No. 20-50314

In the United States Court of Appeals for the Fifth Circuit

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, P.A., doing business as Brookside Women's Health Center and Austin's Women's Health Center; ROBIN WALLACE, M.D., M.A.S.,

Plaintiffs-Appellees,

v.

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 the Executive Director of the Texas Board of Nursing,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

APPELLANTS' OPPOSED EMERGENCY MOTION TO STAY PENDING APPEAL AND, ALTERNATIVELY, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF THIS MOTION

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Certificate of Interested Persons

No. 20-50314

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, P.A., doing business as Brookside Women's Health Center and Austin's Women's Health Center; Robin Wallace, M.D., M.A.S.,

Plaintiffs-Appellees,

v.

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 the Executive Director of the Texas Board of Nursing,

Defendants-Appellants.

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

/s/ Kyle D. Hawkins
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Introduction and Nature of Emergency

Late yesterday, the district court transformed its April 9 temporary restraining order into a preliminary injunction. It did so by issuing a new order that (1) extends the April 9 order by 12 days, (2) without giving Appellants a chance to weigh in, (3) while violating Rule 65's letter and spirit, (4) in a way that could otherwise preclude any opportunity to appeal. *See Smith v. Grady*, 411 F.2d 181, 186 (5th Cir. 1969). The newly created preliminary injunction is manifestly unlawful for all the reasons this Court declared the district court's previous actions unlawful. This Court should enter a stay pending appeal and reverse.

Because every day is valuable in combatting this virus, it would be impracticable for Appellants to first seek a stay from the district court. *See* Fed. R. App. P. 8(a)(2)(a)(i). Appellants request that the Court grant this motion **as soon as possible** so that the State may continue to protect its front-line healthcare workers and prevent further spread of the COVID-19 public-health emergency. In the alternative, Appellants request a temporary administrative stay to allow this Court sufficient time to consider Appellants' emergency motion for stay.

Background

I. COVID-19 Continues To Threaten Texas.

The confirmed cases of COVID-19, hospitalizations, and deaths increase by the day. As of April 15, the virus has infected over 2 million people around the world and

killed almost 130,000.[1] There are currently over 610,000 cases in the United States.[2] Also as of April 15, there were over 15,000 confirmed cases in Texas, over 1500 hospitalizations, and 364 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 its peak hospital use on April 29.[5] That makes the coming days critical to ensuring that Texas's healthcare system is ready for the worst.

The Governor issued Executive Order GA-09 on March 22 to prepare for the influx of COVID-19 patients. App.34-35. GA-09 finds 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 finds that

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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*, 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.

> 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. Further, GA-09 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).[6]

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.

App.35. GA-09 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. It is effective until April 21, 2020. App.35.

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

Medication abortion involves taking two medications 24-48 hours apart that end the pregnancy and expel the fetus. App.129-30. Texas law requires that (1) the

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

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).

Under Texas law, abortion providers must comply with the FDA label when prescribing abortion-inducing drugs. *Id.* § 171.062(a)(2). Currently, the FDA label for mifepristone (the most common abortion-inducing drug) permits its use for up to ten weeks' gestation.[7] It also warns of frequent adverse reactions such as nausea, weakness, fever/chills, vomiting, headache, diarrhea, and dizziness.[8] Further, approximately 8% and up to 15% of medication abortions may require surgical intervention, that is, a surgical abortion, because the abortion was not completed.[9]

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 hospitalization.[10] 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

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

[8] *Id.* at 7.

[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 8, *supra* note 7.

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.

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

A. Appellees, 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 related Emergency Rule adopted by the Texas Medical Board. App.2-27.

Appellees also filed a motion for a temporary restraining order or preliminary injunction, pressing only the substantive-due-process claim. App.40-70. The district court gave Appellants until March 30 at 9:00 a.m. to respond, which Appellants did. App.165-207. On March 30, the district court entered its first temporary restraining order. App.263-71. Pursuant to the TRO, Appellants were enjoined from enforcing GA-09 as applied to medical and surgical (what Appellees call "procedural") abortions. App.271.

B. The same day the TRO was issued, Appellees filed a petition for writ of mandamus with this Court and requested an emergency stay. On March 31, the Court issued an administrative stay of the TRO and expedited briefing. Minutes before their mandamus response was due, Appellees filed nine additional declarations in the district court and relied 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, Appellees squarely put this evidence before this Court.

On April 7, the Court, in a 2-1 decision, granted mandamus relief and denied the motion to stay as moot. *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *16 (5th Cir. Apr. 7, 2020). The majority identified three main errors of the district court that warranted mandamus relief:

1. The district court failed to apply the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), 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 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to Appellees' 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.

The Court then performed the proper analysis itself, concluding that, "based on this record," there was a real and substantial relation between GA-09 and Texas's public-health crisis and that Appellees had not shown beyond all question that GA-09 constituted an undue burden on abortion. *Id.* at *8-12. 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 also noted that the district court was planning to have a hearing on the preliminary injunction on April 13 and that evidence could permit the district court make specific findings about abortion access in particular circumstances. *Id.* at *2, 13. But the Court emphasized that the necessary analysis would require a "careful parsing of the evidence." *Id.* at *11.

IV. The District Court Granted A Second TRO.

On remand, Appellees moved for a second temporary restraining order, attaching only a single additional declaration in support of their request—a declaration from an abortion-hotline coordinator who assists women in paying for abortions. App.420-44. That declaration contains hearsay evidence that a handful of women close to the gestational limit are receiving abortions in other States and that one woman is "worrie[d]" about traveling to Houston for her abortion that was scheduled before GA-09 was issued. App. 443.

On the strength of that declaration, Appellees sought three forms of relief: an injunction against enforcement of GA-09 as applied to (1) all medication abortions, (2) any woman who would be past Texas's gestational limit for abortions (twenty-two weeks' LMP) by April 21, and (3) any woman whose pregnancy would reach eighteen weeks' LMP prior to April 21 if she would be unable to obtain an abortion at an ambulatory surgical center (ASC) prior to the twenty-two week limit.[11] App.435.

On April 9, the district court held a conference call with the parties, during which Appellants requested the opportunity to file a written brief in response to this latest TRO application. App.481-88. But the district court denied Appellants that opportunity and ended the call without permitting Appellants to present oral argument. App.481-88. It entered its second TRO less than two hours after the hearing concluded.

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

The second TRO (1) incorporated the erroneous conclusions of law from the court's first TRO, App.475; (2) offered only a single, passing reference to *Jacobson* and *Casey*, App.476; (3) contained no discussion of the State's interest in fighting COVID-19, as required under *Jacobson*, App.466-68; (4) contained 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); (5) accepted everything Appellees said as true, without even citing Appellants' evidence from the first TRO, App.468-75; and (6) ignored the Court's admonition to consider whether the Governor and Attorney General have a "connection" to enforcement by simply asserting that they did, App.475-76.

Appellants filed a second petition for mandamus with the Court. *In re Abbott*, No. 20-50296 (5th Cir.). That mandamus petition remains pending and ripe for adjudication.[12]

V. The District Court Extended The Second TRO Until May 1, Effectively Granting a Preliminary Injunction.

On April 14, the district court entered an order (1) extending its second temporary restraining order until May 1 "under its same terms and conditions except as MODIFIED by the orders of the United States Court of Appeals for the Fifth Circuit rendered April 10, 2020, and April 13, 2020"; and (2) setting the preliminary-injunction hearing for April 29. App.491-94. For the reasons described below, this

[12] The Court should not resolve the pending mandamus petition until it first grants this stay pending appeal and assures itself of its appellate jurisdiction under section 1292(a)(1).

order transforms the second TRO into a preliminary injunction. Appellants filed a notice of appeal under 28 U.S.C. § 1292(a)(1). App.496-99.

ARGUMENT

A stay is warranted because Appellants satisfy all four factors: (1) likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to other parties, and (4) the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

I. The April 9 And 14 Orders Are Effectively A Preliminary Injunction.

This Court has long recognized that an order labeled a "temporary restraining order" may nevertheless be in "actual content, purport, and effect" a preliminary injunction subject to immediate appeal. *Smith v. Gandy*, 411 F.2d 181,186 (5th Cir. 1969), 411 F.2d at 186; *see also Connell v. Dulien Steel Prods*, 240 F.2d 414, 417-18 (5th Cir. 1957) (TRO orders that do not comply with Rule 65 may be appealed as preliminary injunctions). Those decisions comport with the Supreme Court's observation in *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974), that district courts may not "shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions." To hold otherwise would grant the district court "virtually unlimited authority over the parties in an injunctive proceeding." *Id.*; *see also* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2953 (3d ed.) (courts agree that converting TROs to preliminary injunctions is appropriate under circumstances this Court has described).

The district court's April 14 extension makes the "actual content, purport, and effect" of the April 9 order a preliminary injunction in multiple ways:

First, because the April 14 order extends the April 9 order past GA-09's stated expiration date, it purports to foreclose any appeal. GA-09 states that it will expire on April 21. The day after GA-09 expires, any operative TRO will become moot, and Appellants will never be able to vindicate their rights through ordinary appeal. The better approach is to conclude that the April 9 and April 14 orders together impose a preliminary injunction subject to immediate appeal under section 1292(a)(1) and stay pending appeal under Rule 8.

Second, the district court did not comply with Rule 65's requirements. Under Rule 65(b)(2), any TRO must be limited to 14 days. While the TRO entered April 9 purported to expire after 10 days, the April 14 order extended it 12 days, through May 1. But under Rule 65, extensions can be granted only "for good cause" and then only when "the reasons for the extension" are "entered into the record."

Here, the district court did not have good cause to extend the April 9 order. It has had ample time for an adversarial hearing in which both sides are permitted to present evidence and substantive argument. It had scheduled such a hearing for April 13, yet canceled it. It has ignored this Court's directive to carefully parse both sides' evidence. Under those circumstances, there is no cause for a 12-day extension.

Moreover, while Rule 65 requires the district court to enter "the reasons for the extension" in its order, the district court did not do so. The district court offered no reasons other than a desire to give "the court and parties have adequate time to prepare for" a hearing at the end of the month. But Appellants have already made it

clear on multiple occasions that they are happy to present briefing and evidence on the Appellees' second TRO application at any time.

Third, the district court's seriatim orders together comprise an impermissibly overlong TRO. The initial TRO purported to last 10 days. Rule 65 permits one extension of "a like period," that is, an additional 10 days. The district court opted instead for a 12-day extension. If left intact, that extension would mean that the district court has issued a nearly unbroken chain of TROs lasting from March 30, 2020, through May 1, 2020. That 32-day period is several days more than the 28-day maximum Rule 65(b) contemplates. The fact that the district court vacated its first TRO is immaterial; it has had ample time to hear from Appellants, yet refused to do so, preferring instead to impose one TRO after another without Appellants' input.

Fourth, this Court's reasoning in *Connell* confirms that the district court's actions amount to a preliminary injunction, not a TRO. *Connell* explained why TROs generally are not appealable:

> (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal (which accounts for the paucity of cases on this point), and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts.

240 F.2d at 418. That reasoning suggests this Court should treat the April 9 and April 14 orders as a preliminary injunction. Far from lasting a "very brief period[] of time," *id.*, these orders span over three weeks, and enjoin Appellants more than a month

when considered alongside the March 30 TRO. Moreover, the district court has had "opportunity to hear," *id.*, from Appellants, yet it has refused to do so. Indeed, the district court has had "ample opportunity" to carefully parse a full record, yet has chosen instead to delay that obligation while stringing together a series of temporary restraining orders in the meantime. The district court's second TRO and extension, therefore, operate as a preliminary injunction, and interlocutory appeal is appropriate.

II. Appellants Are Likely To Prevail On Appeal.

Appellants are likely to prevail on their appeal, as the district court erred by disregarding this Court's previous directive when it failed to consider Texas's authority to and interest in addressing public-health emergencies as it deems best. Instead, the court, again, substituted its judgment for that of Texas's officials. The district court also wrongly exercised jurisdiction over the Governor and Attorney General and allowed Appellees to assert the rights of third parties.

A. The district court ignored this Court's mandate.

In its ruling on Appellants' first mandamus request, the Court set forth the constitutional test from *Jacobson* that applies here:

> 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. There have been no significant additions to the factual record since then that would permit the district court to enter what is effectively a preliminary injunction.

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 fight against COVID-19. In its previous mandamus opinion, the Court determined that "[t]he answer is obvious": GA-09 is a valid emergency response to the COVID-19 pandemic. *Id.* at *8. Nothing Appellees have offered since then has changed that analysis. Neither the district court's second TRO nor the extension of that TRO even mention it.

GA-09's findings, therefore, remain unchallenged. And, 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 does not "beyond all question" present an undue-burden.

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. Again, nothing in Appellees' new submissions alters what was already presented to the Court in the first mandamus proceeding. And while the district court's second TRO uses the phrase "beyond question" when concluding that GA-09's benefits outweigh its burdens in some cases, App.476, it does not discuss GA-09's benefits as required under *Casey* and *Hellerstedt*.

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.). 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. Consideration of GA-09's benefits is essential when gauging the constitutionality of Texas's actions. The district court's failure to do so violates *Jacobson*, *Casey*, and *Hellerstedt*, as well as this Court's instructions on remand.

a. Medication abortions

As an initial matter, for the reasons described above, a medication abortion is a "procedure" covered by GA-09, because it is a multi-day process designed to end a pregnancy and expel the fetus. *See supra* pp.3-4. To the extent the district court enjoined Texas officials based on the court's conclusion that medication abortion is not a "procedure," App.469, it erred by ordering state officials to comply with state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 124-25 (1981). Further, even if the term "procedure" were ambiguous as to medication abortion, the Supreme Court has long and consistently held that district courts must abstain from deciding cases where a state-law question would "avoid or significantly modify" the federal analysis. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972); *see R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941).

As to the merits, Appellees presented no new evidence of any burden caused by delaying medication abortions, as Appellees' only new declaration mentions medication abortion once. App.441. As a result, the Court's ruling in *In re Abbott* should not change. 2020 WL 1685929, at *11 & n.24 (finding 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, rather than their preferred medication abortion, is not an undue burden. *See Gonzales v. Carhart*, 550 U.S. 124, 163-65 (2007). Moreover, women eligible for medication abortion must be less than ten weeks' gestation, giving them many weeks to obtain an abortion once GA-09 expires.

The benefits remain significant—and were not considered by the district court. Based solely on Appellees' evidence, 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 Appellants an opportunity to respond, the district court did not consider that medication abortion results in *more* visits to the ER and *more* hospital admissions than surgical abortion. *See supra* pp.3-5.

Appellees have not shown "beyond all question" that their constitutional rights have been violated by the delay of medication abortions, and the district court's failure to again conduct the proper analysis is likely to lead to reversal.

b. Gestational-limit abortions

The district court also erred by enjoining Appellants from enforcing GA-09 as to women who are approaching either eighteen or twenty-two-weeks' gestation. App.478. Appellees have not offered any "competent" evidence of particular women in need of injunctive relief. *In re Abbott*, 2020 WL 1685929, at *11-12. The new declaration contains only hearsay that women near the twenty-two-week

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.

More fundamentally, the Supreme Court has held that "the independent existence" of a "second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Casey*, 505 U.S. at 870 (plurality op.); *see also Roe v. Wade*, 410 U.S. 113, 163-64 (1973). That holding controls here: Even if GA-09's delay works to "proscribe" abortion altogether in a small subset of women, the State may indeed do so to protect its legitimate interest in the lives of the front-line healthcare workers. *See* Mandamus Reply 9-10.

By failing to correctly apply *Jacobson* and *Casey*, the district court has, once again, "usurped the State's authority to craft emergency health measures." 2020 WL 1685929, at *1. Appellants are likely to prevail.

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

The Court's mandate as to the previous TRO has already issued, so the district court's failure to heed this Court's instructions violates the mandate rule and 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 erroneous and further grounds for reversal.

B. The district court exceeded its jurisdiction.

1. This Court recently held that "[a] district court's obligation to consider a challenge to its jurisdiction is non-discretionary." *In re Gee*, 941 F.3d 153, 159 (5th Cir. 2019) (per curiam). As explained to the district court, Appellees' claims against the Governor and Attorney General are barred by sovereign immunity and lack of standing, as neither official has authority to enforce GA-09 or related Emergency Rule. In its second TRO, the district merely asserts that they have "some connection," based only on the Governor's authority to issue executive orders (Tex. Gov't Code § 418.012) and the Attorney General's authority to assist local prosecutors upon request (Tex. Gov't Code § 402.028(a)). App.475-76. Neither argument suffices.

The State's sovereign immunity generally bars suits against state officers in their official capacities except when "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 City of Austin v. Paxton*, 943 F.3d 993, 998-99 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). Appellees do not allege the Governor has authority to prosecute or bring enforcement actions based on GA-09. *See* App.7. And

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). But the district court find that any District Attorney would make such a request. Because Appellees' 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.

For essentially the same reasons, Appellees lack standing to sue the Governor and Attorney General. *See City of Austin*, 943 F.3d at 1002-03 (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, Appellees' 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). Because neither the Governor nor the Attorney General enforces GA-09 or Emergency Rule, Appellees' alleged injuries are not redressable against them. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). district court, therefore, erred in enjoining the Governor and Attorney General and its injunction is likely to be reversed.

2. Appellees also lack third-party standing. 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 v. Tesmer*, 543 U.S. 125, 130 (2004). Neither requirement is met here, as Appellees 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 Appellees' patients bringing their own suit, *see, e.g., Doe v. Parson*, 368 F. Supp. 3d 1345 (E.D. Mo. 2019).

III. The State Will Suffer Irreparable Harm If the Injunction Is Not Stayed Pending Appeal.

As detailed in the Court's prior opinion, Texas has a significant interest in preserving the health, welfare, and safety of its citizens, and GA-09 is a measure designed to do just that. *In re Abbott*, 2020 WL 1685929, at *8-9. The harm caused by allowing certain elective abortions to go forward—potentially using up PPE and hospital beds while further spreading the disease—cannot be remedied.

A State suffers an "institutional injury" from the "inversion of . . . federalism principles . . . ." *Tex. v. U.S. Envt'l Protection Agency*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam). Texas must be allowed to take the measures necessary to protect its citizens.

IV. The Remaining Stay Factors Favor Appellants.

A. A stay will not injure Appellees. The named Appellees—abortion clinics and a physician—have not identified any injuries that they will suffer absent the TRO. Instead, the only alleged injuries are those suffered by their patients, none of whom have filed suit. As explained above, the burdens of GA-09 have not been proven by Appellees. And as this Court noted, "nothing prevents [a woman] from

seeking as-applied relief" if circumstances warrant. *In re Abbott*, 2020 WL 1685929 at 11.

B. A stay is in the public interest. When, as here, the State seeks a stay pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). There can be no question that stopping the spread of COVID-19, ensuring healthcare workers have sufficient PPE, and leaving open as many hospital beds as possible is in the public's interest at this time.

Conclusion

The Court should stay the district court's preliminary injunction pending review and resolution of Appellant's interlocutory appeal. In the alternative, the Court should enter a temporary administrative stay while it considers this motion. Appellants request a ruling on the motion to stay as soon as possible, but in any event, no later than Thursday, April 16, 2020. As indicated in the Court's first mandamus opinion, all appellate proceedings are to be expedited.

Respectfully submitted.

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Certificate of Conference

On April 15, 2020, Heather Hacker, counsel for Appellants conferred by e-mail with Julie Murray, counsel for Appellees, who stated that Appellees will oppose the relief requested in this motion and intend to file a response.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance with Rule 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellants contacted the clerk's office and opposing counsel to advise them of Appellants' intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible, or alternatively, Appellants request a temporary administrative stay pending that review at the earliest possible date.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On April 15, 2020, this motion was served via e-mail on all counsel and transmitted to the Clerk of the Court. 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 motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5184 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Kyle D. Hawkins
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