

## USING THE PUBLIC HEALTH EMERGENCY AS AN EXCUSE TO CURTAIL ABORTION ACCESS

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There is nothing new about the passage, implementation, and subsequent judicial approval of laws designed to curtail abortion access. However, when thousands of Americans are dying daily from the global pandemic,<sup>1</sup> some might have imagined that anti-choice activists would give it a rest. On the contrary, Republican governors and their majority-Republican legislatures have manipulated their state's pandemic response plans in order to further restrict abortion access with varying degrees of success.<sup>2</sup> During this period of death, heartache, isolation, and disease, Americans should be coming together to support one another, by ensuring access to adequate health care—not using this disaster as an excuse to deprive individuals of their fundamental right to an abortion.

All anti-abortion laws harm individuals capable of pregnancy, but particularly during a global pandemic—when there has been significant job loss and an economic recession—efforts to curtail abortion access are a form of financial abuse for those who cannot afford a child.<sup>3</sup> Even “short-term reductions in access to [abortion] care could potentially have long-term, persistent financial consequences.”<sup>4</sup> In fact, 34% of women in a June 2020 survey responded that they wanted to get pregnant later in life or have fewer children overall due to the pandemic and the associated financial worries.<sup>5</sup>

Moreover, economic crises and financial distress are widely recognized as contributing factors to increased rates of intimate partner violence,<sup>6</sup> and given the nature of this pandemic, these risks are particularly acute. Due to the job loss and unprecedented home-confinement that has become endemic as a result of the pandemic, domestic violence cases have likely increased.<sup>7</sup> A recent Guttmacher

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<sup>1</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last updated Feb. 26, 2021, 2:34 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>2</sup> Nora Ellmann, *State Actions Undermining Abortion Rights in 2020*, CTR. FOR AM. PROGRESS (Aug. 27, 2020), <https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/>.

<sup>3</sup> See Danielle Renwick, *'I Went to Bed Hungry': Being Denied an Abortion Can Lead to Financial Turmoil*, THE GUARDIAN (June 20, 2020, 12:22 EDT), <https://www.theguardian.com/world/2020/jun/20/abortion-denied-debt-bankruptcy- eviction> (explaining that “women who are unable to obtain abortions are more likely to face debt, bankruptcy and eviction).

<sup>4</sup> *Id.*

<sup>5</sup> Laura D. Lindberg, Alicia VandeVusse, Jennifer Mueller, & Marielle Kirstein, *Early Impacts of the COVID-19 Pandemic: Findings from the 2020 Guttmacher Survey of Reproductive Health Experiences*, GUTTMACHER INST. (Jun. 2020), <https://www.guttmacher.org/report/early-impacts-covid-19-pandemic-findings-2020-guttmacher-survey-reproductive-health>.

<sup>6</sup> See CDC, Risk and Protective Factors for Perpetration, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html> (last visited Feb. 25, 2021).

<sup>7</sup> LINDBERG ET AL, *supra* note 5.

Institute survey found 5% of women reported an intimate partner forcing them to engage in unwanted sexual activity during the pandemic,<sup>8</sup> which could mean that there has also been an increase in unwanted pregnancies. But regardless of whether someone is experiencing the pandemic in a healthy relationship, single, or with the heightened risk and additional trauma of abuse, the government should still recognize the choice to end a pregnancy as an essential economic and healthcare right that individuals must be able to easily and safely exercise.

Despite the dire situation, many states have exploited their pandemic response plans as coverage to enact abortion-restrictions. For instance, governors in eleven states issued executive orders prohibiting abortion services, purportedly in the name of preserving protective equipment for front-line healthcare workers and freeing hospital beds for coronavirus patients.<sup>9</sup> Generally, these public health emergency declarations have specifically defined abortion as an “elective” health procedure, or otherwise non-essential, and thus sought to ban access to it until the end of the pandemic.<sup>10</sup>

Illustrating this obviously mistaken (and demeaning) view of abortion care, the Attorney General of Ohio, in cahoots with the state’s Department of Health, sought to sharply restrict access to the procedure and compared having an abortion during the COVID-19 pandemic to getting a face-lift.<sup>11</sup> Unfortunately, in many states, such efforts were a success, as courts upheld these odious abortion restrictions. For example, in April 2020, the Fifth Circuit affirmed Texas’ temporary near-total ban on abortion services in the state during the pandemic, deeming it a “nonessential procedure.”<sup>12</sup>

Of course, abortion is actually one of the most time-sensitive procedures a person can have—that is, abortion care is *by nature* essential. According to the American College of Obstetricians and Gynecologists, not only is abortion time-sensitive, but

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<sup>8</sup> *Id.*

<sup>9</sup> See Laurie Sobel et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KFF (Aug. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/>. Interestingly, this reasoning—the need to preserve hospital beds—echoes the same flawed reasoning Texas and Louisiana offered for their admitting privileges requirements that were struck down in *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2298 (2016); see *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103, 2214-15 (2020). States arguing that abortion should be halted in order to save more hospital beds for coronavirus patients are ignoring the well-documented fact that very few women have serious complications after abortions that would require hospitalization. See Lisa Rapaport, *Few U.S. Women Have Serious Complications After Abortions*, REUTERS (July 11, 2018), <https://www.reuters.com/article/us-health-abortion-safety/few-u-s-women-have-serious-complications-after-abortions-idUSKBN1K1300>.

<sup>10</sup> *Id.*

<sup>11</sup> Eric Heisig, *Judge Again Gives Ohio Abortion Clinics Discretion on Performing Surgical Procedures During Coronavirus Pandemic*, CLEVELAND.COM (Apr. 23, 2020), <https://www.cleveland.com/court-justice/2020/04/judge-again-gives-ohio-abortion-clinics-discretion-on-performing-surgical-procedures-during-coronavirus-pandemic.html>.

<sup>12</sup> See *In re Abbott*, 954 F.3d 772, 791 (5<sup>th</sup> Cir. 2020). See also Sandra Rose Salathe, *The Nightmarish Challenge of Trying to Get an Abortion in a Pandemic*, SELF (Oct. 8, 2020), <https://www.self.com/story/abortion-access-challenges-pandemic>.

also it is an “essential component of comprehensive health care.”<sup>13</sup> If an abortion procedure is delayed, it “may increase the risks or potentially make [the procedure] completely inaccessible.”<sup>14</sup> This is especially true in states seeking to bar access to abortion services for the sake of public health and safety because they are also the same ones that have already adopted restrictive abortion regulations in non-pandemic times.<sup>15</sup>

Although the restrictions implemented in the early days of the pandemic have since been blocked by the courts or expired on their own, the interim period was incredibly chaotic for people who needed an abortion.<sup>16</sup> Many people found themselves facing additional burdensome steps to obtain the procedure which often included traveling to out-of-state clinics that were not forced to operate under new pandemic restrictions.<sup>17</sup> For example, a twenty-two year old woman from Texas found herself traveling to a Planned Parenthood clinic in Los Angeles after Texas’ executive order banning almost all elective abortions went into effect.<sup>18</sup>

Unfortunately, her experience was not unique, but rather an increasingly common ordeal under the regime of pandemic-era abortion restrictions. Glenna Gordon, a photojournalist documenting the nation’s abortion deserts, reported that the Planned Parenthood clinic in Los Angeles was “getting a huge influx of people from out of state.”<sup>19</sup> During a time when traveling is perilous due to the deadly coronavirus, states that are forcing pregnant people to travel in order to obtain an essential procedure in the name of “pandemic control,” are showing their hand: it is not about pandemic response, it is about curtailing abortion access.

The Supreme Court recently handed down the latest pandemic-era affront to abortion rights in January 2021.<sup>20</sup> The U.S. Food and Drug Administration (FDA) issued a rule during the Trump administration’s final year requiring in-person pick-up of a mifepristone prescription (a medication that induces abortion in the early stages of pregnancy), as opposed to allowing mail delivery of the pill.<sup>21</sup> The Court

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<sup>13</sup> *Joint Statement on Abortion Access During the COVID-19 Outbreak*, THE 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>.

<sup>14</sup> *Id.*

<sup>15</sup> See Olivia Cappello, *Surveying State Executive Orders Impacting Reproductive Health During the COVID-19 Pandemic*, GUTTMACHER INST. (Jul. 24, 2020), <https://www.guttmacher.org/article/2020/07/surveying-state-executive-orders-impacting-reproductive-health-during-covid-19#>. (“Most of these states are rated by Guttmacher as hostile or very hostile to abortion rights based on the number of restrictive abortion policies they have in place.”).

<sup>16</sup> *Id.*

<sup>17</sup> Salathe, *supra* note 12.

<sup>18</sup> Kyle Almond & Benazir Wehelie, *She Tried to Get an Abortion During the Pandemic. Her State Wouldn't Allow It*, CNN (last visited Feb. 6, 2020), <https://www.cnn.com/interactive/2020/06/health/abortion-access-coronavirus-cnnphotos/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S.Ct. 578 (2021).

<sup>21</sup> Andrew Chung, *U.S. Supreme Court Revives Bar on Abortion Pill Mail Delivery in Pandemic*, REUTERS (Jan. 12, 2021), <https://www.reuters.com/article/us-usa-court-abortion/u-s-supreme-court-revives-bar-on-abortion-pill-mail-delivery-in-pandemic-idUSKBN29H30L>.

reinstated this rule after a district court judge in July barred the FDA from enforcing the requirement anywhere in the United States until the end of the pandemic,<sup>22</sup> reasoning that the in-person requirement “place[d] a substantial obstacle in the path of women seeking a medication abortion.”<sup>23</sup> On appeal, the Trump administration posited that enforcing the regulation does not constitute a substantial burden on a woman’s ability to obtain an abortion, noting that patients could always seek a surgical abortion instead.<sup>24</sup> Chief Justice Roberts, concurring, explained that during the pandemic, courts should not second-guess the “politically accountable entities with the background, competence, and expertise to assess public health.”<sup>25</sup>

In defense of abortion rights, Justice Sotomayor dissented taking issue with the disparity between abortion and other medical services during the pandemic.<sup>26</sup> Although the Center for Disease Control and Prevention has urged the use of telemedicine wherever possible during the pandemic, the government has not done so for individuals seeking medication abortions.<sup>27</sup> She wrote that “[t]his country’s laws have long singled out abortions for more onerous treatment than other medical procedures,” and this specific rule imposes an “unjustifiable, irrational, and undue burden on women seeking an abortion during the current pandemic.”<sup>28</sup>

On February 9, 2021, in response to the Court’s reinstatement of the rule, the Democratic leaders of the House Committee on Oversight and Reform sent a letter to the FDA urging it to lift the medically unnecessary in-person dispensing requirement for Mifepristone.<sup>29</sup> Notably, the FDA rule requires the drug to be dispensed in-person but allows the individual to take the pill at a location of their choosing. Individuals are allowed to take this medication in the comforts of their own home because the medication is very safe; in fact, “only 0.1 percent of medication abortion patients experience a complication that requires hospitalization.”<sup>30</sup>

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<sup>22</sup> Amy Howe, *Justices Grant FDA Request to Block Mail Delivery of Abortion*, SCOTUSBLOG (Jan. 12, 2021), <https://www.scotusblog.com/2021/01/justices-grant-fda-request-to-block-mail-delivery-of-abortion-pills/>. The Court reinstated the rule pending an appeal on the merits. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Food & Drug Admin.*, 141 S.Ct. at 579 (Roberts, C.J., concurring).

<sup>26</sup> *Id.* at 579 (Sotomayor J., dissenting).

<sup>27</sup> *Id.* at 585.

<sup>28</sup> Chung, *supra* note 21.

<sup>29</sup> See Letter from House of Representatives Comm. on Oversight & Reform to Dr. Janet Woodcock, Acting Comm’r, FDA (Feb. 9, 2021), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2021-02-09.CBM%20Pressley%20et%20al.%2C%20to%20Woodcock-FDA%20re%20Mifepristone%20REMS.pdf>.

<sup>30</sup> Danielle Campoamor, *Inside the Dems’ New Fight to Increase Abortion Access During the COVID-19 Pandemic*, COSMOPOLITAN (Feb. 9, 2021), <https://www.cosmopolitan.com/politics/a35460171/fda-in-person-medication-abortion-requirement/>. (This statistic includes data from people taking both mifepristone and misoprostol). *Id.*

So, while the drug is incredibly safe and effective, the FDA was still requiring in-person pick up throughout a deadly pandemic.<sup>31</sup> A particularly damning passage of the Committee letter points out that “[o]f the more than 20,000 drugs regulated by the FDA, Mifepristone is the only drug that [the] FDA requires patients to obtain in person at a hospital, clinic, or medical office, but does not restrict the ability of patients to self-administer—unsupervised—at home or at a location of their choosing.”<sup>32</sup> This unique treatment further reveals the fact that public safety is not the real reason behind the abortion barrier—rather, the barrier itself is the point.

Thankfully, last week, the Biden administration announced that it would pause enforcement of the FDA’s rule requiring while the COVID-19 public health emergency lasts.<sup>33</sup> In a letter to the American College of Obstetricians and Gynecologists (ACOG) and the Society for Maternal-Fetal Medicine, acting FDA Commissioner Janet Woodcock explained that upon reviewing recent studies “pertinent to the in-person dispensing requirement” of Mifepristone during the pandemic, the agency concluded that there does not appear to be an increase in serious safety concerns “as a result of modifying the in-person dispensing requirement.”<sup>34</sup>

The next step for abortion rights activists will be to push for an extension of the FDA’s rule to ensure availability of the pill beyond the end of the pandemic. To be sure, the telemedicine option will help protect patients and health care providers from potential additional exposure to COVID-19; but, beyond that, the benefits are painfully clear. Telemedicine also eliminates many of the other obstacles individuals face in accessing abortion care such as “traveling to an abortion clinic, taking time off work, arranging child care, and privacy concerns.”<sup>35</sup>

Further, as women in America anxiously wait to see whether a 6-3 conservative Supreme Court will overturn *Roe v. Wade*, “looser rules around medication abortion could expand access far beyond traditional abortion clinics.”<sup>36</sup> If that day comes, the situation could be dire, particularly for people in states that will be free to ban or otherwise significantly curtail abortion access. Having the option to receive a pill in the mail from a state where it is legal could ensure that all individuals are free to exercise their essential reproductive rights—no matter where they live.<sup>37</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *See* Letter from House of Representatives Comm. on Oversight & Reform, *supra* note 29.

<sup>33</sup> Abigail Abrams, *Why Abortion Pills Are the Next Frontier in the Battle Over Reproductive Rights*, TIME (April 13, 2021, 9:00 PM), <https://time.com/5954429/fda-biden-abortion-pills/>.

<sup>34</sup> Letter from Janet Woodcock, Acting FDA Comm’r, to the Am. Coll. of Obstetricians & Gynecologists (April 12, 2021) (available at <https://twitter.com/ACOGAction/status/1381781110980501512/photo/2>).

<sup>35</sup> *Abrams*, *supra* note 33.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* According to Mary Zieglar, a law professor who studies abortion at Florida State University, “access to abortion is going to be really significant [in the coming years]. Because if people in states where abortion is illegal can still readily get access to illegal but legal elsewhere medication, it’ll be very hard for states to enforce the [anti-abortion] laws.” *Id.*

Thus, expanding access to telemedicine abortion prescriptions could change the entire abortion landscape in this country.<sup>38</sup>

Despite this policy win (and it is a big win), it is important to keep in mind what has become abundantly clear during this past year: COVID-19 has sparked a new abortion rights crisis in this country. Necessary pandemic response was co-opted as a convenient excuse for those who sought to further restrict abortion rights. But our government cannot—and should not—be able to get away with implementing anti-abortion schemes under the guise of crisis response.

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<sup>38</sup> *See id.*