No. _____

In the Supreme Court of the United States

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al.*,
Petitioners,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Governor of Texas, in reliance on the COVID-19 pandemic, issued an executive order that banned nearly all abortions in Texas for at least a month, and potentially far longer. A federal district court twice entered temporary restraining orders against the executive order as applied to certain previability abortion care. In so doing, it found that the executive order did not serve the state's asserted goals of preserving personal protective equipment or hospital capacity and that petitioners were likely to prevail on their claim that the order imposed an undue burden on their patients' constitutional right to obtain an abortion. Despite those well-supported findings, a divided panel of the U.S. Court of Appeals for the Fifth Circuit twice intervened in just over two weeks' time, granting two writs of mandamus to dissolve the TROs.

The day after the Fifth Circuit entered its second mandamus order, and before petitioners could seek this Court's review, the Governor replaced the challenged executive order with a new one that permitted Texas abortion providers to resume services. At that time, petitioners' claims for injunctive relief became moot.

The question presented is whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgments granting writs of mandamus.

PARTIES TO THE PROCEEDING

Petitioners are Planned Parenthood Center for Choice, Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood South Texas Surgical Center, Whole Woman's Health, Whole Woman's Health Alliance, Southwestern Women's Surgery Center, Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, and Robin Wallace, M.D. They were plaintiffs in the district court and plaintiffs-respondents in the court of appeals.

Respondents are Greg Abbott, Governor of Texas; Ken Paxton, Attorney General of Texas; Phil Wilson, Acting Executive Commissioner of the Texas Health and Human Services Commission; Stephen Brint Carlton, Executive Director of the Texas Medical Board; and Katherine A. Thomas, Executive Director of the Texas Board of Nursing, in their official capacities. Respondents were defendants in the district court and defendants-petitioners in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners Planned Parenthood Center for Choice, Planned Parenthood of Greater Texas Surgical Health Services, Whole Woman's Health Alliance, Southwestern Women's Surgery Center, and Brookside Women's Medical Services PA d/b/a Brookside Women's Health Center and Austin Women's Health Center have no parent corporations, and no publicly held corporation holds 10% or more of their shares.

Petitioner Planned Parenthood South Texas Surgical Center is a subsidiary of Planned Parenthood South Texas. No publicly held corporation holds 10% or more of shares in either organization.

Petitioner Whole Woman's Health is the doing-business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC, and Whole Woman's Health of Fort Worth, LLC. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

/s/ *Julie A. Murray*
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STATEMENT OF RELATED PROCEEDINGS

U.S. Supreme Court:

Planned Parenthood Ctr. for Choice v. Abbott, No. 19A1019 (U.S. filed Apr. 11, 2020)

U.S. Court of Appeals for the Fifth Circuit:

In re Abbott, No. 20-50264 (5th Cir. Apr. 7, 2020) (granting first writ of mandamus)

In re Abbott, No. 20-50296 (5th Cir. Apr. 20, 2020) (granting second writ of mandamus)

Sw. Women's Surgery Ctr. v. Abbott, No. 20-50314 (5th Cir. Apr. 20, 2020) (dismissing direct appeal from temporary restraining order)

U.S. District Court for the Western District of Texas:

Planned Parenthood Ctr. for Choice v. Abbott, No. 1:20-cv-00323-LY (W.D. Tex. filed Mar. 25, 2020)

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INTRODUCTION

After a Texas executive order related to the COVID-19 pandemic banned nearly all abortions this past spring, many patients were forced to travel hundreds of miles across state lines to obtain care—despite the pandemic—and others remained pregnant against their will for a month, or even longer. The order imposed significant health, financial, and emotional costs on patients, and in some cases precluded them from having an abortion in Texas altogether.

As the district court in this case found, the executive order that created these burdens did not, as applied to abortion, serve its stated purpose of preserving personal protective equipment for medical providers or hospital space for COVID-19 patients. The order in fact did just the opposite. And far from operating as a generally applicable restriction on non-time-sensitive surgeries and procedures during the pandemic, the executive order effectively treated abortion care, including abortion by medication, unlike comparable time-sensitive medical services.

However, a divided panel of the Fifth Circuit twice issued the extraordinary relief of a writ of mandamus to keep the ban on abortion in place in full or in part. In so doing, it disturbed the district court's well-supported factual findings and dismissed a half century of Supreme Court precedent regarding the right to end a pregnancy. The panel held that courts evaluating the constitutionality of restrictions on *any* individual rights, including the right to abortion, must apply *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), a case both inapplicable here

and—on its own terms—at odds with the Fifth Circuit's purported application of its standard.

Despite the Fifth Circuit's disregard in its mandamus decisions for controlling precedent, it is now impossible for petitioners to seek this Court's review of those decisions. Just one day after the Fifth Circuit's second decision, and two weeks after the first, respondent Governor Greg Abbott replaced the challenged executive order with a separate order permitting abortion services to resume. Petitioners' claims for injunctive relief, therefore, became moot.

Where, as here, a case becomes moot on its way to this Court through no fault of the losing party, the Court's ordinary practice is to vacate the court of appeals' judgment. Vacatur is warranted here for four reasons. First, petitioners had no role in creating the circumstances that led to the mootness of their claims for injunctive relief. Second, the mootness of those claims is attributable to respondent Governor Abbott, who should not retain the benefit of favorable court decisions rendered unreviewable by his own actions. Third, the court of appeals' decisions may tie petitioners' hands in future cases if not vacated, despite their lack of opportunity to seek this Court's review. Fourth, petitioners respectfully submit that, had their claims for injunctive relief not become moot, the Court's review on the merits would have been warranted. The Fifth, Sixth, Seventh, Eighth, and Ninth Circuits are split as to whether *Jacobson* supplies the framework for assessing the constitutionality of restrictions on fundamental rights during a public health crisis. This Court's review would have been warranted to resolve this circuit split and provide much-needed clarity to lower courts assessing the degree to which states may

curtail constitutional rights during a pandemic with no end in sight.

OPINIONS BELOW

The court of appeals' first order granting a writ of mandamus (Pet. App., *infra*, 1a–59a) is reported at 954 F.3d 772. Its second order granting a writ of mandamus (Pet. App., *infra*, 60a–139a), as revised, is reported at 956 F.3d 696. The district court's temporary restraining orders ("TROs") (Pet. App., *infra*, 140a–150a; 154a–171a) are unreported but available at 2020 WL 1502102 and 2020 WL 1815587, respectively.

JURISDICTION

The judgments of the court of appeals were entered on April 7 and April 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the U.S. Constitution; Texas Executive Order No. GA-09 relating to hospital capacity during the COVID-19 disaster, Mar. 22, 2020; and 22 Tex. Admin. Code § 187.57, which are reproduced at Pet. 210a; 201a–204a; and 207a–209a, respectively.

STATEMENT

A. The Executive Order and Enforcement Threat

On March 22, 2020, Texas Governor Greg Abbott issued Executive Order GA-09, which barred the performance of "all surgeries and procedures" that were "not immediately medically necessary." Pet. App. 203a. GA-09's stated purpose was to conserve hospital beds and personal protective equipment ("PPE"), such

as masks, necessary to treat COVID-19 patients. *Id.* at 202a. Accordingly, GA-09 exempted surgeries and procedures that would not require the use of PPE or hospital capacity. Violation of GA-09 carried criminal penalties and potential disciplinary action for health care facilities and medical licensees. *Id.* at 203a. GA-09 preserved Governor Abbott's discretion to modify or extend the order for an indeterminate period of time, but it included a fallback expiration date of April 21, 2020. *Id.* at 204a.

Petitioners are outpatient health care providers (hereinafter, "providers") in Texas that offer previability abortion care among other services. They are not licensed as hospitals, are not set up to offer inpatient care, and use only minimal PPE.

Respondents, who include Governor Abbott, Texas's attorney general, and other state officials responsible for enforcing GA-09 ("state officials"), largely left to individual physicians' discretion the determination whether a surgery or procedure was "immediately medically necessary." But they took a dramatically different approach when it came to abortion by attempting to wield GA-09 as a blanket ban on nearly all pregnancy terminations. That approach was at odds with the views of the American Medical Association, the American College of Obstetricians and Gynecologists, and other experts that abortion is essential care that cannot be delayed. *Id.* at 166a–167a. In particular, on March 23, 2020, the attorney general issued a press release targeting "abortion providers" with "the full force of the law" if they provided "any" abortions, other than in an immediate medical emergency. *Id.* at 206a.

In response to the attorney general's enforcement threat, providers cancelled hundreds of appointments for procedural abortion and even medication abortion, which involves neither "surgery" nor a "procedure." *Id.* at 160a. A medication abortion, which is legal in Texas only until ten weeks of pregnancy, involves a patient taking an initial oral medication and then another medication hours later, after which the pregnancy ends as in a miscarriage. *Id.* A procedural abortion, sometimes called a "surgical abortion," involves the use of suction or instruments to remove the contents of a patient's uterus through the natural opening of the cervix. Unlike a true surgery, a procedural abortion does not involve any incision or require a sterile field. *Id.* at 160a–161a.

While GA-09 was in place, medication abortion utilized no PPE, and procedural abortion required only minimal PPE. *Id.* at 161a–163a. Both medication and procedural abortion require less PPE than pregnancy-related care at each stage of pregnancy for individuals who remain pregnant. *Id.* at 163a–165a. Nevertheless, GA-09 effectively banned both categories of abortion while allowing all other essential outpatient medical care—at the physician's discretion—to continue.

B. This Litigation

1. Faced with an effective ban on abortion for an indeterminate period of time, providers filed suit in the U.S. District Court for the Western District of Texas on behalf of themselves, their staff, and their patients to enjoin GA-09 as applied to previability

abortion care. They asserted substantive due process and equal protection claims.[1]

After briefing and argument, the district court entered its first TRO on March 30, 2020. In reliance on *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the court concluded that providers were likely to succeed on their due process claim that GA-09 violated patients' right to obtain a previability abortion.

2. The same day, state officials petitioned the U.S. Court of Appeals for the Fifth Circuit to grant a writ of mandamus for vacatur of the TRO. They moved to stay the TRO pending mandamus or, in the alternative, for an administrative stay. The next morning, providers informed the court of appeals that they intended to respond to the stay requests by that evening. Without awaiting this response, and over a dissent by Judge Dennis, the panel administratively stayed the TRO without explanation, forcing providers to turn away patients already at their health centers awaiting services. Pet. App. 151a–153a.

Despite rapid briefing, the court of appeals continued the near-complete ban on abortion in the state by maintaining the administrative stay for a full week. In the meantime, patients faced increasingly dire circumstances. Some were at risk of reaching a point in pregnancy after which they would become ineligible for medication abortion, or would require more costly,

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[1] Providers also challenged a related administrative rule, 22 Tex. Admin. Code § 187.57, Pet. App. 207a–209a, that incorporated GA-09's terms. Because the litigation over that rule's constitutionality mirrored the litigation over GA-09, providers do not separately address it here.

two-day procedural abortions. Others were at risk of losing the legal right to have an abortion in Texas altogether. These pressures, coupled with the fear that Texas's ban could last well beyond April 21, 2020, sent patients with the means to do so scrambling to obtain abortions in other parts of the country. *Id.* at 165a.

The same divided panel ultimately issued a writ of mandamus to vacate the TRO. The majority concluded that the district court had erred by not applying *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), in which this Court upheld against constitutional challenge a local ordinance that imposed criminal penalties for an individual's failure to obtain a smallpox vaccination during an outbreak.

Although *Jacobson* did not involve the right to abortion, and predates by decades this Court's modern tiers of constitutional scrutiny, the majority believed that *Jacobson* established "the framework" governing the constitutionality of "a state's emergency restriction of *any individual right*," and thus applied this framework to providers' substantive due process claim. Pet. App. 3a n.1 (emphasis added) (stating that *Jacobson* would also apply to, e.g., claims challenging restrictions on "public worship during an epidemic"). In reliance on selected language from *Jacobson* taken out of context, the majority directed the district court on remand to ask (1) whether applying "GA-09 lacks a 'real or substantial relation' to the public health crisis," and (2) whether "'beyond question,' GA-09's burdens [on the right to abortion] outweigh its benefits" to public health, thus creating an undue burden under *Casey*. *Id.* at 20a–23a (quoting *Jacobson*, 197 U.S. at 31); *see also id.* at 117a.

Judge Dennis again dissented. He disagreed with the majority that the district court's order allowing patients "access to time-sensitive reproductive healthcare, a right supported by almost 50 years of Supreme Court precedent, was a patently erroneous result that must be remedied by" mandamus. *Id.* at 43a (internal quotation omitted). Moreover, in his view, *Jacobson* did not displace the controlling abortion precedents of *Roe* and *Casey*. As he explained, *Jacobson* stands for the unremarkable proposition that a state may enact laws "to protect the public health and safety, even though such laws may impose restraints on citizens' liberties, so long as that regulation is 'justified by the necessities of the case' and does not violate" constitutional rights. *Id.* at 50a–51a (quoting *Jacobson*, 197 U.S. at 28). Judge Dennis also would have concluded that, even under the majority's broad reading of *Jacobson*, the TRO should stand.

3. On remand, with twenty declarations in support, providers filed a second TRO motion that hewed closely to the court of appeals' standard. This time they sought relief only as to (1) medication abortion, and (2) procedural abortion where, based on the treating physician's medical judgment, a patient's pregnancy would be too far along by GA-09's stated expiration date for the patient to obtain an abortion in Texas. This second category included patients whose pregnancies by then would reach twenty-two weeks (generally the legal limit for an abortion in Texas).[2]

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[2] This category also included patients who would reach eighteen weeks of pregnancy by GA-09's expiration, and whose doctors concluded that they would likely be unable to obtain an abortion from one of only a handful of ambulatory surgical facilities in the state that can legally provide abortion at that point in pregnancy.

On April 9, 2020, the district court granted providers' second TRO motion, entering the limited relief sought under the standard described by the Fifth Circuit. It made extensive findings of fact, including that "[t]he health risks associated with both pregnancy and abortion increase with gestational age," *id.* at 166a; that individuals with ongoing pregnancies require more in-person health care "at each stage of pregnancy" compared to individuals who have abortions, *id.* at 164a; that delaying access to abortion would "not conserve hospital resources," *id.*; that delaying access to abortion, whether by medication or procedure, would "not conserve PPE," *id.*; and that medication abortion is not even a medical "procedure," *id.* at 160a. The district court also found that providers had already been forced to "turn[] away hundreds of patients seeking" abortions while GA-09 was in place and some patients had then "exceeded the gestational age limit to obtain an abortion in Texas," or had been forced to travel "as far away as Colorado and Georgia" to obtain care. *Id.* at 165a.

4. State officials again immediately petitioned the court of appeals for a writ of mandamus and sought a stay. On April 10, 2020—again without awaiting providers' planned opposition that evening—the same divided panel issued an administrative stay, except as to those patients whose pregnancies would exceed twenty-two weeks by April 22, 2020. *Id.* at 172a–176a. The court of appeals denied providers' emergency motion to lift the administrative stay. *Id.* at 177a–181a.

Providers then filed an emergency application to Justice Alito on April 11, 2020, seeking vacatur of the court of appeals' administrative stay order as it applied to medication abortion. *See Planned Parenthood*

Ctr. for Choice v. Abbott, No. 19A1019 (U.S. filed Apr. 11, 2020).

However, on April 13, 2020, the Fifth Circuit dissolved the administrative stay as to medication abortion, which mooted providers' pending application in this Court. *See* Letter of Applicants Withdrawing Application, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 19A1019 (U.S. Apr. 14, 2020). At the same time, the panel denied state officials' motion for a stay of the second TRO as applied to medication abortion because it concluded that state officials had "not made the requisite strong showing of entitlement to mandamus relief." Pet. App. 187a.

While the second petition for writ of mandamus remained pending with the Fifth Circuit, the parties continued to prepare in the district court for a preliminary injunction hearing. State officials urged the district court not to move on an "overly ambitious" schedule, *id.* at 123a n.10, and the court ultimately reset the preliminary injunction hearing for April 29, 2020 in anticipation that GA-09 would be extended beyond its stated April 21, 2020, expiration. *Id.* at 191a. To accommodate this scheduling change, the district court extended the application of its second TRO to May 1, 2020. *Id.*

5. On April 17, 2020, Governor Abbott issued Executive Order GA-15 to replace GA-09 after April 21, 2020. *See* Exh. 21, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Apr. 18, 2020), ECF No. 89-2. GA-15 mirrored GA-09 but established an exception that permitted surgeries and procedures in facilities that certified they would reserve at least 25% of their hospital capacity for

COVID-19 patients and would not request PPE from a public source during the COVID-19 disaster.

Providers advised the district court and court of appeals that they expected to qualify for GA-15's new exception and to be able to resume abortion services. Exh. 22, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Apr. 18, 2020), ECF No. 89-3 ("Apr. 18, 2020, Email Correspondence"); Providers' Rule 28(j) Letter, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 17, 2020). They also repeatedly attempted to confirm that state officials shared that view, *see, e.g.*, Apr. 18, 2020, Email Correspondence, which providers recognized might "resolve the disputes of this case," Tr. of Telephone Conference at 7, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Apr. 20, 2020) ("Apr. 20, 2020, Tr.").

However, even after providers submitted the certifications described in GA-15, state officials refused to confirm whether they agreed that the exception to GA-15 applied to providers. Apr. 18, 2020, Email Correspondence; *see also* State Officials' Rule 28(j) Letter, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 17, 2020).

On April 20, 2020, one day before GA-15 would replace GA-09, the same divided Fifth Circuit panel issued a writ of mandamus to vacate the second TRO except as to patients who would be past the twenty-two-week legal limit for an abortion in Texas by April 22, 2020. Pet. App. 60a–139a. Although the panel had earlier denied a stay of the second TRO as to medication abortion on the ground that state officials had not made a "strong showing of entitlement to mandamus relief," *id.* at 187a, it nevertheless reversed its earlier

position and on that same record granted mandamus as to medication abortion.

This time, the majority held that the district court erred in concluding that the burdens of the abortion restrictions outweighed the benefits to the state "beyond question," as required—in its view—for any challenge to succeed under *Jacobson*. *Id.* at 96a. In this respect, the majority circumscribed the district court's fact-finding authority, holding under a cramped reading of *Jacobson* that a court could ask only whether "the state had acted in an 'arbitrary and unreasonable'" manner. *Id.* at 89a. It likened such deference to the Administrative Procedure Act's standard for "arbitrary-and-capricious" review. *Id.* (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570 (2019)).

The majority largely left in place the second TRO's bar on enforcement of GA-09 as applied to patients whose pregnancies would have reached twenty-two weeks when GA-09 expired. But it vacated even this portion of the TRO as it applied to the attorney general and Governor Abbott, stating that the district court should have "dismiss[ed]" these defendants on sovereign-immunity grounds. *Id.* at 72a. It also held that this portion of the TRO, which the district court had extended to May 1, 2020, was not narrowly tailored to remedy GA-09's harm because "there [would] be no 'actual case or controversy' between the parties, and no enforcement of GA-09 for a court to restrain," after April 21, 2020. *Id.* at 71a (citation omitted).

Judge Dennis dissented, lamenting that the panel's intervention in the case had already caused the "legality of abortion in Texas [to] change[] no less than six times." *Id.* at 139a. He concluded that the

majority had faulted "the district court for not abiding by a series of phantom instructions" that could "be found nowhere" in the panel's previous order. *Id.* at 106a. Moreover, even under the majority's shifting legal standard, Judge Dennis would have upheld the second TRO. As he explained, for example, there was sufficient record evidence to conclude that enforcement of GA-09 "was pretextual and motivated not by a desire to advance public health, but rather to reduce the number of abortions performed for its own sake." *Id.* at 128a.

6. The following day, on April 21, 2020, providers moved the court of appeals to recall and stay the mandates for both mandamus orders, which had issued immediately after each decision, and indicated they sought to petition for rehearing en banc. GA-09 was replaced that night by GA-15. On April 22, 2020, the Fifth Circuit denied providers' motions. *Id.* at 197a–200a.

Also on April 22, 2020, state officials confirmed in the district court that GA-09 was "no longer being enforced," which the officials said left the court without "jurisdiction to grant prospective injunctive relief" with respect to the executive order. State Defs.' Suppl. Resp. to Pls.' Mot. for Prelim. Inj. at 7, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Apr. 22, 2020), ECF No. 100 ("State Officials' Suppl. PI Resp."). State officials also made clear their view that providers could resume providing abortions under GA-15. *Id.* Based on these representations, providers withdrew their pending preliminary injunction motion.

Since that time, no further district court briefing has occurred. Providers have resumed providing abortions, and Governor Abbott has not issued further executive orders restricting their ability to do so.

REASONS FOR GRANTING THE PETITION

The issues addressed in the Fifth Circuit's mandamus orders became moot before providers could seek this Court's review. When, as here, an appeal becomes moot "while on its way" to this Court, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 & n.2 (1950); *see also, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.); *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (mem.); *Karcher v. May*, 484 U.S. 72, 82 (1987); *Burke v. Barnes*, 479 U.S. 361, 365 (1987); *Duke Power Co. v. Greenwood Cnty.*, 299 U.S. 259, 267 (1936) (per curiam). This Court has followed that approach in "countless cases," *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal" procedure in the event of mootness through no fault of the losing party, *Camreta v. Greene*, 563 U.S. 692, 713 (2011). That is so even where the relevant claim "became moot before certiorari," and where the court of appeals addressed the propriety of a temporary restraining order as opposed to a final judgment. *See Garza*, 138 S. Ct. at 1793.

The rule providing for vacatur serves important purposes: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg.*

Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994). At the same time, "[v]acatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997) (citation omitted).

The case for vacatur is especially strong here for four reasons.

1. All parties agree that providers' claims for injunctive relief as to GA-09 are now moot through no fault of providers. *See* State Officials' Suppl. PI Resp. at 7. Specifically, the court of appeals twice granted a writ of mandamus with respect to temporary restraining orders that prevented enforcement of GA-09 as it applied to some or all previability abortion services. However, Governor Abbott replaced GA-09 with GA-15 the night of April 21, 2020, one day after the Fifth Circuit's second mandamus order, and two weeks after the first. Providers could not possibly have obtained this Court's review of the merits during that time. And after April 21, 2020, state officials recognized that GA-09 was "no longer being enforced," *id.*, so—in the panel's words—there was nothing left of the order "for a court to restrain," Pet. App. 71a (citation omitted). *See also, e.g.*, *Burke*, 479 U.S. at 364–65 (holding that a lawsuit challenging the validity of a statute was moot after the challenged law expired).

Providers had prepared to amend their complaint to seek injunctive relief against any superseding executive order, *see* Apr. 20, 2020, Tr. at 12, in which case this Court might eventually have been called upon to address issues decided by the Fifth Circuit's mandamus orders, such as the standard for gauging the constitutionality of abortion restrictions during the

pandemic and whether Governor Abbott and Texas's attorney general were entitled to sovereign immunity. But GA-15 permitted providers to resume abortion services, making any amendment unwarranted.

2. The mootness of providers' claims for a TRO is entirely attributable to actions of respondent Governor Abbott. Although vacatur is fundamentally an "equitable remedy," *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25, it is "clear[ly]" appropriate "when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court,'" *Garza*, 138 S. Ct. at 1792 (quoting *Arizonans for Off. Eng.*, 520 U.S. at 72). As this Court has remarked, "'[i]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Id.* (quoting *Arizonans for Off. Eng.*, 520 U.S. at 75).

That is precisely what would happen absent vacatur in this case. Governor Abbott, along with the other respondents, obtained two favorable judgments from the court of appeals immediately before GA-09 came off the books at his direction. Indeed, Governor Abbott urged the court of appeals to issue the second judgment even after it would have been clear to state officials—though not yet to providers or the public at large—that GA-15 would cause the pending petition for a writ of mandamus to become moot in a matter of days. *See* State Officials' Rule 28(j) Letter, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 17, 2020). In these circumstances, providers should not be forced to "acquiesce in th[ose] judgment[s]." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25.

3. This Court explained in *Munsingwear* that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41. Through vacatur, the Court thus ensures "that no party is harmed by . . . a preliminary adjudication" rendered moot by a prevailing party's actions or the vagaries of circumstance. *Camreta*, 563 U.S. at 713 (internal quotation marks omitted).

Here, the court of appeals' decisions on providers' now moot claims for injunctive relief could have significant legal ramifications if state officials again use the pandemic and future executive orders as a "pretext[]" to "reduce the number of abortions performed for its own sake," Pet. App. 128a (Dennis, J., dissenting), or to curtail other constitutional rights. Specifically, the Fifth Circuit's "preliminary" orders in this case, *Camreta*, 563 U.S. at 713, issued before the district court could even conduct a preliminary injunction hearing, would establish the framework applicable to any future substantive due process claims that providers bring to challenge restrictions on abortion in Texas during the COVID-19 pandemic. Indeed, the Fifth Circuit panel made clear that it intended its reading of *Jacobson* to apply to any challenge to an emergency restriction on "*any individual right*." Pet. App. 3a n.1 (emphasis added). Given the second mandamus order's holding regarding sovereign immunity, that decision might also preclude providers from obtaining injunctive relief against Governor Abbott and Texas's attorney general in relation to future executive orders that restrict abortion. *Id.* at 72a–75a.

These outcomes would squarely implicate one of vacatur's key purposes: "clear[ing] the path for future

relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40; *see also Camreta*, 563 U.S. at 713 (vacating a ruling due to mootness in a qualified immunity case and recognizing the decision was "legally consequential" because it would prevent the defendant from interviewing suspected child abuse victims in the future without a warrant). The court of appeals' decisions should not be left in place for state officials to use in other proceedings involving providers and their patients, or—for that matter—any other individuals whose rights are infringed, during the COVID-19 pandemic.

4. Vacatur is particularly important here because of emerging disagreements among the lower courts over how to address claims that the government's pandemic response violates fundamental rights. This Court should not leave broad decisions in this area on the books when the claims that underlie them are moot, particularly given the significant likelihood that, if the claims were not moot, the Fifth Circuit's resolution of the legal issues would have merited this Court's review.[3]

There is now a circuit split among the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits regarding the appropriate standard for reviewing constitutional challenges to laws adopted in response to a public health disaster. Specifically, in *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020), the Eighth Circuit adopted

[3] A finding of cert-worthiness is not, however, a prerequisite to vacatur in these circumstances. *See, e.g.*, *Garza*, 138 S. Ct. 1790 (vacating judgment on an issue of first impression in the court of appeals without discussing whether certiorari review would have been warranted); Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 357–58, 968 n.33 (10th ed. 2013).

the Fifth Circuit's overbroad reading of *Jacobson* as the appropriate standard of review in a constitutional challenge to a COVID-19 abortion restriction. Applying that standard, the court of appeals ultimately issued a writ of mandamus to permit enforcement of an Arkansas directive that barred procedural, but not medication, abortions for an extended period of time. *Id.* at 1029–33.

In contrast, in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam), the Sixth Circuit granted an injunction pending appeal in a case involving COVID-19 orders that prohibited in-person church services. *Id.* at 416. It concluded that the plaintiffs were likely to succeed on their free-exercise claim, and in so doing, applied strict scrutiny under modern First Amendment precedent. *Id.* at 413–16; *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam) (applying contemporary free-exercise precedent in a constitutional challenge to COVID-19 orders). The Sixth Circuit's approach is at odds with the overbroad application of *Jacobson* in this case, which the Fifth Circuit made clear would "govern[] a state's emergency restriction of *any individual right*," including "an emergency restriction on gathering in large groups for public worship during an epidemic." Pet. App. 3a n.1 (emphasis added); *see also, e.g.*, *4 Aces Enterprises, LLC v. Edwards*, No. 20-2150, 2020 WL 4747660, at *9 (E.D. La. Aug. 17, 2020) (relying on *Abbott* to conclude that "[t]raditional doctrine does not control during a pandemic" and then

applying *Jacobson* to an equal-protection claim, among others).[4]

Similarly, in *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020), another case involving a challenge to a COVID-19 stay-at-home order, the Ninth Circuit used the review standard developed in contemporary First Amendment case law, *see id.*, not the *Jacobson*-based standard that the state had urged the Ninth Circuit to apply, *see id.* at 941–43 & n.2 (Collins, J., dissenting) (describing state's argument). Under that standard, the court of appeals ultimately denied a preliminary injunction pending appeal of the order as applied to religious services. This Court subsequently denied a request by the *South Bay* plaintiffs for a preliminary injunction as well, *see S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (mem.) (2020), but three dissenting justices made clear that they would have applied strict scrutiny to the state restrictions, *see id.* at 1614 (Kavanaugh, J., dissenting) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993)). The dissent's approach in this Court is at odds with the Fifth Circuit's decision below. *See, e.g.*, *4 Aces Enterprises*, 2020 WL 4747660, at *9 n.9 (recognizing that *Abbott*'s broad sweep is

[4] In *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020), the Sixth Circuit had previously avoided directly answering the question whether and to what extent *Jacobson* modifies otherwise applicable constitutional analysis during a public health crisis. In that case, the court of appeals upheld in many respects a preliminary injunction against a COVID-19-related abortion restriction after concluding that the measure "would [not] pass constitutional muster" under *Roe* and *Casey* or under *Jacobson*. *Id.* at 916.

inconsistent with the dissent in *South Bay* but acknowledging *Abbott* as controlling law).[5]

Finally, the Seventh Circuit has applied contemporary First Amendment precedent, not the Fifth Circuit's overbroad reading of *Jacobson*, to a challenge involving a pandemic-related restriction on constitutional rights. Using that precedent, in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), the court of appeals affirmed the denial of a preliminary injunction that involved an order limiting the size of religious services. Notably, however, the Seventh Circuit suggested that *Jacobson* does relax the standard for reviewing facts relevant to "orders issued in response to public-health emergencies." *Id.* at 347; *see also Ill. Republican Party v. Pritzker*, No. 20 C 3489, 2020 WL 3604106, at *4 (N.D. Ill. July 2, 2020) (citing *Elim* for the proposition that "courts do not evaluate orders issued in response to public-health emergencies by the usual standard"), *appeal filed*, No. 20-2175 (7th Cir. July 2, 2020).

Other courts around the country are also in conflict as to whether *Jacobson* modifies or displaces modern standards of constitutional review during a public health disaster. Federal district courts have reached dramatically different decisions on that question. *Compare, e.g.*, *Bayley's Campground Inc. v. Mills*, No.

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[5] More recently, the Ninth Circuit denied an injunction pending appeal in another case challenging a COVID-19 directive that restricted attendance at religious services. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901 (9th Cir. July 2, 2020). It cited without discussion this Court's denial of a preliminary injunction in *South Bay*, and this Court subsequently denied relief as well. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020) (mem.).

2:20-cv-00176-LEW, 2020 WL 2791797, at *8 (D. Me. May 29, 2020) (rejecting application of *Jacobson* to right-to-travel claim), *and First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020) (same with respect to a First Amendment case involving religious services), *with Lawrence v. Colorado*, No. 1:20-cv-00862-DDD-SKC, 2020 WL 2737811, at *10 (D. Colo. Apr. 19, 2020) (applying *Jacobson* to claims involving the right to travel, right to association, and equal protection).

Still other courts have acknowledged the confusion over the applicable standard without directly addressing it. *See Robinson v. Att'y Gen.*, 957 F.3d 1171, 1183 (11th Cir. 2020) (avoiding the question of whether a broad reading of *Jacobson* or *Casey*'s undue-burden standard applied to an abortion restriction); *Altman v. Cnty. of Santa Clara*, No. 20-cv-02180-JST, 2020 WL 2850291, at *8 (N.D. Cal. June 2, 2020) (declining to decide "whether *Jacobson* or the . . . Second Amendment framework" applied to a pandemic restriction).

Given the disagreement among the courts, providers respectfully submit that it is likely the Court would have granted their petition for a writ of certiorari to review the Fifth Circuit's decision. Particularly under these circumstances, vacatur is warranted to ensure that broad precedent is not immune from review because of mooting events in which providers played no role.

CONCLUSION

The petition for a writ of certiorari should be granted and the underlying decisions of the Fifth Circuit vacated.

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