**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.

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## Statement Regarding Oral Argument

The Governor of Texas and the Attorney General of Texas request oral argument. 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. 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 March 30, 2020, which enjoins Petitioners from enforcing Executive Order GA-09 and the Texas Medical Board's Emergency Rule as applied to medication and surgical abortions. App.263-71.

## Introduction

The district court has entered a temporary restraining order that endangers lives and hinders the State of Texas's efforts to combat the deadly novel coronavirus. Its order exceeds its jurisdiction and ignores this Court's settled law regarding the availability of temporary restraining orders. This extraordinary case merits mandamus relief.

The State of Texas faces today its most serious public-health emergency in over a century. The rapid growth of the coronavirus pandemic has claimed tens of thousands of lives around the globe. The global death toll may ultimately reach millions. Hospitals in New York City and New Orleans are overrun with severely ill patients. Intensive care units have become triage centers, where doctors and nurses conserve limited supplies by treating only those patients who have a good chance at recovery, leaving others to die. Absent extraordinary measures, a similar landscape awaits Texas hospitals.

In the face of this unprecedented emergency, the Governor of Texas issued Executive Order GA-09 to protect our State's ability to combat the pandemic and save

lives. The EO temporarily prohibits any non-essential medical procedure, that is, "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 . . . ." App.35. It applies to every doctor, clinic, and hospital in the State without regard to field or specialty. The EO ensures that no personal protective equipment ("PPE") is wasted on elective procedures. And it ensures that hospitals have sufficient capacity and resources for the coming wave of coronavirus admissions.

The EO's broad sweep includes abortion providers and procedures. Elective abortions, which by definition are abortions that are not medically necessary, must be postponed. Exempting abortions from the three-week pause that applies to everyone else would deplete scarce PPE, reduce hospital capacity, and risk spreading COVID-19 to hundreds, if not thousands, of individuals across the State.

Plaintiffs—a group of abortion clinics and an abortionist physician—ignore all that. They brought the underlying action to procure an exception to the rules that apply to all other providers.

The district court entered a temporary restraining order enjoining the application of the EO. It did so even though it lacks jurisdiction over some of the defendants, and even though Plaintiffs cannot demonstrate a likelihood of success on the merits or any concrete irreparable harm. The district court's order, if left in place, hampers the State's ability to respond to an unprecedent public health emergency and permits abortion facilities to continue to perform hundreds of procedures per week—all while using valuable PPE and decreasing hospital capacity in order to perform *elective* abortions during a global pandemic.

The district court's decision was clearly and indisputably erroneous, and Petitioners have no adequate remedy on appeal because the district court's order permits the expenditure of resources that cannot be recovered. Mandamus should issue.

## Issues Presented

1. Whether the district court clearly and indisputably erred when it treated the right to previability abortion as absolute and enjoined Petitioners from enforcing the EO's three-week delay as applied to abortions.
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 the EO, and permitting Plaintiffs to bring third-party claims.

## Statement of Facts

### I. The COVID-19 Pandemic Presents the Gravest Public Health Emergency to Texas in Over a Century.

The spread of COVID-19, the disease caused by the novel coronavirus known as SARS-CoV-2, has become a global pandemic. App.235. As of today, the virus has infected over 735,000 people around the world and killed over 34,000.[1] There are over 140,000 cases in the United States, and that number continues to grow exponentially.[2] An Imperial College of London study predicted high fatalities, but offered

[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.*

the hope that "rapid, decisive and collective action now will save millions of lives in the next year."[3]

### A. COVID-19 has overwhelmed healthcare systems.

Examples abound of the nightmares that will occur if governments fail to adequately prepare. The starkest example comes from northern Italy, where the local healthcare system stands on the precipice of collapse as physicians choose who will live and who will die.[4] A group of Italian physicians wrote last week in the New England Journal of Medicine that the outbreak is "out of control," "[m]ost hospitals are overcrowded, nearing collapse while medications, mechanical ventilators, oxygen, and personal protective equipment are not available," and "[p]atients lay on floor mattresses."[5]

The healthcare systems in New York City and New Orleans likewise face imminent collapse. New York City is one of the epicenters of the disease. On March 27,

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[3] Ryan O'Hare, *Coronavirus Pandemic Could Have Caused 40 Million Deaths If Left Unchecked*, https://www.imperial.ac.uk/news/196496/coronavirus-pandemic-could-have-caused-40/.

[4] Mattia Ferraresi, *A Coronavirus Cautionary Tale From Italy: Don't Do What We Did*, (Boston Globe, Mar. 13, 2020), https://www.bostonglobe.com/2020/03/13/opinion/coronavirus-cautionary-tale-italy-dont-do-what-we-did/.

[5] Mirco Nacoti, et al, *At the Epicenter of the Covid-19 Pandemic and Humanitarian Crises in Italy: Changing Perspectives on Preparation and Mitigation*, NEJM Catalyst: Innovations in Care Delivery, Mar. 22, 2020), https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080.

it had 21,873 COVID-19 infections, 281 deaths, and at least 3,900 hospitalized.[6] One day later, it reported 30,765 infections.[7] Refrigerated trucks have been brought in to store bodies, and medical staff lack adequate PPE.[8] Even though "[l]imited supplies of face masks, gowns and shields have [medical staff] wearing the same protective equipment all day," they continue to put themselves in harm's way to care for the sick.[9]

Closer to Texas (and specifically the Houston metropolitan area), Orleans Parish has the highest COVID-19 death rate per capita in the nation.[10] On March 22, Louisiana Governor Edwards issued a statewide "stay at home" order, "citing fears that the Louisiana health care system could run out of capacity in as short a time as

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[6] *See* Bernard Condon, Jim Mustian, and Jennifer Peltz, *Coronavirus News: Video Shows New York City Emergency Room Overflowing With Patients as City on Frontlines of Coronavirus Outbreak*, (Associated Press, Mar. 28, 2020), https://abc7ny.com/jamaica-hospital-queens-new-york-city-nyc-coronavirus/6058195/.

[7] Coronavirus Disease Daily Data Study, https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary.pdf.

[8] *See supra* n.6 ("A nurse died from coronavirus after working nonstop for weeks at a hospital where staffers frustrated with dwindling supplies posed in gowns made of trash bags.")

[9] *Id.*

[10] Gordon Russell, *Orleans Parish has highest per-capita coronavirus death rate of American counties-by far*, https://www.nola.com/news/coronavirus/article_907e7d92-6fa3-11ea-9fcd-f3c3cf974ef1.html.

a week."[11] PPE shortage is a major concern, with healthcare workers reporting "a lack of protective equipment amid a surge in new coronavirus cases in the region."[12]

### B. Texas takes extraordinary measures to prepare for COVID-19.

Absent extraordinary intervention, Texas will soon be living the same nightmare consuming Italy and New York. Already, Texas COVID-19 cases have jumped 156% from just five days ago. App.216. An "exponential increase" in COVID-19 cases is expected over the next few days and weeks. App.224-25. Never has there been a more urgent need for swift and decisive action from a state government.

Fortunately, Texas's elected leaders have risen to the occasion. The Governor declared a statewide disaster on March 13, 2020. App.210-11. This declaration permits him to suspend the provisions of any regulatory statutes prescribing that procedure for conduct of state business and the orders and rules of state agencies if they would "in any way prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code § 418.016. He may use "all available resources of state government and of political subdivisions that are reasonably necessary" and even "commandeer or use any private property" if necessary. *Id.* § 418.017. These powers are

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[11] Missy Wilkinson, *New Orleans ER Workers Say Hospitals Are Verging On 'Systemic Collapse,'* https://www.vice.com/en_us/article/7kzjby/covid-19-new-orleans-louisiana-hospitals-coronavirus-emergency.

[12] Andrea Gallo, Blake Paterson and Matt Sledge, *Louisiana Nurses Face Stark Choice Between Personal Protection, Coronavirus Patient Care*, https://www.nola.com/news/coronavirus/article_5ffada98-7071-11ea-9c12-0bbed00fccd5.html.

exercised through executive orders, proclamations, and regulations, which "have the force and effect of law." *Id.* § 418.012.

On March 19, 2020, Dr. John Hellerstedt, Commissioner of the Department of State Health Services, declared a public health disaster because the virus "poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas." App.213-14.

**1. Texas healthcare providers face a shortage of PPE.**

Avoiding collapse requires the entire healthcare system to conserve resources. App.226. Despite guidance "from the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services" to postpone elective procedures, "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." App.219. As the president of the Texas Medical Association recently stated, "[w]ithout sufficient equipment, health care workers will be exposed to and infected by the virus. . . . We absolutely cannot lose any of our health care workforce to infection in a time of record demand."[13]

[13] Mar. 23, 2020 Letter from David C. Fleeger, President, to Gov. Abbott, https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/TMA%20letter%20to%20Gov.%20Abbott%203-23-2020.pdf.

Hospitals in Texas are already critically short on PPE. At Anson General Hospital, north of Abilene, "the supply of N95 masks was down to 14 on Monday [March 23]."[14] At Goodall-Witcher Hospital, north of Waco, the hospital administrator believed that "treating a single COVID-19 patient might require as many as 40 masks per day," but that "his 25-bed hospital had fewer than 75."[15] One of North Texas's largest hospitals, Parkland, is in danger of running out of protective masks "in as little as three weeks."[16]

### 2. The EO requires healthcare providers to forego or postpone unnecessary medical procedures.

To address the critical shortage of PPE and to enable Texas's healthcare system to absorb the surge of COVID-19 patients, the Governor issued Executive Order GA-09 on March 22. App.35. The EO applies to all licensed healthcare professionals and healthcare facilities in the State and requires that they

> 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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[14] Emma Platoff, *Texas Hospitals Brace for Coronavirus Surge With Uncertain Stocks of Protective Gear* (Tex. Tribune, Mar. 25, 2020).

[15] *Id.*

[16] Scott Friedman, Eva Parks, Jose Sanchez and Jack Douglas Jr., *Desperate to Keep Protective Gear in Stock, North Texas Nurses Told to Re-Use Face Masks*, https://www.nbcdfw.com/investigations/desperate-to-keep-protective-gear-in-stock-north-texas-nurses-told-to-re-use-face-masks/2337375/.

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. The Order is effective until April 21, 2020. App.35.

## II. Plaintiffs Sue To Perform Elective Abortions During a Public-Health Crisis.

Plaintiffs filed suit on the evening of March 25 bringing (1) a substantive-due-process claim, and (2) an equal-protection claim, seeking to enjoin the EO and the Texas Medical Board's Emergency Rule implementing the EO. App.2-27.[17] They purported to sue 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.

The same evening they filed suit, Plaintiffs 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. Following a conference call on March 26, the district court gave Petitioners until March 30 at 9:00 a.m. to respond, which Petitioners did. App.165-207.

On March 30, the district court entered a temporary restraining order against all Defenants. App.263-71. Pursuant to the order, Petitioners may not enforce the EO as applied to medical and surgical (what Plaintiffs call "procedural") abortions. App.271.

[17] For ease of reading, references to the EO include the Emergency Rule.

## 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);[18] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc). As explained below, the district court clearly and indisputably erred when it enjoined Petitioners from enforcing the EO against abortion providers and in exercising jurisdiction in the first place. Appeal is an inadequate remedy because temporary restraining orders cannot be appealed. And the deadly virus stalking our State does not wait for courts to act. Mandamus is appropriate in these circumstances.

### 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 in two distinct and significant ways that warrant the extraordinary remedy of mandamus.

First, the court ruled that abortion is, in essence, an absolute right that cannot ever be restricted, no matter how severe the public-health crisis facing the State. App. 267-68. The Supreme Court has never held that the right to previability abortion is absolute, and this Court has already recognized that public-health reasons can justify shutting down all clinics in a state. Petitioners undoubtedly have a compelling

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

interest in requiring that elective abortions be delayed until the COVID-19 crisis has passed, in order to preserve PPE and hospital beds and to prevent the further spread of the disease.

The district court also clearly and indisputably erred in exercising jurisdiction. Plaintiffs' claims against the Governor and Attorney General are barred by sovereign immunity and a lack of standing. Plaintiffs do not have standing to sue on behalf of their patients under 42 U.S.C. § 1983, and their conflict with their patients' health interests should prohibit third-party standing.

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

The Supreme Court's abortion precedent squarely permits regulation of abortion providers to promote health. *Roe v. Wade*, 410 U.S. 113, 163 (1973). And this Court has already stated that closing the only clinic in a State may well be constitutional, if a sufficient reason exists. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014). Given the compelling state interest in combatting COVID-19, and the temporary nature of the burden, the district court clearly erred in granting the TRO.

#### 1. Elective abortion is not an absolute right and may be curtailed due to a public-health emergency.

The States' reserved powers under the Tenth Amendment include the police power, which enables the State to act to protect public health, and the Supreme Court has "distinctly recognized the authority of a state to enact quarantine laws and health laws of every description." *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11,

25 (1905) (upholding Massachusetts law requiring mandatory vaccinations for smallpox). In the dire emergency we now face, a State's police powers and interest stand at their apex, and nothing in the Constitution protects an absolute right to an elective abortion on demand in the circumstances presented here. The district court failed to address any of this precedent.

**a. Longstanding precedent permits States to exercise its police power in an emergency to protect public health.**

The Supreme Court has held repeatedly that States may act to protect their citizens without violating the Constitution when they are faced with potential epidemics. *See id.* (upholding a mandatory vaccination program for small pox against a Fourteenth Amendment challenge); *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380 (1902) (upholding quarantine law against Commerce Clause and procedural due process challenges); *Rasmussen v. State of Id.*, 181 U.S. 198 (1901) (permitting a ban on certain animal imports if evidence of disease was found); *see also, e.g.*, *Benson v. Walker*, 274 F. 622 (4th Cir. 1921) (upholding board of health resolution that prevented carnivals and circuses from entering a certain county in response to the Spanish flu epidemic).

While the Constitution is not suspended during a national crisis, Supreme Court precedent allows States trying to protect public health to take action that may restrict personal liberty:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint,

> to be enforced by reasonable regulations, as the safety of the general public may demand.

*Jacobson*, 197 U.S. at 29; *see also Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704-05 (1897) (concerning property rights).

The court below has limited speedy-trial rights are also being limited during this pandemic.[19] U.S. Const. amend. VI. And the Ohio Supreme Court just rejected an effort to challenge the Ohio Department of Health's order postponing the State's March 17 primary election until June 2, 2020.[20] *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (stating that "any restrictions on [the right to vote] strike at the heart of representative government").

Substantive due process rights involving bodily or personal autonomy are no different. The "liberty secured" by the Fourteenth Amendment includes the right to '"live and work where [one] will,'" *Jacobson*, 197 U.S. at 29 (quoting *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)), but States may quarantine an individual to protect the public against the spread of disease, even if that individual is not sick himself. *See id.* States may also require mandatory vaccinations, notwithstanding the Fourteenth

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[19] Order Regarding Court Operations Under the Exigent Circumstances Created By the COVID-19 Pandemic, (W.D. Tex. Mar. 13, 2020), https://www.txwd.uscourts.gov/wp-content/uploads/2020/03/Order-Re-COVID-19.pdf.

[20] *See State ex rel. Speweik v. Wood Cty. Bd. of Elections*, No. 2020-0382, 2020 WL 1270759 (Ohio Mar. 17, 2020); J. Edward Moreno, *Ohio Supreme Court Denies Challenge to State Primary Delay* (The Hill Mar. 17, 2020), https://thehill.com/home-news/state-watch/487983-ohio-supreme-court-denies-challenge-to-state-primary-delay.

Amendment. *See Jacobson*, 197 U.S. at 27-38; *see also Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015) (rejecting a substantive due process challenge to New York's vaccination requirement for public-school children, relying on *Jacobson*, 197 U.S. 11).

**b. The *Casey* standard does not categorically exempt elective abortion from curtailment during a public-health crisis.**

Despite the curtailment of enumerated rights, Plaintiffs assert, and the district court concluded, that States may never infringe the non-enumerated right to previability abortion—not even in the midst of a public-health crisis caused by a global pandemic. App.56-59 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) and *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019)); App.267-68. But *Casey* did not insulate previability abortions from all incursions.

*Casey* drew a line at viability because "viability marks the earliest point *at which the State's interest in fetal life* is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Casey*, 505 U.S. at 860 (plurality op.) (emphasis added). After viability, the Court reasoned, the State's interests related to the fetus were strong enough to support restriction because "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* But the State's interest in this case is in *everyone's* life—especially those of doctors and nurses who will be most endangered

by a critical PPE shortage. *Casey*, and consequently *Dobbs*, are simply not applicable to a situation like this one, nor do they purport to be.[21]

This Court has recognized that where the State has compelling interests, such as public health, it may take action that has the effect of completely eliminating abortion in a State without running afoul of the Constitution. Addressing Mississippi's admitting-privileges law (which would have closed the sole clinic in Mississippi), this Court clarified that it was not a *per se* undue burden for the State to apply health standards to close that sole clinic, even if it had the effect of banning abortions in the State: "Nothing in this opinion should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis." *Jackson Women's Health Org.*, 760 F.3d at 458. If the operation of a clinic is a threat to the public or its patients, the State has the constitutional authority to shut it down. In that circumstance, as here, the compelling interest of protecting public health justifies the resulting temporary loss of abortion access.

Thus, this Court has recognized that extraordinary circumstances can justify eliminating all abortion clinics in a State. Of course, as explained below, the EO does not eliminate all clinics, but merely temporarily delays elective procedures until the public-health crisis has passed—a constitutionally permissible act to protect the public.

[21] The same is true of the cases cited by Plaintiffs enjoining previability abortion restrictions. App.57-58.

### 2. Compelling reasons, such as the lack of PPE and the spread of COVID-19, justify delaying elective abortions.

Elective abortions are subject to the EO under its plain text and for good reason. Performance of elective abortions (1) reduces the scarce supply of PPE available to healthcare providers treating COVID-19 patients, (2) results in hospitalizations of women, and (3) contributes to the spread of the COVID-19 virus. Faced with the public-health crisis caused by COVID-19, the EO is well within constitutional bounds.

#### a. Elective abortions are not "immediately medically necessary."

To the extent Plaintiffs argue that performing elective abortions complies with the EO, App.51-52, they are mistaken. Unless performed to preserve the life or health of the mother or because of a severe fetal anomaly, abortions are an elective procedure. App.230. And "elective abortions are never 'immediately medically necessary.'" App.236. Thus, under the plain text of the EO, abortion providers must delay all elective abortion procedures.

Plaintiffs assert that elective abortions are an "essential component of comprehensive care" and can be performed under the EO. App.52. But that is not the standard. Cancer treatments, heart surgeries, and diagnostic procedures are also "essential component[s] of care," but CMS has put out guidance recommending that these procedures be postponed.[22] Under the language of the EO, elective abortions are not

[22] CMS Adult Elective Surgery and Procedures Recommendations, https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf

"immediately necessary," nor do they "correct a serious medical condition." App.35, 230-31, 235-36. Thus, the EO unambiguously prohibits the performance of elective abortions, like other elective procedures, for a limited time.

**b. Elective abortions use scarce PPE and may reduce hospital capacity.**

Plaintiffs admit that they use PPE when performing surgical abortions, but claim they are trying to use less in light of the shortage. App.16-17. That is not sufficient. All PPE that is used for an unnecessary medical procedure like elective abortion is PPE that cannot be used by physicians, nurses, and staff treating COVID-19 patients.

Plaintiffs also admit that abortion complications sometimes require hospitalization or treatment at an emergency room. App.12. Planned Parenthood conceded during previous litigation that at least 210 women each year in Texas are hospitalized after seeking an abortion. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014). That is about four women every week. Even using the rate claimed by Plaintiffs for major complications, 0.23%, App.12, that is two women every week. App.222 (noting over 53,000 abortions in 2017). By taking up needed beds in the midst of this pandemic, abortion patients will further burden potentially overtaxed emergency departments during the COVID-19 crisis.

Medication abortions are not exempt—they, too, require the use of PPE and may require hospitalization. Physicians must examine a patient prior to prescribing any abortion-inducing drug and must schedule a follow-up appointment to ensure the abortion is complete. Tex. Health & Safety Code § 171.063(c), (e)-(f). These visits

consume PPE, especially with the possibility of asymptomatic COVID-19 carriers at the clinic. App.230.

Moreover, incomplete medication abortions are so common that the FDA requires providers to have the "ability to provide surgical intervention" and "access to medical facilities quipped to provide blood transfusions and resuscitation, if necessary."[23] Mifeprex, a common abortion-inducing drug, has an 8% incomplete abortion rate before 49 days (7 weeks) and a more than 15% incomplete abortion rate for gestations beyond that.[24] There is, thus, a significant chance that women given a medication abortion will need subsequent surgical intervention, requiring PPE, and in dire cases, hospitalization or a blood transfusion. Medication abortion risks impacting hospital resources just like surgical abortion and other outpatient elective procedures that may, but do not usually, result in hospital visits, and is also temporarily prohibited by the EO.

**c. Performing hundreds of elective abortions risks spreading COVID-19.**

Aside from impacting PPE supplies and hospital capacity, Plaintiffs may well contribute to the spread of the virus by continuing to perform non-medically necessary procedures. App.226. People infected with COVID-19 may infect others prior

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[23] Mifeprex REMS, https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2019_04_11_REMS_Document.pdf.

[24] 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.

to the onset of symptoms, and even N95 masks cannot completely eliminate the risk of contracting the virus. App.242. Plaintiffs, however, admit they do not wear N95 masks, so they are at increased risk of becoming infected themselves and spreading the virus. App.61. Moreover, as Plaintiffs state, women travel from other locations to receive abortions at their clinics, but traveling to other parts of the State is exactly what is causing the spread of the virus. *See* App.23-24; App.87 ("Some [patients] come from over a hundred miles to receive care at our clinic."); App.95 (patients "hail from all over Texas").

In 2017, there were 53,843 abortions performed in Texas, which averages to over 1,000 abortions per week. App.222. Such a high volume of people traveling "all over" the State and coming through medical facilities risks spreading the illness further. One asymptomatic healthcare worker could infect hundreds of women. Permitting physicians and clinics, including Plaintiffs, to perform non-medically necessary procedures is not worth the risk of spreading COVID-19 further and contributing to an out-of-control spike in the coming days or weeks.

**3. The EO is not an unconstitutional undue burden.**

Restrictions on previability abortions are subject to the undue-burden test. Under *Casey*, a law imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 878 (plurality op.). *Casey* made clear that "[n]ot 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." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

**a. The EO imposes a limited burden on women seeking elective abortions.**

The EO imposes only a temporary burden on abortion access. That the procedure will have to be delayed a few weeks for public health reasons does not amount to a total denial of that right. *See* Part I.A.1.b. *supra*; *see also Casey*, 505 U.S. at 886 (acknowledging mandatory waiting period may sometimes result in a delay of "much more than a day" but concluding that it was not an undue burden even if it increased costs and potential delays). And because the EO applies to *every* physician and *every* clinic in Texas, it is obviously not "designed to strike at the right itself." *Casey*, 505 U.S. at 874.

Indeed, many people across Texas will not be able to have a desired surgery for the next three weeks because of the grave threat of COVID-19. Physicians have been postponing surgeries for cancer patients, for patients with heavy bleeding that can be controlled temporarily with medication, for orthopedic procedures, bariatric surgeries, and tubal ligations. App.230-31, 235. All physicians at UT Southwestern Medical Center are restricted to performing surgery only in life-threatening cases in order to preserve hospital capacity and PPE for treating COVID-19 patients. App.235. Nationwide, stent procedures for clogged arteries, surgeries for breast, thyroid,

prostate, and kidney cancer, mammograms, and colonoscopies are being postponed because of the threat of COVID-19.[25]

The temporary burden on women seeking abortion is commensurate with—and exceeded in some cases—by the burdens being placed on many other Texans seeking other types of procedures during this unprecedented time. The State took emergency action to preserve limited medical resources in the next few weeks to prevent a complete breakdown of the healthcare system in Texas, and the action it took is consistent with recommendations by the Surgeon General and the American College of Surgeons.[26]

Despite arguing that abortion is one of the "safest medical procedures in the United States," App.12, Plaintiffs also claim that "a delay of several weeks or even days may increase the risks." App.23. But the only quantifiable evidence of that increase is a 0.16% major complication rate for first trimester abortions and 0.41% for second trimester abortions. App.129. Even if the EO pushed every abortion to the second trimester, a 0.25% larger chance of a major complication cannot justify

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[25] Marilynn Marchione, *Cancer, Heart Surgeries Delayed as Coronavirus Alters Care* (Associated Press Mar. 18, 2020), https://www.usnews.com/news/health-news/articles/2020-03-18/cancer-heart-surgeries-delayed-as-coronavirus-alters-care [https://perma.cc/2ZRC-FEE6].

[26] Vice Adm. Jerome M. Adams, M.D., *Surgeon General: Delay Elective Medical, Dental Procedures to Help Us Fight Coronavirus*, (USA Today Mar. 22, 2019), https://www.usatoday.com/story/opinion/2020/03/22/surgeon-general-fight-coronavirus-delay-elective-procedures-column/2894422001/; Am. College of Surgeons, *COVID-19: Elective Case Triage Guidelines for Surgical Care*, Mar. 24, 2020, https://www.facs.org/covid-19/clinical-guidance/elective-case.

exempting Plaintiffs from the limits imposed on everyone else, such as those of a cancer patient waiting for surgery, or a heart patient with a blockage waiting for a stent.[27] The costs or risks of other procedures may rise as a result of the delay—cancer may metastasize, tumors may grow, and heart conditions can worsen. But that alone does not invalidate a valid exercise of the State's police power to protect the public health. Plaintiffs have identified no substantial burdens that will result from delaying elective abortions in accordance with the EO.[28]

**b. The benefits of the EO are compelling.**

Enforcement of the EO has multiple compelling benefits—none of which were so much as mentioned by the district court. First, restricting contact between patients, medical staff, and physicians will help prevent the spread of COVID-19. Second, preventing much of Plaintiffs' use of PPE will help reduce the scarcity of PPE for healthcare workers on the frontlines caring for COVID-19 patients. Third, delaying elective abortions will preserve hospital capacity for COVID-19 patients, rather than those suffering complications from elective abortion.

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[27] Plaintiffs claim that the risk of dying in childbirth is fourteen times higher than from having an abortion. App.13. But "this statement is unsupported by the literature and there is no credible scientific basis to support it." Byron Calhoun, *The Maternal Mortality Myth in the Context of Legalized Abortion*, Linacre Q. 2013 Aug. 80(3): 264-276, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6027002/.

[28] If any woman will be unable to have an abortion after the EO expires because of Texas's gestational limit on abortion, *see* Tex. Health & Safety Code § 171.044, she may seek as-applied relief. It is unlikely there are many such women, as only 3% of abortions in Texas occur after 17 weeks LMP. App.222.

The Court should reject any claim that Plaintiffs will not have a significant impact on the prevention and treatment of COVID-19. If the healthcare system is stretched to its breaking point, even a few hospital beds or additional PPE become the difference between life and death. To cite an earlier example, a mere 14 masks separates Anson General Hospital from either being able to protect its healthcare workers, or for those workers to risk transmission and further spread of the disease.[29] The CDC has even told healthcare workers that they can use bandanas if nothing else is available.[30] The public is donating homemade masks to healthcare workers,[31] and Texas enlisted the help of inmates at Gatesville Correctional Facility to make cotton masks for the same reason.[32] Texas has at best days or weeks before a surge in Texas COVID-19 cases. It is critical for everyone to do their part now to prepare, if Texas hopes to avoid situations like those found in Italy, New York City, and New Orleans.

As the Supreme Court stated in *Roe*, the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under

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[29] Platoff, *supra* note 14.

[30] Centers for Disease Control and Prevention, *Strategies for Optimizing the Supply of Facemasks*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html.

[31] David Enrich, Rachel Abrams, and Steven Kurutz, *A Sewing Army, Making Masks for America*, (N.Y. Times, Mar. 25, 2020), https://www.nytimes.com/2020/03/25/business/coronavirus-masks-sewers.html.

[32] Deanna Hackney and Eric Levenson, *Texas Turns To Prison Labor to Help Cover Face Mask Shortages*, https://www.cnn.com/2020/03/22/us/texas-coronavirus-mask-trnd/index.html.

circumstances that insure maximum safety for the patient." 410 U.S. at 150. During this public health crisis, "maximum safety" for patients—and medical staff—is to minimize contact with others, especially in view of PPE shortage. If Plaintiffs continue performing elective abortions, they will create continued close contact and encourage traveling, which will further spread the virus. App.227, 242.

* * *

The district court read *Casey* to create an inviolable right to a previability abortion that cannot be inconvenienced under even the most compelling public emergency imaginable. But *Casey* did no such thing. The Supreme Court has recognized limitations on other rights in the face of a dire emergency, when the State's police power is at its zenith. The district court's refusal to apply such limitations here was clear error. And that error not only creates an absolute right to an elective abortion on demand regardless of circumstances, but it endangers all Texans generally and healthcare providers specifically during the worst pandemic of our lifetimes.

### 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)).

This Court recently held, in the course of assessing a mandamus petition, that "[a] district court's obligation to consider a challenge to its jurisdiction is non-

discretionary." *In re Gee*, 941 F.3d at 159. That is because federal "courts are not roving commissions as-signed to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). They must decide a law's validity only within a case or controversy. *See In re Gee*, 941 F.3d at 161; *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 546 (5th Cir. 2019). And that requires subject-matter jurisdiction. *See In re Gee*, 941 F.3d at 161.

Petitioners here 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. Yet the district court proceeded regardless. It did not offer so much as a word of analysis of its own jurisdiction before acting. That was clear and indisputable error. *See In re Gee*, 941 F.3d at 161. Mandamus should issue.

**1. Plaintiffs' claims against the Governor and the Attorney General are independently barred by sovereign immunity and Plaintiffs' lack of standing.**

Even if Plaintiffs had standing generally, *but see infra* Part I.B.2, their claims against the Governor and Attorney General are independently barred. Sovereign immunity bars these claims because the Governor and Attorney General lack authority to enforce the EO. Absent enforcement authority, Plaintiffs cannot invoke the *Ex parte Young* exception to sovereign immunity. Similarly, Plaintiffs lack Article III standing because, as to the Governor and Attorney General, they have shown neither an injury in fact nor redressability. The district court's sole attempt to address these

issues was to conclude that the Attorney General's opinion "carries great weight" with those who enforce the law. App.268.

**a. The *Ex parte Young* doctrine does not allow suit against the Governor and Attorney General, who do not have independent authority to enforce the EO.**

Plaintiffs' claims against the Governor and the Attorney General are barred by sovereign immunity because these defendants do not enforce the EO. The State's sovereign immunity generally bars suits against state officers in their official capacities. The Supreme Court has carved out a narrow exception, the *Ex parte Young* doctrine, for cases where "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

But *Ex parte Young* allows suit only when the defendant enforces the challenged statute. *See Ex parte Young*, 209 U.S. 123, 157 (1908); *see also Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). That is because, absent such a connection, the plaintiff has simply "ma[de] [the official] a party as a representative of the state," and such a suit is barred by the State's sovereign immunity. *Ex parte Young*, 209 U.S. at 157.

Plaintiffs do not allege the Governor has authority to prosecute or bring enforcement actions based on the EO. *See* App.7. And the district court explicitly recognized that "the attorney general is not the enforcer of [the EO's] penalties." App.268.[33]

[33] While the Attorney General has statutory authority to "assist" with criminal prosecutions, he can do so only "[a]t the request of a district attorney, criminal district attorney, or county attorney." Tex. Gov't Code § 402.028(a); *see* App.8. Plaintiffs do not allege any of the District Attorney Defendants is likely to seek such

That should have been the end of the matter. *See City of Austin*, 943 F.3d at 998 ("Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends.").

Any prosecution based on the EO would be brought by local officials, and any administrative enforcement action would be initiated by HHSC, the TMB, or the TBN. Because Plaintiffs' claims against the Governor and Attorney General are premised on making them parties purely as "representative[s] of the state," *Ex parte Young*, 209 U.S. at 157, those claims are barred by sovereign immunity and must be dismissed.

**b. Plaintiffs have not alleged injury in fact *or* redressability as to the Governor and Attorney General.**

For essentially the same reasons, Plaintiffs lack standing to sue the Governor and Attorney General (even if they had standing to sue the other defendants). *See City of Austin v. Paxton*, 943 F.3d 993, 1002-03 (5th Cir. 2019) (discussing the relationship between *Ex parte Young*'s requirements and Article III standing).

Because there is no likelihood that the Governor or Attorney General will take enforcement action, Plaintiffs' asserted injuries are not "fairly traceable to the challenged action of the defendant," and they lack standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation and alterations omitted). As to the Attorney General's ability to "assist" with criminal prosecutions, *see supra* n.33, injury that

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assistance, much less that such a request is imminent. As this Court recently explained, it must be "likely"—not just possible—that the official will act to enforce the law. *See City of Austin v. Paxton*, 943 F.3d 993, 1002-03 (5th Cir. 2019).

relies on such an "attenuated chain of inferences" does not suffice. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013).

Further, a plaintiff must also show it is "likely," as opposed to merely "speculative," that the claimed injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). That redressability requirement is missing here. Plaintiffs seek an order enjoining the Governor and the Attorney General from "enforc[ing] the Executive Order and Emergency Rule, as interpreted by Defendants, to prohibit abortions." App.67. That order would not redress anything. Plaintiffs do not have Article III standing to sue the Governor or the Attorney General.

**2. Abortion providers—like Plaintiffs—lack third-party standing to challenge the EO.**

To have standing in a typical lawsuit, a litigant must assert his own rights, not those of a third party. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). But Plaintiffs do not assert their own injury; instead, they assert the rights of unnamed patients.[34]

Plaintiffs bring this suit "under 42 U.S.C. § 1983," App.3, but section 1983 provides a cause of action only when *the plaintiff* suffers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It does not provide a cause of action to plaintiffs claiming an injury based on the violation of a third party's rights. *See Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) ("[Plaintiffs] [a]re required to prove some violation of their personal rights.").

[34] *See* App.22, 24-25 (alleging claims based on "patients' fundamental right to abortion").

Section 1983 "incorporates . . . the Court's 'prudential' principle that the plaintiff may not assert the rights of third parties." David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 (1981).

When "[t]he alleged rights at issue" belong to a third party, rather than the plaintiff, the plaintiff lacks statutory standing, regardless of whether the plaintiff has suffered his own injury. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999) (holding that a lawyer "clearly had no standing" to bring a § 1983 claim based on a violation of his client's rights). Plaintiffs cannot assert a third party's constitutional rights under section 1983, and they have no federal right to perform abortions—that is why they have relied on their patients' rights. Thus, they lack standing.

And even if section 1983 did not prohibit Plaintiffs from relying on the rights of third parties, the Supreme Court's doctrine of prudential standing would. Under that doctrine, a litigant may assert a third party's rights only when (1) the litigant has a "close" relationship with the third party; and (2) some "hindrance" affects the third party's ability to protect her own interests. *Kowalski*, 543 U.S. at 130. Neither requirement is met here, as Plaintiffs are suing on behalf of hypothetical patients, *see id.* at 131; there is a conflict between their economic interests and their patients' (and the public's) safety, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004); and there is no hindrance to Plaintiffs' patients bringing their own suit, *see, e.g., Doe v. Parson*, 368 F. Supp. 3d 1345 (E.D. Mo. 2019).

Neither this Circuit nor the Supreme Court has ever allowed third-party standing under circumstances like these—in which an abortion provider was seeking,

contrary to its patients' and the public's interests, to avoid public-health measures (which would otherwise protect their patients and the public) in the midst of a public-health crisis.[35]

Plaintiffs' belated submission of an affidavit from a Jane Doe who, in fact, aborted her pregnancy does not change this calculus. App.255-61. There is no evidence that Jane Doe could not have obtained an abortion after the expiration of the EO, given that she was early in her pregnancy. Instead, the affidavit demonstrates that women are able to be heard in court (with multiple attorneys on their side) and do not need abortion providers to speak for them.

Defendants briefed this issue in district court. But rather than assuring itself of its jurisdiction, the district court ignored any standing objection. That was clear error. *In re Gee*, 941 F.3d at 157.

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

**A.** 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); *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

[35] This Court in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* recognized that a doctor's interests could conflict with his patients' interests, barring third-party standing. 748 F.3d at 589 n.9. And *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981), concerned a zoning decision, not a public-health crisis.

mandamus is an appropriate tool to obtain relief from a temporary restraining order. *See 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 explained above, this issue is extraordinarily time sensitive, with each day presenting new challenges to Texas's healthcare providers. Waiting to appeal a potential temporary injunction in fourteen or twenty-eight days will come with significant public-health costs.

**B.** Mandamus is appropriate in these circumstances. Defeating the COVID-19 virus requires the cooperation of *everyone*. And time is of the essence. The longer Plaintiffs are allowed to perform elective procedures—consuming scarce PPE, increasing hospitalizations, and potentially spreading the virus to countless individuals—the longer it will take to flatten the curve in Texas, meaning more illnesses, more hospitalizations, and more deaths. Plaintiffs are not exempt from public-health measures that apply to everyone else. 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 March 30, 2020.

Respectfully submitted.

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## Certificate of Service

On March 30, 2020, this petition was served via e-mail on counsel for Plaintiffs 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 7783 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
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