No. 20-305

In the Supreme Court of the United States

PLANNED PARENTHOOD CENTER FOR CHOICE, ET AL., PETITIONERS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In order to preserve personal protective equipment and hospital capacity in the early stages of the COVID-19 pandemic, the Governor of Texas issued an executive order prohibiting most elective medical procedures for thirty days. A group of abortion providers (now Petitioners) sued, arguing that delaying elective abortions during a pandemic was an unconstitutional undue burden. They obtained two consecutive temporary restraining orders, each of which was quickly overturned by the Fifth Circuit via a writ of mandamus. Petitioners did not seek expedited relief from this Court or the en banc Fifth Circuit. Instead, they returned to district court and waited nearly five months before filing the instant petition seeking vacatur under *United States v. Munsingwear*, 340 U.S. 36, 40-41 (1950). During that delay, the Fifth Circuit decisions have been cited, relied on, or discussed in nearly one hundred cases across the country (and dozens more briefs and secondary sources), making them canonical decisions on the intersection of constitutional rights and public officials' response to COVID-19.

The question presented is:

Whether Petitioners have shown an equitable entitlement to the extraordinary remedy of vacatur when (1) they delayed almost five months before seeking vacatur; (2) the challenged decisions have been adopted by other Fifth Circuit cases and cited hundreds of times in dozens of courts across the country in a fast-developing area of law; and (3) Petitioners chose not to seek expedited relief from the decisions when they had the chance, but instead elected to return and litigate in district court.

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BRIEF IN OPPOSITION

Petitioners ask this Court to erase two published Fifth Circuit decisions issued in April that have been cited hundreds of times in courts across the country and adopted in *other* Fifth Circuit cases as settled law. The challenged decisions upheld the Texas Governor's efforts to manage in real time the State's response to the emerging and little-understood COVID-19 pandemic by, among other things, preserving the State's limited supply of critical personal protective equipment (PPE). The Governor broadly forbade all health care providers, from oncologists to dermatologists, from performing most non-medically necessary procedures in order to preserve PPE and hospital capacity for the COVID-19 surge. Petitioners sued, claiming that abortion providers should receive a special exemption from the rules that governed everyone else. The Fifth Circuit disagreed in two decisions that have now become engrained Fifth Circuit jurisprudence and stand as canonical decisions in the limited body of caselaw addressing the power of the State to respond to an evolving public-health crisis.

The relief Petitioners request appears to be unprecedented. As far as Respondents can tell, this Court has never applied *Munsingwear* to vacate a court of appeals decision that has been as widely cited and discussed as these. Usually, when a party desires *Munsingwear* vacatur, it moves swiftly, before the harm it seeks to prevent materializes. Petitioners here did the opposite: They waited five months. The result is that vacating the challenged decisions would be pointless. The Fifth Circuit has already relied on the challenged cases in other decisions, as have other courts and litigants around the country.

The proper course is thus to deny the petition. But if the Court wishes to consider the possibility of expanding *Munsingwear* to this new and unique circumstance, it should do so only after full briefing and oral argument.

STATEMENT

Petitioners' recitation of facts relies heavily on the findings made in the district court's second temporary restraining order. App. 154a-71a. But, as the Fifth Circuit determined, those findings carried no weight: The district court "barred" the State from "offering evidence or argument," App. 79a, and simply "adopted all 30 of [Petitioners'] proposed findings without citing or discussing a single declaration submitted by [the State]," App. 95a. As discussed below, the Fifth Circuit properly rejected those impermissible findings. The Court should not, therefore, treat the findings in the second TRO as established fact.

I. Executive Order GA-09

A. In March 2020, little was known about COVID-19, but its catastrophic effects were being seen around the world. In Italy, for example, the outbreak was "out of control," "[m]ost hospitals [were] overcrowded, nearing collapse while medications, mechanical ventilators, oxygen, and personal protective equipment [were] not available," and "[p]atients lay on floor mattresses."[1] Closer to home, in New York City, hospitals were cramming beds into hallways and bringing in refrigerated trucks to

[1] Mirco Nacoti, et al., *At the Epicenter of the Covid-19 Pandemic and Humanitarian Crises in Italy: Changing Perspectives on Preparation and Mitigation*, NEJM Catalyst: Innovations in Care Delivery, Mar. 21, 2020), https://catalyst.nejm.org/doi/full/10.1056/CAT.20.0080.

assist with overflowing morgues.[2] When a nurse died from COVID-19 after working nonstop for weeks, medical staff feared the lack of PPE made contracting COVID-19 "not a matter of if . . . but when."[3]

In Texas, the President of the Texas Medical Association wrote that the shortage of PPE was "unacceptable" and that medical professionals were "inadequately equipped to keep themselves and our fellow Texans safe."[4] He feared that health care workers would be "exposed to and infected by the virus . . . in a time of record demand."[5] A clear pattern was emerging: A lack of PPE would lead to increased infections, especially for frontline workers, and increased infections would soon overwhelm hospitals. Thus, preserving PPE and hospital capacity were priorities in preparing for the oncoming surge.

B. To ready Texas for the rapidly emerging pandemic, Governor Greg Abbott proclaimed a statewide disaster on March 13, 2020, App. 201a, which allowed him

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[2] *See* Bernard Condon, Jim Mustian, & Jennifer Peltz, *Video Shows New York City Emergency Room Overflowing With Patients as City on Frontlines of Coronavirus Outbreak*, (Associated Press, Mar. 28, 2020), https://6abc.com/jamaica-hospital-queens-new-york-city-nyc-coronavirus/6058157/; Miguel Marquez & Sonia Moghe, *Inside a Brooklyn Hospital That Is Overwhelmed with COVID-19 Patients and Deaths*, (CNN, Mar. 31, 2020), https://www.cnn.com/2020/03/30/us/brooklyn-hospital-coronavirus-patients-deaths/index.html.

[3] *See* Condon, *supra* n.2.

[4] Letter from David C. Fleeger, President of Tex. Med. Ass'n, to Gov. Abbott at 1, (Mar. 23, 2020), https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/TMA%20letter%20to%20Gov.%20Abbott%203-23-2020.pdf.

[5] *See supra* n.4.

to "issue executive orders" that "have the force and effect of law," Tex. Gov't Code § 418.012.

On March 22, after concluding that "a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster," App. 202a, the Governor issued executive order GA-09, restricting most nonessential medical procedures for thirty days. App. 201a-04a. The Governor found that "hospital capacity and personal protective equipment are being depleted by surgeries and procedures that are not medically necessary to correct a serious medical condition or to preserve the life of a patient," and that this was "contrary to recommendations from the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services." App. 202a.

As a result, the Governor, via GA-09, ordered "all licensed health care professionals and all licensed health care facilities" to

> 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.

App. 203a. GA-09 did not, however, 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." App. 203a.

Violating GA-09 could result in criminal penalties. App. 203a; Tex. Gov't Code § 418.173. Under Texas law,

local district and county attorneys bring those enforcement actions. Tex. Code Crim. Proc. arts. 2.01, .02.

GA-09 contained an explicit expiration date and time: April 21, 2020, at 11:59 p.m. App. 203a-04a. It expired on its terms at that time.

C. On March 23, the day after the Governor issued GA-09, the Texas Medical Board issued an emergency amendment to its administrative rules that largely adopted the language of GA-09. App. 207a-09a (amending 22 Tex. Admin. Code § 187.57). A medical provider's failure to comply with this new directive could result in disciplinary action by the Board. App. 207a-09a.

Also on March 23, Texas Attorney General Ken Paxton issued a press release advising health care professionals to comply with GA-09. App. 205a-06a. As explained in the press release,

> [GA-09] applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.

App. 205a-06a.

II. The First TRO And Mandamus (*Abbott I*)

A. On March 25, Petitioners (a group of abortion clinics and one doctor) filed suit against the Governor, Attorney General, several other state officials (collectively, "the State"), and multiple local criminal district attorneys. App. 7a, 143a n.4. They argued that GA-09 and

the associated administrative rule violated substantive due process and equal protection. App. 7a-8a.

Petitioners asked for a temporary restraining order solely on the basis of their due-process claim, attaching multiple declarations, most of which came from clinic administrators and executives discussing the typical use of PPE at their clinics and their COVID-19 prevention measures. *See* Pls.' Mot. for TRO and/or Prelim. Inj., *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-CV-00323-LY (W.D. Tex., filed Mar. 25, 2020) (Doc. 7). Petitioners argued that the postponement of elective abortions amounted to an unconstitutional "ban" on abortion, that they do not normally use much PPE, and that it would be safer, in their opinion, to permit elective abortions, making GA-09 an undue burden. *See generally id.*

The State responded on March 30 and included multiple declarations of its own explaining the danger of COVID-19, the scarcity of and need to conserve PPE, and some of the other medical procedures being postponed by GA-09. State Defs.' Resp. to Pls.' Mot. for a TRO, *Planned Parenthood Ctr. for Choice*, No. 1:20-CV-00323-LY (W.D. Tex., filed Mar. 30, 2020) (Doc. 30). The State argued that GA-09 was not an unconstitutional undue burden because Supreme Court precedent permits some restrictions of individual rights during public-health emergencies, GA-09 was not a "ban" on abortion, and the benefits of conserving PPE and hospital capacity outweighed the need for immediate elective abortions. *See generally id.* The State also raised arguments regarding sovereign immunity, Article III standing, and abstention. *See generally id.*

That afternoon, the district court entered a temporary restraining order. App. 140a-50a. The district court

did not conduct an undue-burden analysis; instead it found that GA-09 was a "ban" on abortion and was, therefore, unconstitutional no matter the underlying circumstances. App. 145a-47a. As a result, the district court enjoined GA-09 as to all abortions (medication and surgical) in Texas until 3:00 p.m. on April 13, the day a preliminary-injunction hearing was scheduled to be held.[6] App. 149a.

B. That evening, the State filed a mandamus petition and emergency motion to stay and for a temporary administrative stay with the Fifth Circuit. App. 9a. The next day, the Fifth Circuit issued an administrative stay and ordered expedited briefing of both the stay motion and the mandamus petition. App. 151a-53a.

Shortly before they filed their mandamus response, Petitioners "supplement[ed]" the district-court record with an additional nine declarations. *See* Notice of Suppl. Filing in Supp. of Pls.' Mot. for Prelim. Inj., *Planned Parenthood Ctr. for Choice*, No. 1:20-CV-00323-LY (W.D. Tex., filed Apr. 2, 2020) (Doc. 49). They then proceeded to rely on those declarations in their mandamus response, and the Fifth Circuit considered them. App. 81a.

On April 7, the Fifth Circuit, in a 2-1 decision, granted the State's mandamus petition and denied the motion for

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[6] Some plaintiffs in abortion cases, like Petitioners here, have begun using the phrase "procedural abortion" to refer to a surgical abortion. App. 8a n.15. The American College of Obstetricians and Gynecologists uses "surgical abortion." *See* Resp. in Opp. to Appl. for Stay at 5, 25, 29, *FDA v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S., filed Sept. 8, 2020). This Court has also used "surgical abortion" in its opinions. *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2131 (2020) (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311, 2315 (2016).

stay as moot. App. 1a-59a (*Abbott I*). The panel identified three main errors that warranted mandamus relief.

First, the district court failed to apply this Court's precedent in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). App. 2a. Under *Jacobson*, a court may enjoin a law concerning a public-health emergency only if the law (1) has "no real or substantial relation" to protecting public health; or (2) is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31; App. 14a-15a. Rejecting any argument that *Jacobson* was no longer good law or did not apply in the abortion context, the panel noted that this Court cited *Jacobson* in its seminal abortion decisions: *Roe v. Wade*, 410 U.S. 113, 154 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992), and *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). App. 16a-18a.

Second, the district court erred in treating the postponement of elective abortions as an "outright ban" on abortion, when it was only a temporary delay. App. 3a. Instead, the district court should have applied the undue-burden test and recognized the State's legitimate interest in combatting the COVID-19 pandemic. App. 23a-29a.

Third, the district court usurped the State's role in deciding how best to craft emergency public-health measures, substituting its judgment for that of the State. App. 3a, 30a. Under *Jacobson*, the Fifth Circuit explained, it is not for courts to second-guess the political branches regarding how best to respond to a public-health emergency. App. 31a.

The panel clarified that, on remand, the district court could make targeted findings about specific ways in which GA-09 constituted an undue burden, but that it

should limit any injunction to Petitioners, as opposed to all abortion providers in Texas. App. 3a-4a, 20a n.19. The panel anticipated the district court would make those findings after the parties presented additional evidence at the already-scheduled April 13 preliminary-injunction hearing. App. 3a-4a, 31a-32a. The court emphasized that properly addressing the question under *Jacobson* would require "careful parsing of the evidence." App. 27a. Finding the other elements of mandamus met, the panel then granted relief. App. 39a-40a.

Upon receipt of the Fifth Circuit's ruling, the district court vacated its temporary restraining order, but then canceled the April 13 preliminary-injunction hearing and ordered the parties to file a joint status report on a new preliminary-injunction schedule. App. 65a.

Petitioners did not seek expedited en banc review of the Fifth Circuit's ruling or ask this Court for an emergency stay pending review. Rather, they returned to district court, leaving *Abbott I* as law of the case and law of the circuit.

III. The Second TRO And Mandamus (*Abbott II*)

A. On April 8, the day after *Abbott I* was issued, Petitioners sought a second temporary restraining order. Pls.' Second Mot. for a TRO, *Planned Parenthood Ctr. for Choice*, No. 1:20-CV-00323-LY (W.D. Tex., filed Apr. 8, 2020) (Doc. 56). This time, they asked for more limited relief, arguing that their new request met the legal and factual standards set by the Fifth Circuit in *Abbott I*. *See generally id.* Petitioners added only a single new declaration from an abortion hotline operator. *See generally id.*

The next day, the district court held a short telephone conference with the parties at which the court indicated that it would not wait for the State to respond before it

ruled. App. 65a. The court announced that if the State disagreed with any ruling the court made, the State could head back to the Fifth Circuit. App. 66a.

A few hours later, and before the State could file a response, the district court issued a second temporary restraining order, enjoining the State from enforcing GA-09 as to Petitioners with respect to (1) medication abortions, (2) abortions in which the woman would reach 22-weeks' LMP (last menstrual period) prior to April 21, and (3) abortions in which the woman would reach 18-weeks' LMP prior to April 21 and would be unlikely to be able to reach an ambulatory surgical center.[7] App. 154a-71a.

Contrary to the Fifth Circuit's mandate, the district court did not apply *Jacobson*, mentioning it only once in passing. App. 168a-69a. It did not carefully parse the evidence—indeed, it failed to mention any evidence offered by the State (in response to Petitioners' first request for a temporary restraining order). App. 154a-71a. Instead, the court adopted, almost verbatim, the proposed findings and conclusions submitted by Petitioners. App. 95a, 154a-71a.

B. The next morning, on April 10, the State filed its second mandamus petition with the Fifth Circuit, as well as a motion for emergency stay and for administrative stay. App. 67a. That afternoon, the panel entered an administrative stay except as to abortions for women who would reach 22-weeks' LMP prior to April 21. App. 172a-76a. Petitioners filed a motion to lift the administrative stay, but before the panel ruled (and ultimately denied

[7] Under Texas law, abortions are generally prohibited after 22-weeks' LMP, and abortions after 16-weeks' fertilization (18-weeks' LMP) must be performed in an ambulatory surgical center. Tex. Health & Safety Code §§ 171.004, .044.

the motion), App. 177a-81a, Petitioners filed an emergency application to vacate the administrative stay with Justice Alito. Emergency Appl. to Vacate Admin. Stay, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 19A1019 (U.S., filed Apr. 11, 2020). No response was requested, and Petitioners withdrew their application when the Fifth Circuit largely lifted the administrative stay on April 13. App. 182a-88a.

On April 20, the Fifth Circuit, again in a 2-1 decision, granted the State's second mandamus petition as to medication abortions and the 18-week LMP limitation. App. 60a-139a (*Abbott II*). The panel found that the district court "flatly contradicted" the mandate in *Abbott I* when it did not apply *Jacobson* or consider any evidence offered by the State in support of GA-09. App. 75a-82a. The panel noted multiple evidentiary shortcomings, such as the lack of evidence of the amount of PPE used by Petitioners during the pandemic (as opposed to non-pandemic times), or of any woman approaching 18-weeks' LMP who would be unable to reach an ambulatory surgical center. App. 86a-88a, 99a-101a. The panel also faulted the district court for failing to consider the State's sovereign-immunity arguments and held that the district court exceeded its jurisdiction, as neither the Governor nor the Attorney General had the necessary "connection" to the enforcement of GA-09 under *Ex parte Young*, 209 U.S. 123, 157 (1908). App. 72a-75a. The panel did conclude, however, that mandamus was not warranted as to women who would reach 22-weeks' LMP prior to GA-09's expiration on April 21. App. 101a-02a.

Petitioners again did not seek expedited relief from this Court or the en banc Fifth Circuit. On April 22, 2020, after the expiration of GA-09, Petitioners moved to recall and stay the mandates in *Abbott I* and *Abbott II*, pending

a petition for rehearing en banc or a petition for a writ of certiorari. The Fifth Circuit denied those motions. App. 197a-200a.

Since then, Petitioners have not amended their complaint, which challenges only GA-09 and the associated administrative rule, nor have they dismissed their lawsuit, which remains pending in district court.

IV. Executive Order GA-15

On April 17, 2020, three days prior to the Fifth Circuit's decision in *Abbott II*, the Governor issued executive order GA-15, which was to take effect on April 21, 2020, at 11:59 p.m. and to remain in effect until 11:59 p.m. on May 8, 2020. App. 64a n.7, 68a. As GA-09 did, GA-15 required health care professionals and facilities to postpone most surgeries and procedures that were not immediately medically necessary. App. 68a n.10. GA-15 included an exception, however, for any surgery or procedure performed in a licensed health care facility that certified in writing to the Texas Health and Human Services Commission both:

> (1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and (2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster.

App. 68a n.11. As Petitioners admit, they were able to meet the terms of this exception and resumed performing elective abortions after GA-09 expired on April 21. Pet. 14.

Petitioners then waited almost five months—until September 3—before asking this Court to vacate *Abbott I* and *II* (the *Abbott* decisions).

ARGUMENT

I. Petitioners Are Not Entitled To The Extraordinary And Equitable Remedy Of Vacatur.

Vacatur for mootness is not automatic. Rather, it is an "extraordinary remedy," and Petitioners must prove their "equitable entitlement" to it. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Petitioners have failed to do so.

For four main reasons, equity favors denying Petitioners' request to vacate the *Abbott* decisions:

1. Petitioners waited almost five months before seeking vacatur, allowing the *Abbott* decisions to become leading canonical cases in a rapidly developing area of the law and to be cited in nearly one hundred decisions from courts across the country;
2. The public interest lies in preserving important COVID-19 precedent that, again, has been widely cited and relied on by other courts;
3. Petitioners voluntarily chose not to seek review of the merits of either *Abbott* decision in this Court or the en banc Fifth Circuit when they had the opportunity;
4. Because of the above considerations, vacatur would accomplish nothing, as the challenged decisions have been adopted in other Fifth Circuit cases and are now settled Fifth Circuit law.

Petitioners' litigation choices demonstrate their ineligibility for the remedy of vacatur, and the public

interest requires retaining decisions of consequence. The Court should deny the petition.

A. Vacatur is an equitable remedy that considers a party's litigation conduct and the public interest.

Because vacatur is "rooted in equity," the decision whether to vacate "turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)); *see also Bancorp*, 513 U.S. at 23 (declaring *Munsingwear*'s description of vacatur as an "established practice" to be dictum). As authorized by statute, the Court may enter orders that are "just under the circumstances." 28 U.S.C. § 2106; *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944) (stating that, when a case becomes moot, the Court "may make such disposition of the whole case as justice may require").

In deciding whether vacatur is equitable and just in a given case, the Court looks primarily to the conduct of the party seeking vacatur, as "'[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Bancorp*, 513 U.S. at 25 (alteration in original) (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)). Thus, for example, if the party seeking vacatur due to mootness "caused the mootness by voluntary action," vacatur will be denied. *Id.* at 24.

Similarly, if the party seeking vacatur chose not to seek merits review of the underlying decision when it was available, vacatur is not warranted. *See id.* at 28 (referring to "the lack of equity of a litigant who has voluntarily abandoned review"). As the Court has explained, a party who "steps off the statutory path" of appellate

review and seeks "the secondary remedy of vacatur as a refined form of collateral attack on the judgment . . . disturb[s] the orderly operation of the federal judicial system." *Id.* at 27. Consequently, a party's "voluntary forfeiture of review" is a "failure of equity that makes the burden decisive"—vacatur is denied. *Id.* at 26.

Decisions regarding vacatur must also "take account of the public interest." *Id.* "Judicial precedents are presumptively correct and valuable to the legal community as a whole." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting) (cited in *Bancorp*, 513 U.S. at 26-27). Significant benefits "flow to litigants and the public from the resolution of legal questions." *Bancorp*, 513 U.S. at 27. Even decisions that create circuit splits promote the public interest, as "debate *among* the courts of appeals . . . illuminates the questions that come before [the Court] for review." *Id.* Thus, a decision "should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi*, 510 U.S. at 40 (Stevens, J., dissenting) (cited in *Bancorp*, 513 U.S. at 26-27).

The public interest is best served not only by preserving decisions of importance, but in requiring the party seeking vacatur to follow "orderly procedure" when seeking that relief. *Bancorp*, 513 U.S. at 26-27; *Munsingwear*, 340 U.S. at 41. Under that standard, Petitioners' request must be denied. Petitioners voluntarily chose not to seek expedited merits review of the *Abbott* decisions and unnecessarily delayed before requesting vacatur. The Court should not relieve them of the consequences of their deliberate choices by vacating two of the leading decisions analyzing constitutional rights during a pandemic.

B. Equity requires denying Petitioners' request to vacate.

Petitioners complain about the potential ramifications of the *Abbott* decisions, both as to them and as to "any other individuals whose rights are infringed[] during the COVID-19 pandemic." Pet. 17-18. But for months they did nothing while courts across the country relied on the *Abbott* decisions. And they did not ask this Court for expedited merits review of either decision, choosing instead to accept the results and return to district court. Their complacency and its consequences render vacatur inequitable.

1. Petitioners' delay weighs against vacating canonical decisions that have been cited across the country.

In *Munsingwear*, the Court refused to relieve the government of the consequences of its prior choice not to seek vacatur, finding that the United States had "slept on its rights." 340 U.S. at 41. Petitioners' conduct here presents the same inequity: They chose not to seek vacatur for months while courts around the country relied on the *Abbott* decisions. And now they ask the Court to relieve them of the consequences of their actions. Pet. 17-18. But "[c]onstitutional litigation is not a game of gotcha." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020) (plurality op.). Petitioners slept on their rights and are not entitled to vacatur.

a. Petitioners' current claim about the need to prevent the *Abbott* decisions from "spawn[ing] any legal consequences" (at 17-18) is irreconcilable with their conduct and the equitable remedy of vacatur. Despite believing that the *Abbott* mandamus proceedings became moot in April, Petitioners waited until September—when their deadline was about to expire—before filing their petition

seeking vacatur. During that time, courts across the country cited and relied on the *Abbott* decisions when addressing constitutional claims during the COVID-19 pandemic.

Abbott I was the first circuit court decision to address a constitutional challenge to a governmental action taken to combat COVID-19. As a result, it was cited in 78 decisions issued between April 7 (when *Abbott I* was decided) and September 3 (when Petitioners requested vacatur).[8] Since the petition was filed in this case, *Abbott I* has been cited in an additional 15 decisions. *Abbott II* was cited in 20 decisions between April 20 and September 3, and has been cited in 8 decisions since then.[9]

As the law of the circuit, the *Abbott* decisions have been cited in multiple other Fifth Circuit cases concerning different constitutional rights.[10] The district courts within the Fifth Circuit have also faithfully applied the

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[8] All calculations of the number of times a given case has been cited are made by using Westlaw's "Citing References" feature and applying the relevant filters.

[9] As a point of reference, *Jacobson*, this Court's leading precedent on constitutional rights and public-health emergencies, has been cited in 169 decisions since April 7 of this year.

[10] Voting rights: *E.g.*, *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 6127049, at *5-7 (5th Cir. Oct. 14, 2020); *Mi Familia Vota v. Abbott*, No. 20-50793, 2020 WL 6058290, at *4 & nn.18, 20 (5th Cir. Oct. 14, 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400-01 (5th Cir. 2020).

Prison conditions: *E.g.*, *Marlowe v. LeBlanc*, 810 F. App'x 302, 306 n.4 (5th Cir. 2020) (per curiam); *Valentine v. Collier*, 956 F.3d 797, 803-04 (5th Cir. 2020) (per curiam).

Abbott decisions to constitutional challenges concerning COVID-19.[11]

Outside the Fifth Circuit, the Eighth Circuit has explicitly adopted the reasoning of *Abbott I* regarding the application of the *Jacobson* framework in a challenge by abortion providers to an Arkansas order delaying elective abortions. *In re Rutledge*, 956 F.3d 1018, 1028-31 (8th Cir. 2020). The Sixth and Eleventh Circuits, in similar cases concerning abortion, discussed *Abbott I* at length before distinguishing it. *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1182-83 (11th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020), *petition for cert. filed* No. 20-482 (U.S. Oct. 14, 2020).

District courts outside the Fifth Circuit have also relied on the *Abbott* decisions. Many courts have cited *Abbott I* to support their use of the two-part *Jacobson* framework.[12] Additional courts have cited the *Abbott*

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[11] *See, e.g.*, *910 E Main LLC v. Edwards*, No. 6:20-CV-00965, 2020 WL 4929256, at *6 (W.D. La. Aug. 21, 2020) (due-process and equal-protection claims); *4 Aces Enters., LLC v. Edwards*, No. 20-CV-2150, 2020 WL 4747660, at *9-11, *13-14 (E.D. La. Aug. 17, 2020) (due-process, equal-protection, and takings claims); *6th St. Bus. Partners LLC v. Abbott*, No. 1:20-CV-706-RP, 2020 WL 4274589, at *3-5 (W.D. Tex. July 24, 2020) (First, Fifth, and Fourteenth Amendment claims); *Sanchez v. Brown*, No. 3:20-CV-00832-E, 2020 WL 2615931, at *18 (N.D. Tex. May 22, 2020) (mem. op.) (prison conditions); *Russell v. Harris County*, 454 F. Supp. 3d 624, 637 (S.D. Tex. 2020) (mem. op.) (due-process and equal-protection claims regarding posting bond).

[12] *See, e.g.*, *Page v. Cuomo*, No. 1:20-CV-732, 2020 WL 4589329, at *8 (N.D.N.Y. Aug. 11, 2020); *Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-CV-0687 (GTS/DJS), 2020 WL 3766496, at *8-9 (N.D.N.Y. July 6, 2020); *Feltz v. Bd. of Cty. Comm'rs*, No. 18-CV-0298-CVE-JFJ, 2020 WL 2393855, at *14 (N.D. Okla. May 11, 2020); *SH3 Health Consulting, LLC v. Page*, No. 4:20-CV-00605-SRC, 2020 WL 2308444, at *6-7 (E.D. Mo. May 8, 2020) (mem. op.);

decisions for everything from the enforcement authority of state officials under *Ex parte Young*, to judicial second-guessing of public-health measures, to more general propositions about state authority in public-health emergencies.[13]

As reflected in the numerous opinions that rely on the *Abbott* decisions, parties litigating these issues cite the *Abbott* decisions extensively in their arguments. *Abbott I* has been cited in 128 appellate and trial-court filings, and *Abbott II* has been cited in 43 such filings. Scholars, too, have taken notice: 14 secondary sources, such as law reviews and treatises, cite *Abbott I*, and 5 cite *Abbott II*. In all, Westlaw reflects 240 citing references to *Abbott I* and 77 to *Abbott II* to date.

Petitioners' choice to sleep on their rights has resulted in far-reaching consequences. It would be

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Lawrence v. Colorado, 455 F. Supp. 3d 1063, 1070 (D. Colo. 2020); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 910 nn.52, 53, 59 (W.D. Ky. 2020).

[13] *See, e.g.*, *Luke's Catering Serv., LLC v. Cuomo*, No. 20-CV-1086S, 2020 WL 5425008, at *6 (W.D.N.Y. Sept. 10, 2020); *MacEwen v. Inslee*, No. C20-5423 BHS, 2020 WL 4261323, at *2 (W.D. Wash. July 24, 2020); *Bannister v. Ige*, No. CV 20-00305 JAO-RT, 2020 WL 4209225, at *4 (D. Haw. July 22, 2020); *Legacy Church, Inc. v. Kunkel*, No. Civ. 20-0327 JB\SCY, 2020 WL 3963764, at *108 (D.N.M. July 13, 2020) (mem. op.); *Ill. Republican Party v. Pritzker*, No. 20 C 3489, 2020 WL 3604106, at *3 (N.D. Ill. July 2, 2020), aff'd, 973 F.3d 760 (7th Cir. 2020); *Altman v. County of Santa Clara*, No. 20-CV-02180-JST, 2020 WL 2850291, at *12 (N.D. Cal. June 2, 2020); *Amato v. Elicker*, 460 F. Supp. 3d 202, 220 (D. Conn. 2020); *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *3, *5 (D. Ariz. May 8, 2020).

The Constitutional and Health Law Scholars' amicus brief catalogues additional cases that have relied on the *Abbott* opinions. Am. Br. 19-22.

inequitable to excuse their delay and erase two of the canonical cases on the intersection of constitutional rights and COVID-19.

b. In these circumstances, granting Petitioners' request would be unprecedented. Petitioners have not cited, and the State has not found, any case like this—one in which a petitioner waited nearly five months after an appeal became moot before asking this Court to vacate, during which time the case was cited as precedent across the country in a fast-developing area of law. In *Garza*, by contrast, the United States sought vacatur nine days after the plaintiff acted to moot the case, during which time no court cited the D.C. Circuit's decision. 138 S. Ct. at 1792 (petition filed on November 3, noting appeal became moot on October 25).

The other cases cited by Petitioners (at 14-17) do not support vacatur in these circumstances either.

- *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.), *Trump v. International Refugee Assistance*, 138 S. Ct. 353 (2017) (mem.), and *Camreta v. Greene*, 563 U.S. 692, 711 (2011), became moot after the Court granted certiorari.
- *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72-73 (1997), became moot before the Ninth Circuit issued a merits ruling, which required this Court to vacate.
- *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (per curiam), and *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936) (per curiam), became moot prior to a ruling by the court of appeals, resulting in vacatur of the district court's ruling.
- *Karcher v. May*, 484 U.S. 72 (1987), was not moot, so vacatur was not considered.

- And in *Burke v. Barnes*, 479 U.S. 361 (1987), although the petitioner waited three months to file his petition for certiorari following the denial of rehearing, the court of appeals' decision was cited only twice during that time. *See* Br. of Pet'rs, *Burke v. Barnes*, No. 85-781, 1985 WL 669407, at *1 (U.S. Oct. 1985) (describing timing).

Petitioners' choice to wait and watch as the *Abbott* decisions were cited by dozens of courts disentitles them to the remedy of vacatur. The Court should not reward such delay, nor should it vacate two decisions that have become part of the fabric of COVID-19 jurisprudence.

2. Public interest favors retaining significant COVID-19 decisions.

Separate from Petitioners' fault in failing to promptly seek vacatur is the public interest in preserving decisions of importance. *See Bancorp*, 513 U.S. at 26. And, as just described above, the *Abbott* decisions are extraordinarily significant to the development of the law during the COVID-19 pandemic. Because judicial precedents are "valuable to the legal community as a whole," Petitioners must persuade the Court that "the public interest would be served by a vacatur." *Id.* at 26-27 (quoting *Izumi*, 510 U.S. at 40 (Stevens, J., dissenting)). But "public interest" appears nowhere in their petition.

As the D.C. Circuit has noted, "the establishment of precedent argues *against* vacatur, not in favor of it." *Mahoney v. Babbitt*, 113 F.3d 219, 223 (D.C. Cir. 1997) (emphasis added). The *Abbott* decisions are two of the leading decisions on the intersection of governmental efforts to combat COVID-19 and constitutional rights. *See supra* pp.17-19. They have been cited and relied on by courts across the country. Even courts that ultimately

disagree with or distinguish the *Abbott* decisions discuss them. *See, e.g.*, *Robinson*, 957 F.3d at 1182-83; *Adams & Boyle*, 956 F.3d at 927; *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1085 (D. Kan. 2020). Regardless, vacatur to permit the Fifth Circuit to reconsider those legal issues in some future case is "far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *Bancorp*, 513 U.S. at 27.

Indeed, it would be especially unsound to vacate decisions applying the law to judicial and executive orders that were by definition temporary. By rule, TROs are typically of short duration. Fed. R. Civ. P. 65(b)(2) (limiting total length of TRO to twenty-eight days unless consent is obtained). As Petitioners would have it, the losing party in a circuit-court decision on a TRO could simply wait until the TRO expires and seek vacatur, leaving little precedent on the topic. The D.C. Circuit recognized as much when it declined to vacate its own decision regarding a prior restraint on speech. *Mahoney*, 113 F.3d at 223. Because prior-restraint litigation is typically fast-paced, the court reasoned that, if vacatur were required after the speech occurred and mooted the case, "the judicial system could seldom establish precedent governing future cases of prior restraint." *Id.*

Further, many COVID-19 lawsuits, like this one, concern temporary governmental restraints. If vacatur becomes routine after those laws expire, the public will lose much of the precedent that has developed during this time. Courts have risen to the challenge of the pandemic, issuing hundreds of decisions concerning COVID-19 measures as applied to health, prisons, voting, and religion, to name a few. *See supra* pp.17-19. Under Petitioners' theory, all of those decisions should be vacated if the underlying law expires or is repealed prior to this

Court's review, leaving pandemic law largely undeveloped.[14] *See Jewish War Veterans of the U.S. of Am., Inc. v. Mattis*, 266 F. Supp. 3d 248, 253 (D.D.C. 2017) ("[W]here an opinion establishes precedent on a rarely-litigated constitutional issue . . . that presents a reason to deny vacatur.").

The story of the federal courts' response to COVID-19 cannot be told without the *Abbott* decisions. Petitioners offer no argument that the public interest supports vacatur of such consequential rulings. And this Court should not countenance the erasure of what the judicial system has achieved during this unprecedented time merely because the governmental acts at issue are temporary.

3. Vacatur is inequitable because Petitioners voluntarily abandoned review of the *Abbott* decisions.

Petitioners' voluntary choice to return to district court and litigate under the *Abbott* decisions, rather than seek expedited review in this Court or the en banc Fifth Circuit before GA-09 expired, renders vacatur inequitable. When "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari," he "surrender[s] his claim to the equitable remedy of vacatur." *Bancorp*, 513 U.S. at 25. In such instances, "[t]he judgment is not unreviewable, but simply unreviewed by his own choice." *Id.*; *see also id.* at 27 (refusing vacatur to "a party who steps off the statutory path" of appellate review). Petitioners knew these were

[14] The Tenth Circuit has already declined to vacate a district-court ruling that enjoined an executive order delaying elective abortions after that order expired. *S. Wind Women's Ctr. LLC v. Stitt*, 823 F. App'x 677, 682 (10th Cir. 2020) (per curiam).

emergency proceedings with short deadlines; yet they "step[ped] off the statutory path" to merits review in this Court when they chose to return to district court and litigate under *Abbott I* and *II* rather than seek expedited relief. In this context, their decision represents a choice not to seek review at all, rendering vacatur inequitable.

The D.C. Circuit has denied a request to rehear and vacate its prior opinion in similar circumstances. In *Mahoney*, the D.C. Circuit issued an order on January 19 permitting certain speech during the inaugural parade on January 20. 113 F.3d at 220. The government did not seek emergency review from this Court but waited until after the parade and filed a motion for rehearing, asking the court to vacate its prior order under *Munsingwear*. *Id.* at 220-21. The court declined. It explained that, although the government's "time for doing otherwise was short," "established procedure provides for application to the Supreme Court for a stay of our emergency order." *Id.* at 221-22. Thus, the controversy effectively ended "when the losing party . . . declined to pursue its appeal," rendering *Munsingwear* "inapplicable." *Id.* at 222; *see also Blankenship v. Blackwell*, 429 F.3d 254, 258 (6th Cir. 2005) (declining to vacate a district-court order after an election mooted the lawsuit when the challenging party "could and should have acted more expeditiously in asserting their legal rights to ensure that their case was resolved prior to that election").

When *Abbott I* was decided on April 7, Petitioners had a choice: Ask this Court for emergency relief, seek emergency en banc relief, or return to district court and litigate under the ruling of *Abbott I*. Petitioners chose the last option, abandoning further appellate proceedings and making *Abbott I* the law of the circuit and law of the case. *See In re JPMorgan Chase & Co.*, 916 F.3d 494,

504 (5th Cir. 2019) (explaining that mandamus opinions are binding precedent). Petitioners' request for a second TRO emphasized that their requested injunction complied with *Abbott I*. Pls.' Second Mot. for a TRO at 2, 8, 11-14, *Planned Parenthood Ctr. for Choice*, No. 1:20-CV-00323-LY (W.D. Tex., filed Apr. 8, 2020). Having chosen to litigate under *Abbott I* in these circumstances, Petitioners cannot now ask the Court to vacate it.

The same holds for *Abbott II*. Petitioners knew that GA-09 was about to expire and that *Abbott II* would be binding on them in future litigation but made no effort to seek expedited review. As the D.C. Circuit put it, "[t]hey could have addressed the Circuit Justice for [] a stay. They chose not to do so." *Mahoney*, 113 F.3d at 222.[15]

Petitioners' conduct here stands in stark contrast with that of the government in *Garza*, in which the government planned to seek emergency relief in this Court the morning after the D.C. Circuit's decision. 138 S. Ct. at 1792. Although the government was thwarted from merits review by the plaintiff's deliberate bad-faith conduct, it was able to obtain vacatur under the circumstances. *Id.* at 1793.

All parties to this lawsuit knew it was proceeding on an emergency basis. The State Defendants diligently and expediently sought review of the district court's orders, filing mandamus petitions within hours of the rulings. Petitioners did not do the same with respect to the Fifth

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[15] It makes no difference that Petitioners had limited time to seek this Court's review in between the issuance of *Abbott II* and the expiration of GA-09. Petitioners were able to file an emergency application with this Court challenging the administrative stay in the *Abbott II* proceedings one day after the stay was entered. Emergency Appl. to Vacate Admin. Stay, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 19A1019 (U.S., filed Apr. 11, 2020).

Circuit's decisions. This case, then, "stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all." *Bancorp*, 513 U.S. at 25. Petitioners' abandonment of appellate review of the merits renders vacatur unavailable to them. The Court should deny the petition.

4. Vacatur would accomplish nothing.

Finally, not only would vacatur be inequitable, but for the reasons set out above, it would be useless. The Fifth Circuit has already imported the *Abbott* decisions into other cases. For example, the court has relied on *Abbott I*'s holding that *Jacobson* does not permit judicial second-guessing of governmental responses to public-health crises. *Marlowe*, 810 F. App'x at 306 n.4. Other panels have followed *Abbott II*'s holding regarding *Ex parte Young*'s requirement that state officials have a sufficient connection to the enforcement of the challenged law. *See, e.g.*, *Mi Familia Vota*, 2020 WL 6058290, at *4; *Tex. Democratic Party*, 961 F.3d at 400-01. Thus, Petitioners' concerns about the impact of the *Abbott* decisions on future litigation, Pet. 17, would not be alleviated by vacatur.[16]

The principles the *Abbott* decisions espouse are the settled law of the Fifth Circuit—they will continue to provide the framework for any litigation Petitioners might bring. Vacating them thus will not benefit Petitioners. And that makes vacatur unavailable: "It is a traditional axiom of equity that a court of equity will not do

[16] Indeed, Petitioners cannot even bring themselves to argue that vacatur will accomplish anything. Their brief uses speculative wording—the *Abbott* decisions "may" tie Petitioners' hands, "could have" significant legal ramifications, and "might" preclude Petitioners from obtaining future relief. Pet. 2, 17.

a useless thing." *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring).

II. Petitioners' Arguments For Vacatur Lack Merit.

As demonstrated above, Petitioners' argument that vacatur is necessary to avoid the legal consequences of the *Abbott* decisions is deeply flawed. Their other arguments fare no better, as they fail to account for Petitioners' own conduct, the impact of their delay in seeking review, the underlying facts, and the holdings of *Abbott I* and *II*. Pet. 15-22. When assessed under this Court's precedent, their arguments do not demonstrate an equitable entitlement to the extraordinary remedy of vacatur.

A. Petitioners bear greater responsibility for the unreviewability of the *Abbott* decisions.

1. Petitioners first assert that (1) their requests for injunctive relief are moot, and (2) the mootness is not their fault. Pet. 15. As to their assertion of mootness, Petitioners' litigation conduct says otherwise: To this day, Petitioners refuse to dismiss as moot their pending challenge to GA-09 in district court. Petitioners cannot have it both ways, asking this Court to vacate appellate decisions on the grounds of mootness while insisting they may maintain the same claims in district court.

Even so, Petitioners' denial of fault is not enough. It is insufficient for Petitioners to demonstrate "merely equivalent responsibility for the mootness." *Bancorp*, 513 U.S. at 26. They must prove an "equitable entitlement" to vacatur. *Id.* And as explained above, while Petitioners' actions did not cause the mootness, the *Abbott* decisions were unreviewed by Petitioners' own choice: Petitioners abandoned any attempt to have this Court consider *Abbott I* or *II*, choosing instead to return to

district court and litigate under those decisions. Review, then, was not prohibited by "happenstance," but by Petitioners' voluntary decisions.

2. Next, relying on precedent that supports vacatur when the party that prevailed below takes "voluntary action" to moot the dispute, *Garza*, 138 S. Ct. at 1792, Petitioners repeatedly claim that the Governor caused the mootness by "replacing" GA-09 with GA-15 the day after *Abbott II* was issued. Pet. i, 2, 16. Neither the facts nor the law supports this assertion.

First, GA-09's expiration date was set on March 22, 2020, when the Governor issued GA-09—prior to any lawsuit being filed, much less any favorable opinions from the Fifth Circuit. App. 201a-04a. Petitioners cite no case holding that allowing a law to expire on its own terms is a voluntary act that requires vacatur, and the Tenth Circuit has already rejected such an argument. *S. Wind Women's Ctr.*, 823 F. App'x at 682. Under Petitioners' theory, the only way the Governor could have avoided vacatur for mootness was *to take* voluntary action by continually extending GA-09 until Petitioners could obtain review.

Second, Petitioners' repeated claim that GA-09 was "replaced" the day *after* the Fifth Circuit decided *Abbott II* was decided is misleading. Pet. i, 2, 13, 15. A new executive order (GA-15) was issued on April 17, three days *before* the Fifth Circuit decided *Abbott II,* and its effective date was set for April 21, which turned out to be the day after *Abbott II* was decided. App. 64a n.7, 67a The Governor could not have known at the time he issued GA-15 that the Fifth Circuit would ultimately rule in the State's favor in *Abbott II*. Indeed, at the time he issued GA-15, the Fifth Circuit had largely denied the State's request to stay the second TRO. App. 182a-88a.

Regardless, GA-15 is irrelevant to the question of vacatur: Any new executive order, even if it were a "replacement," would not keep litigation over GA-09 from becoming moot once GA-09 expired.

Third, *Abbott I* became moot, not when GA-09 expired on April 21, but on April 13 at 3:00 p.m., when the underlying TRO would have expired on its own terms. App. 149a. The expiration of a TRO moots appellate proceedings regarding that order. *See, e.g.*, *Cty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 483 (6th Cir. 2002); *Video Tutorial Servs., Inc. v. MCI Telecomms. Corp.*, 79 F.3d 3, 5-6 (2d Cir. 1996) (per curiam). Because the first TRO, which was the only order at issue in *Abbott I*, would have expired on April 13, any further appellate proceedings regarding *Abbott I* would have become moot at that time. The mootness of *Abbott I* was, therefore, unrelated to any act of the Governor.

Fourth, and finally, the Governor should never have been a party in the first place because he lacked a sufficient connection to the enforcement of GA-09, as the panel held in *Abbott II*. App. 72a-75a (citing *Ex parte Young*). Petitioners have not shown that his actions (to the extent the Court believes he voluntarily mooted the case) should be attributed to the parties who were properly joined and who prevailed in the Fifth Circuit.

Blame for the unreviewability of the *Abbott* decisions lies not with the Governor, but with Petitioners. They knew of the expedited time table yet did not act quickly to obtain relief. Equity does not favor vacatur in these circumstances.

B. Disagreement among the courts of appeals is not a reason for vacatur.

Finally, Petitioners assert that the *Abbott* decisions should be vacated because they are on one side of a

circuit split regarding the constitutionality of laws designed to combat COVID-19. Pet. 18-22. But the presence of a circuit split is a reason to *deny* vacatur, not grant it. "[D]ebate *among* the courts of appeals . . . illuminates the questions that come before [the Court] for review." *Bancorp*, 513 U.S. at 27. This Court eliminates one side of a circuit split only after plenary review consisting of full briefing and argument. It would be deeply inappropriate to summarily vanish, without full review, the seminal cases on only one side of a fast-evolving disagreement.[17]

Turning first to abortion-related cases, the Sixth and Eleventh Circuits chose to distinguish the *Abbott* decisions, rather than create an open split, *Robinson*, 957 F.3d at 1182-83; *Adams & Boyle*, 956 F.3d at 927, and the Eighth Circuit largely adopted the reasoning of *Abbott I*, *In re Rutledge*, 956 F.3d at 1028. The abortion providers in *Rutledge* did not seek certiorari, so to the extent these decisions reflect a split, the split will remain regardless of whether the *Abbott* decisions are vacated.

The remainder of Petitioners' discussion is puzzling, as they cite four circuit-court cases concerning free-exercise claims, none of which mention either *Abbott* decision and none of which explicitly rule on whether the two-part *Jacobson* framework applies. Two cases out of the Sixth Circuit found state orders unconstitutional under the strict-scrutiny test when they singled out "faith-

[17] The Constitutional and Health Law Scholars' amicus brief additionally argues that the *Abbott* decisions should be vacated because they were incorrectly decided. Am. Br. 5-18. That is wrong—the *Abbott* decisions were rightly decided. But in any event, the Court has rejected the argument that the correctness of a decision is a factor in whether it should be vacated, as the Court lacks jurisdiction to reach the merits of a moot case. *Bancorp*, 513 U.S. at 27.

based" gatherings for heightened COVID-19 restrictions. *Roberts v. Neace*, 958 F.3d 409, 411 (6th Cir. 2020) (per curiam); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam). Each cited *Jacobson* once and the *Abbott* decisions not at all. The Seventh and Ninth Circuits upheld laws that were found to be neutral towards religious gatherings. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). Neither decision mentioned the *Abbott* rulings,[18] and the Seventh Circuit stated only that courts do not evaluate state orders issued in response to public-health emergencies as if they had proceeded through years of notice and comment, *Elim Romanian*, 962 F.3d at 347.

Petitioners appear to believe that because these rulings did not use the two-part *Jacobson* test, but relied on familiar First Amendment analysis, they are necessarily inconsistent with the *Abbott* decisions. But the two-part *Jacobson* test, as used in the *Abbott* decisions, incorporates generally applied constitutional analysis; indeed, the Fifth Circuit faulted the district court for failing to apply the applicable undue-burden test. App. 26a-27a. *Jacobson* just requires that the violation be shown "beyond all question." App. 16a (quoting *Jacobson*, 197 U.S. at 31).

Vacating the *Abbott* decisions will not bring conformity to this area of the law—to the dubious extent that conformity is lacking at all. It will only eliminate two of the canonical cases considering emergency COVID-19 measures.

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[18] The dissenting judge in *South Bay United* noted his disagreement with *Abbott I*. 959 F.3d at 943 n.2 (Collins, J., dissenting).

* * *

Petitioners' dilatory approach to obtaining review and vacatur in this Court disentitles them to the relief they seek. The *Abbott* decisions have been cited far and wide, and vacating them now would simply remove the seminal cases on which so many others have already relied. Petitioners thus cannot show entitlement to the extraordinary and equitable remedy of vacatur.

III. The Petition Should Be Denied; In The Alternative, It Should Be Set For Full Briefing And Oral Argument On Plenary Review.

For all the above reasons, the petition should be denied. But if the Court wishes to explore the expansion of *Munsingwear* into the unique circumstances presented here, it should order full briefing and oral argument. On plenary review, the State will demonstrate that under settled law, vacatur in the circumstances presented here would be extraordinarily inequitable.

Under no circumstances should the Court summarily vacate the decisions below. If the Court wishes to consider discarding the State's hard-fought victories, it should first hear full argument from the State.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020

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