ABORTION OPPORTUNISM

Rachel Rebouché*

Eleven states have tried to suspend abortion care in response to COVID-19.[1] State officials claim that they will preserve medical supplies, hospital space, and health care capacity by classifying abortion as an elective, non-essential surgery that must be delayed. Advocacy groups representing abortion providers sued in several states to enjoin these bans.[2] What has emerged is a fight that ignores medical evidence and threatens to exacerbate the current public health emergency.

The Executive Order issued in Texas offers an apt example. Though abortion may be available in Texas for the time being, opinions from the U.S. Court of Appeals for the Fifth Circuit provide a troubling roadmap for suspending constitutional rights as a health emergency measure.

* Associate Dean for Research and Professor of Law, Temple University Beasley School of Law. Many thanks to Craig Green, Paul Gugliuzza, Maya Manian, Seema Mohaptra, and Lindsay Wiley. I authored a short opinion piece that bears a similar name as this essay: *Anti-Abortion Opportunism*, THE NATION, Apr. 15, 2020, https://www.thenation.com/article/society/abortion-ban-covid/.

[1] *See* Kaiser Family Foundation, *State Action to Limit Abortion Access During the COVID-19 Pandemic*, May 1, 2020, https://www.kff.org/womens-health-policy/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/; *see also* Dennis Carter, *State Officials Try to End Legal Abortion During COVID-19 Crisis*, REWIRE, Apr. 11, 2020, https://rewire.news/article/2020/03/23/state-officials-try-to-end-abortion-during-covid-19-crisis/ (listing states that have explicitly suspended abortion).

[2] In response, federal district courts have enjoined these bans. Adam Liptak, *Fight Over Texas Abortion Ban Reaches Supreme Court*, N.Y. TIMES, Apr. 11, 2020, https://www.nytimes.com/2020/04/11/us/coronavirus-texas-abortion-ban-supreme-court.html.

This essay first focuses the Texas case, paying special attention to courts' descriptions of medication abortion. It then examines current regulation of medication abortion more generally, including the application of telemedicine, in order to situate the dispute over COVID-19 suspensions. This background undermines the Fifth Circuit's conclusion that abortion suspensions are reasonable measures to curb the pandemic and not pretext for anti-abortion animus. State and federal regulations of medication abortion are untethered to sound health policy during ordinary times, but they are especially unresponsive to the challenges posed by the current pandemic.

Legal Challenges to Abortion Suspensions

On March 22, 2020, the Governor of Texas issued Executive Order GA-09, which postponed non-essential surgeries and procedures until April 22, 2020 and gave the governor discretion to extend the deadline if needed.[3] The next day, the Texas Attorney General issued a press release interpreting the Order to prohibit all non-urgent abortions, and the Texas Medical Board implemented that interpretation through an emergency rule.[4] Planned Parenthood, the Center for Reproductive Rights, and the Lawyering Project filed suit, and, on March 30, Judge Yeakel on the U.S. District Court of the Western District of Texas granted a temporary restraining order, holding that the ban would cause irreparable harm by delaying terminations until "an abortion would be less safe, and eventually illegal."[5] Judge Yeakel also noted that the Texas rule banned nearly all pre-viability abortions, violating U.S. Supreme Court precedent establishing constitutional abortion rights.[6]

On March 31, the Fifth Circuit issued a temporary stay, and, on April 7, a divided panel overturned Judge Yeakel's order.[7] The Fifth Circuit ruled that the district court failed to apply the "framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago."[8] The Fifth Circuit relied on *Jacobson v. Massachusetts*, a case the Supreme Court decided in 1905, which upheld a mandatory small-pox vaccination as a reasonable regulation to protect public health.[9] The Supreme Court in *Jacobson* wrote that

[3] Executive Order GA-09, "Relating to hospital capacity during the COVID-19 disaster" (March 22, 2020).
[4] Planned Parenthood Center for Choice v. Abbott, No.s1:20-cv-00323, at 4 (W.D. Tex. April 9, 2020). The Texas Medical Board's guidance on the Executive Order exempts procedures for which "there is a risk of patient deterioration or disease progression likely to occur if the procedure is not undertaken or is significantly delayed," and noted that "the prohibition does not apply to office-based visits without surgeries or procedures." The Board defined "procedure" as excluding "examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests." Texas Medical Board, Updated Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic (Mar. 29, 2020), http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17.
[5] Planned Parenthood Center for Choice v. Abbott I, No. 1:20-cv-00323, at 7 (W.D. Tex. March 30, 2020) (citing Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 796 (7th Cir. 2013)).
[6] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.").
[7] In re Abbott I, __ F.3d __, 2020 WL 1685929 (5th Cir. April 7, 2020).
[8] *Id*. at 10.
[9] 197 U.S. 11 (1905).

legislators can choose the means by which they exercise emergency health authority unless the "regulations [are] so arbitrary and oppressive . . . as to justify the interference of the courts to prevent wrong and oppression."[10]

According to the Fifth Circuit, Texas's abortion ban was a reasonable way to conserve medical supplies and hospital capacity in response to COVID-19. The court determined that medication abortions, which entails taking two pills, reduce supplies of PPE because of the ultrasound and in-person consultation Texas law requires of all abortion patients.[11] The court discounted any concern that suspending abortion care might result in costs to the healthcare system because it would force patients to travel out of state, self-induce terminations, or carry pregnancies to term.[12]

Two days later, the district court issued another order, this time ruling that the executive order could not be applied to medication abortion or to other abortions after 18 weeks of gestation.[13] Based on guidance from the Texas Medical Board, Judge Yeakel made specific factual findings that "[p]roviding medication abortion does not require the use of any PPE," that ultrasounds are "diagnostic tests" exempted from the order, and that the order "does not apply to office-based visits [such as counseling sessions] without surgery or procedures."[14]

The Fifth Circuit issued another temporary stay and reiterated its *Jacobson* analysis.[15] The Texas ban on almost all abortions would remain in place except for "any patient who, based on the treating physician's medical judgment, would be past the legal limit for an abortion – 22 weeks [ ] – on April 22, 2020."[16] Lawyers challenging the suspension asked the Supreme Court to vacate the Fifth Circuit's stay and to protect medication abortions during the first ten weeks of pregnancy.[17] That petition soon became moot. In a surprising twist, the Fifth Circuit lifted the stay on April 13.[18] Although the court stood behind its application of *Jacobson*, it held that the record was ambiguous on whether the order applied to medication abortions; indeed, the guidance of the Texas Medical Board suggested that "neither dispensing medication nor ancillary diagnostic elements (such as a physical examination or ultrasound) qualify as 'procedures'" under the order.[19]

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[10] *Id*. at 38.
[11] In re Abbott I, __ F.3d __, 2020 WL 1685929 n.24 (5th Cir. April 7, 2020). The Fifth Circuit also held that hospital beds might be taken if complications resulted after administration.
[12] *Id*. at 44 (Dennis J., dissenting) ("Restricting contact between abortion providers and their patients cannot further the goals of GA-09 if the same order permits in-person contact between providers and patients in other settings.").
[13] Planned Parenthood Center for Choice v. Abbott II, No. 1:20-cv-00323 at 13 (W.D. Tex. April 9, 2020). The court reasoned that patients with pregnancies advanced to 18 weeks could not delay because, by the April 22 suspension deadline, abortion might be illegal, given the prohibition of terminations after 22 weeks, or impossible, given that the abortion would have to be performed in an ambulatory surgical center.
[14] *Id*. at 7 (quoting guidance of the Texas Medical Board).
[15] *See* In re Abbott II, __ F.3d __, 2020 WL 1685929 at 9, n.24 (5th Cir. April 10, 2020).
[16] *Id*. at 3-4.
[17] Emergency Application to Justice Alito to Vacate Administrative Stay of Temporary Restraining Order Entered by the United States Court of Appeals for the Fifth Circuit, Planned Parenthood Center for Choice v. Abbott, No. 19A1019 (April 11, 2020), https://www.supremecourt.gov/DocketPDF/19/19A1019/.
[18] In re Abbott III, __ F.3d __, No. 20-50296 at 4 (5th Cir. April 13, 2020). The court chided the district court for refusing to apply its analysis of Jacobson: "We have serious concerns about whether the district court's April 9 TRO adhered to our order in in Abbott II." *Id.* at 3.
[19] *Id*. at 4.

The Fifth Circuit quickly reversed course, though, after the state asked the court to reinstate the stay. Two days before the order expired, the Fifth Circuit entered a stay of the district court's decision, rebuking the district court for failing to apply *Jacobson*. In its third opinion, the Fifth Circuit held that medication abortion does consume PPE because providers (like all healthcare professionals) have to wear protective masks when seeing patients.[20]

Shortly after the Fifth Circuit issued that decision, a new Executive Order took affect and was not subject to the court's decision. The order provided an exception to the ban on non-essential procedures for facilities that do not use hospital beds or request PPE from the government.

Though abortion is again legal in Texas, during the month of fluctuating legal status, patients had their appointments cancelled with a moment's notice or were turned away from clinics who had to suspend services. Numerous news stories recount the resulting hardships from the Texas ban, suggesting just how essential abortion care is for those seeking to end pregnancies.[21] Moreover, clinics that shut and reopened multiple times over March and April now have long waiting lists for appointments.[22]

What is particularly striking is the Fifth Circuit's misunderstanding of what medication abortion involves. That misunderstanding tracks longstanding state regulation of medication abortion that contradicts medical evidence and sound clinical practice. Rather than suspend medication abortion, expanding access to it would actually meet the state's goal of slowing COVID-19's spread.

Reasonableness and Regulating Medication Abortion

The Fifth Circuit's justification for suspending constitutional rights to pre-viability abortion rests on a broad reading of the deference accorded to states exercising police powers.[23] Under *Jacobson,* regulations to protect the public must bear "a real or substantial relation" to the health emergency and cannot be, "beyond all question, a plain, palpable invasion of rights."[24]

The key question, then, is whether suspension of abortion is a reasonable means of protecting public health. Courts have made divergent findings about how abortion suspension is likely to affect the spread of COVID-19. The Fifth Circuit deferred to the state's argument that the

[20] As a result, for two days before the first Executive Order expired, the Fifth Circuit allowed the suspension of all abortions unless delay would put a patient's pregnancy past the state's legal limit.
[21] Sabrina Tavernise, *Abortion During a Pandemic? Texas Says No in Many Cases*, N.Y. TIMES, Apr. 14, 2020, https://www.nytimes.com/2020/04/14/us/abortion-texas.html?referringSource=articleShare; Sarah McCammon, *In Texas, Oklahoma, Women Turned Away Because of Coronavirus Abortion Bans*, NAT'L PUB. RADIO, Apr. 2, 2020, https://www.npr.org/2020/04/02/826369859/in-texas-oklahoma-women-turned-away-because-of-coronavirus-abortion-bans.
[22] Paige Alexandria, *Abortion Is Available Again in Texas. But You'll Have to Get in Line*, REWIRE NEWS, May 6, 2020, https://rewire.news/author/paige-alexandria/.
[23] Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review – Not Suspension of Civil Liberties – In Times of Crisis*, HARV. L. REV. BLOG, Apr. 9, 2020, https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/.
[24] 197 U.S. 11, 39 (1905).

regulation was not "arbitrary" or "oppressive;" it refused to "second guess" Texas, in its own words.[25] The Eighth Circuit followed the Fifth Circuit's interpretation of *Jacobson*, keeping in place Arkansas's ban of surgical abortions. The Sixth and Eleventh Circuits upheld injunctions issued by district courts in Tennessee and Alabama, respectively, because the suspensions created undue burdens on constitutional rights to abortion and failed the reasonableness standard of *Jacobson*.[26]

The Sixth Circuit, for instance, found that suspending abortion does not conserve scarce medical resources and does not slow the spread of COVID-19.[27] Rather, many people who lack access to abortion will travel to other jurisdictions to end their pregnancies;[28] providers in neighboring states have seen an influx of new patients.[29] Overextended providers will be stretched even farther, causing delays and increasing costs for travelers, who should limit social contact. For those who do not or cannot travel, self-managed abortion can be effective and safe, but it can also increase costs for the health system if patients lack accurate information and adverse health consequences occur.[30] Unplanned parenthood will create even more stress on hospitals and physicians.[31] Continuing a pregnancy requires prenatal care that includes multiple interactions with the health care system and also requires PPE. The consequences of abortion suspensions will fall disproportionately on people who already experience hardships due to COVID-19 – people who are unemployed, essential workers, and those who do not have access to health care, or face other logistical challenges.[32] Ample data shows that low income people and people of color have higher rates of unplanned pregnancies and higher rates of maternal morbidity and mortality.[33] Current projections of COVID-19's impact further reveals the deepening disparate impact of the pandemic.[34]

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[25] The Fifth Circuit appeared to ignore that only abortion providers, and no other physicians, had been targeted for the Order's enforcement.

[26] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2319 (2016) (holding that anti-abortion regulations are unconstitutional and impose an undue burden when they "vastly increase the obstacles confronting women seeking abortions" without "providing any benefit to women's health.). Last year, the Fifth Circuit upheld a Louisiana statute identical to the one struck down in *Whole Woman's Health*, which is before the Supreme Court now. June Medical Services v. Russo, 140 S. Ct. 35 (2019).

[27] Adams & Boyle, P.C. et al. v. Slatery et al., __ F.3d. __, No. 20-5408 (6th Cir. Apr. 24, 2020).

[28] Jonathan Bearak et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care*, GUTTMACHER INST. POL'Y ANALYSIS (2020), https://www.guttmacher.org/article/2020/04/covid-19-abortion-bans-would-greatly-increase-driving-distances-those-seeking-care.

[29] In re Abbott, __ F.3d __, 2020 WL 1685929 at 29 (5th Cir. April 7, 2020) (Dennis, J., dissenting). *See also* Michael Konopasek, *Colorado Clinics Perform More Abortions Due to COVID-19 Restrictions in Other States*, FOX DENVER 31, May 5, 2020, https://kdvr.com/news/coronavirus/colorado-clinics-perform-more-abortions-due-to-covid-19-restrictions-in-other-states/.

[30] Texas currently has three times the national rate of self-induced abortion. L. Fuentes et al., *Texas Women's Decisions and Experiences Regarding Self-managed Abortion*, 20 BMC WOM. HEALTH 1 (2020).

[31] American College of Obstetricians and Gynecologists, *COVID-19 FAQs for Obstetrician-Gynecologists, Obstetrics*, https://www.acog.org/clinical-information/physician-faqs/covid-19-faqs-for-ob-gyns-obstetrics.

[32] For documentation of some the consequences of the denial of abortion care, see Advancing New Standards in Reproductive Health, *Research on Abortion Care: Introduction to the Turnaway Study*, March 2020, https://www.ansirh.org/sites/default/files/publications/files/turnawaystudyannotatedbibliography.pdf.

[33] People of color have higher maternal mortality rate as compared to other U.S. populations. For relevant data, see https://www.supremecourt.gov/DocketPDF/18/18-1323/124217/20191203113334405_18-1323%20-1460%20tsac%20NHeLP--Corrected--PDFA.pdf

[34] Catherine Powell, *The Color of COVID: The Racial Justice Paradox of Our New Stay-at-Home Economy*, CNN, Apr. 18, 2020, https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-

In addition, a reasonableness inquiry would suggest weighing the means chosen by the state – suspending abortion care – against the ends of the regulation – conserving PPE and hospital capacity.[35] Texas's inclusion of medication abortion brings into focus a core problem with the Executive Order: it does not meet its purported goals. The effort to target medication abortion is counter to medical evidence and suggests that the aim of legislators is to thwart abortion rather than to protect the public's health.

Almost 40% of the nation's abortions are medication abortions. Like the vast majority of terminations, medication abortion is not administered in a hospital or physicians' office, but in standalone clinics devoted to reproductive health services. Although the state of Texas argued that "some number of medication abortions result in incomplete abortions that require hospitalizations," the risks and complications associated with medication abortion are low.[36] Rarely will a hospital bed be taken because of medication abortion.

Medication abortion would not need contact with health care providers at all, except that state as well as federal law requires it.[37] In a medication abortion, which can occur in the first ten weeks of pregnancy, patients ingest two pills: the first drug (mifepristone or Mifeprex) is typically taken in a health center, followed by a second drug (misoprostol) at home twenty-four to forty-eight hours later.[38] Medication abortions require no gown, mask, eyewear, shoe covers, or gloves; in other words, no PPE.[39]

Research demonstrates that medication abortion, like many other healthcare procedures, can be safely and effectively administered online or over the telephone.[40] Researchers like Ushma

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powell/index.html ("While 37% of Asian workers and 29.9% of white workers are able to work remotely, only 19.7% of black workers, and 16.2% of Latinx workers, are able to telework, according to the Bureau of Labor Statistics.").

[35] It is beyond the scope of this essay to ask whether *Jacobson* rests on rational basis review or whether, in light of more modern caselaw, it requires something more searching. Suffice it say, the extent to the Fifth Circuit's deference to state rationales may have troubling consequences for how courts demarcate the limits of state power to suspend constitutional rights in times of health emergencies.

[36] Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175, 181-82 (2015); Rachel Jones & Heather Boonstra, *The Public Health Implications of the FDA's Update to the Medication Abortion Label*, HEALTH AFFAIRS (2016), http://healthaffairs.org/blog/2016/06/30/the-public-health-implications-of-the-fdas-update-to-the-medication-abortion-label/.

[37] Other countries permit medication abortion without a prescription based on studies that demonstrate that it is as – safe as other over-the-counter medications. *See* Nathalie Kapp et al., *A Research Agenda for Moving Early Medical Pregnancy Termination Over the Counter*, 124 BJOG 1646 (2017). Recently, the United Kingdom expanded tele-abortion in response to COVID-19. Aamna Mohdin, *Relaxation of UK Abortion Rules Welcomed by Experts*, THE GUARDIAN, Mar. 30, 2020, https://www.theguardian.com/world/2020/mar/30/relaxation-of-uk-abortion-rules-welcomed-by-experts-coronavirus.

[38] Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017,* GUTTMACHER INSTITUTE (2019), https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017.

[39] The district court also found that minimal PPE is used in aspiration (sometimes called surgical) abortion, which is an outpatient procedure that involves no incision, sterile field, or general anesthesia. Planned Parenthood Center for Choice v. Abbott, No. 1:20-cv-00323, at 7 (W.D. Tex. March 30, 2020).

[40] Ushma D. Upadhyay & Daniel Grossman, *Telemedicine for Medication Abortion*, 100 CONTRACEPTION 351, 353 (2019). Though studies show that tele-abortion care is effective and safe, it is impeded by legal requirements that directly or indirectly necessitate a visit to a provider or health center described in the text.

Upadhyay and Daniel Grossman have shown that tele-abortion could effectively allow "no-touch" terminations[41] for people who are not at risk for medical complications, are less than eight weeks pregnant, and have regular menstrual cycles.[42] A report issued by the Center for Reproductive Rights and the Columbia University Mailman School of Public Health summarized the evidence:

> [T]here is overwhelming evidence that the safety and effectiveness of medication abortion is the same whether it is provided via telemedicine or through in-person provision, as shown by a seven-year cohort study with tens of thousands of patients, systematic reviews, and an evaluation of a telemedicine abortion service across five states.[43]

Despite the ease with which medication abortion can be delivered, and its proven effectiveness,[44] several states (including Texas) and the federal government make access to medication abortion needlessly difficult and obstruct efforts to provide remote solutions for its delivery.

First, federal rules prohibit mailing Mifeprex to patients or dispensing the drug at a pharmacy. The U.S. Food and Drug Administration (FDA) subjects Mifeprex to drug safety restrictions (a Risk Evaluation and Mitigation Strategy or REMS), which mandates, among other things, collection of the drug at a clinic, physician's office, medical center, or hospital.[45] This restriction contradicts substantial evidence of the drug's safety and effectiveness; the FDA .[46] As an early response to the pandemic, twenty-one state attorneys general urged the government to lift or to stop enforcing the FDA's protocol.[47]

[41] *Id*. Megan K. Donovan, *Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, 21 GUTTMACHER POL'Y REV. 41 (2018).
[42] Pam Belluck, *Abortion by Telemedicine: A Growing Option as Access to Clinics Wanes*, N.Y.TIMES, Apr. 28, 2020, https://www.nytimes.com/2020/04/28/health/telabortion-abortion-telemedicine.html?referringSource=articleShare
[43] Center for Reproductive Rights & Columbia Mailman School of Public Health, *Expanding Telemedicine Can Ensure Abortion Access During COVID-19 Pandemic*, Apr. 29, 2020, https://reproductiverights.org/document/expanding-telemedicine-can-ensure-abortion-access-during-covid-19-pandemic.
[44] Melissa J. Chen et al., *Mifepristone With Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 OBSTETRICS & GYNECOLOGY 12, 17-20. (2015).
[45] In addition, per FDA policy, the prescribing provider must be registered with the drug manufacturer and the patient must sign a form confirming receipt of counseling on risks associated with mifepristone. FDA-2020-D-1106, https://www.regulations.gov/comment?D=FDA-2020-D-1106-0018.
[46] American College of Obstetricians and Gynecologists, Position Statement: Improving Access to Mifepristone for Reproductive Health Indications, June 2018, https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2018/improving-access-to-mifepristone-for-reproductive-health-indications.
[47] Letter from Attorney General Xavier Becerra et al. to Secretary Alex M. Azar II, U.S. Department of Health & Human Services at 3, Mar. 30, 2020, https://ag.ny.gov/sites/default/files/final_ag_letter_hhs_medication_abortion_2020.pdf ("The FDA itself has stated that the 'safety profile of Mifepristone is well-characterized and its risks well-understood after more than 15 years of marketing. Serious adverse events are rare and the safety profile of Mifepristone has not substantially changed.'").

Second, several states' laws reach beyond the current FDA rules with additional restrictions on medication abortion.[48] Although patients must collect Mifeprex at a health center, FDA policy allows them to collect misoprostol at a pharmacy and administer it at home. Eighteen states, however, mandate that the prescribing physician be physically present when the patient collects misoprostol.[49] In addition, thirty-three states prohibit non-physicians from administering medication abortion despite evidence that advanced practice clinicians can safely and effectively counsel patients.[50] These laws layer on top of restrictions that apply to all abortions, regardless of type: most notably, pre-termination ultrasounds and counseling, which also necessitate clinic-patient contact.[51]

Finally, nine states explicitly ban telehealth for medication abortion.[52] Over the last month, additional states have sought to implement similar bans or require a physician to be physically present for all medication abortions.[53] Yet legislators in many of the same states have sought to expand telehealth in contexts other than abortion, recognizing the importance of healthcare solutions that limit contact between professionals and patients. For example, the Texas Medical Board allows medical consultation over the internet and telephone, as well as virtual treatment and diagnosis. At the federal level, the coronavirus relief legislation relaxed guidelines for Medicaid and Medicare coverage of telehealth and included grants for federally qualified health centers, rural health clinics, and hospices to develop telehealth practices.[54]

Abortion Exceptionalism Revisited

Contradictory treatment of abortion compared to other outpatient services existed long before COVID-19.[55] State regulations discourage abortion through unnecessary and targeted

[48] The Policy Surveillance Project, Medication Abortion Project, Dec. 1, 2019, http://lawatlas.org/datasets/medication-abortion-requirements. Texas regulates in accordance with the FDA-approved label, though it does not allow changes to the administration of the drug in light of advances in clinical or medical practice. *Id.*

[49] Guttmacher Institute, *State Laws and Policies: Medication Abortion*, May 1, 2020, https://www.guttmacher.org/state-policy/explore/medication-abortion.

[50] Center for Reproductive Rights & Columbia Mailman School of Public Health, *supra* note 43, at 1.

[51] Laws mandating waiting periods, like those in place in the same states seeking to suspend abortion, require at least two trips to a provider: the first to receive state-mandated informed consent (often an in-person requirement) and the second after 24, 48, or 72 hours (depending on the state law) have elapsed. Jones et al., *supra* note 38, at 5.

[52] The Policy Surveillance Project, Medication Abortion Project, Dec. 1, 2019, http://lawatlas.org/datasets/medication-abortion-requirements.

[53] Jordan Ross, *Ohio Senate Passes Bill to Ban Use of Telemedicine for Abortions*, JURIST, Mar. 5, 2020, https://www.jurist.org/news/2020/03/ohio-senate-passes-bill-to-ban-use-of-telemedicine-for-abortions/; Kansas News Service, *COVID-19 Prompts Kansas Governor to Ease Rules for Telemedicine and Medical Shipments*, Mar. 22, 2020, https://www.kcur.org/post/covid-19-prompts-kansas-governor-ease-rules-telemedicine-and-medical-shipments#stream/0.

[54] The Coronavirus Aid, Relief, and Economic Security Act, Pub. Law. No. 116-138 (2020). When it comes to abortion care, however, Congress instead has focused on ensuring that restrictions on federal funding for abortion care are reiterated in coronavirus relief legislation. *Id.* §§ 3211(b) 236, 5001(b) 606. Center for Reproductive Rights & Columbia Mailman School of Public Health, *supra* note 43, at 2 ("To encourage providers to use a variety of remote communications technologies (including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype), the Office for Civil Rights (OCR) will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Privacy, Security and Breach Notification Rules….").

[55] *See* Bonnie S. Jones et al., *State Law Approaches to Facility Regulation of Abortion and Other Office Interventions*, 108 AM. J. PUB. HEALTH 486, 488 (2018).

regulations, shining a light on the motivations underpinning current COVID-19 suspensions. Public health research makes this clear. Datasets developed by the Center for Public Health Law Research demonstrate that abortion-targeted laws, unlike rules for other outpatient procedures, apply "regardless of the level of sedation or anesthesia used[] or the nature of the office intervention."[56] Abortion restrictions are "more numerous and more stringent" as compared to regulation of other types of office-based procedures.[57]

Some states, however, have recognized abortion as essential health care that must remain available during this national emergency.[58] For example, Minnesota deemed reproductive health centers a "critical sector" that will remain open,[59] and New York health centers are working to expand access to medication abortion so that eligible patients can pick up medication and self-administer while being in contact with their physician.[60]

Expanding access to medication abortion – not restricting access – is the right policy to protect the public health and reduce the burden of COVID-19 for pregnant individuals, health care workers, and medical systems. The urgent need to save lives and medical resources during the immediate crisis could also support other useful policies. The FDA could stop enforcing its outdated protocol so that abortion medication can be shipped directly to individuals' homes. Indeed, the FDA has already indicated that it would stop enforcement of REMS for other medicines as a COVID-19 measure.[61] States likewise could waive certain abortion regulations, such as waiting periods, so that patients can avoid unnecessary visits to clinics, decreasing the risk of COVID-19 exposure. Virginia took such a proactive measure: in addition to removing other abortion restrictions, Governor Northam suspended the state's mandatory ultrasound law and 24-hour waiting period.[62]

Before the COVID epidemic, abortion policy was unnecessarily restrictive especially with regard to medication abortion and telemedicine for abortion. Maybe the COVID pandemic can push the country toward more sensible abortion policies, now and beyond this national emergency.

Conclusion

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[56] *Id*. at 491.
[57] *Id.*
[58] Lessons from other countries may be instructive. Canada had similar restrictions on elective procedures but each province deemed abortion care as essential. Rachel Gilmore, Abortion Access will be Maintained across Canada Amid COVID-19 Outbreak, CTV NEWS, Mar. 26, 2020, https://www.ctvnews.ca/health/coronavirus/abortion-access-will-be-maintained-across-canada-amid-covid-19-outbreak-1.4870129.
[59] States like Michigan and California classify abortion (or "pregnancy related visits and procedures") as exemptions to restrictions on all non-essential medical services. Noting the rhetorical difference, those states describe abortion as an exception to the suspension of non-essential procedures rather than classify it as an essential service.
[60] A number of advocacy groups, like NARAL Pro-Choice, have called on states to waive certain abortion restrictions so that patients can avoid visits to clinics, decreasing the risk of COVID-19 exposure.
[61] U.S. Department of Health and Human Services Food and Drug Administration, Policy for Certain REMS Requirements During the COVID19 Public Health Emergency, March 2020, https://www.fda.gov/media/136317/download.
[62] Virginia Governor Ralph S. Northam, *Press Release, Governor Northam Signs Virginia Reproductive Health Protection Act* (April 10, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856019-en.html.

There is a clear way to alter abortion law to account for the COVID pandemic: permit tele-abortion to the extent it is medically feasible and suspend medically unnecessary requirements, such as in-person consultations and pre-abortion ultrasounds, that impede access and increase clinic-patient contact. The country has witnessed how quickly culture can change to manage a national emergency: many of our streets have been empty, our group gatherings gone, and our places of meeting have been largely shut. Policy can also bend to stop a pandemic that does not care about abortion politics.