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## The Legal and Medical Necessity of Abortion Care Amid the COVID-19 Pandemic

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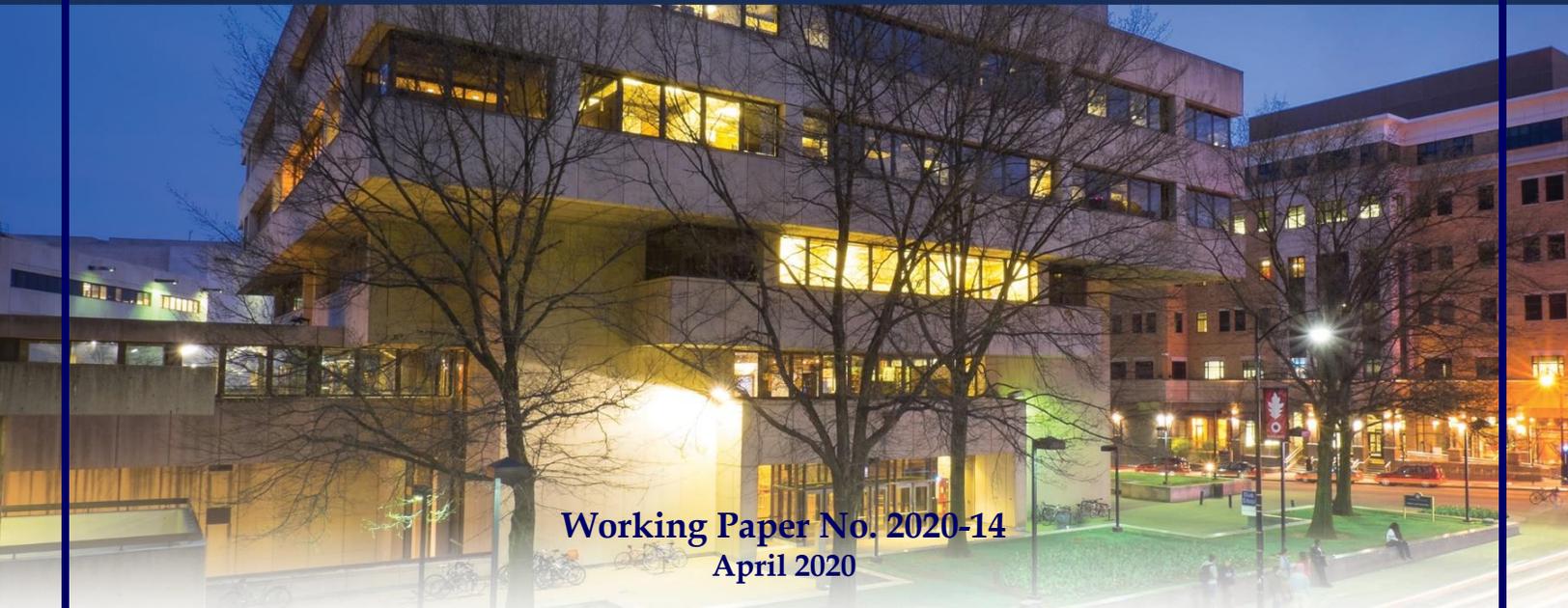
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The Legal and Medical Necessity of Abortion Care Amid the COVID-19  
Pandemic

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In response to the COVID-19 pandemic, states have ordered the cessation of non-essential healthcare. Unfortunately, many conservative states have sought to capitalize on those orders to halt abortion care. In this short paper, we argue that abortion should not fall under any state's non-essential healthcare order. Major medical organizations recognize that abortion is essential healthcare that must be provided even in a pandemic, and the law recognizes abortion as a time-sensitive constitutional right. Finally, we examine the constitutional arguments as to why enforcing these orders against abortion providers should not stand constitutional scrutiny. We conclude that no public health purpose can be served by this application because abortion uses less scarce resources and involves fewer contacts with healthcare professionals than prenatal care and delivery assistance, which is continuing to be provided in this public health emergency.

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## INTRODUCTION

To combat the COVID-19 pandemic, many states have issued orders halting or delaying non-essential medical care to preserve dwindling supplies of personal protective equipment (PPE) and reduce the spread of the disease. As of April 23, 2020, eight states have attempted to enforce these orders against abortion providers, declaring that abortion services are “non-essential,”<sup>1</sup> “elective,”<sup>2</sup> or “not immediately medically necessary.”<sup>3</sup> At least five additional states have indicated that they may enforce these orders against abortion providers, but have yet to do so.<sup>4</sup> This trend is troubling for many reasons. Not only is abortion essential and medically necessary healthcare, but it is also a time-sensitive constitutional right. Delaying abortions will have the ultimate effect of preventing many women from obtaining a pre-viability abortion.

In this short paper, we will describe the various state orders that have been enforced against abortion clinics. We will then describe the medical and legal reasons that abortion is essential and time-sensitive, arguing that abortion care should therefore not fall within the orders as written. Finally, we will explore whether the orders as applied to abortion providers are unconstitutional despite the states’ broad police powers during a public health crisis.

### I. Background

The COVID-19 pandemic is already greatly straining healthcare systems in parts of the country. Many states, in preparation for an expected surge of new inpatients and to conserve hospital resources, have issued orders to halt all non-essential healthcare visits and procedures.<sup>5</sup> These measures have two goals: preserve PPE for healthcare workers and halt the spread of COVID-19 by limiting

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<sup>1</sup> See OHIO DEPT. OF HEALTH, DIRECTOR’S ORDER FOR THE MANAGEMENT OF NON-ESSENTIAL SURGERIES AND PROCEDURES IN OHIO (Mar. 17, 2020), [https://content.govdelivery.com/attachments/OHOOD/2020/03/17/file\\_attachments/1403950/Director%27s%20Order%20non-essential%20surgery%203-17-2020.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/03/17/file_attachments/1403950/Director%27s%20Order%20non-essential%20surgery%203-17-2020.pdf) [Hereinafter Ohio Order]; STATE OF IOWA, IOWA PROC. OF DISASTER EMERGENCY (Mar. 26, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.26.pdf> [Hereinafter Iowa Order].

<sup>2</sup> Ark. Dept. of Health, ADH Directive on Elective Surgeries (Apr. 3, 2020), [https://content.govdelivery.com/attachments/ARAG/2020/04/10/file\\_attachments/1424442/Elective\\_Procedure\\_Directive\\_April\\_3.pdf](https://content.govdelivery.com/attachments/ARAG/2020/04/10/file_attachments/1424442/Elective_Procedure_Directive_April_3.pdf) [Hereinafter Arkansas Order]; State of Tennessee, Executive Order: An Order to Reduce the Spread of COVID-19 By Limiting Non-Emergency Healthcare Procedures, (Apr. 8, 2020), <http://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf> [Hereinafter Tennessee Order].

<sup>3</sup> Tex. Exec. Order No. GA-09 (Mar. 22, 2020), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-09.pdf> [Hereinafter Texas Order].

<sup>4</sup> See *infra* notes 8-12.

<sup>5</sup> See *infra* Figure One.

close interpersonal contact.<sup>6</sup> No state’s non-essential healthcare order *explicitly* halts abortion care; but nevertheless, eight states have interpreted these orders to cover at least some types of abortion and have attempted to enforce them against abortion providers: Alabama, Arkansas, Iowa, Louisiana, Ohio, Oklahoma, Tennessee, and Texas.<sup>7</sup> Below, we describe these orders, how they have been used to restrict abortions, and the litigation efforts to date through April 23, 2020.

At least five additional states—Kentucky,<sup>8</sup> Mississippi,<sup>9</sup> Indiana,<sup>10</sup> West Virginia,<sup>11</sup> and Alaska<sup>12</sup>—have also suggested their state’s non-essential healthcare order covers at least some types of abortion, but at the time of this publication, the states have not yet pursued legal action to enforce that view against abortion providers. As a result, to our knowledge, abortion providers in those states are continuing to provide abortion care on the ground that abortion is essential care, and therefore its provision does not violate the orders. Though we do not include these states in our deeper discussion below, if these states (or others) were to begin enforcing the orders against abortion providers, the following analysis should nevertheless govern.

#### A. *The Orders*

Each state’s order is different in scope, timing, and stated purpose. Each order aims to prevent elective or non-essential procedures, but uses slightly different language to effectuate that intent. For instance, both Ohio and Iowa prohibit “non-essential or elective surgeries and procedures that utilize personal protective equipment (PPE).”<sup>13</sup> Alabama, Arkansas, Oklahoma, and Tennessee

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<sup>6</sup> See *infra* Figure One.

<sup>7</sup> See *infra* Section I.A-C.

<sup>8</sup> *Statement from Attorney General Cameron Regarding the Continuation of Abortions During the COVID-19 State of Emergency*, KENTUCKY.GOV (Mar. 27, 2020), <https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=889>.

<sup>9</sup> Mississippi Public Broadcasting, *MPB LIVE: Governor Tate Reeves COVID-19 Response (3/24/2020)*, YOUTUBE (Mar. 24, 2020), [https://www.youtube.com/watch?time\\_continue=1&v=RTWGMQ02Bs4&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=1&v=RTWGMQ02Bs4&feature=emb_logo) (beginning at 1:05:22).

<sup>10</sup> *Gov. Holcomb Provides March 31 Update on COVID-19 Fight*, YOUTUBE (Mar. 31, 2020), <https://www.youtube.com/watch?v=zJ0mHBu9Kbc> (beginning at 15:40).

<sup>11</sup> Phil Kabler, *Morrisey: Abortions Part of Suspended Surgeries*, CHARLESTON GAZETTE-MAIL (April 2, 2020), [https://www.wvgazette.com/coronavirus/morrisey-abortion-part-of-suspended-surgeries/article\\_d2e1cb98-75a9-55f3-83f8-7ceeb5487048.html](https://www.wvgazette.com/coronavirus/morrisey-abortion-part-of-suspended-surgeries/article_d2e1cb98-75a9-55f3-83f8-7ceeb5487048.html).

<sup>12</sup> STATE OF ALASKA, AMENDED COVID-19 HEALTH MANDATE (Apr. 7, 2020), <https://gov.alaska.gov/wp-content/uploads/sites/2/04072020-COVID-Mandate-005-Revised-Selective-Non-Urgent-Procedures.pdf>.

<sup>13</sup> Ohio Order, *supra* note 1; Iowa Order, *supra* note 1.

require the delay of all “elective” medical procedures.<sup>14</sup> Texas requires the postponement of “all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient . . . .”<sup>15</sup> Louisiana orders the postponement of all “in-person medical services” and “medical and surgical procedures” unless they are necessary to “treat an emergency medical condition” or to “avoid further harms from underlying conditions or diseases.”<sup>16</sup>

Most of these orders—those that only cover surgeries or procedures—should only apply to surgical abortions, if they cover abortion at all. Medication abortion ends a pregnancy solely through the use of medications alone.<sup>17</sup> The first medication, mifepristone, is typically taken in a health clinic, and the second medication, misoprostol, can be taken at home or another chosen location usually 24 to 48 hours later.<sup>18</sup> No “procedure” is required. While certain states, like Arkansas, Iowa, Ohio, and Tennessee, have limited their enforcement to surgical abortions,<sup>19</sup> other states, like Arkansas, Oklahoma, and Texas have attempted to enforce their orders to delay or prohibit all abortions, including medication abortion, despite the plain text of the order.<sup>20</sup> Because these states have previously made it illegal to use telemedicine for abortion care,<sup>21</sup> they are now using those unnecessary

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<sup>14</sup> ORDER OF THE STATE HEALTH OFFICER SUSPENDING CERTAIN PUBLIC GATHERINGS DUE TO RISK OF INFECTION BY COVID-19 (Mar. 27, 2020), <https://governor.alabama.gov/assets/2020/03/Amended-Statewide-Social-Distancing-SHO-Order-3.27.2020-FINAL.pdf>. [Hereinafter Alabama Order]; OFFICE OF THE GOVERNOR STATE OF OKLAHOMA, EXECUTIVE DEPARTMENT FOURTH AMENDED EXECUTIVE ORDER 2020-07 (Mar. 24, 2020), <https://www.sos.ok.gov/documents/executive/1919.pdf> [Hereinafter Oklahoma Order]; Arkansas Order, *supra* note 2; Tennessee Order, *supra* note 2.

<sup>15</sup> Texas Order, *supra* note 3.

<sup>16</sup> Healthcare Facility Notice/Order #2020-COVID19-All-007, La. Dep’t of Health, (Mar. 21, 2020), [http://ldh.la.gov/assets/medicaid/hss/docs/Coronavirus\\_2019/LDH\\_Updated\\_Medical\\_Surgical\\_Procedures\\_03212020.pdf](http://ldh.la.gov/assets/medicaid/hss/docs/Coronavirus_2019/LDH_Updated_Medical_Surgical_Procedures_03212020.pdf) [Hereinafter Louisiana Order].

<sup>17</sup> *Medication Abortion*, KAISER FAMILY FOUND. (Jun. 1, 2018), <https://www.kff.org/womens-health-policy/fact-sheet/medication-abortion>.

<sup>18</sup> *Id.*

<sup>19</sup> See e.g., Ian Richardson, *Iowa Orders Additional Retail Closures, Halts Elective and Nonessential Surgeries and Dental Procedures*, DES MOINES REGISTER (Mar. 26, 2020), <https://www.desmoinesregister.com/story/news/health/2020/03/26/iowa-governor-kim-reynolds-daily-covid-19-news-conference-coronavirus/2914636001/>; Press Release, Arkansas Attorney General’s Office, Rutledge Warns Health Care Professionals And Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries (Apr. 10, 2020), <https://arkansasag.gov/media-center/news-releases/rutledge-warns-health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all-medically/>.

<sup>20</sup> See *infra* Section 1.B.

<sup>21</sup> Okla. Stat. Ann. 63, § 1-729.1 (West 2012); Tex. Occ. Code Ann. § 111.005(c) (West 2017); Ark. Code Ann. § 20-16-603.

laws to argue that medication abortion must be discontinued because it requires a face-to-face interaction. If not for state and federal regulations, the entire medication abortion process could be safely and effectively managed via telemedicine, which allows for treatment of patients using telecommunications technology.<sup>22</sup> In fact, England, Scotland, and Wales are now temporarily permitting telemedicine for medication abortion care to limit COVID-19 transmission.<sup>23</sup>

The non-essential healthcare orders were created to satisfy one of two goals: preserve PPE and hospital resources or reduce the spread of COVID-19. The orders in Arkansas, Iowa, Louisiana, Ohio, and Texas fall into the former category, and only apply to procedures that threaten the PPE supply.<sup>24</sup> However, the orders in Alabama, Oklahoma, and Tennessee were created with the more general purpose.<sup>25</sup> As discussed in Section III below, the goals of these orders are relevant to their application.

The timing of the orders varies across jurisdictions. In Ohio, the order is connected to the State of Emergency and will continue until the Governor declares the emergency over.<sup>26</sup> In Arkansas and Louisiana, there is no official sunset date.<sup>27</sup> The orders in Alabama, Iowa, Oklahoma, Tennessee, and Texas were originally set to expire on April 17,<sup>28</sup> April 16,<sup>29</sup> April 7,<sup>30</sup> April 30,<sup>31</sup> and April 21<sup>32</sup> respectively. These orders have already been extended at least once in Alabama (to April 30),<sup>33</sup>

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<sup>22</sup> Ushma D. Upadhyay & Daniel Grossman, *Telemedicine for Medication Abortion*, 100 *CONTRACEPTION* 351 (2019).

<sup>23</sup> Hillary Margolis, *England Leads Way in UK after U-Turn on COVID-19 Abortion Access*, HUMAN RIGHTS WATCH (Mar. 31, 2020), <https://www.hrw.org/news/2020/03/31/england-leads-way-uk-after-u-turn-covid-19-abortion-access#>.

<sup>24</sup> Ohio Order, *supra* note 1; Iowa Order, *supra* note 1; Texas Order, *supra* note 3; Arkansas Order, *supra* note 2; Louisiana Order, *supra* note 16.

<sup>25</sup> Oklahoma Order, *supra* note 14; Alabama Order, *supra* note 14; Tennessee Order, *supra* note 2.

<sup>26</sup> Ohio Order, *supra* note 1.

<sup>27</sup> Arkansas Order, *supra* note 2; Louisiana Order, *supra* note 16.

<sup>28</sup> Alabama Order, *supra* note 14.

<sup>29</sup> Iowa Order, *supra* note 1.

<sup>30</sup> Oklahoma Order, *supra* note 14.

<sup>31</sup> Tennessee Order, *supra* note 2.

<sup>32</sup> Texas Order, *supra* note 3.

<sup>33</sup> Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection By COVID-19 (Amended Apr. 3, 2020), Alabama.gov, (Apr. 3, 2020), <https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf>.

Iowa (April 30),<sup>34</sup> Oklahoma (April 24),<sup>35</sup> and Texas (May 8).<sup>36</sup> In Texas, the extended order also loosened the prohibition as noted in Figure One.<sup>37</sup> It is entirely possible that the orders will be extended for many more months, as Alabama recently admitted in litigation.<sup>38</sup>

**Figure One: State Orders**

State	Stated Goal of the Order	Text of the Order	Timing of the Order
AL	“Further social distancing measures are necessary . . . to prevent the spread of COVID-19.”	On March 27, 2020, the State Health Officer of Alabama ordered that “all dental, medical, or surgical procedures be postponed until further notice” unless “necessary to treat an emergency medical condition.” The order defines “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.”	“Prior to April 17, 2020, a determination will be made whether to extend this Order.”  On April 3, 2020, this order was extended to April 30, 2020.
AR	To “preserve staff, personal protective equipment (PPE), and patient care supplies; ensure staff and patient safety; and expand available hospital capacity during the COVID-19 pandemic.”	On April 3, 2020 the Arkansas Department of Health issued a directive to delay “elective surgeries” and “Procedures, testing, and office visits that can be safely postponed.” Exceptions should be made where: (1) “there is a threat to the patient’s life if the procedure is not performed”; (2) “there is a threat of permanent dysfunction of an extremity or organ system if the surgery is not done”; (3) “there is a risk of metastasis or progression of staging of a disease or condition if surgery is not performed”; (4) “there is a risk that the patient’s condition will rapidly deteriorate if surgery is not done, and there is a threat to life or an extremity or organ system or a threat of permanent dysfunction or disability.”	For “the coming several weeks.”

<sup>34</sup> Press release, Office of the Governor of Iowa, Gov. Reynolds signs new proclamation continuing State Public Health Emergency Declaration (Apr. 3, 2020), <https://governor.iowa.gov/press-release/gov-reynolds-signs-new-proclamation-continuing-state-public-health-emergency-2>.

<sup>35</sup> Oklahoma Executive Department, Third Amended Executive Order 2020-13, (Apr. 16, 2020), <https://www.sos.ok.gov/documents/executive/1931.pdf>.

<sup>36</sup> Texas Executive Department, Executive Order: Relating to Hospital Capacity During the COVID-19 Disaster, (Apr. 17, 2020), [https://gov.texas.gov/uploads/files/press/EO-GA-15\\_hospital\\_capacity\\_COVID-19\\_TRANS\\_04-17-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-15_hospital_capacity_COVID-19_TRANS_04-17-2020.pdf).

<sup>37</sup> Proclamation from Governor Abbott's Office, Governor Abbott Issues Executive Order to Loosen Restrictions on Surgeries, (Apr. 17, 2020), <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-loosen-restrictions-on-surgeries>.

<sup>38</sup> Order Granting Preliminary Injunction, *Robinson v. Marshall*, No. 2:19-CV-00365 (M.D. Ala. Apr. 12, 2020) [Hereinafter Alabama Injunction].

IA	“Responding to this public health disaster requires the preservation of personal protective equipment to protect our healthcare workforce and the preservation of critical hospital capacity for Iowans.”	<p>On March 26, 2020, the Governor of Iowa ordered that “[a]ll nonessential or elective surgeries or procedures that utilize personal protective equipment (PPE) must not be conducted.”</p> <p>A “nonessential surgery or procedure” is defined as “one that can be delayed without due risk to the current health of the patient, considering all appropriate factors including, but not limited to: (1) threat to the patient’s life if the surgery or procedure is not performed; (2) threat of permanent dysfunction of an extremity or organ system; (3) risk of metastasis or progression of staging; or (4) risk of rapidly worsening or severe symptoms.”</p>	<p>The order “shall continue to expire on April 16, 2020 at 11:59 pm unless sooner terminated or extended in writing by” the Governor.</p> <p>On April 2, 2020, this order was extended until April 30, 2020.</p>
LA	To “preserve Personal Protective Equipment (PPE) and to utilize hospital staffing, equipment, and bed capacity for the transition to the COVID-19 emergency.”	<p>On March 21, 2020, the Louisiana Department of Health directed “all medical and surgical procedures” to be postponed. The order exempts medical and surgical procedures that “treat an emergency medical condition” (defined in the order) or are necessary to “avoid further harms from underlying conditions or diseases.”</p> <p>The order also required all healthcare providers to “postpone all in-person healthcare services that can safely be postponed for 30 days,” according to the providers’ medical judgment.</p>	<p>“[U]ntil further notice.”</p> <p>This order was modified, but not substantially changed, on April 20, 2020.<sup>39</sup> It continues to stay in effect “until further notice.”</p>
OH	“This order is issued for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio.”	<p>On March 17, 2020, the Director of the Ohio Department of Health issued an order prohibiting all “non-essential or elective surgeries” that use personal protective equipment (PPE).</p> <p>A “non-essential surgery” is defined as “a procedure that can be delayed without due risk to the current health of the patient.” Essential surgeries include “threat to the patient’s life if [the] surgery or procedure is not performed; threat of permanent dysfunction of an extremity or organ system; risk of metastasis or progression of staging; or risk of rapidly worsening or severe symptoms (time sensitive).”</p>	<p>“This Order shall remain in full force and effect until the State of Emergency declared by the governor no longer exists, or the Director of the Ohio of Health rescinds or modifies this Order.”</p>
OK	To protect the public’s “peace, health, and safety.”	<p>On March 24, 2020, the Governor of Oklahoma issued an order requiring “medical providers in Oklahoma to postpone all elective surgeries, minor medical procedures, and non-urgent dental procedures.”</p>	<p>The portion of the order was effective until April 7.</p> <p>The Order was amended and is now in effect until April 24.</p>
TN	“To reduce the spread of COVID-19 by limiting non-emergency	<p>On April 8, 2020, Tennessee Governor issued an order to “postpone surgical and invasive procedures that are elective and non-urgent.” The order defined elective and non-urgent procedures as “procedures that can be delayed until the expiration of this Order</p>	<p>The order is effective from April 9, 2020 to April 30, 2020.</p>

<sup>39</sup> Healthcare Facility Notice/Order #2020-COVID19-All-010, La. Dep’t of Health, (Apr. 20, 2020), <http://ldh.la.gov/assets/oph/Coronavirus/resources/providers/LDH-MEMO-UPDATE-RESTORE-MED-SURG-Procedures.pdf>.

	healthcare procedures.”	because they are not required to provide life-sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or to prevent rapid deterioration or serious adverse consequences to a patient’s physical condition if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider.”	
TX	To prevent “a shortage of hospital capacity or personal protective equipment” which “would hinder efforts to cope with the COVID-19 disaster.”	<p>On March 21, 2020, the Governor of Texas issued an Executive Order postponing “all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician.”</p> <p>The order excluded any procedure that, “if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.”</p> <p>The extended order added another exception: if the healthcare facility certifies in writing that “(1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients . . . ; and (2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster.”</p>	<p>“This executive order shall remain in effect and in full force until 11:59 p.m. on April 21, 2020, unless it is modified, amended, rescinded, or superseded by me or by a succeeding governor.”</p> <p>On April 17, 2020, this order was extended until May 8, 2020 (with the modification noted in the previous column).</p>

*B. Enforcement Against Abortion Providers*

No state’s order has explicitly halted abortion. Rather, once the orders were issued, state officials attempted to enforce the orders against abortion providers. For instance, in Ohio—the first state to attempt this enforcement—it was reported that the Ohio Attorney General sent letters to two abortion clinics stating: “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.”<sup>40</sup> In Texas, the Attorney General interpreted the non-essential healthcare order to apply to all abortions—including medication abortion—except those “medically necessary to preserve the health or life of the mother.”<sup>41</sup> The Attorney General threatened to go

<sup>40</sup> Kate Smith, *Ohio Abortion Clinics Ordered to Stop Procedures due to Coronavirus*, CBS NEWS (Mar. 21, 2020), <https://www.cbsnews.com/news/ohio-abortion-clinics-coronavirus-shut-down-not-essential/>.

<sup>41</sup> Press Release, Tex. Att’y Gen. Office, 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),

after providers with “the full force of the law,” including jail time, effectively banning abortion in Texas for at least a month.<sup>42</sup> Similarly, in Arkansas, Iowa, Louisiana, Oklahoma, and Tennessee, either the Governor or Attorney General ordered abortions to cease pursuant to the state orders, although Arkansas, Iowa and Tennessee limited their enforcement to surgical abortions.<sup>43</sup>

It is worth noting that many other states have similar orders, but have not attempted to enforce them against abortion providers.<sup>44</sup> Some states have even protected abortion care explicitly. For instance, New Jersey ordered all “elective” medical procedures to cease, but included an exemption for family planning services, including abortion care: “Nothing in this Order shall be construed to limit access to the full range of family planning services and procedures, including terminations of pregnancies, whether in a hospital, ambulatory surgery center, physician office, or other location.”<sup>45</sup> The fact that only states that have historically opposed abortion are enforcing these non-essential healthcare orders against abortion providers is telling and indicates an exploitation of the pandemic to advance a political—rather than a public health—agenda.

### C. *Litigation Efforts*

Once states began to enforce these non-essential healthcare orders against abortion providers, litigation became necessary to protect abortion access. On March 25, 2020, Planned Parenthood filed an emergency lawsuit on behalf of eight clinics in Texas to prevent the state from enforcing the order against abortion providers.<sup>46</sup> In its complaint, Planned Parenthood demanded an immediate temporary restraining order to allow abortion clinics to remain open. Although

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<https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all>.

<sup>42</sup> *Id.*

<sup>43</sup> See e.g., Press Release, Okla. State Governor's Office, 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://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries); Press Release, Arkansas Attorney General's Office, Rutledge Warns Health Care Professionals And Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries (Apr. 10, 2020), <https://arkansasag.gov/media-center/news-releases/rutledge-warns-health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all-medically/>; La. Dep't of Justice, Shreveport Abortion Clinic Ignoring Health Directive, Further Jeopardizing Public Safety (Mar. 28, 2020), <http://www.ag.state.la.us/Article/9747>.

<sup>44</sup> See e.g., Mich. Exec. Order No. 2020-17 (Mar. 20, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-522451--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522451--,00.html); Minn. Exec. Order No. 20-09 (Mar. 19, 2020), <https://www.leg.state.mn.us/archive/execorders/20-09.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> Complaint, Planned Parenthood Ctr. for Choice v. Abbott, No. A-20-CV-323 (W.D. Tex. Mar. 25, 2020).

Planned Parenthood was originally successful in the district court and received a temporary restraining order,<sup>47</sup> the following day, the Fifth Circuit Court of Appeals stayed the temporary restraining order, allowing Texas to temporarily prohibit abortions while the case is argued.<sup>48</sup> On remand, Planned Parenthood earned a new, and more limited, temporary restraining order,<sup>49</sup> but the Fifth Circuit stayed it again with one exception: “for any patient, who . . . would be past the legal limit for abortion in Texas . . . on April 22, 2020.”<sup>50</sup> On April 11, 2020, the plaintiffs requested emergency relief from the Supreme Court to vacate the Fifth Circuit’s stay.<sup>51</sup> This request was withdrawn after the Fifth Circuit also permitted medication abortion to proceed,<sup>52</sup> but the Circuit later reconsidered its decision and again outlawed medication abortions.<sup>53</sup> Nevertheless, on April 22, 2020, abortion providers in Texas began to provide abortion again, arguing that they qualified for a new exception that Texas created in their modified and extended order.<sup>54</sup> It appears that Texas might accept that abortion providers meet this exception.<sup>55</sup>

Separately, on March 30, 2020, Planned Parenthood, ACLU, and others joined forces to sue government officials in Iowa, Ohio, Oklahoma and Alabama. The plaintiffs again sought a declaration that the orders could not be applied against abortion providers in their state. In Ohio, Oklahoma and Alabama, the courts issued temporary restraining orders on the same day, permitting abortion providers to provide at least some essential abortion care.<sup>56</sup> Ohio and Oklahoma filed an appeal

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<sup>47</sup> Order Granting Pl.’s Req. for TRO, *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323 (W.D. Tex. Mar. 30, 2020).

<sup>48</sup> Order Granting Writ of Mandamus, *In re Abbott*, No. 20-50264 (5th Cir. Mar. 31, 2020).

<sup>49</sup> Order Granting Temporary Restraining Order, *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323 (W.D. Tex. Apr. 9, 2020) [Hereinafter Texas TRO] (enjoining enforcement of the order against the provision of medication abortion and surgical abortion taking place after 18 weeks).

<sup>50</sup> Order Granting Writ of Mandamus, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 10, 2020) [Hereinafter 5th Cir. Writ].

<sup>51</sup> Emergency App. to Justice Alito to Vacate Administrative Stay of TRO Entered by the 5th Cir., *Planned Parenthood Ctr. for Choice et al. v. Abbott et al.*, No. 19A1019 (Apr. 11, 2020).

<sup>52</sup> Order Denying Pet. Em. Mot. to Stay Temporary Restraining Order, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 13, 2020).

<sup>53</sup> Order Granting Writ of Mandamus in Part, *In re Abbott*, No. 20-50296 (5th Cir. Apr. 20, 2020).

<sup>54</sup> Sabrina Tavernise, *Texas Allows Abortions to Resume During Coronavirus Pandemic*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-abortion-texas.html>.

<sup>55</sup> *Id.*

<sup>56</sup> Order Granting Temporary Restraining Order, *Preterm-Cleveland v. Attorney General of Ohio*, No. 1:19-cv-00360 (S.D. Ohio March 30, 2020) [Hereinafter Ohio TRO]; Order Granting Temporary Restraining Order, *Robinson v. Marshall*, No. 2:19-CV-365 (M.D. Ala. Mar. 30, 2020); Order Granting Temporary Restraining Order, *South Win Women’s Ctr. v. Stitt*, No. 5:20-cv-00277 (W.D. Okla. Apr. 6, 2020) [Hereinafter Oklahoma Order]. In Alabama, the TRO was converted into a preliminary injunction on April 12, 2020, but was more limited. Alabama

in the Sixth and Tenth Circuits, but both circuits held that they lacked jurisdiction to consider an appeal at that time given the short-lived nature of a temporary restraining order.<sup>57</sup> Alabama has filed an appeal in the Eleventh Circuit, which has yet to be decided. In Iowa, the parties reached a settlement two days after the litigation commenced, with an agreement by both sides that physicians may “treat abortion the same as other procedures,” which “allows them to make a case-by-case determination for each patient” about whether abortion is essential.<sup>58</sup> As a result, abortion care has continued in Iowa.<sup>59</sup>

Litigation in Arkansas, Louisiana, and Tennessee began a little later, on April 13, 2020. The following day, a judge in Arkansas entered a temporary restraining order.<sup>60</sup> However, on April 22, 2020, the Eighth Circuit “adopt[ed] the reasoning of the Fifth Circuit” and stayed the temporary restraining order without exception.<sup>61</sup> The plaintiffs are seeking a new restraining order at the district court now.<sup>62</sup> However, because Arkansas had only limited surgical abortions under its order, the stay did not affect the provision of medication abortion in the state. In Louisiana, the parties are in discussions to resolve the dispute, and the courts have thus far not responded to the plaintiffs’ emergency request.<sup>63</sup> As for Tennessee, on April 17, 2020, a judge granted a preliminary injunction,<sup>64</sup> which is currently being appealed to the Sixth Circuit.<sup>65</sup>

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Injunction, *supra* note 38. In Ohio, the restraining order was extended another two weeks. Order Extending Temporary Restraining Order, *Preterm-Cleveland et al v. Att’y Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Apr. 10, 2020).

<sup>57</sup> Order Dismissing Appeal, *South Win Women’s Ctr. v. Stitt*, No. 20-6045 (10th Cir. Apr. 13, 2020); Order Dismissing Appeal, *Preterm-Cleveland v. Attorney General of Ohio*, No. 20-03365 (6th Cir. Apr. 6, 2020).

<sup>58</sup> Press Release, Planned Parenthood N. Cent. States, Joint Statement on Order from Johnson County Court (Apr. 1, 2020), <https://www.plannedparenthood.org/planned-parenthood-north-central-states/about-ppncs/media-relations/joint-statement-on-order-from-johnson-county-court>.

<sup>59</sup> *Id.*

<sup>60</sup> Order Granting Temporary Restraining Order, *Little Rock Family Planning Services v. Leslie Rutledge*, No. 4:19-cv-00449-KGB (E.D. Ark. Feb. 14, 2020).

<sup>61</sup> Order Granting Writ of Mandamus, *Little Rock Family Planning Services v. Leslie Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) [Hereinafter 8th Cir. Writ].

<sup>62</sup> Mot. for Temporary Restraining Order, *Little Rock Family Planning Servs. v. Rutledge*, No. 19-cv-449 (E.D. Ark. Apr. 22, 2020).

<sup>63</sup> Notice to Counsel, *June Medical Servs. v. Russo et al*, No. 3:20-cv-00229 (M.D. La. Apr. 23, 2020).

<sup>64</sup> Order Granting Preliminary Injunction, *Adams & Boyle v. Herbert H. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 17, 2020).

<sup>65</sup> Notice of Appeal, *Adams & Boyle v. Herbert H. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 17, 2020).

## II. Abortion is Essential and Time-Sensitive and Therefore Excluded from the Orders

The current pandemic calls for urgent strategies to slow the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), the virus that causes the respiratory illness known as COVID-19, and to conserve medical resources. For that reason, delaying elective and non-essential medical care is an appropriate response to this unprecedented crisis. However, the application of these orders to abortion care is deeply problematic. First and foremost, abortion care is essential and urgent. Defining abortion as elective or non-essential is inaccurate from a medical perspective and can have significant health repercussions if abortion is delayed or prohibited.<sup>66</sup> In addition to health consequences, the legal consequences are also critical. Delaying abortion care, especially surgical abortion care, until the COVID-19 crisis passes will, in effect, preclude a large proportion of women from exercising their constitutional right to a pre-viability abortion. Abortion is therefore also *legally* essential and time-sensitive. As a result, none of the orders should be interpreted to prohibit abortion care.

### A. Abortion is a Time-Sensitive and Essential Medical Procedure

As affirmed in statements by major medical and public health organizations including the American College of Obstetricians and Gynecologists, the American Medical Association, the World Health Organization, and the United Nations Population Fund, abortion is a time-sensitive procedure which is typically urgent; as a result, these organizations conclude that abortion should not be halted in this pandemic.<sup>67</sup> Delays in abortion care can have serious negative consequences and increase the risks to the patient.<sup>68</sup> For instance, it may preclude the option of a less invasive medication abortion, which is approved only up until 10 weeks gestational

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<sup>66</sup> Elizabeth Janiak & Alisa B. Goldberg, *Eliminating the Phrase “Elective Abortion”*: *Why Language Matters*, 93 *CONTRACEPTION* 89 (2016). The physician authors argue that “every use of the phrase ‘elective abortion’ reinforces the false perception that some abortions are necessary (and access to these abortions therefore must be protected) — and others are not (and access to these abortions therefore need not be protected).” *Id.* at 91. Rather, all abortions are imperative to the health and wellbeing of women. *Id.*

<sup>67</sup> *Joint Statement on Abortion Access During the COVID-19 Outbreak*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>; WHO, *INTERIM GUIDANCE: CLINICAL MANAGEMENT OF SEVERE ACUTE RESPIRATORY INFECTION (SARI) WHEN COVID-19 DISEASE IS SUSPECTED*, WORLD HEALTH ORGANIZATION 13 (Mar. 13, 2020); *AMA Statement on Government Interference in Reproductive Health Care*, AM. MED. ASS’N. (March 30, 2020), <https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproductive-health-care>; *COVID-19 Frequently Asked Questions*, U.N. POPULATION FUND (last modified March 30, 2020), <https://www.unfpa.org/covid-19-FAQs>.

<sup>68</sup> *Joint Statement on Abortion Access*, *supra* note 67; Lauren J. Ralph et al., *Self-Reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171 *ANNALS INTERNAL MED.* 4, 238-47 (2019).

age.<sup>69</sup> Delay can also increase the risk of medical complications by necessitating a procedure later in the pregnancy, at which point the abortion becomes more complex to perform.<sup>70</sup> If a first-trimester abortion is delayed until the second trimester, this would result in increased and perhaps prohibitive cost and access barriers, as second trimester abortions are more expensive, require more time (2-3 days), and have fewer providers able to perform them.<sup>71</sup> As a result, delays may ultimately impede women from having an abortion procedure entirely, which as explored in more detail below, denies them their constitutional right to a pre-visibility abortion.<sup>72</sup>

Research from the landmark Turnaway Study has demonstrated that being denied an abortion can have harmful short- and long-term financial, mental health, and physical health implications.<sup>73</sup> Compared to women who received abortions, those who were denied abortion were more likely to experience financial distress that was sustained for years following the intended abortion.<sup>74</sup> Women denied abortion also had higher rates of anxiety and stress, and lower self-esteem and life satisfaction in the short term,<sup>75</sup> and were more likely to experience potentially life-threatening conditions associated with pregnancy such as preeclampsia and postpartum hemorrhage.<sup>76</sup> These women were also more likely to report worse long-term physical health.<sup>77</sup> Being able to obtain an abortion was associated with a decrease in physical violence from the man involved with the pregnancy as compared to continuing the pregnancy to term, which supports the researchers’

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<sup>69</sup> *Mifeprex (mifepristone) Information*, FOOD & DRUG ADMIN. (last updated Feb. 5, 2018), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>.

<sup>70</sup> THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES*, 10 (2018).

<sup>71</sup> Diana Greene Foster & Katrina Kimport, *Who Seeks Abortions at or After 20 Weeks?*, 45 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 210, 212-16 (2013); Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 AM. J. PUBLIC HEALTH 1687, 1689-92 (2014).

<sup>72</sup> Upadhyay et al., *supra* note 71, at 1691-92.

<sup>73</sup> *Id.*; Sarah Miller, Laura R. Wherry, & Diana Greene Foster, *The Economic Consequences of Being Denied an Abortion*, NBER Working Paper No. 26662, 11, JEL I18 (Jan. 2020); Ralph et al., *supra* note 68; M. Antonia Biggs et al., *Women’s Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion, A Prospective, Longitudinal Cohort Study*, 74 JAMA PSYCHIATRY 169 (2017).

<sup>74</sup> Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUBLIC HEALTH 407, 409 (2018); Miller, Wherry & Greene Foster, *supra* note 75.

<sup>75</sup> Biggs et al., *supra* note 73.

<sup>76</sup> Caitlin Gerdts et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, 26 WOMEN’S HEALTH ISSUES 55, 57 (2016).

<sup>77</sup> Ralph et al., *supra* note 68.

hypothesis that having a baby makes it more difficult for women to leave a violent relationship.<sup>78</sup> For all of these reasons, from a medical standpoint, timely access to abortion care is critical for people’s health and well-being.

*B. Abortion is a Time-Sensitive and Essential Legal Right*

Abortion is not only time-sensitive and essential from the medical perspective, but also from the legal perspective. The Supreme Court has recognized a woman’s right to a pre-viability abortion since 1973.<sup>79</sup> Since that time, the Supreme Court has never wavered in its view that a state cannot constitutionally prevent a woman from obtaining an abortion before viability.<sup>80</sup> The Court has certainly allowed states more leeway to dissuade women from obtaining abortions or to otherwise burden their decision, but it remains foundational constitutional law that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”<sup>81</sup> That illegal obstruction is exactly what will occur if these orders are enforced against abortion providers.

Most states ban abortions at a certain point in a woman’s pregnancy. In Alabama, Arkansas, Iowa, Louisiana, Ohio, Tennessee, and Texas, that ban starts at 22 weeks since a woman’s last period.<sup>82</sup> Inevitably, there will be women that were close to the deadline who will now be time-barred and forced to carry the pregnancy to term. To the extent this happens to any woman, the state would be unconstitutionally preventing those women from “making the ultimate decision to terminate her pregnancy before viability.”<sup>83</sup> And it is irrelevant if the number of women who fall in this category is small—as the Court has made clear, “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>84</sup>

It is unlikely, however, that only women who are close to their state’s abortion deadline will be denied an abortion by the temporary closure of abortion clinics. Though many of the orders are only set to last weeks or a month, experts believe that the COVID-19 pandemic will not ultimately be under control until we

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<sup>78</sup> Sarah CM Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC MEDICINE 1, 5 (2014).

<sup>79</sup> *Roe v. Wade*, 410 US 113 (1973).

<sup>80</sup> See *Whole Woman’s Health v. Hellerstedt*, 579 US \_\_ (2016) (reaffirming, again, that the constitution protects a woman’s right to a pre-viability abortion).

<sup>81</sup> *Planned Parenthood v. Casey*, 505 US 833, 879 (1992).

<sup>82</sup> *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (updated Apr. 1, 2020), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>.

<sup>83</sup> *Casey*, 505 US at 879.

<sup>84</sup> *Id.* at 894.

have a vaccine, which could take years.<sup>85</sup> For instance, in the Alabama litigation, “the defendants admitted that the course of the pandemic could last three or four months, beginning in early March.”<sup>86</sup> And Alabama, Iowa, Oklahoma, and Texas have already extended their orders at least once.<sup>87</sup> Alternatively, states could lift the orders when COVID-19 cases start falling, only to reinstate them as new outbreaks begin; this pattern could continue for years. Assuming that these orders are extended or reinstated over time to account for a more realistic prognosis of the pandemic, women who are much earlier into their pregnancies could also be time-barred from accessing their constitutionally protected pre-viability abortion right. Moreover, once abortion clinics reopen, there will likely be a mass demand, causing long wait times that further delay care. Thus, in effect, these orders operate as state abortion bans for at least some women for unknown periods of time.

It is worth noting that these laws will have a disproportionately harmful effect on lower income women, among whom a disproportionate number are women of color. Women with means are currently traveling to neighboring states to obtain abortion care, and demand in those states have increased greatly as a result.<sup>88</sup> Of course, this travel itself increases risk of exposure to SARS-CoV-2.<sup>89</sup> However, many women, especially poor and low-income women, cannot travel—either because they cannot afford it, lack a car, or cannot take the time off work or away from their children.<sup>90</sup> Some of these women will inevitably attempt to purchase abortion medications online or to self-induce an abortion with harmful medications, which can expose them to greater legal and medical risks.<sup>91</sup> These issues highlight the particular injustice inherent in these states’ actions in that they exacerbate pre-existing and well-documented socioeconomic and racial disparities in access to abortion care.<sup>92</sup>

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<sup>85</sup> Experts suggest that it could take at least 12-18 months to find a vaccine. Denise Grady, *Not His First Epidemic: Dr. Anthony Fauci Sticks to the Facts*, N.Y. TIMES (March 20, 2020), <https://www.nytimes.com/2020/03/08/health/fauci-coronavirus.html>. Until then, it is unclear if we will be able to contain the virus and through what measures.

<sup>86</sup> Alabama Injunction, *supra* note 38.

<sup>87</sup> See *supra* notes 33-36.

<sup>88</sup> Sabrina Tavernise, ‘Overwhelmed and Frustrated’: What It’s Like Trying to Get an Abortion in Texas, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/abortion-texas-coronavirus.html> (describing the experiences of women who could and could not travel to obtain an abortion and the increased demand in places like Oklahoma and Kansas).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See Christine Dehlendorf & Tracy Weitz, Access to Abortion Services: A Neglected Health Disparity, 22 J Healthcare Poor & Underserved 415, 416-17 (2011); Brief of Amici Curiae National Health Law Program and National Network of Abortion Funds Supporting Petitioners—Cross-Respondents, *June Medical Services v. Rebekah Gee*, Nos. 18-1323, 18-1460 (U.S. Dec. 2, 2019).

In this section, we have explained why abortion care is both medically and legally essential and time-sensitive care. As a result, the orders should not be interpreted to apply to abortion care, and any contrary interpretation by the state would be arbitrary. But there are also constitutional questions associated with the states' attempts to apply these orders against abortion providers.

### III. The Constitutionality of the Orders as Applied to Abortion Providers

If states had attempted to halt pre-viability abortions in normal circumstances, the courts would immediately strike down their conduct as an unconstitutional undue burden under *Planned Parenthood v. Casey*. But these are not normal circumstances. The question, therefore, becomes whether the state's action as applied to abortion providers is constitutional in light of the COVID-19 pandemic.

It is clear that states have broad police power, which includes the ability to restrict some civil liberties to contain a public health crisis. For instance, courts are quick to uphold state quarantine and vaccination orders in light of a sufficient public health crisis, even though forced quarantine undoubtedly infringes on a person's liberty interest and coerced vaccination restricts a person's right to bodily autonomy.<sup>93</sup> Though early courts evaluated these invasions under a reasonableness standard, upholding state conduct unless it was arbitrary or unreasonable under *Jacobson v. Massachusetts*,<sup>94</sup> the modern view is that the state's conduct would be evaluated under strict scrutiny if it involved a restriction of constitutional rights.<sup>95</sup> This is a point of contention as the Supreme Court has never re-examined the limits of state powers during a public health emergency under modern constitutional analysis, which relies on tiers of scrutiny. And the legal standard chosen could very easily determine the outcome—the reasonableness standard is a much lower bar

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<sup>93</sup> See e.g., *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (upholding Massachusetts's vaccination law); *U.S. ex rel. Siegel v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y.1963) (permitting the quarantine of an individual who returned from a "small pox infected area"); *Hickox v. Christie*, 205 F. Supp. 3d 579, 593 (D.N.J. 2016) (permitting the quarantine of a healthcare worker who had returned from treating Ebola patients, but who showed no symptoms and tested negative for the disease); *City of Newark v. J.S.*, 279 N.J. Super. 178 (Law. Div. 1993) (allowing involuntary commitment of a homeless man with tuberculosis).

<sup>94</sup> 197 U.S. at 25-28.

<sup>95</sup> These modern scholars suggest that the reasonableness standard was established before the Supreme Court created the tiers of scrutiny that guide constitutional analysis. Ben Horowitz, *A Shot in the Arm: What A Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During A Public Health Emergency*, 60 AM. U. L. REV. 1715, 1730 (2011); Kellen Russoniello, *The End of Jacobson's Spread: Five Arguments Why an Anti-Intoxicant Vaccine Would Be Unconstitutional*, 43 AM. J.L. & MED. 57, 59-60 (2017); Christopher Richins, *Jacobson Revisited an Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 409-10 (2011). And today, in the context of civil commitment for mental illness, for instance, the courts use strict scrutiny. See *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

than strict scrutiny. In fact, the Fifth and Eighth Circuits opted to use the reasonableness standard to permit Arkansas and Texas's enforcement of the non-essential healthcare orders against abortion providers.<sup>96</sup> It is worth noting that these historically conservative courts might walk back their reliance on the reasonableness standard in *Jacobson* once plaintiffs begin challenging state restrictions to other protected liberties that are more aligned with conservative values, like halting religious services.<sup>97</sup> But regardless, we argue below that recent state attempts to enforce non-essential healthcare orders against abortion providers should fail under any standard.

Under strict scrutiny, the state must prove that it acted pursuant to a compelling government interest and utilized the least restrictive means to accomplish that goal.<sup>98</sup> It is unlikely the state could satisfy either of these elements here. First, though we may assume that states entered their non-essential healthcare orders to protect public health—a compelling government interest—there are real reasons to doubt whether the states' genuine goal in *enforcing* the state orders against abortion providers were so noble. Arkansas, Alabama, Iowa, Louisiana, Ohio, Oklahoma, Tennessee, and Texas all have a long history of trying to restrict abortion access through any means possible.<sup>99</sup> For instance, in recent months, Alabama and Louisiana have attempted to ban abortion at conception, Iowa and Ohio have attempted to ban abortion once fetal cardiac activity is detected around six weeks, and Arkansas has attempted to ban abortion at twelve weeks.<sup>100</sup> It is highly likely that these states' actions are simply another attempt to block abortion and have nothing to do with containing spread of SARS-CoV-2. If the state's true interest in enforcing the orders against abortion providers is to protect potential life, this goal is iterative of all abortion cases and should therefore be governed by the undue burden standard announced in *Planned Parenthood v. Casey*.<sup>101</sup> Under the standard, the state would clearly lose because the state's interest in protecting

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<sup>96</sup> Order Granting Writ of Mandamus at 2, *In re Abbott*, No. 20- 50264 (5th Cir. Apr. 7, 2020) (“That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home. The right to abortion is no exception.”); 8th Cir. Writ, *supra* note 61, at 14-16.

<sup>97</sup> See generally, John Kruzal, *Governors Headed for Messy Fight Over Coronavirus Restrictions*, THE HILL (Apr. 20, 2020), <https://thehill.com/regulation/court-battles/493420-governors-headed-for-messy-fight-over-coronavirus-restrictions>.

<sup>98</sup> Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

<sup>99</sup> See e.g., Dan Keatin, Lauren Tierney & Tim Meko, *In These States, Pandemic Crisis Response Includes Attempts to Stop Abortion*, N.Y. TIMES (Apr. 21, 2020), [https://www.washingtonpost.com/nation/2020/04/21/these-states-pandemic-crisis-response-includes-attempts-stop-abortion/?arc404=true&utm\\_campaign=wp\\_the\\_health\\_202&utm\\_medium=email&utm\\_source=newsletter&wpisrc=nl\\_health202](https://www.washingtonpost.com/nation/2020/04/21/these-states-pandemic-crisis-response-includes-attempts-stop-abortion/?arc404=true&utm_campaign=wp_the_health_202&utm_medium=email&utm_source=newsletter&wpisrc=nl_health202).

<sup>100</sup> *State Bans on Abortion Throughout Pregnancy*, *supra* note 82.

<sup>101</sup> *Casey*, 505 US at 879.

potential life does not give it the power to prohibit women from accessing a pre-viability abortion.<sup>102</sup>

To determine if the state's true motive in enforcing the non-essential healthcare orders against abortion providers is to protect its citizens' public health—potentially satisfying the first element of strict scrutiny—courts can examine the rationale for orders, and whether the application of those orders to abortion providers furthers the stated goal. All of the states that have applied their non-essential healthcare orders against abortion providers have claimed their order's purpose was either to preserve PPE or halt the spread of SARS-CoV-2.<sup>103</sup> However, abortion requires much less PPE and fewer healthcare encounters than traditional pregnancy care.<sup>104</sup> Women who are denied access to abortion and thus are forced to continue their pregnancies would need regular prenatal care and labor and delivery assistance, which require a great deal more PPE and hospital resources.<sup>105</sup>

Obstetric care providers are at particularly increased risk for occupational exposure because of long periods of interaction with patients during labor, multiple team members involved in patient care, and the unpredictable occurrence of sudden obstetrical emergencies with their potential for unanticipated intubations in [COVID-19 positive] women undergoing labor and delivery.<sup>106</sup>

By comparison, the vast majority of abortions occur outside the hospital setting and require little to no PPE.<sup>107</sup> And where pregnant women must routinely interact with the healthcare setting for prenatal care, abortion requires far fewer interactions—often only a single appointment.<sup>108</sup> The fewer healthcare interactions, the less risk of spreading SARS-CoV-2. As a result, if the states ordered the cessation of all non-essential healthcare to preserve PPE and limit the spread of the disease, then restricting abortion care counteracts those goals. For these same reasons, the states would also likely fail the narrow tailoring element of strict scrutiny as they could not prove that restricting abortion would actually reduce the spread of SARS-CoV-2 and preserve PPE compared to the continuation of a pregnancy.

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<sup>102</sup> *Id.*

<sup>103</sup> *See* Figure 1.

<sup>104</sup> *See e.g.*, Texas TRO, *supra* note 49, at 7-9.

<sup>105</sup> *See id.* at 9.

<sup>106</sup> Noelle Breslin et al., *COVID-19 In Pregnancy: Early Lessons*, 6 AM. J. OBSTETRICS & GYNECOLOGY MFM (forthcoming 2020), <https://www.sciencedirect.com/science/article/pii/S2589933320300410>.

<sup>107</sup> *See* Texas TRO, *supra* note 49, at 7-8.

<sup>108</sup> *Id.* at 9.

Though it is a closer call, the above analysis should also suffice to prove that the states' enforcement of the non-essential healthcare orders against abortion providers is unreasonable under *Jacobson*. Though that case was quite deferential to state powers amidst a public health emergency, it nevertheless allowed for relief if the plaintiff could show that the state conduct "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. . . ." <sup>109</sup> In those cases, the state conduct would be arbitrary, oppressive, and unreasonable. <sup>110</sup> The analysis above demonstrates that there is no public health interest served by limiting a woman's constitutional right to obtain a pre-viability abortion. It neither preserves PPE nor limits healthcare interactions compared to the default alternative of prenatal care and delivery, and multiple major medical organizations recommend that abortion care be considered essential and time-sensitive. <sup>111</sup> In fact, it might harm public health by forcing women to travel across state lines for abortion care, thus increasing exposure to SARS-CoV-2, or to resort to unsafe methods for abortion. <sup>112</sup> Rather, the public health emergency is being used as a pretext for the states' longstanding attempt to end abortion by any means necessary. <sup>113</sup>

Assuming this constitutional analysis is correct, it is worth briefly discussing the appropriate remedy. Many of the courts that have entered preliminary injunctions or temporary restraining orders have applied them narrowly. Some courts have enjoined the state from preventing medication abortion on the grounds that it is not a procedure or does not further the public health goals of the order; <sup>114</sup> courts have also enjoined the state from preventing surgical abortions near the state's deadline on the grounds that it improperly prohibits a woman from obtaining a pre-viability abortion. <sup>115</sup> Even when these remedies are combined, states are still allowed to prohibit abortions that are too late in gestational age to be completed with medication abortion, but not late enough to be near a state's ban. In our view, this remedy is insufficient. Because abortion is essential and time-sensitive medical care, and because delays in abortion care can increase the risk of

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<sup>109</sup> *Jacobson*, 197 U.S. at 31.

<sup>110</sup> *Id.*

<sup>111</sup> See discussion, *supra* note 67.

<sup>112</sup> See *supra* Section II.B.

<sup>113</sup> And in fact, the Western District of Texas reinstated Planned Parenthood's temporary restraining order even after the Fifth Circuit ordered it to reconsider the case under *Jacobson*. Texas TRO, *supra* note 49, at 13. However, this was overruled as well. 5th Cir. Writ, *supra* note 50.

<sup>114</sup> See Texas TRO, *supra* note 49; Oklahoma TRO, *supra* note 56. As a reminder, many states also never attempted to use their non-essential healthcare orders to limit medication abortion.

<sup>115</sup> For instance, the Middle District of Alabama's preliminary injunction allowed the plaintiffs to perform abortions if they determine the patient could lose her legal right to obtain an abortion if the abortion was delayed, after considering *Jacobson*. Alabama Injunction, *supra* note 38. The Fifth Circuit in Texas held similarly. 5th Cir. Writ, *supra* note 50. As did Ohio and Oklahoma. Ohio TRO, *supra* note 56; Oklahoma TRO, *supra* note 56.

medical complications or otherwise impede women from accessing abortion care altogether, we think it would be arbitrary to interpret the orders to cover any abortion. And because the abortion prohibition does not promote any public health purpose, it is unconstitutional in its entirety.

## **CONCLUSION**

This paper explores the exploitative use of the COVID-19 pandemic to limit abortion access in certain states. We describe the various states' non-essential healthcare orders, how states have used them against abortion providers, and litigation efforts regarding the legality of that enforcement. We then conclude that the orders cannot prohibit the continued provision of abortion care, which is essential medical care and a time-sensitive constitutional right. Finally, we briefly explore the constitutional arguments that favor invalidating these states' attempts at preventing women from obtaining their right to a pre-viability abortion on the ground that it serves no public health purpose.