No. 20-50264

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 THE STATES OF ALABAMA, ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' EMERGENCY MOTION TO STAY

JEFF LANDRY
ATTORNEY GENERAL
Elizabeth B. Murrill*
Solicitor General
Counsel of Record
J. Scott St. John
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

Steve Marshall, Attorney General of Alabama

Leslie Rutledge, Attorney General of Arkansas

Lawrence Wasden, Attorney General of Idaho

Curtis T. Hill, Jr., Attorney General of Indiana

Daniel Cameron, Attorney General of Kentucky

Jeff Landry, Attorney General of Louisiana

Lynn Fitch, Attorney General of Mississippi

Eric Schmitt, Attorney General of Missouri

Douglas J. Peterson, Attorney General of Nebraska

Dave Yost, Attorney General of Ohio

Mike Hunter, Attorney General of Oklahoma

Alan Wilson, Attorney General of South Carolina

Jason Ravnsborg, Attorney General of South Dakota

Herbert Slattery, Attorney General of Tennessee

Sean Reyes, Attorney General of Utah

Patrick Morrisey, Attorney General of West Virginia

Elizabeth Murrill, Counsel for *Amici Curiae*

Joseph Scott St. John, Counsel for *Amici Curiae*

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INTEREST OF *AMICI*

Amici are chief legal officers of their respective States. They review, defend, and enforce a wide variety of matters during a state declared emergency.

Although rare, the spread of COVID-19 is a dangerous situation impacting virtually every aspect of life. States officials' efforts to protect people are unprecedented. Amici have an interest in this case because its outcome will profoundly and *immediately* affect States' ability to enforce gubernatorial executive orders and public health orders during this rapidly-developing epidemic.

Federal courts are removed from day-to-day decision-making in a disaster response. The growing death toll acutely illustrates why no federal court should assume the grave responsibility for responding to an epidemic, but the District Court did exactly that. It was well within the Texas' power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary. The temporary restraining order issued by the District Court should be immediately stayed and Texas' petition for mandamus expedited to address these critical issues.

ARGUMENT

I. THE DISTRICT COURT FAILED TO GRASP THAT STATES ARE FIGHTING TO KEEP PEOPLE ALIVE.

Responding to COVID-19 has challenged States and the Federal government in virtually every way. Louisiana saw a tenfold increase in cases in only *10 days*.[1] Almost 200 Louisianans will have died when this brief is filed. Every day, governors report their numbers: people who have tested positive, have died, been hospitalized, are in ICU, and are on ventilators. Several states are experiencing exponential growth in COVID19 cases.

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, recently warned that the outbreak could kill 100,000–200,000 Americans. Other officials warn of shortages of personal protective equipment ("PPE") used to protect healthcare providers and prevent the spread of infections, and nurses and doctors on the front lines plead for PPE.

Officials and citizens are understandably scared. COVID-19 appears to be transmissible by asymptomatic carriers.[2] The virus has an

[1] Louisiana Department of Health, Coronavirus, http://ldh.la.gov/Coronavirus/ (last visited Mar. 31, 2020).
[2] L.F. Moriarty *et al*, *Public Health Responses to COVID-19 Outbreak*, 69 MMWR 347, 350 (2020).

incubation period of up to 14 days, during which "[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection."[3] The virus can remain on surfaces many days[4], and patients may remain infectious for weeks after their symptoms subside.[5] Not surprisingly, healthcare professionals have tested positive even while going to great lengths to protect themselves,[6] and healthcare facilities have been identified as a vector for COVID-19 transmission.[7]

Citing the grave threat posed by the epidemic, the President declared a national emergency March 13, 2020.[8] He has invoked the Defense Production Act to prioritize and allocate medical resources, to

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[3] D.L Heymann & N. Shindo, 395 Lancet 542, 543 (2020).
[4] Moriarty, *supra* Note 2, at 350.
[5] Y. Wu et al, *Prolonged Presence of SARS-CoV-2 Viral RNA in Faecal Samples*, Lancet Gastroenterol Hepatol (2020), https://www.thelancet.com/journals/langas/article/PIIS2468-1253(20)30083-2/fulltext (last accessed Mar. 31, 2020)
[6] J. Adamy, *Doctors with Coronavirus Frightened by Their Own Symptoms*, https://www.wsj.com/articles/doctors-with-coronavirus-frightened-by-their-own-symptoms-11585479600, https://www.wsj.com/articles/doctors-with-coronavirus-frightened-by-their-own-symptoms-11585479600
[7] *Id.*; *see also* M. Nacoti et al*, At the Epicienter of the COVID-19 Pandemic and Humanitarian Crisis in Italy*, https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080 (last visited Mar. 31, 2020).
[8] Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, 85 Fed. Reg. 15337 (Mar. 18, 2020)

prevent hoarding of resources, and "to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators."[9] At the same time, the Centers for Disease Control and Prevention ("CDC") issued guidance that healthcare providers should "delay all elective ambulatory provider visits" and "delay inpatient and outpatient elective surgical procedural cases."[10] The CDC issued detailed guidance on optimizing the supply of PPE under both contingency and crisis conditions.[11] The Centers for Medicare and Medicaid Services ("CMS") also issued detailed recommendations and a triage chart.[12] Heeding that

[9] *E.g.*, Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19 (issued Mar. 27, 2020), https://www.whitehouse.gov/presidential-actions/eo-delegating-additional-authority-dpa-respect-health-medical-resources-respond-spread-covid-19/

[10] CDC, Resources for Clinics and Healthcare facilities, https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/index.html (last visited Mar. 31, 2020).

[11] CDC, Strategies to Optimize the Supply of PPE and Equipment, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html (last visited Mar. 31, 2020).

[12] CMS, Adult Elective Surgery and Procedure Recommendations, https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf (last visited Mar. 31, 2020).

advice, healthcare providers have deferred a wide variety of procedures, even life-saving transplants.[13]

Like all 50 States, Texas' Governor declared a state of disaster in connection with the COVID-19 pandemic[14] and the Commissioner of the Texas Department of State Health Services declared a public health disaster.[15] The Governor issued additional executive orders prohibiting gatherings of more than 10 people, requiring daily reports of hospital utilization, quarantining travelers from certain areas, and preserving personal protective equipment for emergency and critical care responders[16] The Governor's actions are, without doubt, extraordinary but arise during extraordinary times. Attorney General Paxton's support and explanation underscored the critical importance of and need for compliance to stop the spread of COVID-19 from *all* medical providers and to delay *all* medically unnecessary procedures. They are consistent

[13] A. Marcus, *Coronavirus Threat Forces Longer Wait for Some Organ-Transplant Patients* (WSJ, Mar. 25, 2020), https://www.wsj.com/articles/coronavirus-threat-forces-longer-waits-for-some-organ-transplant-patients-11585137601
[14]Texas Executive Order GA-09
[15] Declaration of a Public Health Disaster in the State of Texas, https://gov.texas.gov/uploads/files/press/DECLARATION_of_public_health_disaster_Dr_Hellerstedt_03-19-2020.pdf (last visited Mar. 31, 2020)
[16] News – Proclamations, https://gov.texas.gov/news/category/proclamation.

with the actions of other Governors. The District Court, however, gave only lip service to this crisis.

II. A STAY IS PROPER BECAUSE THE DISTRICT COURT CLEARLY AND INDISPUTABLY LEGALLY ERRED.

District Court clearly and indisputably erred when it failed to defer to state experts and the State's vast power to implement their advice during an epidemic. The States' police power "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *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). 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.* And where necessity warrants, States may go further still. *See, e.g.*, *United States v. Caltex*, 349 U.S. 149 , 154 (1953) ("[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of

many more could be saved."); *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879) ("There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. The rights of necessity are a part of the law.").

Jacobson v. Massachusetts, 197 U.S. 11 (1905) illustrates the scope of state power to protect against the spread of disease. Massachusetts authorized a board of health to require vaccination to prevent Smallpox but Jacobsen refused to be vaccinated and was convicted. *Id.* at 21. The Supreme Court rejected his Fourteenth Amendment challenge, explaining that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. The Court declined to "usurp the functions of another branch of government" by reweighing the risks and benefits of the emergency action. *Id.* at 27-28, 36-37. Similarly, in *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902), the Supreme Court upheld a geographic quarantine around New Orleans. The quarantine was held not to violate the Fourteenth Amendment. *Id.* at 387, 393.

The United States has thankfully had limited experience with epidemics for over 100 years. But *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016), makes clear that *Jacobson* and *Compagnie Francaise* remain good law *and* that disease can still warrant temporary restrictions of individual liberty. In *Hickox*, a nurse was quarantined after caring for ebola patients and sued State officials. *Id.* at 584. The court observed "[t]he State is entitled to some latitude . . . in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease." *Id.* at 584. Citing *Jacobsen* and *Compagnie Francaise*, the court found no unconstitutionality, and specifically rejected "judicial second-guessing of the discretionary judgments of public health officials acting within the scope of their (and not [the court's]) expertise." *Id.* at 591-94.

The Supreme Court has made clear that even fundamental rights may yield in the face of a sufficiently compelling government interest. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality) ("[T]he ordinary mechanism that [courts] use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without

due process of law,' U.S. Const., Amdt. 5, is the test . . . articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))." 542 U.S. at 528-29 (citing cases); *see also, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (Second Amendment); *Michigan v. Fisher*, 558 U.S. 45 (2009) (Fourth Amendment); *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (civil commitment); *Zemel v. Rusk*, 381 U.S. 1, 14-17 (1965) (balancing right to travel against national security interests). Nothing in *Roe v. Wade* exempts abortion providers from compliance with public health orders in the face of an indisputably grave public health crisis. Nor did it sanction such an exemption for abortion in such circumstances. The District Court clearly and indisputably erred in reading it to do so.

III. TEXAS AND OTHER STATES WILL BE IRREPARABLY HARMED IN THE ABSENCE OF A STAY.

The district court's second guessing the judgment of State *and federal* officials during an ongoing pandemic disaster response causes irreparable harm; it will contribute to higher exposure and death rates. The damage will not just be to Texas. The ruling below will engender more litigation and encourage more defiance of public health orders. It will deplete PPE and contribute to the spread of the virus.

Plaintiffs concede COVID-19 is a "worldwide pandemic," "federal and state officials expect a surge of infections . . . to test the limits of the healthcare system," and "[h]ealthcare workers are facing a shortage of [at least] certain types of PPE." Compl. ¶ 45. They further concede they "use some PPE," Compl. ¶ 54. Finally, Plaintiffs concede the FDA believes "demand could exceed supply" even for gloves. Compl. ¶ 54 n.26.

Plaintiffs spend pages rehashing the right to abortion and demand a *blanket* exemption—not granted for any other provider or procedure—from a facially neutral regulation that is applicable to all surgeries and medical procedures.[17] Plaintiffs insist *their* judgment should override the judgment of subject matter experts at *every level of government* that the health and welfare of the general public, medical provider health, and PPE should be protected and conserved, together with the judgment that delaying medical procedures will protect the public from the spread of a deadly disease.

[17] *Jacobson* contemplates individual, as-applied challenges even to emergency public health orders. 197 U.S. at 38-39. Modern abortion law is in accord. *See generally Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). Plaintiffs instead pursue a broad challenge that has adverse consequences for patients who meet the criteria and are safer in a less highly-trafficked environment with strictly-enforced infectious disease protocols. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004) (third party standing vitiated by potential conflict of interest).

Patient-specific judgment is what the situation requires. The American College of Surgeons emphasizes that "[p]lans for case triage should *avoid blanket policies and instead rely on data and expert opinion from qualified clinicians and administrators, with a site-specific granular understanding of the medical and logistical issues in play*."[18] While doctors all over the country are responsibly exercising such case-specific judgment, the District Court apparently believes abortion providers need not be required to do so and can keep doing business as usual.

That conclusion is irresponsible and dangerous. The federal judiciary is uniquely unsuited to the task it is being asked to undertake—second-guessing the judgment of infectious disease experts, public health officials, and state disaster managers. *These* are the officials expressly tasked with protecting the public from a deadly contagious virus.

The District Court substituted its judgment for based upon the statements of unqualified declarants (by comparison) whose statements *demonstrate* the threat and raise more questions than they answer.

[18] American College of Surgeons, COVID-19: Guidance for Triage of Non-emergent Surgical Procedures, https://www.facs.org/covid-19/clinical-guidance/triage (last accessed Mar. 31, 2020).

Plaintiffs document *hundreds* of contacts a month. *E.g.*, Dewitt-Dick Decl. (ECF 7-2) ¶2; Klier Decl. (ECF 7-5)¶ 9. Their lack of using, minimal use, or optional use of PPE raises serious concerns about the adequacy of staff and patient protection. Dewitt-Dick Decl. ¶6; Barraza Decl. (ECF 7-1) ¶7. Ferringo Decl. (ECF 7-3) ¶¶10. At least one implicitly acknowledges having treated symptomatic patients "for whom there is a concern for COVID-19". Barraza Decl. ¶¶7 n.1, 8. Southwestern "would" treat a patient with COVID-19 by supplying *the patient* with a N95 respirator, Dewitt-Dick Decl. ¶2. Southwest confesses it sent symptomatic staff home, but is silent as to whether it quarantined staff in contact with a symptomatic person. *See* Dewitt-Dick Decl. ¶13-14. Plaintiffs' declarations prove they intend to continue to invite high a volume of traffic through the clinic, without adequate protection, while a deadly virus spreads through Texas and the nation. They are entirely unqualified to opine much less overrule State public health experts' judgment.[19]

[19] Plaintiffs' submit declarations from administrators, business managers and two doctors who are not experts in epidemiology or infectious disease and who offer no opinions on these issues. Their backgrounds and training are insufficient to even compare with the expert opinions of State and Federal public health officials responding to the pandemic.

No one believes this situation will last forever. But States should not be required to abide judicial imposition of blanket exclusions to public health orders. The very existence of such exclusions threatens state government's ability to enforce all public health orders. The District Court's ruling directly interferes with infection control and will contribute to increased infections and deaths. *No federal court should assume that grave responsibility*. It was well within the State's power to articulate a simple, workable rule requiring physicians to defer procedures that are not immediately medically necessary. The District Court abdicated its duty when it gave only lip service to the undisputedly compelling public interest in restricting procedures to protect the health and safety of the public and minimize additional burdens on emergency responders as well as the use of PPE.

CONCLUSION

The District Court' gave carte-blanche protection to abortion clinics from state-wide, neutrally-applicable emergency orders the Texas Governor issued to address a grave threat to public health when his powers are at a zenith. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring). It has, without any evident

appreciation for the scope of the current public health threat or breadth of the required response to it, permitted an exception which poses a clear and present danger to the public welfare. This Court should grant Texas' request for a stay of this extraordinarily flawed ruling.

Respectfully submitted,

JEFF LANDRY
ATTORNEY GENERAL

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill*
Solicitor General
Counsel of Record
J. Scott St. John
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 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.

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Solicitor General
Louisiana Department of Justice
1885 N. Third St.

Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 27(d)(2)(A) because the brief contains 2,591 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, with footnotes in 12-point Century Schoolbook font.

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Attorney for Amici Curiae

Dated: March 31, 2020