

2021

Covid-19, Abortion, and Public Health in the Culture Wars

Laura D. Hermer

Mitchell Hamline School of Law, laura.hermer@mitchellhamline.edu

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Constitutional Law Commons](#), and the [Health Law and Policy Commons](#)

Recommended Citation

Hermer, Laura D. (2021) "Covid-19, Abortion, and Public Health in the Culture Wars," *Mitchell Hamline Law Review*: Vol. 47 : Iss. 1 , Article 4.

Available at: <https://open.mitchellhamline.edu/mhlr/vol47/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

COVID-19, ABORTION, AND PUBLIC HEALTH IN THE CULTURE WARS

Laura D. Hermer[†]

I. THE SETTING OF THE PANDEMIC.....	100
II. THE CONNECTION BETWEEN SCARCE PPE AND ABORTION RESTRICTIONS.....	106
III. THE LAWSUITS.....	111
IV. WHAT THE BRIEFS REVEAL	121
V. CONCLUSION.....	125

When I was asked to write an article on the restrictions that some states sought to impose on abortion access during the Covid-19 pandemic, my initial thought was that the topic would probably be stale before I finished writing the piece. The worry was misplaced. On the one hand, all the restrictions put in place shortly after the pandemic began either expired or were defeated before the summer of 2020—long before the publication of this article. But attempts to restrict access to abortion in the United States are evergreen. The topic is continually relevant.

Some legislators use nearly any event as an excuse or vehicle for abortion restrictions. Is there a bill to address police brutality? Try to append abortion restrictions to it.¹ A bill to cut access to health insurance and block-grant Medicaid? Include abortion restrictions.²

One cannot blame them for trying. After all, crises, with their unsettling of the usual order of things, provide fruitful opportunities to advance any number of causes, no matter how tenuous their relation might be to the crisis in question.³ But this begs the question: what is it about abortion that precipitates such a reflexive reaction from some legislators? What is it that makes a governor assert that the “[g]overnment’s role should be to protect life from the beginning to the end,” when

[†]Professor of Law, Mitchell Hamline School of Law. Thanks to Professor Raleigh Levine for her helpful feedback on this article and to the editors for their review. Any errors or omissions are my own.

¹ See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); Paul Kane, Seung Min Kim, John Wagner, *House Panel Approves Expansive Policing Bill to Ban Chokeholds and Make it Easier to Prosecute Officers for Misconduct*, WASH. POST (June 17, 2020), https://www.washingtonpost.com/powerpost/democrats-move-ahead-on-expansive-police-reform-legislation-after-floyds-death/2020/06/16/1cf9aff4-b012-11ea-8f56-63f38c990077_story.html [https://perma.cc/N3RT-NGDD].

² See, e.g., American Health Care Act of 2017, H.R. 1628, 115th Cong. § 103 (2017).

³ See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 175-76 (1984) (discussing how advocates seek “to hook [their] own interests onto the problem or political event of the moment”).

signing legislation banning abortion after a fetal heartbeat can be detected?⁴ It is not about saving children or improving their lives. If it were, the same politicians fighting to end abortion would also be vociferously fighting for clean air and environmental standards, reliable financial support for families in need, paid and temporally generous parental leave, universal early childhood programs, improved and enriched public school education, and free or reduced-cost public post-secondary and vocational education, among other matters. Many such legislators, however, are opposed to these sorts of programs, or at least to increasing their funding and scope.

For these legislators, it's not the fetuses that are important, but rather the prohibition of abortion itself and what that entails for those who may need one. Healthcare delivery problems in the context of Covid-19 provided a similar wedge for anti-abortion legislators and governors. Politicians used concern about preserving personal protective equipment (PPE) and protecting both health care providers and patients to seek to restrict or, in some cases, nearly eliminate access to many or most abortions.

This article will discuss how these politicians sought to accomplish these ends.⁵ It will examine the arguments that they and their amici made to support their policy choices,⁶ and will detail the implications of those policies on the patients seeking abortions, their health care providers, their fetuses, and their loved ones in the context of the pandemic.⁷ It will argue that the implications of these policies strongly suggest that the restrictions had nothing to do with protecting the lives of unborn children, the health of the people involved, or scarce PPE.⁸ Rather, the restrictions are intended to help subordinate women by taking away some of the hard-won control that people with uteruses have over their biology.⁹ The juxtaposition of these restrictions against our society's fierce fight against the pandemic makes the disparities in how we treat certain biological problems rather stark.¹⁰ The time is ripe for a re-evaluation of when, if ever, it may be reasonable for a state to restrict the right to an abortion.¹¹

I. THE SETTING OF THE PANDEMIC

The 2019 novel coronavirus (Covid-19) appears to have originated in the Hubei province of China in or around November 2019.¹² Although the virus may

⁴ Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019), <https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortions-becomes-law-in-ohio> [https://perma.cc/AXA2-4XPM].

⁵ See *infra* Part II.

⁶ See *infra* Part II.

⁷ See *infra* Part II.

⁸ See *infra* Part III.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part V.

¹² Helen Davidson, *First Covid-19 Case Happened in November, China Government Records Show - Report*, GUARDIAN (Mar. 13, 2020), <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in->

have been present earlier, the first reported case of Covid-19 in the United States was identified on January 19, 2020.¹³ The patient, a 35-year-old man, had returned to Snohomish County, Washington, four days earlier after visiting family in Wuhan, China.¹⁴ The clinic reported the case to the Centers for Disease Control and Prevention (CDC) the next day.¹⁵ Sporadic reports of cases in the United States followed, and by the end of February 2020, confirmed community spread was identified in Seattle.¹⁶

This was an outcome the United States had hoped to avoid. Once community spread was confirmed at the pandemic's origin in Wuhan, China tried to contain the virus's spread by severely restricting transportation in and out of Wuhan and the other major cities in Hubei province.¹⁷ The "unprecedented" lockdown affected fifty-seven million people.¹⁸ The hope was that, by shutting down the region, the

november-china-government-records-show-report [https://perma.cc/2KDX-EZN7].

¹³ Michelle Holshue, Chas DeBolt, Scott Lindquist, Kathy Lofy, John Wiesman, Hollianne Bruce, Christopher Spitters, Keith Ericson, Sara Wilerson, Ahmet Tural, George Diaz, Amanda Cohn, LeAnne Fox, Anita Patel, Susan Gerber, Lindsay Kim, Suxiang Tong, Xiaoyan Lu, Steve Lindstrom, Mark Pallansch, William Weldon, Holly Biggs, Timothy Uyeki, & Satish Pillai, *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENGLAND J. MED. 929, 929 (2020).

¹⁴ *Id.* at 929–30.

¹⁵ *Id.* at 930.

¹⁶ Michelle Jorden, Sarah Rudman, Elsa Villarino, Stacey Hoferka, Megan Patel, Kelley Bemis, Cristal Simmons, Megan Jespersen, Jenna Iberg Johnson, Elizabeth Mytty, Katherine Arends, Justin Henderson, Robert Mathes, Charlene Weng, Jeffrey Duchin, Jennifer Lenahan, Natasha Close, Trevor Bedford, Michael Boeckh, Helen Chu, Janet Englund, Michael Famulare, Deborah Nickerson, Mark Rieder, Jay Shendure, & Lea Starita, *Evidence for Limited Early Spread of Covid-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 682 (2020); see also Mike Baker & Sheri Fink, *Covid-19 Arrived in Seattle. Where It Went from There Stunned the Scientists.*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-sequencing.html> [https://perma.cc/Y5QB-L8NS].

¹⁷ Amy Qin, Vivian Wang, Russell Goldman, Chris Buckley, Javier Hernández, Austin Ramzy, Gillian Wong, Paulina Villegas, Steven Myers, Tiffany May, Elaine Yu, Denise Grady, Karen Zraick, Rony Rabin, Carl Zimmer, & Rick Gladstone, *Coronavirus Death Toll Climbs in China, and a Lockdown Widens*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/01/23/world/asia/china-coronavirus.html> [https://perma.cc/PSH7-7GJ5].

¹⁸ James Griffiths & Amy Woodyatt, *China Goes into Emergency Mode as Number of Confirmed Wuhan Coronavirus Cases Reaches 2,700*, CNN (Jan. 27, 2020), <https://www.cnn.com/2020/01/26/asia/wuhan-coronavirus-update-intl-hnk/index.html> [https://perma.cc/437M-SSJZ]; Janet Weiner, *Wuhan Lockdown Halted Spread of Coronavirus Across China*, UPENN LEONARD DAVIS INSTITUTE OF HEALTH ECONOMICS (Mar. 22, 2020),

virus could be successfully smothered and any spread would quickly die out. As the virus jumped to other countries and took hold internationally in February, that hope dimmed.¹⁹

Public health officials first confirmed community spread in Washington and California, followed by Oregon, New York, and elsewhere.²⁰ On March 11, the World Health Organization declared Covid-19 a pandemic.²¹ The Trump administration declared a national emergency two days later.²² Multiple states

<https://ldi.upenn.edu/healthpolicysense/wuhan-lockdown-halted-spread-coronavirus-across-china> [<https://perma.cc/U5RC-SABB>].

¹⁹ See, e.g., Lisa Schnirring, *Doubts Rise About China's Ability to Contain New Coronavirus*, CIDRAP NEWS (Jan. 25, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/01/doubts-rise-about-chinas-ability-contain-new-coronavirus> [<https://perma.cc/5TSY-GPVL>] (reporting on an Imperial College London study finding the estimated reproduction number of the virus to be 2.6 in Wuhan at that time, and reporting the first cases in Australia and Malaysia). *But see* Stephanie Soucheray, *Officials Say Most Americans Not at Risk of Coronavirus*, CIDRAP NEWS (Jan. 28, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/01/officials-say-most-americans-not-risk-coronavirus> [<https://perma.cc/LBN2-VPZC>] (quoting Alex Azar, Secretary of the U.S. Department of Health and Human Services, as saying that “Americans should know this is a potentially very serious public health threat, but Americans should not worry for their own safety.”).

²⁰ Helen Branswell, *Four New Coronavirus Cases in Pacific Northwest Suggest Community Spread of the Disease*, STAT (Feb. 28, 2020), <https://www.statnews.com/2020/02/28/california-oregon-coronavirus-case-community-spread/> [<https://perma.cc/4VNG-WZ5S>]; Stephanie Soucheray, *Los Angeles, New York City Report More COVID-19 Cases*, CIDRAP NEWS (Mar. 4, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/03/los-angeles-new-york-city-report-more-covid-19-cases> [<https://perma.cc/ZL7E-D7ZD>]; see also Benedict Carey & James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html> [<https://perma.cc/HQ27-HADY>] (discussing study results estimating that, by the time the first Covid-19 cases were identified in New York City and elsewhere, hundreds or even thousands of infections had already spread throughout the cities).

²¹ Mary Van Beusekom, *'Deeply Concerned' WHO Declares COVID-19 Pandemic*, CIDRAP NEWS (Mar. 11, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/03/deeply-concerned-who-declares-covid-19-pandemic> [<https://perma.cc/34G4-7RK4>].

²² Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [<https://perma.cc/SPM6-7TAB>].

quickly started closing schools, restricting the size of public gatherings, and taking other steps to limit human interaction.²³

Meanwhile, hospitals and other health care providers in New York City, San Francisco, Seattle, and other parts of the country experiencing larger outbreaks started running short of PPE.²⁴ In March, it was clear that the United States had a woefully insufficient PPE supply in relation to what it would likely need.²⁵ The need should have been apparent to any government that was paying attention. Health care providers had to treat all patients as potentially infected, no matter why the patient sought care, and thus had to use far more PPE than usual.²⁶ This was not just a problem in the United States, but rather in all countries affected by the pandemic.²⁷ Most U.S. hospitals used a “just-in-time” supply system, and thus had

²³ See, e.g., *Map: Coronavirus School Closures*, EDUC. WK. (May 15, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [<https://perma.cc/QJN7-2T3M>] (providing each state and territory’s decision regarding school closure and relevant dates, among other data, and showing that nearly all states ordered schools closed in March 2020); *Coronavirus State Actions*, NAT’L GOVERNORS’ ASS’N (2020), <https://www.nga.org/coronavirus-state-actions-all/> [<https://perma.cc/5MBP-Y978>] (providing detailed information regarding the official actions of each state’s governor in response to the pandemic).

²⁴ See, e.g., Ken Budd, *Where Is All the PPE?*, ASS’N OF AM. MED. COLLS. NEWS (Mar. 27, 2020), <https://www.aamc.org/news-insights/where-all-ppe> [<https://perma.cc/389Y-VAPF>] (discussing the PPE shortages around the United States and steps health care providers have taken in response to the shortages).

²⁵ See Andrew Jacobs, Matt Richel, & Mike Baker, *‘At War with No Ammo’: Doctors Say Shortage of Protective Gear Is Dire*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> [<https://perma.cc/BLH9-XHPN>] (noting that in March, “[w]ith coronavirus cases soaring, doctors, nurses and other front-line medical workers across the United States [were] confronting a dire shortage of masks, surgical gowns and eye gear to protect them from the virus”).

²⁶ See, e.g., *Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html> [<https://perma.cc/N4Z3-DPRW>] (detailing recommendations regarding PPE use for both health care professionals and patients according to relevant circumstances); see also *Healthcare Workers and Employers*, OCCUPATIONAL HEALTH & SAFETY ADMIN. (2020), <https://www.osha.gov/SLTC/covid-19/healthcare-workers.html> [<https://perma.cc/6FM4-5DQN>] (providing guidance for PPE use for health care workers during the pandemic).

²⁷ See, e.g., *Rational Use of Personal Protective Equipment (PPE) for Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG. 2–6 (Mar. 19, 2020), https://apps.who.int/iris/bitstream/handle/10665/331498/WHO-2019-nCoV-IPCPPE_use-2020.2-eng.pdf [<https://perma.cc/P4U8-8EW9>] (discussing how to

only limited supplies on hand rather than a surplus, even though the problem of meeting PPE demand with such systems had been identified in prior pandemics.²⁸ To make matters worse, the Strategic National Stockpile, designed to supplement health care supplies in emergencies, had not been replenished in many cases for a decade and contained stores of often outdated and sometimes non-functioning supplies.²⁹

Despite clear signs that the United States could experience a disastrous shortage of PPE and other medical necessities, the federal government failed to use the time it had between late January and mid-March to shore up PPE supplies (in addition to a number of other critical steps).³⁰ Once the pandemic took hold in New

optimize PPE use given disruptions in the global PPE supply chain during the pandemic).

²⁸ Anita Patel, Maryann D'Alessandro, Karen Ireland, W. Burel, Elaine Wencil, & Sonja Rasmussen, *Personal Protective Equipment Supply Chain: Lessons Learned from Recent Public Health Emergency Responses*, 15 HEALTH SEC. 244, 245 (2017) (noting that “[t]he US PPE supply chain provides sufficient product to meet anticipated normal market demands with minimal ability to immediately surge production, resulting in challenges in meeting large, unexpected increases in demand that might occur during a public health response”).

²⁹ See, e.g., Olivia Rubin, *Feds Send Supplies from Stockpiles but Some Items are Old or Expired, Officials Say*, ABC NEWS (Mar. 24, 2020), <https://abcnews.go.com/Health/feds-send-supplies-stockpiles-items-expired-officials/story?id=69770784> [<https://perma.cc/GX93-K7BU>] (reporting that “[l]ocal officials say the strategic national stockpile has not been replenished since the outbreak of the flu known as H1N1 in 2009, which may explain why some of the goods are expired”); see also *Considerations for Release of Stockpiled N95s Beyond the Manufacturer-Designated Shelf Life*, CTNS. FOR DISEASE CONTROL & PREVENTION (July 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/release-stockpiled-N95.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Frelease-stockpiled-N95.html [<https://perma.cc/4PNY-X7AG>] (observing that “some” of the stockpile’s N95 masks exceeded their shelf life and providing information about how to treat such equipment).

³⁰ The President repeatedly professed confidence throughout most of February that the novel coronavirus would not become a problem in the United States. See Interview by Sean Hannity with Donald Trump, United States President, in Palm Beach, Fla. (Feb. 2, 2020), <https://factba.se/transcript/donald-trump-interview-sean-hannity-part-1-february-2-2020> [<https://perma.cc/6F5M-U3NL>] (Sean Hannity: “How concerned are you [about Covid-19]?” Donald Trump: “Well, we pretty much shut it down coming in from China.”); Interview by Trish Regan with Donald Trump, United States President, in Manchester, N.H. (Feb. 10, 2020), <https://factba.se/transcript/donald-trump-interview-trish-regan-fox-business-february-10-2020> [<https://perma.cc/83PP-D9TN>] (Donald Trump: “You know in April, supposedly, [the coronavirus] dies with the hotter weather. And that’s a beautiful date to look forward to.”); *Remarks by President Trump Before Marine One Departure*, WHITE HOUSE (Feb. 23, 2020),

York City, New Orleans, and several other cities, the federal government initially provided some PPE to harder-hit areas but claimed that states were primarily responsible for ensuring a sufficient supply.³¹ In the chaos that followed, states were reduced to bidding for PPE not only against each other but even against the federal

<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-83/> [<https://perma.cc/T7RW-VNEU>] (“We have [Covid-19] very much under control.”); *Remarks by President Trump in Meeting with African American Leaders*, WHITE HOUSE (Feb. 28, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-african-american-leaders/> [<https://perma.cc/KG99-YUPA>] (“With what we’re talking about now with the virus, we can’t do that. We have to do it differently. If we’re doing a great job, we should congratulate these professionals that are the best in the world And you know what? If we were doing a bad job, we should also be criticized. But we have done an incredible job. We’re going to continue. It’s going to disappear. One day—it’s like a miracle—it will disappear.”). As late as March 10, 2020, three days before he declared a national emergency, President Trump claimed with regard to the pandemic that “we’re prepared, and we’re doing a great job with it. And it will go away. Just stay calm. It will go away.” *Remarks by President Trump After Meeting with Republican Senators*, WHITE HOUSE (Mar. 10, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-republican-senators-2/?utm_source=link&utm_medium=header [<https://perma.cc/QTK8-ZL8F>].

³¹ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, WHITE HOUSE (Mar. 22, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-8/> [<https://perma.cc/A2R5-ACW2>] (“And whatever the states can get, they should be getting. I say we’re sort of a backup for the states. And some of the states are doing really well and some don’t do as well.”).

government.³² Some states alleged that the federal government intercepted PPE orders.³³

II. THE CONNECTION BETWEEN SCARCE PPE AND ABORTION RESTRICTIONS

To conserve scarce PPE and testing supplies and to help prevent the spread of the virus, thirty-six governors and the D.C. mayor ordered or requested a halt to all elective health care visits, procedures, and tests in March or April.³⁴ Some directives

³² See, e.g., Lauren Feiner, *States Are Bidding Against Each Other and the Federal Government for Important Medical Supplies—and It’s Driving Up Prices*, CNBC (Apr. 11, 2020), <https://www.cnbc.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html> [<https://perma.cc/87S8-U9F6>] (“Lacking supplies from the federal government, states and localities have had to find their own. That’s created a market with many bidders, including the federal, state and local governments along with individual consumers, likely contributing to higher prices.”). The article further noted:

Ben Brunjes, an assistant professor of public policy at the University of Washington, said the federal government could easily take over procurement on the states’ behalf and was puzzled why it’s so far declined to do so. “FEMA and other organizations have the ability to say stop, you stop buying it and we’ll disseminate it,” said Brunjes, who previously helped set preparedness policy at the Homeland Security Institute, a federally funded center that provides analysis to the government. “They’re choosing right now to not use that part of their disaster powers.”

Id.

³³ See, e.g., *Large Amount of Covid-19 Testing Equipment Bound for Minn. Picked Off by Federal Gov’t*, CBS MINNESOTA NEWS (May 21, 2020), <https://minnesota.cbslocal.com/2020/05/21/gov-walz-large-amount-of-covid-19-testing-equipment-bound-for-minn-picked-off-by-federal-govt/> [<https://perma.cc/CLY9-E6AH>] (noting Minnesota Governor Walz claimed that “personal protective equipment gowns on the way to Minnesota never made it, and [were] instead diverted away from the state by the White House”); Mia Jankowicz, *Officials in at Least 6 States Are Accusing the Federal Government of Quietly Diverting Their Orders for Coronavirus Medical Equipment*, BUS. INSIDER (Apr. 8, 2020), <https://www.businessinsider.com/coronavirus-federal-govt-fema-accused-taking-states-masks-ventilator-orders-2020-4> [<https://perma.cc/C7HV-JWJD>] (reporting that officials in Colorado, Massachusetts, New Jersey, Kentucky, Texas, and Florida accused FEMA of “[sweeping] up” PPE orders that were supposed to go to the states).

³⁴ *State Guidance on Elective Surgeries*, AMBULATORY SURGERY CTR. ASS’N (Apr. 20, 2020),

were very general. Alabama's initial directive stated that, "[e]ffective immediately, all elective dental and medical procedures shall be delayed."³⁵ Others were much more specific. For example, Indiana governor Eric Holcomb's directive provided that:

To preserve PPE for health care providers who are battling the COVID-19 pandemic, beginning April 1, 2020, all health care providers, whether medical, dental or other, and health care facilities, whether hospitals, ambulatory surgical centers, dental facilities, plastic surgery centers, dermatology offices and abortion clinics, are directed to cancel or postpone elective and non-urgent surgical or invasive procedures. An "elective and non-urgent" procedure, for the purposes of this Executive order includes any surgery or invasive procedure which can be delayed without undue risk to the current or future health of the patient as determined by the patient's treating physician, dentist or health care provider. This prohibition, however, shall not apply to any procedure that, if performed in accordance with the commonly accepted standards of clinical practice, would not deplete the hospital capacity needed and available to cope with the COVID-19 disaster, or utilize in any way PPE (exempting gloves).³⁶

Still others added provisions further clarifying the scope of the order. For example, New Mexico's directive, prohibited "[a]ll hospitals and other health care facilities, ambulatory surgical facilities, dental, orthodontic and endodontic offices in the State of New Mexico . . . from providing non-essential health care services, procedures, and surgeries," defining "non-essential health care services, procedures, and surgeries" as those which can be delayed for three months without undue risk to patient health, and offered specific examples.³⁷ It furthermore specifically exempted:

- (a) the provision of emergency medical care or any actions necessary to provide treatment to patients with emergency or urgent medical needs;
- (b) any surgery or treatment that if not

<https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-state> [https://perma.cc/7UYF-RPBT].

³⁵ ALA. OFF. ST. HEALTH OFFICER, ORDER OF THE STATE HEALTH OFFICER SUSPENDING CERTAIN PUBLIC GATHERINGS DUE TO RISK OF INFECTION BY COVID-19 3 (Mar. 19, 2020), <https://governor.alabama.gov/assets/2020/03/Alabama-State-Health-Officer-Statewide-Social-Distancing-Order-3.19.20.pdf> [https://perma.cc/2AAM-45P7].

³⁶ Ind. Exec. Order No. 20-13 4 (Mar. 30, 2020), <https://www.in.gov/gov/files/Executive%20Order%2020-13%20Medical%20Surge.pdf> [https://perma.cc/RF7F-WSRL].

³⁷ N.M. DEP'T OF HEALTH, PUBLIC HEALTH ORDER, 2 (Mar. 24, 2020), https://www.governor.state.nm.us/wp-content/uploads/2020/03/3_24_PHO_1.pdf [https://perma.cc/FDJ3-5D7R].

performed would result in a serious condition of a patient worsening . . . and; (c) *the full suite of family planning services*.³⁸

A clarification such as New Mexico's is especially useful in the context of family planning services. Nearly all family planning services, including most abortions, are technically considered "elective."³⁹ In other words, most are not emergently or urgently necessary to preserve a patient's life or prevent a significant deterioration in a patient's health. But the term "elective" fails to capture the urgency inherent in family planning services. Without timely access to them—whether preventive or remedial—patients risk not so much their lives or health (though both can be in the balance), but rather their life courses and plans, their employment, their aspirations, their finances, and their closest and most intimate relationships.

New Mexico's order recognized this.⁴⁰ Other states, however, did not. For example, Alabama clarified its initial, very general order two weeks later, on March 27.⁴¹ It prohibited all dental and medical procedures with two exceptions. The first

³⁸ *Id.* at 2–3 (emphasis added). At least three other states—Washington, Minnesota, and Massachusetts—similarly expressly excepted "the full suite of family planning services" in their orders. *See, e.g.,* Restrictions on Non Urgent Medical Procedures, Wash. Proclamation No. 2024 (Mar. 19, 2020), https://www.governor.wa.gov/sites/default/files/20-24%20COVID-19%20non-urgent%20medical%20procedures%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/QAN4-BUQ8>] (noting that "[t]he above prohibition does not apply to the full suite of family planning services"); *FAQ: Executive Order Delaying Elective Medical Procedures*, MINN. DEPT PUB. HEALTH (Mar. 25, 2020), <https://www.health.state.mn.us/diseases/coronavirus/hcp/electivefaq.pdf> [<https://perma.cc/2USH-YL97>] (stating that "[t]he order does not apply to the full suite of family planning services"); Steph Solis, *Coronavirus Response: Hospitals Must Cancel Colonoscopies, Knee Replacements; Abortions Can Continue as Scheduled*, MASSLIVE (Mar. 17, 2020), <https://www.masslive.com/coronavirus/2020/03/coronavirus-response-hospitals-must-cancel-colonoscopies-knee-replacements-abortion-can-continue-as-scheduled.html> [<https://perma.cc/GKP3-5VX4>] (noting that abortions are not considered to be "nonessential, elective invasive procedures" for the purpose of the Massachusetts order).

³⁹ *See* Michelle Bayefsky, Deborah Bartz, & Katie Watson, *Abortion During the Covid-19 Pandemic—Ensuring Access to an Essential Health Service*, NEW ENG. J. MED. (Apr. 20, 2020) ("[e]lective' abortion has been physically separated from other routine health care services; it is predominately performed in independent clinics, even though it could be performed in most private obstetrics and gynecology practices."); *see infra* notes 44–49 and accompanying text; *see also infra* note 51 and accompanying text.

⁴⁰ N.M. DEPT OF HEALTH, *supra* note 37 (recognizing that the Order's prohibition "is not meant to apply to . . . the full suite of family planning services").

⁴¹ ALA. OFF. ST. HEALTH OFFICER, ORDER OF THE STATE HEALTH OFFICER SUSPENDING CERTAIN PUBLIC GATHERINGS DUE TO RISK OF INFECTION BY COVID-19 (Mar. 27, 2020),

was “[d]ental, medical or surgical procedures necessary to treat an emergency medical condition,” and defined “emergency medical condition” as:

a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected by a person’s licensed medical provider to result in placing the health of the person in serious jeopardy or causing serious impairment to bodily functions or serious dysfunction of bodily organs.⁴²

The second was “[d]ental, medical or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient’s ongoing and active treatment.”⁴³ Neither exception obviously encompasses surgical abortions. Subsequent comments and testimony from the Alabama State Health Officer and an attorney for the state indicated that, in fact, the state intended prohibited “elective” procedures to include abortions.⁴⁴ Alabama,⁴⁵ along with

<https://governor.alabama.gov/assets/2020/03/Amended-Statewide-Social-Distancing-SHO-Order-3.27.2020-FINAL.pdf> [<https://perma.cc/2WCZ-VJDK>].

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *See, e.g.,* Robinson v. Attorney General, 957 F.3d 1171, 1175–76 (11th Cir. 2020). At a hearing on March 30, “counsel for the state said that the March 27 order applies to abortions, and that abortion procedures do not fall into the enumerated exceptions unless they are required to protect the life or health of the mother.” *Id.* at 1175. The state modified that interpretation of the order several different times over the next several days through revised orders, new guidance, and conflicting testimony at court hearings. *Id.* at 1175–76.

⁴⁵ *See id.* at 1174–75 (“After Dr. Harris issued the March 27 order, counsel for the plaintiffs reached out to the Alabama Department of Public Health to determine whether the order would be applied to their clinics. On March 29, the chief counsel to the Attorney General stated in response: ‘we are unable to provide . . . a blanket affirmation that abortions will, in every case, fall within one of the exemptions.’”).

Arkansas,⁴⁶ Iowa,⁴⁷ Louisiana,⁴⁸ Ohio,⁴⁹ Oklahoma,⁵⁰ Tennessee,⁵¹ Texas,⁵² and West Virginia,⁵³ ultimately chose, whether directly in the state order or through an

⁴⁶ ARK. DEP'T HEALTH, ADH DIRECTIVE ON ELECTIVE SURGERIES (Apr. 3, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Elective_Procedure_Directive_April_3.pdf [https://perma.cc/YAA5-YPCN]; John Moritz & Frank E. Lockwood, *Abortion Clinic Told to Pause Surgeries; State Says Little Rock Site Flouts Virus Rules*, ARK. DEMOCRAT GAZETTE (Apr. 11, 2020), <https://www.arkansasonline.com/news/2020/apr/11/abortion-clinic-told-to-pause-surgeries/> [https://perma.cc/2NBW-GRJM] (“The Arkansas Department of Health on Friday ordered one of the two operating abortion clinics in the state to stop performing the surgical procedure, after the agency accused the clinic of violating a prohibition on elective surgeries during the covid-19 pandemic. Little Rock Family Planning Services was ordered to stop performing all surgical abortions not ‘immediately necessary to protect the life or health’ of the mother until after the public-health emergency has passed, said a letter sent to the clinic from the Health Department.”).

⁴⁷ See, e.g., Barbara Rodriguez, *Governor's Office Says Order Suspending 'Non-Essential' Surgery Includes Surgical Abortions*, DES MOINES REG. (Mar. 27, 2020), <https://www.desmoinesregister.com/story/news/health/2020/03/27/coronavirus-in-iowa-surgical-abortion-suspended-kim-reynolds-non-essential-surgery-proclamation/2930439001/> [https://perma.cc/H78S-QTFT] (“Pat Garrett, a spokesman for Reynolds, confirmed the governor’s orders through a one-sentence statement to the Des Moines Register. ‘Proclamation suspends all nonessential or elective surgeries and procedures until April 16th, that includes surgical abortion procedures,’ he said in an email.”).

⁴⁸ Complaint at 18, *June Med. Serv. v. Russo*, No. 3:20-CV-00229-JWD-EWD (M.D. La., Apr. 13, 2020), <http://reproductiverights.org/sites/default/files/2020-04/LA%20COVID-19%20Complaint.pdf> [https://perma.cc/YX57-Q8CM] (quoting the Louisiana Attorney General as stating “that elective abortions are not essential procedures”).

⁴⁹ Darrel Rowland, *Capitol Insider: Yost Orders Clinics to Stop 'Non-Essential and Elective' Surgical Abortions*, COLUMBUS DISPATCH (Mar. 21, 2020), <https://www.dispatch.com/news/20200321/capitol-insider-yost-orders-clinics-to-stop-rsquo-non-essential-and-elective-surgical-abortions> [https://perma.cc/T62K-SJRA] (“In his letter to abortion providers, Yost said, ‘You and your facility are ordered to immediately stop performing non-essential and elective surgical abortions. Non-essential surgical abortions are those that can be delayed without undue risk to the current or future health of a patient.’”).

⁵⁰ Press Release, Office of the Okla. Governor, Governor Stitt Clarifies Elective Surgeries and Procedures Suspended Under Executive Order (Mar. 27, 2020), https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries [https://perma.cc/XKW9-Z9NB] (“Today, Governor Stitt clarified that any type of abortion services as defined in 63 O.S. § 1-730(A)(1) which are not a medical emergency as defined in 63 O.S. § 1-738.1 or otherwise necessary to prevent serious health risks to the unborn child’s mother are included in that Executive Order.”).

informal clarification, to use the technically “elective” designation of most abortions to declare that abortion services were among the procedures to be delayed for the pendency of the state’s order.⁵⁴

III. THE LAWSUITS

Civil liberties and women’s health care organizations rapidly filed suit in eight of the states to enjoin the various orders.⁵⁵ Over the course of about three weeks, the district court in six of the cases granted the plaintiffs’ requests for

⁵¹ *Adams & Boyle, P.C. v. Slattery*, 956 F.3d 913, 919 (6th Cir. 2020) (noting that Tennessee opposed the Plaintiffs’ request for a temporary restraining order prohibiting the State from enforcing EO-25—the executive order prohibiting health care providers from performing most elective procedures until at least April 30, 2020—with respect to surgical abortions).

⁵² Press Release, Office of the Tex. Attorney General, *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> [https://perma.cc/6HLU-QM56] (“This prohibition applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including . . . any type of abortion that is not medically necessary to preserve the life or health of the mother.”).

⁵³ See, e.g., Brad McElhinny, *Morrisey Says Order Halting Elective Medical Procedures Applies to Abortion Facilities*, METRO NEWS (Apr. 1, 2020), <https://wvmetronews.com/2020/04/01/morrisey-says-order-halting-elective-medical-procedures-applies-to-abortion-facilities/> [https://perma.cc/QR2A-3GQN] (quoting West Virginia Attorney General Patrick Morrisey as stating that “[t]his declaration is broad-based and applies to all facilities We’ve had some questions: Yes, it also applies to abortion facilities as well.”).

⁵⁴ A few other states, such as Alaska, included surgical abortions among the procedures subject to delay, but then clarified that they were leaving it up to a provider’s judgment how long—presumably if at all—to delay the procedure. See, e.g., Rashah McChesney, *State Requests Providers Delay Elective Abortions Because of COVID-19 Pandemic*, ALASKA PUB. MEDIA (Apr. 8, 2020), <https://www.alaskapublic.org/2020/04/08/state-requests-providers-delay-elective-abortions-because-of-covid-19-pandemic/> [https://perma.cc/R6VC-LMH3] (quoting Alaska Department of Health and Social Services Commissioner Crum as leaving “it up to the healthcare providers choice” on how long to delay).

⁵⁵ See, e.g., Laurie Sobel, Amrutha Ramaswamy, Brittni Frederiksen, & Alina Salganicoff, *State Action to Limit Abortion Access During the COVID-19 Pandemic* (Aug. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> [https://perma.cc/7TZE-LSGF] (providing a timeline of events in relevant cases).

temporary restraining orders.⁵⁶ The Sixth, Tenth, and Eleventh Circuits upheld the lower court in three cases.⁵⁷ The Fifth and Eighth Circuits reversed in two cases.⁵⁸ However, Texas and Arkansas ultimately rendered these reversals moot by permitting elective procedures to resume.⁵⁹ Three other cases settled.⁶⁰ None were further appealed.

Uniformly, the plaintiffs in each suit argued, *inter alia*, that the orders unconstitutionally violated women's right to obtain a pre-viability abortion, and as a first matter, sought a temporary restraining order and/or preliminary injunction against enforcement of the relevant state's order.⁶¹ To obtain a preliminary injunction, a plaintiff "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest."⁶²

On the issue of likelihood of success on the merits, federal district courts in Alabama, Arkansas, Ohio, Oklahoma, Tennessee, and Texas held that the plaintiffs would likely prevail because a state's interests are not sufficient to prohibit pre-viability abortions.⁶³ As one court noted, orders that "implement[] a blanket

⁵⁶ See cases cited *infra* note 63.

⁵⁷ See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020); *Pre-Term Cleveland v. Attorney Gen. of Ohio*, No. 20-3365, 2020 WL 1673310 (6th Cir. 2020); *Robinson v. Marshall*, 957 F.3d 1171 (11th Cir. 2020).

⁵⁸ *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

⁵⁹ *In re Rutledge*, 956 F.3d at 1033; *In re Abbott*, 954 F.3d at 796.

⁶⁰ See, e.g., Brianne Pfannenstiel, 'Essential' Abortions Can Continue in Iowa Despite Coronavirus Outbreak, the State and Advocates Agree, DES MOINES REG. (Apr. 1, 2020), <https://www.desmoinesregister.com/story/news/politics/2020/04/01/coronavirus-in-iowa-essential-abortions-can-continue-covid-19/5103533002/> [<https://perma.cc/4YLZ-7XZK>] (discussing the settlement reached between the ACLU and Iowa); *What If Roe Fell: Louisiana*, CTR. FOR REPROD. RIGHTS, <https://reproductiverights.org/state/louisiana> [<https://perma.cc/QN4H-2NUR>] (noting that the Center for Reproductive Rights settled with the State of Louisiana); *Update on Access to Abortion Case in West Virginia Amid Covid-19*, ACLU OF W. VA (May 8, 2020), <https://www.acluww.org/en/news/update-access-abortion-care-west-virginia-amid-covid-19> [<https://perma.cc/2LYG-49RT>] (reporting that abortion services resumed in the state and the ACLU dismissed its suit after the governor issued a new executive order).

⁶¹ See, e.g., *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1175 (11th Cir. 2020).

⁶² *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The test for obtaining a temporary restraining order are substantially similar or identical in all relevant circuits here.

⁶³ *Robinson v. Marshall*, No. 19cv365-MHT, 2020 WL 1520243, at *2 (M.D. Ala. Mar. 30, 2020); *Little Rock Fam. Plan. Servs. v. Rutledge*, No. 19-cv-00449-KGB, 2020 WL 1862830, at *7 (E.D. Ark. Apr. 14, 2020); *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 19-cv-00360, 2020 WL 1957173, at *1 (S.D. Ohio Apr. 23,

postponement of *all* abortions, medication or procedures that are not necessary to preserve the life or health of the mother” necessarily impose a “substantial obstacle” to obtaining an abortion, and as such are unconstitutional.⁶⁴ The delay of several weeks or more to obtain an abortion makes it likely that many women would suffer irreparable harm if the state orders remained in place, given that all of the states in question impose time restrictions on abortion access.⁶⁵ “[T]he loss of constitutional rights, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’”⁶⁶ The courts also held that denying women a constitutional right, even if only temporarily, imposes a graver hardship than any alleged diminution of the scope of a state’s attempt to protect the public’s health and safety through conservation of PPE.⁶⁷ As the Eastern District Court of Arkansas observed, “there is record evidence that, if women are forced to continue their pregnancies, the PPE [and hospital capacity] required for the associated pre-natal care and delivery would surpass that used . . . in providing abortion care.”⁶⁸ Finally, maintaining status quo access to abortion or otherwise preventing a violation of constitutional rights where the plaintiffs are likely to prevail is in the public interest.⁶⁹

2020); *South Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1932900, at *7 (W.D. Okla. Apr. 20, 2020); *Adams & Boyle, P.C. v. Slatery*, No. 15-cv-00705, 2020 WL 1905147, at *5 (M.D. Tenn. Apr. 17, 2020); *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1502102, at *2 (W.D. Tex. Mar. 3, 2020).

⁶⁴ *Robinson*, 2020 WL 1520243, at *2. The Arkansas court held that the substantial obstacle analysis did not apply, as the Arkansas Governor’s executive order amounted to a nearly complete prohibition. *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *7. Under *Casey*, where a “state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,” it constitutes an “undue burden” on the pregnant person and, as such, is an unconstitutional restriction on the right to an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

⁶⁵ *Robinson*, 2020 WL 1520243, at *2; *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *10; *Preterm-Cleveland*, 2020 WL 1957173, at *1. *S. Wind Women’s Ctr. LLC*, 2020 WL 1932900, **7-8; *Adams*, 2020 WL 1905147, at *6; *Planned Parenthood Ctr. for Choice*, 2020 WL 1502102, at *3.

⁶⁶ *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *10 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971))); *see also Planned Parenthood Ctr. for Choice*, 2020 WL 1502102, at *3.

⁶⁷ *Robinson*, 2020 WL 1520243, at *3; *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *7-8; *Preterm-Cleveland*, 2020 WL 1957173, at *10; *South Wind Women’s Ctr. LLC*, 2020 WL 1932900, *17; *Adams*, 2020 WL 1905147, at *6; *Planned Parenthood Ctr. for Choice*, 2020 WL 1502102, at *3.

⁶⁸ *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *8; *accord Preterm-Cleveland*, 2020 WL 1957173, at *14; *Adams*, 2020 WL 1905147, at *6.

⁶⁹ *Robinson*, 2020 WL 1520243, at *3; *Little Rock Fam. Plan. Servs.*, 2020 WL 1862830, at *10.

Given the issues involved, the analysis would seem relatively straightforward. Nevertheless, several of the defendants or their amici argued that neither *Casey's* bar on absolute prohibitions of pre-viability abortions nor *Casey's* undue burden test provided the relevant standard. Rather, they argued that the test from *Jacobson v. Massachusetts* should apply, describing the circumstances under which a state's police powers in the service of public health reach too far.⁷⁰ The *Jacobson* Court held that

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.⁷¹

Nevertheless,

if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.⁷²

None of the corresponding district courts agreed that *Jacobson* provided the applicable test, but two did weigh the constitutional right to an abortion under *Casey* in light of the state's constitutional duty to protect the public's health under *Jacobson*. The Eastern District Court of Arkansas did so only in passing, suggesting that the plaintiffs would prevail under the different and more stringent test stated in *Jacobson* for determining when a state has overreached in protecting public health.⁷³ The Southern District Court of Ohio court offered a more nuanced analysis. It held that the state's interest in protecting the public health must yield where it "inva[des] . . . rights secured by the fundamental law," such as the right to obtain an abortion.⁷⁴ The right to an abortion is not absolute, the court noted, and as such might, under other circumstances, need to yield to the state's interest under *Jacobson*.⁷⁵ However, the court held that it would impose an undue burden to make women delay surgical abortions in what effectively would be, in this context, a shortsighted and ineffectual

⁷⁰ See, e.g., Brief of the States of Kentucky, Louisiana et al. as Amici Curiae Supporting Appellants at 5, *Adams & Boyle, P.C. v. Slattery*, 956 F.3d 913 (2020) (No. 20-5408), 2020 WL 2201204 (arguing that, under *Jacobson v. Massachusetts*, a state has expanded authority to restrict rights and liberties during emergencies and that such restrictions become unconstitutional only where they have "no real or substantial relation" to addressing the emergency, or [are] "beyond all question, a plain, palpable invasion of rights secured by [the Constitution]" (citations omitted)).

⁷¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

⁷² *Id.* at 31.

⁷³ *Little Rock Fam. Plan. Serv.*, 2020 WL 1862830, at *8-9.

⁷⁴ *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, 2020 WL 1957173, at *11 (S.D. Ohio Apr. 23, 2020) (quoting *Jacobson*, 197 U.S. at 31).

⁷⁵ *Id.*

effort to conserve PPE and hospital capacity in the short term.⁷⁶ The court reasoned that restricting surgical abortions to the latest legal date would require more difficult and lengthier surgeries with more PPE, which are available only at particular locations and carry a greater risk of complications.⁷⁷

Yet both the Fifth and the Eighth Circuits reached a different result than the Ohio district court did on the application of *Jacobson* vis à vis restrictions placed on access to surgical abortions. First, both held that *Jacobson*, and not *Casey*, provided the essential framework for analysis. According to these courts,

[t]he bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some “real or substantial relation” to the public health crisis and are not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”⁷⁸

Rather than requiring that a court weigh the competing interests of abortion rights and protecting public health, the Fifth Circuit concluded that the standard is breached where the state exercises power in an “arbitrary, unreasonable,” or “oppressive” manner, or where it fails to include “a medical exception for [e]xtreme cases.”⁷⁹ The Fifth (and later, Eighth) Circuit’s analysis, then, did not entail considering whether the plaintiffs merited a temporary restraining order under the applicable four-factor test and using *Casey* (and perhaps also *Jacobson*) to consider the relative weight of individual versus state interests. Rather, the two circuits used the two factors from *Jacobson*, above, to consider whether Texas’s and Arkansas’s prohibitions on performing elective surgical abortions lack a “‘real or substantial relation’ to the public health crisis,” or “whether [they are] beyond all question, a plain, palpable invasion of the right to abortion.”⁸⁰

On the “real or substantial relation” prong, both circuits held that the state directives in question applied to all elective surgeries, with only a handful of generally applicable exceptions, and were reasonable means of addressing PPE shortages.⁸¹ Indeed, the Fifth Circuit in a later decision held that even medication abortions were a fit subject for restrictions under Texas’s order, given the existence of state laws requiring a physical examination and an ultrasound prior to providing the medications and an examination following the administration of the medication,

⁷⁶ *Id.* at *12–14.

⁷⁷ *Id.*

⁷⁸ *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31); *accord In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020).

⁷⁹ *In re Abbott*, 954 F.3d at 784.

⁸⁰ *Id.* at 786 (stating that “*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. We could avoid applying *Jacobson* here only if the Supreme Court had specifically exempted abortion rights from its general rule. It has never done so. To the contrary, the Court has repeatedly cited *Jacobson* in abortion cases without once suggesting that abortion is the only right exempt from limitation during a public health emergency”) (internal quotations omitted); *In re Rutledge*, 956 F.3d at 1028.

⁸¹ *In re Abbott*, 954 F.3d at 787; *In re Rutledge*, 956 F.3d at 1029.

since PPE is required in the pandemic for such in-person exams.⁸² What is more, according to the Eighth Circuit, *Jacobson* does not require a “piecemeal approach” in scrutinizing state determinations that would allow a separate analysis for elective abortions in contradistinction to other types of elective surgeries.⁸³ Indeed, such an approach “would encroach upon the State’s policy determinations in how best to combat Covid-19, and we are not empowered to ‘usurp the functions of another branch of government.’”⁸⁴ While they may ask whether the measures are purely pretextual, the Fifth Circuit averred that “courts may not second-guess [their] wisdom or efficacy.”⁸⁵ This, notwithstanding the *Jacobson* Court’s dicta that courts can indeed step in where the

acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.⁸⁶

The Fifth and Eighth Circuits’ reasoning and their blinkered use of *Jacobson* conveniently allows courts in those circuits to avoid considering evidence that could lead to inconvenient findings. Notably, providing women with timely and desired abortions requires less PPE use than either later-term abortions or continuing a pregnancy to term and giving birth.⁸⁷ States that are genuinely concerned about conserving PPE and protecting patients and health care workers from coronavirus exposure would not only exempt such abortions from restrictions on elective surgeries, but would additionally permit pre-abortion counseling and other requirements to be performed remotely, as they have done for most other health care services that can feasibly be offered remotely.⁸⁸

Of course, it would be inappropriate and untenable if courts had to hear challenges from proponents of each type of elective surgery, from knee replacements to tummy tucks. Patients want their surgeries, and surgeons and surgical facilities want to remain in business. Nevertheless, the question of how delays affect PPE use and coronavirus exposure is uniquely relevant to abortions as compared to nearly any other elective surgery. If one delays a carpal tunnel release or gallbladder surgery, the patient must continue to endure the pain and other symptoms that led them to seek treatment. However, the surgery can usually wait, and once performed, it usually remains mostly identical to what would have taken place earlier. In the case of abortion, however, the situation is quite different. Pregnancy cannot be put on hold.

⁸² *In re Abbott*, 956 F.3d 696, 714 (5th Cir. 2020).

⁸³ *In re Rutledge*, 956 F.3d at 1029.

⁸⁴ *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)).

⁸⁵ *In re Abbott*, 956 F.3d at 785.

⁸⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

⁸⁷ *See, e.g.*, *Pre-Term Cleveland v. Attorney Gen. of Ohio*, No. 20-3365, 2020 WL 1673310, at *2 (6th Cir. Apr. 6, 2020).

⁸⁸ *See infra* notes 120–124.

Thus, whether one decides to abort, delay abortion, or continue a pregnancy, all such decisions and their outcomes will likely occur entirely during the pandemic, given the pandemic's likely duration. Medication abortions, which can be performed up to the tenth week of pregnancy if not otherwise contraindicated, require no PPE where state law permits them to be performed remotely.⁸⁹ At and after the tenth week of pregnancy, a surgical abortion is required.⁹⁰ According to physician declarations made in connection with the Ohio case, “[i]n a typical procedure, clinicians use gloves, a surgical mask, protective eyewear, disposable and/or washable gowns, and hair and shoe covers.”⁹¹ The procedures used up until the fifteenth week of pregnancy can be performed in a single appointment.⁹² However, starting with the fifteenth week, dilations and extractions or evacuations require two days: the first to start the dilation of the

⁸⁹ In October 2020, the Supreme Court left in place a preliminary injunction enjoining the Food and Drug Administration and the Department of Health and Human Services from enforcing the federal in-person dispensing and signature requirements regarding mifepristone prescriptions. The American College of Obstetricians and Gynecologists and other groups challenged the enforcement of these requirements during the pandemic. See Adam Liptak, *Supreme Court Won't Immediately Revive Abortion-Pill Restriction*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/politics/supreme-court-abortion-pill-restriction.html> [<https://perma.cc/U2HU-CJ44>]; American Coll. of Obstetricians & Gynecologists v. Food & Drug Admin., No. 8:20-cv-01320-TDC, 2020 WL 3960625 (D. Md. Jul. 13, 2020).

See *In re Abbott*, 956 F.3d 696, 719 (5th Cir. 2020) (“Medication abortion is available until 10 weeks . . .”); Sarah McCammon, *More Patients Seek Abortion Pills Online During Pandemic, but Face Restrictions*, NPR (May 28, 2020), <https://www.npr.org/2020/05/28/863512837/more-patients-seek-abortion-pills-online-during-pandemic-but-face-restrictions>, [<https://perma.cc/G9NS-BTLK>] (noting that “[i]n many states, abortion pills can be prescribed remotely”); Carrie N. Baker, *Telemedicine Abortion: What It Is and Why We Need It Now More Than Ever*, MS. MAG. (Mar. 26, 2020), <https://msmagazine.com/2020/03/26/telemedicine-abortion-what-it-is-and-why-we-need-it-now-more-than-ever/> [<https://perma.cc/SYB9-MLGH>] (noting that telemedicine abortions would not require any PPE).

⁹⁰ Motion for & Brief in Support of Temporary Restraining Order and/or Preliminary Injunction at 3, *Preterm-Cleveland, Inc. v. Yost*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020), 2020 WL 1949711 (stating that surgical abortion is “the only abortion method available for all patients who are over 10 weeks pregnant”).

⁹¹ *Id.* at 7.

⁹² *Surgical Abortion (First Trimester)*, UCSF HEALTH, <https://www.ucsfhealth.org/treatments/surgical-abortion-first-trimester#:~:text=Surgical%20abortion%2C%20also%20known%20as,and%20oral%20pain%2Drelieving%20medications.> [<https://perma.cc/9Z2L-9KNB>].

cervix, and the second to perform the abortion.⁹³ Not only is the procedure riskier than those used in earlier weeks of pregnancy, but the need for multiple days for the procedure increases the PPE that must be used. Depending on the jurisdiction, either by the twentieth week or the time the fetus has become viable, often around the twenty-fourth week, most states ban abortions except where the life or health of the woman is at stake or, in some cases, where the fetus has a condition that is incompatible with life outside the uterus.⁹⁴

Continuation of a pregnancy requires regular prenatal care, only some of which may be performed via telemedicine or otherwise through remote means.⁹⁵ Over the course of a normal pregnancy, the American Academy of Pediatrics and the American College of Obstetricians and Gynecologists generally recommend that the patient be examined every four weeks through the twenty-eighth week, every two weeks from the twenty-ninth to the thirty-sixth week, and then weekly thereafter until delivery.⁹⁶ If these guidelines are followed, a pregnant person will have more than ten prenatal examinations over the course of their pregnancy. At all in-person examinations, the patient's health care providers must use PPE, most notably masks and gloves, and every visit exposes the patient and their caregivers to possible Covid-19 infection. At the end of it, childbirth requires multiple attendants if it takes place in a hospital, all of whom must typically use the same PPE required in performing an abortion.⁹⁷ And following the birth, the mother and child typically

⁹³ *Surgical Abortion (Second Trimester)*, UCSF HEALTH, <https://www.ucsfhealth.org/treatments/surgical-abortion-second-trimester> [<https://perma.cc/KRY5-Y6B5>].

⁹⁴ See *In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020) (“[A]fter a fetus is viable, states may ban abortion outright, except for pregnancies that endanger the mother’s life or health.”); *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Nov. 1, 2020), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/QP8V-ZMCN>] (noting that 43 states prohibit abortion at some point during pregnancy).

⁹⁵ See *Coronavirus (COVID-19), Pregnancy, and Breastfeeding: A Message for Patients*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (July 14, 2020), <https://www.acog.org/patient-resources/faqs/pregnancy/coronavirus-pregnancy-and-breastfeeding#How%20will%20COVID19%20affect%20prenatal%20and%20post-partum%20care%20visits> [<https://perma.cc/DYW5-BLUC>]; see also *If You Are Pregnant, Breastfeeding, or Caring for Young Children*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fpregnancy-breastfeeding.html [<https://perma.cc/ZKW2-PHWA>].

⁹⁶ AM. ACAD. OF PEDIATRICS & AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *GUIDELINES FOR PERINATAL CARE* 150 (8th ed. 2017).

⁹⁷ See, e.g., *Coronavirus (COVID-19), Pregnancy, and Breastfeeding: A Message for Patients*, *supra* note 95 (mentioning some of the PPE that the health care team

remain in the hospital between two and four days.⁹⁸ In other words, delay will almost always result in using more PPE during the pandemic, not less.

On the second prong of the *Jacobson* test—whether the orders constituted, “beyond all question, a plain, palpable invasion’ of the right to abortion”—the Fifth and Eighth Circuits averred that the orders in question “do[] not *prohibit* non-essential procedures,” but rather “*delay*[]” them.⁹⁹ In Texas, all elective medication and surgical abortions were prohibited, and the Fifth Circuit allowed the order to stand except with respect to those patients “who, based on the treating physician’s medical judgment, would be past the legal limit for an abortion in Texas—twenty-two weeks [after the last menstrual period]—on April 22, 2020.”¹⁰⁰ The Eighth Circuit emphasized that medication abortions were still available up to the tenth week of pregnancy in Arkansas and that, for all others, the Arkansas Department of Health directive would expire on May 11, 2020, unless renewed.¹⁰¹ The restrictions are facially neutral, in that they applied to all elective surgeries and not just to abortions, and had endpoints in a few weeks that perhaps would not be extended.¹⁰² Thus—according to both circuits—these restrictions did not constitute an undue burden that, under *Jacobson*, “beyond all question” violated the constitutional rights of women seeking an abortion.¹⁰³ In other words, if a pregnant person might have a two-week window halfway through their pregnancy to obtain a riskier abortion requiring two days to complete and offered by only a handful of

may need to wear during labor and delivery, including masks, protective breathing equipment, goggles, and face shields).

⁹⁸ See Newborns’ and Mothers’ Health Protection Act, 29 U.S.C. § 1185(a) (1996).

⁹⁹ *In re Abbott*, 956 F.3d 696, 717 (5th Cir. 2020); see also *In re Rutledge*, 956 F.3d 1018, 1030 (8th Cir. 2020) (holding that, because “[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor” and because it contains certain exceptions, “the ADH directive is not, beyond all question, a prohibition of pre-viability abortion in violation of the Constitution”); *In re Abbott*, 954 F.3d at 789 (“GA-09 is a temporary postponement of all non-essential medical procedures, including abortion, subject to facially broad exceptions. Because that does not constitute anything like an ‘outright ban’ on pre-viability abortion, GA-09 ‘cannot be affirmed to be, *beyond question*, in palpable conflict with the Constitution.”).

¹⁰⁰ *In re Abbott*, 956 F.3d at 723. Elsewhere the court wrote that “[a] woman who would be 18 weeks [after the last menstrual period] when GA-09 expires has up to four weeks to legally procure an abortion in Texas. No case we know of calls that an ‘absolute ban’ on abortion.” *Id.* at 721.

¹⁰¹ *In re Rutledge*, 956 F.3d at 1030.

¹⁰² *Id.* The Fifth Circuit was even more brief, stating only that “we know of no precedent saying that it violates *Casey* ‘beyond question’ when a generally applicable emergency health measure causes backlogs and travel delays for women seeking abortion. In fact, even outside of a public health crisis, the Supreme Court has ‘recognize[d] that increased driving distances do not always constitute an ‘undue burden.’” *In re Abbott*, 956 F.3d at 722 (citing *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016)).

¹⁰³ *In re Abbott*, 956 F.3d at 722; *In re Rutledge*, 956 F.3d at 1030–31.

locations separated by hundreds of miles in the state, then that constitutes a sufficient constitutional fig leaf to protect the governor's order.

As others have discussed, *Jacobson* was decided when our understanding of protections and liberties guaranteed by the Constitution were rather different than they are now.¹⁰⁴ Robust constitutional protections for individual choice in procreation, contraception, and abortion, among many other important liberties, lay in the future. Justice Holmes cited *Jacobson* in 1927 when he cavalierly declared in *Buck v. Bell* that “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”¹⁰⁵ As Professor Wendy Mariner and colleagues observe, “[t]his suggests that the [*Buck*] Court did not view *Jacobson* as having required any substantive standard of necessity or reasonableness that would prevent what today would be considered an indefensible assault.”¹⁰⁶

This observation may be true. But the *Jacobson* Court may have had a more nuanced view of balancing individual liberties against the state's police power. Professor Wendy Parmet writes that “by 1900, the Court read the Fourteenth Amendment as imposing a general reasonableness limit on the police power.”¹⁰⁷ The *Jacobson* Court emphasized that

the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.¹⁰⁸

Liberty can exist only when we legislate and organize our society in ways that prevent us from harming others in our exercise of it.¹⁰⁹ It follows that those liberties can be limited in the context of a pandemic and that, as Professor Parmet notes, the reasonability of state action is judged based on the relevant circumstances.¹¹⁰ The necessities of a pandemic may require actions that, under less exigent circumstances, would not be allowed. However, even under the Court's interpretation of constitutional liberties in 1905, a court may be justified in stepping in where the state's power to restrict liberties in a public health emergency is “exercised in particular circumstances and in reference to particular persons in such

¹⁰⁴ See, e.g., Wendy E. Parmet, *Rediscovering Jacobson in the Era of Covid-19*, 100 B.U. L. REV. ONLINE 117, 131 (2020); Wendy K. Mariner, George J. Annas, & Leonard H. Glantz, *Jacobson v. Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 581–82 (2005).

¹⁰⁵ *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a state law that authorized involuntary sterilization of “feeble-minded” persons).

¹⁰⁶ Mariner et al., *supra* note 104, at 584.

¹⁰⁷ Parmet, *supra* note 104, at 124.

¹⁰⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

¹⁰⁹ Parmet, *supra* note 104, at 124.

¹¹⁰ *Id.* at 125.

an arbitrary, unreasonable manner, or . . . go so far beyond what was reasonably required for the safety of the public.”¹¹¹

Indeed, while the majority in *Roe v. Wade* cited *Jacobson* in observing that the right to privacy in the context of doing with “one’s body as one pleases” is not unlimited,¹¹² Justice Douglas in his concurrence quoted the case for the proposition that “[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.”¹¹³ The plurality in *Casey* cited *Jacobson* for the proposition that “our cases since *Roe* accord with *Roe*’s view that a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims.”¹¹⁴ Yet, the Fifth and Eighth Circuits had little difficulty brushing away the clinics’ challenges. To those circuits, the possibility of foreclosing abortions to some pregnant people and forcing them to give birth to unwanted children is merely “distressing, inconvenient, or objectionable,” rather than an act that “violate[s] rights guaranteed by the Constitution.”¹¹⁵ The possibility is effectively of no more importance than compelling someone to be vaccinated against a pandemic threat or else to be fined.

IV. WHAT THE BRIEFS REVEAL

Ultimately, the decisions in the Fifth and Eighth Circuits largely became moot when both Texas and Arkansas permitted the resumption of elective surgeries.¹¹⁶ The opinions in those circuits, as well as in the district court opinions

¹¹¹ *Jacobson*, 197 U.S. at 28.

¹¹² *Roe v. Wade*, 410 U.S. 113, 154, 213–14 (1973). The Fifth Circuit used this citation to help support its decision that application of the elective surgery restrictions to abortion services was constitutional. *In re Abbott*, 954 F.3d 772, 789 (2020). The Fifth Circuit’s use of the *Casey* Court’s citation in this connection missed the mark, on the other hand. The Court in *Casey* wrote that

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*’s view that a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 857 (citing *Jacobson*, 197 U.S. at 24–30). See *supra* note 99 and accompanying text.

¹¹³ *Roe*, 410 U.S. at 213–14 (Douglas, J., concurring) (quoting *Jacobson*, 197 U.S. at 29).

¹¹⁴ *Casey*, 505 U.S. at 857.

¹¹⁵ *Jacobson*, 197 U.S. at 28.

¹¹⁶ Tex. Exec. Order No. GA-15 (Apr. 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-15_hospital_capacity_COVID-

and filings of parties and amici, remain largely as a testament to the continued deployment of pretextual rationales in the service of restricting abortion rights. The discussion of relevant facts in these cases provide insight, not into the factors that motivated the states to institute abortion restrictions during the pendency of the pandemic, but rather into those that likely did not.

Arkansas, for example, evidently was not concerned about protecting pregnant people, the fetuses they carried, the health care providers working in clinics offering abortion services, or any of the individuals and family members with whom any of the people in question interacted from Covid-19, since the state continued to require women to obtain in-person counseling prior to getting an abortion, rather than permitting such counseling to take place remotely.¹¹⁷ Such counseling is ostensibly required to make the person seeking an abortion consider the gravity of her decision and its implications, particularly for the unborn life she carries. Presumably, the state wishes to encourage people considering abortion to instead choose to carry the fetus to term. But if this were so, then the state would presumably be interested in protecting the health of the fetus and thus would seek to prevent pregnant people from falling ill with Covid-19. Studies suggest that exposure to SARS-CoV-2, the virus that causes Covid-19, may be associated with preterm birth and stillbirth.¹¹⁸ Yet the district court in *Little Rock Family Planning*

19_TRANS_04-17-2020.pdf [https://perma.cc/VH2H-S4X7]; Ark. Exec. Order No. 20-13 (Apr. 4, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-13_.pdf [https://perma.cc/H9CR-MFB6].

¹¹⁷ *Little Rock Fam. Plan. Servs. v. Rutledge*, 2020 WL 1862830, at *5 (E.D. Ark. 2020). Ark. Code § 20-16-1703(b) requires the physician who will perform an abortion to make a specific list of disclosures to a woman in person at least 72 hours in advance of the procedure. This issue applies in other cases, as well. *See, e.g., Preterm-Cleveland, Inc. v. Yost*, 2020 WL 1949711, at *20 (S.D. Ohio Mar. 30, 2020) (“Plaintiffs could make further progress in preserving PPE and reduce overall contagion risks during the pandemic, but for the medically unnecessary abortion restrictions in Ohio law that limit Plaintiffs’ ability to adapt to this crisis. For example, Ohio could eliminate its requirements that patients make an extra in person visit to the health center and physicians determine the presence fetal heart tone 24 hour prior to the abortion, or allow patients who can safely utilize medication abortion through eleven weeks to do so. Such changes could reduce the opportunity for the virus to spread and further minimize the need for PPE.”).

¹¹⁸ Reem S. Chamseddine, Farah Wahbeh, Frank Chervenak, Laurent J. Salomon, Baderledeen Ahmed, and Arash Rafii, *Pregnancy and Neonatal Outcomes in SARS-CoV-2 Infection: A Systematic Review*, J. PREGNANCY (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7542507/pdf/JP2020-4592450.pdf> [https://perma.cc/CHC4-RQ2X]; *see also* Daniele Di Mascio, Asma Khalil, Gabriele Saccone, Giuseppe Rizzo, Danilo Buca, Marco Liberati, Jacopo Vecchiet, Luigi Nappi, Giovanni Scambia, Vincenzo Berghella, Francesco D’Antonio, *Outcome of Coronavirus Spectrum Infections (SARS, MERS, COVID-19) During Pregnancy: A Systematic Review and Meta-Analysis*, 2 AM. J. OBSTETRICS & GYNECOLOGY MFM (2020),

Services v. Rutledge observed that “[m]andatory in-person counseling is [still] required prior to procedures, with prescribed wait times and return visits to the clinic,” and that “these in-person counseling sessions have not been permitted to be conducted by telemedicine.”¹¹⁹ On the other hand, Arkansas quickly allowed most other health care services to move to telemedicine.¹²⁰

The same was true in Texas. In mid-March 2020, Governor Greg Abbott temporarily suspended state laws requiring, for example, in-person visits to establish a treating relationship or to refill opioid prescriptions,¹²¹ and has since extended them.¹²² The governor directed state medical and nursing boards to fast-track temporary licensure of out-of-state and retired health care professionals.¹²³ Governor Abbott also allowed reimbursement for telemedicine visits at the same rate as in-person visits for all state-regulated health plans.¹²⁴ These are just some of the actions the governor took to make medical care easier to access during the pandemic. Loosening medically unnecessary restrictions on abortion services that expose women, health care professionals, and their loved ones to Covid-19—restrictions that, in the case of medication abortions, were the sole reason for their prohibition under the challenged executive order—were not among them.

<https://www.sciencedirect.com/science/article/pii/S2589933320300379?via%3Dihub> [<https://perma.cc/A9HE-V2LZ>].

¹¹⁹ *Little Rock Fam. Plan. Services*, 2020 WL 1862830, at *5.

¹²⁰ *See, e.g.*, Ark. Exec. Order No. 20-05 (Mar. 13, 2020) https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-05.pdf [<https://perma.cc/G7UK-Y7K4>] (suspending requirements of Ark. § 17-80-401 et seq, as well as requirements of the Board of Examiners in Counseling, to permit the establishment of a treating relationship via remote consultation and the provision of counseling through technological means). Ark. Exec. Order No. 20-05 fails to suspend the requirements of Ark. Code § 20-16-1703, relating to informed consent to abortion procedures.

¹²¹ Press Release, Tex. Med. Bd., TMB Waiver for Chronic Pain Patients Granted by Governor Abbott (Mar. 19, 2020), <http://www.tmb.state.tx.us/dl/60D898B9-8B1E-D4DD-663F-FCABD683968C> [<https://perma.cc/BM8R-P2VD>]; Press Release, Tex. Med. Bd., TMB Responding to Governor Abbott’s State Disaster Declaration (Mar. 14, 2020), <http://www.tmb.state.tx.us/dl/920E0677-1BAF-C306-781B-A570AD6795A1> [<https://perma.cc/P2AW-VJP6>].

¹²² *See, e.g.*, *Coronavirus Disease (COVID-19) Response*, TEX. MED. BD., <http://www.tmb.state.tx.us/page/coronavirus> [<https://perma.cc/34C5-3HDH>] (providing links to the various updates).

¹²³ Press Release, Office of the Tex. Governor, Governor Abbott Fast-Tracks Licensing for Out-of-State Medical Professionals (Mar. 14, 2020), <https://gov.texas.gov/news/post/governor-abbott-fast-tracks-licensing-for-out-of-state-medical-professionals> [<https://perma.cc/G78K-6T6X>].

¹²⁴ Press Release, Office of the Tex. Governor, Governor Abbott Waives Certain Regulations for Telemedicine Care in Texas (Mar. 17, 2020), <https://gov.texas.gov/news/post/governor-abbott-waives-certain-regulations-for-telemedicine-care-in-texas> [<https://perma.cc/433B-YPZM>].

The State of Ohio argued that its inclusion of abortion among the elective procedures to be delayed was meant not only to conserve PPE but also to prevent the spread of the virus through personal interaction.¹²⁵ However, as the district court observed:

Defendant Acton's Stay at Home Order provides exceptions for Ohioans exercising their First Amendment rights to freedom of religion, the press, and speech, but provides no such exception for Ohioans exercising their fundamental Fourteenth Amendment rights at issue here, despite the fact that those exercising First Amendment rights could also increase personal interaction, contact, and further viral spread.¹²⁶

The implicit tiering of constitutional rights is both telling and not particularly surprising.¹²⁷

Alabama and Ohio both refused to provide requested clarification regarding the scope of their state orders. In both states, after abortion providers were told to stop violating the orders, the providers sought to know the precise contours of the prohibitions. Neither state would give them the requested information. In Ohio, when the district court judge "invited" the state to clarify its interpretation of the order, "[d]efendants informed the Court that they would offer no such clarification."¹²⁸ The Ohio court found the defendants' refusal and their "fluidity" in their interpretation of the order to be sufficiently concerning to remark on it in the opinion granting the plaintiffs' motion for a preliminary injunction.¹²⁹

None of these issues inspire confidence in the states' concern for the health or welfare of their residents, whether born or unborn. If the states were truly concerned, then, in the context of the pandemic, they would suspend waiting periods prior to abortions to minimize travel requirements, PPE use, and personnel exposure. They would also suspend ultrasound and other pre-abortion requirements that have no relevance to the health or safety of the person getting the abortion.¹³⁰ Where health care professionals have questions regarding the scope or

¹²⁵ *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, 2020 WL 1957173, at *2 (S.D. Ohio Apr. 23, 2020).

¹²⁶ *Id.* at *15.

¹²⁷ Others were not as circumspect in this regard. The American Center for Law and Justice, in its amicus brief in support of Petitioners in *In re Abbott*, argued that exceptions to state pandemic regulations and orders "must be reserved for the most fundamental and expressly enumerated rights," which they allege, "do[] not include abortion," as the Constitution nowhere mentions abortion. Brief for the American Center for Law and Justice as Amici Curiae, *In re Abbott*, 956 F.3d 696 (5th Cir. 2020), 2020 WL 2045295, at **6-7.

¹²⁸ *Preterm-Cleveland*, 2020 WL 1957173, at *4.

¹²⁹ *Id.* at *9.

¹³⁰ See, e.g., Nichole Austin & Sam Harper, *Assessing the Impact of TRAP Laws on Abortion and Women's Health in the USA: A Systematic Review*, 44 *BMJ SEXUAL & REPROD. HEALTH* 128 (2018), <https://srh.bmj.com/content/familyplanning/44/2/128.full.pdf> [<https://perma.cc/D9HW-RLJA>] ("We found relatively little evidence on the

interpretation of regulations or guidance, they would provide clarification and do so with reasonable promptness. These actions would conserve scarce resources and help minimize exposure to infection while at the same time, not encouraging abortions.

V. CONCLUSION

The evidence strongly suggests that states that sought to use pandemic PPE scarcity as an excuse to restrict abortions had no genuine interest in the health, safety, or welfare of pregnant people seeking abortions, their fetuses, or their health care providers. Nevertheless, the opportunity proved too much for some states to resist. It is likely only a matter of time before the next opportunity arises, and reproductive rights proponents must once again spring into action to defend against unlawful restrictions.

I would like to conclude with a few remarks that, nearly fifty years since *Roe v. Wade* was decided, ought to go without saying. Abortion is not an elective procedure in the way that, for example, a facelift or simple hernia repair is an elective procedure. It is also not a “lifestyle choice,” just as choosing to have a child is not a lifestyle choice. There is nothing trivial about the decision to those making it. Part of the problem in the United States is that, in many aspects of state and national policy, we as a society treat major decisions about family formation, composition, and conduct as if they are akin to choosing whether to purchase a bungalow versus a colonial-style house, or whether to live in Nashville or Naples. It is, in part, why the country does so little to make it easier for people to be parents by, for example, providing generous paid family leave, encouraging a culture in which it is normal and expected for parents of all genders to reduce the time they work during their children’s earliest years, and offering good and affordable public daycare. While the choices mentioned above are all big decisions that not everyone gets to make, certain decisions about family formation are different. They are fundamental to our identity, involve strong biological drives, and directly impact the course of our society. As Justice Douglas wrote in a related context, they involve rights that are “older than the Bill of Rights.”¹³¹ These are issues that, at one time, the Supreme Court at least was able in part to grasp.

impact of TRAP laws on other health outcomes. While supporters of these laws argue that extensive regulatory efforts are important in protecting women’s health, we did not find any evidence of this impact; however, given the noted safety of abortion in the absence of these policies, it would be difficult to detect a protective effect if one existed”) (internal citation omitted); *see also* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12 (2015) (observing, *inter alia*, that “We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new [admitting privileges] requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws”) (internal citation omitted).

¹³¹ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Imagine that, several months into the coronavirus pandemic, you and your family have been dutifully staying at home as much as possible, wearing masks, and keeping your distance from others whenever you have gone outside the home. Unbeknownst to you, one of your family members has been careless while hanging out with friends on a number of occasions. He falls ill. You ensure he is confined to one room, but soon you and others in your family develop coughs and fevers. You become seriously short of breath and need medical assistance. Yet, when you try to get care, you are told that viruses are natural, as is your body's response to them. What is more, it is your fault that you did not discover the imprudent behavior of your family member. You are told that you are simply going to have to isolate during the virus, do your best without medical attention, and rejoice in the wonder of biology, which should be cherished and revered. If you did not want to get sick, then, you are told, you should have done a better job isolating yourself from everyone, even your loved ones.

Most of us would consider this outrageous. As a society, especially in the United States, we have invested substantial resources and talent in the investigation of ways to arrest, alter, and enhance our biological trajectories. Many billions of dollars are spent annually on developing medical and surgical treatments for diseases that were once debilitating or fatal.¹³² In the spring of 2020, as just one portion of public funding, the federal government allocated \$3.6 billion to the National Institutes of Health to spend on Covid-19 research.¹³³ We not only have been “fighting against” cancer, heart disease, diabetes, sickle cell disease—any number of maladies—since the inception of the heyday of medical research, but we also work hard on issues like the ability to choose certain aspects of a potential child's appearance or control our weight or sculpt our bodies.

Yet, if we exchange “pregnancy” for “Covid-19,” and setting aside those many cases in which a pregnancy is desired, suddenly biology becomes indomitable. For example, Georgia State Representative Ed Setzler said that “[i]f a state recognizes the personhood of a human being,” referring to a fetus, “the entire *Roe* case crumbles. I say that with a full stop. What we're doing here is we're recognizing the human beings that are scientifically distinct . . . from their mothers as their own persons . . . under Georgia law.”¹³⁴ Ohio State Representative Kristina Roegner

¹³² See, e.g., *2013-2018 U.S. Investments in Medical and Health Research and Development*, RESEARCH AM. 5 (2019), https://www.researchamerica.org/sites/default/files/Publications/InvestmentReport2019_Fnl.pdf [<https://perma.cc/PG6S-Y6H2>] (finding \$194.2 billion was spent on medical and health research and development in 2018).

¹³³ Science News Staff, *House Panels Use “Emergency” to Boost NIH, DOE Science Budgets*, SCIENCE MAG. (July 7, 2020), <https://www.sciencemag.org/news/2020/07/house-spending-panels-give-nih-big-increase-deal-covid-19-impacts> [<https://perma.cc/DL7A-ALYP>].

¹³⁴ Video Recording of Senate Science and Technology Committee Hearing at 43 min., 27 sec. (Mar. 14, 2019) (remarks by Rep. Ed Setzler (R-35th)), <https://livestream.com/accounts/26021522/events/8751687/videos/194075744> [<https://perma.cc/LV38-4FB6>].

explained in support of her “heartbeat” bill that, in contradistinction to using viability as the point at which abortion becomes illegal,

[t]he detection of a fetal heartbeat is an objective standard that can be applied uniformly. While our ability to detect a fetal heartbeat through a given test may change, the presence of that heartbeat will not, regardless of changes in modern science. An unborn infant either has a beating heart, or that baby does not.¹³⁵

The “right to choose” then becomes about choosing whether or not to have sex and thus risk becoming a parent. Once one chooses to have sex, if one conceives as a result and is considering abortion, the state “can and should intervene to protect the child.”¹³⁶

A different and equally uniform standard would be to allow abortion up until the time at which most fetuses can survive outside the womb without the use of any medical technology. Standard medical literature usually places this point at about thirty-seven weeks gestation.¹³⁷ Pace Roegner, a fetus either has sufficiently well-developed lungs to breathe air once born, or that fetus does not.¹³⁸ This standard has numerous advantages. First, the lungs are among the last major organ groups to develop sufficiently to support life outside the womb.¹³⁹ By the time a fetus can breathe, if born, the now-baby can also usually suckle and sufficiently regulate their temperature to survive outside the uterine environment without medical care—though of course, like all infants, they also require around-the-clock attention, feeding, and changings, ideally with love, in order to survive.¹⁴⁰ A clear, uncomplicated standard would eliminate most maternal/fetal conflicts and, what is more, would do so by prioritizing the only person involved who both possesses and can independently exercise full legal capacity under state law. Yet this change would not likely alter the choice of most people who do not want to be pregnant to abort their pregnancy within the first fourteen weeks of gestation, as the process becomes

¹³⁵ Heartbeat Bill Prohibiting Abortion of an Unborn Human with a Detectable Heartbeat: Hearing on SB. 23 Before the S. Comm. on Health, Hum. Servs. & Medicaid, 2019 Leg., 133rd Sess. 3 (Oh. 2019) (statement of Sen. Kristina D. Roegner, member, S. Comm. on Health, Hum. Servs. & Medicaid), http://search-prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/133rd_ga/ready_for_publication/committee_docs/cmte_s_health_1/testimony/cmte_s_health_1_2019-02-13-0130_102/sb23roegner.pdf [https://perma.cc/89CJ-3AXL].

¹³⁶ *Id.*

¹³⁷ Jason Gardosi, *Normal Fetal Development*, in DEWHURST’S TEXTBOOK OF OBSTETRICS & GYNAECOLOGY 28 (D. Keith Edmonds, ed., 7th ed. 2007).

¹³⁸ M.A. Thompson & A.D. Edwards, *Neonatal Care for Obstetricians*, in DEWHURST’S TEXTBOOK OF OBSTETRICS & GYNAECOLOGY 178 (D. Keith Edmonds, ed., 7th ed. 2007) (discussing the role of surfactant in neonatal respiration and problems in infants born preterm).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 82–83.

more difficult and less readily available as gestation continues.¹⁴¹ It would simply solidify the legality of that choice.

The best way to prevent abortions is to provide people with free access to effective, long-lasting contraceptive methods of their choice. It is only when these methods fail, or when a tragedy occurs during a wanted pregnancy, that abortion should be necessary. Without reliable access to both contraceptives and abortion, women cannot plan their lives and consistently and effectively participate in the public sphere. Restricting access to abortion and contraception is in the same league as redlining and restricting the rights of felons to vote. It is a way of trying to restrict the full and equal ability of certain groups to participate in our society. It is time we end these restrictions.

¹⁴¹ *Fact Sheet: Induced Abortion 2*, GUTTMACHER INST. (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf [<https://perma.cc/A7H9=FE7L>] (showing that 88% of induced abortions occurred within the first twelve weeks of pregnancy in 2016).

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School *of* Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu