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How the COVID-19 response is altering the legal and regulatory landscape on abortion

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I. SHIFTING LANDSCAPE OF ABORTION POLITICS IN THE COVID RESPONSE

The CARES Act, a two trillion-dollar stimulus bill designed to fund the response to COVID-19 and address the many economic shortfalls created by the pandemic, offered the first arena for Democrats and Republicans to bring questions of abortion access into the COVID-19 response. Republicans successfully pushed for the application of the abortion restrictions to CARES Act funding vis-à-vis the Hyde Amendment. The Hyde Amendment was passed in 1976 as part of an appropriations bill and has been passed as a rider every year since. It prevents federal dollars from being used to access abortions except in cases where the life of the mother is at risk or in cases of rape or incest. The CARES Act incorporates the Hyde Amendment through reference to Public Law 116-94,¹ the appropriations act that limits federal funding on abortion. The restrictions on funding apply to the supplemental awards for health centers² as well as the coronavirus relief funds.³ These provisions allow for the expansion of the Hyde Amendment into the COVID-19 response including for healthcare providers involved in detection, prevention, diagnosis, and treatment of COVID-19.⁴

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1 H.R. 1865 116th Congress (2019–2020).

2 The Coronavirus Aid, Relief, and Economic Security Act, Pub. Law. No. 116-138. tit. III (2)(b) § 3211 (b) 236 (2020).

3 The Coronavirus Aid, Relief, and Economic Security Act, Pub. Law. No. 116-138. tit. V § 5001 (b) 606 (2020).

4 The Coronavirus Aid, Relief, and Economic Security Act, Pub. Law. No. 116-138. tit. III (2)(b) § 3211 (b) 236 (2020). Thanks to Rebecca Hart for her assistance in interpreting the CARES Act.

While the CARES Act was being debated, state governors and agencies took steps to reduce hospital and clinic-based exposure of COVID-19 by limiting provided medical services to essential, emergency, and non-elective services only. As of today, 33 states have released official orders or unofficial guidance to postpone medical care. The language of the orders differs with some states prohibiting ‘non-emergency services’ and others focusing on elective procedures.⁵ State level action was encouraged by the Center for Medicare and Medicaid Services, the World Health Organization,⁶ and the Centers for Disease Control⁷ each recommending that medical supplies and hospital staff be preserved and redirected to the COVID response.

What is an elective, essential, or emergency service became immediately controversial as several state governors including Texas, Ohio, Iowa, Mississippi, and Alabama chose to classify abortion as a non-essential or non-emergency service. The bans on abortion were often announced after the first public health order was released and were frequently justified by the claim that clinic closures were necessary to preserve personal protective equipment (PPE) in the state. The Executive Order in Texas, GA9, for example, did not originally mention abortion, but the State Attorney General clarified the next day that abortion was not considered an essential service except for abortions for the life or health of the mother. The Texas law contained some of the harshest penalties for violation of the law including up to 1000 dollars or 180 days in jail.⁸ Ohio and Mississippi similarly claimed that elective abortions needed to end in order to save PPE. Abortion clinics were monitored to ensure closure. In a letter to Planned Parenthood of Ohio, for example, State Attorney General Dave Yost stated that all abortions should be delayed and if the organization did not respond accordingly, the ‘Department of Health will take all appropriate measures.’⁹

The American College of Obstetricians and Gynecologists (ACOG) and the American Medical Association (AMA) have both issued statements criticizing state governors for preventing access to abortion. ACOG, along with several other groups including the American Society for Reproductive Medicine, issued a Joint Statement stating unequivocally that abortion ‘is an essential component of comprehensive health care’ for which the timeliness of the procedure matters.¹⁰ The AMA expressed dismay that

5 Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by Covid, <https://governor.alabama.gov/assets/2020/03/Amended-Statewide-Social-Distancing-SHO-Order-3.27.2020-FINAL.pdf> (accessed Mar. 27, 2020).

6 World Health Organization, COVID-19: Operational Guidance for Maintaining Essential Health Services During an Outbreak, <https://www.who.int/news-room/detail/30-03-2020-who-releases-guidelines-to-help-countries-maintain-essential-health-services-during-the-covid-19-pandemic> (accessed Mar. 25, 2020).

7 Center for Medicare and Medicaid Services, CMS Adult Elective Surgery and Procedures Recommendations, <https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf> (accessed Mar. 15, 2020).

8 For a discussion on liability for physicians, see, I. Glenn Cohen, Andrew Crespo, and Douglas White, *Potential Legal Liability for Withdrawing or Withholding Ventilators During COVID-19: Assessing the Risks and Identifying Needed Reforms*, J. AMER. MED. ASSN. (2020).

9 Letter from Jonathan Fulkerson to Planned Parenthood of Southwest Ohio (Mar. 20, 2020).

10 The American College of Obstetricians and Gynecologists, *Joint Statement on Abortion Access During the COVID-19 Pandemic*, <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak> (accessed Mar. 18, 2020).

ected officials are ‘exploiting this moment’ to enact abortion bans that would limit women’s reproductive healthcare.¹¹

Legal challenges to the abortion bans were filed immediately with varied results. In Texas, the abortion ban continues. While the District Court instead granted the abortion providers motion to block the law from going into effect and a temporary restraining order was put into place this was reversed by the Appellate Court on the grounds that the appeals court needed additional time to consider the issue. In their filings, the State of Texas argues that elective abortions are not medically necessary.¹² The dissenting judge noted that the Executive Order itself seemed to exempt elective abortions as a procedure because it was a procedure ‘performed in accordance with the commonly accepted standard of clinical practice’ and does not deplete hospital capacity or the supply of PPE.¹³ Over the criticism of health advocates and physicians, the Federal Appeals Court upheld the Texas Executive Order. The expiration of the Executive Order on April 21, 2020, however, allowed abortion providers to continue to make health care services available. In other states, including Ohio and Alabama, District Courts have blocked the abortion bans from going into effect. With regard to Alabama, the court acknowledged that delaying abortion would result in women being prevented from exercising their right to obtain an abortion.¹⁴

Attorney generals (AGs) of conservative states have united to continue their push for abortion bans. The Attorney General of Kentucky, who called for a state ban for elective abortions to further the goal of social distancing and preservation of PPE, filed an amicus brief in the Fifth Circuit case on the Texas law alongside fellow AGs who argued in support of Texas for an ongoing ban on elective abortions through the pandemic.¹⁵ They had the support of numerous pro-life and religious organizations who also called for bans on abortion during this time of PPE shortage. The advocacy of AGs for abortion bans sparked a reaction. AGs seeking to keep abortion accessible, including from New York and California, filed a brief for Planned Parenthood in the Fifth Circuit arguing that elective abortion procedures did not diminish the PPE supply and could aggravate COVID-19 transmission because women would travel in order to get abortions. The brief also highlights that abortions cannot be postponed for weeks

11 American Medical Association, *AMA Statement on Government Interference in Reproductive Health Care*, <https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproductive-health-care> (accessed Mar. 30, 2020).

12 State Defendants Response to Plaintiffs Motion for a Temporary Restraining Order, *Planned Parenthood Center for Choice v. Gregg Abbott*, No. 1:20-cv-00323-LY, (W.D. Texas 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20200330_28.2%20ExA-Resp%20TRO.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

13 Petition for Writ of Mandamus, *Planned Parenthood Center for Choice v. Gregg Abbott*, No. 20–50264 (W.D. Texas 2020), <https://reproductiverights.org/sites/default/files/2020-03/2020-03-31%20-%20Sua%20Sponte%20Stay.pdf> (accessed May 4, 2020).

14 Temporary Restraining Order, *Yashica Robinson v. Steven Marshall*, No. 2:19cv365-MHT (WO), (M.D. Ala March 30, 2020), https://www.aclu.org/sites/default/_les/_eld_document/robinson_v_marshall_-_order_granting_tro.pdf (accessed May 4, 2020).

15 *Attorney General Cameron Joins Amicus Briefs Supporting Four States in Banning Elective Abortions During COVID-19 Pandemic*, KentuckyGov, <https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prid=893> (accessed May 4, 2020).

or months, and most abortions do not require any hospitalization.¹⁶ Similar briefs were filed in pending litigation in other states. The litigation continues to play out.

The third site of abortion advocacy relates to the ongoing attempt to restrict clinical practice and address a longstanding issue of telehealth for medication abortion. In addition to filing briefs against State attempts to ban elective abortions, AGs from 21 states also sent a letter to the Food and Drug Administration (FDA) and Health and Human Services (HHS) to make it easier to access medication abortion during this time via telehealth.¹⁷ Medication abortion typically uses two drugs, mifepristone and misoprostol (mifepristone is also referred to as Mifeprex). Although misoprostol is available with prescription, greater barriers exist in accessing mifepristone. Issues with access are due to the fact that mifepristone is subject to an FDA Risk Evaluation and Mitigation Strategy (REMS),¹⁸ which sets rules as to who can prescribe the drug and where it must be taken. The AGs requested that the REMS for mifepristone be removed allowing for greater access for women. As a more minimal proposal, they suggested that the FDA at least allow for certified providers to be able to use mifepristone with telehealth services even if the REMS are not lifted. These requests have been longstanding from the reproductive health community who have sought to respond to abortion access issues in rural areas and in states with few abortion clinics by advocating for telehealth medication abortion. Despite an uptick in advocacy around access to abortion via telehealth in support for easing restrictions, the FDA has yet to respond to the letter or advocacy.

II. LONG-TERM IMPACT?

While it is unclear how these various fights will play out in the context of COVID-19, the ongoing attempts to block or gain access to abortion services will have lasting impact on the legal and regulatory environment for abortion care both inside and outside of the clinic.

First, in the context of COVID-19, abortion is being conceptualized as a procedure that can be delayed. This requires abortion to be categorized as an elective, non-emergency, and non-essential procedure that can be postponed to a later date. This is false. In fact, in many of the states proposing that abortions be postponed, conservative legislatures are also trying to decrease the time in which women can access abortion. While many of the bans (some as early 6 weeks) are often not in effect due to ongoing litigation, their existence suggests that lawmakers have a clear sense that delaying abortion may mean not accessing the procedure at all.

Second, the classification of abortion as an elective, non-essential procedure during an emergency sets precedent for the future. This is not the last pandemic the world will see that will deplete hospital resources and strain health system supplies. It is important that abortion, which is both essential and not a procedure that can be delayed

16 Brief for the States of New York et al., *On Petition for Writ of Mandamus*, No. 20-50264 (W.D. Texas Apr. 3, 2020), <https://www.oag.ca.gov/system/files/attachments/press-docs/PP%20Choice%20FILED%20COPY.pdf> (accessed May 4, 2020).

17 Letter from Xavier Becerra et al. to Alex Azar and Stephen Hahn, https://ag.ny.gov/sites/default/files/final_ag_letter_hhs_medication_abortion_2020.pdf (accessed Mar. 30, 2020).

18 Mifeprex (Mifepistone) Information, FDA.gov, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepistone-information> (accessed May 4, 2020).

indefinitely, remains an option for pregnant individuals. This is both because not doing so places them at risk—in this epidemic travelling for an abortion may violate stay-at-home orders and expose women and physicians to illness—but also because women should have the right to terminate pregnancies that could result in adverse health outcomes for the fetus or infant. This is not a hypothetical situation. The Zika epidemic, also declared a health emergency by the World Health Organization, raised myriad issues related to abortion access and pregnant women attempted to navigate the harms resulting from a Zika infection to a fetus.¹⁹ Women and pregnant individuals must continue to be able to access abortions during public health emergencies in situations of uncertainty. Setting a precedent that allows the status of abortion to be decided purely by elected officials for political gain, with little or no consideration of health outcomes, is not good public health practice.

Finally, increased access to medication abortion could have a positive short- and long-term impact for access to reproductive health care. If the FDA responds positively to the letter from AGs asking for the REMS on mifepristone to be removed, this could set abortion by telehealth on a new path. While accessing medical abortion is particularly necessary in an environment where clinical services may not be available due to abortion's status as a non-essential medical service, advice from the medical community including the American College of Obstetrics and Gynecology has long been to support greater access to medication abortion. If COVID moves the FDA in this direction, it would set a positive path forward for access to abortion via telehealth.

III. CONCLUSION

Managing epidemics is political. By mobilizing the idea of scarcity, elected officials have created an opening to insert abortion politics into the COVID-19 response. The result is a shifting legal and regulatory landscape with the potential to alter abortion access for better or worse in the short and long term.

19 Clare Wenham et al., *Zika, Abortion and Health Emergencies: A Review of Contemporary Debates*, 15 *GLOB. HEALTH* 49 (2019).