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,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas, Austin Division

BRIEF OF 19 STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' (SECOND) PETITION FOR MANDAMUS

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CERTIFICATE OF INTERESTED PARTIES

Amici as governmental parties are not required to file a certificate of interested parties

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INTEREST OF *AMICI*[1]

The *amici* States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, Tennessee, Utah, and West Virginia are engaged in responding to the COVID-19 pandemic. With some state-by-state variation, they review, defend, and enforce a wide variety of matters during a state-declared emergency. The rare emergency underlying this case—the pandemic spread of COVID-19—is a dangerous situation affecting virtually every aspect of American life

The *amici* States have a strong interest in this case because its outcome profoundly and immediately affects States' ability to enforce gubernatorial executive orders and public health orders during this rapidly developing pandemic. States are taking unprecedented action to protect people from the COVID-19 threat. *Amici* have an interest in defending these good-faith and non-arbitrary actions designed to save American lives. .

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a)(2).

SUMMARY OF ARGUMENT

By constitutional design, federal courts are removed from responsibility for day-to-day decision-making during disasters such as pandemics. Instead, States and their elected officials bear constitutional responsibility for those decisions and the difficult consequences flowing from them. The daily-growing COVID-19 death toll acutely illustrates why no federal court should assume the grave responsibility of substituting its judgment for the considered judgment of Governors and their expert public-health advisors during an emergency. And yet, for a second time, the district court below has done exactly that, in direct contravention of Supreme Court precedent and now the law of this case. *See In re Abbott*, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir. April 7, 2020).

This Court should stay[2] the district court's second temporary restraining order and again issue a writ of mandamus because the district court has again neither interpreted nor applied the law correctly, the Plaintiffs' evidence remains wholly insufficient, and the

[2] Amici acknowledge the partial administrative stay that was issued April 10, 2020. This brief is filed in support of both a full stay and, ultimately, issuing the writ Mandamus.

district court's ruling causes immediate irreparable harm to Texas and all states engaged in this fight.

According to statistics kept by Johns Hopkins University, almost half a million Americans are infected with COVID-19, 18,248 have died as of April 10, 2020,[3] and these numbers climb daily. As they climb, States are confronted with a variety of new challenges.[4]

Notwithstanding Texas's clear and compelling interests in deciding how best to protect Texans, the district court arbitrarily rewrote GA-09 again, this time to permit broad exceptions for certain abortions, without even allowing Texas time to respond before the TRO issued. In doing so, the district court failed to conduct the relevant legal analysis, ignored Texas's interests and authority, and usurped Texas's role in determining how best to fight this pandemic.

ARGUMENT

[3] Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited Apr. 10, 2020).

[4] T. Pearce, *Emergency Field Hospitals Popping Up Across the Country for Corona Virus Patients*, https://www.washingtonexaminer.com/news/emergency-field-hospitals-popping-up-around-the-country-for-coronavirus-patients

I. MANDAMUS IS PROPER BECAUSE THE DISTRICT COURT AGAIN FAILED TO APPLY THE LAW PROPERLY..

This Court has already recognized the broad scope of the States' police power under the current circumstances. *In re Greg Abbott*, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir. April 7, 2020); *see also Lawton v. Steele*, 152 U.S. 133, 136 (1894). "The power to protect the public health lies at the heart of [that] power." *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1096-97 (D.C. Cir. 1968). Indeed, protection of the public health "has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations." *Id.*

The Supreme Court has long-recognized the scope of the state's power is at its zenith during an emergency, and it is "not within the power of the federal court to usurp the functions of another branch of government" by reweighing the risks and benefits of emergency actions. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *see also, e.g.*, *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902). *Jacobson* remains good law and provides the

proper framework for examining the state's exercise of authority during an emergent pandemic.

But the district court continues to ignore this Supreme Court precedent—and now the directive of this Court—which requires *deference* to the State's judgment. Instead, it cut and pasted the plaintiffs findings of fact, did not allow Texas time to respond, and arbitrarily re-wrote GA-09 to grant broad exceptions that undermine that order's effect. In doing so, the district court again substituted its own judgment for that of the Texas officials charged with responding in a pandemic. Nothing in *Roe v. Wade,* 410 U.S. 113 (1973), permitted the district court to do so or exempted abortion providers from compliance with generally-applicable public-health orders in the face of a grave public-health crisis.

Arguments that *Jacobson* does not provide the proper framework for analysis are contradicted by the very abortion cases Plaintiffs' claim apply. Indeed, those arguments have already been squarely rejected by this Court. *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1993), and *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), all *cite* to *Jacobson* for the long-held proposition that state

interests may be compelling enough to override individual rights. And none of those cases involved a state's delay of some abortion procedures in response to an ongoing public health crisis—the context of *Jacobson*.

Roe, *Casey*, and *Carhart* not only do not raise abortion rights above all other constitutional rights, but they affirm abortion rights are *not* exempt from *Jacobson's* framework. Thus, "by all accounts, then, the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*." *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *8 (5th Cir. April 7, 2020) (granting mandamus and ordering district court to vacate TRO creating an abortion-specific carve out to Texas public-health order). Yet, the district court refused to apply that Supreme Court precedent, contrary to this Court's express direction.

II. THE DISTRICT COURT ALSO ERRED WHEN IT CARVED OUT EXCEPTIONS TO THE STATE'S EMERGENCY ORDER.

Based upon pre-existing insufficient declarations and a single new declaration *from a hotline coordinator* who assists women in paying for abortions, App. 439-44, the district court peremptorily issued a new temporary restraining order that re-wrote GA-09 to allow broad

exemptions not contemplated by the order. In doing so, the district court substituted its judgment for that of subject matter experts at every level of government. In short, the district court again "usurp[ed] the functions of another branch of government," *Jacobson,* 197 U.S. at 28, by reweighing the risks and benefits of Governor Abbott's emergency order. That is what *Jacobson* forbids.

The Governor and his advisors make decisions based upon the input of a wide variety of other federal, state, and local officials, including the President of the United States, the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, and the federal COVID-19 Task Force, while also evaluating related consequences. Plaintiffs, in contrast, offer self-interested declarations by individuals who bear no responsibility to the public (or even the clinic staff and patients) for the consequences. Not one is qualified to *substitute* their judgment for that of officials with access to vast quantities of information (vis-à-vis both Texas and the nation as a whole) and tasked with protecting the general public health. *See Ralston v. Smith & Newphew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to

permit a physician to testify concerning any medical-related issue."); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1112-13 (5th Cir. 1991) (A medical degree "is not enough to qualify him to give an opinion on every conceivable medical question."), *abrogated on other grounds by Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). At most, they offer a generalized *ipse dixit*, without any reliable application of knowledge to specific facts. *Cf. Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987) ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."). Some even use COVID19 as a ground for "medical necessity" to justify individual abortions when no public health authority in the country has concluded abortion is necessary or appropriate to address potential exposure to COVID-19.

Regardless, plaintiffs and their proffered experts not only do not have the same information as the Texas officials tasked with responding to the epidemic, they do not bear responsibility for the consequences of their *ipse dixit* opinions. Not surprisingly, most do not even proceed from the correct starting point: they focus on the concept of individualized patient-centered care, "but an epidemic requires a

change of perspective toward a concept of *community-centered care*." M. Nacoti, *et al.*, *At the Epicenter of the COVID-19 Pandemic and Humanitarian Crises in Italy*, NEJM CATALYST (Mar. 21, 2020). The district court clearly erred by cutting and pasting fact-findings arising from these unqualified and insufficient opinions and relying on them as a basis to re-write the Governor's order.

III. THE COURT'S RULING GRAVELY THREATENS STATE AUTHORITY TO PROTECT PUBLIC HEALTH.

The district court's new TRO is entirely arbitrary. The exceptions still threaten to expose more people to COVID-19 and undermine Texas's efforts to stop its spread. But the harm caused by second-guessing state officials during an ongoing pandemic response goes well beyond that immediate, irreparable harm. The court's action broadly undermines compliance, thereby prolonging the epidemic and increasing death tolls. There is no effective remedy for this harm. This is precisely why the Supreme Court—and virtually every state court to ever consider the issue—recognizes state power is at its zenith during an epidemic. Spotty compliance by those who claim special exemptions only contributes to higher exposure and death rates and encourages additional noncompliance.

As our States have previously urged, Governors and their public health experts must have flexibility to address rapidly changing needs in each of their states. The district court nevertheless overruled Texas's decision based on evidence that actually demonstrates a threat to the plaintiffs' patients, staff, *and* the public. Plaintiffs' declarations proved they should not be performing *any* procedures while a deadly virus is spreading through the nation.

1. The carve-out for elective abortions beyond Texas law's gestational limit.

The district court erred in holding that the order is likely unconstitutional for those pregnancies that would be beyond Texas's gestational limit.

First, Supreme Court precedent rejects the notion that an otherwise-valid public health measure to forestall an epidemic is unconstitutional solely because it may have the effect of altogether preventing the exercise of an individual liberty in a particular instance. *See Jacobson*, 197 U.S. at 14, 26. Assuming *arguendo* that anyone allegedly prevented from exercising a constitutionally protected liberty as a result of a health measure has a valid claim to relief, that claim is

properly raised in an as-applied challenge focused on the precise circumstances at issue.

Upholding states' ability to take such measures to fight COVID-19 is critical outside the context of medical procedures, too. States' widespread prohibition on assemblies over ten people will altogether prevent individuals' First Amendment interests in corporate worship to celebrate or receive the sacraments on Good Friday and Easter. Nothing in law elevates abortion above these fundamental First Amendment interests. Because Texas's elective procedure postponement is at its core a valid measure to protect the public health, as the district court and this Court have already recognized, the district court erred as a matter of law in holding that it cannot apply where the effect would be to prevent a surgical abortion altogether.

Second, the district court committed legal error in entering a TRO as if Plaintiffs brought an as-applied challenge. Women seeking abortion who would not be eligible after the order's expiration are only a small fraction of the abortion-seeking population. Yet a facial challenge, as Plaintiffs bring here, requires Plaintiffs at least show that the order is unlawful in "in a large fraction of relevant cases." *Gonzales*, 550 U.S.

at 167-68. Evaluation of the small fraction of cases where a woman could not legally seek an abortion after the EO's expiration is appropriate only in "as-applied challenges," which "are the basic building blocks of constitutional adjudication." *Id.* at 168 (citation and internal marks omitted).

The district court's carve-out "should not have been entertained in the first instance," for it is not "within [courts'] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Id.* This is especially true because, given the nature of the emergency order, the district court's action has the effect of a permanent injunction.

2. The medication abortion carve-out

Even if this Court allows the first aspect of the TRO, it should still order the district court to vacate the broad carve-out for *all* medication abortions because the district court's order misapplies the law and relies on clearly erroneous factual determinations.

A medication abortion requires much more than simply handing over a prescription. Undisputed evidence shows the medication that induces a woman to abort exposes women to *greater* risk of

complications than surgical abortions at the same gestational age, thus requiring more hospitalization during this most-exigent time. *See* Pet. Br. at n.7; 9.[5] Studies show the risk of hospitalization for medication abortions is between 6% and 15%. The complication rate for medication abortion is between two and four times higher than surgical abortion in the same trimester. *Id.* The FDA certainly does not treat this procedure as a mere prescription. Rather, the FDA has subjected medication abortion to a Risk Evaluation and Mitigation Strategy ("REMS") that limits its use to physicians who certify they have

> the ability to provide surgical intervention in cases of incomplete abortion or severe bleeding, or . . . have made plans to provide such care through others, and ability to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary.

Mifeprex Prescriber Agreement Form.[6] Thus, the district court's basis for allowing medication abortions to go forward is clearly erroneous.[7]

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[5] *See also,* 2016 data and research reaffirming Mifeprex to remain in U.S. Food and Drug Administration Risk Evaluation & Management Strategies (REMS) program and labeling requirements at https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (last accessed April 10, 2020.

[6]https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2019_04_11_Prescriber_Agreement_Form_for_Danco_Laboratories_LLC.pdf

[7] The district court minimizes interpersonal contact required by medication abortion, but ignored the fact that medication abortion requires close contact for FDA-required preliminary examinations and for follow-up visits to ensure the abortion is complete, *supra* n.1.

The district court ignored that a significant percentage of medication abortions require surgical completion, blood products, and potentially emergency hospitalization, thus causing even more interpersonal contact, PPE usage, and demand on an already over-taxed emergency care system. Texas was thus reasonable in providing for a short-term delay of all such procedures, medication-induced and surgical, until the order expires and the greatest strain on Texas's healthcare system has passed. After this point, elective abortions could go forward, since at that time the State will have less need to reduce interpersonal contact and preserve healthcare resources. But until then, delaying medication abortions meets Texas's compelling interests.

Third, the district court misapplied the relevant law. The district court believed the benefits of reducing community spread of COVID19, reducing potential demand on an over-taxed system, and preserving PPE were "outweighed" by individualized interests in abortion. But this is precisely the type of weighing this Court found should be left to Texas's elected leaders. *See also In re Abbott*, 2020 WL 1685929, at *8 (rejecting district court's balancing where it is "obvious" that the order

"is a valid emergency response to the COVID-19 pandemic."). The district court improperly put itself in the position of making the difficult decisions concerning how to manage this public health crisis. Because our constitutional structure and system of democracy does not countenance such acts, Texas is entitled to mandamus.

3. Granular litigation of emergency orders.

Our constitutional structure vests state officials with the duty and power to protect the public and address downstream consequences of their carefully-calibrated emergency decisions. The federal judiciary is uniquely unsuited to second-guessing the judgment of infectious disease experts, public health officials, and state disaster managers. Upholding exceptions to the Governor's orders for Texas abortion providers only further undermines efforts to obtain compliance from other segments of society.

Federal district courts should not be haling senior state officials into court in the middle of an emergency, re-writing state public health orders based on a limited factual record, and creating exclusions that undoubtedly threaten the public as a whole. Indeed, the Supreme Court analogously categorized as "folly" that

> the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to removing the furniture, &c. belonging to the lawyers of the temple . . . for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt.

United States v. Caltex, 344 U.S. 149, 155 n.7 (1952). Yet that is precisely what Plaintiffs invite: "distraction of officials from their governmental duties [and] inhibition of discretionary action" during an emergency, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), all to present an incomplete record to a federal judiciary ill-equipped to second-guess the executive's emergency decision-making.[8]

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[8] This case amply illustrates the informational problem with having federal courts weigh-in on state emergency orders. After Texas and *Amici* pointed out the obvious evidentiary gaps in Plaintiffs' case, *e.g.*, Br. of the States of Alabama, *et al,* at 12 n.19; *In re Abbott*, No. 20-50264 (5th Cir. Mar. 31, 2019), Plaintiffs added additional conclusory declarations from individuals from outside of Texas emphasizing the minimal need for PPE for abortions – albeit under ordinary circumstances. But on April 10, an Austin TV station reported that—according to a former employee of Plaintiff PPGT— "there is not enough PPE at the clinics, workers are being forced to do non-essential work for patients in-person and they're not being offered paid sick leave if they come down with COVID-19 symptoms." The employee stated, "There's this big disconnect between the people managing us and the work that is being done on the ground . . . . The reality is that a lot of our services, while vital, are not urgent. *Planned Parenthood employees laid off, claim it's retaliation for voicing concerns*, WXAN, https://www.kxan.com/news/local/austin/planned-parenthood-employees-laid-off-claim-its-retaliation-for-voicing-concerns/ (visited April 11, 2020). In short, it appears the true facts support of GA-09, notwithstanding the conclusory declarations Plaintiffs submitted, reflect troubling infection control practices that are dangerous to staff and patients. *See, e.g.*, Barraza Decl. (ECF 7-1) ¶ 7 (noting reuse of PPE throughout the day); Ferringo Decl. (ECF 7-3) ¶¶ 10, 12 (implying PPE use is optional).

CONCLUSION

The district court again substituted its judgment for that of state public health officials based upon a flawed interpretation and application of Supreme Court jurisprudence and a factually deficient record. It re-wrote an emergency order issued in good faith by the Texas Governor under conditions expressly authorized by Texas law. The district court legally and factually erred by carving out exceptions for some surgical and all medication abortions. This Court should grant the stay and mandamus should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) and 29(a)(5) because the brief contains 3,211 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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Dated: April 12, 2020