Texas' Executive Order GA-09: A Dangerous Precedent in Unprecedented Times

Neelam Patel*

As lockdowns swept across the country in early March, nonessential healthcare services were shut down to prevent the spread of the novel coronavirus (COVID-19), and to preserve personal protective equipment (PPE) for healthcare workers treating COVID-19 patients.[1] Texas was no exception. On March 22, 2020, Governor Abbott issued Executive Order GA-09, which would "postpone all surgeries and procedures that are not immediately medically necessary"[2] unless the patient "would be at risk for serious adverse medical consequences or death, as determined by the patient's physician."[3] The order would remain in effect until April 21, 2020.[4] The next day, Texas' attorney general published a press release that explicitly stated the shutdown of medical facilities included abortion providers, unless the pregnancy was life-threatening, and noncompliance with the order would result in a fine, jail time, or both.[5]

Ultimately, GA-09 is an assault on basic reproductive rights, a thinly veiled attempt to ban all abortions under the guise of a public health crisis. Even more worrying is the fact that it was largely upheld by the Fifth Circuit.[6] The Fifth Circuit deemed that the Executive Order was an appropriate exercise of police power during a pandemic. However, the court failed to consider the extent of the harm caused by the lack of access to abortion and the confusion resulting from drawn out legal battles. As such, the fate of GA-09 must not set a precedent for how access to reproductive care should be approached during public health emergencies.

I. *Abbott I* & *Abbott II* – Challenging Executive Order GA-09

(a) District Court Proceeding – Planned Parenthood v. Abbott (Abbott I)

On March 25, 2020, Planned Parenthood and other Texas abortion providers quickly filed suit against the governor of Texas, the attorney general of Texas, and various other state officials, seeking an immediate injunction to keep the

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[1] *See State Governors' "Stay-at-Home" and Prohibition on Elective Procedures Orders*, McGuireWoods (Mar. 26, 2020), https://www.mcguirewoods.com/client-resources/Alerts/2020/10/state-governors-stay-at-home-prohibition-elective-procedures-orders.

[2] *See* Tex. Exec. Order GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.

[3] *Id*.

[4] *Id*.

[5] *See* Press Release, Ken Paxton, Attorney General, Tex., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all.

[6] *See* In re Abbott, 954 F.3d 772, 796 (5th Cir. 2020) (*Abbott II*).

Executive Order GA-09 from halting access to abortion services.[7] In *Planned Parenthood Center for Choice v. Abbott*, the district court granted the injunction, allowing abortive procedures to continue in Texas.[8]

In its opinion, the district court determined that: (a) the Plaintiffs had a substantial likelihood of success on the merits of their claim that the Executive Order, as interpreted by the attorney general, violated the Plaintiffs' patients' Fourteenth Amendment rights by banning all abortions before viability;[9] (b) the Plaintiffs would suffer irreparable harm if not for the injunction;[10] (c) the threatened injury to the Plaintiffs outweighed the damage a Temporary Restraining Order might have caused the Defendants;[11] and (d) a Temporary Restraining Order would not disserve the public interest.[12]

The district court reasoned the Due Process Clause of the Fourteenth Amendment protects the right to a pre-viability abortion, and the state has no interest that would be sufficient to justify an *outright ban* on pre-viability abortions.[13] The court pointed to the attorney general's own interpretation of GA-09 in the accompanying press release, which indicated the order would eliminate access to all non-emergency abortions, or all non-emergency abortions starting at ten weeks, at which point medication abortions are usually no longer medically possible.[14] In other words, for individuals requiring non-medication abortions, the GA-09 would bar *all possibility* of obtaining an abortion in the state, thereby completely eliminating their right to an abortion during the lockdown.[15] Although the district court acknowledged the governor's power to release executive orders to address the ongoing public health emergency, it determined the Supreme Court's prohibition on outright pre-viability abortion bans outweighed the state's interest in attempting to mitigate the spread of COVID-19.[16]

(b) Writ of Mandamus – Texas' Appeal to the Fifth Circuit (Abbott II)

Immediately, the governor sought a writ of mandamus to overrule the injunction. The Court of Appeals for the Fifth Circuit ruled against Planned Parenthood and vacated the district court's order, thus allowing the restriction on access to abortions to continue until the Executive Order expired.[17] The Court of Appeals justified issuing a writ of mandamus by stating that: (a) the district court ignored

[7] Compl. For Inj. And Decl. Relief., at 2, Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d 753 (W.D. Tex. 2020), *vacated*, No. A-20-CV-323-LY, 2020 WL 1808897 (W.D. Tex. Apr. 8, 2020) (*Abbott I*).
[8] *See* Planned Parenthood, 450 F. Supp. 3d at 759 (*Abbott I*).
[9] *See id*. at 757.
[10] *Id*.
[11] *Id*. at 758.
[12] *Id*.
[13] *See id.* at 757.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 757–58.
[17] *See* In re Abbott, 954 F.3d 777 (*Abbott II*).

the framework of *Jacobson v. Commonwealth of Massachusetts*, which governs emergency public health measures like GA-09;[18] (b) the district court's result was wrong because *Jacobson* was not applied, and *Casey*'s undue-burden test was conducted incorrectly;[19] and (c) the district court had commandeered the state's authority to create public health measures.[20]

First, the Court of Appeals recognized that under the threat of great danger, constitutional rights can be "reasonably restricted 'as the safety of the general public may demand.'"[21] In *Jacobson v. Commonwealth of Massachusetts*, the Supreme Court established the framework governing the state's exercise of authority during a public health crisis.[22] In upholding a state's mandatory vaccination law, the Court in *Jacobson* recognized that the Constitution does not confer an absolute right to be completely free at all times, and the state has increased power to subject people's rights to restraint in order to address the growing smallpox epidemic.[23] *Jacobson* also established that the scope of judicial authority to review rights-claims during a public health emergency is limited to situations in which the statute enacted has "no real or substantial relation" to public health, or is, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[24] In this case, the Court of Appeals found GA-09 was enacted as a valid emergency response to the Covid-19 pandemic inquiry, and thus, the district court should have analyzed the order under the *Jacobson* framework.[25]

Moreover, the Court of Appeals reasoned that abortion cases are not exempt from the *Jacobson* inquiry, and the burden on access to abortion due to a public health measure must be analyzed under the *Jacobson* standard.[26] Normally, the prevailing standard for analyzing abortion restrictions is the undue-burden balancing test set forth in *Planned Parenthood v. Casey*. Under *Casey*, a "state[] may not impose outright bans on pre-viability abortions," nor may a state impose "an undue burden" on the right to an abortion.[27] An "undue burden" exists if a regulation's "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[28] First, while the district court held GA-09 constituted an outright ban on access to abortion, the Fifth Circuit characterized the Executive Order as merely "postponing" the right to the procedure.[29] Second, under *Jacobson*, the burden analysis must account for

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[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 778.
[22] *Id*.
[23] *Id*. at 783.
[24] *Id*. at 784 (quoting Jacobson v. Commonwealth of Massachusett*s*, 197 U.S. 11, 31 (1905)).
[25] *Id*. at 783−84.
[26] *Id*. at 783.
[27] *Id*. (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 878 (1992)).
[28] *Id*.
[29] *Id.* at 788 (stating that the district court's interpretation of GA-09 as a complete ban on pre-viability abortion was "plainly wrong," thus altering the *Jacobson* burden analysis).

the heightened state interest in addressing public health crises. Thus, the Fifth Circuit held that the district court only "should have asked whether GA-09 imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic Texas now faces."[30] Under this framework, the Fifth Circuit affirmed the constitutionality of the Executive Order.

(c) The Fifth Circuit's Flawed Jacobson *Analysis*

The Fifth Circuit, however, ignored critical facts that counseled against upholding GA-09. For example, the different amounts of PPE used by the two abortion procedures were factored into the Court of Appeals' analysis of the *Jacobson* test, but were not factored into the original Executive Order. The Court of Appeals stated that its "review of the record…[revealed] considerable evidence that *surgical abortions* consume PPE," while "the record is unclear how PPE is consumed in *medication abortions*" in order to justify the connection between the order and restricted rights to satisfy *Jacobson*.[31] However, according to the governor and attorney general's own interpretations of the Executive Order, it was their intention to stop pre-viability abortions, even in cases where no PPE would be necessary. The attorney general's press release made no distinction between medication and surgical abortions, nor was there any mention of the 20-week deadline after which only life-threatening pregnancies can be ended.[32] Without these express caveats, the Executive Order and press release could be interpreted to ban abortion throughout its duration.[33] In effect, this confusion created a disjointed response from abortion clinics, some shutting down entirely while others continued operating within the boundaries the courts have given the Executive Order.[34]

Additionally, in attempting to control the spread of the virus, the Executive Order actually had the opposite effect. Women began leaving Texas to obtain abortions from surrounding states rather than deciding to carry their pregnancies to term or waiting an entire month in hopes of receiving care.[35] Since one of the stated goals of the Executive Order was to minimize the spread of the virus, it is concerning that one of its most significant consequences regarding abortion was to force women to cross state borders, increasing their contact with more people than if they had been able to receive care in their home state.[36] In a pandemic that has swept across the entire country, it makes very little sense to force women who do not fit into the provided exceptions to use the PPE and facilities of other states while receiving care.

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[30] *Id*. at 787 (quoting Jacobson, 197 U.S. at 31).
[31] *Id*. at 790 (emphasis added).
[32] Paxton, *supra* note 5.
[33] Sami Sparber, *Texas Banned Abortion During the Pandemic, But She Got One Anyway. How The Legal Battle Is Creating Confusion For Clinics*, TEXAS TRIBUNE (Apr. 10, 2020), https://www.texastribune.org/2020/04/10/texas-abortion-law-coronavirus-confusion-clinics/.
[34] *Id*.
[35] Arielle Avilla, *The State's Ban Isn't Stopping Texans From Getting Abortions*, TEXAS MONTHLY (Apr. 13, 2020), https://www.texasmonthly.com/politics/texas-abortion-ban-coronavirus/.
[36] *Id*.

The district court justified its injunction by listing all of these aforementioned harms caused by GA-09.[37] As such, the district court was actually not "plainly wrong" regarding the intention behind the Order, and it should have qualified as an "undue burden" on abortion under *Jacobson*.

II. Renewed Legal Challenge – Renewed Motion for Temporary Restraining Order (TRO)

(a) District Court Proceeding (Abbott III)

Despite the prior unsuccessful attempt to fully enjoin the enforcement of GA-09, advocates attempted a second strategy to limit its scope. Planned Parenthood, together with other reproductive health advocates, filed a renewed motion for a Temporary Restraining Order, seeking to: (a) keep GA-09 from being interpreted as a complete ban on abortion; (b) keep GA-09 from being enforced against those providing medication abortions; (c) keep GA-09 from being enforced against those who provide a procedural abortion to any patient who would be more than 18 weeks post last menstrual cycle on April 22, 2020; and (d) keep GA-09 from being enforced against those who provide a procedural abortion to any patient who would be past the legal limit for an abortion in Texas on April 22, 2020.[38]

The district court granted the Temporary Restraining Order.[39] The district court reasoned the attorney general's interpretation of the Executive Order would cause the Plaintiffs' patients to suffer irreparable harm.[40] In the district court's view, the deprivation of a fundamental constitutional right is enough to constitute an irreparable injury.[41] Additionally, the four-week delay would potentially cause the pregnancy to progress to the 20-week mark, after which "an abortion would be less safe, and eventually illegal."[42] The district court decided that this threatened deprivation of abortion outweighed any damage the restraining order could cause the state.[43]

(b) Texas' Appeal - Evidence of Intent to Prohibit All Abortion

Even though the new Temporary Restraining Order carved out very narrow exceptions,[44] the governor and attorney general nevertheless sought writs of mandamus to stop the court from enjoining the ban on medication abortions[45] and

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[37] *See* Planned Parenthood, 450 F. Supp. 3d at 758−89 (*Abbott I*).
[38] *See* Planned Parenthood Ctr. for Choice v. Abbott, No. A-20-CV-323-LY, 2020 WL 1815587, at *7 (W.D. Tex. Apr. 9, 2020), *mandamus granted, order vacated in part sub nom*. In re Abbott, 956 F.3d 696 (5th Cir. 2020), and *appeal dismissed sub nom.* Sw. Women's Surgery Ctr. v. Abbott, 802 F. App'x 150 (5th Cir. 2020) (*Abbott III*).
[39] *See id.* at *1.
[40] *See id*. at *6.
[41] *See id*.
[42] *Id*. (quoting Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 796 (7th Cir. 2013).
[43] In re Abbott, 954 F.3d at 785 (*Abbott II*).
[44] *Id*.
[45] *See* In re Abbott, 809 F. App'x 200, 201 (5th Cir. 2020).

as applied to women who would pass the 20-week mark before the Executive Order expired.[46] Thankfully, the Court of Appeals denied these requests.[47] However, the fact that they were made to begin with points to the troubling actions that Governor Abbott took in an attempt to stop all abortion in the state, *regardless* of the amount of PPE required or the time-sensitivity of the procedure.

Based on the actions of Texas' elected officials, the Executive Order was undeniably meant to be an outright ban, and to create a precedent in which the governor could use a public health emergency to ban all pre-viability abortions, despite the lack of any data finding medication abortions would use PPE, or a caveat for women who would pass 20 weeks of pregnancy before the end of the ban.[48] As such, the Executive Order should have been treated as "beyond all question, a plain, palpable invasion of rights secured by the fundamental law" and should not be considered to have "a real and substantial connection to public health.[49]

III. Conclusion

Under current law, there is a constitutional right to a pre-viability abortion, which should not be infringed on, even under the guise of public safety. Although the Fifth Circuit decided that GA-09 was a legitimate health measure, their assertions about the purpose of the Order were incorrect, as demonstrated by the later actions of Governor Abbott and Attorney General Paxton. Their blatant attempts to bar even abortions that would not use any PPE point to a political move to completely deprive women of their right to an abortion.

The series of drawn-out legal battles, which confused both patients and providers in Texas, must not set a precedent for other abortion clinics across the country.[50] It is unlikely that COVID-19 will be the last public health emergency the United States faces in the coming years.[51] It is imperative that women's ability to access quality healthcare in a timely manner be protected, especially the right to a pre-viability abortion. Women should not have to rely on uncertain court orders, or have to travel to other states, putting them and their families at risk, in order to exercise their constitutional rights.

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[46] *See* In re Abbott, 956 F.3d 696, 704 (5th Cir. 2020) (*Abbott IV*).
[47] *See* In re Abbott, 809 F. App'x 200, 201 (5th Cir. 2020) (*Abbott V*); *See* In re Abbott, 956 F.3d 696, 704 (5th Cir. 2020) (*Abbott IV*).
[48] *See* In re Abbott, 954 F.3d at 790 (*Abbott II*).
[49] *Id*. at 784.
[50] Sparber, *supra* note 33.
[51] Victoria Gill, *Coronavirus: This is Not the Last Pandemic*, BBC NEWS (June 6, 2020), https://www.bbc.com/news/science-environment-52775386.