

THE MESS IN TEXAS: LITIGATING COVID-19 ABORTION RESTRICTIONS

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BLOG ([HTTP://WWW.SRHM.ORG/NEWS-CATEGORY/BLOG/](http://www.srhm.org/news-category/blog/))

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Over the last six weeks, abortion access in the state of Texas has been unclear at best and unavailable at worst. Dueling court orders between a federal trial court and the region's federal appeals court lifted the suspension of almost all abortions – deemed by the state as “non-essential” healthcare – only to restore it days later. After four court orders (and a withdrawn petition to the US Supreme Court), abortion care has resumed in the state. But the US battle over abortion access is far from over, and Texas residents are still grappling with the effects (<https://rewire.news/author/paige-alexandria/>), of cancelled appointments and weeks of delay.

Events unfolded quickly after the Governor of Texas issued an executive order (https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf), which postponed non-essential surgeries and procedures until April 22, 2020. The next day, an emergency rule applied the executive order to all non-urgent abortions, including medication abortion. Lawyers representing abortion providers filed a lawsuit. A federal court granted a temporary decision that stopped the executive order from taking effect: the state's action would cause irreparable harm and was an unconstitutional ban of nearly all pre-viability abortion.

On April 7, a divided panel of the appeals court (<https://www.politico.com/news/2020/04/07/court-backs-texas-pandemic-abortion-ban-citing-emergency-powers-173419>) put the order back in place, overturning the lower court order. As justification, the appeals court relied on a Supreme Court case decided over 100 years ago, which held that legislators may respond to a health crisis with reasonably-related regulations that are not arbitrary or oppressive. The Court concluded that Texas' executive order was a reasonable means to conserve medical supplies and hospital capacity. Even though medication abortion only requires taking two pills, and thus no personal protective equipment (PPE), the ultrasound and in-person consultation mandated for *all* abortion patients could expend PPE. The court further held that hospital beds would be taken if complications occur—a risk that actually rarely occurs.

In response, the lower court issued yet another order (https://www.courthousenews.com/wp-content/uploads/2020/04/show_temp.pdf) to clarify that, by its own terms, the executive order should not apply to medication abortion or to abortions after 18 weeks of gestation. Medication requires no PPE, and, according to the Texas Medical Board's guidance, the order never applied to ultrasounds or pre-abortion counseling.

Then, in two back-to-back decisions, the appeals court first responded (<https://context-cdn.washingtonpost.com/notes/prod/default/documents/f1ebc656-b7d1-44d6-bbad-79a7089bb3b8/note/33e92af7-e60c-4a1c-bf23-680da10fe207.#page=1>) to the lower court's opinion by finding mixed evidence about whether the executive order applied to medication abortions. But two days before the executive order expired, the court reinstated the suspension of almost all abortions, restating its deference to the state's implausible arguments. A new executive order, which ended May 8 and was not subject to the court's decision, had an exception that could apply to the state's abortion providers.

Although abortion is now available in Texas, the appeals court's willingness to suspend constitutional rights in the guise of protecting public health provides a troubling precedent. Banning abortion care does not protect the public's health; it exacts sizable cost (<https://www.ansirh.org/sites/default/files/publications/files/turnawaystudyannotatedbibliog>) from individuals and health systems. The state suspension encouraged people to cross state lines (<https://kdvr.com/news/coronavirus/colorado-clinics-perform-more-abortions-due-to-covid-19-restrictions-in-other-states/>), in search of services, thwarting the goal of stemming the spread of the virus. Delayed abortion leads to terminations performed at later gestational stages, which increase health risks and financial burdens as time passes.

Self-managed abortion can be safe and effective; unsuccessful attempts, however, can result in resort to hospitals and use of PPE. Most strikingly, continuing a pregnancy to term requires prenatal care and extended reliance on healthcare resources, taking professionals' time and again consuming PPE. Over the long term, unplanned parenthood can have significant long-term effects (<https://www.ansirh.org/research/turnaway-study>) on the health of individuals and their families. These consequences will fall disproportionately on those already marginalized by the inequities of our healthcare system, with the added struggle of navigating the impact of COVID-19.

State suspensions (<https://www.kff.org/womens-health-policy/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/>), having few (if any) credible benefits (<http://bostonreview.net/science-nature-politics-law-justice/daniel-grossman-abortions-dont-drain-hospital-resources>), are pretextual encroachments on abortion rights rather than reasonable public health measures. Abortion has long been singled out for burdensome regulation (<https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304278>), in stark contrast to comparably safe medical procedures. In 2016, the US Supreme Court struck down (https://www.supremecourt.gov/opinions/15pdf/15-274_new_e18f.pdf) a Texas law that threatened to close health centers across the state. The law, which required providers to obtain admitting privileges and clinics to qualify as ambulatory surgical centers, lacked any plausible health justification and erected substantial obstacles to abortion care. The same appeals court that permitted Texas to suspend almost all abortion care upheld a nearly identical law targeting abortion providers in Louisiana just last year. A Supreme Court decision in that case, *June Medical Services v. Russo* (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1323_11o2.pdf), is expected this summer.

COVID-19 presents enormous challenges to the delivery of healthcare services both in the U.S. and abroad. But in this instance, Texas exacerbated the health emergency. Rather than suspend abortion, the state could have relaxed ultrasound and in-person consultation requirements to limit patient-physician contact. Virginia, for example, recently repealed (<https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB733>) mandatory ultrasounds and in-person counseling. Telehealth for abortion (<https://www.nytimes.com/2020/04/28/health/telabortion-abortion-telemedicine.html?referringSource=articleShare>), which is currently banned in Texas, should be expanded across the country – a move Planned Parenthood (<https://time.com/5820326/planned-parenthood-telehealth-coronavirus/>) is making in its health centers. These are examples

of measures that would alleviate overburdened healthcare systems at a crucial time – policies that advance the health of all populations and do not intensify healthcare shortages and disparities.

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