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

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

Plaintiffs,

v.

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

Defendants.

No. 1:20-cv-00323-LY

PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs file a second motion for a narrow temporary restraining order ("TRO") to enjoin Defendants from enforcing Executive Order GA-09, ECF No. 1-2, as that order applies to Plaintiffs' provision of (1) medication abortion; and (2) procedural abortion where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion entirely because (a) the patient's pregnancy would reach twenty-two weeks LMP by April 21, 2020; or (b) the patient's pregnancy would reach eighteen weeks LMP by April 21, 2020, thus requiring abortion care at an ambulatory surgical center ("ASC") and the patient is unlikely to be able to obtain an abortion at an ambulatory surgical center before the patient's pregnancy reaches the 22-week cutoff (hereinafter, abortion for "Covered Circumstances").[1]

[1] To the same extent, Plaintiffs also seek a TRO enjoining enforcement of the Texas Medical Board's ("Medical Board") emergency amendment to 22 Tex. Admin. Code § 187.57 ("Emergency Rule"). Plaintiffs discuss the Emergency Rule together with the Executive Order here and throughout. Pursuant to the Agreed Stipulation for Non-Enforcement Pending Final

Plaintiffs seek this narrow relief in light of the U.S. Court of Appeals for the Fifth Circuit's April 7, 2020, decision granting a writ of mandamus to vacate this Court's earlier TRO. *In re Greg Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) ("Slip Op."). The Fifth Circuit concluded that this Court erred in granting a TRO as applied to all medication and procedural abortion and in applying *Roe v. Wade*'s longstanding rule against previability abortion bans to assess Plaintiffs' likelihood of success on their substantive due-process claim.[2] The Court of Appeals nevertheless made clear that this Court, on remand, could still "make targeted findings, based on competent evidence, about the effects of GA-09 on abortion access," and thus address—under the legal standard set out in the Fifth Circuit's decision—the "validity of applying GA-09 in specific circumstances." Slip Op. at 3.

The Court of Appeals emphasized two circumstances in particular. The first is that the Executive Order contains an exception for procedures that "if performed under normal clinical standards 'would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster,'" and that this Court's TRO contained no findings about the use of PPE in medication abortion, *id.* at 19–20, 22. The second is that as-applied relief may be appropriate as to patients whose pregnancies will reach or exceed Texas's gestational age cut-off while abortion services remain suspended. *Id*. at 23.

Applying the Fifth Circuit's analysis, this Court should grant Plaintiffs' second motion for a narrow TRO addressing these two circumstances pending briefing and decision on Plaintiffs' broader preliminary injunction application. Plaintiffs are likely to prevail on their substantive due-

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Resolution, Att'ys' Fees, and Costs, ECF No. 25, Plaintiffs' motion does not apply to Defendant Brian Middleton, District Attorney of Fort Bend County, Texas.

[2] Plaintiffs dispute the correctness of the Fifth Circuit's decision but assume that it is controlling for purposes of this motion.

process claim that in the Covered Circumstances the Executive Order violates the patient's right to an abortion because, "beyond all question," *id.* at 12, 13, the burdens imposed by the Executive Order in those circumstances far outweigh any benefits of barring these patients from obtaining an abortion during the month-long Executive Order, and, because of clinic crowding, potentially for weeks thereafter even if the Executive Order itself is not extended. And as set forth in prior briefing, injunctive relief is urgently needed to prevent further irreparable harm to Plaintiffs' patients' health and rights. Plaintiffs have been forced to turn away hundreds of patients in need of abortion care for more than two weeks already, resulting in severe and ongoing harm to patients.

Plaintiffs respectfully request entry of a second TRO pending resolution of their motion for a preliminary injunction. In the alternative, Plaintiffs request expedited review of Plaintiffs' motion for a preliminary injunction. Plaintiffs intend to file additional briefing on their motion for preliminary injunction, providing further evidence and developing arguments responsive to the Fifth Circuit's mandamus opinion, and would request a hearing by Thursday, April 16.

State Defendants have advised that they will oppose this motion. For the Court's reference and in accordance with Local Rule CV-7(g), Plaintiffs attach a proposed temporary restraining order consistent with the relief sought here.

BACKGROUND

Plaintiffs incorporate by reference the facts as recited in their March 25, 2020, Motion for Temporary Restraining Order and/or Preliminary Injunction and Memorandum in Support, ECF No. 7; the declarations filed in support of that motion, ECF Nos. 7-1–7-9; the additional facts as recited in Plaintiffs' Supplemental Statement in Support of Motion for TRO, ECF No. 29; the declaration of Jane Doe filed March 30, 2020, ECF No. 29-1; the declarations filed as attachments to Plaintiffs' Notice of Supplemental Filing in Support of the Preliminary Injunction Motion, ECF

Nos. 49-1–49-9; and the declaration of Rashae Ward, filed herewith as Exhibit 20. Plaintiffs also offer the following recitation of the procedural history most pertinent to this second motion for a TRO:

This Court entered a TRO on March 30, 2020, enjoining Defendants from enforcing the Executive Order as banning all medication abortions and procedural abortions. The Court set a hearing for April 13, 2020, on Plaintiffs' pending motion for a preliminary injunction.

Defendants filed a petition for a writ of mandamus in the Fifth Circuit. They also filed a motion to stay the TRO pending resolution of the mandamus petition, or in the alternative, for an administrative stay. On March 31, 2020, a divided panel of the Fifth Circuit granted an administrative stay of the TRO. *In re Abbott*, No. 20-50264 (5th Cir. Mar. 31, 2020). On April 7, 2020, that same divided panel issued a writ of mandamus vacating this Court's earlier TRO. *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020). The majority concluded that mandamus was appropriate for three reasons.

First, the panel believed that this Court erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which the panel described as setting forth "the framework [that] govern[s]" the constitutionality of "emergency public health measures like GA-09." Slip Op. at 2. In the majority's view, under *Jacobson*, this 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." *Id.* at 16 (citing 197 U.S. at 31).

Second, the majority rejected Plaintiffs' argument that the Executive Order operates as an "outright ban" on abortion, instead viewing the Executive Order as a "temporary postponement" of access which operates only for some subset of abortions. *Id.* at 21. The Court of Appeals stated, for example, that the Executive Order exempts "'any procedure' that, if performed under normal

clinical standards, 'would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.'" *Id.* at 19. Because the Fifth Circuit concluded the Executive 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, Slip Op. at 21–24, requiring this Court to weigh the burdens that the Executive Order places on patients seeking abortion against the benefits of the Executive Order in furthering the state's goals of conserving PPE and resources for hospitals treating COVID-19 patients. Given the overlay of *Jacobson*, the majority held that "*certain applications* of GA-09 may constitute an undue burden under *Casey*," where Plaintiffs are able to "prove that, 'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at 18 (quoting *Jacobson*, 197 U.S. at 31) (emphasis added). And as noted above, the Fifth Circuit's analysis called into question two specific applications of the Executive Order: its application to medication abortion, given that the record is "unclear how PPE is consumed in medication abortions," *id.* at 22, and its application to patients whose opportunity to obtain an abortion in Texas will be foreclosed while services remain suspended. *Id*. at 23.

Third, the majority 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 25.

The Fifth Circuit declined to issue a writ of mandamus on other grounds raised by Defendants. It had no need to address the sovereign immunity of the Governor and Attorney General because "a justiciable controversy exists as to the [Defendant] health officials, who may enforce the order's administrative penalties." *Id.* at 8 n.17 (citing, *e.g.*, 22 Tex. Admin. Code

§ 187.57(b)).[3] The Court of Appeals also determined that Plaintiffs have "standing to sue on their own behalf because GA-09 'directly operates' against them." *Id*. (quoting *Planned Parenthood of Cen. Mo. v. Danforth*, 428 U.S. 52, 62 (1976)). It therefore did not reach the question whether Plaintiffs have third-party standing to sue on behalf of their patients.

Throughout its opinion, the majority emphasized the "limits of [its] decision, which [was] based only on the record before" it. *Id.* at 3. It acknowledged that this Court, so long as it relied on the Fifth Circuit's legal standard, could still "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*. In this context, the Fifth Circuit acknowledged that other federal courts have recently enjoined state orders similar to Texas's Executive Order, but distinguished those TROs on the grounds that they were "narrowly tailored and did not permit blanket provision of abortion." *Id.* at 10 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) (holding that TRO was sufficiently "narrowly tailored" where it authorized provision of abortion "deemed legally essential to preserve a woman's right to constitutionally protected access to abortions" per the healthcare provider's "determin[ation], on a case-by-case basis, that the surgical procedure is medically indicated and cannot be delayed, based on the timing of pre-viability or other medical conditions"); *Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700, at *3 (M.D. Ala. Apr. 3, 2020) (narrowing TRO in light of state defendants' representations that challenged executive order authorized provision of abortion where provider determined that, in her

[3] The Court did, however, instruct that on remand, this Court "should consider whether the Eleventh Amendment requires dismissal of the Governor or Attorney General because they lack any 'connection' to enforcing GA-09 under *Ex parte Young*, 209 U.S. 123 (1908)." Slip Op. at 8 n.17.

"reasonable medical judgment," 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 executive order's "imposi[tion of] requirements that effectively *deny* a right of access to abortion" because such requirements "imposed an 'undue burden' on abortion access" and were thus "'unreasonable,' 'arbitrary,' and 'oppressive'" in violation of *Jacobson*).

The Fifth Circuit also recognized that in evaluating Plaintiffs' need for relief this Court may ask whether a state's emergency measures "are pretextual—that is, arbitrary or oppressive," and thus run afoul of *Jacobson*. Slip Op. at 13. Although it concluded that the record before it did not include "evidence that GA-09 applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt from GA-09's requirements," *id.* at 26, it left open the possibility that Plaintiffs could rely on such evidence to seek narrower relief from this Court on remand.

ARGUMENT

To warrant relief, plaintiffs seeking a temporary restraining order must show: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the injury to the plaintiffs outweighs any harm that the TRO might cause the defendants; and (4) that granting the TRO will not disserve the public interest. *See*, *e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). Plaintiffs easily meet this standard with respect to their provision of abortion under the Covered Circumstances, even under the legal standard announced by the Fifth Circuit.

I. Plaintiffs Will Succeed on the Merits of Their Substantive Due-Process Claim as to Abortion in the Covered Circumstances

Under the Fifth Circuit panel's order granting Defendants' petition for writ of mandamus, "certain applications of GA-09 *may* constitute an undue burden under *Casey*" where, "'beyond question,' GA-09's burdens outweigh its benefits in those situations." Slip Op. at 18 (emphasis in original) (quoting *Jacobson*, 197 U.S. at 31). Plaintiffs have demonstrated that they are likely to succeed on their substantive due-process claim under this standard at least as to abortion in the Covered Circumstances.

A. The Executive Order Is Unconstitutional as to Plaintiffs' Provision of Medication Abortion

Temporarily restraining enforcement of the Executive Order as to medication abortion is consistent with the Fifth Circuit's order, *see id.* at 22, and supported by a recent, persuasive opinion by a sister court. Earlier this week, a district court entered a TRO preventing enforcement of Oklahoma's executive order as to medication abortion on the grounds that "the benefit to public health of the ban on medication abortions is minor and outweighed by the intrusion on Fourteenth Amendment rights caused by that ban," such that Oklahoma's executive order so applied violated *Jacobson*'s rule against "unreasonable," "arbitrary," and "oppressive" uses of the state's emergency powers. *See S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *2, 5 (quoting *Jacobson*, 197 U.S. at 31).

Moreover, under the balancing test required by the Fifth Circuit, the burdens of prohibiting medication abortion far outweigh its benefits in furthering the state's interests. Specifically, the prohibition on medication abortion will impose a severe burden on patients seeking this method of abortion in Texas. Because of Defendants' threatened application of the Executive Order to medication abortion, patients seeking medication abortion have been subjected to a month-long

delay, assuming the Order is not extended beyond April 21, 2020. Compl. Ex. B at 4, ECF No. 1-2. In Texas, medication abortion is only available until ten weeks LMP. Tex. Health & Safety Code § 171.063(a)(2). Further, record evidence demonstrates that the Executive Order will, in fact, cause an even longer delay for these patients because abortion providers in Texas will not be capable of absorbing the full backlog of patients in need of abortion care after the Executive Order expires. Johnson Decl. ¶ 12; Nguyen Decl. ¶ 23. Some medication patients who have the means to travel will be forced to seek access to medication abortion care in other states while the Executive Order remains in effect. Doe Decl. ¶¶ 12–27; Johnson Decl. ¶¶ 8–10; Nguyen Decl. ¶ 17; Ward Decl. ¶ 7.

On the other side of the scale, a ban on medication abortion does nothing to serve the Executive Order's purported goals. As to preserving hospital capacity, medication abortion is overwhelmingly safe. Levison Decl. ¶ 9; Schutt-Aine Decl. ¶¶ 12, 14. While Defendants assert without evidence that medication abortion frequently results in complications necessitating "surgery," the complication rates they cite are outdated and inconsistent with the best, current medical evidence. Levison Decl. ¶ 9. In general, complications associated with medication abortion—including those requiring hospital care—are exceedingly rare. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12, 2315 (2016). Nearly all abortions in Texas are provided in outpatient facilities, such as Plaintiffs' abortion facilities and ASCs, not hospitals,[4] and indeed almost all medication abortion patients choose to complete their abortion at home rather than in a medical facility of any kind. Further, the evidence demonstrates that individuals with ongoing

[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).

pregnancies are far more likely to require treatment in a hospital than individuals who have abortions. Chang Decl. ¶¶ 16–18; Levison Decl. ¶¶ 8–11.

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—does require PPE. Texas law does require that medication abortion be preceded by an ultrasound and be offered in conjunction with a confirmation visit. Tex. Health & Safety Code §§ 171.012, 171.063(e); Tex. Admin. Code § 139.53(b)(4); Barraza Decl. ¶ 7; Ferrigno Decl. ¶ 9; Hagstrom Miller Decl. ¶ 12; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶¶ 15, 23. But patients with ongoing pregnancies also require ultrasound examinations. Chang Decl. ¶¶ 11–12; Macones Decl. ¶ 12; Wood Decl. ¶ 14. And in any event, a transabdominal ultrasound and follow-up appointment are not procedures, and thus are not covered by the Executive Order. *See* Tex. Med. Bd., *Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic* (Mar. 29, 2020), http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17 ("TMB Guidance"); *see also* Levison Decl. ¶¶ 18–19 (saying that ultrasounds are still being performed during the COVID-19 pandemic); Macones Decl. ¶ 12 (same); Wood Decl. ¶ 14 (same). Although the Fifth Circuit held that the record underlying this Court's prior decision did not sufficiently address the extent to which an ultrasound might require PPE and constitute a procedure, that question is addressed in the record now before this Court. Transabdominal ultrasounds do not require the use of *any* PPE. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. Transvaginal ultrasounds require the use of one pair of non-sterile gloves, at most. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. And the Medical Board's published guidance concerning the Executive Order indicates that non-

invasive diagnostic tests—like ultrasound—are not procedures in the first place. TMB Guidance. 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 that are required for a patient with an ongoing pregnancy. Levison Decl. ¶¶ 12–14; Macones Decl. ¶ 20; Schutt-Aine Decl. ¶ 26.

Thus, Defendants' application of the Executive Order to medication abortion does not advance their asserted interests to a degree sufficient to justify the harm to patients from not being able to access abortion for a month or more. *See S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *2, 5 (quoting *Jacobson*, 197 U.S. at 31). Plaintiffs are therefore likely to succeed on their substantive due-process claim as to this category of patients.

In addition, Plaintiffs are separately likely to succeed on this claim because the record now demonstrates that the Executive Order, as interpreted by Defendants, in fact, "applies . . . differently" to this type of medication "than to any other." Slip Op. at 26. Indeed, Defendants have identified *no* other oral medication they consider prohibited by the Executive Order, which on its face applies only to "surgeries and procedures." *See* Compl. Ex. B at 4, ECF No. 1-2. Moreover, Plaintiffs have now presented evidence, which was not part of the record at the time this Court entered its TRO, showing that treatments "comparable" in terms of in-person contact and PPE use "are exempt from GA-09's requirements." Slip Op. at 26; Levison Decl. ¶¶ 18–19 (saying that obstetric care like blood draws, ultrasounds, and other in-person diagnostics are still performed during prenatal visits); Wood Decl. ¶¶ 9–11, 14, 16–17 (saying that ultrasound examinations are still being performed for obstetrical patients). Indeed, a person with an ongoing pregnancy can and must obtain routine prenatal care and testing even though it requires the use of more PPE than medication abortion. Chang Decl. ¶¶ 8, 12, 15; Levison Decl. ¶¶ 12–14. Under these

circumstances, the record demonstrates that "Texas has exploited the present crisis as a pretext to target abortion providers *sub silentio*," justifying judicial intervention. Slip Op. at 12, 26 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

B. The Executive Order Is Unconstitutional as to Patients for Whom Abortion Will Be Inaccessible After Expiration of the Order

Plaintiffs are similarly likely to prevail on their substantive due-process claim as applied to their provision of abortion to patients (1) whose pregnancies would exceed twenty-two weeks LMP—the statutory gestational-age limit for most legal abortion in Texas—by the expiration of the order, or (2) whose pregnancies would exceed eighteen weeks LMP by the expiration of the order and who are unlikely, in the judgment of the treating physician, to be able to access care at an ambulatory surgical center (in one of the four Texas metropolitan areas where abortions are provided) before the patient's pregnancy reaches the 22-week cutoff.

Even if the Executive Order does not operate as a substantial obstacle in all cases, the record demonstrates that it will do so at least as to many patients who will pass Texas's twenty-two week LMP statutory gestational-age limit before the Executive Order expires or whose pregnancies will, by the expiration of the order, reach eighteen weeks LMP, at which time the patient will be ineligible to have an abortion at a licensed abortion facility under Texas law. Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at ASCs, *id.*, but there are no ASCs that provide abortion care outside of Texas' four largest metropolitan areas, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016). 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 even the considerable powers allotted to a state in a public health emergency," and should be enjoined. *S. Wind Women's Ctr. LLC*, 2020 WL 1677094, at *5;

see also Slip Op. at 18 (stating that Plaintiffs would have the opportunity to show that "certain applications of GA-09 that *may* constitute an undue burden under *Casey*" such that those applications are "*beyond question*, in palpable conflict with the Constitution" (emphasis in original)).

Contrary to Defendants' assertions earlier in this litigation, the existence of this subset of patients is not hypothetical. Record evidence demonstrates that some patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the EO has been in place. Hagstrom Miller Decl. ¶ 27; Johnson Decl. ¶ 10; Nguyen Decl. ¶¶ 7–8, 11; Ward Decl. ¶¶ 12–13, 16. Moreover, Defendants' own evidence shows that in 2017, 3,146 abortions were provided at or after fifteen weeks LMP (thirteen weeks post-fertilization), and 819 abortions occurred after eighteen weeks LMP (sixteen weeks post-fertilization). *See* Exs. in Supp. of Defs.' Resp. to Pls.' Mot. for TRO at 15, ECF No. 28-3.

For these patients, the Executive Order's month-long duration (even assuming the order is not extended and causes no further delay past its expiration) would result in a complete denial of abortion access, and thus constitutes a "plain, palpable invasion" of that fundamental right. Slip Op. at 12 (quoting *Jacobson*, 197 U.S. at 31); *id.* at 18–21 (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); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) (enjoining ban on abortions starting at fifteen weeks).

Neither the Fifth Circuit nor Defendants maintain otherwise. In its mandamus decision, the Fifth Circuit acknowledged that the Executive Order might violate *Roe*, *Casey*, and *Jacobson* if it

operated as an "outright ban" on abortion. *See* Slip Op. at 18, 21. Similarly, in their mandamus filings before the Fifth Circuit, Defendants' only comment on these circumstances was to assert that such patients could seek as-applied relief, not that they were unentitled to such relief. *See* Pet. for Writ of Mandamus at 22 n.28, *In re Greg Abbott*, No. 20-50264 (5th Cir. March 30, 2020); Pet'rs' Emergency Mot. to Stay TRO Pending Mandamus at 14 n.18, *In re Greg Abbott*, No. 20-50264 (5th Cir. March 30, 2020).

The Executive Order is also unconstitutional as applied to these patients because it is pretextual and thus "arbitrary and oppressive." Slip Op. at 13. The Fifth Circuit concluded that the record before it did not include "evidence that GA-09 applies any differently to abortions than to any other procedure" or evidence of "any comparable procedures that are exempt from GA-09's requirements." *Id.* at 26. But as discussed, *see supra* Part I.A, the record before this Court now includes evidence that physicians are continuing to provide obstetrical and gynecological procedures comparable to abortion in PPE use and/or time-sensitivity, based on their professional medical judgment. *See* Chang Decl. ¶ 24; Levison Decl. ¶ 18. The Executive Order permits them to do so. Plaintiffs seek limited relief requiring Defendants to treat abortion similarly. *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. The decisions will not be singled out for adverse consequences because the services in question are abortions or abortion-related.").

II. Plaintiffs' Patients Will Suffer Irreparable Harm If the Executive Order Is Fully Enforced

As discussed above with respect to application of the undue-burden test, and as set forth more fully in the attached proposed temporary restraining order, Plaintiffs' patients will suffer

serious and irreparable harm in the absence of the more narrowly defined temporary relief sought here.

III. The Balance Of Harms And Public Interest Support Injunctive Relief

Plaintiffs' more narrowly tailored TRO request will serve the public interest and is favored by the balance of equities. As instructed by the Fifth Circuit, assessment of these factors involves, among other things, "weigh[ing] the potential injury to the public health" if Defendants are enjoined from enforcing the Executive Order as applied to the two narrow categories of abortion care at issue in this motion. Slip Op. at 25.

As is clear from the previous discussion of the benefits and burdens of the Executive Order under *Casey*'s undue-burden test, the Order will exacerbate rather than alleviate the public health crisis. Preventing patients in need of medication abortion from obtaining it will not save *any* PPE. Moreover, even assuming that Defendants are correct that some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small, Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12, and can generally be handled in an outpatient setting. In contrast, the number of Texas women in need of medication abortion who will be foreclosed from obtaining it will increase the demand for hospital capacity. Levison Decl. ¶¶ 8–10, 21; Macones Decl. ¶¶ 19–20; Schutt-Aine Decl. ¶ 26. And, as Defendants concede, some patients unable to obtain a medication abortion are traveling to other states during a pandemic, thus increasing the risk of COVID-19 transmission (and conserving no PPE). *See* Doe Decl. ¶¶ 9, 19–22. Accordingly, the record demonstrates that entry of the TRO to restore abortion access would *serve* the State's interest in public health. *See, e.g.*, Bassett Decl. ¶¶ 6–8; Levison Decl. ¶¶ 20–23; Sharfstein Decl. ¶¶ 9–12. That outcome, combined with the consideration of the interests of patients in need of care, weighs heavily in favor of entering a TRO.

CONCLUSION

For these reasons, this Court should grant Plaintiffs' second motion for a temporary restraining order enjoining enforcement of the Executive Order and Emergency Rule as to (1) medication abortion; and (2) procedural abortion where (a) based on the treating physician's medical judgment, the patients would be past the gestational age limit for an abortion in Texas (twenty-two weeks LMP) on April 22, 2020, and (b) based on the treating physician's medical judgment, the patient would be more than eighteen weeks LMP and therefore no longer be eligible to have an abortion in a licensed abortion facility in Texas on April 22, 2020, and the patient would be likely be unable to obtain care at an ASC at or after that time.

Dated: April 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of April, 2020, I filed a copy of the foregoing with this Court's CM/ECF system, which will serve a copy on the following individuals:

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