Maryland Law Review

Volume 80 | Issue 3 Article 5

"TRAPped" in a Public Health Emergency: How Abortion Restrictions During the COVID-19 Pandemic Mirror Earlier Attacks on the Abortion Right and How Judicial Review Failed to Protect It

Nancy L. Dordal

COMMENT

"TRAPped" IN A PUBLIC HEALTH EMERGENCY: HOW ABORTION RESTRICTIONS DURING THE COVID-19 PANDEMIC MIRROR EARLIER ATTACKS ON THE ABORTION RIGHT AND HOW JUDICIAL REVIEW FAILED TO PROTECT IT

NANCY L. DORDAL*

In the wake of the COVID-19 pandemic, states issued emergency orders postponing certain medical procedures to curb the spread of the virus and to preserve medical equipment and hospital capacity.[1] Several states included abortion procedures in these orders.[2] Though all federal district courts enjoined enforcement of the executive orders as applied to abortions, the federal circuit courts split: some agreed with the district courts, but two circuits issued mandamus relief to uphold the temporary abortion bans.[3] In their analyses of the constitutionality of such abortion bans, the United States Courts of Appeals for the Fifth and Eighth Circuits invoked *Jacobson v. Massachusetts*[4] as a new and looser framework for constitutional analysis.[5] This Comment will argue that the purportedly temporary abortion bans mirror earlier attacks on the abortion right and that the two circuit courts improperly applied the *Jacobson* framework when analyzing these orders.[6]

Sections I.A and I.B will trace the Supreme Court's abortion rights jurisprudence.[7] Section I.C will explain the framework of constitutional

*J.D. Candidate, 2022, University of Maryland Francis King Carey School of Law. The author thanks the staff of the *Maryland Law Review*, especially Delaney Anderson, Brandon Wharton, Erin Weinstock, Jamy Klotzbach, Michael Sammartino, and Lydia Jines, for their invaluable editorial support. The author also wishes to thank Professor Leigh Goodmark for her encouragement, honesty, and wisdom. Additionally, the author is grateful to her parents, Anne and Andrew Dordal, for instilling in the author a love of learning, her brother, Christopher Dordal, for inspiring the author to think critically about the world around her, and her partner, Sean Martin, for his continuous encouragement, support, and love. Lastly, the author thanks Sarah Kim Eisenhard, for always being there.

1. *See infra* Section I.D.
2. *See infra* Section I.D.
3. *See infra* Section I.D.
4. 197 U.S. 11 (1905).
5. *See infra* Section I.D.2.
6. *See infra* Part II.
7. *See infra* Sections I.A–B.

analysis during a public emergency.[8] Sections I.D and I.E will explore litigation relating to abortion access during the COVID-19 pandemic, including how courts have approached states' use of emergency orders to ban abortions.[9] Section II.A will articulate how federal courts have incorrectly upheld state emergency orders, as applied to abortions, using the *Jacobson* framework.[10] Section II.B will explore how these orders, as applied to abortions, resemble earlier attacks on abortion rights.[11] Lastly, Section II.C will contemplate how the reasoning employed by the federal courts in these cases may implicate abortion jurisprudence down the line, both during the pandemic and afterwards.[12]

I. BACKGROUND

The Supreme Court's abortion jurisprudence has developed significantly over the past fifty years, and it is vital to understand this body of law as the backdrop for challenges to the constitutionality of abortion during a pandemic.[13] Section I.A explores the landmark case, *Roe v. Wade*,[14] and the subsequent abortion case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[15] Section I.B traces the development of the Court's abortion jurisprudence into the twenty-first century.[16] Section I.C provides context for the role of judicial review during a public emergency.[17] Section I.D examines how the courts have responded to state orders postponing non-emergency medical procedures as a result of the COVID-19 pandemic as applied to abortions.[18] Finally, Section I.E discusses other abortion litigation during the COVID-19 pandemic relating to in-person requirements for medication abortions.[19]

A. Early Abortion Caselaw: Roe *and* Casey

In the landmark case *Roe v. Wade*, the Court held that the constitutional right to privacy includes a woman's right to terminate a pregnancy.[20] The

8. *See infra* Section I.C.
9. *See infra* Sections I.D–E.
10. *See infra* Section II.A.
11. *See infra* Section II.B.
12. *See infra* Section II.C.
13. *See infra* Part II.
14. 410 U.S. 113 (1973).
15. 505 U.S. 833 (1992); *see infra* Section I.A.
16. *See infra* Section I.B.
17. *See infra* Section I.C.
18. *See infra* Section I.D.
19. *See infra* Section I.E.
20. 410 U.S. 113, 153 (1973).

Court qualified its decision, however, based on the gestational period of the woman's pregnancy.[21] Writing for the Court, Justice Blackmun doubted the strength of the relationship between the Court's articulation of the privacy right and an absolute right to bodily autonomy,[22] relying on *Jacobson v. Massachusetts*[23] and *Buck v. Bell*.[24] In addition to the woman's interest in bodily autonomy, the Court recognized two other "separate and distinct" interests at stake: (1) the state's interest in protecting the woman's health and (2) the state's interest in protecting the potentiality of human life.[25] In balancing these three competing interests, the Court adopted a trimester framework for constitutional analysis.[26] Critically, the Court concluded that the state's interests in protecting the health of the pregnant woman and the potentiality of human life become compelling[27] at the point the fetus becomes viable.[28] After the viability point is reached, states may regulate abortion, except where an abortion is necessary to protect the life of the pregnant woman.[29]

Justice Stewart concurred, noting that the constitutional right to privacy, though not fully explained by Justice Blackmun's majority opinion, is implicated by the liberty interests guaranteed by the Due Process Clause of Fourteenth Amendment.[30] Then-Associate Justice Rehnquist disputed the right to an abortion as a fundamental right altogether[31] and criticized the Court's use of the compelling state interest test, a test Rehnquist believed was limited to Equal Protection questions, in its Due Process analysis.[32]

Another crucial case in the Court's abortion jurisprudence came in 1992 with the fractured opinion of *Planned Parenthood of Southeastern*

21. *Id.* at 154.

22. *Id.*

23. 197 U.S. 11 (1905) (limiting the right to bodily autonomy in the context of the smallpox epidemic); *see also infra* Section I.C.

24. 274 U.S. 200 (1927) (holding that a Virginia statute mandating sterilization of certain types of disabled people was constitutional).

25. *Roe*, 410 U.S. at 162.

26. *Id.* at 163. During the first trimester, the woman's right to bodily autonomy dominates. *Id.* at 162–63. At this stage of a pregnancy, an abortion is generally safer than carrying a fetus to term, so, according to the Court, the state's interest in protecting the woman's health is not yet compelling. *Id.* at 163. Nor is the state's interest in protecting the potentiality of human life yet compelling, as the fetus is not yet viable. *Id.* The analysis changes during the second trimester, according to the *Roe* Court. *Id.*

27. *Id.* at 163.

28. The point of viability, or the point at which a fetus could survive outside of the womb, is around twenty-four weeks, according to the Court. *Id.* at 160.

29. *Id.* at 163–64.

30. *Id.* at 170 (Stewart, J., concurring).

31. *Id.* at 177 (Rehnquist, J., dissenting).

32. *Id.* at 173.

Pennsylvania v. Casey.[33] Justices O'Connor, Kennedy, and Souter jointly wrote the controlling opinion.[34] The majority clarified that the right to terminate a pregnancy stems from the substantive component of the Due Process Clause of the Fourteenth Amendment.[35] The Court nominally upheld *Roe*, but in their plurality opinion, Justices O'Connor, Kennedy, and Souter rejected *Roe*'s trimester framework outright, characterizing it as legislating from the bench.[36] Instead, the plurality focused the opinion solely on viability.[37]

The plurality adopted an "undue burden" standard in place of strict scrutiny for analyzing abortion restrictions.[38] According to the plurality, an undue burden is one in which the "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[39] This test balances the woman's liberty interest with the state's interests in protecting the woman's health and preserving the potentiality of life.[40] Applying the undue burden test, the Court ultimately upheld four of the five challenged restrictions,[41] characterizing only the law's requirement that married women notify their husbands of their intended abortions as an undue burden.[42]

33. 505 U.S. 833 (1992).

34. *Id.* at 843. Only Parts I, II, III, V-A, V-C and VI constitute a majority. *Id.* at 843–44.

35. *Id.* at 846.

36. *Id.* at 872–73 (plurality opinion) ("A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers. . . . We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*."). The Court defined the three-part central holding of *Roe* as: (1) women have the right to abort a non-viable fetus without undue state interference; (2) states may restrict abortion once the viability point has been reached, as long as the restrictions do not prohibit abortions necessary to protect the life or health of the pregnant woman; and (3) for the duration of the pregnancy, the state's interests in protecting the health of the pregnant woman and preserving the fetus's potentiality of life are legitimate. *Id.* at 846.

37. *Id.* at 878.

38. *Id.* at 876. Justice O'Connor had previously articulated this standard in her dissent in *City of Akron v. Akron Ctr. for Reproductive Health*. 462 U.S. 416, 462–63 (1983) (O'Connor, J., dissenting).

39. *Casey*, 505 U.S. at 877 (plurality opinion).

40. *Id.* at 877–78.

41. This case concerned five provisions of Pennsylvania's Abortion Control Act of 1982. *Id.* at 844 (majority opinion). The Court upheld the following four provisions: (1) that a woman seeking an abortion must give informed consent; (2) that a woman seeking an abortion receive certain state-published information at least twenty-four hours before undergoing the procedure, effectively creating a twenty-four-hour delay; (3) that a minor seeking an abortion must first obtain the informed consent of her parents or a judge; and (4) that abortion providers comply with certain records and reporting requirements. *Id.* at 887, 895, 899, 901.

42. *Id.* at 895. Justice Stevens defended *Roe*'s trimester framework and preferred a broader undue burden test. *Id.* at 914 (Stevens, J., concurring in part and dissenting in part). Justice Stevens additionally would have held the provision requiring pregnant women seeking an abortion to wait twenty-four hours while considering state-published information unconstitutional. *Id.* at 918.

B. Abortion Rights Analysis in the Twenty-First Century

After *Casey*, the Court's abortion jurisprudence primarily concerned specific restrictions on abortion, rather than the existence of the right to have one at all.[43] In *Stenberg v. Carhart*,[44] the Supreme Court struck down a Nebraska law that imposed criminal penalties on physicians conducting dilation and evacuation ("D&E") abortions[45] as a violation of a woman's right to an abortion as articulated in *Roe* and *Casey*.[46] Lawmakers began facing public pressure to ban intact D&E abortions after a physician's description of the procedure circulated into the political sphere.[47] Subsequently, Congress passed the Partial-Birth Abortion Ban Act of 2003, which imposed criminal penalties on doctors who intentionally performed intact D&E procedures.[48] The Act did not include an exception in cases where an intact D&E abortion was necessary for the pregnant woman's health.[49]

The Court upheld the federal act in *Gonzales v. Carhart*, relying on Congress's factual findings and language differences between the federal act and the Nebraska act.[50] Justice Kennedy, writing for the majority, concluded

---

Justice Blackmun, who authored the Court's *Roe* opinion, defended *Roe*'s trimester framework. *Id.* at 930 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He would have applied traditional strict scrutiny in this case to invalidate all five of the challenged restrictions. *Id.* at 934. Chief Justice Rehnquist would have overruled *Roe* outright, disagreeing that the right to an abortion is a fundamental right encompassed in the right to privacy guaranteed by the Fourteenth Amendment's Due Process Clause. *Id.* at 952 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). He criticized the Court's adoption of a new test and instead would have used rational basis review to uphold each of the challenged restrictions. *Id.* at 966, 979. Justice Scalia also rejected the existence of a constitutional right to an abortion outright. *Id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

43. *See infra* Section I.B.

44. 530 U.S. 914 (2000).

45. There are two types of D&E procedures: standard and intact. Gonzales v. Carhart, 550 U.S. 124, 137 (2007). Intact D&E abortions differ from standard D&E abortions in that intact D&Es involve a physician "extract[ing] the fetus intact or largely intact with only a few passes" through the cervix. *Id.* at 136. When performing standard D&Es, on the other hand, physicians use surgical instruments to dismember the fetus within the uterus, which then necessitates more passes through the cervix than an intact D&E procedure requires. *Id.* Anti-choice advocates refer to intact D&E abortions as "partial-birth abortions," a term strategically used to invoke an emotional (and political) response. *See id.* at 170 n.1 (Ginsburg, J., dissenting) ("The term 'partial-birth abortion' is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions."); *id.* at 182 ("Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion.").

46. *Stenberg*, 530 U.S. at 929–30.

47. *Gonzales*, 550 U.S. at 138. As Justice Ginsburg put it, the public outcry stems from the fact that "a fetus that is not dismembered resembles an infant." *Id.* at 182 (Ginsburg, J., dissenting).

48. *Id.* at 140–41 (majority opinion).

49. *Id.* at 143.

50. *Id.* at 141.

that the law did not impose an undue burden on women seeking abortions.[51] The Court noted that its decision in *Casey* relied on three premises: (1) the Government has a legitimate interest in regulating the medical profession to protect the profession's integrity;[52] (2) the state has an interest in preserving the potentiality of the fetus's life for the duration of the pregnancy;[53] and (3) the state has an interest in fully informing women who might come to regret their choice to obtain an abortion.[54] According to the Court, the act at issue in *Gonzales* furthered these legitimate governmental interests; it did not intentionally impose a substantial obstacle on women seeking an abortion.[55] Further, the evidence that intact D&Es were safer than standard D&Es was, in the Court's view, inconclusive,[56] and standard D&Es were permitted under the Act.[57] Thus, the Court deferred to Congress, holding that the Act did not impose an undue burden because it did not have the effect of imposing a "substantial obstacle in the path of [women] seeking an abortion"[58] and that an exception to the ban for the health of the pregnant woman was unnecessary.[59]

51. *Id.* at 147.

52. *Id.* at 157.

53. *Id.* at 158.

54. *Id.* at 159–60.

55. *Id.* at 160.

56. *Id.* at 163.

57. *Id.* at 164. *But see id.* at 180 (Ginsburg, J., dissenting) (highlighting the consensus by medical authorities with relevant training that an intact D&E was, in fact, sometimes the safest procedure); *id.* at 181–82 (noting that the majority's reasoning does not protect standard D&E procedures from condemnation and regulation, as the majority claims it does, because both types of procedures are "'brutal'").

58. *Id.* at 156 (majority opinion) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992)).

59. *Id.* at 166. Justice Thomas concurred but wrote separately to "reiterate [his] view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." *Id.* at 169 (Thomas, J., concurring) (internal citation omitted). Justice Ginsburg characterized the majority's decision as an "alarming" misapplication of the *Casey* and *Stenberg* precedents because those cases, she noted, require that post-viability regulations of abortion protect the pregnant woman's health. *Id.* at 170 (Ginsburg, J., dissenting). This law, she wrote, "saves not a single fetus from destruction, for it targets only a *method* of performing abortion." *Id.* at 181. She also highlighted that Congress—and the majority—ignored the overwhelming consensus in the relevant medical field that intact D&E abortions were sometimes medically necessary. *Id.* at 180 ("The Court acknowledges some of this evidence . . . , but insists that, because some witnesses disagreed with [the American College of Obstetricians and Gynecologists] and other experts' assessment of risk, the Act can stand. . . . In this instance, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D&E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D&E procedure, and many performed abortions only on rare occasions.").

In 2016, the Court again visited the undue burden test in *Whole Woman's Health v. Hellerstedt*.[60] There, the Court, with Justice Breyer writing for the majority, struck down two Texas laws, concluding that both imposed substantial obstacles on women seeking previability abortions without sufficient medical benefits to justify the laws, thereby imposing undue burdens on women trying to access abortions.[61] The first law required abortion providers to have admitting privileges at a hospital within thirty miles of the site where the abortion took place.[62] The second law required abortion facilities to meet the standards required of ambulatory surgical centers.[63] Justice Breyer clarified that under the *Casey* undue burden test, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer."[64] Because "there was no significant health-related problem that the new [admitting-privileges] law helped cure," there was no benefit to the law.[65] And because the law had the effect of shuttering a dramatic number of existing abortion facilities,[66] the law imposed a substantial obstacle in the path of women seeking an abortion.[67] Weighing the lack of benefits against the imposed obstacle, the Court concluded that the admitting privileges requirement posed an undue burden in violation of the Constitution.[68] Likewise, the Court deemed the surgical center requirement an undue burden in violation of the Constitution because the heightened standard was unnecessary, did not benefit patients seeking abortions,[69] and posed a substantial obstacle to women seeking abortions by reducing the number of abortion facilities in the state to single digits.[70]

60. 136 S. Ct. 2292 (2016).

61. *Id.* at 2300.

62. *Id.* Requirements that an abortion provider have admitting privileges purport to "ensure that women have easy access to a hospital should complications arise during an abortion procedure." *Id.* at 2311. But there is little evidence that such admitting privileges are necessary because complications from abortions are rare, and even when complications do arise, they very rarely manifest during an actual procedure. *Id.*

63. *Id.* at 2300. Ambulatory surgical center requirements include, *inter alia*, detailed spatial dimensions, in-office traffic patterns, staffing requirements, and HVAC requirements. *Id.* at 2314–15.

64. *Id.* at 2309.

65. *Id.* at 2311.

66. *Id.* at 2312.

67. *Id.*

68. *Id.* at 2313.

69. *Id.* at 2315.

70. *Id.* at 2316. Justice Ginsburg concurred to emphasize that abortions are often safer than carrying a fetus to term and that restrictions on abortion most adversely affect vulnerable women. *Id.* at 2320 (Ginsburg, J., concurring). Justice Thomas criticized the Court's articulation of the undue burden standard as a balancing test of the burdens and benefits of an abortion restriction and the Court's conferral of third-party standing on the abortion providers. *Id.* at 2321–22 (Thomas, J., dissenting). He characterized the majority opinion as emblematic of just how "unworkable" the Court's third-party standing and tiers of scrutiny analyses are. *Id.* at 2328. In Justice Alito's view,

Justice Breyer further clarified the undue burden standard in the recent *June Medical Services LLC v. Russo* plurality opinion.[71] He explained that the undue burden test requires courts to independently examine legislative findings and weigh the benefits of an abortion law as compared to its burdens.[72] The Court thus struck down a Louisiana statute that "is almost word-for-word identical to Texas's admitting-privileges law,"[73] concluding the law was an undue burden—and therefore unconstitutional—because it imposed a substantial obstacle for women seeking an abortion without any health benefit for the pregnant women.[74]

Chief Justice Roberts concurred in the judgment, achieving a five-Justice majority to strike down the law.[75] The Chief Justice based his decision on a substantial obstacle test, believing that *Whole Woman's Health* was wrongly decided but still respecting it as precedent under stare decisis.[76] His test eliminates the balancing that the plurality's test—the test articulated by the majority in *Whole Woman's Health*—requires.[77]

C. Framework for Constitutional Analysis During a Public Emergency

The Supreme Court has long recognized states' authority to regulate the public's health and safety through their inherent police powers.[78] Historically in public emergencies, including pandemics, states broaden the use of this

not enough women of reproductive age in Texas were affected by these provisions for them to be considered an undue burden and that there was not enough evidence to conclude that these provisions had a material impact on access to abortion. *Id.* at 2343, 2346 (Alito, J., dissenting).

71. 140 S. Ct. 2103 (2020). There currently is a circuit split on which test—the undue burden test or substantial obstacle test—is controlling. *Compare* Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d 183, 209 (D. Md. 2020) (holding that the *Whole Woman's Health* undue burden test remained the correct standard because the *June Medical* plurality and Chief Justice Roberts's concurrence in the judgment did not share a "common denominator" regarding the appropriate standard), *with* Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (holding that the substantial obstacle test, favored by Chief Justice Roberts, is the appropriate test because Chief Justice Roberts's *June Medical* concurrence in the judgment was necessary to achieve a majority). *June Medical* was decided on June 29, 2020, in the midst of the COVID-19 pandemic and after the cases challenging state executive orders discussed below. However, the decision is still vitally important for understanding how abortion rights jurisprudence might develop in the future, especially with the marked shift in the ideological makeup of the Supreme Court with Justice Barrett replacing Justice Ginsburg. *See* 166 CONG. REC. S6588 (daily ed. Oct. 25, 2020) (confirming the nomination of Amy Coney Barrett to be the Supreme Court).

72. *June Med. Servs.*, 140 S. Ct. at 2112 (citing Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).

73. *Id.*

74. *Id.* at 2112–13.

75. *Id.* at 2133 (Roberts, C.J., concurring in the judgment).

76. *Id.*

77. *Id.* at 2135–36. Justices Thomas, Alito, Gorsuch, and Kavanaugh each wrote separate dissents. *See id.* at 2142 (Thomas, J., dissenting); *id.* at 2153 (Alito, J., dissenting); *id.* at 2171 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

78. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

power.[79] In *Jacobson v. Massachusetts*, the Court held that a Massachusetts law requiring compliance with local ordinances mandating vaccination against smallpox was constitutional.[80] The Court explained that a state's police powers contain authority to enact reasonable regulations to ensure the public's health and safety and "to enact quarantine laws and health laws of every description."[81] The regulations and rules adopted under a state's police powers, however, are still subject to the Constitution and "must always yield" where a state's police powers conflict with the Constitution's grant of federal authority or its conferral of an individual right.[82] The Court noted that individual rights are not absolute; the state is free to reasonably restrict such rights if the public good so requires.[83]

Though the federal government must give deference to the states' police powers, the Court emphasized that there may be circumstances where a state's rules and regulations relating to a public health emergency could be unreasonable enough to warrant judicial interference.[84] Most importantly, the *Jacobson* Court held that judicial review during a public health crisis was limited to those state and local rules that nominally protect public health and safety, but that, in reality, have "no real or substantial relation to those objects" or are "a plain, palpable invasion of rights" conferred by the Constitution.[85] Before the COVID-19 pandemic, courts primarily cited *Jacobson* to uphold a state's use of its police power in instances where a state mandated that individuals suspected of carrying infectious diseases quarantine[86] and where a state required vaccinations for public school children.[87]

79. *See infra* Section I.C.

80. *Jacobson*, 197 U.S. at 31.

81. *Id.* at 25 (internal quotation marks omitted).

82. *Id.*

83. *Id.* at 26.

84. *Id.* at 28.

85. *Id.* at 31.

86. *See, e.g.*, United States *ex rel.* Siegel v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963) (involving smallpox); Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016) (involving Ebola); Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973) (involving venereal disease).

87. *See, e.g.*, Zucht v. King, 260 U.S. 174, 176 (1922) (holding that *Jacobson* settled that a state's police power does, in fact, encompass mandatory vaccination regimes); Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015) (holding that *Jacobson* barred substantive due process challenges to New York's mandatory vaccine requirement for public school children); Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353–54 (4th Cir. 2011) (relying on *Jacobson* in holding that West Virginia's mandatory vaccine requirement for public school children was not unconstitutional). Courts have also given deference to states using their police powers in other emergency situations like hurricanes. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998). For example, in 1992, Florida residents challenged a curfew put in place by county officials after the governor declared a state of emergency in the wake of Hurricane Andrew. *Id.* at 108. The challengers claimed that the curfew infringed on their constitutional right to travel. *Id.* at 107. The United States Court

D. State Executive Orders and Abortion During the COVID-19 Pandemic

In response to the COVID-19 pandemic,[88] state governors across the country issued executive orders postponing non-emergency medical procedures to preserve hospital capacity and personal protective equipment ("PPE") and to curtail spread of the virus.[89] Violations of some of these orders carried criminal penalties.[90] Abortion providers in Ohio, Tennessee, Oklahoma, Alabama, Texas, and Arkansas brought suit in their respective jurisdictions to limit the scope of their state's executive order to exclude abortions.[91] In each case, the relevant federal district court temporarily enjoined enforcement of the order as applied to abortion procedures.[92] Three federal circuits—the Sixth, Tenth, and Eleventh—ultimately let the district courts' rulings stand.[93] The Fifth and Eighth Circuits, however, issued mandamus relief to effectively overrule the district courts in their jurisdictions.[94]

---

of Appeals for the Eleventh Circuit ultimately held that the curfew was constitutional, relying on precedential cases that have "consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction." *Id.* at 109. More generally, the Eleventh Circuit noted that in emergency situations, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency." *Id.*

88. COVID-19, the serious respiratory disease caused by the SARS-CoV-2 virus, rapidly spread across the United States (and the world) in the spring of 2020 through person-to-person transmission. Preterm-Cleveland v. Att'y Gen., 456 F. Supp. 3d 917, 920 (S.D. Ohio 2020). Efforts to curb infections of COVID-19 include maintaining at least a six-foot distance from other individuals and, especially for healthcare workers, donning personal protective equipment ("PPE") like masks, face shield, and gloves. *Id.* As the virus gained traction in the United States, healthcare facilities faced a shortage of such PPE. *Id.*

89. Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020); Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 918 (6th Cir. 2020); S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 679 (10th Cir. 2020); Robinson v. Att'y Gen., 957 F.3d 1171, 1174 (11th Cir. 2020); *In re* Abbott *(Abbott II*), 954 F.3d 772, 777 (5th Cir. 2020); *In re* Rutledge, 956 F.3d 1018, 1023 (8th Cir. 2020).

90. *See, e.g.*, *Slatery*, 956 F.3d at 919; Planned Parenthood Ctr. for Choice v. Abbott (*Abbott III*), No. A-20-CV-323-LY, 2020 U.S. Dist. WL 1815587, at *2 (W.D. Tex. Apr. 9, 2020) (noting the criminal penalties for violating the respective state emergency order), *vacated in part sub nom.* In re Abbott (*Abbott VI*), 956 F.3d 696 (5th Cir. 2020).

91. *Pre-Term Cleveland*, 2020 WL 1673310, at *1; *Slatery*, 956 F.3d at 919; *Stitt*, 808 F. App'x at 680; *Robinson*, 957 F. 3d at 1175; Planned Parenthood Ctr. for Choice v. Abbott (*Abbott I*), 450 F. Supp. 3d 753, 755 (W.D. Tex. 2020); *Rutledge*, 956 F.3d at 1025.

92. *Preterm-Cleveland*, 456 F. Supp. 3d at 939; Adams & Boyle, P.C. v. Slatery, 455 F. Supp. 3d. 619, 629 (M.D. Tenn. 2020), *aff'd as modified*, 956 F.3d 913 (6th Cir. 2020); S. Wind Women's Ctr. LLC v. Stitt, 455 F. Supp. 3d 1219, 1231 (W.D. Okla. 2020); Robinson v. Marshall, 454 F. Supp. 3d 1188, 1206 (M.D. Ala. 2020); *Abbott III*, 2020 WL 1815587, at *7; Little Rock Fam. Plan. Servs. v. Rutledge, 454 F. Supp. 3d 821, 834–35 (E.D. Ark. 2020), *order vacated in part*, No. 4:19-cv-00449, 2020 WL 2079224 (E.D. Ark. Apr. 22, 2020).

93. *See infra* Section I.D.1.

94. *See infra* Section I.D.2.

1. Some Jurisdictions Limited the Scope of State Executive Orders, Rendering Them Inapplicable to Abortion Procedures.

The United States Courts of Appeals for the Sixth, Tenth, and Eleventh Circuits each upheld their respective district courts' enjoinment of the respective state executive orders as applied to abortion procedures.[95]

i. Sixth Circuit

On March 17, 2020, the Ohio Department of Health issued an order postponing all non-emergency procedures that required PPE use and imposing criminal sanctions on those who disobeyed the order.[96] On March 20 and 21, Ohio officials sent abortion providers letters threatening to take action if the providers did not cease performing abortions in compliance with the order.[97] The providers brought suit, seeking a temporary restraining order ("TRO"),[98] which the district court partially granted about ten days later.[99] When Ohio moved to stay the TRO pending appeal, the Sixth Circuit held that it lacked jurisdiction over the State's interlocutory appeal.[100] The district court's injunction as applied to abortion procedures remained intact—meaning abortions in Ohio could continue as usual.[101]

The Sixth Circuit later issued a similar opinion on a second case arising out of an analogous state order from Tennessee.[102] In holding that the district court did not abuse its discretion in enjoining the Tennessee executive order, the court noted that absent a pandemic, the executive order's three-week prohibition on procedural abortions[103] would clearly constitute a substantial

95. *See infra* Sections I.D.1.i–iii.

96. Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at *2.

101. *Id.*

102. Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 918 (6th Cir. 2020). On April 8, 2020, Governor Lee of Tennessee issued an executive order postponing all "surgical and invasive procedures that are elective and non-urgent" until the order expired on April 30. *Id.* (quoting Tenn. Exec. Order No. 25 (April 8, 2020), https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf). The order did not allow health professionals to perform procedures that, in their professional judgment, would not counteract the executive order's purpose. *Id.* at 918–19. Abortion providers challenged the executive order on substantive due process grounds as applied specifically to procedural abortions because the parties in this case stipulated that the executive order did not apply to medication abortions. *Id.* at 919–20. State officials conceded that the order imposed criminal penalties on abortion providers who performed procedural abortions during the three-week duration of the executive order, except in extreme circumstances. *Id*. at 919.

103. Procedural abortions, also referred to as surgical abortions, include aspiration abortions (where the embryo or fetus is sucked out of the uterus through the cervix using a vacuum) and D&E abortions, both of which take place in out-patient clinical settings. *Id.* at 917. Medication abortions,

obstacle in the path of women seeking an abortion and would therefore be unconstitutional as an undue burden under *Casey*.[104] Under the *Jacobson* framework, the court reasoned, the executive order, for some women at least, "constitute[d] 'beyond question a plain, palpable invasion'" of their fundamental right to a previability abortion, despite the deference afforded to Tennessee.[105] The court did, however, limit the scope of the preliminary injunction.[106] Almost a year later, the Supreme Court summarily granted certiorari, vacated the judgment, and remanded to the Sixth Circuit to vacate its expired order granting the preliminary injunction as moot.[107]

ii. Tenth Circuit

Similarly, Governor Kevin Stitt of Oklahoma issued an executive order on March 24, 2020, mandating the delay of "all elective surgeries, minor medical procedures, and non-emergency dental procedures,"[108] including all abortions not specifically defined as a medical emergency by Oklahoma statute or abortions not necessary to preserve the pregnant woman's life.[109] The district court enjoined enforcement of the executive order as it pertained to all medication abortions and all surgical abortions for patients who would be unable to obtain a legal abortion before the expiration of the executive order.[110] In a per curiam opinion, the Tenth Circuit dismissed the state officials' appeal for lack of jurisdiction.[111]

---

used in the earliest weeks of a pregnancy, involve ingesting medications that shed the uterine lining to end the pregnancy. *Medical Versus Surgical Abortion*, UNIV. OF CAL., SAN FRANCISCO HEALTH, https://www.ucsfhealth.org/education/medical-versus-surgical-abortion.

104. *Slatery*, 956 F.3d at 929. Specifically, the Sixth Circuit held (1) that the abortion providers were likely to succeed on the merits of their substantive due process claim; (2) that the abortion providers and their patients were likely to suffer irreparable harm if the preliminary injunction were not granted; (3) that the balance of equities weighs in the abortion providers' favor; and (4) that the injunction is in the public interest. *Id.* at 924, 927–29.

105. *Id.* at 926 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

106. *Id.* at 929–30. The court limited the order's application to only the three categories of women who would be adversely affected by the executive order: (1) women who would likely be unable to obtain an abortion at all if their procedures were delayed until the expiration of the executive order; (2) women who would likely face more intrusive procedures if their procedures were delayed until the expiration of the executive order; and (3) women who would likely specifically have to undergo a two-day procedure if their procedures were delayed until the expiration of the executive order. *Id.*

107. Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262, 1263 (U.S. Jan. 25, 2021), *vacating as moot* 956 F.3d 913 (6th Cir. 2020).

108. S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 679 (10th Cir. 2020) (quoting Okla. Exec. Order 2020-07, Am. No. 4, ¶ 18). The executive order initially imposed a deadline of April 7, 2020, but it was later extended to April 30. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

iii. Eleventh Circuit

Alabama issued a similar order postponing all medical procedures that were not immediately medically necessary because of an emergency for several weeks.[112] Abortion providers sought confirmation that their clinics would not be subject to the order.[113] Alabama officials vacillated on their interpretation of the scope of the order, so the district court granted the abortion providers a preliminary injunction, enjoining the enforcement of the order as applied to abortion providers who, in their professional medical judgment, believed their patients must go forward with their abortion procedures or else lose their legal rights.[114] Relying on *Jacobson*, the Eleventh Circuit found that the district court did not abuse its discretion in enjoining enforcement of the order.[115] The court noted that, within the *Jacobson* framework, neither the individual's right to terminate a pregnancy nor the state's police powers were unlimited.[116]

2. Other Jurisdictions Maintained the Restrictions on Abortion.

Other circuits took different approaches. Though both district courts in Texas and Arkansas enjoined enforcement of their respective state's executive order as applied to abortions, both the Fifth and Eighth Circuits used mandamus relief to effectively overrule the district courts.[117]

i. Fifth Circuit

Like the governors mentioned above, Texas Governor Greg Abbott issued executive order GA-09 on March 22, 2020, postponing non-essential medical procedures,[118] which the state interpreted to include limitations on

112. Robinson v. Att'y Gen., 957 F.3d 1171, 1174 (11th Cir. 2020). After Governor Kay Ivey of Alabama declared a state of emergency on March 13, 2020, the Alabama State Health Officer issued an order on March 27, 2020. *Id.* The order was initially active until April 17, 2020 but was later extended until April 30, 2020. *Id.*

113. *Id.* at 1174–75.

114. *Id.* at 1176.

115. *Id.* at 1174, 1179.

116. *Id.* at 1179–80.

117. *See infra* Sections I.D.2.i–ii.

118. *Abbott II*, 954 F.3d 772, 777 (5th Cir. 2020). The order postponed "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" until April 21, 2020 at 11:59 PM. Tex. Exec. Order No. GA-09 (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf. Excepted from the order was "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." *Id.*

abortions.[119] Abortion providers in the state brought suit challenging the executive order on substantive due process grounds.[120] On March 30, the district court issued a TRO against the executive order as applied to abortion procedures.[121] State officials subsequently sought an emergency stay of the order and a writ of mandamus—a type of relief used only in "exceptional circumstances amounting to a judicial usurpation of power . . . or a clear abuse of discretion"[122]—from the Fifth Circuit to vacate the district court's TRO.[123] The Fifth Circuit ultimately partially granted the Texas officials' writ of mandamus and directed the district court to vacate the TRO,[124] letting the temporary abortion ban stand except for one narrow exception.[125]

The Fifth Circuit held that mandamus relief was warranted because the district court failed to follow the Fifth Circuit's *Abbott II* mandate, requiring the district court to evaluate GA-09 within the *Jacobson* framework.[126] The Fifth Circuit also held that the district court's ruling was "patently erroneous" and abused its discretion for several reasons.[127] It "usurped the state's

119. *Abbott II*, 954 F.3d at 792 n.25.

120. *Abbott I*, 450 F. Supp. 3d 753, 755 (W.D. Tex. 2020). On March 29, 2020, however, the Texas Medical Board clarified that "'the prohibition does not apply to office-based visits without surgeries or procedures'" and that a "'procedure' does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests." *Abbott III*, No. A-20-CV-323-LY, 2020 U.S. Dist. WL 1815587, at *2 (W.D. Tex. Apr. 9, 2020), *vacated in part sub nom. Abbott VI*, 956 F.3d 696 (5th Cir. 2020) (quoting *Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic*, TEX. MED. BD. (Mar. 29, 2020), https://med.uth.edu/ortho/wp-content/uploads/sites/60/2020/03/TMB-COVID-19-Elective-Surgery-FAQs-Updated-20200329.pdf).

121. *Abbott II*, 954 F.3d at 778.

122. Cheney v. U.S. District Court, 542 U.S. 367, 380 (2004) (internal quotations omitted). Mandamus relief can be used "to restrain a lower court when its actions would threaten the separation of powers by embarrass[ing] the executive arm of the Government, . . . or result in the intrusion by the federal judiciary on the delicate area of federal-state relations." *Id.* at 381 (alteration in original) (internal quotations omitted).

123. *Abbott II*, 954 F.3d at 779.

124. *Abbott VI*, 956 F.3d at 704.

125. The Fifth Circuit permitted the part of the April 9 TRO restraining enforcement of GA-09 for "patients 'who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—[twenty-two]-weeks LMP—on April 22, 2020.'" *Id.* (quoting *Abbott III*, 2020 WL 1815587, at *7).

126. *Id.* at 710.

127. *Id.* at 713. Citing inadequacy of the record, the Fifth Circuit concluded that the district court abused its discretion in exempting medication abortions from GA-09 for the following reasons: (1) the district court failed to consider PPE usage and standard of care in medication abortions during the pandemic (as opposed to during normal times), *id.* at 714; (2) the district court usurped state officials' authority to enact policy to protect the public during a public health crisis, *id.* at 716; and (3) the district court failed to "carefully parse record evidence"—as mandated by *Abbott II*—and failed to cite any evidence submitted by state officials in the TRO, *id.* at 718.

authority to craft emergency public health measures," justifying mandamus relief.[128]

The Fifth Circuit concluded that the district court's TRO patently erred by exempting patients who would reach eighteen weeks since their last menstrual period ("LMP")[129] before the expiration of GA-09 and whose doctors determined would be unlikely to obtain an abortion before reaching Texas's twenty-two weeks LMP limitation on abortion.[130] In the court's view, the district court's characterization of GA-09 as a categorical ban on abortion for these patients in violation of *Casey* was "obviously wrong."[131] Despite hesitation, the Fifth Circuit noted that the district court did not patently err by exempting patients who would reach twenty-two weeks LMP before the expiration of GA-09.[132] Lastly, the Fifth Circuit held that state officials had met the remaining burdens for mandamus relief, concluding that the state officials had no other adequate means of relief and that the extraordinary circumstances of this case justified mandamus as a remedy.[133]

In dissent, Judge Dennis accused the majority of "simply disagree[ing] with the district court's decisions on matters that are squarely within its discretion" and misappropriating mandamus as a form of relief.[134] Judge Dennis emphasized that mandamus is a unique form of relief only to be used "in 'exceptional circumstances,'" not merely when the appellate court disagrees with the lower court or even when the lower court errs.[135] Because he and judges in other circuits reached different conclusions, Judge Dennis wrote that the state officials necessarily did not meet the "clear and indisputable" requirements for mandamus relief.[136]

In the dissent's view, there was sufficient evidence in the record for the district court to find that enforcement of GA-09 on all the types of abortion at issue was not substantially related to protecting public health and that such enforcement infringed on Texas patients' constitutional right to an abortion

128. *Id.* at 713.

129. Medical professionals calculate gestational age based on how many weeks have passed since the first day of a patient's last menstrual period, rather than the date of conception. Anne Davis, *How Doctors Date Pregnancies, Explained*, REWIRE NEWS GROUP (Oct. 17, 2013, 9:12 AM), https://rewirenewsgroup.com/article/2013/10/17/whats-in-a-week-pregnancy-dating-standards-and-what-they-mean/.

130. *Abbott VI*, 956 F.3d. at 721.

131. *Id.*

132. *Id.* at 722.

133. *Id.* at 723.

134. *Abbott VI*, 956 F.3d at 724 (Dennis, J., dissenting in part).

135. *Id.* at 726 (quoting *Cheney*, 542 U.S. at 380).

136. *Id.* (quoting *Cheney*, 542 U.S. at 380–81); *see also supra* Section I.D.1 (discussing the federal circuits reaching the opposite conclusion as the Fifth Circuit did here).

under the *Jacobson* framework.[137] Based on the plain meaning of the executive order, the dissent inferred that "the enforcement against abortion providers more generally is pretextual and motivated by hostility to abortion rights."[138] The Supreme Court, nearly a year later, granted certiorari, vacated the judgment, and remanded the case so that the Fifth Circuit could dismiss the case as moot.[139]

ii. Eighth Circuit

The Eighth Circuit approached the as-applied challenges to Arkansas's directive postponing non-emergency medical procedures similarly, which applied to surgical abortions, but not medication abortions.[140] After the district court enjoined enforcement of the directive as applied to surgical abortions,[141] the Eighth Circuit, relying explicitly on the Fifth Circuit's *Abbott II* reasoning, granted Arkansas's petition for mandamus relief.[142] The Eighth Circuit concluded that because the abortion providers challenged the directive in a supplemental complaint as part of litigation already pending (rather than initiating new, separate litigation), the State had no other means of relief.[143] Using reasoning similar to the Fifth Circuit, the Eighth Circuit maintained that the district court abused its discretion in deeming its decision consistent with *Jacobson* because it did not apply the *Jacobson* framework sufficiently, leading to "patently erroneous results."[144]

137. *Id.* at 733–34. The district court specifically found: (1) that suspending medication abortions under GA-09 does not conserve PPE nor hospital capacity and (2) that GA-09 provided no net benefit in prohibiting patients who would reach eighteen weeks LMP and be unlikely to obtain an abortion before the 22-week cutoff according to their doctors from receiving medication abortions. *Id.* at 737–39.

138. *Id.* at 735.

139. Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262, 1263 (U.S. Jan. 25, 2021), *vacating as moot* 956 F.3d 913 (6th Cir. 2020).

140. *See In re* Rutledge, 956 F.3d 1018, 1025 (8th Cir. 2020) (relying on the Fifth Circuit's reasoning in *Abbott II*). On March 11, 2020, Governor Asa Hutchinson of Arkansas declared a state of emergency and issued Executive Order 20-03, giving the Arkansas Department of Health authority to do "everything reasonably possible to respond to and recover from the COVID-19 virus." *Id.* at 1023. On April 3, 2020, the Arkansas Department of Health issued a directive postponing all surgeries deemed not medically necessary by a patient's doctor. *Id.* The directive did not contain an expiration date but could only endure as long as the duration of the state of emergency, which, unless extended by the Governor, was capped at sixty days by Arkansas law. *Id.* at 1024.

141. *Id.*

142. *Id.* (citing *Abbott II*, 954 F.3d 772 (5th Cir. 2020)).

143. *Id.* at 1026–27.

144. *Id.* at 1028.

E. Litigation Challenging Medication Abortion Requirements in the District of Maryland

Abortion litigation during the COVID-19 pandemic has not only arisen because of state emergency orders. Some abortion advocates have also brought suit challenging the requirements that, before a patient receives a medication abortion, the patient must sign an agreement in front of the prescribing physician in person and the physician must dispense the abortion-inducing drug in person (rather than through a retail or mail-order pharmacy).[145] On May 27, 2020, abortion providers brought suit in the U.S. District Court for the District of Maryland to enjoin the United States Food and Drug Administration ("FDA") from applying these in-person requirements for medication abortions during the pandemic.[146] The abortion providers argued that such requirements unconstitutionally infringed upon the right to an abortion, and that the requirements violated the Equal Protection Clause.[147]

The district court granted a nationwide preliminary injunction and, using the *Whole Woman's Health* balancing test analysis,[148] held that abortion providers were likely to succeed in their claim that it was unconstitutional to enforce in-person requirements for medication abortions.[149] The burdens imposed by the in-person requirements, including difficulty travelling to an appropriate clinic and risk of infection for a medication abortion, constitute a substantial obstacle in the path of women seeking an abortion.[150] The benefits of the requirement, that the doctor can assess and counsel the patient in person[151] and that the patient is less likely to face a delay by receiving the medication in person,[152] can be adequately remedied without the in-person requirements during the pandemic through telemedicine.[153] The Fourth Circuit denied the FDA's motion for stay

145. Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d 183, 191 (D. Md. 2020).

146. *Id.* at 197.

147. *Id.*

148. This district court maintained that the undue burden balancing test articulated in *Whole Woman's Health* was the appropriate standard, even after *June Medical*, because, in that case, the plurality and Roberts's concurrence in the judgment did not share a "common denominator" regarding the appropriate standard. *Id.* at 209. *But see* Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (holding that the constitutional standard for abortion laws going forward is a substantial obstacle test because Chief Justice Roberts's concurrence in the judgment was necessary to achieve a majority, so his opinion is controlling).

149. *Am. Coll. of Obstetricians & Gynecologists*, 472 F. Supp. 3d at 224.

150. *Id.* at 216.

151. *Id.* at 219–20.

152. *Id.* at 220.

153. *Id.* at 222.

pending appeal on August 13, 2020.[154] In January, 2021, the Supreme Court stayed the injunction pending disposition of the appeal in the Fourth Circuit, allowing the FDA to continue enforcing the in-person requirements.[155] Three months later, the FDA changed course, announcing it would cease enforcing both the in-person dispensing and signature requirements for the duration of the pandemic.[156]

II. ANALYSIS

During the COVID-19 pandemic, states used their broad police powers to employ a variety of tactics to stop the spread of the virus.[157] Some of these tactics infringed upon citizens' civil liberties, including the right to have an abortion.[158] As states used their emergency orders to delay abortions by characterizing them as "non-essential" or "elective" procedures, courts looked to *Jacobson v. Massachusetts* for guidance.[159] Section II.A argues that federal courts improperly used the *Jacobson* framework both normatively and descriptively to uphold state emergency orders that temporarily banned abortion during the COVID-19 pandemic.[160] Section II.B explores how the state orders restricting access to abortion in the name of public health mirror frequent anti-abortion attacks on abortion rights, like Targeted Regulation of Abortion Providers ("TRAP") laws.[161] Section II.C then considers how these orders and the cases upholding them as applied to abortions may inform how abortion rights are treated farther along in the pandemic or even afterwards.[162]

A. Using the Jacobson *framework to suspend judicial review of abortion restrictions is both normatively and descriptively incorrect.*

Courts that both upheld and struck down temporary abortion bans resulting from state emergency orders all invoked *Jacobson* to some degree

154. Am. Coll. of Obstetricians & Gynecologists v. FDA, No. 20-1824 (4th Cir. Aug. 13, 2020) (order denying motion for stay pending appeal).

155. FDA v. Am. Coll. of Obstetricians & Gynecologists, No. 20A34 (U.S. Jan. 12, 2021).

156. Joint Motion to Hold Appeals in Abeyance 1, 7, ECF No. 103, Am. Coll. of Obstetricians & Gynecologists v. FDA, No. 20-1824 (4th Cir. Apr. 13, 2021).

157. *See supra* Section I.D.

158. *See generally* Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39 (2020) (discussing how constitutional analysis has played out with respect to other civil liberties like limitations on gatherings, firearms sales, religious services, and businesses).

159. *See supra* Section I.D.

160. *See infra* Section II.A.

161. *See infra* Section II.B.

162. *See infra* Section II.C.

in their analyses.[163] Courts that upheld the abortion bans viewed *Jacobson* as granting exceptional deference to the states.[164] This framework, however, is both normatively and descriptively incorrect.[165] This sort of suspension of judicial review is normatively improper because the courts are a necessary check on the states' exercise of police powers—including and especially during an emergency health crisis.[166] The *Jacobson* framework adopted by these courts is also descriptively improper because *Jacobson* did not establish a different standard of judicial review.[167]

1. Suspension of judicial review under the Jacobson *framework is normatively improper.*

Since *Marbury v. Madison*,[168] judicial review over government action has been a foundational aspect of constitutional analysis.[169] Legal scholars, however, have long criticized courts' apparent suspension of judicial review during times of crisis.[170] Under this "suspension" model, courts apply a lower level of scrutiny to a constitutional challenge or only nominally apply the designated tier of scrutiny while in actuality applying a much less rigorous standard.[171] Suspension of judicial review allows the government to curtail access to abortion with little pushback.[172] When judicial review is suspended, the political branches do not need to be transparent nor must they tailor the means of implementing their policies.[173] Courts upholding the bans have claimed to be concerned with lower courts second-guessing state authority during a public health emergency.[174] The higher deference some courts have interpreted *Jacobson* as requiring effectively eliminates the judicial power to review legislative findings as *Whole Woman's Health v. Hellerstedt* requires.[175]

163. *See supra* Section I.D.

164. *See supra* Section I.D.2.

165. *See infra* Sections II.A.1–2.

166. *See infra* Section II.A.1.

167. *See infra* Section II.A.2.

168. 5 U.S. (1 Cranch) 137 (1803).

169. *Id.* at 177.

170. *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568 (2003) ("The conventional wisdom is that courts are ineffective as guardians of liberty when the general public is clamoring for security.").

171. Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 182 (2020).

172. *Id.* at 195.

173. *Id.*

174. *Abbott VI*, 956 F.3d 696, 716 (5th Cir. 2020).

175. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

The states' mitigation efforts to curb the spread of the virus—"flattening the curve"—required extending the duration of emergency orders.[176] As such, the suspension of judicial review could last an indeterminate amount of time.[177] As of February 2021, a year after the pandemic broke out in the United States—and about a year after Ohio, Tennessee, Oklahoma, Alabama, Texas, and Arkansas issued executive orders postponing nonemergency surgeries—every state in the Union save one remained under some sort of public health emergency order.[178] Texas repeatedly extended its initial emergency order declared on March 13, 2020.[179] Indeed, the state of emergency lasted longer than an entire pregnancy carried to term.[180] Suspending ordinary judicial review supposedly for a temporary duration, but in reality for an indefinite duration, is the "exception [that] swallow[s] the rule."[181]

The *Jacobson* framework gives judges a mechanism to uphold bans they agree with politically.[182] By assuming, as some courts have, that all abortions are elective rather than medically necessary, those courts have also been able to characterize abortion providers as demanding exceptional treatment.[183] At

176. *Abbott VI*, 956 F.3d at 703; Wiley & Vladeck, *supra* note 171, at 187.

177. Wiley & Vladeck, *supra* note 171, at 187.

178. *Each State's COVID-19 Reopening and Reclosing Plans and Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Feb. 12, 2021), https://www.nashp.org/governors-prioritize-health-for-all/ (maintaining continuously updated records of current state emergency orders across the United States). Michigan was the only state no longer under a state of emergency because, in October 2020, the Michigan Supreme Court ruled that Governor Gretchen Whitmer did not have the authority to unilaterally extend the state of emergency past the initial April 30, 2020, expiration date. Jason Slotkin, *Michigan Supreme Court Rules Against Governor's Emergency Powers*, NPR (Oct. 3, 2020, 3:14 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/10/03/919891538/michigan-supreme-court-rules-against-governors-emergency-powers.

179. 46 Tex. Reg. 889 (Feb. 5, 2021).

180. The state of emergency was still in effect as of February 2021, eleven months after Governor Abbott initially declared the emergency. *Id.* The Texas executive order challenged in *Abbott* was superseded by GA-15 on April 22, 2020, which contained an exception that allowed plaintiff abortion providers to continue performing abortions. State Defendants' Supplemental Response to Plaintiffs' Motion for Preliminary Injunction at 8, *Abbott III*, 450 F. Supp. 3d 753 (2020) (No. 1:20-cv-00323-LY), 2020 WL 2702292. Texas officials abandoned the temporary abortion ban. *Id.* These restrictions that initiated the litigation have since been lifted but may return if cases of COVID-19 surge. B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99, 110 (2020).

181. Wiley & Vladeck, *supra* note 171, at 187.

182. *Id.* at 191.

183. *See* Hill, *supra* note 180, at 117 ("Differential treatment of abortion providers is normalized by the stigma that permeates abortion provision, treats abortion services as outside of mainstream health care, and assumes almost all abortions are, by default, elective. Thus, the providers' requests to be allowed to make their own determinations whether a particular surgery for a particular patient qualified as essential and non-elective were cast by states, and some courts, as requests for 'blanket exemption[s].'" (quoting Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *3 (6th Cir. Apr. 6, 2020))). *See also In re* Rutledge, 956 F.3d 1018, 1032 (8th Cir. 2020)

the same time, dissenting judges have criticized their colleagues for abdicating their impartial role when it comes to abortion-related cases.[184] Abortion occupies a unique position in constitutional analysis;[185] few other medical procedures are attacked with such regularity and animosity.[186]

For example, the Texas executive order resulted in two appeals to the United States Court of Appeals for the Fifth Circuit.[187] The first time, the Fifth Circuit held that the district court had not properly applied the *Jacobson* framework, which it interpreted as requiring that only those public health measures that have "no real or substantial relation to [the public health objectives], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law" could be struck down and remanded.[188] When the district court again used the *Jacobson* framework to strike down the abortion ban, the Fifth Circuit issued a writ of mandamus to overturn that ruling—a form of relief appropriate "only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'"[189] As Judge Dennis notes in his dissent, other courts around the country have disagreed with the Fifth Circuit's ruling, indicating that the district court could not have clearly abused its discretion.[190] In its initial mandate, the Fifth Circuit even directed the district court to "inquire whether Texas has exploited the present crisis as a pretext to target abortion providers *sub silentio*."[191] The district court went on to find that the medical benefits of an abortion ban were limited, especially for medication abortions.[192]

(characterizing the district court's injunction of the executive order as applied to abortion providers as "effectively . . . 'a blanket exemption from a generally-applicable emergency public health measure . . . .'" (quoting *Abbott II*, 954 F.3d 772, 795 (5th Cir. 2020))).

184. *Abbott VI*, 956 F.3d 696, 725 (5th Cir. 2020) (Dennis, J., dissenting in part) ("I again echo the words of a colleague in dissent in a case now before the United States Supreme Court: 'It is apparent that when abortion comes on stage it shadows the rule of settled judicial rules.'" (quoting June Med. Servs. LLC v. Gee, 905 F.3d 787, 816 (5th Cir. 2018) (Higginbotham, J., dissenting), *rev'd*, 140 S. Ct. 2103 (2020)).

185. Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *3 (6th Cir. Apr. 6, 2020) (Bush, J., concurring in part and dissenting in part).

186. *See supra* note 183 and accompanying text.

187. *Abbott VI*, 956 F.3d at 703. The Eighth Circuit adopted the same reasoning as the Fifth Circuit. *Rutledge*, 956 F. 3d at 1025.

188. *Abbott II*, 954 F.3d 772, 784 (5th Cir. 2020) (emphasis omitted) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

189. *Abbott VI*, 956 F.3d at 707 (quoting *In re* Volkswagen of Am., Inc. 545 F.3d 304, 309 (5th Cir. 2008)).

190. *Id.* at 726 (Dennis, J., dissenting in part).

191. *Abbott II*, 954 F.3d at 792.

192. *Abbott III*, No. A-20-CV-323-LY, 2020 WL 1815587, at *3 (W.D. Tex. Apr. 9, 2020) (finding that "[p]roviding medication abortion does not require the use of any PPE"); *id.* at *5 (finding that applying the executive order to abortions will not further the executive order's goals because it "will not conserve PPE" and "will not conserve hospital resources" and finding that

Relying on these findings, the district court ruled that the executive order as applied to abortions did not bear a real or substantial relation to the public health emergency and thus remained unconstitutional even under the *Jacobson* framework.[193]

Scholars have also argued that ordinary judicial review during a pandemic is necessary to cultivate a robust and appropriate response to both the continuing COVID-19 pandemic and other public health crises in the future.[194] The threat of defending its policies in court under ordinary judicial scrutiny "force[s] the government to do its homework—to communicate not only the purpose of its actions, but also how the imposed restrictions actually relate to and further those purposes."[195] Under ordinary judicial review, courts would explain the states' emergency response reasoning in a precise manner that would then have precedential value for future emergencies.[196] Such a requirement for transparent and reasoned pandemic policies from government officials could lead to more effective responses to public health crises in general.[197]

2. Courts upholding abortion bans during the pandemic have applied Jacobson *incorrectly as a descriptive matter because* Jacobson *did not articulate a new framework of constitutional analysis during times of emergencies.*

Jacobson has been invoked by every court that has reviewed a temporary abortion ban imposed by a state responding to the COVID-19

"[p]hysicians are continuing to provide [other] obstetrical and gynecological procedures comparable to abortion in PPE use or time-sensitivity, based on their professional medical judgment").

193. *Id.* at *6.

194. Wiley & Vladeck, *supra* note 171, at 194–95.

195. Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/.

196. *See* Cole, *supra* note 170, at 2566 ("Because emergency measures frequently last well beyond the de facto end of the emergency, and because the wheels of justice move slowly, courts often have an opportunity to assess the validity of emergency measures after the emergency has passed, when passions have been reduced and reasoned judgment is more attainable. In doing so, courts have at least sometimes been able to take advantage of hindsight to pronounce certain emergency measures invalid for infringing constitutional rights. And because courts, unlike the political branches or the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes, judicial decisions offer an opportunity to set the terms of the *next* crisis, even if they often come too late to be of much assistance in the immediate term.").

197. *See* Amanda Mull, *The Difference Between Feeling Safe and Being Safe*, ATLANTIC (Oct. 26, 2020), https://www.theatlantic.com/health/archive/2020/10/pandemic-safety-america/616858/ (noting that mixed messages from government officials fuel the general public's misunderstanding of how to combat the coronavirus and can lead to greater frequency of risky behaviors).

pandemic.[198] The U.S. Courts of Appeals for the Sixth and Eleventh Circuits both held that *Jacobson* did not impose a new framework of constitutional analysis but must instead be considered together with the standard for abortion-related challenges in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Whole Woman's Health*.[199] On the other hand, the purported *Jacobson* test requires, according to the Fifth and Eighth Circuits, that district courts ask only whether the burdens imposed on abortion by a state's executive order are substantially related to the public health emergency or whether the order's burdens "'beyond question' exceed its benefits."[200]

The Sixth and Eleventh Circuits are correct.[201] *Jacobson* does not establish a new standard of review.[202] The *Jacobson* Court used a balancing test based on reasonableness of the state's use of its police powers.[203] In *Abbott II*, the Fifth Circuit interpreted this to mean that, in the context of abortion restrictions during a public health emergency, rationality review replaces heightened scrutiny.[204] But the *Jacobson* Court's definition of what is "reasonable" more closely mirrors heightened scrutiny than the Court's later interpretation of what is "reasonable" under rationality review.[205] Even if *Jacobson* does establish a new standard of review during a public health crisis, it is not a more deferential one.[206] *Jacobson* was decided in 1905 two months before *Lochner v. New York*[207]—before the development of modern

198. *See supra* Section I.D.

199. Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 927 (6th Cir. 2020); Robinson v. Att'y Gen., 957 F.3d 1171, 1182–83 (11th Cir. 2020).

200. *Abbott II*, 954 F.3d 772, 790 (5th Cir. 2020) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

201. *Slatery*, 956 F.3d at 927; *Robinson*, 957 F.3d at 1182–83. *See also* Hill, *supra* note 180, at 108 (explaining that both the *Jacobson* standard and the undue burden test of *Casey* and *Whole Woman's Health* require courts to balance the state's interest against individual liberties); Wiley & Vladeck, *supra* note 171, at 190 (explaining that "*Jacobson* adopted a quintessential balancing test").

202. Wiley & Vladeck, *supra* note 171, at 190.

203. *Jacobson*, 197 U.S. at 28.

204. *Abbott II*, 954 F.3d at 784–85; *Abbott VI*, 956 F.3d 696, 704–5 (5th Cir. 2020).

205. *Compare Jacobson*, 197 U.S. at 28 ("[The] acknowledged power of a local community to protect itself against an epidemic threatening the safety of all[] might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."), *with* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

206. Wiley & Vladeck, *supra* note 171, at 191.

207. 198 U.S. 45 (1905).

constitutional scrutiny analysis and fundamental rights jurisprudence.[208] As such, *Jacobson* cannot function as an exception to either subsequent jurisprudential tradition.[209] The *Jacobson* rule acknowledges that state political branches must have leeway to enact reasonable policies in response to a public health crisis, but the rule "is not one of categorical deference to a state's political decisions."[210] One scholar characterized *Jacobson* as imposing *limitations* on the state's police power, rather than granting it deference.[211]

The circumstances of a pandemic fit squarely into ordinary judicial scrutiny analysis.[212] During a public health crisis, the government's attempts to control the spread of virus and to diminish the level of emergency for the public become increasingly compelling.[213] Indeed, the undue burden test for the abortion right is likewise proportional.[214] The purported benefits of a state's executive order banning abortions for a period of time during a health crisis will likely weigh more heavily than the purported benefits of other state laws implicating the abortion right.[215] The undue burden test already takes the context of a pandemic into account.[216]

Before the COVID-19 pandemic, *Jacobson* was cited often in the context of quarantined individuals suspected of carrying and potentially transmitting infectious diseases.[217] In *United States ex rel. Siegel v. Shinnick*,

208. *See id.* at 64 (holding that the Fourteenth Amendment protected the freedom of contract, beginning the since-rejected doctrine of economic due process); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting a need for heightened scrutiny for laws that "prejudice against discrete and insular minorities" and planting the seed of what would later become the familiar tiers of scrutiny).

209. Wiley & Vladeck, *supra* note 171, at 190.

210. Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 965 (1989).

211. *Id. See also* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 856–57 (2002) (finding that *Jacobson* imposed limits on the state's police powers).

212. Wiley & Vladeck, *supra* note 171, at 188.

213. *Id.* at 189.

214. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 876 (1992); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

215. Hill, *supra* note 180, at 108 ("In the context of a pandemic, the *Whole Woman's Health* standard for deciding whether a burden is 'undue' already allows courts to take into account the urgency and time-sensitivity of the state's interests in preserving hospital capacity, maintaining the supply of PPE, and limiting contact. The court must then balance those benefits against the burden on the individual's right to access abortion . . . ."); Wiley & Vladeck, *supra* note 171, at 189 ("[W]hat the coronavirus pandemic helps to make clear is that even widespread, mass incursions into civil liberties, such as statewide shelter-in-place orders, can generally survive modern constitutional scrutiny under most circumstances.").

216. Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 927 (6th Cir. 2020).

217. *See* United States *ex rel.* Siegel v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963) (involving smallpox); Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016) (involving Ebola); Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973) (involving venereal disease).

a 1963 case about the mandatory quarantine of a woman returning from Sweden who was suspected of having contracted smallpox, the district court did not articulate which level of scrutiny it applied in upholding the federal quarantine order.[218] The court did, however, inquire into the reasonableness of the health officials' medical and scientific justifications for the woman's quarantine.[219] In *Hickox v. Christie*, the district court noted that "[a] restriction can be so arbitrary or overbroad as to be impermissible," but it ultimately found no constitutional violation in the mandatory quarantine of a nurse returning to the United States from Ebola-stricken Sierra Leone.[220] In *Reynolds v. Nichols*, the district court upheld the mandatory detention without bond of a sex worker suspected of having a venereal disease.[221]

In all of these cases, the imposed quarantines were upheld by the courts.[222] None of the courts, however, interpreted the state's police powers as imposing such a deferential standard, effectively a suspension of judicial review, as the *Abbott VI* and *In re Rutledge* courts did.[223] The *Abbott II* approach, endorsed by the Eighth Circuit in *Rutledge*, contended that:

> *Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. We could avoid applying *Jacobson* here only if the Supreme Court had specifically exempted abortion rights from its general rule. It has never done so. To the contrary, the Court has repeatedly cited *Jacobson* in abortion cases without once suggesting that abortion is the only right exempt from limitation during a public health emergency.[224]

This characterization of *Jacobson* assumes that a challenge to an abortion restriction necessarily cannot stand under the *Jacobson* framework.[225] The deference afforded to the political branches under this framework negates the inquiry into the rationale for the policy that *Whole*

218. *Siegel*, 219 F. Supp. at 791.

219. *Id.* ("The words cautioning against light use of isolation are indeed strong but the three medical men who testified manifestly shared a concern that was *evident and real and reasoned*. Their differentiation of the case of [the woman's husband] was *forthright, reasoned and circumstantially reassuring*." (emphasis added) (footnote omitted)).

220. *Hickox*, 205 F. Supp. 3d at 592–93.

221. *Reynolds*, 488 F.2d at 1383.

222. *Siegel*, 219 F. Supp. at 791; *Hickox*, 205 F. Supp. 3d at 592–94; *id.* at 603 (dismissing all federal causes of action for damages); *Reynolds*, 488 F.2d at 1383.

223. *See Abbott VI*, 956 F.3d 696, 723 (5th Cir. 2020) (concluding that an exceptional exercise of mandamus relief was warranted because the district court "usurp[ed] . . . the state's power by second-guessing 'the wisdom and efficacy of [its] emergency measures'") (quoting *Abbott II*, 954 F.3d 772, 795 (5th Cir. 2020)); *In re* Rutledge, 956 F.3d 1018, 1027–28 (8th Cir. 2020) (following the Fifth Circuit's reasoning and concluding that state emergency public health measures may only be struck down in rare instances where the measures are pretextual) (citing *Abbott II*, 954 F.3d at 784–85 and Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

224. *Abbott II*, 954 F.3d at 786.

225. *Id.*

Woman's Health not only permits, but requires.[226] The *Jacobson* Court itself, however, referred extensively to the thorough medical justifications for mandatory vaccines as a legitimate exercise of the police powers.[227] Professor Burris, over thirty years before the COVID-19 pandemic began, assumed that for cases in which heightened scrutiny normally applied—like cases implicating the abortion right[228]—heightened scrutiny would also apply in regards to state health actions.[229]

As discussed in Section II.A.1, the Fifth Circuit cited *Kansas v. Hendricks*[230] in its decision to uphold Texas's temporary ban on abortion for the proposition that *Jacobson* relaxes ordinary constitutional scrutiny.[231] However, the *Hendricks* Court only held that constitutional rights of individuals may be restricted in civil contexts.[232] It is also true, as the Fifth Circuit noted, that the Supreme Court has cited *Jacobson* in its abortion jurisprudence, but only for the proposition that constitutional rights are not absolute.[233] Plaintiff abortion providers in *Abbott II* and *Rutledge* did not contend that the abortion right is absolute, only that, under the proportional standard of constitutional scrutiny articulated in *Casey* and *Whole Woman's Health*, the state orders unconstitutionally restrict previability abortions.[234]

In addition to misinterpreting what *Jacobson* required, the Fifth Circuit tipped the scale of the *Jacobson* test by directing the district court to evaluate whether the executive order had a "real or substantial relation" to the public health emergency as a whole, despite the fact that the challenge was an as-

226. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

227. *Jacobson*, 197 U.S. at 23–24.

228. Although the undue burden test is not the most traditional articulation of heightened scrutiny, Justice Breyer made clear in *Whole Woman's Health* that the undue burden test is a higher form of scrutiny than rational basis review. *Whole Woman's Health*, 136 at 2309 ("[The Fifth Circuit's interpretation of the second part of the undue burden test] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable [in other contexts].").

229. Burris, *supra* note 210, at 935.

230. 521 U.S. 346 (1997).

231. *Abbott II*, 954 F.3d 772, 785 (5th Cir. 2020).

232. *Hendricks*, 521 U.S. at 356–57.

233. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

234. *See* Second Am. Compl. 4, *Abbott III*, No. A-20-CV-323-LY, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020) (demonstrating the proportional nature of abortion constitutional analysis by noting that "[t]he Texas Attorney General's enforcement threats are a blatant effort to exploit a public health crisis to advance an extreme, anti-abortion agenda, *without any benefit* to the state in terms of preventing or resolving shortages of PPE or hospital capacity") (emphasis added); Memorandum of Law in Support of Motion for Ex Parte Temporary Restraining Order and/or Preliminary Injunction 26, Little Rock Fam. Plan. Servs. v. Rutledge, No. 4:19-cv-00449-KGB, 2020 WL 2777815 (E.D. Ark. June 26, 2019) (acknowledging that the undue burden test is proportional in nature, but even so, "[p]laintiffs are likely to succeed [on the merits] because the burdens of the COVID-19 Abortion Ban far outweigh its purported benefits.").

applied one.[235] The district court never enjoined enforcement of the executive order in its entirety.[236] Thus, in addition to using an improper mechanism for relief, the Fifth Circuit imposed the incorrect test on the district court.[237] Of course the district court failed to abide by the "spirit of [the *Abbott II*] mandate,"[238] because the spirit of the mandate demanded that the challenge could not stand under the articulated framework.[239] For the reasons outlined above, this articulated framework was incorrect.[240]

B. Orders restricting access to abortion during the COVID-19 pandemic mirror past efforts to restrict the abortion right.

After the Supreme Court decided *Casey* in 1992, anti-abortion advocates designed their strategy to restrict abortion as much as possible within the confines of *Casey*.[241] These strategies reflect a "death by a thousand cuts" approach to curtailing the abortion right, making access to abortion so restricted as to effectively ban it.[242] Anti-abortion legislation generally fall into one of three categories: (1) laws that impose delays on individuals seeking abortions;[243] (2) laws that ban intact D&E abortions;[244] and (3) laws that impose "commonsense" health and safety measures that are actually unnecessary.[245] Laws in this third category, often referred to as TRAP laws, make accessing abortion more difficult in the name of promoting

235. *Abbott II*, 954 F.3d at 787.

236. *See Abbott III*, 2020 WL 1815587, at *6 ("[B]ased on the court's findings of fact, it is beyond question that the Executive Order's burdens outweigh the order's benefits *as applied* to Plaintiffs' provision of (1) medication abortion; and (2) procedural abortions where, in the treating physician's medical judgment, the patient would otherwise be denied access to abortion . . . .") (emphasis added).

237. *Abbott VI*, 956 F.3d 696, 729 n.8 (5th Cir. 2020) (Dennis, J., dissenting in part).

238. *Id.* at 711 (majority opinion).

239. *See Abbott II*, 954 F.3d at 786 (suggesting that the only way this challenge could succeed is if *Jacobson* did not apply at all); *Abbott VI*, 956 F.3d at 724 (Dennis, J., dissenting) ("[T]he majority simply disagrees with the district court's decisions on matters that are squarely within its discretion.").

240. *See supra* Sections II.A.1–2.

241. John A. Robertson, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, 7 U.C. IRVINE L. REV. 623, 626 (2017).

242. Serena Mayeri, *How Abortion Rights Will Die a Death by 1,000 Cuts*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html.

243. Robertson, *supra* note 241, at 626. These laws include informed consent requirements that play out as waiting periods and/or mandatory ultrasound laws. *Id.*

244. *Id.* at 627. This is the type of law that was at issue in *Stenberg v. Carhart* and *Gonzales v. Carhart*. *Id.*

245. *Id.* at 627–28. These laws impose restrictions on abortion clinics that are already subjected to ordinary medical clinic health and safety regulations. *Id.* The heightened requirements often lead to the closure of many abortion facilities. *Id.*

health and safety, but have few actual medical benefits.[246] These laws often lead to the closure of abortion facilities.[247] Because the majority of women seeking abortions have low incomes, the barriers imposed by these laws also reduce the frequency of abortions by inflating the financial and emotional stress of obtaining one.[248] State emergency orders responding to the COVID-19 pandemic, and the judicial decisions upholding enforcement of the orders as applied to abortions, exemplify other TRAP laws imposed since the *Casey* decision.[249] The temporary abortion bans resulting from the orders use delay tactics to essentially eliminate abortions altogether.[250] The orders also impose restrictions on abortion facilities that appear neutral, but actually aim to restrict abortion as much as possible without sufficient medical benefits to warrant such restrictions.[251]

1. State emergency orders diminish the abortion right through delay, possibly to the point of obsolescence.

Using the pandemic as a pretext to cut off abortion access is a political strategy often wielded by anti-abortion advocates.[252] The goal of many TRAP laws is to regulate abortion facilities to the point of obsolescence.[253] Likewise, temporary state abortion bans render performance of abortions an impossibility without severe consequences for abortion providers.[254] Because of the exceptionally time-sensitive nature of pregnancy, temporary bans on abortion can serve as an outright ban.[255] Although state emergency

246. *Targeted Regulation of Abortion Providers*, GUTTMACHER INSTITUTE (Feb. 1, 2021), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

247. Robertson, *supra* note 241, at 627–28.

248. Jenna Jerman, Lori F. Frohwirth, Megan L. Kavanaugh, & Nakeisha Blades, *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 95, 95 (2017), https://www.guttmacher.org/journals/psrh/2017/04/barriers-abortion-care-and-their-consequences-patients-traveling-services.

249. *See infra* Sections II.B.1–2.

250. *See infra* Section II.B.1.

251. *See infra* Section II.B.2.

252. Hill, *supra* note 180, at 100.

253. *Targeted Regulation of Abortion Providers*, *supra* note 246. These laws include regulations applying to doctors' offices including the width of hallways, the size of procedure rooms, and the distance of the office from a hospital. *Id.* It also includes licensing requirements like hospital admitting privileges requirements. *Id.* The Supreme Court ruled some of these requirements unconstitutional for posing an undue burden on a woman seeking an abortion in *Whole Woman's Health v. Hellerstedt*. 136 S. Ct. 2292, 2300 (2016).

254. *Abbott III*, No. A-20-CV-323-LY, 2020 WL 1815587, at *2, *5 (W.D. Tex. Apr. 9, 2020).

255. *Id.* at *7; *Abbott VI*, 956 F.3d 696, 727 (5th Cir. 2020) (Dennis, J., dissenting in part); Robinson v. Att'y Gen., 957 F.3d 1171, 1180 (11th Cir. 2020); *see also* Jackson, *supra* note 158, at 54 (highlighting the unique nature of abortion and the constitutional right to obtain one). *But see Abbott VI*, 956 F.3d at 707 (concluding that the executive order did not operate as a categorical ban on abortion).

orders postponing elective surgeries and procedures appear to neutrally target other types of medical procedures as well,[256] the requirement that an abortion occur within a limited period of time, often by twenty to twenty-two weeks makes abortion unique.[257]

Relying on the purported temporary nature of the state orders allows anti-abortion advocates to feign compliance with the *Casey* and *Whole Woman's Health* undue burden test while impinging on a woman's right to a previability abortion.[258] The Fifth Circuit rejected the notion that the Texas executive order, as applied to abortions, was a categorical ban on abortion for the women who would reach twenty-two weeks LMP—the legal cutoff for obtaining an abortion in Texas—before the expiration of the executive order.[259] To uphold the ban, the court had to find that it was not a categorical ban on abortion, as that would be a clear violation of *Roe*[260] and *Casey*,[261] and that abortions are "elective" or "non-essential" so as to fall within the purview of the state orders.[262] The states defending their orders, therefore, characterized the bans as only temporary delays in abortion access.[263] But this "temporary delay" characterization also fails the undue burden test of *Casey* and *Whole Woman's Health* because the delay is significant enough to impose a substantial obstacle on a woman seeking an abortion.[264] In some cases, the so-called "temporary" order pushed some pregnant patients past the twenty-two weeks LMP cutoff, making it illegal for them to obtain an abortion at all in Texas.[265] Even if the bans are only temporary, the surge of people seeking abortions after the expiration of the temporary ban would lead

256. Some abortion providers in these cases concede that those imposing the orders do not have the express purpose of targeting abortions. Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *3 (6th Cir. Apr. 6, 2020).

257. *See id.* (noting that Ohio's cutoff for obtaining an abortion is twenty-two weeks); *Robinson*, 957 F. 3d at 1180 (noting that Alabama's cutoff for obtaining an abortion is twenty weeks).

258. *See* Hill, *supra* note 180, at 112 ("[By using the words 'elective' or 'non-essential' in most state orders], anti-abortion officials were able to exploit a particular popular understanding of electiveness in the abortion context that would not apply to other medical procedures.").

259. *Abbott VI*, 956 F.3d at 707. The Eighth Circuit also rejected this framing. *In re* Rutledge, 956 F.3d 1018, 1030 (8th Cir. 2020).

260. Roe v. Wade, 410 U.S. 113, 153 (1973).

261. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992).

262. S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 679 (10th Cir. 2020); Pre-Term Cleveland v. Att'y Gen., No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020); Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 918 (6th Cir. 2020); Robinson v. Att'y Gen., 957 F.3d 1171, 1174 (11th Cir. 2020); *Abbott II*, 954 F.3d 772, 777 (5th Cir. 2020); *In re* Rutledge, 956 F.3d 1018, 1023 (8th Cir. 2020).

263. *See, e.g.*, *Slatery*, 956 F.3d at 922; *Abbott VI*, 956 F.3d at 717 (5th Cir. 2020) (noting the temporary nature of the order).

264. Hill, *supra* note 180, at 109.

265. *Abbott III*, No. A-20-CV-323-LY, 2020 WL 1815587, at *5 (W.D. Tex. Apr. 9, 2020)

to even more delays.[266] The fact of the matter is: mandating the delay of all abortions "completely removes the ability of the person affected to exercise her constitutional right to an abortion for as long as the order remains in place."[267]

2. State emergency orders restricting abortion during the pandemic mirror TRAP laws because the emergency orders as applied to abortions have few, if any, medical benefits.

State orders restricting abortions during an emergency health crisis are further similar to TRAP laws in that they provide few medical benefits yet purport to promote health and safety.[268] In the cases of state emergency bans on non-essential medical procedures, including abortion, the health and safety benefits purportedly come in the form of fighting the spread of the pandemic.[269] The orders, however, do not promote the health of either the individual pregnant patients or the general public at risk of contracting COVID-19.[270]

The temporary bans on abortion do not promote the health of pregnant people.[271] In *Abbott II*, the majority acknowledged the possibility of exploitation of the order to advance political anti-abortion goals,[272] and the district court concluded accordingly that the order's burdens beyond question outweighed its benefits as applied to both medication abortions and procedural abortions where delaying the procedure would push the patient past the state cutoff for obtaining an abortion.[273] Health risks for both abortion and pregnancy increase as the pregnancy progresses.[274] As noted by Professor B. Jessie Hill, "[p]regnancy progresses inevitably and relatively quickly . . . ."[275] The longer a pregnancy progresses, the risk of

266. *Id.*

267. Jackson, *supra* note 158, at 54.

268. *See infra* Section II.B.2.

269. Hill, *supra* note 180, at 100–01.

270. *See Abbott III*, 2020 WL 1815587, at *3–6 (detailing findings that the Texas executive order did not further its stated goals and, in fact, imposed an increased health risk on women who would be delayed in obtaining an abortion).

271. *Id. See also* Hill, *supra* note 180, at 112–16 (discussing how the word "elective" is misinterpreted in the context of abortions and how the same misinterpretation is not present in discussions of other types of medical procedures).

272. *Abbott II*, 954 F.3d 772, 792 (5th Cir. 2020).

273. *Abbott III*, 2020 WL 1815587, at *6 (noting that a woman in Texas might be denied access to abortion entirely because either "the patient's pregnancy would reach [twenty-two] weeks LMP by April 21, 2020; or the patient's pregnancy would reach [eighteen] weeks LMP by April 21, 2020, thus requiring abortion care at an ASC and, in the judgment of the treating physician, the patient is unlikely to be able to obtain an abortion at an ASC before the patient's pregnancy reaches the [twenty-two]-week cutoff").

274. *Id.* at *5.

275. Hill, *supra* note 180, at 109.

complications increases—as much as thirty-eight percent per week.[276] Women who passed the gestational age cutoff for either medication abortions, or D&E abortions during the ban would then have to obtain a riskier abortion at a later gestational stage once the order expired, subjecting themselves to higher risk of complications.[277]

Abortion patients rarely need to be hospitalized,[278] and women continuing their pregnancies are actually *more* likely to need and seek out care in a hospital.[279] Pregnant women who could not obtain an abortion would also still need medical care during this period.[280] The Texas order even permitted ordinary in-office visits to continue during the period the executive order was in effect.[281] Additionally, the cost of an abortion increases with gestational age, putting more financial and emotional stress on patients prevented from obtaining an abortion for even a short period of time.[282] This is an especially important factor considering that most women who seek abortions have low incomes.[283] Some women unable to get an abortion in Texas were instead travelling out of state by car and airplane for both medication and procedure abortions.[284] Travelling out of state during a pandemic is a health risk that public officials in every state have acknowledged,[285] but it is not even an option for most women seeking abortions, most of whom are low-income and do not have the expendable funds to travel or potentially miss work, especially when some states have required out-of-state travelers to quarantine for two weeks.[286]

Applying state orders temporarily banning elective procedures to abortion likewise does not promote the health justifications relating to the

276. *Id.* (citing Linda A. Bartlett et al, *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004)).

277. *Abbott III*, 2020 WL 1815587, at *5.

278. *Id.* at *3; Robinson v. Att'y Gen., 957 F.3d 1171, 1181 (11th Cir. 2020).

279. *Abbott III*, 2020 WL 1815587, at *4.

280. *Id.* at *3.

281. *Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic*, TEX. MED. BD. (Mar. 29, 2020), https://med.uth.edu/ortho/wp-content/uploads/sites/60/2020/03/TMB-COVID-19-Elective-Surgery-FAQs-Updated-20200329.pdf (clarifying that "the prohibition does not apply to office-based visits without surgeries or procedures").

282. *Abbott III*, 2020 WL 1815587, at *6.

283. Jerman, *supra* note 248, at 95.

284. *Abbott III*, 2020 WL 1815587, at *5.

285. *See* Sarah Mervosh, Denise Lu, & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (last updated Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (documenting which states had some form of a shelter-in-place order by April 20, 2020).

286. Jerman, *supra* note 248, at 95.

COVID-19 pandemic.[287] The *Abbott III* district court found that application of the executive order to abortions would not even help the state achieve its stated goal of preserving PPE or increasing hospital capacity.[288] Abortions generally are performed in outpatient settings that use few resources; medication abortions are even self-administered at the patient's home.[289] As such, medication abortions do not require any PPE and, on the rare occasion that follow-ups are needed, they occur in outpatient settings, not hospitals.[290] Pre-procedure ultrasounds, required twenty-four hours before an abortion in Texas, use only minimal PPE and were exempt from the order as "office-based visits without surgery or procedures" where "non-invasive diagnostic tests" would be performed.[291] Women continuing their pregnancies are actually more likely to use more hospital resources than women who sought abortions.[292] Women continuing their pregnancies would also need more in-person care—and thus use more PPE—than women who received abortions.[293] Women who would be unable to have an abortion due to the executive orders would require both PPE and hospital space when giving birth.[294]

Abortion-related caselaw requires that the veracity of the purported medical benefits be sufficient to justify an imposition on a woman's right to terminate her pregnancy.[295] Emergency public health jurisprudence also takes the relevance of health benefits into account.[296] As Professor Burris observed, "*Jacobson* was not based on the irrelevance of medical facts but on the overwhelming medical support for smallpox vaccination."[297] The medical justifications for applying state temporary bans on medical procedures to abortion clearly do not have the purported health benefits that anti-abortion advocates claim and must thus be struck down as

287. *Abbott III*, 2020 WL 1815587, at *3–6; *Abbott VI*, 956 F.3d 696, 730–31 (5th Cir. 2020) (Dennis, J., dissenting in part).

288. *Abbott III*, 2020 WL 1815587, at *4.

289. Jackson, *supra* note 158, at 54.

290. *Abbott III*, 2020 WL 1815587, at *3.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at *5.

295. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

296. *See* Jacobson v. Massachusetts, 197 U.S. 11, 35 ("Since then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.").

297. Burris, *supra* note 210, at 962.

unconstitutional TRAP laws that infringe upon the right to terminate a pregnancy, even (and especially) during a pandemic.[298]

C. Looking Ahead: Abortion Regulation Further Into and After the Pandemic

Courts abdicating their role as a check on the political branches is incredibly dangerous during a pandemic.[299] Not only could a lack of judicial review passively condone infringement of civil rights in the present, but it could also affirmatively provide a blueprint for limiting civil rights in the future.[300] Though, nearly a full year later, the Supreme Court vacated both the Sixth and the Fifth Circuits' long-expired orders,[301] the effects of the orders have already been felt. In addition, vacating the orders as moot leaves open the possibility for future orders whose merits are substantively similar.[302]

Some critics have argued that the COVID-19 pandemic may lead to strengthening of the abortion right.[303] This view presumes that issues of gender and racial inequality that the pandemic has exacerbated will lead to a jurisprudential shift in defining the abortion right from one of substantive due process to equal protection.[304] Presumably, this new framework would better allow the abortion right to stand undisturbed where states impose temporary abortion bans in the name of public safety.[305] A classification based on pregnancy, though, is not the same as one based on sex or gender.[306] Thus, under an equal protection analysis, the state orders would only need to survive rational basis review as applied to abortion restrictions.[307] The undue burden test, born from substantive due process, on the other hand, is a form

298. *See supra* Section II.B.2.

299. Wiley & Vladeck, *supra* note 171, at 183.

300. *Id.*

301. Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262, 1263 (U.S. Jan. 25, 2021), *vacating as moot* 956 F.3d 913 (6th Cir. 2020).

302. Adam Lidgett, *High Court Axes COVID-19 Texas, Tenn. Abortion Decisions*, LAW360 (Jan 25, 2021, 6:39 PM), https://www.law360.com/articles/1348088/high-court-axes-covid-19-texas-tenn-abortion-decisions-?_ga=2.170492640.1323691957.1613013748-183638477.1560918015. The Sixth Circuit's order prevented Tennessee officials from imposing a temporary abortion ban, and the Fifth's required enforcement of Texas's temporary ban. *Id.*

303. *See generally* Ariane Frosh, *Reproducing Equality: How COVID-19 Can Strengthen Abortion Rights*, 68 UCLA L. REV. DISCOURSE 80 (2020) (arguing that the COVID-19 pandemic may lead to a shift in the abortion jurisprudence where the right to terminate a pregnancy would be protected under the Equal Protection Clause of the Constitution, rather than the Due Process Clause).

304. *Id.* at 83.

305. *Id.* at 84–85.

306. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

307. *Id.* at 495.

of heightened scrutiny that provides a higher level of protection for the right to have an abortion.[308]

Though such a drastic shift in the Supreme Court's abortion jurisprudence is unlikely,[309] there is historical evidence that a public health crisis like the COVID-19 pandemic may lead to a liberalization of abortion rights.[310] After public health crises like rubella and the scare surrounding the Thalidomide drug, reproductive rights expanded.[311] The COVID-19 pandemic may spark the public's desire to more voraciously protect abortion rights and other civil liberties.[312] One area where this liberalization is likely to take place in the context of the COVID-19 pandemic—and, indeed, already has—is in the in-person requirement for obtaining abortion-inducing medication.[313] Abortion providers in Maryland were initially successful in obtaining an injunction regarding the in-person visits required to receive a medication abortion.[314] Even after the Supreme Court subsequently stayed the injunction, the FDA decided not to enforce the in-person requirements of its own volition.[315] That is not the end of the story, however, as the attorneys general for Indiana, Louisiana, Alabama, Arkansas, Idaho, Kentucky, Mississippi, Missouri, Nebraska, and Oklahoma have asked the Fourth Circuit to let them intervene in the litigation to defend the in-person requirements.[316] In any event, if in-person requirements prove unnecessary and unduly burdensome during a pandemic, perhaps support for eliminating

308. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (clarifying that the undue burden test is a form of heightened scrutiny).

309. This is especially true considering the recent change in the makeup of the Supreme Court, the now six-justice conservative bloc is unlikely to strengthen the abortion right. Ariane de Vogue, *Amy Coney Barrett's Record of Advocating for Limits to Abortion Rights*, CNN (Oct. 6, 2020, 9:00 AM), https://www.cnn.com/2020/10/06/politics/amy-coney-barrett-abortion-record/index.html.

310. *See* Leah Moczulski, *Public Health Crises and Abortion: The Need for a Reinterpretation of the Helms Amendment's "Family Planning" Provision in Light of the Zika Epidemic*, 32 EMORY INT'L L. REV. 289, 292 (2018) (arguing that liberalization of abortion rights have coincided with public health outbreaks across the globe).

311. *Id.* (citing Donald J. Kenney, *Thalidomide-Catalyst to Abortion Reform*, 5 ARIZ. L. REV. 105, 110 (1964)).

312. *Id.* (noting the historical correlation between the liberalization of abortion rights and public health emergencies).

313. Joint Mot. to Hold Appeals in Abeyance 1, 7, ECF No. 103, Am. Coll. of Obstetricians & Gynecologists v. FDA, No. 20-1824 (4th Cir. Apr. 13, 2021).

314. Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d 183, 232 (D. Md. 2020).

315. Joint Motion to Hold Appeals in Abeyance 7, *Am. Coll. of Obstetricians & Gynecologists*, No. 20-1824.

316. Response/Reply Brief of Intervenors-Appellants 15, ECF No. 91, *Am. Coll. of Obstetricians & Gynecologists*, No. 20-1824 (4th Cir. Apr. 14, 2021).

the requirements will gain traction as telemedicine expands beyond the pandemic.[317]

More likely, however, is the probability that the understanding of the abortion right during the COVID-19 pandemic could provide a blueprint for using state emergency police powers to curtail the right in the future.[318] Though the litigation surrounding state emergency orders delaying some medical procedures has seemingly died down, new surges of coronavirus infections may stir up additional litigation.[319] If anti-choice advocates succeed, the suspension of judicial review model, adopted by some courts as a result their interpretation of *Jacobson*, might allow the expansion of the states' police powers to operate as a mechanism to curtail access to abortion (and other civil liberties) for indefinite periods of time.[320] The suspension of judicial review model also prevents the development of strong caselaw around constitutional issues during a public health emergency.[321]

III. CONCLUSION

States are perfectly within their rights to exercise their police powers to protect the health and safety of the public during the COVID-19 pandemic.[322] Some emergency measures chosen by the states may infringe on citizens' constitutional rights—like the right to terminate a pregnancy—but such measures must be reasonable.[323] In analyzing whether a state unconstitutionally banned access to abortion procedures through state orders postponing all elective or non-essential procedures, courts misapplied *Jacobson v. Massachusetts* normatively and descriptively.[324] The functional bans on abortion—even if only temporary—are merely the latest attempt by anti-abortion advocates to restrict abortion to the point of obsolescence.[325] As the pandemic continues ravaging the country, we will likely continue to

317. *See* Jessica Valenti, Opinion, *The Anti-Abortion Movement Can't Use This Myth Anymore*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/opinion/abortion-pill-fda-covid.html; s*ee also Using Telehealth Services*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Updated June 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/telehealth.html (outlining the benefits of telemedicine).

318. *See* Wiley & Vladeck, *supra* note 171, at 183 (arguing that without ordinary judicial review, we run the risk of allowing the government to use emergency measures as a pretext for violating civil rights and citing *Korematsu v. United States* as an example of this problem); *see also* Hill, *supra* note 180, at 119–22 (arguing that a rhetorical reframing of abortions as normal healthcare is necessary to protect the abortion right from unnecessary targeted restrictions).

319. Hill, *supra* note 180, at 110–11.

320. *See supra* Section II.A.1.

321. *See* Cole, *supra* note 170, at 2566.

322. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

323. *Id.* at 26; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992).

324. *See supra* Section II.A.

325. *See supra* Section II.B.

see similar attacks on abortion.[326] Without a restructuring of public emergency jurisprudence and a reframing of the abortion right, the right to an abortion remains extremely vulnerable during the COVID-19 pandemic—and, perhaps, beyond it.[327]

326. *See supra* Section II.C.
327. *See supra* Section II.C.