No. 20-50264

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

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In re: GREGG 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; KATHERINE A. THOMAS, in her official capacity as the 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 Case No. 1:20-CV-323, Hon. Lee Yeakel

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BRIEF OF AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AND OTHER NATIONWIDE ORGANIZATIONS OF MEDICAL PROFESSIONALS AS *AMICI CURIAE* IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

No. 20-50264, *In re Gregg 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, in addition to those disclosed in the parties' statements of interested persons, 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.

Amici Curiae	**Counsel**
1. States of Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia	1. Louisiana Department of Justice (Elizabeth Murrill; J. Scott St. John) 2. Lill Firm, P.C. (David S. Lill)
1. American Center for Law & Justice	1. American Center for Law & Justice (Edward Lawrence White)
1. American College of Obstetricians and Gynecologists 2. American Medical Association 3. American Academy of Family Physicians 4. American Academy of Nursing	1. Mayer Brown (Nicole A. Saharsky; Kathleen S. Messinger) 2. American College of Obstetricians and Gynecologists (Skye L. Perryman)

5. American Academy of Pediatrics 6. AAGL 7. American College of Nurse-Midwives 8. The American College of Osteopathic Obstetricians and Gynecologists 9. American College of Physicians 10. American Osteopathic Association 11. American Psychiatric Association 12. American Society for Reproductive Medicine 13. American Urogynecologic Society 14. North American Society for Pediatric and Adolescent Gynecology 15. National Association of Nurse Practitioners in Women's Health 16. Society of Family Planning 17. Society for Maternal-Fetal Medicine 18. Society of Gynecologic Oncology 19. Society of Gynecologic Surgeons 20. The Society of OB/GYN Hospitalists	

Dated: April 2, 2020 /s/ *Nicole A. Saharsky*

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INTEREST OF *AMICI CURIAE*

Amici are nationwide, non-partisan organizations of leading medical professionals and experts in the United States. They represent the doctors and nurses who are on the front lines caring for patients and fighting the COVID-19 pandemic. They file this brief because the Governor of Texas's new executive order, which according to the Attorney General effectively bans abortion in the state, poses a severe threat to the health and well-being of women in Texas. The executive order is contrary to the considered judgment of the medical community. If permitted to remain in effect, it will deny women essential medical care, care that should not be delayed or denied, in violation of the Constitution. A full list of *amici* is provided in the appendix to this brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

For the first time since 1973, abortion is effectively illegal in Texas. Physicians and medical professionals in the state face possible criminal prosecution if they provide this essential medical care. Reproductive health care is critical to a woman's overall health, and access to abortion

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(2), (a)(4)(E). The parties have consented to the filing of this brief.

is an important component of reproductive health care. *Amici* are leading societies of medical professionals, whose policies represent the considered judgment of many health care professionals in this country. *Amici*'s position is that laws that regulate abortion should be supported by a valid medical justification. The Governor's decision to effectively ban abortion in Texas during the COVID-19 pandemic lacks a valid medical justification. If allowed to remain in effect, the Governor's order will render abortion inaccessible in the state and will severely harm women.

On March 22, 2020, the Governor issued Executive Order GA-09, which bars "all surgeries and procedures that are not immediately medically necessary."[2] The order's stated purpose is to conserve hospital resources, including personal protective equipment (PPE).[3]

The Attorney General has interpreted the executive order to take the drastic step of banning all non-emergency abortions in Texas, and he

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[2] Tex. Exec. Order No. GA-09, at 3 (Mar. 22, 2020), https://perma.cc/F6EU-EBPE.

[3] *Id.* (order exempts procedures that "would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster").

has stated he will criminally prosecute physicians and medical professionals who violate the order.[4] The ban is scheduled to last at least until April 21, 2020, or until the Governor modifies it.[5] The state defendants suggest that this is just a "three-week pause,"[6] but there is no medical or scientific reason to believe that the COVID-19 pandemic will be resolved in three weeks.

The executive order has the "force and effect of law."[7] Physicians and medical professionals who violate the law are subject to criminal penalties, including fines of up to $1,000 and imprisonment for up to 180 days.[8] Violators also are subject to administrative enforcement proceedings, which may result in discipline by the state medical board.[9]

This ban is contrary to the considered judgment of the country's leading physician organizations, including guidance from the American

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[4] Office of the Att'y Gen. of Tex., *Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic* (Mar. 23, 2020) ("Those who violate the governor's order will be met with the full force of the law."), https://perma.cc/9WSX-JW6N.

[5] Tex. Exec. Order No. GA-09, at 3 (Mar. 22, 2020).

[6] Pet. for a Writ of Mandamus 2.

[7] Tex. Gov't Code Ann. § 418.012 (West 1987).

[8] *See* Tex. Gov't Code Ann. § 418.173 (West 1987).

[9] *See* 25 Tex. Admin. Code §§ 135.24(a)(1)(F), 139.32(b)(6); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (b)(10).

Medical Association, the American College of Obstetricians and Gynecologists, and the American College of Surgeons.[10] The Governor's ban on abortion in the state, except in cases of emergency, is not supported by accepted medical practice or scientific evidence. There is a broad medical consensus that abortion is essential health care, accessed by at least one-quarter of women in the United States during their lifetimes. There is no evidence that prohibiting abortion during the pandemic will mitigate PPE shortages or promote public health and safety.

The Governor's order will make safe abortion inaccessible in Texas. Abortion care will be delayed or, in some cases, denied altogether. Some women will travel long distances to go out of state to obtain abortion care. And some women likely will resort to unsafe methods of abortion.

There is no medical justification for this ban on abortion. *Amici's* members are on the front lines caring for patients, at great personal risk. They understand that the COVID-19 pandemic is a public health crisis

[10] Am. Coll. of Obstetricians & Gynecologists (ACOG), *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020) (*ACOG Joint Statement*), https://perma.cc/52S9-LHUA; Am. Coll. of Surgeons, *COVID-19 Guidelines for Triage of Gynecology Patients* (Mar. 24, 2020) (*American College of Surgeons Statement*), https://perma.cc/4KXE-24KY; Am. Med. Ass'n, *AMA Statement on Government Interference in Reproductive Health Care* (Mar. 30, 2020) (*AMA Statement)*, https://perma.cc/2YZR-2UXT.

that requires the full attention and resources of our health care system. But the COVID-19 pandemic does not justify restricting abortion care in Texas. Most abortions do not require use of any hospital resources and use only minimal PPE. Indeed, the Governor's order is likely to *increase*, rather than decrease, burdens on hospitals and use of PPE. At the same time, it will severely impair essential health care for women, and it will place doctors, nurses, and other medical professionals in an untenable position by criminalizing necessary medical care.

The Court should deny the petition for a writ of mandamus.

ARGUMENT

I. ABORTION IS ESSENTIAL, TIME-SENSITIVE, AND SAFE HEALTH CARE

Abortion is an essential component of comprehensive health care. Like all medical matters, decisions regarding abortion should be made by patients in consultation with their physicians and health care professionals and without undue interference from outside parties.[11] The medical

[11] ACOG, *Statement of Policy, Abortion* (reaffirmed 2017) (*ACOG Abortion Policy*), https://perma.cc/73RA-RMUK.

community recognizes that "[a]ccess to legal and safe pregnancy termination . . . is essential to the public health of women everywhere."[12]

Abortion also is a common medical procedure. In 2017, medical professionals performed over 860,000 abortions nationwide,[13] including approximately 55,440 in Texas.[14] Approximately one-quarter of American women will have an abortion before the age of 45.[15]

Abortion is one of the safest medical procedures performed in the United States, and the vast majority of abortions are performed in outpatient non-hospital settings.[16] Complication rates from abortion are extremely low, and most complications are relatively minor and easily

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[12] Editors of the *New England Journal of Medicine* et al., *The Dangerous Threat to* Roe v. Wade, 381 New Eng. J. Med. 979, 979 (2019) (stating the view of the editors, along with several key organizations in obstetrics, gynecology, and maternal-fetal medicine, including the American Board of Obstetrics and Gynecology); *see ACOG Joint Statement*; *American College of Surgeons Statement; AMA Statement.*

[13] Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, at 7 (2019) (*Abortion Incidence 2017*).

[14] Guttmacher Inst., *State Facts About Abortion: Texas* (2020).

[15] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 Am. J. Pub. Health 1904, 1908 (2017).

[16] *See, e.g.*, National Academies of Sciences, Engineering, Medicine, *The Safety and Quality of Abortion Care in the United States* 10 (2018) (*Safety and Quality of Abortion Care*) ("The clinical evidence clearly shows that legal abortions in the United States – whether by medication, aspiration, D&E, or induction – are safe and effective. Serious complications are rare.").

treatable.[17] The most common complications following an abortion typically can be treated by follow-up procedures at the clinic and/or with antibiotics.[18]

Major complications from abortion are exceptionally rare, occurring in just 0.23 to 0.50 percent of cases, depending on the method used.[19] The risk of death from abortion is even rarer. Nationally, fewer than one in 100,000 patients die from abortion-related complications.[20] The risk of death associated with childbirth is approximately fourteen times higher than the risk associated with abortion.[21]

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[17] Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 181 (2015) (Upadhyay); *see Safety and Quality of Abortion Care* 60.

[18] *See* ACOG, *Induced Abortion: What Complications Can Occur with an Abortion?* (2015), https://perma.cc/DFU5-WL5D; *Safety and Quality of Abortion Care* 116.

[19] Kari White et al., *Complications from First-Trimester Aspiration Abortion: A Systematic Review of the Literature*, 92 Contraception 422, 434, 435 tbl. 7 (2015) (White).

[20] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States,* 119 Obstetrics & Gynecology 215, 216 (2012) (Raymond & Grimes); *see* ACOG, *Guidelines for Women's Health Care: A Resource Manual* 719 (4th ed. 2014).

[21] Raymond & Grimes 216.

Advances in medical science have expanded safe options for pregnancy termination. For example, medication abortion is a safe and effective option in the first trimester.[22] Thirty percent of abortions are medication abortions, where patients typically take the medication to complete the procedure at home.[23]

Non-medication abortion commonly is performed in clinics or doctor's offices, as opposed to hospitals. Nationally, 95 percent of abortions are performed in non-hospital settings.[24] There is no medically sound reason to assume that abortions performed in hospitals are safer than those performed in abortion clinics or offices. Indeed, scientific literature suggests that the safety of abortions performed in office settings is equivalent to those performed in hospital settings.[25]

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[22] *See Safety and Quality of Abortion Care* 10, 51-55.

[23] Tara C. Jatlaoui et al., *Abortion Surveillance – United States 2015*, 67 Morbidity & Mortality Weekly Rep. 1, 33 tbl. 11 (2018) (Jatlaoui); Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 Perspectives on Sexual & Reprod. Health 17, 24 tbl. 5 (2017) (*Abortion Incidence 2014*).

[24] Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 Perspectives on Sexual & Reprod. Health 41, 42 (2011) (*Abortion Incidence 2008*); Theodore Joyce, *The Supply-Side Economics of Abortion*, 365 New Eng. J. Med. 1466, 1467 (2011) (Joyce).

[25] Sarah C.M. Roberts, Ushma D. Upadhyay & Guodong Liu, *Association of Facility Type with Procedural-Related Morbidities and Adverse Events Among Patients Undergoing Induced Abortions*, 319 JAMA 2497, 2505 (2018); White 440; *see Safety and Quality of Abortion Care* 10, 73, 79.

The overwhelming weight of medical evidence conclusively demonstrates that abortion is an extremely safe, common medical procedure. The Supreme Court made just that point in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), when it noted that "[t]he great weight of evidence demonstrates that," before Texas enacted certain regulations, "abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." *Id.* at 2302 (quoting district court's order). *See also June Medical Services LLC v. Kliebert*, 250 F. Supp. 3d 27, 61 (M.D. La. 2017) ("Abortion is one of the safest medical procedures in the United States."), *rev'd*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019) (No. 18-1323) (argued Mar. 4, 2020).

While abortion is a safe and common medical procedure, it is also a time-sensitive one for which a delay may increase the risks or potentially make it completely inaccessible. The consequences of being unable to obtain an abortion profoundly impact a person's life, health, and well-being.

II. THE GOVERNOR'S ORDER WILL MAKE SAFE, LEGAL ABORTION INACCESSIBLE IN TEXAS

The Governor's order will lead to abortion care being delayed or denied. If Texas's abortion facilities must suspend all services while the executive order remains in effect, many patients seeking abortion care in early pregnancy will no longer be eligible for medication abortion.[26] Many patients may not be able to obtain care until the second trimester.[27] Second-trimester abortions "are more expensive, and fewer facilities offer the service."[28] And once the executive order expires, existing facilities may not have enough capacity to immediately provide abortion care to patients seeking that care, which will delay the service even further.[29]

Delays in obtaining an abortion can compromise patients' health. Abortion should be performed as early as possible because, although abortion procedures are among the safest medical procedures, the associated rate of complications increases as the pregnancy progresses.[30] The

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[26] Kari White et al., *The Potential Impacts of Texas' Executive Order on Patients' Access to Abortion Care* 1, Tex. Policy Evaluation Project, Research Brief (2020) (*Potential Impacts*), https://perma.cc/5V3F-25UK.

[27] *Id.*

[28] *Id.* at 2.

[29] *Id.*

[30] *Safety and Quality of Abortion Care* 75; *see ACOG Abortion Policy*.

chance of a major complication is higher in the second trimester than in the first trimester.[31]

As a result of the Governor's order, some women will travel out of state in order to attempt to obtain abortion care. One very recent study concluded that most women will have to travel large distances to obtain abortion care: "If Texas clinics are forced to suspend services while the executive order remains in effect, most counties (94%) will be 100 miles or more from a facility and approximately three-quarters (72%) will be over 200 miles away."[32] While the out-of-state travel itself poses an undue burden on women seeking abortion care, "most of Texas' neighboring states require a mandatory in-person consultation visit and 24-hour waiting period."[33] As a result, "many patients seeking care out of state would have to travel 800 round-trip miles or more to attend two separate visits."[34] While some patients may be able to stay overnight, "research indicates that fewer than one in five patients do so."[35] For many women,

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[31] Upadhyay 181.
[32] *Potential Impacts* 3.
[33] *Id.*
[34] *Id.*
[35] *Id.*

especially low-income women, "[i]t is often difficult . . . to make the necessary arrangements to travel to a clinic, especially one that is far away. Finding child care, taking time off work and covering the cost of gas increase patients' out-of-pocket expenses and are logistically challenging to arrange."[36]

Out-of-state travel may be particularly challenging as a result of COVID-19 because of "economic uncertainty from lost wages and need to care for children who are at home."[37] Moreover, at least one bordering state – Oklahoma – has similarly attempted to outlaw abortion,[38] meaning that even women who would be able to travel to a state like Oklahoma could be unable to access care.

The Governor's order likely will cause some women to resort to unsafe methods of care. Studies have found that women are more likely to self-induce abortions when they face barriers to reproductive services.[39]

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[36] *Id.*

[37] *Id.*

[38] Okla. Fourth Am. Exec. Order 2020-07 (Mar. 24, 2020), https://perma.cc/A86V-2PMS; Office of Gov. J. Kevin Stitt, *Governor Stitt Clarifies Elective Surgeries and Procedures Suspended Under Executive Order* (Mar. 27, 2020), https://perma.cc/6V4H-YSMZ.

[39] *See, e.g.*, Lisa H. Harris & Daniel Grossman, *Complications of Unsafe and Self-Managed Abortion*, 382 New Eng. J. Med. 1029, 1029 (2020).

In Texas, many women will not have the means to travel out of state for abortion care, which increases the likelihood that they will attempt to self-induce abortion or seek an illegal abortion.[40] Methods of self-induction outside medical abortion may rely on harmful tactics such as herbal or homeopathic remedies, getting punched in the abdomen, using alcohol or illicit drugs, or taking hormonal pills.[41]

Previous experience in Texas proves the point: From 2011 to 2013, Texas severely curtailed the ability to obtain abortion care. In 2013, "the number of abortions performed in Texas declined 13% compared to the same period" the previous year, and "[t]he number of medication abortions provided . . . declined 70%."[42] A study that surveyed women seeking abortions revealed that "five of 23 respondents said they had thought about or looked into trying to self-manage their abortion; they said they did not pursue that option because they were worried that it

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[40] *See* ACOG, Comm. on Health Care for Underserved Women, *Opinion Number 613, Increasing Access to Abortion* 2-3 (2014) (*ACOG Opinion 613*); Elizabeth G. Raymond et al., *Mortality of Induced Abortion, Other Outpatient Surgical Procedures and Common Activities in the United States*, 90 Contraception 476, 478 (2014).

[41] Daniel Grossman et al., *Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas*, Tex. Policy Evaluation Project Research Brief 3 (2015).

[42] Liza Fuentes et al., *Texas Women's Decisions and Experiences Regarding Self-Managed Abortion*, BMC Women's Health 2 (2020).

would not be safe or that it would not be effective."[43] That study concluded that "self-managed abortion may become more common if clinic-based abortion care becomes more difficult to access, especially among women in south Texas" and "among poor women – who make up more than half of all abortion patients."[44]

Finally, evidence suggests that women are more likely to experience short-term psychological issues when denied an abortion. For example, women denied abortions because of gestational age bans are more likely to report short-term symptoms of anxiety than those women who received an abortion.[45] Accordingly, restrictions on abortion, such as those at issue here, are detrimental to women's physical and psychological health and well-being.

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[43] *Id.*

[44] *Id.* at 11.

[45] M. Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA Psychiatry 169, 172 (2017).

III. THERE IS NO MEDICAL JUSTIFICATION FOR THE GOVERNOR'S ORDER, AND IT WILL SEVERELY HARM WOMEN AND MEDICAL PROFESSIONALS

A. The COVID-19 Pandemic Does Not Justify Restricting Or Prohibiting Abortion Care In Texas

It is the consensus of the nation's medical experts that the COVID-19 pandemic does not justify restricting or prohibiting abortion care.[46] The vast majority of abortions are performed in non-hospital settings.[47] Very, very few abortions result in complications that require hospitalization.[48] Because most abortion care is delivered in outpatient settings, providing abortion care does not require hospital resources, including hospital PPE.

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[46] *ACOG Joint Statement* (ACOG and several other medical organizations "do not support COVID-19 responses that cancel or delay abortion procedures."); *American College of Surgeons Statement* (listing "[p]regnancy termination (for medical indication or patient request)" as a "[s]urger[y] that if significantly delayed could cause significant harm"); *AMA Statement* (In response to states issuing orders "ban[ning] or dramatically limit[ing] women's reproductive health care," the AMA's view is that "physicians – not politicians – should be the ones deciding which procedures are urgent-emergent and need to be performed, and which ones can wait, in partnership with our patients.").

[47] Jatlaoui 33 tbl. 11; Joyce 1467; *see Abortion Incidence 2014*, at 24 tbl. 5; *Abortion Incidence 2008*, at 42.

[48] Ushma D. Upadhyay et al., *Incidence of Post-Abortion Complications and Emergency Department Visits Among Nearly 55,000 Abortions Covered by the California Medi-Cal Program* slide 28 (Jan. 28, 2014) (ANSIRH Grand Rounds presentation), https://perma.cc/Y4NJ-WM7Q.

Permitting abortion care – which is essential, time-sensitive health care – will not substantially increase the burdens hospitals face as a result of the COVID-19 pandemic. In contrast, forcing women to carry pregnancies to term will increase reliance on the health care system and use of PPE. Pregnant women remain in the health care system. They often visit hospitals (including emergency rooms) for evaluation, thus using hospital bed space and resources. Most women give birth in hospitals and some births even require surgery. Further, women who attempt unsafe, unmanaged abortions may require emergency hospitalization, which could use significant hospital resources. Accordingly, the Governor's order will actually *increase* the burdens on hospitals and increase the use of PPE.

The Governor's order also is likely to increase, rather than decrease, the spread and severity of COVID-19. For the few women who may have the resources to travel to another state to obtain an abortion, there is no evidence that abortions in other states would utilize less medical equipment than abortions in Texas. Further, travel is one factor that

contributes to the spread of COVID-19.[49] Many Governors have issued "shelter-in-place" orders that prevent people from even leaving their homes, except in certain narrow circumstances, in order to reduce COVID-19 spread.[50]

To be sure, the availability of PPE is of critical importance to *amici,* who are on the front lines of the COVID-19 pandemic. *Amici's* members are caring for patients every day in trying circumstances and in cases where they have not been provided adequate PPE or testing. Yet, it is disingenuous, at best, for the State to claim that banning abortion will preserve or mitigate shortages of PPE that the nation's medical professionals need to care for people during the pandemic. There is simply no evidence or logic under which that would be the case.

B. The Order Will Harm Women And Pose A Serious Threat To Medical Professionals In Texas

The Texas order bans all non-emergency abortions in the state, which will increase the likelihood that women will delay the procedure or will not be able to obtain the procedure at all. As discussed, the order

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[49] Centers for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19) – Travel in the US* (last reviewed Mar. 30, 2020), https://perma.cc/2QA7-TL9M.

[50] *See* Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (updated Apr. 2, 2020), https://perma.cc/A6GF-HK7G.

means women may travel outside the state to obtain abortions, attempt to self-induce abortions through potentially harmful methods, or ultimately be unable to obtain abortions at all, forcing them to carry an unwanted pregnancy to term.[51] Each of these outcomes increases the likelihood of negative consequences to a woman's physical and psychological health that could be avoided if abortion services were available.[52] Being forced to carry a pregnancy to term could profoundly affect a person's life, health, and well-being.

The Governor's order also poses serious threats to physicians and medical professionals. Under the order, doctors, nurses, and other medical professionals who perform abortion care that is constitutionally protected and medically necessary could lose their licenses and even be subject to criminal penalties, including imprisonment.[53] Those are draconian sanctions to place on individuals who are only attempting to offer the best possible care to their patients.

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[51] *See, e.g.*, *Abortion Incidence 2017*, at 3, 8.

[52] *See, e.g.*, *ACOG Opinion 613*.

[53] Tex. Exec. Order No. GA-09, at 3; *see* Tex. Gov't Code Ann. § 418.173 (West 1987); *see* 25 Tex. Admin. Code §§ 135.24(a)(1)(F), 139.32(b)(6); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (b)(10).

Abortion is essential health care for women, protected by the Constitution. For the first time since 1973, Texas has banned virtually all abortions in the state. No valid medical justification supports that ban. *Amici* urge this Court to deny the petition for a writ of mandamus.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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Dated: April 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: April 2, 2020 /s/ *Nicole A. Saharsky*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *Amici Curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 3,800 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface and type style requirements of Rule 32(a) and Fifth Circuit Rule 32.1 because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: April 2, 2020 /s/ *Nicole A. Saharsky*

APPENDIX

LIST OF *AMICI CURIAE*

1. The **American College of Obstetricians and Gynecologists** (ACOG) is the nation's leading group of physicians providing health care for women. With more than 60,000 members – representing more than 90 percent of all obstetricians-gynecologists in the United States – ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care. ACOG is committed to ensuring access to the full spectrum of evidence-based quality reproductive health care, including abortion care, for all women. ACOG opposes medically unnecessary laws or restrictions that serve to delay or prevent care. ACOG has previously appeared as *amicus curiae* in various courts throughout the country. ACOG's briefs and guidelines have been cited by numerous courts as providing authoritative medical data regarding childbirth and abortion.

2. The **American Medical Association** (AMA) is the largest professional association of physicians, residents, and medical students in

the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policymaking process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all fields of medical specialization and in every state. The federal courts have cited the AMA's publications and *amicus curiae* briefs in cases implicating a variety of medical questions.

3. The **American Academy of Family Physicians** (AAFP) is the national medical specialty society representing family physicians. Founded in 1947 as a not-for-profit corporation, its 134,600 members are physicians and medical students from all 50 states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Uniformed Services of the United States. AAFP seeks to improve the health of patients, families, and communities by advocating for the health of the public and serving the needs of its members with professionalism and creativity.

4. The **American Academy of Nursing** (Academy) serves the public by advancing health policy through the generation, synthesis, and

dissemination of nursing knowledge. Academy Fellows are inducted into the organization for their extraordinary contributions to improve health locally and globally. With more than 2,800 Fellows, the Academy represents nursing's most accomplished leaders in policy, research, administration, practice, and academia.

5. The **American Academy of Pediatrics** (AAP) is a non-profit professional organization founded in 1930 dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. Its membership is comprised of 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. AAP has become a powerful voice for child and adolescent health through education, research, advocacy, and the provision of expert advice. AAP has worked with the federal and state governments, health care providers, and parents on behalf of America's families to ensure the availability of safe and effective reproductive health services.

6. **AAGL** is a professional medical association of 7,500 minimally invasive gynecologic surgeons and is the global leader in minimally invasive gynecologic surgery. AAGL's mission is to elevate the quality

and safety of health care for women through excellence in clinical practice, education, research, innovation and advocacy. AAGL is accredited by the Accreditation Council for Continuing Medical Education to provide continuing medical education for physicians.

7. The **American College of Nurse-Midwives** (ACNM) works to advance the practice of midwifery to achieve optimal health for women through their lifespan, with expertise in women's health and gynecologic care. Its members include approximately 7,000 certified nurse midwives and certified midwives who provide primary and maternity care services to help women of all ages and their newborns attain, regain, and maintain health. ACNM and its members respect each woman's right to dominion over her own health and care, and ACNM advocates on behalf of women and families, its members, and the midwifery profession to eliminate health disparities and increase access to evidence-based, quality care.

8. The **American College of Osteopathic Obstetricians and Gynecologists** (ACOOG) is a non-profit, non-partisan organization committed to excellence in women's health representing over 2,500 providers. ACOOG educates and supports osteopathic physicians to improve the

quality of life for women by promoting programs that are innovative, visionary, inclusive, and socially relevant. ACOOG is likewise committed to the physical, emotional, and spiritual health of women.

9. The **American College of Physicians** (ACP) is the largest medical specialty organization in the U.S. and has members in more than 145 countries worldwide. ACP membership includes 159,000 internal medicine physicians, related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

10. The **American Osteopathic Association** (AOA) represents more than 151,000 osteopathic physicians (DOs) and osteopathic medical students; promotes public health; encourages scientific research; serves as the primary certifying body for DOs; and is the accrediting agency for osteopathic medical schools. As the primary certifying body for DOs and the accrediting agency for all osteopathic medical schools, the AOA works to accentuate the distinctiveness of osteopathic principles and the diversity of the profession.

11. The **American Psychiatric Association** (APA) is a non-profit organization representing over 38,800 physicians who specialize in the practice of psychiatry. APA members engage in research into and education about diagnosis and treatment of mental health and substance use disorders, and are front-line physicians treating patients who experience mental health and/or substance use disorders.

12. The **American Society of Reproductive Medicine** (ASRM) is a multidisciplinary not-for-profit organization dedicated to the advancement of the science and practice of reproductive medicine. Its members include approximately 8,000 professionals. ASRM accomplishes its mission through the pursuit of excellence in education and research and through advocacy on behalf of patients, physicians, and affiliated health care providers.

13. The **American Urogynecologic Society** (AUGS) is the premier non-profit organization representing professionals dedicated to treating female pelvic floor disorders. Founded in 1979, AUGS represents more than 1,900 members, including practicing physicians, nurse practitioners, physical therapists, nurses and health care professionals, and researchers from many disciplines.

14. The **North American Society for Pediatric and Adolescent Gynecology** (NASPAG) is dedicated to providing multidisciplinary leadership in education, research, and gynecologic care to improve the reproductive health of youth. NASPAG conducts and encourages multidisciplinary and inter-professional programs of medical education and research in the field and advocates for the reproductive well-being of children and adolescents and the provision of unrestricted, unbiased, and evidence-based medical practice.

15. The **National Association of Nurse Practitioners in Women's Health** (NPWH) is a national non-profit educational and professional organization that works to ensure the provision of quality primary and specialty health care to women of all ages by women's health and women's health focused nurse practitioners. Its mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs. Since its inception in 1980, NPWH has been a trusted source of information on nurse practitioner education, practice, and women's health issues. In keeping with its mission, NPWH is committed

to ensuring the availability of the full spectrum of evidence-based reproductive health care for women and opposes unnecessary restrictions on access that serve to delay or prevent care.

16. The **Society of Family Planning** (SFP) is the source for science on abortion and contraception. SFP represents approximately 800 scholars and academic clinicians united by a shared interest in advancing the science and clinical care of family planning. The pillars of its strategic plan are (1) building and supporting a multidisciplinary community of scholars and partners who have a shared focused on the science and clinical care of family planning; (2) supporting the production of research primed for impact; (3) advancing the delivery of clinical care based on the best available evidence; and (4) driving the uptake of family planning evidence into policy and practice.

17. The **Society for Maternal-Fetal Medicine** (SMFM), founded in 1977, is the medical professional society for obstetricians who have additional training in the area of high-risk, complicated pregnancies. Representing over 4,000 members, SMFM supports the clinical practice of maternal-fetal medicine by providing education, promoting research, and engaging in advocacy to reduce disparities and optimize the

health of high-risk pregnant women and their babies. SMFM and its members are dedicated to ensuring that medically appropriate treatment options are available for high-risk women.

18. The **Society of Gynecologic Oncology** (SGO) is the premier medical specialty society for health care professionals trained in the comprehensive management of gynecologic cancers. With 2,000 members representing the entire gynecologic oncology team in the United States and abroad, the SGO contributes to the advancement of women's cancer care by encouraging research, providing education, raising standards of practice, advocating for patients and members and collaborating with other domestic and international organizations. In that mission, the SGO strives to ensure access to women's health care as part of an overall prevention strategy for gynecologic cancer.

19. The mission of the **Society of Gynecologic Surgeons** is to promote excellence in gynecologic surgery through acquisition of knowledge and improvement of skills, advancement of basic and clinical research, and professional and public education.

20. The **Society of OB/GYN Hospitalists** (SOGH) is a rapidly growing group of physicians, midwives, nurses and other individuals in

the health care field who support the OB/GYN Hospitalist model. SOGH is dedicated to improving outcomes for hospitalist women and supporting those who share this mission. SOGH's vision is to shape the future of OB/GYN by establishing the hospitalist model as the care standard and the Society values excellence, collaboration, leadership, quality and community.