



# Abortion opportunism

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## I. INTRODUCTION

Twelve states issued executive orders suspending abortion care in response to COVID-19.<sup>1</sup> State officials claim that they will preserve medical supplies, hospital space, and healthcare capacity by classifying abortion as an elective, nonessential surgery that can be delayed. Advocacy groups representing abortion providers sued in several states to enjoin these bans.<sup>2</sup> What emerged was a fight that ignores medical evidence and threatened to exacerbate the current public health emergency.

The Executive Order issued in Texas offers an example. Though the issue now may be settled there, opinions from the U.S. Court of Appeals for the Fifth Circuit provide a worrisome roadmap for suspending constitutional rights as a health emergency measure.

This essay first focuses on the Texas case, paying attention to courts' descriptions of medication abortion and describing state and federal laws that restrict telehealth approaches to abortion. The current landscape of regulatory constraints undermines

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\* Associate Dean for Research and Professor of Law, Temple University Beasley School of Law. Many thanks to Aziza Ahmed, Alex Bondy, Naomi Cahn, Craig Green, Paul Gugliuzza, Maya Manian, Linda McClain, Seema Mohapatra, 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*, <https://www.kff.org/womens-health-policy/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> (accessed May 13, 2020); see also Dennis Carter, *State Officials Try to End Legal Abortion During COVID-19 Crisis*, *Rewire*, Apr. 13, 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>.

the Fifth Circuit's conclusion that abortion suspensions are reasonable measures to curb the pandemic rather than political pretext for antiabortion animus. State and federal regulation of medication abortion is untethered to sound health policy during ordinary times, but it is especially unresponsive to the challenges posed by the pandemic.

## II. LEGAL CHALLENGES TO ABORTION SUSPENSIONS

On March 22, 2020, the Governor of Texas issued Executive Order GA-09, which postponed nonessential surgeries and procedures until April 22, 2020.<sup>3</sup> The next day, the Texas Attorney General issued a press release interpreting the Executive Order to prohibit all nonurgent abortions, and the Texas Medical Board implemented that interpretation through an emergency rule.<sup>4</sup> Planned Parenthood, the Center for Reproductive Rights, and the Lawyering Project filed suit, and, on March 30, Judge Yeakel of the U.S. District Court of the Western District of Texas granted a temporary restraining order, holding that the ban on abortions would cause irreparable harm by delaying terminations until 'an abortion would be less safe, and eventually illegal'.<sup>5</sup> Judge Yeakel also noted that the Texas emergency rule, by banning nearly all pre-viability abortions, created an "undue burden" on women seeking abortions, thereby violating the U.S. Supreme Court precedent establishing constitutional abortion rights.<sup>6</sup>

On March 31, the Fifth Circuit issued a temporary stay blocking Judge Yeakel's order and, on April 7, a divided panel overturned Judge Yeakel's order.<sup>7</sup> 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'.<sup>8</sup> The Fifth Circuit relied on *Jacobson v. Massachusetts*, a 1905 Supreme Court case, which upheld a mandatory smallpox vaccination as a reasonable regulation to protect public health.<sup>9</sup> The Supreme Court in *Jacobson* wrote that 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.'<sup>10</sup>

3 Executive Order GA-09, 'Relating to hospital capacity during the COVID-19 disaster' (Mar. 22, 2020).

4 *Planned Parenthood Center for Choice v. Abbott*, No. 1:20-cv-00323, at 4 (W.D. Tex., Apr. 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*, <http://www.tmb.state.tx.us/idl/59C97062-84FA-BB86-91BF-F9221E4DEF17> (accessed Mar. 29, 2020).

5 *Planned Parenthood Center for Choice v. Abbott I*, No. 1:20-cv-00323, at 7 (W.D. Tex., Mar. 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., Apr. 7, 2020).

8 *Id.* at 10.

9 197 U.S. 11 (1905).

10 *Id.* at 38.

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 entail taking two pills, reduce supplies of PPE because of the ultrasound and in-person consultation Texas law requires of all abortion patients.<sup>11</sup> The court discounted any concern that suspending abortion care might result in costs to the healthcare system because stranded patients will travel out of state for care, self-induce terminations, or carry pregnancies to term incurring the costs of prenatal care, labor and delivery.<sup>12</sup>

Two days later, the district court issued another decision, this time ruling that the Executive Order could not be applied to medication abortion or to procedural (non-medication) abortions after 18 weeks of gestation.<sup>13</sup> Based on the 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 Executive Order, and that the Executive Order 'does not apply to office-based visits [such as counseling sessions] without surgery or procedures.'<sup>14</sup>

The Fifth Circuit then issued another temporary stay and reiterated its *Jacobson* analysis.<sup>15</sup> 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.'<sup>16</sup> Lawyers challenging the suspension asked the Supreme Court to vacate the Fifth Circuit's stay and to assure Texas patients of access to medication abortion during the first 10 weeks of pregnancy.<sup>17</sup> That petition soon became moot. In a surprising twist, the Fifth Circuit lifted the stay on April 13.<sup>18</sup> Although the court stood behind its application of *Jacobson*, it held that the record was ambiguous as to whether the Executive 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 Executive Order.<sup>19</sup>

The Fifth Circuit quickly reversed course, however. Two days before the Executive Order expired, the Fifth Circuit entered a stay of the district court's decision, rebuking the district court for failing to apply *Jacobson*. The Fifth Circuit held that medication

11 In re Abbott (Abbott I), 954 F.3d 772, n.24 (5th Cir. 2020).

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 In re Abbott (Abbott II) 800 F. App'x 293, \*13 (5th Cir. 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 (Abbott II) 800 F. App'x 293, n.24 (5th Cir. 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, <https://www.supremecourt.gov/DocketPDF/19/19A1019/> (accessed Apr. 11, 2020).

18 In re Abbott (Abbott III), No. 20-50296, 2020 WL 1866010, at \*4 (5th Cir. Apr. 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 Abbott II.' *Id.* at 3.

19 *Id.* at 4.

abortion consumed PPE after all because providers (as other healthcare professionals) wear protective masks when seeing patients during the pandemic.<sup>20</sup>

Shortly after the Fifth Circuit issued its last decision, a new Executive Order took effect and was not subject to the court's decision.<sup>21</sup> The Executive Order provided an exception for facilities that do not use hospital beds or request PPE from the government.<sup>22</sup> The Governor's office clarified that abortion providers fell under the exception.<sup>23</sup>

During the six weeks of fluctuating judicial opinions on the legality of the Texas order, patients had their appointments cancelled with a moment's notice and were turned away from clinics that had to suspend services. Clinics that shut and reopened had long waiting lists for appointments.<sup>24</sup> Multiple accounts detail the resulting hardships from the Texas ban, affirming that, for patients with delayed or denied care, abortion is an essential service.<sup>25</sup>

Of additional significance is the Fifth Circuit's misunderstanding of how medication abortion is administered—a misunderstanding that justified the Texas suspension. Rather than suspending abortion, expanding access to medication abortion, particularly when delivered through telemedicine, could have helped meet the state's goal of slowing COVID-19's spread. However, as the next section makes plain, the court's treatment of medication abortion tracks longstanding legislative restrictions that contradicts medical evidence and clinical practice regarding its provision.

### III. 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 judicial deference accorded to states exercising police powers.<sup>26</sup> Under *Jacobson*, the smallpox vaccination case, 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.'<sup>27</sup>

20 As a result, for 2 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 Executive Order by the Governor of the State of Texas, Executive Order GA-15, 'Relating to hospital capacity during the COVID-19 disaster' (April 17, 2020) (expired May 8, 2020).

22 *Id.*

23 Shannon Najmabadi, *Texas Clinics Resume Abortion Services as State Acknowledges Ban is No Longer in Place*, Texas Tribune, Apr. 22, 2020, <https://www.texastribune.org/2020/04/22/texas-abortions-coronavirus-ban/>.

24 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/>.

25 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>.

26 Lindsay F. Wiley and 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/>.

27 197 U.S. 11, 39 (1905).

The disagreement among the litigants, and four federal appellate courts, 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 regulation was not 'oppressive'; in the court's own words, it refused to 'second guess' Texas.<sup>28</sup> The Eighth Circuit followed the Fifth Circuit's interpretation of *Jacobson*, keeping in place Arkansas's ban of procedural abortions.<sup>29</sup> Conversely, the Sixth and Eleventh Circuits upheld injunctions issued by district courts in Tennessee and Alabama, respectively, because the suspensions not only created an undue burden on constitutional rights to abortion but also failed the reasonableness standard of *Jacobson*.<sup>30</sup>

A reasonableness inquiry should weigh the means chosen by the state—suspending abortion care—against the ends of the regulation—conserving PPE and hospital capacity.<sup>31</sup> The Sixth Circuit, for instance, held that suspending abortion does not conserve scarce medical resources and does not not impede COVID-19's circulation.<sup>32</sup> Travel, self-managed abortion, or carrying a pregnancy to term results in continued contact with the healthcare system and the consumption of medical resources. Many people who lack access to abortion will travel to other jurisdictions to legally end their pregnancies;<sup>33</sup> providers in neighboring states, without the assistance of additional staff or capacity, must manage this influx of new time-bound patients. Overextended providers have been stretched even farther, causing delays and increasing costs for travelers, who otherwise should limit social contact.<sup>34</sup> For those who do not or cannot travel, self-managed abortion can be effective and safe, but it can also increase costs for the healthcare system if patients lack accurate information or skill and adverse health consequences occur.<sup>35</sup>

28 In re Abbott (Abbott I), 954 F.3d 772, \*12 (5th Cir. 2020) ("*Jacobson* disclaimed any judicial power to second-guess the policy choices made by the state in crafting emergency public health measures."). The Fifth Circuit appeared to ignore that only abortion providers, and no other physicians, had been targeted for the Executive Order's enforcement.

29 In re Rutledge, 956 F.3d 1018, 15-16 (8th Cir. 2020).

30 See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (holding that antiabortion 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.'). In June 2020, the Supreme Court struck down a Louisiana statute that required abortion providers to obtain admitting privileges at nearby hospitals; however, the plurality of the Court disagreed about how the undue burden test applied. *June Medical Services v. Russo*, 591 U.S. \_\_\_ (2020).

31 It is beyond the scope of this essay to ask whether *Jacobson* rests on rational basis review or whether, in light of more modern case law, it requires something more searching. Suffice it say, the Fifth Circuit's deference to state rationales may have troubling implications regarding the scope of state power to suspend constitutional rights in times of health emergencies.

32 *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, \_\_\_ (6th Cir. 2020); see also *In re Abbott (Abbott I)*, 954 F.3d 772, 29 (5th Cir. 2020) (Dennis, J., dissenting).

33 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>.

34 See 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-abortion-due-to-covid-19-restrictions-in-other-states/>.

35 Texas currently has three times the national rate of self-induced abortion. Liza Fuentes et al., *Texas Women's Decisions and Experiences Regarding Self-managed Abortion*, 20 BMC Wom. Health 1 (2020).

Unplanned parenthood will create even more stress on hospitals and physicians.<sup>36</sup> Continuing a pregnancy requires prenatal care that includes multiple interactions with healthcare professionals each necessitating PPE. The consequences of abortion suspensions fall disproportionately on people who already suffer hardships due to COVID-19—people who are unemployed or essential workers, and those who do not have access to healthcare or face other logistical challenges.<sup>37</sup> Ample data show that low-income people and people of color have higher rates of unplanned pregnancies and higher rates of maternal morbidity and mortality.<sup>38</sup> COVID-19 has deepened these profound inequalities and health disparities.<sup>39</sup>

Moreover, Texas's suspension 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 seeks to undermine abortion rights rather than protect the public's health. Almost 40% of the nation's abortions are medication abortions.<sup>40</sup> Medication abortions typically require no gown, mask, eyewear, shoe covers, or gloves; in other words, no PPE is used.<sup>41</sup> Like the vast majority of terminations, medication abortion is not administered in a hospital or physician's 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.<sup>42</sup> Rarely is a hospital bed needed because of medication abortion.

This means that medication abortion could require no contact with healthcare providers at all, except that law requires it.<sup>43</sup> In a medication abortion, which can occur

36 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>.

37 For documentation of some 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>.

38 People of color have a higher maternal mortality rate as compared to other U.S. populations. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUBLIC HEALTH 407 (2018).

39 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-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.').

40 Rachel K. Jones et al., Abortion Incidence and Service Availability in the United States, 2017, Guttmacher Institute 8 (2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>.

41 The district court also found that minimal PPE is used in aspiration (sometimes called surgical or procedural) 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., Mar. 30, 2020).

42 Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 *Obstet. Gynecol.* 175, 181–82 (2015); Rachel Jones and 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/>.

43 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). For example, the United Kingdom expanded teleabortion in response to COVID-19. Aamna Mohdin, *Relaxation of UK Abortion Rules*

in the first 10 weeks of pregnancy, patients ingest two pills: the first drug (mifepristone) is followed by a second drug (misoprostol) taken 24–48 hours later.<sup>44</sup>

Research demonstrates that medication abortion, like many other healthcare procedures, can be safely and effectively administered online or over the telephone.<sup>45</sup> Ushma Upadhyay and Daniel Grossman argue that teleabortion could permit ‘no-touch’ terminations.<sup>46</sup> Patients who are not at risk for medical complications, are less than 8 weeks pregnant, and have regular menstrual cycles do not need in-person visits or pre-termination ultrasounds.<sup>47</sup> Likewise, a study launched by Gynuity Health Projects (with permission from the U.S. Food and Drug Administration (FDA)) monitored healthcare professionals providing medication abortion care by videoconference and mail.<sup>48</sup> Results of the study illustrate that “direct-to-patient telemedicine abortion service was safe, effective, efficient and satisfactory.”<sup>49</sup> 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.<sup>50</sup>

Despite the ease with which medication abortion can be administered, and its proven effectiveness,<sup>51</sup> several states (including Texas) and the federal government make access to medication abortion needlessly difficult, with an eye to obstructing efforts to provide remote solutions for its delivery.

This obstruction comes about in three ways. First, federal rules prohibit dispensing drugs through the mail or at a pharmacy. The FDA restricts mifepristone under a drug safety program (a Risk Evaluation and Mitigation Strategy or REMS), which mandates, among other things, that patients collect the drug at a clinic, physician’s office, medical center, or hospital.<sup>52</sup> As an early response to the pandemic, 21 state attorneys general

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*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>.

44 Jones & Boonstra, *supra* note 45, at 1.

45 Ushma D. Upadhyay and Daniel Grossman, *Telemedicine for Medication Abortion*, 100 *Contraception* 351, 353 (2019).

46 Id. Megan K. Donovan, *Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, 21 *Guttmacher Pol’y Rev.* 41 (2018).

47 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?referrerSource=articleShare>.

48 Gynuity Health Projects, *The Teleabortion Project*, <https://telabortion.org/>.

49 Elizabeth Raymond et al., *TelAbortion: Evaluation of a Direct to Patient Telemedicine Abortion Service in the United States*, 100 *Contraception* 173, 173 (2019).

50 Center for Reproductive Rights & Columbia Mailman School of Public Health, *Expanding Telemedicine Can Ensure Abortion Access During COVID-19 Pandemic*, <https://reproductiverights.org/document/expanding-telemedicine-can-ensure-abortion-access-during-covid-19-pandemic> (accessed Apr. 29, 2020).

51 Melissa J. Chen et al., *Mifepristone With Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 *Obstet. Gynecol.* 12, 17–20. (2015).

52 FDA rules do not require a physician to be physically present when a patient takes mifepristone. 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. See Letter from Attorney General Xavier Becerra et al. to Secretary Alex M. Azar II, U.S. Department of Health & Human Services at

urged the government to lift or to stop enforcing the FDA's protocol, but to no avail; rather, and as described below, a federal district court enjoined some aspects of the REMS.<sup>53</sup>

Second, several states' laws reach beyond the FDA's rules and impose additional restrictions on medication abortion.<sup>54</sup> Eighteen states mandate that the prescribing physician be physically present when the patient collects and takes the medication.<sup>55</sup> In addition, 33 states prohibit nonphysicians from administering medication abortion despite evidence that advanced practice clinicians can safely and effectively counsel patients.<sup>56</sup> These laws layer on top of other state restrictions, such as pre-termination ultrasounds and counseling, that apply to all abortions regardless of type and also necessitate clinic-patient contact.<sup>57</sup>

Finally, nine states explicitly ban telehealth for medication abortion.<sup>58</sup> Over the last several months, state and federal bills have sought to require the physical presence of a physician during medication abortions.<sup>59</sup> At the same time, states as well as the federal government have expanded telehealth for non-abortion medical services, recognizing the importance of healthcare solutions that limit contact between professionals and patients.<sup>60</sup> For example, the Texas Medical Board relaxed restrictions on medical consultation, treatment, and diagnosis over the Internet and telephone.<sup>61</sup> At the federal level, the coronavirus relief legislation issued guidelines for Medicaid and Medicare coverage of telehealth and included grants to develop telehealth practices for federally qualified health centers, rural health clinics, and hospices.<sup>62</sup>

3 (Mar. 30, 2020), [https://ag.ny.gov/sites/default/files/final\\_ag\\_letter\\_hhs\\_medication\\_abortion\\_2020.pdf](https://ag.ny.gov/sites/default/files/final_ag_letter_hhs_medication_abortion_2020.pdf) (citing FDA-2020-D-1106).

53 *Id.* at 3 ("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").

54 State Abortion Laws, Medication Abortion Requirements, Dec. 1, 2019 (accessed May 28, 2020), <http://lawatlas.org/datasets/medication-abortion-requirements>. Texas regulates medication abortion 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.*

55 Guttmacher Institute, State Laws and Policies: Medication Abortion, <https://www.guttmacher.org/state-policy/explore/medication-abortion> (accessed May 1, 2020).

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

57 Most waiting periods necessitate 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.

58 Datasets that map the regulation on medication abortion are available through the Policy Surveillance Program at Temple University's Center for Public Health Law Research. State Abortion Laws, Medication Abortion Requirements, Dec. 1, 2019 (accessed May 28, 2020), <http://lawatlas.org/datasets/medication-abortion-requirements>.

59 See 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/>; Teleabortion Prevention Act of 2020, 116th Congress, S. 3252, at <https://www.congress.gov/bills/116/congress/senate/bill/3252/text>.

60 See, e.g., 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>.

61 Texas Medical Board, Press Release, TMB Responding to Gov. Abbott's State of Disaster Declaration (Mar. 14, 2020), <http://www.tmb.state.tx.us/dl/920E0677-1BAF-C306-781B-A570AD6795A1>.

62 The Coronavirus Aid, Relief, and Economic Security Act, Pub. Law. No. 116-138 (2020). Relating to abortion, Congress has focused on ensuring that restrictions on federal funding for abortion care are

#### IV. ABORTION EXCEPTIONALISM REVISITED

Contradictory treatment of abortion compared to other outpatient services existed long before COVID-19.<sup>63</sup> Public health research makes clear that abortion-targeted laws, unlike rules for outpatient procedures with similar (or even heightened) risk, apply 'regardless of the level of sedation or anesthesia used[] or the nature of the office intervention.'<sup>64</sup> Abortion restrictions are 'more numerous and more stringent' than regulations of other types of office-based procedures.<sup>65</sup>

Some states, however, have recognized abortion as essential healthcare that must remain available during the present national emergency.<sup>66</sup> A few states protected access to abortion in executive orders, and an increasing number of health centers have relied on teleabortion so that eligible patients can pick up medication and self-administer while being in remote contact with their physician.<sup>67</sup>

Expanding rather than restricting access to medication abortion can help protect the public health and reduce the burden of COVID-19 for pregnant individuals, health-care professionals, and health systems. The urgent need to save lives and medical resources 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.<sup>68</sup> Indeed, the FDA has already indicated that it would stop enforcement of REMS for other medicines as a COVID-19 measure.<sup>69</sup> On July 13, 2020, the U.S. District Court of the District of Maryland issued a nationwide injunction of the REMS protocol for mifepristone while the national emergency exits. In assessing the burdens imposed by the policy, the court held that the cumulative effects of abortion restrictions create a substantial obstacle to abortion care, rendering the in-person requirement unconstitutional during the pandemic. The court cites evidence that the FDA policy disproportionately effects low income people and people of color, who struggle to

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reiterated in coronavirus relief legislation. Id. §§ 3211(b) 236, 5001(b) 606. On the federal expansion of telemedicine, see also 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 . . .').

63 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).

64 Id. at 491.

65 Id.

66 Lessons from other countries may be instructive. Canada enacted similar restrictions on non-essential 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>.

67 Kaiser Family Foundation, *supra* note 1. See Carrie N. Baker, *Feminist Multi-Front Battle to End FDA's Abortion Pill Restriction*, Ms. Magazine, May 20, 2020, <https://msmagazine.com/2020/05/20/feminist-multi-front-battle-to-end-fdas-abortion-pill-restriction/>.

68 The FDA has recognized the safety and effectiveness of mifepristone. See 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>.

69 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>.

arrange childcare, transportation, and time off work which can be especially difficult during the pandemic.<sup>70</sup>

States could waive 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 repealing other abortion restrictions, Governor Northam suspended the state's mandatory ultrasound law and 24-hour waiting period.<sup>71</sup>

Before the COVID-19 epidemic, abortion policy was unnecessarily restrictive especially with regard to medication abortion and telemedicine for abortion. Responses to COVID-19 can shine a light on more sensible abortion policies, now and beyond the current crisis.

## V. CONCLUSION

Given the challenges presented by COVID-19, state and federal policy should permit teleabortion to the extent it is feasible and suspend medically unnecessary requirements, such as in-person consultations and pre-abortion ultrasounds, that 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 postponed, and our places of meeting largely shut. Policy can also bend to hinder a pandemic that does not take sides in the abortion debate.

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70 American College of Obstetricians & Gynecologists et al. v. United States Food and Drug Administration et al., No. 8:20-cv-01320 (D. Md. May 27, 2020)

71 Virginia Governor Ralph S. Northam, Press Release, Governor Northam Signs Virginia Reproductive Health Protection Act, <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856019-en.html> (accessed Apr. 10, 2020).