Case No. 20-50264

# In the United States Court of Appeals for the Fifth Circuit

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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.*

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

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## BRIEF OF THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, TEXAS VALUES, AND OTHER FAMILY POLICY ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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## CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

American Association of Pro-Life Obstetricians And Gynecologists
Texas Values
Indiana Family Institute
Family Heritage Alliance Action, South Dakota
Minnesota Family Council
Wisconsin Family Action
Alaska Family Action
California Family Council
Ohio Citizens for Community Values
Nebraska Family Alliance
Family Policy Institute of Washington
The Family Foundation (Kentucky)
Louisiana Family Forum

/s/ Jonathan F. Mitchell
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## Interest of Amici Curiae

Amicus curiae American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is a membership organization of obstetricians and gynecologists. It seeks to encourage and equip its members and other medical practitioners to provide an evidence-based rationale for defending the lives of both the pregnant mother and her unborn child. Many of AAPLOG's members are treating COVID-19 patients, and their lives are endangered by the district court's order and the plaintiffs' determination to continue diverting scarce personal protective equipment away from COVID-19 and toward elective abortion procedures.

Amici curiae Texas Values, Indiana Family Institute, Family Heritage Alliance Action South Dakota, Minnesota Family Council, Wisconsin Family Action, Alaska Family Action, California Family Council, Ohio Citizens for Community Values, Nebraska Family Alliance, Family Policy Institute of Washington, The Family Foundation (Kentucky), and the Louisiana Family Forum are Judeo-Christian nonprofit organizations that promote research and education to encourage, strengthen, and protect American families, including pro-life policies.

## Statement of Compliance with Rule 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission of this brief.

## INTRODUCTION

The COVID-19 pandemic has led to a worldwide shortage of personal protective equipment (PPE), such as masks, gloves, gowns, and face shields. This shortage is threatening the lives of doctors and nurses on the front lines of the pandemic, who are already being instructed to re-use the masks and gowns that are needed to protect them and their colleagues from the highly contagious virus.[1] It is also putting the entire American health-care system at risk of collapse. If hospitals run out of personal protective equipment and medical professionals begin falling sick and dying, then the nation will become incapable of treating those who acquire the COVID-19 virus, which will drastically increase the number of infections and lead to a loss of life of catastrophic proportions.

The plaintiffs do not dispute any of this. Indeed, they acknowledge the shortage of PPE and the need to conserve these scarce supplies for health-care providers who are fighting the COVID-19 pandemic.[2] Yet the plaintiffs

1. *See* Andrew Jacobs, Matt Richtel, and Mike Baker, *"At War With No Ammo": Doctors Say Shortage of Protective Gear Is Dire*, New York Times (March 19, 2020), available at https://nyti.ms/2UYZMvs; Melanie Evans and Khadeeja Safdar, *Hospitals Facing Coronavirus Are Running Out of Masks, Other Key Equipment*, Wall Street Journal (March 18, 2020), available at https://on.wsj.com/39FTPsG.

2. App. 14 ("Healthcare workers are facing a shortage of certain types of PPE"); App. 23 ("The current shortage of PPE is expected to continue for months."); App. 43 ("Federal and state officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE"). The references to "App." throughout this brief are citations of the appendix to the State's mandamus petition.

simultaneously insist that they have a constitutional entitlement to divert this admittedly scarce personal protective equipment toward non-life-saving abortion procedures, at a time when every piece of personal protective equipment must be conserved to the maximum possible extent for the life-saving work of those who are attempting to stem a horrific pandemic that is projected to kill as many as 240,000 Americans.[3] The district court agreed with the plaintiffs, and issued a temporary restraining order that allows every abortion provider in Texas (including abortion providers who are not even parties to this lawsuit) to continue performing elective abortions that consume scarce personal protective equipment during this time of national crisis. App. 263–271. The state has petitioned for writ of mandamus, and this Court has stayed the district court's order while it considers whether mandamus should issue.

## Summary Of Argument

The district court's order endangers the lives of COVID-19 patients and the medical professionals who desperately need the PPE that abortion providers are diverting toward non-life-saving procedures. The district court was indifferent to the loss of life that might result from its order, because it insisted that the Constitution gives women an absolute right to abort a pre-viability fetus—regardless of how many people might die from their decision

3. *See* Rick Noack, et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts*, Washington Post (March 31, 2020), available at https://wapo.st/2USL9tD.

to consume scarce personal protective equipment during a global pandemic.[4] But the Constitution is not a suicide pact,[5] and the Supreme Court has never held that the right to abortion trumps a State's efforts to save the lives of human beings who have already been born. Indeed, the Supreme Court has specifically held that the State's interest in protecting human life after fetal viability trumps the right to have an abortion. *See Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."). If a State can prevent a woman from having an abortion in order to save the life of a post-viability fetus, then it surely can prevent a woman from having an abortion to save the lives of COVID-19 patients and the medical professionals who are treating them.

Other constitutional rights (including rights that actually appear in the Constitution, such as the right to peaceably assemble) are currently being subordinated to COVID-19 prevention measures,[6] and for good reason. All constitutional rights are subject to the State's police powers, and the State's need to protect the life and safety of its citizens during a national emergency prevails over any claim of constitutional right. People who get sick and die

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4. App. 267 ("[B]efore fetal viability outside the womb, a state has *no interest* sufficient to justify an outright ban on abortions." (emphasis in original).
5. *See Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).
6. *See* Executive Order No. GA-14 (available at https://bit.ly/3dITwAN).

cannot exercise *any* of their constitutional rights, so a claim that one has a constitutional right to behave in a manner that threatens the lives and safety of others is self-defeating.[7] Mandamus is amply warranted to correct the district court's reckless and irresponsible ruling.

No matter how important the right to abortion may seem—and it is certainly important to the providers whose livelihoods depend on it and to the women who want to rid themselves of an unwanted fetus—it is not a life-or-death matter for either the patient or the provider, apart from the rare situations in which a pregnancy threatens the mother's life.[8] The plaintiffs and their attorneys have every right to believe that the profit margins of abortion providers and the convenience of abortion patients should take priority over the lives of COVID-19 patients and the medical professionals who are treating them. But their claim that the Constitution requires the judiciary to impose their twisted priorities on elected officials who are trying to save as many lives as possible during a global pandemic is preposterous. Mandamus is necessary to remind these blinkered ideologues that there are some things more important than access to abortion, and the need to protect human life and safety during a deadly and catastrophic pandemic is one of them.

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7. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.")
8. The Governor's executive order accommodates those situations by allowing surgeries to proceed when a patient's life is endangered.

Finally, mandamus is warranted because the district court had no authority to enjoin the defendants from enforcing their orders against nonparty abortion providers. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."). Only a subset of the State's abortion providers are parties to this lawsuit, and they have not sued as class representatives. These plaintiffs have no standing to seek an injunction that exempts non-party abortion providers—or the patients of those non-party abortion providers—from the Governor's order. Although it is not necessary for the Court to reach this issue if it decides to vacate the TRO across the board, it would nonetheless be helpful to remind the district courts that they are not permitted to convert lawsuits for injunctive relief into de facto class actions, apart from the procedures set forth in Rule 23.

## ARGUMENT

### I. A STATE MAY SUSPEND ACCESS TO ABORTION TO PRESERVE THE LIVES OF THOSE THREATENED BY THE COVID-19 PANDEMIC

Factual disputes are common in abortion litigation. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–18 (2016). But in this case, the relevant facts are undisputed. The plaintiffs acknowledge that our nation

is facing a shortage of personal protective equipment.[9] The plaintiffs also admit that surgical abortions consume personal protective equipment that is needed by those fighting the COVID-19 pandemic.[10] And they do not deny that drug-induced abortions consume PPE as well.[11] No one in this case is accusing Governor Abbott of exaggerating the shortage of personal protective equipment, nor is anyone denying the need to conserve personal protective equipment for those who are treating COVID-19 patients.[12]

Yet the district court held that a woman's right to abort a pre-viability fetus is absolute. App. 267 ("[B]efore fetal viability outside the womb, a state has *no interest* sufficient to justify an outright ban on abortions." (emphasis in

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9. App. 14 ("Healthcare workers are facing a shortage of certain types of PPE"); App. 23 ("The current shortage of PPE is expected to continue for months."); App. 43 ("Federal and state officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE").
10. App. 17 ("[C]linicians use some PPE for procedural abortion—such as gloves, a surgical mask, and protective eyewear").
11. The plaintiffs are cagey in how they describe the process of drug-induced abortions, and they are careful to assert only that the provision of pills does not require the use of PPE. App. 16 ("Providing patients with pills for medication abortion does not require the use of any PPE."). But the plaintiffs do not deny the State's claim that drug-induced abortions consume PPE during the pre-abortion examination and the post-abortion follow-up appointment. And they do not deny the State's claim that drug-induced abortions require surgical follow-up procedures that consume PPE in anywhere from 8% to 15% of cases.
12. App. 268 ("'The State Defendants well describe the emergency facing this country at the present time. They do not overstate when they say, 'Texas faces it worst public health emergency in over a century.'").

original)). So it did not matter to the district court that abortion providers are consuming scarce personal protective equipment that is needed to fight the COVID-19 pandemic. And it did not matter to the district court whether an abortion provider's use of PPE will contribute to the spread of COVID-19 or kill medical professionals who run out of PPE because it was used on abortions instead. According to the district court, there is *nothing* that can prevail over a woman's right to abort a pre-viability fetus. No amount of human life that might be saved—and no amount sickness that might be prevented—can ever justify an order that prevents or delays any woman from obtaining a pre-viability abortion. The plaintiffs made the same argument in their district-court filings: The right to pre-viability abortion is absolute, and anyone who might get sick or die on account of a woman's decision to abort is nothing more than collateral damage of the sexual revolution.[13]

Lawyers and judges who seek to impose pro-abortion policies from the bench have always given to short shrift to the fact that abortion kills a human fetus. *See* Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 181–85; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 934–35 (1973). But now they have outdone themselves by insisting that the right to abortion allows patients and providers to consume scarce personal protective equipment that is needed to prevent others from falling sick and dying during a

13. App. 56 ("Prior to viability, a state has *no interest* sufficient to justify a ban on abortion" (emphasis in original)).

catastrophic global pandemic. The plaintiffs in this case have gone beyond asserting that the right to an abortion should trump the right to life of a pre-viability human fetus. They are asserting nothing less than a constitutional right to endanger the lives and safety of their fellow human beings who have already been born, and who are breathing and walking on the Earth.

The Supreme Court has never allowed a constitutional right to be exercised in a manner that endangers the public health or safety. The right of free speech does not allow one to jeopardize other people's lives by inciting violence or yelling "fire" in a crowded theater. *See Schenck v. United States*, 249 U.S. 47, 52 (1919). The right of the people to peaceably assemble is giving way to stay-at-home orders that are needed to slow the spread of COVID-19 and protect the lives of those who would otherwise contract the disease and die. Houses of worship and gun shops that sell constitutionally protected firearms have been ordered to close their doors in the hopes of making progress toward bending or flattening the curve. Yet the plaintiffs and the district court have the chutzpah to assert that the right to abortion—a court-created right that cannot be found anywhere in the language of the Constitution—is so absolute and sacrosanct that it must prevail over a State's efforts to prevent the spread of a deadly pandemic, even at a time when rights that actually appear in the Constitution are readily being subordinated to state-imposed measures that seek to curb the spread of COVID-19.

The plaintiffs eventually get around to acknowledging the State's interest in conserving personal protective equipment, and they admit that their abor-

tions consume PPE that is desperately needed by those on the front lines of the COVID-19 pandemic who will fall sick or die without it. App. 61–64. But they think they should get a special allowance to use PPE during this time of national crisis because: (1) They have "taken steps to preserve PPE" when performing abortions;[14] (2) They claim that they aren't using that much PPE in the grand scheme of things;[15] and (3) Abortion should be considered an "essential" medical procedure.[16]

The problem with this argument is that *any* use of PPE during this time of shortage jeopardizes human life and safety by depleting the PPE available to combat the COVID-19 pandemic. The plaintiffs do not deny that their consumption of PPE will have this effect; they simply try to downplay the magnitude of the impact.[17] But *every* piece of PPE is needed to protect the lives and safety of those who are combatting a highly contagious virus that is projected to kill as many as 240,000 Americans. Even a single transmission of the virus from one person to another could lead to thousands of deaths, especially if the virus is transmitted to a health-care worker who interacts with scores of patients and colleagues on a daily basis. The plaintiffs cannot

14. App. 61–62.
15. App. 63.
16. App. 52.
17. App. 61–62 ("[B]anning abortions does *little to nothing* to prevent the 'deplet[ion]' of the personal protective equipment needed 'to cope with the COVID-19 disaster." (emphasis added)).

create a constitutional entitlement to divert PPE away from COVID-19 by characterizing their own use as de minimis.

The plaintiffs also insist that abortion should be considered an "essential" procedure, and that the Constitution therefore compels States to divert PPE away from the live-saving treatment of COVID-19 patients and toward abortions.[18] But the issue is not whether abortion should be placed into an "essential" or a "non-essential" cubbyhole. The issue is whether a woman's abortion is *more* essential—or equally essential—to the battle against COVID-19. A woman whose life is endangered by a pregnancy can plausibly assert that her need for PPE is equally essential to the need to preserve PPE for the COVID-19 pandemic, because in either situation the PPE will used for life-saving treatment.[19] The Governor's order recognizes this by allowing abortion providers to continue using PPE for life-saving abortions.

But a woman who is seeking only to rid herself of an unwanted pregnancy cannot possibly claim that her abortion is more essential than the need for PPE on the front lines of the COVID-19 pandemic. Whatever harms may befall a woman who is denied an elective abortion, they are not matters of life or death, as even the plaintiffs appear to recognize.[20] The continuation of an

18. App. 15, 41–42, 52,

19. And the Governor's order allows abortion providers to continue use PPE for life-saving abortions.

20. App. 22–23 ("If a person is forced to continue a pregnancy against their will, . . . it can pose a risk to their physical, mental, and emotional health, as well as to the stability and wellbeing of their family, including their existing children. Pregnancy, childbirth, and an additional child

unwanted pregnancy may result in adverse health consequences or economic hardship, as the plaintiffs observe, but it will not cause anyone to contract a deadly disease or die. The diversion of PPE away from COVID-19 and toward elective abortion procedures, by contrast, will aggravate the spread of a deadly pandemic that has already killed 4,000 Americans, sickened another 200,000, and is projected to kill hundreds of thousands more. The notion that the Constitution compels a State to allocate PPE to abortion providers at the expense of those fighting COVID-19 is untenable, and it is a reflection of the plaintiffs' selfish indifference to the lives and safety of their fellow citizens.

## II. The District Court Had No Authority To Enjoin The Defendants From Enforcing The Governor's Order Against Abortion Providers Who Are Not Parties To This Lawsuit

The plaintiffs in this case are only a subset of the abortion providers in Texas, and they did not sue as class representatives. The district court therefore lacked authority to enjoin the enforcement of the Governor's Order against anyone other than the named plaintiffs. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can di-

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may exacerbate an already difficult situation for those who have suffered trauma, such as sexual assault or domestic violence. And research has found that women denied an abortion were four times more likely than women who received an abortion to experience economic hardship and insecurity lasting for years, with serious consequences for those women and their families.")

rectly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[T]he question at issue [is] whether a court may grant relief to non-parties. The right answer is no."); *Zepeda v. I.N.S.*, 753 F.2d 719, 727–28 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.").[21]

The district court, however, enjoined the defendants from enforcing the Governor's Order against *anyone* that provides surgical or drug-induced abortions—regardless of whether the provider was a party to this lawsuit. But the judicial power extends only to resolving cases or controversies between parties, and the Court's relief may extend only to the named litigants, or to classes that have been certified consistent with the requirements of Rule 23. The only time that a court may issue relief that extends beyond the named litigants or a certified class is when that remedy is needed to ensure that the prevailing parties obtain the relief to which they are entitled. *See Pro-*

21. *See also* Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 854 (1991) ("[T]he binding effect of the federal judgment extends no further than the parties to the lawsuit. Against nonparties, the state remains free to lodge criminal prosecutions."); Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 Ford. Urb. L.J. 657, 663 (2004) ("All injunctive relief, of course, including preliminary injunctions, binds only the defendants before the court, and applies only to protect the specific plaintiffs who have brought the suit.").

*fessional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273–74 (5th Cir. 1984). But that allowance is not applicable here. The only relief to which the plaintiffs might be entitled is an injunction that allows *them* to continue performing abortions. The plaintiffs are suffering no Article III injury from the defendants' enforcement of the Governor's order against nonparty abortion providers, and the plaintiffs have no third-party standing to assert the constitutional rights of another provider's abortion patients.

This basic rule of federal practice is often overlooked by the district courts, and "nationwide injunctions" have become all the rage in constitutional litigation. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (criticizing this trend); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017) (same). The effect of these injunctions is to convert lawsuits into de facto class actions without any need to satisfy the procedures or requirements of Rule 23. *See Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper."). But the recent popularity of this maneuver should not obscure its illegality, especially when the district court did not bother to discuss the above-cited authorities that flatly prohibit this practice. Mandamus is warranted to correct the scope of an injunction that violates the binding precedent of this Court.

## Conclusion

The petition for writ of mandamus should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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## Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF or e-mail on April 2, 2020, upon:

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## Certificate of Electronic Compliance

Counsel also certifies that on April 2, 2020, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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## CERTIFICATE OF COMPLIANCE

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Dated: April 2, 2020