Case No. 20-50296

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
Case No. 1:20-cv-00323-LY

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING PETITIONERS. FILED WITH CONSENT.

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April 13, 2020

CERTIFICATE OF INTERESTED PERSONS

No. 20-50296, In re: Greg Abbott, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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CORPORATE DISCLOSURE STATEMENT

The American Center for Law and Justice (ACLJ) is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and State courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues before the Supreme Court and lower federal courts, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005), and filed an *amicus curiae* brief in the related appeal of *In re: Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 7, 2020).

The ACLJ is devoted to defending our God-given individual rights and liberties, including those enumerated by the Founding Fathers in the Declaration of Independence and the United States Constitution. The ACLJ is especially dedicated to defending the fundamental human right to life; without it, no other right or liberty

[1] All parties to this appeal consented to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

can be enjoyed. This brief is submitted by the ACLJ and more than 125,000 of its members who support the Petitioners and urge a grant of mandamus relief to vacate the temporary restraining order entered against them on April 9, 2020.

INTRODUCTION

One of the most essential and fundamental purposes of our constitutional system of government, if not the most essential and fundamental, is to protect the lives of Americans from threats, whether foreign or domestic. As this Court has noted, protecting public safety is "a compelling interest at the heart of government's function." *Hous. Chronicle Publ. Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007); *see also In re: Abbott*, 2020 U.S. App. LEXIS 10893 at *5 (acknowledging the "state's critical interest in protecting the public health").

Although the federal and State constitutions set forth numerous individual rights that may not be infringed upon without a compelling (or other very important) reason, none of these rights are *absolute*. Law, history, and common sense all recognize that one's exercise of individual liberty may rarely, if ever, extend so far as to put the lives, health, or property of others in serious jeopardy. That is the root of the core issue in the case at hand: whether a right (here, the abortion right first recognized by the Supreme Court in 1973) is "absolute" such that a State government has no ability to temporarily interfere with the exercise of that right as a necessary means of addressing a deadly pandemic. The Executive Order is not a "*ban*" on a

constitutional right. It is a temporary suspension of activities with a definitive end to the suspension, and it has been enacted in exigent and emergent circumstances for the purpose of protecting and promoting the welfare of the American people, including saving their lives. Governments across the country, and the world, are taking drastic, necessary measures to stem the tide of countless thousands of deaths. Thus, the Executive Order temporarily suspending abortions in Texas to alleviate unnecessary strain on its health system and to preserve personal protective equipment ("PPE") for those health workers combatting the COVID-19 pandemic is constitutional. The Executive Order is currently set to expire on April 21, 2020, roughly one week from the filing of this brief.

ARGUMENT

I. Constitutional Rights Are Not Absolute.

The Supreme Court has long recognized that constitutional rights – even ones determined to be fundamental – are not absolute and can be subject to regulation and restriction, especially when the government acts to protect a compelling government interest such as protecting Americans' lives.[2] The Court has stated that there is a

[2] *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("[T]he Second Amendment . . . right was not unlimited, just as the First Amendment's right of free speech was not."); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to

(Footnote continues on next page.)

"duty our system [of government] places on this Court to say where the individual's freedom ends and the State's power begins." *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

Particularly relevant to the case at hand is the Supreme Court's recognition that, although the freedom of religion is among the most fundamental of liberties, "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). There is no reason why the abortion right asserted by Respondents should be given a special, much broader construction than the fundamental rights protected by the First Amendment, which would allow individuals to endanger the lives and safety of others. *Cf. A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 267, n.74 (5th Cir. 2010) (health and safety interests are sufficient "to justify inroads into a student's free expression").

Broad protection should indeed be given to our sacred liberties, and Americans must remain ever vigilant and hold our government accountable to protect against the encroachment of those liberties. Yet, it should not be impossible

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serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (holding that the Free Exercise Clause protects two distinct freedoms: the freedom to believe and the freedom to act; the latter is not absolute).

for the government to do what is required to protect lives from a grave threat, as here, the likes of which have not been seen in generations.

II. Governor Abbott's Executive Order is Constitutional and Does Not Permanently Diminish the Constitutional Rights of American Citizens.

a. States have broad authority to protect those within their borders.

In times of emergency as well as times of peace, the States possess substantial police power to protect their residents' health and safety. Governor Abbott's Order falls squarely within the constitutionally-recognized police powers of Texas, and any temporary infringement of a right to abortion is necessary to protect the health, safety, and lives of *all* Texans. Where the safety of all citizens conflicts with the rights of some, the safety of all must prevail. *See Union Dry Goods Co. v. Ga. Public Service Corp.*, 248 U.S. 372, 375 (1919).

While a global pandemic implicates the interests and powers of both the federal and State governments, the Supreme Court has "distinctly recognized the authority of a *State* to enact quarantine laws and 'health laws of *every description*[.]'" *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905) (internal emphasis added). In fact, when Jacobsen argued that his Constitutional rights were violated by the mandatory vaccination requirement imposed by Massachusetts, the Court went so far as to say that

> the liberty secured by the Constitution of the United States to every person within its jurisdiction *does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from*

> *restraint*. There are manifold restraints to which every person is necessarily subject for the common good.

Id. at 26 (internal emphasis added). "Real liberty for all" does not exist in a vacuum, where one person may exercise his or her rights to the injury of others. *Id.*

And, when there is a question as to the validity of a State governor's order, "[t]he presumption of law is in favor of the validity of the order . . . ." *Union Dry Goods Co.,* 248 U.S. at 374-75; *accord In re: Abbott*, 2020 U.S. App. LEXIS 10893 at *17, 34; *see also Beer Company v. Massachusetts*, 97 U.S. 25, 33 (1877) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to preservation of good order and public morals.").

Abortion, while residing in the tension between morality and health, still squarely rests within the State police power of Texas and Governor Abbott. The ongoing crisis stemming from the COVID-19 pandemic presents not only a dire need for the continued protection of Texans and, indeed, of all United States citizens, but also creates a haze of medical uncertainty, of a kind not seen in this country for over a century. Thus, it is within the broad purview of State government to navigate the situation for the health and safety of its citizens. In light of the extraordinary deference courts have given to regulations enacted under State police powers, any

exceptions to the above principles must be reserved for the most fundamental and expressly enumerated rights, which does not include abortion.

b. Abortion providers do not fall within a narrow exception to traditional State police powers.

Abortion is not a right enshrined in the actual language of the Constitution. In 1973, the Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a right protected, at least to a certain extent, by the federal Constitution. After *Roe*, the Court commented on this new constitutional right by stating that the Court's rulings after *Roe* had "undervalue[d] the State's interest in [protecting] potential life." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The Court has since ruled that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman," and that the State has an "interest in promoting respect for human life *at all stages* in the pregnancy." *Gonzales*, 550 U.S. at 157, 163. In sum, the Court has clearly established that there can be constitutional limits on abortion; in order words, abortion is not a right superior to any other right. Thus, if the government may place restrictions on abortion to protect the lives of the unborn, it follows that it may also place restrictions on abortion to save the lives of the born.

The Executive Order does not constitute a substantial obstacle to a woman's right to choose abortion. The Order applies equally to *all* licensed healthcare professionals and healthcare facilities in the State. The Order requires that they

> 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.[3]

The Order is a temporary, four-week suspension of elective procedures, equally applied to all licensed healthcare professionals and healthcare facilities, and thus equally affecting any person who would ordinarily elect to have a surgery or procedure during those four weeks. It is not a "ban," nor does it single out abortion for disfavored treatment. Rather, the Order is a reasonable means of furthering the stated, critically important purpose of combatting the "shortage of hospital capacity or personal protective equipment [which] would hinder efforts to cope with the COVID-19 disaster."

In *Gonzales v. Carhart*, the Court noted that there was medical uncertainty regarding the Partial-Birth Abortion Ban Act of 2003 and whether it would impose a significant health risk on women. 550 U.S. at 163. The Court noted that it has "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* Furthermore, it held that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164. Consequently, the Court determined that "[t]he medical uncertainty over whether the Act's prohibition

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[3] Tex. Exec. Order No. GA-09.

creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.*

The same principles apply here: Texas has ample authority to weigh the available information concerning COVID-19, and the competing interests of all involved, and conclude that temporarily halting elective procedures will help to save lives. The COVID-19 pandemic is claiming countless lives across the country—and will continue to do so for the foreseeable future—and Respondents' insistence on continuing to perform elective abortions will undoubtedly limit the necessary resources needed to treat COVID-19 patients. Respondents cannot show that elective abortions are more beneficial to the public interest than adequately treating pandemic patients and protecting healthcare workers. As such, allowing abortions to proceed amidst this crisis, against Governor Abbott's Order, does not fall within a narrow exception to traditional State police powers. *See In re: Abbott*, 2020 U.S. App. LEXIS 10893 at *4 (noting that, in times where public safety may demand, a State may restrict rights and the "right to abortion is no exception").

c. Governor Abbott was acting within Texas's police powers when enacting the Executive Order.

The situation presented by COVID-19 would not be the first instance in which a Texas governor was called upon to exercise the State's police powers in a time of medical crisis. For example, in *Louisiana v. Texas*, 176 U.S. 1, 13 (1900), the governor of Texas placed an embargo on Louisiana, prohibiting all individuals and

common carriers from entering Texas, due to an outbreak of Yellow Fever. *Id.* at 19. While the Court dismissed the case for lack of subject matter jurisdiction,[4] it noted that "*quarantine laws belong to that class of state legislation which is valid until displaced by Congress,* and . . . such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government." *Id.* at 20-21 (emphasis added). The Court also stated that "it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment." *Id.* at 23.

In giving its reasoning, the Court quoted the case of *Morgan Steamship Co. v. La. Board of Health*, 118 U.S. 455 (1886), in which the Court upheld fees that were collected as part of a quarantine system provided by Louisiana statute for protection of the people from infectious and contagious diseases that may have been transferred by the vessels. *Id.* In that decision, the Court stated that

> [t]he matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Id. at 465.

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[4] The controversy was not between the two States directly, as required for original jurisdiction under U.S. CONST. art. III, § 2, because Louisiana brought the suit on behalf of its citizens and not itself. *Id.* at 23.

In sum, the Supreme Court has repeatedly given deference to State governors and their police powers in times of emergency. Therefore, this Court should also give deference to Governor Abbott and uphold his Emergency Order.

CONCLUSION

The ACLJ, *amicus curiae*, respectfully requests that this Court grant mandamus relief for the Petitioners and direct the district court to vacate the temporary restraining order entered on April 9, 2020.

DATED: April 13, 2020

Respectfully submitted,

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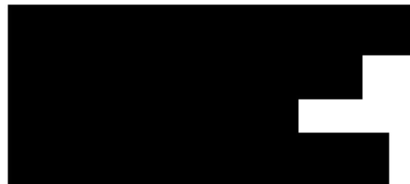

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