

Reproductive Rights in the Time of COVID-19

By Autumn Katz, Managing Senior Counsel, U.S. Litigation and Nimra Chowdhry, State Legislative Counsel, U.S. Policy & Advocacy Center for Reproductive Rights, New York, NY

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In the early months of the COVID-19 pandemic, many state officials implemented emergency orders responding to this unprecedented public health crisis. The ostensible purpose of these orders was to reduce the impact and stop the spread of COVID-19. While some states have expanded or protected access to essential abortion care during this time, others sought to use the pandemic as an opportunity to ban some or all abortions. Lawsuits filed by the Center for Reproductive Rights, Planned Parenthood Federation of America, the American Civil Liberties Union, the Lawyering Project, pro bono law firms, and local attorneys were largely successful in blocking these harmful measures and restoring access to abortion care during the COVID-19 pandemic. However, the fight to preserve abortion access is far from over.



Despite being one of the most common and safest procedures performed in the United States,¹ abortion remains one of the most restricted and regulated medical procedures in the country. States have enacted almost 500 medically unnecessary restrictions on abortion care since 2011 alone.² These restrictions have made it increasingly difficult for abortion providers to remain open and push abortion care further out of reach.³ Further, these restrictions exacerbate the already difficult circumstances under which women⁴ seek and access abortion services, including the need to take time away from work, arrange childcare and travel, and pay for the procedure itself, since Medicaid and many private insurance plans do not cover the procedure. Moreover, these circumstances have been further complicated by the COVID-19 pandemic, which has heightened the travel, financial, and other logistical burdens patients face.

Early Responses by State Officials to the COVID-19 Pandemic

At the outset of the pandemic, state and local officials began issuing executive orders and local guidance that were aimed at restricting travel, closing non-essential businesses and temporarily prohibiting or postponing non-urgent, non-essential medical procedures. State actions under the pandemic that impacted abortion care included: (1) carving out explicit protections for reproductive health and advocating to expand abortion access; (2) banning some or all abortion services; or (3) staying silent on the subject. In the first category, a number of states like Massachusetts, Minnesota, New Mexico, and Washington carved out explicit exemptions that allowed for the continued provision of reproductive healthcare, including abortion. For instance, in its guidance requiring hospitals and ambulatory surgical centers to postpone or cancel any nonessential, elective invasive procedures, Massachusetts state officials clearly stated that “terminating a pregnancy is not considered a nonessential, elective invasive procedure.”⁵ Similarly, the New Mexico Department of Health Cabinet Secretary chose to protect “the full suite of family planning services” in that state’s order limiting non-essential healthcare services, procedures, and surgeries.⁶ And Michigan’s Governor Gretchen Whitmer issued restrictions on non-essential medical procedures but noted that “pregnancy-related visits and procedures”

were exempt.⁷ These orders provided abortion providers assurances that their practices would not be impacted by COVID-19 restrictions.

In a similar vein, a coalition of 21 state attorneys general, led by California's Attorney General Xavier Becerra, advocated for expanded access to reproductive healthcare, and specifically abortion care, during the pandemic.⁸ In a letter dated March 30, 2020, the coalition urged the Trump Administration to relax its enforcement of the Risk Evaluation and Mitigation Strategy (REMS) designation of abortion care during the pandemic to allow pregnant people to access medication abortion via telehealth.⁹ The REMS obstructs access to Mifeprex, the first medication taken as part of a medication abortion, by mandating that it be dispensed in person (in a clinic, medical office, or hospital setting) and prohibiting distribution via retail or online pharmacies. The letter argues that relaxing these restrictions would reduce in-person contact and prevent the spread of COVID-19.¹⁰ The state attorneys general further argue that it is critical to remove onerous limitations on healthcare providers, and in light of the pandemic, not doing so would be irresponsible and contrary to the recommendations of leading medical groups.¹¹ Subsequent to the letter, a lawsuit was filed against the Food and Drug Administration challenging the in-person requirement of the REMS to allow retail and online pharmacies to dispense the medication to patients during the pandemic.¹²

Some states were generally silent about the availability of reproductive healthcare in light of various state-issued executive orders. Without explicit restrictions on abortion, providers were able to continue providing care. However, for some providers in states more hostile to abortion, this meant they were operating during the pandemic on high alert, waiting each day to see if their elected officials would force them to shut their doors, turn patients away, and send those patients to travel hundreds of miles in order to reach an available provider.

Efforts to Restrict Abortion During the Pandemic

In at least nine states where executive orders were issued postponing all non-urgent, non-essential, and/or elective medical procedures and surgeries to combat the COVID-19 pandemic, state officials interpreted these orders to prohibit some or all abortion care.¹³ While none of the state orders in question explicitly singled out abortion (rather, they were generally applicable orders that applied across the board to any "non-essential"¹⁴ or "non-emergency"¹⁵ medical procedures), public officials in these states acted swiftly to interpret abortion care as elective and non-essential, and thus prohibited. Unsurprisingly, the states that sought to exploit the public health crisis to block abortion access during the pandemic — including Alabama, Arkansas, Iowa, Louisiana, Ohio, Oklahoma, Tennessee, Texas, and West Virginia — have been trying for years to dismantle abortion access by passing laws banning abortion outright and enacting medically unnecessary restrictions targeting providers and patients.

Alabama, for example, passed one of the most extreme abortion bans in the country in 2019, imposing criminal liability on abortion providers for nearly all abortion care. That law has also been preliminarily blocked.¹⁶ Ohio enacted a similar ban on abortion as early as six weeks of pregnancy in 2019, and Iowa did the same in 2018. Those laws, like Alabama's, have been blocked by court order.¹⁷ And mere months after Tennessee's attempt to curtail abortion access during the ongoing public health crisis, while the state was still battling the coronavirus pandemic, the legislature passed a sweeping bill restricting abortion access in the state. That Tennessee law — which prohibits abortions as early as six weeks and at periodic intervals thereafter, and prevents patients from obtaining an abortion depending on their reason for having the procedure — has been partially blocked by the courts.¹⁸ Bans on abortion, much like abortion restrictions in general, disproportionately impact pregnant people of color, low-income individuals, LGBTQ people, young people, people with disabilities, those who live in rural areas, and others who face continued systematic barriers to healthcare. Abortion bans, particularly in the midst of a global pandemic, are a dangerous tool used to play politics with people's lives by exacerbating systemic inequities, with grave financial and health consequences.

In response to these efforts by public officials to prohibit abortion by means of the state's COVID-19 response, legal groups quickly filed lawsuits on behalf of abortion providers across the country to safeguard their patients' ability to receive timely abortion care during the pandemic. The ensuing litigation moved at a breakneck pace because of the urgency of restoring abortion access as quickly as possible, and because many of the state orders being challenged were set to expire within several weeks of passage.

State Police Powers

The various executive orders prohibiting non-essential or non-urgent procedures were justified by the states as a valid exercise of their broad powers to enact measures for the protection of public health and safety, powers that are at their apex during a public health emergency. Thus, a central issue raised by these lawsuits was whether it was permissible for states to interpret a generally applicable executive order to prohibit abortion, a constitutionally protected right. State officials defending against these lawsuits argued that such extreme measures were necessary to preserve personal protective equipment (PPE), free up hospital staff and equipment to treat the most critically ill patients, and reduce the risk of transmission of COVID-19. In short, these states claimed that halting abortion procedures for several weeks, or for an indeterminate period of time, was a valid and necessary exercise of the states' police powers given the scope and magnitude of the pandemic.¹⁹

In response, the plaintiffs involved in these lawsuits introduced fact and expert testimony showing that abortion is time-sensitive and essential healthcare, and that the state's asserted justifications for barring abortion procedures during the pandemic were contrary to the recommendations of leading medical and public health experts. To begin with, pregnancy, by its very nature, is time-sensitive, and abortion care is time-sensitive for several reasons. *First*, the availability of abortion services is limited, as many states ban the procedure beginning after a certain point in pregnancy. For example, Alabama, Arkansas, Iowa, Louisiana, Ohio, Oklahoma, Tennessee, and Texas all prohibit abortions beyond 22 weeks of pregnancy.²⁰ *Second*, some abortion methods are only available during a finite window of time during pregnancy. Medication abortion, for example, which allows a patient to end an early pregnancy, is only available up to 10 or 11 weeks of pregnancy. *Third*, when patients are delayed beyond the first trimester of pregnancy (when the vast majority of abortions are performed), they face multiple barriers in accessing care, including: (1) increased cost, because the abortion procedure is lengthier and more complex to perform; (2) increased risk of medical complications (although abortion is safe throughout pregnancy and far safer than childbirth, the risks of complications increase with gestational age); and (3) fewer options for receiving care (because far fewer providers offer abortion care later in pregnancy).²¹ Thus, having access to abortion early in pregnancy is critical because delays imposed by state restrictions can make it difficult or even impossible for patients to access care.

Indeed, at the beginning of the COVID-19 outbreak, major medical organizations issued public statements explicitly recognizing that abortion is essential, time-sensitive healthcare that should not be delayed during a public health pandemic.²² As the American College of Obstetricians and Gynecologists, along with seven other leading women's health organizations explained, abortion is an "essential component of comprehensive health care," and "a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible."²³ Patients who are ultimately unable to obtain an abortion face serious "consequences . . . [which can] profoundly impact a person's life, health, and well-being."²⁴ Research shows that being denied a wanted abortion results in women being more likely to experience financial distress,²⁵ and can negatively impact not only the woman's socioeconomic status, but also that of her children.²⁶

Regarding states' asserted rationale for banning abortion care — namely, to conserve PPE and other medical resources and prevent the spread of the disease — the plaintiffs argued that these goals were not actually served by prohibiting abortion care during the pandemic. For one, abortion care is extremely safe and requires only minimal use of PPE. A medication abortion, which involves the patient taking two medications in tandem in a process that feels similar to a miscarriage, simply requires the provider to hand the patient pills to be ingested orally. Typically, the patient takes the first medication in the office and the second medication 48 hours later at home, in a location of her choosing. The dispensing of the pills to the patient at most requires the provider to don a surgical mask and gloves. Procedural abortion (also sometimes referred to as a surgical abortion), is typically performed in an outpatient setting and involves no incision or need for general anesthesia,²⁷ and likewise entails only minimal use of PPE (typically gloves, surgical mask or face shield, and scrubs or a disposable gown). Neither medication nor procedural abortion involves the use of hospital resources needed during the COVID-19 pandemic such as hospital or ICU beds, ventilators, and hospital staff. In addition, by pushing patients to delay abortion care, these executive orders actually had the perverse effect of increasing the need for PPE and hospital resources. When patients seeking abortion are delayed beyond 10 or 11 weeks, they become ineligible for a medication

abortion, which entails the least use of PPE. Moreover, delaying patients can force them into having a longer, more complex procedure, as procedural abortion performed later in the second trimester is typically a two- or three-day procedure, necessitating two to three times the amount of PPE. This in turn means that contact between patients and healthcare providers will be doubled or tripled, creating far greater opportunities for transmission and spread of the virus.

In terms of the states' asserted interest in preventing transmission of the disease, the providers argued that halting abortion services actually had the reverse effect. For patients deprived of the ability to receive an abortion due to a state executive order banning the procedure, the only alternatives both entail increased risk and expense: delay the procedure until later in pregnancy, and undergo a lengthier, more complex, and more expensive procedure for which fewer providers are available; or seek care out-of-state, either by driving or flying significant distances to reach the nearest provider. Of course, forcing patients to undertake risky and expensive travel during a pandemic *increases* rather than decreases the risk of contagion for patients, providers, and third parties, and fails to preserve any PPE.

And for patients unable to either delay their abortions for several weeks until after a statewide ban was lifted, or to travel and receive care from an out-of-state provider, the only other alternative is to remain pregnant and carry an unwanted pregnancy to term. But state officials seemed to disregard the fact that a pregnant patient who is unable to obtain an abortion still requires healthcare services. In fact, at every stage of pregnancy, a pregnant person needs medical care (such as ultrasound imaging, lab tests, and other diagnostic tests) and will require the use of far more PPE over the course of the pregnancy than would be required for abortion care. For instance, a patient who continues the pregnancy to term will need multiple prenatal visits (necessitating multiple encounters with healthcare providers throughout the pregnancy), as well as a multi-day hospital admission for labor and delivery, thus consuming far more PPE and hospital resources than abortion care. Not to mention that people with ongoing pregnancies are more likely to seek treatment in a hospital for a wide range of conditions and are at increased risk for severe illness from COVID-19, as compared to non-pregnant people.²⁸

After considering such evidence, an Alabama district court found that postponing abortion care in the state for a one-month period "would make securing a lawful abortion far more difficult, or even impossible."²⁹ The court further found that "widespread delays" would ensue if the executive order were enforced against abortion providers, and that patients would face "tremendous, and sometimes, insurmountable" obstacles if forced to delay care for the duration of the executive order. In addition, the court explained that obstacles patients face in seeking abortion care, such as "difficulty traveling to clinic," "receiving necessary time off, or child care," would be further "exacerbate[d]" by "a pandemic which has yielded widespread job loss, financial difficulty, and social isolation."³⁰ The district court rejected the state's contention that patients could simply delay their procedures until after the expiration of the order, explaining that only one clinic in Alabama could perform abortions after 14 weeks, and "if widespread delays to abortions [were to] occur, that clinic's limited capacity will likely become a serious barrier that renders lawful abortions entirely unavailable to some women in Alabama."³¹

In the same vein, in denying Ohio's request for emergency relief after a district court granted a preliminary injunction to permit abortion providers to provide care on a case-by-case basis, the Sixth Circuit explained:

There are multiple forms of surgical abortion, all of which are typically provided in a clinical setting rather than a hospital. The first uses the aspiration method, which can be performed up to approximately 15 weeks measured from the first day of the pregnant woman's last menstrual cycle. It requires no incision, general anesthesia, or sterile field. After 15 weeks, a second method, called the dilation and evacuation technique, is used and, depending on how far into the pregnancy it is performed, requires more time in the clinic and uses more PPE. The State argues that the intent of the Director's Order is to preserve PPEs in the immediate near-term, "[s]o the fact that the order might require (some) abortionists to use more PPEs weeks or months from now (in some cases) is really beside the point." But it is not beside the point to question whether the Director's Order deprives a woman of her right to an abortion during the optimal 15-week period during which the aspiration method can be performed.³²

In short, the statewide bans on abortion — rather than preserving scarce resources and protecting public health — had the exact opposite effect.

The Legal Framework

With respect to the relevant legal framework, state officials defending against these lawsuits claimed that their actions were a valid use of the state's police power, relying heavily on a 1905 Supreme Court case concerning a smallpox vaccine mandate. That case, *Jacobson v. Commonwealth of Massachusetts*,³³ reached the Supreme Court after an outbreak of smallpox prompted the city of Cambridge to require its inhabitants to be vaccinated against the disease. The plaintiff argued that the city's compulsory vaccination law — which "subject[ed] him to fine or imprisonment for . . . refusing to submit to vaccination" — was "unreasonable, arbitrary and oppressive" and a deprivation of his personal liberty.³⁴ The Supreme Court acknowledged the plaintiff's liberty interest but noted that the fundamental right to liberty is "not unrestricted," and the state has a countervailing interest in protecting the public health and safety, especially during an epidemic.³⁵ Of course, just as an individual's right to liberty is not unfettered, neither is a state's power to enact regulations.³⁶ After considering the competing interests at stake, the *Jacobson* Court explained that, where a state passes legislation "purporting . . . to protect the public health," the challenged provision must have a "real or substantial relation to those objects."³⁷ A statute that is "beyond question, a plain, palpable invasion of rights secured by the fundamental law" will not pass constitutional muster.³⁸ Likewise, if a statute is otherwise "in palpable conflict" with a right secured by the Constitution, "it cannot be affirmed."³⁹

The states involved in COVID-19 litigation argued that *Jacobson* requires courts to uncritically defer to state officials with respect to measures purporting to protect public health and safety. In response, plaintiffs challenging these COVID-19 related abortion bans questioned *Jacobson's* relevance, given the long line of Supreme Court precedent affirming an individual's right to abortion prior to viability. Indeed, *Jacobson* was decided many decades before *Roe v. Wade* and *Planned Parenthood v. Casey*, cases in which the Court recognized and reaffirmed that the Constitution protects a woman's liberty interest in deciding whether to end a pregnancy, and that states may not enact legislation that creates an undue burden for patients seeking to exercise that fundamental right.⁴⁰ Under this unwavering precedent, plaintiffs argued, states cannot impose a ban on the procedure, even during a pandemic. Plaintiffs further argued that, even taking into consideration the Supreme Court's opinion in *Jacobson* — which recognized that some restrictions on individual liberty may be permissible in order to protect the public health — an outright ban on abortion constituted "a plain, palpable invasion of rights secured by the fundamental law," and therefore failed constitutional review under *Jacobson*.

The Sixth Circuit, grappling with the application of *Jacobson* to Tennessee's statewide mandate prohibiting all procedural abortions, first observed that "asking a person to get a vaccination, on penalty of a small fine, is a far cry from forcing a woman to carry an unwanted fetus against her will for weeks, much less all the way to term."⁴¹ The Sixth Circuit went on to explain that "[w]ere there no public health crisis, [] the analysis would be relatively straightforward," because a ban on "all procedural abortions for a three-week period" clearly constitutes an undue burden.⁴² But as the court explained, the outcome would not be altered because, "even accepting *Jacobson* at face value. . . . prevent[ing] a woman from exercising her right in-state altogether, or [] require[ing] her to undergo a more invasive and costlier procedure tha[n] she otherwise would have — constitutes — beyond question, a plain, palpable invasion of rights."⁴³ Turning to Tennessee's purported justification for its executive order, the Sixth Circuit explained that "halting procedural abortions for a three-week period" would, at best, result in a paltry amount of PPE saved," and characterized the state's "bold assertions" about the dire harms that would ensue if the executive order were enjoined as "nothing more than the State's say-so."⁴⁴ A district judge for the Western District of Oklahoma referenced similar concerns about how to balance the competing arguments raised by the parties and the difficulties facing courts during the pandemic: "This case raises an issue that has long been a source of struggle for the courts: the proper use of the judicial power in reviewing laws and executive orders or actions taken in response to a public health emergency."⁴⁵

The Sixth Circuit largely upheld the injunction against Tennessee's executive order,⁴⁶ as did the Tenth and Eleventh Circuits against executive orders in Oklahoma and Alabama, respectively. In contrast, the Courts of Appeal for the Fifth and Eighth Circuits reversed lower court orders that prevented state officials from enforcing executive orders in Texas and Arkansas against abortion providers,

finding that *Jacobson* controlled and the lower courts had erred by “second-guess[ing] the state’s policy choices in crafting emergency public health measures.”⁴⁷

Regardless, for the hundreds of patients looking to access abortion care in the midst of a global pandemic, the rapidly shifting legal status of abortion in these states sowed confusion and uncertainty, even in states where litigation ultimately proved successful. Texans seeking abortion care were among the hardest hit, stymied by multiple barriers and daunting travel distances. When the executive order first took effect, and with each subsequent reversal of the district court’s injunction by the Fifth Circuit Court of Appeals, Texas providers were forced to cancel multiple appointments, throwing patient care into disarray.⁴⁸ According to researchers at the University of Texas at Austin, the ban imposed by the Texas executive order meant that approximately one-third (35 percent) of patients were pushed from having a first-trimester abortion to a second-trimester abortion.⁴⁹ In addition to noting the negative impacts of the delays faced by Texas patients, the Texas researchers explained that Texas abortion patients were faced with serious travel burdens: 94 percent of Texas counties are located at least 100 miles from the nearest out-of-state abortion facility, and approximately three-quarters are over 200 miles away.⁵⁰ Thus, according to a report from the Guttmacher Institute, Governor Greg Abbott’s shutdown of abortion services within the state meant that the average driving distance for a patient seeking abortion increased by nearly 2,000 percent (from an average of 12 miles to the nearest in-state abortion provider to an average of 243 miles to the nearest out-of-state provider).⁵¹ As explained in the Guttmacher Report, the patients most acutely harmed by the prohibition on abortion procedures were low-income women and single parents, who typically cannot afford to take time off work or pay the increased travel costs for obtaining abortion care out of state. A CNN reporter described how one Texas patient ended up traveling all the way to Los Angeles in order to obtain abortion care.⁵² Another Texas patient who was prevented by Governor Abbott’s order from obtaining care in her home state ended up driving 12 hours to Denver in order to have her medication abortion, and described how she drove straight through the night on her way home and avoided “tak[ing] breaks or rest[ing],” because she was afraid of having the abortion in the car.⁵³

Of course, patients who managed to navigate the rapidly shifting legal landscape and obtain abortion care during the pandemic still had to contend with a host of other burdens. Most abortion patients are low-income and struggle to arrange for time off work, childcare, transportation, and other logistical difficulties. In a global pandemic, these burdens were compounded by rising unemployment, financial insecurity, school closures, limited childcare options, and the increased risks of travel. In addition, patients forced to seek care out-of-state were faced with increased travel burdens along with the logistical challenges of arranging such travel.

Moreover, even in states where abortion providers were not affected by state-mandated closures, patients nonetheless faced obstacles, as some clinics stop taking new appointments or delayed patients’ appointments in order to not overwhelm and crowd the clinics.

State Litigation Status and Outcomes

Alabama⁵⁴

- **Current status: Injunction granted and upheld by Court of Appeals; new state order subsequently issued allowing abortion care to continue.**
- On March 27, 2020 Alabama issued a state order that could be enforced to prohibit abortion as an elective/non-essential procedure.
- Plaintiffs filed suit on March 29 seeking to block enforcement of the state’s order as applied to abortion clinics.
- On April 12, the district court preliminarily enjoined Alabama’s abortion ban, allowing abortion procedures on a case-by-case basis, taking into account a variety of individualized factors and the providers’ reasonable medical judgment.
- The state appealed the district court’s preliminary injunction to the U.S. Court of Appeals for the Eleventh Circuit. On April 23, the Eleventh Circuit denied the state’s request to reinstate the executive order pending appeal and agreed to hear the state’s

appeal on an expedited schedule.

- On April 28, Alabama issued a new state order permitting most medical procedures (including abortion) to proceed unless the procedure “would unacceptably reduce access to personal protective equipment or other resources necessary to diagnose and treat COVID-19.”
- Subsequently, the parties jointly agreed to dismiss the appeal because the original order expired on April 30, rendering the preliminary injunction moot.

Arkansas⁵⁵

- **Current status: Injunction granted by district court but reversed by Court of Appeals. New state order later issued permitting procedural abortions for patients able to show negative test results for COVID-19. Medication abortion not impacted.**
- On April 3, 2020 the Arkansas Department of Health issued a directive requiring procedures that could safely be postponed to be rescheduled for a later date. On April 10, the Department issued a cease-and-desist letter stating that the directive required the postponement of all non-emergency procedural abortions.
- Plaintiffs filed suit on April 13 challenging Arkansas’s procedural abortion ban.
- On April 14, the district court temporarily blocked Arkansas’s procedural abortion ban.
- On April 15, the state petitioned for emergency relief to the U.S. Court of Appeals for the Eighth Circuit, seeking to reverse the district court’s order.
- On April 22, a three-judge panel of the Eighth Circuit ruled 2-1 to grant the state’s petition for emergency relief to reverse the district court and reinstate Arkansas’s non-emergency procedural abortion ban.
- On April 27, Arkansas issued a new state order permitting elective procedures (including non-emergency procedural abortions) to continue if patients test negative for COVID-19 48 hours beforehand.
- On May 1, plaintiffs asked the district court to issue a new restraining order against the testing requirement in the state’s April 27 order for those patients who would be pushed past the legal limit for abortion care in Arkansas.
- On May 7, the district court denied plaintiffs’ request for a new restraining order, concluding that the requirement was likely constitutional.
- Plaintiffs subsequently moved to voluntarily dismiss the case, citing new Arkansas regulations extending the window for a patient to test negative for COVID-19 to 72 hours prior to a procedural abortion. Dismissal without prejudice was granted June 11, 2020.

Louisiana⁵⁶

- **Current status: The parties reached a settlement allowing abortion care to continue.**
- On March 21, 2020 the Louisiana Department of Health issued an order stating that “any and all medical and surgical procedures SHALL be postponed until further notice” except for procedures necessary to “(i) treat emergency conditions, or (ii) to avoid further harms from an underlying condition.”⁵⁷ Subsequently, the Department of Health and Louisiana attorney general announced that they would enforce this order against abortion providers.
- Plaintiffs filed suit on April 13 challenging Louisiana’s attempt to use the executive order to close abortion clinics.

- On April 30, the parties settled, allowing abortion care to continue in the state. Plaintiffs subsequently dismissed their case.

Ohio⁵⁸

- **Current status: Injunction granted and Ohio's appeal rejected by Court of Appeals; abortion providers subsequently permitted to provide services under new state order (medication abortion not affected).**
- On March 17, 2020 Ohio issued a state order postponing all "non-essential surgeries and procedures."⁵⁹ On March 20, the Ohio Attorney General's office sent cease-and-desist letters to Ohio abortion clinics ordering them to stop performing non-emergency procedural abortions and claiming they were in violation of the order.
- Plaintiffs filed suit on March 30 challenging Ohio's procedural abortion ban.
- On March 30, the district court temporarily blocked Ohio's abortion ban, allowing providers to determine on a case-by-case basis which procedural abortions should be postponed and which should proceed.
- On April 6, the U.S. Court of Appeals for the Sixth Circuit rejected the state's appeal and continued to block the ban on abortion.
- On April 23, the district court preliminarily enjoined Ohio's abortion ban, allowing providers to determine on a case-by-case basis which procedural abortions should be postponed and which should proceed (based on gestational age, risks to the patients' life and health, and other medical reasons).
- On May 1, a new state order went into effect that allowed procedural abortion to resume.

Oklahoma⁶⁰

- **Current status: Injunction granted and state's emergency appeal rejected; new executive order issued permitting abortion care to resume.**
- On March 24, 2020 Governor Kevin Stitt issued an executive order postponing "all elective surgeries, [and] minor medical procedures."⁶¹ On March 27, Governor Stitt issued a press release explicitly stating that all non-emergency abortions must be postponed.⁶²
- Plaintiffs filed suit on March 31 challenging Oklahoma's abortion ban.
- On April 6, the district court temporarily blocked Oklahoma's abortion ban, allowing abortion providers to resume: (i) all medication abortions, and (ii) procedural abortions for any patient who would be barred under state law from having an abortion after the scheduled expiration of the executive order.
- On April 13, the U.S. Court of Appeals for the Tenth Circuit denied the state's attempt to appeal the district court's temporary order.
- On April 16, Oklahoma issued a revised state order that continued to postpone non-emergency abortions.
- On April 20, the district court preliminarily enjoined Oklahoma's abortion ban, allowing most abortion care to continue effective immediately, and allowing abortion care to resume fully starting April 24.
- The state appealed to the U.S. Court of Appeals for the Tenth Circuit. On April 27, the Tenth Circuit denied the state's request to stay the preliminary injunction pending appeal and denied the state's request to expedite the appeal.
- On August 18, the Tenth Circuit dismissed the case as moot after the expiration of the executive orders.

Tennessee⁶³

- **Current status: Injunction granted by district court and affirmed by Court of Appeals (medication abortion not impacted). The state has asked the Supreme Court to vacate the Court of Appeals' decision.**
- On April 8, 2020 Governor Bill Lee issued an executive order stating that “[a]ll healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent[.]”⁶⁴
- Plaintiffs filed suit on April 13 challenging Tennessee’s effective ban on procedural abortions.
- On April 17, the district court preliminarily enjoined Tennessee’s procedural abortion ban.
- Tennessee appealed; on April 20, a three-judge panel of the Sixth Circuit denied the state’s request for an administrative stay of the district court’s decision.
- On April 24, the Sixth Circuit affirmed the preliminary injunction in a 2-1 decision, and on May 14, the court denied the state’s request for rehearing *en banc*.
- On October 8, the state filed a cert petition, asking the United States Supreme Court to vacate the Sixth Circuit’s judgment and remand the case to the district court with instructions to dismiss the providers’ case as moot. The petition will be distributed for the Court’s consideration in January 2021.

Texas⁶⁵

- **Current status: Injunctions granted by district court but reversed on two occasions by Court of Appeals. Abortion providers eventually permitted to provide services under new state order. Texas providers have asked the Supreme Court to vacate the Court of Appeals’ decisions.**
- On March 22, 2020 Governor Abbott issued an executive order postponing “all surgeries and procedures that are not immediately medically necessary.”⁶⁶ The Texas attorney general issued a press release the next day suggesting that the provision of non-emergency abortions would violate the Executive Order.⁶⁷
- Plaintiffs filed suit on March 25 challenging Texas’s abortion ban.
- On March 30, the district court temporarily blocked Texas’s abortion ban.
- On April 7, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit reversed and granted the state’s petition for emergency relief to reinstate Texas’s abortion ban. The Court of Appeals then remanded the case back to the district court.
- Plaintiffs again sought injunctive relief from the district court and on April 9, the court again temporarily blocked Texas’s abortion ban, allowing abortion providers to resume (i) all medication abortions, and (ii) procedural abortions for any patient who would be barred from having an abortion after the scheduled expiration of the executive order.
- On April 10, the Fifth Circuit three-judge panel issued an administrative stay of the district court’s decision, which had the effect of reinstating Texas’s abortion ban.
- On April 11, plaintiffs asked the U.S. Supreme Court to take emergency action and restore access to medication abortion in Texas.
- On April 13, the Fifth Circuit issued an order permitting medication abortion to temporarily resume in Texas; plaintiffs subsequently withdrew their request for relief from the Supreme Court.
- On April 15, Texas issued a new state order continuing to prohibit all non-emergency abortions.

- On April 20, a three-judge panel of the Fifth Circuit again granted the state's petition for emergency relief, reversing the district court's second temporary restraining order and reinstating Texas's abortion ban except as to patients who would be past the legal gestational age for abortion in Texas by the time the executive order was set to expire.
- On April 21, a new state order went into effect in Texas with a broader exception for healthcare providers.
- In a court filing on April 22, Texas confirmed that the new state order exempted abortion providers, who were able to resume providing services under the new executive order.
- On September 3, plaintiffs asked the Supreme Court to vacate the Fifth Circuit's decisions. The petition will be distributed for the Court's consideration in January 2021.

West Virginia⁶⁸

- **Current status: Patients able to receive abortions under West Virginia's state order.**
- On March 31, 2020 Governor Jim Justice issued an order indefinitely banning "all elective medical procedures," defined as those "not immediately medically necessary to preserve the patient's life or long-term health."⁶⁹ On April 2, the attorney general stated that this order prohibits both procedural and medication abortion.
- Plaintiffs filed suit on April 24 challenging West Virginia's abortion ban.
- On April 30, a new state order went into effect that allowed abortion to resume. On May 6, the parties voluntarily dismissed the case.

Looking Ahead at the Future of Abortion Access in the United States

At the time of this article's drafting, COVID cases are once again on the rise. Thus far, no state has moved to reinstate any executive orders prohibiting "elective" or "non-essential" procedures. However, in order for abortion care to remain accessible not only during the pandemic but more generally, states and the federal government must take action to eliminate medically unnecessary and burdensome barriers that curtail abortion access, such as biased counseling laws; funding and insurance restrictions that preclude coverage for medically necessary care; notification and consent requirements for minors; and prohibitions on abortion by telemedicine. Measures like these mean that for many — especially poor and marginalized individuals — the right to abortion exists only in theory, and not in practice. It is time for states and the federal government to recognize the essential nature of abortion care and stop playing politics with people's lives.

- 1 See Raymond, E. et al, *Mortality of induced abortion, other outpatient surgical procedures and common activities in the United States*, 90 *Contraception* 476 (2014).
- 2 Nash, E., *Unprecedented Wave of Abortion Bans is an Urgent Call to Action*, Guttmacher Inst. (May 2019), available at <https://www.guttmacher.org/article/2019/05/unprecedented-wave-abortion-bans-urgent-call-action>. See also Comm. on Health Care for Underserved Women, ACOG Comm. Op. No. 815, *Increasing access to abortion*, 136(6) *Obstet. & Gynecol.* e107-15, 108-09 (December 2020), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2020/12/increasing-access-to-abortion.pdf> (noting the "dramatic increase" of "legislative measures restricting abortion" in recent years, and stating that the American College of Obstetricians and Gynecologists opposes medically unnecessary restrictions on abortion because they "improperly regulate medical care and do not improve patient safety or quality of care").
- 3 See, e.g., Ctr. for Reproductive Rights, *What if Roe Fell* (2020), <https://reproductiverights.org/what-if-roe-fell> (last visited Nov. 30, 2020); Nash, E., *Abortion rights in peril - what clinicians need to know*, 381 *N. Engl. J. Med.* 497 (2019), available at https://www.nejm.org/doi/10.1056/NEJMp1906972#article_citing_articles.

- 4 The words “women” and “woman” are used throughout this article to describe patients or individuals who are pregnant or may become pregnant. The authors recognize that individuals seeking pregnancy and abortion care are highly diverse and include transgender and gender non-binary people, who often face heightened barriers in accessing healthcare services.
- 5 Mem. from Elizabeth Kelley, Bureau of Health Care Safety and Quality, Mass. Dep’t of Pub. Health to Mass. Hosp. Chief Exec. Officers and Adm’rs, Ambulatory Surgical Ctrs. re: Nonessential, Elective Invasive Procedures in Hosps. and Ambulatory Surgical Ctrs. during the COVID-19 Outbreak (Mar. 15, 2020), *available at* <http://www.massmed.org/Patient-Care/COVID-19/Nonessential-Elective-Invasive-Procedures-in-Hospitals-and-Ambulatory-Surgical-Centers-during-the-COVID-19-Outbreak--MEMO/>.
- 6 New Mexico Dep’t of Health, Pub. Health Emergency Order Imposing Temporary Restrictions on Non-Essential Health Care Servs., Procedures, and Surgeries; Providing Guidance on those Restrictions; and Requiring a Report from Certain Health Care Providers (Mar. 24, 2020); *available at* <https://www.nmhealth.org/publication/view/rules/5702/>.
- 7 Exec. Order No. 2020-17: Temporary restrictions on non-essential medical and dental procedures (RESCINDED), *available at* https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522451--,00.html.
- 8 Letter from Xavier Becerra, Cal. Attorney Gen., et al. to Alex Azar, Sec’y of U.S. Dep’t of Health & Human Servs. (Mar. 30, 2020), *available at* <https://www.oag.ca.gov/system/files/attachments/press-docs/FINAL%20AG%20Letter%20HHS%20Medication%20Abortion%202020%20%289%29%5B1%5D.pdf>.
- 9 REMS is a statutory designation that allows the U.S. Food and Drug Administration to issue additional restrictions on medications beyond those already provided by the drug’s labeling. 21 U.S.C.A. § 355(p).
- 10 *Id.* at 3-4; *see also* Raymond, E., et al., *Sixteen Years of Overregulation: Time to Unburden Mifeprex*, 376 *New Eng. J. Med.* 790 (2017).
- 11 *See* state attorneys general letter at 2, citing recommendations of the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Academy of Family Physicians. In fact, 13 states already allow the use of abortion care via telemedicine for clinicians enrolled in a study of abortion via telehealth. Gynuity Health Projects, *TelAbortion, For Providers & Allies* (2020), <https://telabortion.org/about/for-providers>.
- 12 The in-person dispensing requirement, which had been blocked by court order for the duration of the COVID-19 public health emergency, is currently in effect. *See Am. Coll. Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 8:20-cv-01320-TDC, 2020 WL 7240396 (D. Md. Dec. 9, 2020), *stay of prelim. inj. granted by* No. 20A34, 2021 WL 99362 (U.S. Jan. 12, 2021).
- 13 In addition, elected officials in a handful of other states made public statements indicating that executive orders halting non-essential healthcare in their states would apply to abortion care, but ultimately providers were able to continue providing care under those state orders without interruption. *See, e.g.,* Hensley, E., *Mississippi’s only abortion clinic still open, but a legal battle could be on the horizon*, *available at* <https://mississippitoday.org/2020/04/16/mississippis-only-abortion-clinic-still-open-but-a-legal-battle-could-be-on-the-horizon/>.
- 14 *See, e.g.,* Ohio Dep’t of Health, *Director’s Order for the Management of Non-essential Surgeries and Procedures throughout Ohio*, *available at* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/directors-order-non-essential-surgery-3-17-2020>.
- 15 *See, e.g.,* State of Tennessee, Executive Order 25: *An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures*, <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf>.
- 16 *Robinson v. Marshall*, 2:19-cv-00365-MHT-SMD (M.D. Ala. Oct. 29, 2019); <https://law.justia.com/cases/federal/district-courts/alabama/almdce/2:2019cv00365/69868/68/>.

- 17 *Preterm-Cleveland v. Yost*, 1:19-cv-00360-MRB (S.D. Oh. July 3, 2019); <https://www.courthousenews.com/wp-content/uploads/2019/07/ohio-abortion.pdf>.
- 18 *Memphis Center for Reproductive Health v. Slatery*, NO. 3:20-cv-00501 (M.D. Tn. July 13, 2020); <https://reproductiverights.org/press-room/tennessee-abortion-ban-blocked-federal-court-minutes-after-being-signed-law>.
- 19 See, e.g., *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020), *petition for cert. docketed*, No. 20-482 (U.S. Oct. 14, 2020).
- 20 Guttmacher Inst., *State Bans on Abortion Throughout Pregnancy* (Dec. 1, 2020), available at <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>.
- 21 See, e.g., The Nat'l Acads. of Scis., Engg, and Med., *The Safety and Quality of Abortion Care in the United States*, 97, 116 (2018).
- 22 Ctr. for Reproductive Rights and Columbia Univ. Mailman Sch. of Pub. Health, *Abortion is Essential Healthcare* (New York: 2020), available at <https://reproductiverights.org/sites/default/files/documents/USP-COVID-FS-Interactive-Update.pdf>. See also *In re Abbott*, Brief of American College of Obstetricians and Gynecologists, American Medical Association, and other Nationwide Organizations of Professionals as *Amici Curiae* in Opposition to the Petition for a Writ of Mandamus, No. 20-50264 (5th Cir. 2020), available at https://www.plannedparenthood.org/uploads/filer_public/99/48/994883ad-d170-47a4-8147-5a6e82e9cf0a/00515370632_-_2020-04-02_-_acog_ama_et_al_amicus_brief.pdf.
- 23 Am. Coll. of Obstetricians & Gynecologists, *Joint Statement on Abortion Access During the COVID-19 Outbreak*, Mar. 18, 2020, <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.
- 24 *Id.*
- 25 Foster, D., et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Public Health 407 (2018).
- 26 Foster, D., et al., *Comparison of health, development, maternal bonding, and poverty among children born after denial of abortion vs after pregnancies subsequent to an abortion*, 172 JAMA Pediatr. 1053 (2018).
- 27 See generally The Nat'l Acads. of Scis., Engg, and Med., *The Safety and Quality of Abortion Care in the United States* (2018) 6, 8-11, 14, 29, 31, 33, 60, 79; available at <https://www.nap.edu/download/24950#>.
- 28 Ctrs. for Disease Control and Prevention, *Pregnancy, Breastfeeding, and Caring for Newborns* (Dec. 18, 2020); available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html>.
- 29 *Robinson v. Marshall*, 2:19-cv-00365-MHT-SMD (M.D. Ala. Apr. 19, 2020); <https://law.justia.com/cases/federal/district-courts/alabama/almdce/2:2019cv00365/69868/68/>.
- 30 *Id.*
- 31 *Id.*
- 32 *Pre-Term Cleveland v. Attorney General of Ohio*, Case No. 20-3365, 3-4 (6th Cir. Apr. 6, 2020); <https://ij.org/wp-content/uploads/2020/04/6th-Cir.-Pre-term-Cleveland-order.pdf>.
- 33 197 U.S. 11 (1905).
- 34 *Jacobson*, 197 U.S. at 26.
- 35 *Id.* at 26-27, 25.

- 36 See, e.g., *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020) (“But just as constitutional rights have limits, so too does a state’s power to issue executive orders limiting such rights in times of emergency.”).
- 37 *Id.* at 31.
- 38 *Id.*
- 39 *Id.*
- 40 See *Roe*, 410 U.S. 113, 152-53 (1973); *Casey*, 505 U.S. 833, 874 (1992).
- 41 *Adams & Boyle, PC*, 956 F.3d at 926.
- 42 *Id.* at 924.
- 43 *Id.* at 926 (quoting *Jacobson*, 197 U.S. at 31).
- 44 *Id.*
- 45 *South Wind Women’s Ctr. LLC v. Stitt*, No. 5:20-cv-00277, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020), available at <https://www.courthousenews.com/wp-content/uploads/2020/04/ok-abortion.pdf>.
- 46 The Sixth Circuit affirmed the district court order but narrowed the scope of the injunction, allowing abortions to go forward for those patients who would be timed out as a result of the executive order; or who would be forced to undergo a more complex/lengthier/two-day procedure. *Adams & Boyle, PC*, 956 F.3d at 929-30.
- 47 *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).
- 48 See *infra* at n. 65 for a summary of the legal challenge to Texas’ executive order.
- 49 White, K., et al., Texas Policy Evaluation Project, Research Brief: *The potential impacts of Texas’ executive order on patients’ access to abortion care* (March 2020); <http://sites.utexas.edu/txpep/files/2020/03/TxPEP-Research-Brief-Executive-Order-3-31-20.pdf>.
- 50 *Id.*
- 51 Bearak, J., et al., *COVID-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care* (Apr. 23, 2020), available at <https://www.guttmacher.org/article/2020/04/covid-19-abortion-bans-would-greatly-increase-driving-distances-those-seeking-care> (“the Guttmacher Report”).
- 52 Almond, K. & Wehelie, B., *She tried to get an abortion during the pandemic. Her state wouldn’t allow it*, <https://www.cnn.com/interactive/2020/06/health/abortion-access-coronavirus-cnnphotos/>.
- 53 Tavernise, S., *‘Overwhelmed and Frustrated’: What It’s Like Trying to Get an Abortion in Texas* (Apr. 14, 2020), available at <https://www.nytimes.com/2020/04/14/us/abortion-texas-coronavirus.html>.
- 54 *Robinson v. Marshall*, 454 F. Supp. 3d 1188 (M.D. Ala. 2020), application for stay denied by *Robinson v. Att’y Gen.*, 957 F.3d 1171 (11th Cir. 2020).
- 55 *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449, 2020 WL 1862830 (E.D. Ark. 2020); *In re Rutledge*, No. 20-1791, 2020 WL 1933122 (8th Cir. 2020).
- 56 *June Med. Servs. v. Russo*, No. 3:20-cv-00229 (M.D. La. 2020).

- 57 Louisiana Department of Health, *Healthcare Facility Notice/Order, Notice #2020-COVID-19-ALL-007*, Mar. 21, 2020, available at <https://ldh.la.gov/assets/oph/Coronavirus/resources/providers/LDH-UPDATED-Notice-Med-Surg-Procedures.32120.pdf> (emphasis in original).
- 58 *Preterm-Cleveland v. Att’y Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020), *appeal dismissed*, No. 20-3365 (6th Cir. Apr. 6, 2020).
- 59 Amy Acton, Director Ohio Dep’t of Health, RE: Director’s Order for the Management of Non-Essential Surgeries and Procedures throughout Ohio (Mar. 17, 2020), available at https://coronavirus.ohio.gov/wps/wcm/connect/gov/e7cee147-Of86-438b-aelf-c5922f46c47c/Director%27s+Order+non-essential+surgery+3-17-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_MIHGGIKON0J000QO9DDDDM3000-e7cee147-Of86-438b-aelf-c5922f46c47c-n3GxdDg.
- 60 *South Wind Women’s Ctr. LLC v. Stitt*, No. 5:20-cv-00277, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020), *appeal from TRO denied*, No. 20-6045 (10th Cir. Apr. 13, 2020), *appeal dismissed as moot*, No. 20-6055, 2020 EL 4782347, at *2 (10th Cir. Aug. 18, 2020).
- 61 Fourth Amended Executive Order 2020-07, State of Oklahoma (Mar. 24, 2020), available at <https://www.sos.ok.gov/documents/executive/1919.pdf>.
- 62 *Governor Stitt Clarifies Elective Surgeries and Procedures Suspended Under Executive Order* (Mar. 27, 2020), available at https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries.
- 63 *Adams & Boyle, P.C. v. Slatery*, 455 F. Supp. 3d 619 (M.D. Tenn. 2020), *aff’d*, 956 F.3d 913 (6th Cir. 2020), *reh’g en banc denied* (6th Cir. May 14, 2020), *petition for cert. docketed*, No. 20-482 (U.S. Oct. 14, 2020).
- 64 Exec. Order No. 25, An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures (Apr. 8, 2020), available at <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee25.pdf>.
- 65 *Planned Parenthood Ctr. for Choice v. Abbott*, 450 F. Supp. 3d 753 (W.D. Tex. 2020); *mandamus granted by* 954 F.3d 772 (5th Cir. 2020); *Planned Parenthood Ctr. for Choice v. Abbott* No. 20-cv-00323, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020); *stay granted in part by In re Abbott*, No. 20-50296, 800 Fed. App’x 293 (5th Cir. Apr. 10, 2020); *emergency application filed, Planned Parenthood Ctr. for Choice v. Abbott*, No. 19A1019 (U.S. Apr. 11, 2020); *stay granted in part and denied in part, In re Abbott*, No. 20-50296, 809 Fed. App’x 200 (5th Cir. Apr. 13, 2020); *mandamus granted and order vacated in party by* 956 F.3d 696 (5th Cir. 2020); *petition for cert. docketed, Planned Parenthood Ctr. for Choice v. Abbott*, No. 20-305 (Sept. 3, 2020).
- 66 Gov. Greg Abbott, Exec. Order GA 09, *Relating to hospital capacity during the COVID-19 disaster* (Mar. 22, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.
- 67 Health Care Prof’ls & Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all>.
- 68 *Women’s Health Ctr. of W. Va. v. Morrissey*, 2:20-cv-00293 (S.D.W.V. 2020).
- 69 Gov. Jim Justice, Exec. Order No. 16-20 (Mar. 31, 2020), available at <https://apps.sos.wv.gov/adlaw/executivejournal/readpdf.aspx?DocID=89754>.

About the Authors

Autumn Katz is the Managing Senior Counsel for the Center for Reproductive Right's U.S. Legal Program. She has litigated multiple cases in state and federal courts across the United States, including challenges to mandatory waiting period laws, a ban on state Medicaid funding for abortion, and a requirement that fetal and embryonic tissue resulting from an abortion or miscarriage be buried or cremated. Prior to joining the Center in 2012, Ms. Katz was a litigator at Dewey & LeBoeuf LLP, where she devoted a significant amount of time to pro bono matters involving civil and constitutional rights. She graduated *cum laude* from the University of Michigan Law School and received her B.A. in International Studies from Washington University. She can be reached at akatz@reprorights.org.

Nimra Chowdhry is a legislative and policy attorney with experience working in federal, state, and local public policy as an advocate for pregnant people, people of color, young people, and immigrants. In her current role, Ms. Chowdhry is State Legislative Counsel at the Center for Reproductive Rights, where she focuses on regulations and legislation impacting abortion care across the country. Prior to her work at the Center, she worked with Advocates for Youth and the National Asian Pacific American Women's Forum, where she advanced Reproductive Justice policies for Muslim and immigrant youth and the Asian American community. Since 2018, she has served on the national board of directors for SIECUS: Sex Ed for Social change. Ms. Chowdhry graduated from the University of Houston Law Center and received her B.A. in Government and Women's and Gender studies from the University of Texas. She can be reached at nchowdhry@reprorights.org.