No. 20-____

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

PETITION FOR WRIT OF MANDAMUS

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Certificate of Interested Persons

No. 20-____

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Petitioners, as governmental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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STATEMENT REGARDING ORAL ARGUMENT

Petitioners request oral argument. For the second time in as many weeks, the district court has entered a temporary restraining order that exceeds its jurisdiction and endangers the health of Texans in the face of the worst pandemic to reach our State in over a century. The order below compromises the State's efforts to protect public health in the name of advancing a theory of the right to abortion that the Supreme Court has never endorsed. These clear and indisputable errors are all the more pronounced because they disregard this Court's own directives issued just three days ago. *In re Abbott*, No. 20-50264, 2020 WL 1685929 (5th Cir. April 7, 2020).

Telephonic or video oral argument is likely to assist the Court's resolution of these serious matters.

Statement of Relief Sought

Petitioners Greg Abbott, Ken Paxton, Phil Wilson, Stephen Brint Carlton, and Katherine A. Thomas seek mandamus relief directing the district court to vacate the temporary restraining order it entered on April 9, 2020, which enjoined all Defendants from enforcing Executive Order GA-09 "as a categorical ban against all abortions," and against Respondents who (1) "provide medication abortion;"(2) "provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care;" and (3) "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." App.477-78.

Introduction

Just two days after this Court declared the district court's view of the law "patently wrong," the district court has issued a new temporary restraining order repeating those exact same "extraordinary . . . errors." *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *1 (5th Cir. Apr. 7, 2020). This Court should again grant mandamus relief to correct the district court's clear and indisputable errors and violations of the mandate rule and law-of-the-case doctrine.

Last week, the district court issued a TRO enjoining a variety of state officials from the enforcement of Executive Order GA-09 as it pertains to abortion. This Court exercised its mandamus authority to order the district court to vacate that unlawful TRO, concluding that the district court disregarded the law governing state

powers during a public-health emergency, contradicted the Supreme Court's abortion jurisprudence, and "usurped the state's authority to craft emergency health measures." *Id.*

Now the district court has entered a new TRO that is more modest in scope but no less impermissible in result. The new TRO prevents Petitioners from enforcing GA-09 as to (1) medication abortions, (2) unnamed and unidentified hypothetical women whose pregnancies would reach eighteen weeks' LMP on April 22, 2020, and who would be likely unable to reach an ambulatory surgical center (ASC) in Texas, and (3) unnamed and unidentified hypothetical women whose pregnancies would reach twenty-two weeks' LMP on April 22, 2020, and therefore would be ineligible for abortion under state law.

Each of those provisions is legally impermissible under the binding Supreme Court authority this Court described three days ago. But each also flouts this Court's specific instructions. The new TRO:

- incorporates the same wrong conclusions of law this Court rejected three days ago, App.475; 2020 WL 1685929, at *5-13;
- offers only a single, passing reference to *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), even though this Court emphasized that those cases control these claims, App.476; 2020 WL 1685929, at *6-12;

- presents no discussion of the State's interest in fighting COVID-19, as required under *Jacobson*, other than to acknowledge its existence, App.466-68; 2020 WL 1685929, at *12-13;
- contains no discussion of the benefits of GA-09, as required under *Casey* and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); 2020 WL 1685929, at *7-9
- accepts everything Respondents said as true, without allowing Petitioners to respond or considering Petitioners' evidence from the first TRO, App.468-75, and without any "careful parsing of the evidence" tied to "particular circumstances," 2020 WL 1685929, at *11, *12; and
- ignores this Court's admonition to consider whether the Governor and Attorney General have a "connection" to enforcement, by parroting Respondents' language and ignoring Petitioners' jurisdictional arguments, App.475-76; 2020 WL 1685929, at *5 & n.17.

In the end, all these errors make the new TRO no less a "patently erroneous result" than the first one. 2020 WL 1685929, at *5. Once again, the district court has "usurped the state's authority to craft emergency health measures." *Id.* at *1. Mandamus should again issue.

Issues Presented

1. Whether the district court clearly and indisputably erred when it enjoined enforcement of GA-09 on an indistinguishable factual record from the record before this Court when it vacated the district court's first, broader temporary restraining order.

2. Whether the district court clearly and indisputably erred when it exceeded its jurisdiction by enjoining the Governor and Attorney General, who do not enforce GA-09, and permitting Respondents to bring third-party claims.

STATEMENT OF FACTS

I. COVID-19 Continues To Threaten Texas.

A. Since the parties were last before the Court, the coronavirus pandemic has claimed even more lives and consumed more limited medical resources. As of April 9, the virus has infected nearly 1.5 million people around the world and killed almost 90,000.[1] There are currently over 430,000 confirmed cases in the United States—100,000 more than existed when the Court wrote its previous opinion.[2] *See In re Abbott*, 2020 WL 1685929, at *2. Also as of April 9, there were over 10,000 confirmed cases in Texas, almost 1500 hospitalizations, and 199 fatalities.[3]

The latest forecasts suggest that the pandemic may peak in Texas in the next few weeks.[4] The Institute for Health Metrics and Evaluation predicts that Texas may hit

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[1] Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6.

[2] *Id.*

[3] Tex. Dep't of State Health Servs., *Texas Case Counts COVID-19*, https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83

[4] *See* Tex. Pub. Radio, *Coronavirus State-by-State Projections: When Will Each State Peak?*, https://www.tpr.org/post/coronavirus-state-state-projections-when-will-each-state-peak (projecting April 24); KPRC, *Weeks earlier than expected: April 19 named new projected peak date for coronavirus in Texas*,

its peak hospital use on April 22.[5] The worst is yet to come. That makes the upcoming weeks critical in ensuring that Texas's healthcare system is ready for the worst.

B. As described in the prior mandamus proceedings before this Court, the Governor issued Executive Order GA-09 on March 22 to prepare for the influx of COVID-19 patients. App.34-35. GA-09 contained several findings, including that "a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster." App.34. GA-09 also includes a finding that

> hospital capacity and personal protective equipment are being depleted by surgeries and procedures that are not medically necessary to correct a serious medical condition or to preserve the life of a patient, contrary to recommendations from the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services.

App.34.

Based on those findings, the Governor ordered that all licensed healthcare professionals and healthcare facilities in the State

> shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

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https://www.click2houston.com/news/2020/04/07/weeks-earlier-than-expected-april-19-named-new-projected-peak-date-for-coronavirus-in-texas/ (projecting April 19).

[5] IHME, *COVID-19 Projections (Texas)*, https://covid19.healthdata.org/united-states-of-america/texas.

App.35. It does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." App.35. GA-09 is effective until April 21, 2020. App.35.

II. Medication Abortion Uses PPE, May Result in Hospitalization, and Requires In-Person Interactions.

Because the district court refused to provide Petitioners with an opportunity to respond to Respondents' second request for a TRO, Petitioners provide some background on medication abortion here.[6] Medication abortion involves taking two medications to end a pregnancy. App.129. Under Texas law, held constitutional by this Court, abortion providers must comply with the FDA label when prescribing abortion-inducing drugs. Tex. Health & Safety Code § 171.062(a)(2); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600-05 (5th Cir. 2014). Currently, the FDA label for mifepristone (the most common abortion-inducing drug) permits its use for up to ten weeks' gestation.[7]

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[6] As explained in more detail below, the district court granted the TRO without giving Petitioners any meaningful opportunity to weigh in. It convened a hearing, during which Petitioners requested the opportunity to file a written brief in response to this latest TRO application. The district court denied Petitioners an opportunity to file a written response and ended the call without permitting Petitioners to present oral argument. It entered its new TRO less than two hours after the hearing concluded.

[7] *See also* Mifeprex Label 17, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

Texas law also requires that (1) the physician perform an ultrasound 24 hours prior to the abortion (unless the patient lives more than 100 miles away), Tex. Health & Safety Code § 171.012(a)(4); (2) the physician perform a physical examination prior to the abortion, *id.* § 171.063(c); and (3) the physician schedule a follow-up appointment to ensure that the abortion is complete, *id.* § 171.063(e)-(f).

These additional requirements help ensure the safety of the woman. Mifepristone should not be provided to women with ectopic pregnancies. *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 506 n.3 (6th Cir. 2006) (noting that one woman died from using mifepristone with an ectopic pregnancy).[8] Thus, a physician must first determine that the pregnancy is not ectopic before providing a medication abortion.

Further, approximately 8% and up to 15% of medication abortions may require surgical intervention because the abortion was not completed.[9] It is therefore necessary, and included as part of the FDA label, that women return seven to fourteen days later for a follow-up appointment to determine if the abortion is complete.[10]

Finally, according to the FDA label, up to 4.6% of medication abortions result in a visit to an emergency room and up to 0.6% of medication abortions can result in

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[8] *See id.* at 4 (Mifeprex contraindicated for ectopic pregnancies)

[9] American College of Obstetricians and Gynecologists, *Medical Management of First-Trimester Abortion, Practice Bulletin 143* (2016), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2014/03/medical-management-of-first-trimester-abortion.

[10] *See* Mifeprex Label 18, *supra* note 7.

hospitalization.[11] In 2017, there were approximately 17,000 medication abortions in Texas, or 325 per week. App.222. That amounts to fifteen ER visits per week and two hospital admissions. And the numbers would likely increase if more women began choosing medication abortion as a result of the district court's order.

Thus, in addition to the required in-person interactions, medication abortion consumes PPE, to the extent it is needed for ultrasounds, surgical interventions, and hospital visits and admissions. And medication abortion can result in hospital visits far more often than surgical abortion at the rates put forward by Respondents. App.12.

III. This Court Granted Mandamus Relief After The District Court Entered A TRO Enjoining Petitioners From Enforcing GA-09.

A. As this Court is aware, Respondents, a group of abortion clinics and a physician, filed suit on the evening of March 25 bringing (1) a substantive-due-process claim, and (2) an equal-protection claim, challenging GA-09 and the related Emergency Rule adopted by the Texas Medical Board. App.2-27. They purported to file suit on behalf of themselves, their staff, physicians, nurses, and patients. App.6-7. The named Defendants include Petitioners (multiple state officials), as well as nine district attorneys. App.7-10.

Respondents also filed a motion for a temporary restraining order or preliminary injunction. App.40-70. The motion pressed only the substantive-due-process claim. App.56-64. The district court gave Petitioners until March 30 at 9:00 a.m. to

[11] *See* Mifeprex Label 8, *supra* note 7.

respond, and Petitioners did. App.165-207. On March 30, the district court entered a temporary restraining order. App.263-71. Pursuant to the order, Petitioners were enjoined from enforcing GA-09 as applied to medical and surgical (what Respondents call "procedural") abortions. App.271.

B. The same day the TRO was issued, Respondents filed a petition for writ of mandamus with this Court and requested an emergency stay pending a ruling on the petition. On March 31, the Court issued an administrative stay of the TRO and ordered expedited briefing on the motion and petition, which was completed on April 3. Minutes before their mandamus response was due on April 2, Respondents filed nine additional declarations in the district court, purportedly in support of their preliminary-injunction request, but then proceeded to rely on those declarations in their mandamus response. *See* Opp. to Pet. for Writ of Mandamus 4 n.2, *In re Abbott*, No. 20-50264 (Apr. 2, 2020); App.273-415. That is, Respondents squarely put this new evidence before this Court and ensured this Court would consider that evidence in reaching its decision.

On April 7, the Court, in a 2-1 decision, granted mandamus relief and denied the motion to stay as moot. *In re Abbott*, 2020 WL 1685929, at *16. The Court identified three main errors of the district court that warranted mandamus relief:

1. The district court failed to apply the framework of *Jacobson*, 197 U.S. 11, to judge the emergency public-health measures adopted in GA-09. *In re Abbott*, 2020 WL 1685929, at *1.

2. The district court failed to apply the undue-burden test in *Casey*, 505 U.S. 833, to Respondents' challenge of GA-09's delay of abortion procedures. *In re Abbott*, 2020 WL 1685929, at *1.

3. The district court usurped Texas's authority to craft emergency health measures, substituting its own view for that of the State. *In re Abbott*, 2020 WL 1685929, at *1.

Given the district court's failure to apply the relevant precedent and the fast-moving nature of the pandemic, the panel majority determined that mandamus relief was appropriate. *Id.* The panel held that, "based on this record," Respondents were not entitled to injunctive relief because GA-09 does not "'beyond question'" violate the constitutional right to abortion, but noted that the district court was planning to have a hearing on the preliminary injunction in several days and that new facts and evidence could permit the district court make specific findings about abortion access in particular circumstances. *Id.* at *2, 13.

IV. On Remand, The District Court Entered Another Temporary Restraining Order On Virtually The Same Record.

On April 8, 2020, the district court vacated the preliminary injunction hearing previously set for April 13, 2020. App.417-18. It instead directed the parties to file a joint status report on April 15 and choose a new hearing date, keeping in mind the current expiration date of GA-09 on April 21. App.461. The same afternoon, Respondents filed a second motion for a temporary restraining order. App.417-41. They attached a single additional declaration in support of their request from an abortion-hotline coordinator who assists women in paying for abortions. App.436-41. That declaration offers hearsay that a handful of women close to the gestational limit are receiving abortions in other States. App.443. It also offers hearsay that one woman is "worrie[d]" about traveling to Houston for an abortion that was scheduled before GA-09 was issued. App.443.

Respondents' new request was narrower than their first but no less dismissive of the State's interests. Respondents asked for a TRO enjoining GA-09 as applied to (1) all medication abortions; (2) any woman whose pregnancy would reach eighteen weeks' LMP prior to April 21 if "in the treating physician's medical judgment" she would be unable to reach an ASC to obtain an abortion prior to the twenty-two week limit;[12] and (3) any woman who would be past Texas's gestational limit for abortions (twenty-two weeks' LMP) by April 21, and App.456-57.

The district court gathered the parties on a conference call at 2:30 p.m. on April 9, 2020.[13] The call lasted less than fifteen minutes. The court declined to hear any substantive argument and rejected Petitioners' request to file a response to the TRO application. The district court issued a temporary restraining order less than two hours later. App.443.

Rather than doing the "careful parsing of the evidence" this Court instructed, 2020 WL 1685929, at *11, the district court appears to have largely cut-and-pasted the factual findings from the proposed order submitted by Respondents, and incorporated the findings of fact and conclusions of law from its first TRO rejected by this Court just three days ago. *Compare* App.445-57 *with* App.465-79; App.475, 477. The district court offered only a single, passing reference to *Jacobson* and *Casey*, App.476,

[12] Texas requires all abortions after sixteen weeks (eighteen weeks' LMP) to be performed in an ASC. Tex. Health & Safety Code § 171.004.

[13] The transcript of the call was still being finalized by the court reporter at the time of this filing. Petitioners will supplement the appendix with the transcript as soon as it is available.

even though this Court emphasized that those cases control these claims. The district court presented no discussion of the State's interest in fighting COVID-19, as required under *Jacobson*, other than to acknowledge its existence. App.466-68. And it included no discussion of the benefits of GA-09, as required under *Casey* and *Hellerstedt*.

Indeed, the district court accepted everything Respondents said as true, without allowing Petitioners to respond or considering Petitioners' evidence from the first TRO, App.468-75, and without any "careful parsing of the evidence" tied to "particular circumstances," 2020 WL 1685929, at *11, *12. The district court also ignored the Court's admonition to consider whether the Governor and Attorney General have a "connection" to enforcement, by parroting Respondents' language and ignoring Petitioners' jurisdictional arguments, App.475-76.

The district court granted exactly the relief Respondents requested: it enjoined Defendants from enforcing GA-09 and the Emergency Rule "as a categorical ban on all abortions provided by Plaintiffs," App. 477,[14] and "against Plaintiffs or agents of plaintiffs who" (1) "provide medication abortion;"(2) "provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an

[14] The district court "RESTRAINED" Petitioners from enforcing GA-09 "as a categorical ban on all abortions provided by Plaintiffs." App.456. But of course GA-09, on its face, is not a "categorical ban" on any procedure. *See* App.35. This overbreadth is a further demonstration of the district court's disregard of this Court's warning that any injunction must be "narrowly tailored to particular circumstances." *In re Abbott*, 2020 WL 1685929, at *12.

ambulatory surgical center in Texas or to obtain abortion care;" and (3) "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." App.477-78. Its new TRO expires on April 19. App.478.

Reasons the Writ Should Issue

Petitioners are entitled to mandamus relief because (1) their right to the writ is clear and indisputable; (2) they have no other adequate means to obtain relief; and (3) the writ is appropriate under the circumstances. *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019) (per curiam);[15] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc).

The district court clearly and indisputably erred. The Supreme Court has already held that "[a] court would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Jacobson*, 197 U.S. at 28. And this Court admonished the district court to follow that precedent. *In re Abbott*, 2020 WL 1685929, at *12. Despite that, the district court's latest order engages in more judicial second-guessing of the State's efforts to fight the COVID-19 pandemic and lacks evidentiary support. Once again, the district court "overstepped its proper role and imposed its own judgment about how the COVID-19 pandemic should be handled." *Id.* at *13. "This [i]s a usurpation of the state's power." *Id.*

[15] Although unsigned, *In re Gee* is published, binding precedent.

For the same reasons mandamus was appropriate regarding the district court's earlier TRO, it is appropriate now. Once again, Petitioners have no other adequate means to obtain relief; once again, the district court's order interferes with Texas's efforts to manage a public-health emergency.

I. The District Court Clearly and Indisputably Erred.

A right to mandamus is clear and indisputable when a district court clearly abuses its discretion. *In re Volkswagen*, 545 F.3d at 311. The district court clearly and indisputably erred by granting injunctive relief this Court already held was improper without any appreciable change in the factual record.

A. Texas may temporarily delay elective abortion procedures in order to alleviate a public-health crisis.

In its ruling on Petitioners' first mandamus request, the Court set forth the constitutional test from *Jacobson* that would apply in this case:

> when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

In re Abbott, 2020 WL 1685929, at *7 (quoting *Jacobson*, 197 U.S. at 31). The Court then found, based on the evidence before it, that (1) GA-09 bore a "real or substantial" relation to the COVID-19 crisis, *id.* at *8-9; and (2) it was not "beyond question" that GA-09 created an undue burden, *id.* at *9-12. Thus, Respondents were not entitled to injunctive relief. The same is true today. The factual record is nearly identical to what was previously before this Court just a few days ago. Based on this

Court's previous ruling, the district court clearly and indisputably erred by granting the second TRO.

1. GA-09 bears a real and substantial relation to the COVID-19 pandemic.

The first *Jacobson* inquiry is whether GA-09 has a "real or substantial relation" to the goals of fighting COVID-19. In its previous mandamus opinion, the Court determined that "[t]he answer is obvious"—GA-09 was a valid emergency response to the COVID-19 pandemic. *Id.* at *8. Nothing Respondents have offered since then has changed that analysis, and the district court did not address it.

GA-09's findings remain unchallenged. There is a need to preserve PPE and hospital capacity. App.34. GA-09 also referenced a prior executive order (GA-08) that was aimed at "slowing the spread of COVID-19" by reducing numerous in-person interactions. App.34 (referring to the executive order entered on March 19).[16] Respondents' new filings still do not challenge any of these means as inappropriate measures to reduce the spread of COVID-19 and protect patients and those on the front lines of the fight. They simply ask for an exception for certain elective abortions.

Respondents' exception would swallow the rule. It is unlikely that any single provider will dramatically impact the overall PPE supply or hospital capacity in the State. But when all providers work together, doctors, nurses, and the public will benefit. That is why GA-09 applies—and must apply—to all healthcare providers, no

[16] Available at https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

matter what type of procedures they perform. As the Court has already found, there is a real and substantial relation between GA-09 and the public-health goals sought to be achieved by Texas.

2. GA-09 is not an unconstitutional undue burden "beyond all question."

The second *Jacobson* inquiry asks whether GA-09 is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. The Court previously held that GA-09 "merely postpones certain non-essential abortions, an emergency measure that does not plainly violate *Casey* in the context of an escalating public health crisis." *In re Abbott*, 2020 WL 1685929, at *9. Again, nothing in Respondents' new submissions alters what was already presented to the Court in the first mandamus proceeding. Respondents certainly have not proven that "'beyond question' [GA-09]'s burdens outweigh its benefits." *Id.*

A law imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 878 (plurality op.). "Not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id.* at 876. Even if state regulation "increas[es] the cost or decreas[es] the availability of medical care," or makes it "more difficult or more expensive to procure an abortion," that "cannot be enough to invalidate it" if the law serves a "valid purpose[] . . . not designed to strike at the right itself." *Id.* at 874. If a law amounts to a "substantial obstacle," the Court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2309.

Respondents have not shown "beyond all question" that GA-09 violates their patients' constitutional rights. Instead, the district court has, again, substituted its judgment of what it thinks is best during the pandemic for that of the Governor of Texas and his public-health advisors. The Court left open the possibility that Respondents could submit more evidence to change this outcome and gave examples related to the exact relief Respondents now seek. First, the Court suggested Respondents could demonstrate whether different methods of abortion consume PPE differently, for instance with evidence on "how PPE is consumed in medication abortions." *In re Abbott*, 2020 WL 1685929 at *11. Second, Respondents could seek relief, in "specific contexts," for example, with "competent evidence show[ing] that a woman" will exceed the gestational limit for abortions in Texas before the expiration of GA-09. *Id.* The district court granted injunctive relief to Respondents on both of those issues, yet Respondents submitted no evidence to bolster their claims beyond what was already before this Court.

a. Medication abortions

Respondents have no new evidence of any burden caused by delaying medication abortions. The new declaration Respondents submitted with their second motion for TRO contains no evidence regarding medication abortion. App.439-44. As a result, the Court's ruling in *In re Abbott* should not change. *Id.* at *11 & n.24 (finding that the evidence before this Court regarding the evidence of PPE use in medication abortions "unclear" and acknowledging evidence that medication abortions can result in hospitalizations). There is no constitutional right to a preferred method of abortion, so the fact that some women may ultimately require a surgical abortion is not an

undue burden. *See Gonzales v. Carhart*, 550 U.S. 124, 163-65 (2007); *see also Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that a woman does not have the right to "terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses"). Moreover, women eligible for medication abortion must be less than ten weeks' gestation, giving them many weeks to obtain an abortion.

The benefits remain significant—and were not considered by the district court. Respondents claim that medication abortion consumes little PPE, but, again, *all* PPE is valuable at this time. And Respondents made that argument to the Court in the first mandamus proceeding. Regardless, based solely on Respondents' evidence (much of which Petitioners have not yet had an opportunity to respond to), the district court concluded that no PPE is used in medication abortion. App.470. But the district court also found that medical abortions may require surgical intervention, which requires PPE. App.470-71. Moreover, by failing to give Petitioners an opportunity to respond, the district court did not consider evidence that medication abortion results in *more* visits to the ER and *more* hospital admissions than surgical abortion. *See supra* pp.7-8. Texas could be dealing with an additional fifteen women per week visiting the ER because of complications from a medication abortion. And that number will only increase if more women seek to take advantage of the district court's ruling.

In sum, nothing has changed that would warrant a different ruling from this Court. In fact, as mentioned above, exempting medication abortions from GA-09 could create more difficulties with hospital capacity than exempting surgical abortions. "[I]f the choice is between two reasonable responses to a public crisis, the

judgment must be left to the governing state authorities." *In re Abbott*, 2020 WL 1685929, at *12 (citing *Jacobson*, 197 U.S. at 30). Respondents have not shown "beyond all question" that their constitutional rights have been violated.

b. Gestational-limit abortions

The district court also erred by enjoining Petitioners from enforcing GA-09 against Respondents who perform a surgical abortion on a patient who would be past the legal limit for an abortion in Texas, or against Respondents who perform a surgical abortion on a woman who, "in the treating physician's medical judgment," is over eighteen weeks' LMP but may not reach an ASC before she reaches the gestational limit. App.478. Again, Respondents have presented no new evidence that would alter the analysis this Court already performed in *In re Abbott*.

Respondents have still failed to offer any "competent" evidence of particular women in need of injunctive relief. *In re Abbott*, 2020 WL 1685929 at *11-12. Their new declaration contains only hearsay that women near the gestational limit are obtaining abortions outside Texas. App.439-40. That is duplicative of what was already before this Court. *See* App.94-95, 119, 158, 162, 349, 355. Moreover, there is no evidence in the record—either now or previously—showing that there are particular women approaching eighteen weeks' LMP who can travel to an abortion clinic but not an ASC and would therefore be denied an abortion because of GA-09. And as this Court has already recognized, to the extent such women exist and have no other options, they may seek as-applied relief. *In re Abbott*, 2020 WL 1685929, at *11; *see also Gonzales*, 550 U.S. at 168.

This Court's directions were unambiguous: the district court must engage in a "careful parsing of the evidence" before entering any relief. *In re Abbott*, 2020 WL 1685929, at *11. The district court refused to do so. Respondents "bear the burden to prove, 'by a clear showing,' that they are entitled to relief." *Id.* at *12. But since the record has not appreciably changed since earlier this week, just as there was before, there is a lack of evidence to support the conclusion that GA-09 violates the right to abortion "beyond question." *Id.* The district court clearly and indisputably erred in granting another TRO.

* * *

As this Court noted, these are extraordinary times. States have "closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities." *Id.* at *9. But these are temporary measures designed to get the country through the worst pandemic in a century with the minimum loss of life. States are authorized to make those judgment calls, and the district court's continued second-guessing of Texas's efforts violates *Jacobson* and this Court's admonition last week in *In re Abbott*. Mandamus should issue.

3. The district court violated the mandate rule and the law-of-the-case doctrine.

Because the Court's mandate as to the previous TRO issued three days ago, the district court's failure to heed this Court's instructions "violates the mandate rule or the law-of-the-case doctrine." *Ball v. LeBlanc*, 881 F.3d 346, 351 (5th Cir. 2018). That rule and doctrine provide that "an issue of fact or law decided on appeal may

not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *Id.* (cleaned up). Their scope is broad: "a district court must implement 'both the letter and the spirit' of the panel's mandate." *Id.* (citation omitted). The district court's refusal to do so here was clearly and indisputably erroneous and further grounds to grant mandamus relief.

B. The district court exceeded its jurisdiction.

The traditional use of mandamus has been "to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). If the facts demonstrate a "judicial usurpation of power," mandamus should issue. *Id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)); *see also In re Abbott*, 2020 WL 1685929, at *1 (finding usurpation of power as to first TRO).

Petitioners have lodged multiple objections to the district court's jurisdiction, any and all of which should have prohibited the Court from interfering with the State's public-health decisions, including sovereign immunity, lack of standing, and lack of third-party standing. Three days ago, this Court acknowledged these jurisdictional points and directed the district court to consider sovereign immunity under the proper standard before issuing any further orders. 2020 WL 1685929, at *5 & n.17. Yet the district court proceeded regardless. That was clear and indisputable error. *See In re Gee*, 941 F.3d at 161. Mandamus should issue.

1. Respondents' claims against the Governor and the Attorney General are barred by sovereign immunity.

Just days ago, this Court instructed the district court to "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)." *In re Abbott*, 2020 WL 1685929, at *5 n.17 (citing *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 745-46 (5th Cir. 2014)). Instead of meaningfully assessing this issue, the district court declared in conclusory fashion that "the governor and attorney general likely have 'some connection with the enforcement of the [sic].'" App.475-76. That was obvious and irremediable error. The Governor and Attorney General are not proper defendants under *Ex parte Young*, so they cannot be subject to a TRO.

Ex parte Young allows suit only when the defendant enforces the challenged statute. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Ex parte Young*, 209 U.S. at 157; *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). Neither the Governor nor the Attorney General enforces GA-09. Any prosecution would be brought by local officials, and any administrative enforcement action would be initiated by HHSC, the TMB, or the TBN. *See In re Abbott*, 2020 WL 1685929, at *5 n.17 (noting "Petitioner health officials . . . may enforce the order's administrative penalties"). That the *agency* defendants can properly be sued under *Ex parte Young* does not excuse the district court from considering the propriety of relief against other defendants.

1. It is immaterial that the Governor has authority to "issue executive orders, proclamations, and regulations and amend or rescind them." Tex. Gov't Code § 418.012; *see* App.476 (citing Tex. Gov't Code § 418.012). Power to make law is fundamentally different from power to enforce it. After all, the Legislature enacts statutes, but plaintiffs challenging statutes cannot therefore enjoin the Legislature. *See Hall v. Louisiana*, 974 F. Supp. 2d 944, 949, 954 (M.D. La. 2013) (so holding).

And federal courts are powerless to "require affirmative action by the sovereign," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949), so the court cannot order the Governor to exercise his authority to amend or supersede GA-09. *See MSA Realty Corp. v. State of Ill.*, 990 F.2d 288, 294 (7th Cir. 1993) ("[T]he Supreme Court has never approved a lower court order requiring officials of a state to take actions that constitute performance by a state of obligations that are the state's in its political capacity."). The Governor's lawmaking authority under section 418.012 is not a "connection" to enforcement under *Ex parte Young*.

The Governor lacks any mechanism "to compel obedience to" the EO. Black's Law Dictionary (11th ed. 2019) (defining "enforce"). Rather, other officials are "statutorily tasked," *City of Austin*, 943 F.3d at 998, with enforcing it through criminal prosecution and administrative penalty. The Eleventh Amendment bars the district court's TRO against the Governor.

2. The Texas Attorney General is likewise not subject to suit under *Ex parte Young*. His ability to "assist" with criminal prosecutions "at the request" of a local prosecutor, Tex. Gov't Code § 402.028—the district court's sole reference, *see* App.475-76—does not suffice, because there is no likelihood of such action.

The Court recently made clear that it is not enough to say, as Respondents do here, that the defendant "*might* . . . bring a proceeding to enforce" the law. *City of Austin*, 943 F.3d at 1000 (emphasis added). Respondents must show "that he is *likely* to do [so] here." *Id.* at 1001-02 (emphasis added). They cannot. The Attorney General's authority is conditioned on a request for assistance from a district attorney, and there is no showing such a request is likely. Tex. Gov't Code § 402.028(a).[17]

The Attorney General's press release is immaterial because it cannot substitute for the lack of any request for assistance from a local prosecutor. Unlike in *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015), which involved a statute under which the Attorney General can independently pursue enforcement actions, *id.* at 392; *see* Tex. Bus. & Com. Code § 17.47, here the Attorney General has no independent authority. The press release's general admonishment, App.31, does not overcome the Attorney General's lack of independent enforcement authority. *City of Austin*, 943 F.3d at 1001.

2. Without a case or controversy against the Governor and Attorney General, the District Court cannot issue an order restraining them.

For the same reasons, Respondents lack Article III standing to obtain relief against the Governor and Attorney General. To be sure, a "justiciable controversy" exists generally because the agency defendants do have authority to enforce GA-09. *See In re Abbott*, 2020 WL 1685929, at *5 n.17; App.475-76. That sufficed for

[17] That Respondents may face consequences if they violate GA-09 does not mean they can sue the Attorney General even though the *City of Austin* plaintiffs could not. Respondents can sue the officials who *do* enforce penalties for violating GA-09. But the Attorney General is not one of them.

purposes of this Court's review of Petitioners' original mandamus petition. But that a plaintiff can seek relief against one defendant does not allow it to seek relief against another, as "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). And because Respondents' alleged injury is not traceable to any possible enforcement action by the Governor or Attorney General, Respondents lack Article III standing to obtain injunctive relief against them. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation and alterations omitted); *see also City of Austin*, 943 F.3d at 1002-03 (discussing the relationship between *Ex parte Young*'s requirements and Article III standing). The district court also failed to assess this deficiency.[18]

II. Petitioners Have No Adequate Remedy by Appeal, and Mandamus Is Appropriate Under the Circumstances.

A. Yet again, Petitioners have been forced to seek relief by way of mandamus, as temporary restraining orders typically are not immediately appealable under 28 U.S.C. § 1292. *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426 (5th Cir. Unit A 1981);

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[18] Respondents cannot assert third-party standing *even though* they can allege their own injury. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Heald v. Dist. of Columbia*, 259 U.S. 114, 123 (1922). To sue based on "the legal rights or interests of third parties," which is what Respondents claim, the plaintiff must show (1) a "close" relationship with the third party; and (2) that some "hindrance" affects the third party's ability to protect her own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), did not address this issue. And Plaintiffs cannot show a close relationship or hindrance. *See* No. 20-50264, Pet. for Mandamus at 28-30; Reply at 13-15.

United States v. Spectro Foods Corp., 544 F.2d 1175, 1179 (3d Cir. 1976); *Chandler v. Garrison*, 394 F.2d 828, 828 (5th Cir. 1967). Multiple courts of appeals have recognized that mandamus is an appropriate tool to obtain relief from a temporary restraining order. *See In re Abbott*, 2020 WL 1685929; *In re Lifetime Cable*, No. 90-7046, 1990 WL 71961, *1 (D.C. Cir. Apr. 6, 1990); *In re King World Prods.*, 898 F.2d 56, 59 (6th Cir. 1990); *In re Dist. No. 1-Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 n.8 (D.C. Cir. 1983); *O'Neill v. Battisti*, 472 F.2d 789, 790-91 (6th Cir. 1972) (per curiam); *Dell Plastics, Inc. v. Henderson*, 1961 WL 8100, *1 (2d Cir. Sept. 27, 1961) (per curiam).

Moreover, as the Court previously recognized, this issue is extraordinarily time sensitive, with each day presenting new challenges to Texas's healthcare providers. *In re Abbott*, 2020 WL 1685929, at *14. Waiting to appeal a potential temporary injunction in nine days will come with significant public-health costs.

B. Mandamus is appropriate in these circumstances for the reasons already identified in the Court's earlier opinion. As explained above, Texas may be approaching its peak of COVID-19 cases in the next few days and weeks. *See supra* pp.4-5. A small delay in all elective procedures now means a greater chance that Texas emerges from this pandemic with minimal loss of life. But everyone must do their part. The Court should apply its mandamus authority to vacate the district court's TRO and eliminate the threat it poses to public health.

Conclusion

The Court should grant mandamus relief and direct the district court to vacate the temporary restraining order entered on April 9, 2020.

Respectfully submitted.

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Certificate of Service

On April 10, 2020, this petition was served via e-mail on counsel for Respondents and transmitted to the Clerk of the Court. A copy will be sent to Judge Lee Yeakel of the Western District of Texas. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This petition complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 6975 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

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

PLANNED PARENTHOOD CENTER FOR CHOICE, PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, WHOLE WOMAN'S HEALTH, WHOLE WOMAN'S HEALTH ALLIANCE, SOUTHWESTERN WOMEN'S SURGERY CENTER, BROOKSIDE WOMEN'S MEDICAL CENTER PA D/BA BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN'S WOMEN'S HEALTH CENTER, AND ROBIN WALLACE, M.D., M.A.S., PLAINTIFFS,	§	
V.	§	CAUSE NO. A-20-CV-323-LY
GREG ABBOTT, GOVERNOR OF TEXAS, KEN PAXTON, ATTORNEY GENERAL OF TEXAS, PHIL WILSON ACTING EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, STEPHEN BRINT CARLTON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, KATHERINE A. THOMAS, EXECUTIVE DIRECTOR OF THE TEXAS BOARD OF NURSING, EACH IN THEIR OFFICIAL CAPACITY, AND MARGARET MOORE, DISTRICT ATTORNEY FOR TRAVIS COUNTY, JOE GONZALES, CRIMINAL DISTRICT ATTORNEY FOR BEXAR COUNTY, JAIME ESPARZA, DISTRICT ATTORNEY FOR EL PASO COUNTY, JOHN CREUZOT, DISTRICT	§	

ATTORNEY FOR DALLAS COUNTY,	§
SHAREN WILSON, CRIMINAL	§
DISTRICT ATTORNEY TARRANT	§
COUNTY, RICARDO RODRIGUEZ, JR.,	§
CRIMINAL DISTRICT ATTORNEY	§
FOR HIDALGO COUNTY, BARRY	§
JOHNSON, CRIMINAL DISTRICT	§
ATTORNEY FOR MCLENNAN	§
COUNTY, KIM OGG, CRIMINAL	§
DISTRICT ATTORNEY FOR HARRIS	§
COUNTY, AND BRIAN MIDDLETON	§
CRIMINAL DISTRICT ATTORNEY	§
FOR FORT BEND COUNTY, EACH IN	§
THEIR OFFICIAL CAPACITY,	§
DEFENDANTS.	§

ORDER GRANTING PLAINTIFFS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER

Before the court is Plaintiffs' Second Motion for a Temporary Restraining Order and Memorandum in Support (Dkt. #56). Having considered the motion, the evidence in the record, the legal arguments made by all parties to date, and the opinion, order, and writ of mandamus issued by the United States Court of Appeals for the Fifth Circuit April 7, 2020, *In re Abbott*, No. 20-50264 2020 WL 1685929 (5th Cir. April 7, 2020), the court again considers whether Plaintiffs are entitled to temporary relief limiting the scope of Executive Order GA-09 issued by the governor of Texas on March 22, 2020.

Accompanying Plaintiffs' motion are proposed findings of fact and conclusions of law. The proposed findings and conclusions carefully and painstakingly track the evidence before the court regarding both of Plaintiffs' motions for temporary relief and the applicable law. The court has reviewed and considered these proposed findings and conclusions and determined that they are, in

substantial part, accurate and in concurrence with court's own review of the evidence and the law. The court will, therefore, adopt the bulk of the proposed findings and conclusions as its own.

The court makes the following findings of fact:

1. On March 13, 2020, the United States declared a state of emergency and the State of Texas declared a state of disaster related to the COVID-19 pandemic. *See* Proclamation by the Governor of the State of Texas (Mar. 13, 2020);[1] Proclamation No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020).

2. On March 22, 2020, the governor issued an executive order barring "all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster" (March 22, 2020) ("Executive Order") at 3.[2] The Executive Order further states that procedures that, "if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster" are exempt from the order. *Id.* The Executive Order remains in effect until 11:59 PM on April 21, 2020, unless the governor rescinds or modifies it. *Id.*

3. Federal officials and medical professionals expect the pandemic to last well beyond April 21, 2020. Schutt-Aine Decl. ¶ 40. This court likewise expects the pandemic to last beyond April 21.

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[1] *Available* at https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

[2] *Available* at https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID19_hospital_capacity_IMAGE_03-22-2020.pdf.

The current shortage of personal protective equipment ("PPE") is expected to continue for the next three to four months. Sharfstein Decl. ¶ 13.

4. Failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both. Executive Order at 3 (citing Tex. Gov't Code § 418.173). Violation of the Executive Order may also give rise to disciplinary action against licensed health-care providers by the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing. *See* 25 Tex. Admin. Code §§ 139.32(b)(6), 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (B)(10).

5. On March 23, 2020, the Texas Attorney General issued a press release titled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight Covid-19 Pandemic." The press release states that providing any abortion care (other than for an immediate medical emergency) would violate the Executive Order and warned that "[t]hose who violate the governor's order will be met with the full force of the law."

6. On March 24, 2020, the Texas Medical Board ("Medical Board") adopted an emergency rule ("Emergency Rule") to enforce the Executive Order. Under pre-existing law, the Medical Board can temporarily suspend or restrict a physician's license if the physician's "continuation in practice would constitute a continuing threat to the public welfare." 22 Tex. Admin. Code § 187.57(b). The Emergency Rule expands this basis for discipline to include "performance of a non-urgent elective surgery or procedure" and incorporates the terms of the Executive Order, requiring all licensed health-

care professionals to postpone all surgeries and procedures that are not immediately necessary. 22 Tex. Admin. Code § 187.57 (emergency regulation adopted Mar. 23, 2020).[3]

7. On March 29, 2020, the Medical Board published updated guidance regarding the scheduling of elective surgeries and procedures in light of the Executive Order. Tex. Med. Bd., Updated Texas Medical Board [] Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020) ("Medical Board Guidance").[4] The Medical Board explained that postponing non-urgent elective cases would preserve PPE, ventilator availability, and [intensive-care-unit] beds." It defined "urgent or elective urgent" procedures as those where "there is a risk of patient deterioration or disease progression likely to occur if the procedure is not undertaken or is significantly delayed." The Medical Board noted that "the prohibition does not apply to office-based visits without surgeries or procedures." Further, the Medical Board explained that "[a] 'procedure' does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests."

8. The attorney general's interpretation of the Executive Order, which has been adopted by the State Defendants,[5] creates a credible threat of enforcement against Plaintiffs and their agents for the provision of any abortion. This has had a profound chilling effect on the provision of abortion

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[3] *Available* at https://tinyurl.com/v4pz99u.

[4] *Available* at http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17.

[5] Defendants Greg Abbott, Governor of Texas, Ken Paxton, Attorney General of Texas, Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission, Stephen Brint Carlton, Executive Director of the Texas Medical Board, Katherine A. Thomas, Executive Director of the Texas Board of Nursing, each in their official capacity, are referred to as "State Defendants."

care in Texas. Plaintiffs and their agents have ceased providing nearly all abortion care as a result. Barraza Decl. ¶ 15; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶¶ 25–28; Hagstrom Miller ¶¶ 26–28; Klier Decl. ¶ 17; Lambrecht Decl. ¶¶ 18–20; Schutt-Aine ¶¶ 32–34; Wallace Decl. ¶ 9.

9. Plaintiffs use two methods of providing an abortion: medication abortion and procedural abortion. Schutt-Aine Decl. ¶ 12.

10. Medication abortion is not a surgery or procedure. It involves the patient ingesting a combination of two pills: mifepristone and misoprostol. Schutt-Aine Decl. ¶ 13. The patient takes the mifepristone in the health center and then, typically 24 to 48 hours later, takes the misoprostol at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. Schutt-Aine Decl. ¶ 13. Texas law restricts this method to the first 10 weeks of pregnancy as measured from the first day of a pregnant woman's last menstrual period ("LMP"). Tex. Health & Safety Code § 171.063. Plaintiffs provide medication abortion up to the 10-week limit.

11. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Schutt-Aine Decl. ¶ 16. Early in pregnancy, procedural abortions are performed using a technique called aspiration, in which a clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus. Schutt-Aine Decl. ¶ 16. Beginning around 15 weeks LMP, the clinician generally must use instruments to complete the procedure, a technique called dilation and evacuation ("D&E"). Later in the second trimester of pregnancy, the clinician may begin cervical dilation the day before the procedure itself, resulting in a two-day procedure. Schutt-Aine Decl. ¶ 16. Plaintiffs provide procedural abortion in both the first and second

trimester. Procedural abortions may not be performed in an abortion clinic after 18 weeks LMP. Tex. Health & Safety Code 171.004. At that point, outpatient procedural abortions may only be performed at an ambulatory surgery center ("ASC"), *id.*, but there are no ASCs that provide abortion care outside of Texas's four largest metropolitan areas, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016).

12. Absent exceptional circumstances, Texas law prohibits abortion care altogether after 22 weeks LMP. *See* Tex. Health & Safety Code § 171.044.

13. Abortion patients rarely require hospitalization. Ferrigno Decl. ¶ 14; Hagstrom Miller Decl. ¶ 17; Schutt-Aine Decl. ¶ 12; *Whole Woman's Health*, 136 S. Ct. at 2311.

14. Although some medication abortions require a follow-up aspiration procedure, the number of those cases is exceedingly small and can generally be handled in an outpatient setting. Levison Decl. ¶ 9; Schutt-Aine Decl. ¶ 12.

15. Providing medication abortion does not require the use of any PPE. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶ 10; Hagstrom Miller Decl. ¶ 13; Lambrecht Decl. ¶ 12; Klier Decl. ¶ 11; Schutt-Aine Decl. ¶ 25; Wallace Decl. ¶ 12.

16. Texas law requires an in-person consultation between patient and provider, which must include an ultrasound examination, before every abortion. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). For patients who reside within 100 miles of the facility where the abortion will be performed, the consultation must occur at least 24 hours prior to the abortion procedure. *See id.* According to the Medical Board, "non-invasive diagnostic tests" such as ultrasounds are not procedures, and the prohibition contained in the Executive Order "does not apply to office-based visits without surgery or procedures." Medical Board Guidance. In any event, pre-procedure

ultrasound examinations require minimal PPE. Use of PPE is not required at all for abdominal ultrasound examinations. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. For vaginal ultrasound examinations, doctors or ultrasound technicians typically wear only non-sterile gloves that are discarded after each scan. Ferrigno Decl. ¶ 11; Hagstrom Miller Decl. ¶ 14; Macones Decl. ¶ 14. When laboratory testing is required, technicians likewise utilize only non-sterile gloves. Hagstrom Miller Decl. ¶ 14.

17. For procedural abortion, providers may use some or all of the following PPE items, depending on the circumstances: gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, hair covers, and shoe covers. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶¶ 10, 12; Hagstrom Miller Decl. ¶¶ 13, 15; Klier Decl. ¶ 11; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 25; Wallace Decl. ¶ 12.

18. Following a procedural abortion, the tissue removed from a patient is examined in a pathology laboratory. Ferrigno Decl. ¶ 12; Hagstrom Miller ¶ 15. This task is typically performed by a single staff member who utilizes one washable gown per shift, either one disposable face shield per shift or one set of reusable goggles, one set of disposable shoe covers per shift, one disposable hair cap per shift, and one or more sets of non-sterile gloves. Hagstrom Miller ¶ 15. According to the Medical Board, "the performing of lab tests" is not subject to the Executive Order. Medical Board Guidance; *see also* Tex. Med. Ass'n, TMB Releases Emergency Rules: Non-Urgent Surgeries and Procedures, at 3, 6 (Mar. 29, 2020).[6]

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[6] *Available* at https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/Emergency%20rule%20guidance%20-%203.25%20Update.pdf.

19. Abortion providers generally do not use N95 masks. Only one physician associated with Plaintiffs has used an N95 mask since the beginning of the COVID-19 pandemic, and that physician has been reusing the same mask over and over. Barraza Decl. ¶ 8; Ferrigno Decl. ¶ 13; Hagstrom Miller Decl. ¶ 16; Klier Decl. ¶ 6; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 27.

20. Pregnant women prevented from accessing abortion will still require medical care. Chang Decl. ¶ 8; Levison Decl. ¶ 8; Macones Decl. ¶ 10. Consistent with recommendations from the American College of Obstetricians and Gynecologists ("ACOG") and other medical authorities for providing obstetrical care during the COVID-19 pandemic, obstetricians are generally having two in-person visits with pregnant patients during the first-trimester and more frequent in-person visits during later trimesters. Chang Decl. ¶ 11; Levison Decl. ¶ 19; Macones Decl. ¶¶ 9–10; Wood Decl. ¶ 11. High-risk patients, including those with diabetes or high blood pressure, must have more frequent in-person visits. Chang Decl. ¶ 10; Levison Decl. ¶ 14; Macones Decl. ¶¶ 7, 10; Wood Decl. ¶¶ 11–12. Urine specimens are generally collected and tested at each in-person visit, and blood is sometimes collected and tested also. Chang Decl. ¶ 12; Levison Decl. ¶ 13; Macones Decl. ¶ 11; Wood Decl. ¶ 11. Additionally, obstetricians are generally performing at least one ultrasound during the first trimester and another one at 20 weeks LMP. Chang Decl. ¶¶ 11–12; Macones Decl. ¶ 12; Wood Decl. ¶ 14. High-risk patients will require more frequent ultrasounds. Macones Decl. ¶ 12; Wood Decl. ¶ 14.

21. Because 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, delaying access to abortion will not conserve PPE. Levison Decl. ¶¶ 12–14; Macones Decl. ¶ 20; Schutt-Aine Decl. ¶ 26.

22. Individuals with ongoing pregnancies are more likely to seek treatment in a hospital—for a variety of conditions—than individuals who have pre-viability abortions. Therefore, delaying access to abortion will not conserve hospital resources. Levison Decl. ¶¶ 8–11; Macones Decl. ¶ 19; Schutt-Aine Decl. ¶ 26; *Whole Woman's Health*, 136 S. Ct. at 2311.

23. Individuals who are delayed past the legal limit for abortion will have to deliver babies. Delivery generally takes place in a hospital and requires extensive use of PPE. Thus, requiring patients to carry unwanted pregnancies to term will not conserve PPE or hospital resources. Chang Decl. ¶¶ 16–17; Levison Decl. ¶¶ 9, 15–17; Macones Decl. ¶ 18; Schutt-Aine Decl. ¶ 26.

24. Physicians are continuing to provide obstetrical and gynecological procedures comparable to abortion in PPE use or time-sensitivity, based on their professional medical judgment. *See* Chang Decl. ¶ 24; Levison Decl. ¶ 18.

25. The inability to obtain abortion care in Texas as a result of the Executive Order is causing individuals with unwanted pregnancies who have the ability to travel to go to other states to obtain abortions. The record shows that these individuals are traveling by both car and airplane to places as far away as Colorado and Georgia. Doe Decl. ¶¶ 15–22; Johnson Decl. ¶¶ 8–10; Nguyen Decl. ¶ 17; Ward Decl. ¶¶ 12-14. This long-distance travel increases an individual's risk of contracting COVID-19. Bassett Decl. ¶¶ 7–8; Schutt-Aine Decl. ¶ 37; Sharfstein Decl. ¶ 10; Doe Decl. ¶ 18. The record shows that patients traveling to other states for abortion care include patients seeking medication abortion. Doe Decl. ¶¶ 9, 19–22.

26. Plaintiffs have turned away hundreds of patients seeking abortion care, and will turn away hundreds more, absent entry of a temporary restraining order. Barraza Decl. ¶¶ 6, 15; Dewitt-Dick

Decl. ¶ 8; Ferrigno Decl. ¶¶ 26–28; Hagstrom Miller Decl. ¶¶ 27–28; Johnson Decl. ¶ 4; Klier Decl. ¶ 17; Lambrecht Decl. ¶¶ 18–20; Nguyen Decl. ¶ 8; Schutt-Aine Decl. ¶¶ 33–34; Wallace Decl. ¶ 9.

27. There will be significant pent-up need for abortion care when the Executive Order expires. It will take Plaintiffs weeks to resolve the resulting backlog of patients, meaning that a significant number of patients will face additional delays in accessing abortion even after the Executive Order's now month-long duration expires. Ferrigno Decl. ¶ 29; Hagstrom Miller Decl. ¶ 29; Johnson Decl. ¶ 12; Nguyen Decl. ¶ 23.

28. Patients delayed past 10 weeks LMP are no longer eligible for a medication abortion in Texas. *See* Tex. Health & Safety Code § 171.063(a)(2). Patients delayed past 14 to 16 weeks LMP are no longer eligible for an aspiration abortion, and must instead have a D&E, which is a lengthier and more complex procedure. Ferrigno Decl. ¶ 35; Hagstrom Miller Decl. ¶ 34; Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 16, 39. Patients who are delayed past 18 weeks LMP are no longer eligible for an abortion at an abortion clinic in Texas and must obtain care from an ASC. *See* Tex. Health & Safety Code § 171.004. Patients delayed past 22 weeks LMP are no longer eligible to obtain an abortion in Texas at all, absent exceptional circumstances. *See* Tex. Health & Safety Code § 171.044. Declarations in the record demonstrate that some patients have *already* exceeded the gestational age limit to obtain an abortion in Texas while the Executive Order has been in place. Hagstrom Miller Decl. ¶ 27; Johnson Decl. ¶ 10; Nguyen Decl. ¶¶ 7–8, 11; Ward Decl. ¶¶ 12-13, 16.

29. The health risks associated with both pregnancy and abortion increase with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 22; Macones Decl. ¶ 8. As ACOG and other well-respected medical professional organizations have observed, specifically in relation to the COVID-19 pandemic, abortion "is an essential component of

comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible." ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020);[7] Schutt-Aine Decl. ¶ 22; Sharfstein Decl. ¶ 8.

30. In addition to increasing health risks, delayed access to abortion imposes financial and emotional costs on people with unwanted pregnancies. The cost of an abortion increases with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 39. Women with ongoing pregnancies must cope with the physical symptoms of pregnancy, which often include morning sickness and weight gain; must struggle to conceal their pregnancies from abusive partners or family members; and must deal with the stress and anxiety of not knowing when—or if—they will be able to obtain an abortion. Connor Decl. ¶ 11; Ferrigno Decl. ¶ 34; Hagstrom Miller Decl. ¶ 33; Nguyen Decl. ¶¶ 10–14; Northcutt Decl. ¶¶ 5–6; Ward Decl. ¶¶ 16-17.

31. The court incorporates by reference the findings of fact contained in the court's March 30, 2020 Order Granting Plaintiffs' Request for Temporary Restraining Order. *Planned Parenthood Center for Choice v. Abbott*, 1:20-CV-323-LY (W.D. Tex. Mar. 30, 2020).

The court makes the following conclusions of law:

1. Plaintiffs have standing to bring their claim and a justiciable controversy exists. *See In re Abbott*, No. 20-50264, slip op. at 8 n.17, 2020 WL 1685929 (5th Cir. Apr. 7, 2020). For purposes of sovereign immunity, the governor and attorney general likely have "some connection with the

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[7] *Available* at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortionaccess-during-the-covid-19-outbreak.

the governor, Executive Order at 3, consistent with the governor's statutory authority, Tex. Gov't Code Ann. § 418.012. Similarly, the attorney general has the authority to prosecute Plaintiffs and their agents, at the request of local prosecutors, for alleged violations of the Executive Order, Tex. Gov't Code Ann. § 402.028(a), and he has publicly threatened enforcement against abortion providers in particular.

2. Plaintiffs are entitled to the requested temporary restraining order. In particular, the court concludes that Plaintiffs are likely to succeed on the merits of their substantive due-process claim because, based on the court's findings of fact, it is beyond question that the Executive Order's burdens outweigh the order's benefits as applied 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 22 weeks LMP by April 21, 2020; or (b) the patient's pregnancy would reach 18 weeks LMP by April 21, 2020, thus requiring abortion care at an ASC and, in the judgment of the treating physician, the patient is unlikely to be able to obtain an abortion at an ASC before the patient's pregnancy reaches the 22-week cutoff. The court therefore concludes that application of the Executive Order to these categories of abortion care violates the standards set forth in both *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

To women in these categories, the Executive Order is an absolute ban on abortion. When a temporary delay reaches 22 weeks LMP, the ban is not temporary, it is absolute. A ban within a limited period becomes a total ban when that period expires. As a minimum, this is an undue burden on a woman's right to a previability abortion.

limited period becomes a total ban when that period expires. As a minimum, this is an undue burden on a woman's right to a previability abortion.

3. Plaintiffs and their patients will suffer irreparable harm in the absence of a temporary restraining order; the balance of equities favors Plaintiffs; and entry of a temporary restraining order serves the public interest. In particular, the record demonstrates that entry of a temporary restraining order 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.

4. The court incorporates by reference the conclusions of law contained in the court's March 30, 2020 Order Granting Plaintiffs' Request for Temporary Restraining Order. *Planned Parenthood Center of Choice*, No. 1:20-CV-323-LY (W.D. Tex. Mar. 30, 2020).

Therefore,

IT IS ORDERED that Plaintiffs' Second Motion for Temporary Restraining Order (Dkt. #56), filed April 8, 2020, is **GRANTED**.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster," and the Texas Medical Board's emergency amendment to Title 22 Texas Administrative Code section 187.57, as a categorical ban on all abortions provided by Plaintiffs.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide medication abortions.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide a procedural abortion to any patient who, based on the treating physician's medical judgment, would be more than 18 weeks LMP on April 22, 2020, and likely unable to reach an ambulatory surgical center in Texas or to obtain abortion care.

IT IS FURTHER ORDERED that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are **TEMPORARILY RESTRAINED** from enforcing Executive Order GA-09 and the Emergency Rule against Plaintiffs or agents of Plaintiffs who provide a procedural abortion 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.

IT IS FURTHER ORDERED that this Temporary Restraining Order shall expire on April 19, 2020, at 4:25pm. This order may be extended for good cause, pursuant to Federal Rule of Civil Procedure 65.

Pursuant to an Agreed Stipulation for Non-Enforcement Pending Final Resolution, Attorneys Fees and Costs filed March 28, 2020 (Clerk's Dkt. #25) this order does not apply to Defendant Brian Middleton, Criminal District Attorney for Fort Bend County.

Plaintiffs shall not be required to post a bond. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

This court's April 8, 2020 Order (Dkt. #58) is not affected by this order, and the parties shall continue to comply with the April 8 order.

SIGNED this 9th day of April, 2020 at 4:25 p.m..

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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April 10, 2020

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No. 20-50296 In re: Greg Abbott, et al
USDC No. 1:20-CV-323

Dear Counsel,

We have docketed the petition for writ of mandamus, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. We will not acknowledge or act upon documents not authorized by these rules.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

ATTENTION ATTORNEYS: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website at http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

ATTENTION: If you are filing Pro Se (without a lawyer) you can request to receive correspondence from the court and other parties by email and can also request to file pleadings through the court's electronic filing systems. Details explaining how you can request this are available on the Fifth Circuit website at http://www.ca5.uscourts.gov/docs/default-source/forms/pro-se-filer-instructions. This is not available for any pro se serving in confinement.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer

necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

Amanda Sutton-Foy

By: _____
Amanda Sutton-Foy, Deputy Clerk
504-310-7670

cc: Ms. Jeannette Clack
Mrs. Molly Rose Duane
Mr. Richard Muniz
Ms. Julie A. Murray
Mr. Patrick J. O'Connell
Ms. Jennifer Sandman
Ms. Rupali Sharma
Ms. Hannah Swanson
Ms. Stephanie Toti

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 20-50296

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

Petitioners