United States Court of Appeals for the Fifth Circuit

In re Greg Abbott, Governor of Texas, et al.

No. 20-50264
Filed April 7, 2020.

STUART KYLE DUNCAN, Circuit Judge:

To preserve critical medical resources during the escalating COVID-19 pandemic, on March 22, 2020, the Governor of Texas issued executive order GA-09, which postpones non-essential surgeries and procedures until 11:59 p.m. on April 21, 2020. Reading GA-09 as an "outright ban" on pre-viability abortions, on March 30 the district court issued a temporary restraining order ("TRO") against GA-09 as applied to abortion procedures. At the request of Texas officials, we temporarily stayed the TRO while considering their petition for a writ of mandamus directing vacatur of the TRO. We now grant the writ.

The "drastic and extraordinary" remedy of mandamus is warranted for several reasons.

First, the district court ignored the framework governing emergency public health measures like GA-09. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11. "[U]nder the pressure of great dangers," constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Id.* at 29. That settled rule allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home. The right to abortion is no exception.[1]

Second, the district court's result was patently wrong. Instead of applying *Jacobson*, the court wrongly declared GA-09 an "outright ban" on previability abortions and exempted all abortion procedures from its scope. The court also failed to apply *Casey*'s undue-burden analysis and thus failed to balance GA-

[1] Our dissenting colleague suggests our decision "follows not because of the law or facts, but because of the subject matter of this case." Dissent at —. That is wrong. As explained below, *infra* III.A.1, *Jacobson* governs a state's emergency restriction of *any* individual right, not only the right to abortion. The same analysis would apply, for example, to an emergency restriction on gathering in large groups for public worship during an epidemic. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community … to communicable disease.").

09's temporary burdens on abortion against its benefits in thwarting a public health crisis.

Third, the district court usurped the state's authority to craft emergency health measures. Instead, the court substituted its own view of the efficacy of applying GA-09 to abortion. But "[i]t is no part of the function of a court" to decide which measures are "likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30, 25 S.Ct. 358.

In sum, given the extraordinary nature of these errors, the escalating spread of COVID-19, and the state's critical interest in protecting the public health, we find the requirements for issuing the writ satisfied. * * *

Accordingly, we grant a writ of mandamus directing the district court to vacate its TRO of March 30, 2020.

I.

As all are painfully aware, our nation faces a public health emergency caused by the exponential spread of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2. As of April 6, 2020, over 330,000 cases have been confirmed across the United States, with over 8,900 dead. The virus is "spreading very easily and sustainably" throughout the country, with cases confirmed in all fifty states, the District of Columbia, and several territories. Over the past two weeks, confirmed cases in the United States have increased by over 2,000%. Federal projections estimate that, even with mitigation efforts, between 100,000 and 240,000 people in the United States could die. In Texas, the virus has spread rapidly over the past two weeks and is predicted to continue spreading exponentially in the coming days and weeks.

On March 13, 2020, the President declared a national state of emergency, and the Governor of Texas declared a state of disaster. Six days later, the Texas Health and Human Services Executive Commissioner declared a public health disaster because the virus "poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas." As the district court in this case acknowledged, "Texas faces it[s] worst public health emergency in over a century."

The surge of COVID-19 cases causes mounting strains on healthcare systems, including critical shortages of doctors, nurses, hospital beds, medical equipment, and personal protective equipment ("PPE"). The executive order at

issue here, GA-09, responds to this crisis. Issued by the Governor of Texas on March 22, 2020, GA-09 applies to all licensed healthcare professionals and facilities in Texas and 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.

Importantly, the order "shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." Failure to comply with the order may result in administrative or criminal penalties, including "a fine not to exceed $1,000, confinement in jail for a term not to exceed 180 days, or both." The order automatically expires after 11:59 p.m. on April 21, 2020, but can be modified, amended, or superseded.

On March 25, 2020, various Texas abortion providers ("Respondents") filed suit in federal district court against multiple Texas officials, including the Governor, Attorney General, three state health officials, and nine District Attorneys ("Petitioners"). [On March 26], the district court entered a TRO.

In the TRO, the district court agreed that "Texas faces it[s] worst public health emergency in over a century," and also that "[GA-09], as written, does not exceed the governor's power to deal with the emergency." Nonetheless, the court interpreted GA-09 as "effectively banning all abortions before viability." The court reasoned that, because "no interest" can justify such an "outright ban" on pre-viability abortions, GA-09 contravenes Supreme Court and Fifth Circuit precedent. The TRO therefore prohibits all defendants, including Petitioners, from enforcing GA-09 and the emergency rule "as applied to medication abortions and procedural[15] abortions."

On the evening of March 30, 2020, Petitioners filed a petition for writ of mandamus in our court, requesting that we direct the district court to vacate the TRO. Petitioners simultaneously sought an emergency stay of the TRO, as well as a temporary administrative stay, while the court considered their

[15] "Procedural" abortions, the term used by Respondents and the district court, refers to what are also called "surgical" abortions.

request. On March 31, 2020, we temporarily stayed the TRO and set an expedited briefing schedule.

II.

Federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). That includes the writ of mandamus sought by Petitioners. Mandamus is proper only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." Before prescribing this strong medicine, "we ask (1) whether the petitioner has demonstrated that it has no other adequate means to attain the relief it desires; (2) whether the petitioner's right to issuance of the writ is clear and indisputable; and (3) whether we, in the exercise of our discretion, are satisfied that the writ is appropriate under the circumstances. * * *

III.

A.

We first address the second mandamus prong—whether entitlement to the writ is "clear and indisputable"—because it is central to our analysis. * * *

We conclude Petitioners have shown "a clear and indisputable right to issuance of the writ." In issuing the TRO, the district court clearly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). This extraordinary error allowed the district court to create a blanket exception for a common medical procedure—abortion—that falls squarely within Texas's generally-applicable emergency measure issued in response to the COVID-19 pandemic. This was a patently erroneous result. In addition, the court usurped the power of the governing state authority when it passed judgment on the wisdom and efficacy of that emergency measure, something squarely foreclosed by *Jacobson.*[18]

[18] This case differs from *Preterm-Cleveland v. Atty. Gen. of Ohio*, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020), which declined to review a TRO against Ohio's non-essential-surgeries order. Ohio appealed on the basis that the TRO "threaten[ed] to inflict irretrievable harms." Observing the TRO was "narrowly tailored" and did not permit "blanket" provision of abortions, the majority concluded that the TRO would not inflict irreparable harms and thus that it lacked jurisdiction over the appeal. By contrast, here Petitioners seek not appeal but mandamus, a drastic remedy that we nonetheless find appropriate.

1.

In *Jacobson*, the Supreme Court considered a claim that the state's compulsory vaccination law—enacted amidst a growing smallpox epidemic in Cambridge, Massachusetts—violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Id.* at 26. The Court rejected this claim. Famously, it explained that the "liberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. In describing a state's police power to combat an epidemic, the Court explained:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29. * * *

To be sure, individual rights secured by the Constitution do not disappear during a public health crisis, but the Court plainly stated that rights could be reasonably restricted during those times. *Jacobson*, 197 U.S. at 29. Importantly, the Court narrowly described the scope of judicial authority to review rights-claims under these circumstances: review is "only" available

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects*, or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*.

Id. at 31 (emphasis added). Elsewhere, the Court similarly described this review as asking whether power had been exercised in an "arbitrary, unreasonable manner," *id.* at 28, or through "arbitrary and oppressive" regulations, *id.* at 38.

Jacobson did emphasize, however, that even an emergency mandate must include a medical exception for "[e]xtreme cases." 197 U.S. at 38. Thus, the

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Moreover, the TRO here is not "narrowly tailored" but exempts all abortions from GA-09. The TRO's broad sweep also distinguishes this case from recent district court decisions in Alabama and Oklahoma. *See Robinson v. Marshall*, No. 2:19cv365-MHT, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020); *South Wind Women's Center v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020).

vaccination mandate could not have applied to an adult where vaccination would exacerbate a "particular condition of his health or body." *Id.* at 38–39. In such a case, the judiciary would be "competent to interfere and protect the health and life of the individual concerned." *Id.* at 39. At the same time, *Jacobson* disclaimed any judicial power to second-guess the state's policy choices in crafting emergency public health measures: "Smallpox being prevalent and increasing at Cambridge, the court would *usurp the functions of another branch of government* if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Jacobson*, 197 U.S. at 28 (emphasis added).

The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. *Id.* at 38. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30. * * *

By all accounts, then, the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*. Respondents all but concede this point, offering no discernible argument that *Jacobson* has been superseded or is otherwise inapplicable during a public health crisis such as the COVID-19 pandemic. *See* ECF 53 at 16. The district court, however, failed to recognize *Jacobson*'s long-established framework. While acknowledging that "Texas faces it[s] worst public health emergency in over a century," the court treated that fact as entirely irrelevant. Indeed, the court explicitly refused to consider how the Supreme Court's abortion cases apply to generally-applicable emergency health measures, saying it would "not speculate on whether the Supreme Court included a silent 'except-in-a-national-emergency clause' in its previous writings on the issue." App. 268.

That analysis is backwards: *Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. * * *

2.

Moreover, the district court's refusal to acknowledge or apply *Jacobson*'s legal framework produced a "patently erroneous" result. Under *Jacobson*, the district court was empowered to decide only whether GA-09 lacks a "real or substantial relation" to the public health crisis or whether it is "beyond all question, a plain, palpable invasion" of the right to abortion. 197 U.S. at 31. On the record before us, the answer to both questions is no, but the district court did not even ask them. Instead, the court bluntly declared GA-09 an "outright ban" on pre-viability abortions and exempted all abortion procedures, in whatever circumstances, from the scope of this emergency public health measure. That was a patently erroneous result.

a.

The first *Jacobson* inquiry asks whether GA-09 lacks a "real or substantial relation" to the crisis Texas faces. The answer is obvious: the district court itself conceded that GA-09 is a valid emergency response to the COVID-19 pandemic. The court recognized, as does everyone involved, that Texas faces a public health crisis of unprecedented magnitude and that GA-09 "does not exceed the governor's power to deal with the emergency." Our own review of the record easily confirms that conclusion. * * *

To be sure, GA-09 is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis. So, too, GA-09. As the state's infectious disease expert points out, "[g]iven the risk of transmission in health care settings" there is "a sound basis for limiting all surgeries except those that are immediately medically necessary so as to prevent the spread of COVID 19." In sum, it cannot be maintained on the record before us that GA-09 bears "no real or substantial relation" to the state's goal of protecting public health in the face of the COVID-19 pandemic. *Jacobson*, 197 U.S. at 31.

b.

The second *Jacobson* inquiry asks whether GA-09 is "*beyond question*, in palpable conflict with the Constitution." The district court, while not framing the question in those terms, evidently thought the answer was yes. But the court reached that conclusion only by grossly misreading GA-09 as an "outright ban" on all pre-viability abortions. Properly understood, GA-09 merely postpones certain non-essential abortions, an emergency measure that does not plainly violate *Casey* in the context of an escalating public health crisis. As we explain below, however, Respondents will have the opportunity to show at the upcoming preliminary injunction hearing that certain applications of GA-09 *may* constitute an undue burden under *Casey*, if they prove that, "beyond question," GA-09's burdens outweigh its benefits in those situations.

To begin with, the district court's central (and only) premise—that GA-09 is an "outright ban" on all pre-viability abortions—is plainly wrong. * * * First, GA-09 expires on April 21, 2020, three weeks after its effective date.[22] Second, GA-09 includes an emergency exception for the mother's life and health, based on the determination of the administering physician. Third, GA-09 contains a separate exception for "any procedure" that, if performed under normal clinical standards, "would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." * * *

Properly understood, then, GA-09 is a temporary postponement of all non-essential medical procedures, including abortion, subject to facially broad exceptions. Because that does not constitute anything like an "outright ban" on pre-viability abortion, GA-09 "cannot be affirmed to be, *beyond question*, in palpable conflict with the Constitution." *Jacobson*, 197 U.S. at 31 (emphasis added).

Moreover, due to its mistaken view that GA-09 "bans" pre-viability abortions, the district court failed to analyze GA-09 under *Casey*'s undue-burden test. * * *

For example, the district court did not consider whether different methods of abortion may consume PPE differently. Our own review of the record, at this

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[22] Respondents imply that GA-09 is effectively indefinite in duration. For example, they claim that "[f]or many women, the denial of access to abortion will be permanent … given the uncertain duration of the emergency." But the district court did not temporarily restrain some indefinite regulation; it restrained GA-09, which by all accounts expires on April 21, 2020. If anything, Respondents' concern about the indefinite duration "of the emergency" serves to strengthen Petitioners' position that "extraordinary measures" must be taken now to mitigate the "'exponential increase' in COVID-19 cases … expected over the next few days and weeks."

preliminary stage, reveals considerable evidence that surgical abortions consume PPE. By contrast, the record is unclear how PPE is consumed in medication abortions.[24] * * *

3.

Finally, the district court's extraordinary failure to evaluate GA-09 under the *Jacobson* framework also usurped the state's authority to craft measures responsive to a public health emergency. Such judicial encroachment intrudes on the duties of the "executive arm of Government" and "on a delicate area of federal-state relations," further bolstering Texas's right to issuance of the writ.

In addressing the fourth and final TRO factor—whether a TRO would disserve the public interest—the district court did little more than assert its own view of the effectiveness of GA-09. The district court did not provide any explanation of its conclusion that the public health benefits from an emergency measure like GA-09 are "outweighed" by any temporary loss of constitutional rights. * * *

As *Jacobson* repeatedly instructs, however, if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. "It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. Such authority properly belongs to the legislative and executive branches of the governing authority. In light of the massive and rapidly-escalating threat posed by the COVID-19 pandemic, "the court would *usurp the functions of another branch of government* if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 28 (emphasis added). The district court's order contravened this principle; Respondents and the dissenting opinion invite us to do the same. We decline to engage in such "unwarranted judicial action."

To be sure, the judiciary is not completely sidelined in a public health crisis. We have already explained that Respondents may seek more targeted relief, if they can prove their entitlement to it, at the preliminary injunction stage.

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[24] Respondents assert PPE is not used in "providing the pills" for medication abortions, ECF 53 at 31, whereas Petitioners counter that, for medication abortions, Texas requires a physical examination, ultrasound, and follow-up visits—all of which consume PPE. Petitioners also point out that some number of medication abortions result in incomplete abortions that require hospitalization. The dissent appears to accept at face value Respondents' representations about how medication abortions consume PPE. We think that evidentiary determination is better left to the district court at the preliminary injunction stage.

Additionally, a court may inquire whether Texas has exploited the present crisis as a pretext to target abortion providers *sub silentio*. Respondents make allegations to that effect, contending that Petitioners are using GA-09 "to exploit the COVID-19 pandemic to achieve their longtime goal of banning abortion in Texas." Nonetheless, on this record, we see no evidence that GA-09 was meant to exploit the pandemic in order to ban abortion or was crafted "as some kind of ruse to unreasonably delay … abortion[s] past the point where a safe abortion could occur." *Garza*, 874 F.3d at 753 n.3 (Kavanaugh, J., dissenting). To the contrary, GA-09 applies to a whole host of medical procedures and regulates abortions evenhandedly with those other procedures. The order itself does not even mention abortion—or any other particular procedure—at all. Instead, it refers broadly to "all surgeries or procedures" that meet its criteria.[25] * * *

IV.

The petition for writ of mandamus is GRANTED, directing the district court to vacate the TRO entered on March 30, 2020. * * *

JAMES L. DENNIS, dissenting.

Eight days ago, the district court temporarily restrained Texas's temporary ban of all medication abortions and procedural abortions. "The benefits of a limited potential reduction in the use of some personal protective equipment by abortion providers," the district court explained, "is outweighed by the harm of eliminating abortion access in the midst of a pandemic that increases the risks of continuing an unwanted pregnancy, as well as the risks of travelling to other states in search of time-sensitive medical care." Other states, including Oklahoma, Alabama, and Ohio, have attempted to limit a woman's access to abortion during the COVID-19 pandemic. Thus far, none of those attempts has been successful in the face of a constitutional challenge, either in the district courts or on appeal. The American College of Obstetricians and Gynecologists released a statement that "abortion should not be categorized" as a "procedure[ ] that can be delayed during the COVID-19 pandemic." The statement emphasized, as the district court did, that abortion is "a time-

[25] The district court relied heavily on the Attorney General's press release of March 23, 2020, which clarified that in the Attorney General's view, the GA-09 "includ[es] abortion providers." But the district court gave no reason to believe this press release has the force of law. And, in any event, the press release also reads the order to apply "to all surgeries and procedures[,] … including routine dermatological, ophthalmological, and dental procedures, as well as … orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother."

sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible."

Today, the majority concludes that allowing women in Texas access to time-sensitive reproductive healthcare, a right supported by almost 50 years of Supreme Court precedent, was a "patently erroneous" result that must be remedied by "one of the most potent weapons in the judicial arsenal." Unfortunately, this is a recurring phenomenon in this Circuit in which a result follows not because of the law or facts, but because of the subject matter of this case. For the reasons that follow, I dissent.

I.

On March 22, 2020, Texas Governor Greg Abbott signed Executive Order GA-09 ("GA-09") to expand hospital bed capacity as the state responds to the COVID-19 virus. * * *

The day after the Governor signed GA-09, Texas Attorney General Ken Paxton issued a news release stating that GA-09's prohibition on medically unnecessary surgeries and procedures "applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including … any type of abortion that is not medically necessary to preserve the life or health of the mother." The release states that "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time." Paxton emphasized that "[n]o one is exempt from the governor's executive order on medically unnecessary surgeries and procedures, including abortion providers," and "[t]hose who violate the governor's order will be met with the full force of the law." * * *

I include this explanation not to reiterate the procedural history the majority has already explained, but to emphasize what exactly we are reviewing. Respondents brought a constitutional challenge to GA-09, and though the attorney general's interpretation of that order constitutes the crux of the constitutional issues present in this case, it is GA-09 and only GA-09 that we are interpreting. The majority agrees that the attorney general's news release interpreting GA-09 is not legally binding. The attorney general cannot modify the text of the governor's executive order through his news release; only the governor has the power to "issue executive orders ... [that] have the force and effect of law." And GA-09 grants abortion providers the power to determine whether a procedure is "immediately medically necessary to correct a serious

medical condition of ... a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences." It also permits an exception for any abortion that "if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster."

The attorney general's news release interprets GA-09 to ban "any type of abortion that is not medically necessary to preserve the life or health of the mother," regardless, apparently, of whether such a procedure (1) in the view of the patient's physician, is immediately medically necessary and would put a patient at risk for serious adverse medical consequences if not performed, or (2) would fall under GA-09's exception for procedures that do not utilize PPE or deplete hospital capacity. * * *

III.

In *Jacobson*, the city of Cambridge, Massachusetts, pursuant to state statute, passed a regulation requiring all of its citizens to receive a smallpox vaccination to combat a smallpox outbreak. 197 U.S. at 12. Jacobson challenged the regulation, arguing that it violated his Fourteenth Amendment right "to care for his own body and health in such a way as to him seems best." *Id.* at 26. The Court explained that the state's action in compelling vaccination was an exercise of its police power, which "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25. In rejecting Jacobson's constitutional challenge, the Court explained "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others." *Id.* at 26-27. The Court explained, however, that individual rights are not gutted during a crisis: Courts have a duty to review a state's exercise of their police power where the state's action (1) goes "beyond the necessity of the case, and, under the guise of exerting a police power ... violate[s] rights secured by the Constitution," (2) "has no real or substantial relation to" "protect[ing] the public health, the public morals, or the public safety," or (3) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 28, 30. *Jacobson*, then, stands for the proposition that a state by its legislature may utilize its police power to enact laws to protect the public health and safety, even though such laws may impose restraints on citizens' liberties, so long as

that regulation is "justified by the necessities of the case" and does not violate rights secured by the Constitution "under the guise of exerting a police power." *Id.* at 28-29.

A.

This case is clearly distinguishable from *Jacobson*. There, the city required its citizens to get a smallpox vaccine to stop the spread of a smallpox outbreak. The measure adopted by the city related directly to the public health crisis—every citizen who did not receive the vaccine could actively spread the disease, and therefore mandatory vaccination actively curbed the disease's spread. The thread connecting GA-09 to combatting COVID-19 is more attenuated—premised not on the idea that abortion providers are spreading the virus, but that their continuing operation requires the use of resources that should be conserved and made available to healthcare workers fighting the outbreak. This reasoning requires the additional link that those PPE resources denied to abortion providers are indeed conserved, are significant in amount, and can realistically be reallocated to healthcare workers fighting COVID-19, a showing that Petitioners have not made.

B.

The majority claims that "*Jacobson* disclaimed any judicial power to second-guess the policy choices made by the state in crafting emergency public health measures." Maj. Op. at —. But the Court did not conclude that an emergency situation deprives courts of their duty and power to uphold the constitution—quite the opposite, in fact.

The Court in *Jacobson* determined that the Massachusetts law should not be invalidated because "[s]mallpox being prevalent and increasing in Cambridge, the court would *usurp the functions of another branch of government* if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified *by the necessities of the case*." *Jacobson*, 197 U.S. at 28 (emphases added). The Court certainly did not disclaim any power to so rule, under appropriate circumstances, however, explaining:

> We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the

> safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Id. The Court in *Jacobson* also explained that it had previously "recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, [and] health … within its limits." *Id.* While states have the right to pass such laws, the Court explained, the courts have a "duty to hold … invalid" laws that "went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution." *Id.*

Thus, the Court clearly anticipated that courts would exercise judicial oversight over a state's decision to restrict personal liberties during emergencies. *Jacobson* merely acknowledged that what is reasonable during an emergency is different from what is reasonable under normal circumstances, and that courts must not act as super-executives in an emergency. * * *

Therefore, *Jacobson* reaffirms the district court's duty, and our duty, "to hold [GA-09] invalid" if it (1) goes "beyond the necessity of the case, and, under the guise of exerting a police power … violate[s] rights secured by the Constitution," (2) "has no real or substantial relation to" "protect[ing] the public health, the public morals, or the public safety," or (3) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *See id.* at 28, 30.

IV.

After concluding that the district court clearly abused its discretion in not relying on *Jacobson*, the majority determines that this error produced a patently erroneous result. The majority claims that the district court's conclusion that GA-09 amounts to a previability ban is patently erroneous. In my view, this "conclusion" does not accurately characterize the "result" of the district court's order. The result of the district court's order is to uphold women's rights to abortions and to allow medical and procedural abortions to proceed. That result is not patently erroneous and therefore does not warrant mandamus relief. Contrary to the majority's view, nothing in *Jacobson* or any of the Supreme Court's cases requires a different result. * * *

The goals of GA-09 are furthered by restricting abortions, according to Petitioners, because abortions: (1) "reduce[ ] the scarce supply of PPE available to healthcare providers treating COVID-19 patients," (2) "result[ ] in the

hospitalization of women," reducing hospital capacity for COVID-19 patients, and (3) "contribute[ ] to the spread of the COVID-19 virus."

Though GA-09 does not define PPE, Respondents explain that the term is generally understood to refer to N95 respirators, surgical masks, non-sterile and sterile gloves, and disposable protective eyewear, gowns, and hair and shoe covers. In response to Petitioners' argument that abortions will deplete PPE necessary for healthcare providers treating COVID-19 patients, Respondents contend that abortions utilize little or no PPE and that abortions are time-sensitive procedures.

Regarding the first point, whether an abortion takes no PPE or some PPE depends on the type of procedure. Procedural abortions in Texas are single-day procedures that, unlike surgeries, require no hospital bed, incision, general anesthesia, or sterile field. During the procedure, the providers use PPE such as gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, and hair and shoe covers. Most Respondents do not have N95 respirators, and those that do have only a small supply that they rarely, if ever, use. Medication abortions, which involve only taking medications by mouth, require no PPE to administer the medication, and may require the use of gloves only at pre- and post-procedure appointments, depending on the circumstances. Petitioners identify no other treatment through oral medication that would be affected by GA-09.

Moreover, Respondents point out that Petitioners' PPE conservation argument mistakenly assumes that a patient unable to obtain an abortion will not otherwise need medical care that requires the consumption of PPE. * * * Denying pregnant patients access to abortion now may simply change the purpose for which the PPE is used, without any surplus that is able to be reallocated to healthcare workers treating COVID-19 patients. Other pregnant patients with the resources to do so may choose to seek abortions outside of Texas—a result clearly contrary to Texas's purported goal of avoiding the spread of the virus. * * *

Petitioners suggest that, in addition to these reasons, "Plaintiffs have identified no substantial burdens that will result from delaying elective abortions in accordance with [GA-09]." The majority agrees, concluding that "the expiration date makes GA-09 a delay, not a ban." But it is painfully obvious that a delayed abortion procedure could easily amount to a total denial of that constitutional right: If currently scheduled abortions are postponed, many

women will miss the small window of opportunity they have to access a legal abortion. * * *

[I]nsofar as GA-09 bans procedural and medication abortions generally, this act "has no real or substantial relation to" Petitioners' stated goal of conserving PPE and maintaining access to hospital beds and therefore it goes "beyond the necessity of the case, and, under the guise of exerting a police power … violate[s] rights secured by the Constitution." In particular, abortions require minimal PPE (and medication abortions require no PPE to administer the medication), do not require the use of N95 respirator masks, and rarely require hospitalization. * * *

Petitioners have, therefore, failed to establish that the district court "reached a patently erroneous result" in temporarily restricting Texas's ability to enforce GA-09 insofar as it bans all procedural and medication abortions. Mandamus relief should be denied.

* * *

The district court's result was supported by nearly 50 years of Supreme Court precedent protecting a woman's right to choose, and as such I would not conclude that it was patently erroneous. In a time where panic and fear already consume our daily lives, the majority's opinion inflicts further panic and fear on women in Texas by depriving them, without justification, of their constitutional rights, exposing them to the risks of continuing an unwanted pregnancy, as well as the risks of travelling to other states in search of time-sensitive medical care.

I respectfully but emphatically dissent.