No. 20-50264

In the United States Court of Appeals for the Fifth Circuit

In re GREG ABBOTT, in his official capacity as Governor of Texas; KEN PAXTON, in his official capacity as Attorney General of Texas; PHIL WILSON, in his official capacity as Acting Executive Commissioner of the Texas Health and Human Services Commission; STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board; and KATHERINE A. THOMAS, in her official capacity as Executive Director of the Texas Board of Nursing,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas, Austin Division

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BRIEF OF THE STATES OF ALABAMA, ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR MANDAMUS

JEFF LANDRY
ATTORNEY GENERAL
Elizabeth B. Murrill*
Solicitor General
Counsel of Record
J. Scott St. John
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

Steve Marshall, Attorney General of Alabama

Leslie Rutledge, Attorney General of Arkansas

Lawrence Wasden, Attorney General of Idaho

Curtis T. Hill, Jr., Attorney General of Indiana

Daniel Cameron, Attorney General of Kentucky

Jeff Landry, Attorney General of Louisiana

Lynn Fitch, Attorney General of Mississippi

Eric Schmitt, Attorney General of Missouri

Douglas J. Peterson, Attorney General of Nebraska

Dave Yost, Attorney General of Ohio

Mike Hunter, Attorney General of Oklahoma

Alan Wilson, Attorney General of South Carolina

Jason Ravnsborg, Attorney General of South Dakota

Herbert Slattery, Attorney General of Tennessee

Sean Reyes, Attorney General of Utah

Patrick Morrisey, Attorney General of West Virginia

Elizabeth Murrill, Counsel for *Amici Curiae*

Joseph Scott St. John, Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REGULATIONS

INTEREST OF *AMICI*

Amici are the chief legal officers of their respective States. They review, defend, and enforce a wide variety of laws and executive orders during state emergencies. *Amici* reassert the arguments offered in support of Texas' application to this Court for a stay, and they submit this supplemental brief in support of Texas' Petition for Mandamus to amplify three points: (1) the district court overread abortion jurisprudence in context of a global pandemic; (2) the district court's order will cause immediate and irreparable harm to the States because it concludes that Plaintiffs (or their clients) are exceptional and deserve blanket exemptions from neutral, broadly applicable health and safety orders; and (3) Plaintiffs purport to protect their patients—but allowing them to go about their business as usual during a pandemic would jeopardize the health of Plaintiffs' clients and staff.

Texas' petition for mandamus should be granted because the district court's order will cost lives and cause irreparable harm far beyond the borders of Texas.

ARGUMENT

I. THE STATES HAVE A COMPELLING INTEREST IN PREVENTING THE SPREAD OF A HIGHLY CONTAGIOUS VIRUS THAT THREATENS TO KILL MORE THAN TWO MILLION AMERICANS.

Between Monday and Wednesday of this week, almost 100 more Louisiana residents died from COVID-19 related complications.[1] Texas, just across the border, is seeing its numbers grow rapidly. Every state has laws empowering state officials to take exceedingly broad steps to stop the spread of contagious disease. *See* Exhibit A (non-exhaustive list of state public health and disaster statutes). These powers are necessarily comprehensive and restrict individual liberty in many ways.

Under quarantine laws, a board of health may shut down schools, businesses or factories. *See generally* C*itrus Soap Company v. Peet Bros.,* 194 P. 715 (Cal. Ct. App. 1920); *see also McKillop v. Bd. of Supervisors*, 74 N.W. 1050 (Mich. 1898). The exercise of state power under such circumstances can burden fundamental rights, such as the right to vote. *See generally Harper v. Dotson,* 187 P. 270 (Idaho 1920) (losing the right to vote in an election while quarantined); *Whidden v.*

[1] On Monday at noon, the death toll was 185. By Wednesday at noon, the updated number was 273. *See* LOUISIANA DEPARTMENT OF HEALTH, *Coronavirus (Covid-19)*, http://ldh.la.gov/Coronavirus/.

Cheever, 44 A. 908 (N.H. 1897); *Kirk v. Bd. of Health,* 65 S.E. 387, 389 (S.C. 1909). Religious freedoms can also be burdened. For example, the Commonwealth of Pennsylvania refused to charter a church due to its opposition to then-current medical practice regarding contagious diseases. *In re First Church of Christ, Scientist*, 55 A. 536, 551 (Pa. 1903).

Although courts have addressed the limits of such broad powers, they have been solicitous to the State's needs during a time of peril. *See Kirk,* 65 S.E. at 390 ("[I]t is always implied that the power conferred to interfere with these personal rights is limited by public "necessity".) The inquiry of courts is typically restricted to whether the reason for the State's action in connection with responding to contagious diseases is reasonable and not arbitrary. *See People ex rel. Hill v. Bd. of Educ.*, 195 N.W. 95, 99 (Mich. 1923) (approving exclusion from school of all students, teachers, and janitors who were not vaccinated against smallpox after identifying 18 smallpox cases in the community); *see also Kirk*, 65 S.E. at 389 (approving quarantine of a person for leprosy, though only slightly contagious).

Epidemics are, perhaps, one of the oldest known and least-

questioned justifications for restricting the liberty of the people. *See Morgan's Louisiana & T. R. & S. S. Co. v. Bd. of Health of State of Louisiana*, 118 U.S. 455, 459 (1886) ("If there is any merit or success in guarding against these diseases by modes of exclusion, of which the professional opinion of medical men in America is becoming more convinced of late years, the situation of the city of New Orleans for rendering this exclusion effective is one which invites in the strongest manner the effort."); *Gibbons v. Ogden*, 22 U.S. 1, 114 (1824). Some form of quarantine has existed since ancient times and more "modern" quarantine has been traced back to fourteenth century Europe. Indeed "quarantine" is derived from the Italian word quarantina, meaning forty days. *See* FELICE BATLAN, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 62–63 (2007).

The district court erred in several ways. The district court's passing reference to the COVID-19 crisis fails to grapple with the States' deeply-rooted power to stem the spread of contagion and protect the public—a power that the United States Supreme Court has recognized for many, many years. *See, e.g.*, *Bowditch v. City of Boston*,

101 U.S. 16 (1879); *Lawton v. Steele*, 152 U.S. 133 (1894); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *United States v. Caltex*, 349 U.S. 149 (1953).

The district court also erred by reading the Texas Governor's executive order as a "ban" on pre-viability abortion. The order is not a *ban* on any procedure. Instead, like the orders issue by other governors or health care officials around the country,[2] it calls upon medical professionals to *delay* all medically unnecessary procedures. The point is to avoid placing patients and staff at unnecessary risk and to preserve essential health care worker capacity and equipment. Plaintiffs, however, seek a category exemption from an order that applies to all healthcare providers equally.

Finally, the district court erred by elevating a woman's right to terminate a pregnancy above protecting the public during an epidemic. No Supreme Court case requires that result. To the contrary, as the Supreme Court expressly stated in *Roe v. Wade*—the "State has a

[2] Louisiana's Order, Notice #2020-COVID-19-ALL-007, adopts the definition of "emergency medical condition" from the Emergency Medical Treatment and Labor Act (EMTALA). *See* 42 CFR 489.24.

legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." 410 U.S. 113, 150 (1973). Neither *Roe* nor any post-*Roe* abortion cases evaluates risk to women *and* the public at large posed by providers seeking to be categorically exempt from life-saving measures that are required to respond to a growing epidemic. To the extent they do apply, the balance of interests is firmly on the side of the States.

II. THE HARM CAUSED BY JUDICIAL SECOND-GUESSING OF PUBLIC HEALTH ORDERS DURING AN EPIDEMIC IS IRREPARABLE.

Plaintiffs' claim that the harm caused by the TRO can be addressed later is simply wrong. Plaintiffs do not deny a health crisis exists, but they minimize the harm and broader systemic damage caused by the categorical exemption they seek and the TRO. They claim they are exceptional. But *every* exception weakens the States' ability to fight this disease and causes irreparable harm.

State governments' capacity to protect citizens is being tested like never before. *Amici* cannot adequately convey in a brief the *complexity* of States' response to a disaster like the one presently unfolding. To give

this Court some idea of the depth and breadth of it, *amici* have supplied copies of a Louisiana Situation Report, issued daily from the Governor's Office of Homeland Security, which tracks the major activity of a multitude of state officials. *See* Exhibit B.

In the COVID-19 crisis, governors are making extremely difficult choices, with far-reaching consequence. Closing schools burdens parents who have to stay home with their children and experience lost leave time, income, and potentially their jobs. Graduations, bar exams, and criminal trials are on hold. Medical testing, housing, and treatment of individual in prisons, nursing homes, juvenile facilities, and foster homes must be considered. Some cities will receive floating Navy hospitals and in New Orleans, a field hospital is being set up in a convention center to address the expected shortage of hospital beds. At the same time, state first responders are becoming ill.[3] The shutdown of businesses leads to unemployment. The homeless must be evaluated, housed, tested, and treated. School lunches must be distributed so school children can eat. The states are facing heavy demand for

[3] JOSEPH GUSMAN, *More than 1,400 New York police officer test positive for coronavirus*, THE HILL, https://thehill.com/changing-america/well-being/prevention-cures/490615-more-than-1000-new-york-city-police-officers, last accessed April 1, 2020.

unemployment benefits and supplemental nutrition benefits (also known as SNAP benefits). *Id.*

No State has blithely made decisions restricting work, school, commerce, travel, association, worship, and medical care. These decisions are *necessary* under exigent circumstances.[4] Indeed, the very fact so many states have found such drastic action reasonable and necessary underscores the gravity of the situation.

Plaintiffs' attitude of exceptionalism, and the district court's adoption of it, underscores the challenge states face stemming the spread of the virus. A district court's second-guessing of the judgment of state *and federal* officials during an ongoing pandemic broadly undermines compliance, which only prolongs the agony and increases the death toll. *There is no effective remedy for this harm.* This is precisely why the Supreme Court—and virtually every state court to ever consider the issue—has recognized that state power is at its zenith during an epidemic. Spotty compliance or flagrant noncompliance by those who believe they are exceptional worsens the disaster.

[4] The assertion that Texas or any other state is using this crisis to specifically target abortion clinics or abortions is simply unfounded. The orders issued by Texas and other states are neutral.

The damage is not just to Texans. The ruling below engenders more litigation. The problem is not theoretical. States are facing an onslaught of litigation related to Covid-19. For example, prison advocacy groups in Louisiana and Mississippi are demanding federal judges second-guess and/or restrict the choices of prison officials on how to manage prison populations. *See, e.g.*, Motion for Temporary Restraining Order, *Lewis v. Cain*, No. 3:15-cv-00318-SDD-RLB, (Mar. 31, 2020); *Amos v. Taylor*, No. 4:20-cv-00007-DMB-JMV Doc #: 59 (Mar. 16, 2020).

State officials largely trust that people will voluntarily comply with their orders and exercise responsible judgment out of concern for their own safety and the greater good. But they do not always do so. The district court's order emboldens others to seek unnecessary exceptions through burdensome litigation.

III. ALL HEALTH PROVIDERS' COMPLIANCE IS NECESSARY TO STEM THE TIDE OF COVID-19.

Plaintiffs demand a *blanket* exemption—one not granted for *any other provider or procedure*—from a facially neutral regulation. Their declarations reflect inadequate protections of their own staff, their facility, and their patients from the spread of COVID-19. And the

declarations prove Plaintiffs will continue to move hundreds of people through their clinics, without adequate protection or appreciation of the danger. They are entirely unqualified to opine upon—much less overrule—State public health experts' judgment.[5] *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue."); *Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp. 2d 1287, 1293 (N.D. Okla. 2000) (rejecting contention that a "medical degree is qualification enough"); *see also Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799–800 (4th Cir. 1989) (district court erred by admitting testimony of "expert" who had an advanced degree but no relevant experience or publications). Plaintiffs—at most—offer thin *ipse dixit*, on risk wholly outside their scope of knowledge, training, and experience. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Allowing abortion providers in Texas to conduct business as usual is irresponsible and will contribute the spread of this deadly virus. And

[5] Plaintiffs submit declarations from administrators, business managers and a gynecologist who have no expertise in epidemiology or infectious disease and offer no opinions on these issues.

it will further undermine efforts to obtain compliance from other segments of society. The federal judiciary is uniquely unsuited to the task it is being asked to undertake: second-guessing the judgment of infectious disease experts, public health officials, and state disaster managers.

This situation will not last forever. But the problem will take much longer to resolve—and require greater and longer restrictions on the liberties of the public—if district courts are permitted to grant blanket exceptions to state-issued public health orders.

CONCLUSION

The district court gave carte-blanche protection to abortion clinics from state-wide, neutrally-applicable emergency orders the Texas Governor issued to address a grave threat to public health when his powers are at a zenith. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). That was indisputably wrong. This undoubtedly undermines Texas' and the *Amici* States' ability to enforce their public health orders and protect the public. If there ever was a situation where the individual's rights yield to that of the public at large, it is during an epidemic. This Court should

grant Texas' petition for mandamus and direct the district court to dismiss Plaintiffs' complaint.

Respectfully submitted,

JEFF LANDRY
ATTORNEY GENERAL

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill*
Solicitor General
Counsel of Record
J. Scott St. John
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov
Counsel for Amici Curiae

Steve Marshall
Alabama Attorney General

Leslie Rutledge
Arkansas Attorney General

Lawrence Wasden
Idaho Attorney General

Curtis T. Hill Jr.
Indiana Attorney General

Daniel Cameron
Kentucky Attorney General

Lynn Fitch
Mississippi Attorney General

Eric Schmitt
Missouri Attorney General

Douglas J. Peterson
Nebraska Attorney General

Dave Yost
Ohio Attorney General

Mike Hunter
Oklahoma Attorney General

Alan Wilson
South Carolina Attorney General

Jason Ravnsborg
South Dakota Attorney General

Herbert Slatery III
Tennessee Attorney General

Sean Reyes
Utah Attorney General

Patrick Morrisey
West Virginia Attorney General

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 2,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Attorney for Amici Curiae

Dated: April 2, 2020