expires a significant number of patients will face additional delays in accessing abortion due to backlogs at Providers' health centers, such that some patients will be unable to access care at an ASC before exceeding the gestational limit. App.474. Because the Executive Order as applied to abortion in those circumstances would have the effect of foreclosing the right to abortion for some patients altogether, *see id*. at 2316–18, as to those patients, it extends beyond the reach of the "powers allotted to a state in a public health emergency," and the

district court was right to enjoin it. *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *5.

The district court also correctly recognized that the Executive Order, as applied to these patients, will impose—indeed, already has imposed—irreparable harm. Patients have already exceeded the gestational age limit to obtain an abortion in Texas while the Executive Order has been in place. App.474; *see also* App.349, 353. Moreover, State Officials' own evidence shows that in 2017, approximately sixty abortions per week occurred at or after fifteen weeks LMP, and approximately fifteen per week occurred at or after eighteen weeks LMP. *See* App.222. The Executive Order's month-long delay has necessarily pushed these patients into, respectively, requiring an abortion at an ASC in a select number of locations that some patients will be unable to reach, or being foreclosed from obtaining an abortion in Texas altogether.

For these patients, the Executive Order's month-long duration results in a complete denial of abortion access, and thus constitutes a "plain, palpable invasion" of that fundamental right. *In re Abbott*, 2020 WL 1685929, at *6 (quoting *Jacobson*, 197 U.S. at 31); *id.* at *9–10 (contemplating that an "outright ban" would violate *Jacobson*); *see also Roe v. Wade*, 410 U.S. 113, 166 (1973); *Casey*, 505 U.S. at 846 (stating 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) (enjoining ban on abortions starting at six weeks). Petitioners do not assert otherwise, instead contending that any such patients could seek as-applied relief. *See* Motion to Stay at 19.

The Executive Order is also unconstitutional as applied to these patients because it is "arbitrary and oppressive." *In re Abbott*, 2020 WL 1685929, at *7. Although this Court previously concluded that the record underlying the first TRO did not include "evidence that [the Executive Order] applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt" the order's requirements *id.* at *13, that conclusion, even if correct when reached, no longer holds. As the district court found on remand, physicians are continuing to provide care comparable to abortion in PPE use and time-sensitivity, based on their professional medical judgment. App.473. The Executive Order permits them to do so. Far from seeking an abortion exception, as State Officials contend, Providers simply seek limited relief requiring State Officials to treat abortion similarly to other healthcare. *Cf. Robinson*, 2020 WL 1659700, at *3 (ordering that "[t]he reasonable medical judgment of abortion providers will be treated with the same respect and deference as the judgments of other medical providers" and that "decisions will not be singled out for adverse consequences because the services in question are abortions or abortion-related").

B. The District Court did not err by exercising its authority to enter a TRO.

The district court correctly applied this Court's decision in concluding that it had authority to enter the Limited TRO. Providers have standing to bring their claim and a justiciable controversy exists. App.475 (citing *In re Abbott*, 2020 WL 1685929, at *5 n.17). And the district court followed this Court's instruction to consider whether, for purposes of sovereign immunity, the governor and attorney general likely have "some connection" with enforcement of the Executive Order. App.475–76; *see also In re Abbott*, 2020 WL 1685929, at *5 n.17. As it explained, the governor is responsible for adopting and maintaining the order, consistent with statutory authority. Tex. Gov't Code Ann. § 418.012. App.475–76. Similarly, the attorney general has the authority to prosecute Providers, at the request of local prosecutors, for alleged violations of the Executive Order, and he has publicly threatened enforcement against abortion providers in particular. App.476. The district court did not err, much less indisputably so, in finding "some connection" between these officials and the challenged action's enforcement.

II. State Officials Have Not Shown That They Would Suffer Irreparable Injury in the Absence of a Stay

As explained above, the Executive Order does not further public health as applied to medication abortion and limited categories of procedural abortion at issue in the Limited TRO. In fact, continued imposition of the stay will do irreparable

injury to public health by *increasing* demands for PPE and hospital resources. It will drive up the use of PPE and hospital capacity because at every stage of pregnancy, a pregnant person will need services that require the use of more PPE than abortion does. App.472-73. In addition, the longer an abortion is delayed, the more PPE the abortion procedure itself will require. *See* App.469–72. Finally, in response to a continued stay, some patients will leave Texas—as some already have—to obtain abortions in other states, exposing them to greater risk of COVID-19 infection than seeking care locally. App.473; *see also* App.258–259, 355, 348, 442–43. For these same reasons, State Officials have failed to meet their burden of demonstrating that they would suffer irreparable injury in the absence of a stay.[8]

III. The Remaining Factors Favor Denial of the Stay

The balance of equities and public interest also weigh heavily toward denying the stay. As a result of a stay, some patients, based on their current stage of pregnancy, will no longer be able to obtain an abortion in Texas. Deprivation of these patients' constitutional rights constitutes a profound and irreparable harm. *See, e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Issuance of a stay would also impose additional delay and other attendant burdens on *every* patient who could otherwise obtain a medication abortion under the limited TRO. *See supra* pp.11–12. *See, e.g.*,

[8] This analysis applies equally to State Officials' assertion that the district court's error will be irremediable after the court's resolution of Providers' pending preliminary injunction motion.

Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 796 (2013). Moreover, as the district court expressly found, entry of the TRO "to restore abortion access would *serve* the State's interest in public health." App.477; *see supra* pp.12–15.

CONCLUSION

Issuance of the requested stay would make Texas the only state in the country to enforce an interpretation of a COVID-19 executive order that categorically bars either medication abortion or abortion for patients who, because of their stage of pregnancy, will be unable to obtain an abortion after the executive order's expiration. No other court has allowed such an interpretation, and this Court should not be the first. The motion for a stay should be denied.

Dated: April 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Petitioners are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Julie Murray*
Julie Murray

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5184 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: April 11, 2020

/s/ *Julie Murray*
Julie Murray