BRIEF19

A daily review of covid-19 research and policy.

POLICY BRIEFING

Maximizing vaccine uptake.

Achieving herd immunity by vaccination in a timely fashion was always going to prove a heavy lift. While the federal government did determine allocation of vaccine supplies, leaving the States to decide their individual prioritization risked chaos and confusion. Combined with hesitancy around the vaccine, based on deep-seated mistrust of the government and concern for politicization of the development process, too many members of the public and even some in the healthcare workforce are reluctant to be the among the first to get vaccinated. Against this backdrop, data from the Centers for Disease Control and Prevention (CDC) suggests that nearly 70 percent of the seventeen million distributed doses remain unused in freezers.

To address this slow uptake, State leaders have turned to multiple solutions. Some, like New Yor Governor Andrew Cuomo have discussed fining hospitals that do not use their supplies. Others have given deadlines for healthcare workers to receive their first dose or be moved to the back of the line.

On Wednesday, the Department of Health and Human Services (HHS) Secretary, Alex Azar, announced a partnership with nineteen pharmacy chains with a combined national reach of forty thousand locations to make supplies more readily available to a broader segment of the population, as well as emphasizing that the priority tiering represent "recommendations, and they should never stand in the way of getting shots in arms." *Various. 8 January 2021.* *—Brief19 Policy Team*

Abortion and other care in the time of covid-19. What's the legal status?

As states experience surges in cases and hospitalizations, many states are again delaying nonessential, or "elective" medical procedures. Such delays became commonplace in the spring during the initial covid-19 outbreak in the United States. But exactly what constitutes nonessential medical care? Some states have sought to treat abortion as such.

In *Planned Parenthood v. Casey* (1992), the US Supreme Court affirmed a woman's right to terminate a pregnancy before "viability," while also allowing for states to impose limits on abortion access so long as the burden imposed is not "undue." The question, then, is whether executive orders designating abortion as a nonessential or "elective" medical care subject to delay constitutes an undue burden in violation of *Casey*.

To help determine this, one must consider the burden faced by the women seeking to obtain abortions who have been barred from doing so during the time that the order is in effect. While some unusual deference may be afforded state executives in light of the public health crisis posed by covid-19, forcing interstate travel to obtain abortion is certainly burdensome, especially for women without the financial means to do so. Given the difficulty of interstate travel during a pandemic, one must also consider whether the pregnant individual could still obtain an abortion *at all* upon cessation of the emergency executive order, with some states restricting abortion access after a certain number of weeks of pregnancy. Indeed, the new *JAMA* study found that abortions after 11 weeks' gestation *increased* after the expiration of the order, reflecting delays in care among those seeking abortions.

The irony of such short-term orders is that while they ostensibly were aimed at conserving healthcare resources including PPE, as found by the District Court for the Western District of Oklahoma, delaying abortions through such legal means may have resulted both in fewer abortions, but more invasive ones when they did occur. Therefore, "supplying prenatal care for these patients in the meantime would indisputably require interpersonal contact and the use of PPE and other hospital supplies."

Thus, pandemic-related policies that limited abortion during the stay-at-home periods in states like Texas not only imposed the burdens of requiring interstate travel among women who sought access to abortion care guaranteed to them under the US Constitution, but they also necessitated the utilization of otherwise unnecessary prenatal care related to more invasive abortion methods that were needed as a result of delays, thereby contributing the very strain on healthcare systems that these executive orders purportedly aimed to avoid amidst the covid-19 pandemic. *4 January 2021.* *—Miranda Yaver, PhD*

Shawnee Tribe prevails in DC circuit challenge to CARES act allocation.

On January 5th, the Native American Shawnee Tribe prevailed in the DC Circuit Court of Appeals in a case challenging allocation of funding under the Coronavirus Aid, Relief, and Economic Security Act (CARES). Congress enacted CARES on March 27, 2020 in response to the covid-19 pandemic. While the district court had previously found the case unreviewable, the Circuit Court reversed the lower court's holding.

Title V of the CARES Act appropriated $150 billion for "making payments to States, tribal governments, and units of local government [for] necessary expenditures incurred due to the public health emergency," with payments to be made within 30 days of enactment. Eight billion dollars of the $150 billion were reserved for payments to Tribal governments, as determined by Treasury Secretary, Steven Mnuchin, in consultation with the Secretary of the Interior and Indian Tribes. Funding allocation was determined by the Indian Housing Block Grant (IHBG) program, which does not reflect actual tribal enrollment. Thus, the decision to use these data were found to have an adverse impact on the Shawnee Tribe such that they received only the minimum payment for tribes with a population of fewer than 37 ($100,000) though they counted 3,021 enrolled members and expenditures of $6.65 million in 2019. The Tribe claims that they made multiple attempts to correct the mistake, including seeking help through members of Congress, but were unable to do so. Shawnee Chief Ben Barnes noted that the $100,000 allocated under the CARES Act based on the faulty population data would not even cover the first order of protective equipment and the salary for a public health officer. "They treated us as if we didn't exist," Barnes said.

The Tribe contended that Secretary Mnuchin acted arbitrarily and capriciously, thereby unlawfully violating the Administrative Procedure Act by using IHBG population data rather than other available data and by refusing to adjust what the Tribe identified as errors in the IHBG data. Emphasizing the Secretary's discretion, the district court denied the Tribe's motion for a preliminary injunction, asserting that Mnuchin's decision to use IHBG data was not renewable under the Administrative Procedure Act, though they acknowledged that the Shawnee Tribe would suffer harm.

In response to the lower district court holding, the Shawnee Tribe urged the DC Circuit Court of Appeals to find that Secretary Mnuchin's funding allocation methodology based on IHBG data in fact ran afoul of the Administrative Procedure Act. The DC Circuit panel held instead that the district court should consider the challenge on the merits. *6 January 2021*. *—Miranda Yaver, PhD*

Moving the wrong direction on decarceration. *De facto* death sentences adding up. Back in November, *Brief19* covered the National Academies of Sciences, Engineering, and Medicine's recommendations regarding "decarceration," a concept referring to decreasing the overall size of the prison population through a series of steps coordinated by the penal and healthcare systems. The idea was that in such facilities, covid-19 outbreaks are difficult to control and that people who would otherwise be able to avoid infection simply are unable to avoid it in many circumstances. At the time, the total number of incarcerated individuals was down 10 and 22 percent in jails and federal institutions, respectively, so the problem did not as immediate. Now, however, many local jails and state prisons are facing closures due to unrelenting waves of covid-19 infections among staff, making it nearly untenable to adequately operate these facilities. As a result, detainees and inmates are being transferred to alternative centers that remain open, once again causing overcrowding in a population with more comorbidities and less access to healthcare—in short, creating the perfect storm for case resurgence. According to a *New York Times* database, there have been 480,000 infections and at least 2,100 deaths in correctional facility settings. Further compounding the situation are data showing that jail populations have returned to pre-pandemic levels. As politically unpalatable as decarceration efforts have been to some, increased crowding of at-risk individuals is only asking for trouble. Being put in jail or prison should not be akin to a death sentence. And yet, if action is not taken, that is precisely the outcome in many cases. *Various. 5 January 2021*. *—Brief19 Policy Team*

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Brief19 is a daily executive summary of covid-19-related medical research, news, and public policy. It was founded and created by frontline emergency medicine physicians with expertise in medical research critique, health policy, and public policy.