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Talking Telemedicine and Terminology: The South Carolina Telemedicine Act

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TALKING TELEMEDICINE AND TERMINOLOGY: THE SOUTH CAROLINA TELEMEDICINE ACT

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I. INTRODUCTION

"[H]elping to transform healthcare by improving the quality, equity, and affordability of healthcare throughout the world" is the overall mission of

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the American Telemedicine Association, a non-profit organization based in Washington, D.C., which promotes the education and expansion of telemedicine.[1] On June 3, 2016, then South Carolina Governor, Nikki Haley, signed the South Carolina Telemedicine Act ("the Act") into law.[2] The Act was praised as one of the best in the Southeast;[3] however, it is deficient in one specific area: the prescription of "lifestyle medications."[4] Despite the Act's intended purpose of increasing access to healthcare for rural South Carolinians, the Act's prohibition of "lifestyle medications" caused the neglect of many public health issues, such as access to contraception, rising obesity roles and smoking.[5] This raises a question of why this category of medications has been restricted. This is particularly concerning because the Act was enacted under the state police power, which allows a state to regulate the practice of medicine within it for the protection and well-being of citizens.[6] With this inconsistency in mind, this Note seeks to explore whether the Act should allow telemedicine physicians to prescribe "lifestyle medications" to patients in order to fulfill the Act's purpose of providing affordable healthcare access to rural South Carolinians, which in turn improves the overall public health and welfare of the state's citizens.

This Note seeks to address the gap between the purpose of the Act and the prohibition of "lifestyle medications" based on the police power structure it was enacted under and the norms and ethics of public health. Part II discusses the various definitions of "lifestyle medications," the different categories, and the public health impacts of prescribing these "lifestyle medications." Part III addresses state police powers and their relation to public health. Part IV examines telemedicine generally, the recently passed South Carolina Telemedicine Act, and the use of the term "lifestyle medications" in the legislation. Part V analyzes the gap between the language of the Act, the goal of public health police powers, and the

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1. AM. TELEMEDICINE ASS'N, http://www.americantelemed.org/about/about-ata (last visited Feb. 24, 2016).

2. Alex Koma, *South Carolina Gov. Signs Bill Expanding How Doctors Can Use Telehealth Techniques*, STATESCOOP (June 9, 2016), http://statescoop.com/south-carolina-gov-signs-bill-expanding-how-physicians-can-use-telehealth-techniques.

3. Latoya Thomas & Gary Capistrant, *50 State Telemedicine Gaps Analysis*, AM. TELEMEDICINE ASS'N (Jan. 2016), https://mytelemedico.com/wp-content/uploads/2016/01/2016_50-state-telehealth-gaps-analysis--coverage-and-reimbursement.pdf.

4. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

5. Koma, *supra* note 2.

6. *See generally*, Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955) ("Statutes and municipal ordinances calculated to better the health, safety and welfare of the people have long and universally been recognized to be within the police power.").

legislative intent from a public health perspective. It will also discuss and analyze the constitutionality of this legislation including the term "lifestyle medications." Part VI concludes by recommending two possible solutions. First, the South Carolina Medical Board ("Medical Board") could update its opinion to specially allow the prescription of medications that fall into this category but have a positive public health impact with a low risk of harm. Second, the Legislature could amend the Act to remove this prohibition all together to promote the public health impact and promote the medical liberty of physicians.

II. LIFESTYLE DRUGS

A. Origination of the Term

The term "lifestyle drugs" or "lifestyle medications" was coined in 1978, and, until 2004, had only appeared 3,174 times in English language media.[7] Despite thirty-eight years passing, a formal, widely-accepted definition of "lifestyle medications" has not emerged.[8] In fact, many definitions tend to contradict one another.[9] In 2003, an article described lifestyle drugs as "the medicines used to cure diseases that are linked to stress, urbanisation [sic] and changing diet pattern and lifestyle of high-income level populations."[10] However, *Nature Medicine* described these drugs as "medicines that treat conditions associated with lifestyle such as weight-loss tablets, anti-smoking agents, impotence therapies and hair restorers[.]"[11] Many of these definitions also include oral contraceptives, while other definitions include serotonin reuptake inhibitors (SSRI) as lifestyle medications despite the growing awareness of mental health and illness in the United States.[12] One broadly accepted, yet still vague, definition of "lifestyle medications" is "one used for 'non-health' problems

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7. Claus Møldrup, *The Use of the Terms 'Lifestyle Medicines' or 'Lifestyle Drugs'*, 26 PHARMACY WORLD & SCI. 193, 193–95 (2004) (discussing the varying definitions applied to these terms and how these terms can be used interchangeably).

8. Elizabeth Siegel Watkins, *How the Pill Became a Lifestyle Drug: The Pharmaceutical Industry and Birth Control in the United States Since* 1960, 102 AM. J. OF PUB. HEALTH 1462, 1469–70 (2012).

9. Møldrup, *supra* note 7, at 195.

10. *Id.* at 194 (citing *Lifestyle Drugs: Potion for Growth*, EQUITYMASTER.COM (June 3, 2003), https://www.equitymaster.com/detail.asp?date=06/03/2003&story=3&title=Lifestyle-drugs-Potion-for-growth).

11. Tim Atkinson, *Lifestyle Drug Market Booming*, 9 NATURE MED. 909, 909 (2002).

12. *See generally* Møldrup, *supra* note 7, at 194 (providing an overview of definitions for these terms).

or for problems that lie at the margins of health and well-being. . . . [a] wider definition would include drugs that are used for health problems that might be better treated by a change in lifestyle[.]"[13] Despite all of these interpretations, most agree that defining a drug for "lifestyle" use is largely dependent on the context in which it is given to the patient.[14]

B. Lack of Use in the Medical and Legal Fields

Currently, the term "lifestyle medications" has not been published in any law reviews or law related journals in the United States. Furthermore, a search of all WestLaw and LexisNexis databases fails to return a single result for "lifestyle drug" or "lifestyle medication." This term has also not appeared in any other legislation in the United States. This term does, however, appear abundantly in pharmaceutical trade journals and health insurance literature.[15] This, along with the lack of a solid definition, indicates that this term was developed as a way to market drugs and to determine insurance coverage.[16] The Act failed to include a definitions section defining terms used throughout the legislation; therefore, no guidance has been given as to how to interpret what "lifestyle medications" are for the purpose of the Act.[17] This lack of a definition by the Legislature and absence of one in other areas has led to confusion amongst citizens and telemedicine providers.[18] One such provider, Doctor on Demand, has gone with the definition given in the pharmaceutical trade journals; however, it admits that it is overly cautious in what physicians are allowed to prescribe due to the lack of a clear, bright-line rule.[19]

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13. David Gilbert, Tom Walley & Bill New, *Lifestyle Medicines*, 321 BRITISH MED. J. 1341, 1341 (2000).

14. Watkins, *supra* note 8, at 1469.

15. *See, e.g.*, S. Z. Rahman, *Lifestyle Drugs: Concept and Impact on Society*, 72 INDIAN J PHARM SCI. 409 (2010).

16. Watkins, *supra* note 8, at 1463.

17. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

18. Telephone Interview with Anonymous Physician, Doctor on Demand (Aug. 20, 2016) (author presented herself as a prospective patient to Doctor on Demand on August 20, 2016 to test how access to birth control in South Carolina would be handled. During the initial intake interview with the assigned physician and a subsequent conversation with customer service, this was the information that was disclosed) (notes on file with author).

19. *Id.*

C. *Categories*

The vague definitions of "lifestyle medications" have largely only been clarified by insurance companies, such as Blue Choice of South Carolina, who identified seven classes of medications that fell into this category.[20] These classes included some forms of anti-obesity agents, cosmetic drugs,[21] erectile dysfunction agents, male pattern baldness medication, skin depigmenting agents,[22] smoking cessation agents, and contraceptive agents or products.[23] While some of these categories, such as cosmetic agents and skin depigmenting agents, are clearly used to only enhance one's appearance, many, such as oral contraceptives, provide significant individual health benefits and public health benefits.[24]

1. *Erectile Dysfunction Medication*

In the United States alone, over 18 million men are currently suffering from erectile dysfunction.[25] This is over 17% of the population.[26] Impotence can be caused by a variety of health issues; however, erectile dysfunction is a known side effect of diabetes and cardiovascular issues.[27] Collectively, diabetes and heart disease affect over 57 million Americans each year and that number is growing, which increases the number of men who may begin suffering from impotence.[28] Suffering from erectile dysfunction often causes

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20. *2014 Lifestyle Medication List*, BLUECHOICE HEALTHPLAN OF S.C., http://www.bluechoicesc.com/UserFiles/bluechoice/Documents/Everybody/lifestyle-medications.pdf [hereinafter BLUECHOICE].

21. *Id. See also Tretinoin (Topical Route)*, MAYO CLINIC (Nov. 1, 2015), http://www.mayoclinic.org/drugs-supplements/tretinoin-topical-route/description/drg-20066521 (explaining what these cosmetic drugs are, their uses, and common name brands).

22. BLUECHOICE, *supra* note 20. *See also* Vanessa Ngan, *Hydroquinone*, DERMNET NEW ZEALAND (2005), http://www.dermnetnz.org/topics/hydroquinone/ (explaining the common uses and effects of Hydroquinone).

23. BLUECHOICE, *supra* note 20.

24. Watkins, *supra* note 8, at 1464.

25. Will Dunham, *Erectile Dysfunction Affects 18 Percent of Men*, REUTERS (Feb. 1, 2007), http://www.reuters.com/article/us-erectile-dysfunction-idUSN3149349120070201 (specifically referring to the video interview conducted).

26. *Id.*

27. *Id.*

28. *See 2014 National Diabetes Statistics Report*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/diabetes/data/statistics/2014statisticsreport.html (last updated May 15, 2015) (finding that 29.1 million people in the United States have diabetes); *see also Heart Disease*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/fastats/heart-disease.htm (last updated January 19, 2017) (finding that 27.6 million people in the United States have diabetes).

men to suffer from other symptoms.[29] The Sexual Dysfunction Association conducted a study that found 62% of men suffering from erectile dysfunction also suffered from reduced self-esteem.[30] This condition caused many men to feel emasculated and lead to a variety of other emotional symptoms.[31] These issues included depression and anxiety, which caused more complications to the patients' overall health.[32] Over 25% of the men surveyed indicated that their relationship had been negatively affected, and 21% explained that their relationships had ended as a direct consequence of suffering from erectile dysfunction.[33] Many scholars view high divorce rates as a public health crisis because divorce often leads to health issues, higher percentages of poverty, and higher rates of depression in society, which can negatively affect the public welfare in a variety of ways.[34] There is an intuitive public health interest in keeping couples in healthy relationships, as studies have shown happily married people are healthier people and children of married couples are healthier than divorced couples' children.[35] Men who are treated for erectile dysfunction show an improved quality of life physically, emotionally, and socially.[36] One can infer that this reduces the negative public health impact that can arise from complications of untreated erectile dysfunction in men.

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29. *See* John Tomlinson & David Wright, *Impact of Erectile Dysfunction and its Subsequent Treatment with Sildenafil: Qualitative Study*, 328 BRITISH MED. J. 1, 2–3 (2004), http://www.bmj.com/content/328/7447/1037.full.print (discussing psychological symptoms of erectile dysfunction).

30. *Id.* at 1.

31. *See id.* at 2–3 (discussing emotional and psychological symptoms of erectile dysfunction).

32. *See id.* at 2 (noting how some men with erectile dysfunction become depressed and despondent).

33. *Id.* at 1.

34. *See generally* Simone Frizell Reiter et al., *Impact of Divorce and Loss of Parental Contact on Health Complaints Among Adolescents*, 35 J. PUBLIC HEALTH 278, 279 (2013) (discussing adverse effects associated with divorce).

35. *See* Hui Liu & Corinne Reczek, *Cohabitation and U.S. Adult Mortality: An Examination by Gender and Race*, 74 J. MARRIAGE & FAMILY 794, 809 (2012) (suggesting that married individuals have lower mortality rates than single or cohabiting individuals); Jane Anderson, *The Impact of Family Structure on the Health of Children: Effects of Divorce*, 81 LINACRE Q. 378, 380 (2014) (discussing adverse effect of divorce on the emotional well-being of children).

36. *See* Stuart N. Seidman et al., *Treatment of Erectile Dysfunction in Men With Depressive Symptoms: Results of a Placebo-Controlled Trial With Sildenafil Citrate*, 158 AM. J. PSYCHIATRY 1623, 1628 (2001) (observing a strong association between improvement in erectile dysfunction and quality of life).

2. Smoking Cessation Medication

Smoking is the leading cause of preventable deaths in the world, and it accounts for one in every five deaths in the United States.[37] Currently, over 40 million Americans smoke cigarettes,[38] and over 16 million Americans suffer from a smoking related disease.[39] Those who stop smoking experience significant health benefits.[40] These include, but are not limited to, a "lowered risk for lung cancer and many other types of cancer," a "reduced risk for heart disease, stroke, and peripheral vascular disease," a "reduced heart disease risk within 1 to 2 years of quitting," a "reduced risk of developing some lung diseases," a "reduced risk for infertility in women of childbearing age," and "reduced respiratory symptoms."[41] Smoking is dangerous for nonsmokers as well, and it has become such a public health issue that recent legislation, under state police powers, has led to smoke free environments to reduce the impact of second hand smoke on others.[42] In fact, second hand smoke contains over 7,000 chemicals, and 2.5 million Americans have died from second hand smoke related health issues since 1964.[43]

Smoking cessation medications are used to help persons with nicotine addiction stop smoking.[44] Studies have shown that users of bupropion and varenicline tartrate have a higher rate of successfully ending tobacco use

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37. *Smoking and Tobacco Use: Diseases and Death*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/ (last updated December 20, 2016). *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf (providing a comprehensive look at smoking in the United States).

38. Message from Howard Koh *in* U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, at 40, https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

39. *Id.* at 870.

40. *See Quitting Smoking*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/ (last updated Feb. 1, 2017) ("People who stop smoking greatly reduce their risk for disease and early death.").

41. *Id.*

42. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., LET'S MAKE THE NEXT GENERATION TOBACCO-FREE: YOUR GUIDE TO THE 50TH ANNIVERSARY SURGEON GENERAL'S REPORT ON SMOKING & HEALTH, at 19, https://www.surgeongeneral.gov/library/reports/50-years-of-progress/consumer-guide.pdf (suggesting strategies to reduce smoking rates, such as creating tobacco-free polices in public places).

43. *Id.* at 5.

44. *See generally* Robin L. Corelli & Karen Suchanek Hudmon, *Medications for Smoking Cessation*, 176 WEST J. MED. 131, 134 (2000) (discussing the effectiveness of smoking cessation mediations).

than those who do not use these drugs.[45] Those who attempt to quit smoking with no intervention only have a success rate of 1 to 5% compared to 24% in the individuals who use smoking cessation drugs.[46] Currently, smoking cessation drugs are labeled as a "lifestyle medication"[47] and thus are not available to patients via telemedicine in South Carolina.[48] According to the CDC, approximately 27% of Americans living below the poverty line smoke,[49] and statistics have shown that those living below the poverty line have less access to affordable health providers.[50]

3. Anti-Obesity Medication

Over 36% of American adults are considered obese.[51] Obesity can lead to diabetes, stroke, heart disease, and cancer.[52] In addition, obesity has a large public financial impact, and, in 2008, the estimated cost of obesity and obesity related conditions treatment was $147 billion dollars.[53] The pharmaceutical industry has developed medications that can aid in weight loss for individuals before the drastic measure of weight loss surgery is

45. Rafael Laniado-Laborín, *Smoking Cessation Intervention: An Evidence-Based Approach*, 122 J. POSTGRADUATE MED. 74, 77 (2015) (citing Jane E. Anderson et al., *Treating Tobacco Use and Dependence: An Evidence-Based Clinical Practice Guideline for Tobacco Cessation*, 121 CHEST 932, 938 (2002); HUGHES JR, STEAD LF, & LANCASTER T., ANTIDEPRESSANTS FOR SMOKING CESSATION 2 (2011)).

46. *Id.* at 76 (citing Rafael Laniado-Laborín, S*moking and Chronic Obstructive Pulmonary Disease (COPD): Parallel Epidemics of the 21st Century*, 6 INT'L J. ENVTL. RES. PUB. HEALTH 209, 213 (2009)).

47. *See* BLUECHOICE, *supra* note 20 (listing lifestyle medications).

48. *See* S.C. CODE ANN. § 40-47-37(C)(6) (Supp. 2016) (noting that doctors cannot prescribe lifestyle mediations via telemedicine unless approval is given by the board).

49. Israel T. Agaku, Brian A. King & Shanta R. Dube, *Current Cigarette Smoking Among Adults—United States, 2005–2014*, MORBIDITY & MORTALITY WKLY. REP., at 32 (Jan. 17, 2014), https://www.cdc.gov/mmwr/pdf/wk/mm6302.pdf.

50. *See How is Poverty Related to Access to Care and Preventive Healthcare?,* U.C. DAVIS CTR. FOR POVERTY RES., http://poverty.ucdavis.edu/faq/how-poverty-related-access-care-and-preventive-healthcare (discussing how poorer children and adults are less likely to have a usual source of healthcare).

51. CYNTHIA L. OGDEN ET AL., PREVALENCE OF OBESITY AMONG ADULTS AND YOUTH: UNITED STATES, 2011–2014: NCHS DATA BRIEF, NO. 219, at 1 (Nat'l Ctr. for Health Statistics ed., 2015).

52. *See What Are the Health Risks of Overweight and Obesity?*, NAT'L HEART, LUNG, & BLOOD INST., https://www.nhlbi.nih.gov/health/health-topics/topics/obe/risks (last updated July 13, 2012) (discussing how obesity can increase an individual's risk of diabetes, stroke, heart disease, and cancer).

53. Eric A. Finkelstein et al., *Annual Medical Spending Attributable To Obesity: Payer And Service-Specific Estimates*, 28 HEALTH AFF. 822, 822 (2009).

taken.[54] Some common examples of these medications are benzphetamine, diethylpropion, and phendimetrazine.[55] Studies have shown that individuals taking these drugs have a higher rate of success at losing weight and keeping the weight off.[56] Losing weight, even if only 5% of one's body weight, leads to various health benefits, such as reduced blood pressure, reduced cholesterol, and reduced risk of diabetes and cardiovascular diseases.[57] This in turn reduces healthcare costs for those individuals and society as a whole.[58]

Currently, weight loss drugs are labeled as a "lifestyle medication"[59] and thus are not available to patients via telemedicine in South Carolina.[60] South Carolina's obesity rate is ranked seventh in the nation at 31.7%.[61] There is a clear connection between obesity and socioeconomic status according to the CDC, and there is also a clear connection between access to healthcare and socioeconomic status.[62] Because of these connections, one could infer obesity is at least partly linked to access of healthcare.

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54. *See* BLUECHOICE, *supra* note 20 (listing weight loss medications).

55. *Id.*

56. *See* Susan Z. Yanovski & Jack A. Yanovski, *Long-term Drug Treatment for Obesity: A Systematic and Clinical Review*, 311 JAMA 74, 82 (2014) ("Orlistat, lorcaserin, and phentermine plus topiramate-ER, when used as an adjunct to lifestyle intervention, all increase the likelihood that a patient will achieve a clinically meaningful (5%) 1-year weight loss.").

57. *See generally* NAT'L INSTS. OF HEALTH, *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults*, at 1, http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf (last visited Dec. 27, 2016) (citing Kuczmarski RJ, Carrol MD, Flegal KM, & Troiano RP, *Varying Body Mass Index Cutoff Points to Describe Overweight Prevalence Among U.S. Adults: NHANES III (1988 to 1994)*, OBES RES. 542, 542–48 (1997)) (providing an in-depth view of the statistics on obesity in the United States).

58. CTR. FOR POVERTY RESEARCH, *How is Poverty Related to Access to Care and Preventive Healthcare?*, http://poverty.ucdavis.edu/faq/how-poverty-related-access-care-and-preventive-healthcare.

59. *See* BLUECHOICE, *supra* note 20 (labeling weight loss drugs as lifestyle mediations).

60. *See* S.C. CODE ANN. § 40-47-37(C)(6) (Supp. 2016) (noting that doctors cannot prescribe lifestyle mediations via telemedicine unless approval is given by the board).

61. *South Carolina Ranked 7th in the Nation for Obesity*, S.C. INST. OF MED. & PUB. HEALTH (2015), http://imph.org/south-carolina-ranked-7th-nation-obesity/.

62. *See* CYNTHIA L. OGDEN ET AL., OBESITY AND SOCIOECONOMIC STATUS IN ADULTS: UNITED STATES, 2005–2008: NCHS DATA BRIEF, NO. 50, at 6 (Nat'l Ctr. for Health Statistics ed., 2010) (finding a relationship between lower income and obesity with some groups of people).

4. Oral Contraception

Oral contraceptives provide a significant health benefit for individuals and society as a whole, such as helping individuals plan for pregnancy.[63] There are also additional personal and societal benefits that come from women having access to contraceptives. The ability to plan pregnancy plays a "pivotal role in the financial, physical and emotional health of children . . . "[64] Furthermore, a review of over sixty studies by the Guttmacher Institute recently found that a woman's access to birth control significantly impacted the gender pay gap because access to birth control increases a woman's earning power.[65] This review also found that better parenting was correlated with reliable contraceptives, and this was largely attributed to the fact that risks for depression and anxiety were increased by an unplanned pregnancy.[66] Furthermore, "[m]ultiple studies have shown the adverse maternal and perinatal outcomes related to closely spaced pregnancies, ranging from placenta abruption to lower birth weight."[67] The economic benefits for the public as a whole are also apparent because "for every public dollar spent on contraception, . . . $5.68 is saved in Medicaid spending."[68]

Oral contraceptives are listed on the World Health Organizations' 2015 list of essential medicines alongside antibiotics, cardiovascular medications, diabetic medications, and many others.[69] Despite this classification, hormonal birth control pills have still been labeled as "lifestyle medications."[70] This is attributed to the other uses for birth control pills such as the treatment of acne, premenstrual dysmorphic syndrome, polycystic ovarian syndrome, ovarian cysts, and endometriosis.[71] In addition to preventing pregnancy, hormonal birth control pills can reduce the risks of

63. *See* Watkins, *supra* note 8, at 1463 (noting that birth control is a basic health care need for women of reproductive age).

64. Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, ATLANTIC (July 2, 2014), http://www.theatlantic.com/health/archive/2014/07/the-broader-benefits-of-contraception/373856/.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *WHO Model List of Essential Medicines*, WORLD HEALTH ORG. (Nov. 2015), http://www.who.int/medicines/publications/essentialmedicines/EML_2015_FINAL_amended_NOV2015.pdf?ua=1icines.

70. BLUECHOICE, *supra* note 20.

71. Watkins, *supra* note 8, at 1464.

some cancers.[72] Studies have shown that women in rural areas have a reduced access to contraceptives.[73] In addition, these studies have drawn a correlation between women in rural areas and women in lower socioeconomic statuses, which suggests that their access to healthcare and contraceptives is also reduced.[74]

III. POLICE POWERS AND PUBLIC HEALTH

A. State Police Power

State police power comes from the Tenth Amendment of the United States Constitution, which gives to the states all of the rights and powers "not delegated to the United States" federal government.[75] States are therefore granted the power to establish and enforce laws protecting the welfare, safety, and health of the public. States are also able to use these powers through the executive and legislative branches of government by enacting laws and legislation. These laws can only be questioned by the judicial branch of government; however, this can be done by the state judicial branch or the federal judicial branch.[76] Police powers have been interpreted to give a state the authority to protect the health, safety, and general welfare of state citizens.[77] This power was further elaborated on in the Slaughterhouse Cases, where the court held that police power could be used for "the protection of the lives, limbs, health, comfort, and quiet of all persons."[78] The United States Supreme Court's longstanding rule allows a

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72. Oral Contraceptives and Cancer Risk, NAT'L CANCER INST. (March 21, 2012), https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/oral-contraceptives-fact-sheet.

73. *See Health Disparities in Rural Women*, THE AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS 1, at 2 (2014), www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Disparities-in-Rural-Women (explaining the disparities between socioeconomic classes and access to healthcare).

74. *Id.*

75. U.S. CONST. amend. X.

76. *See generally* Lochner v. New York, 198 U.S. 45, 53 (1905) (discussing the constitutionality of a law enacted under New York's police powers).

77. *See* U.S. CONST. amend. X (noting that "[t]he powers not delegated to the United States . . . are reserved to the states respectively . . .").

78. *See generally* Slaughter-House Cases, 83 U.S. 36, 62 (1872) (explaining that state police powers allow them to create laws that protect the public safety, health, welfare, and morals).

state to regulate the practice of medicine through its police powers also.[79] For example, in *Dent v. West Virginia*, the Supreme Court upheld a law regarding the required training and knowledge for physicians in West Virginia because the state had the authority to regulate the practice of medicine.[80]

B. Public Health and Police Powers

State police powers influencing public health were first recognized after the Revolutionary War with an authorized quarantine following an outbreak of yellow fever.[81] Furthermore, in *Jacobson v. Massachusetts*, the Supreme Court upheld the exercise of the police power to protect the public's health.[82] In *Jacobson*, the Court gave examples of everyday protections that have been enumerated under these police powers, such as sanitary laws and animal control sanctions.[83] These examples contributed to the ideology that police powers can be used for long term preventative measures that are in the public health's best interest. Since *Jacobson*, multiple cases by the Supreme Court and others have bolstered this decision by affirming the "states' authority to (1) regulate individuals and businesses for public health and safety (8 cases), (2) limit liberty to achieve common goods (34 cases), (3) permit legislatures to delegate broad powers to public health agencies (5 cases), and (4) defer to the judgment of legislatures and agencies in the exercise of their powers (13 cases)."[84]

However, while courts have upheld state legislation based on state police powers, courts have also found some cases to be unconstitutional. This can be seen in *Lochner v. New York*, where the court found that a provision passed under New York's state police powers to protect the "health and safety" of bakery workers violated the "liberty to contract."[85]

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79. *See* Patricia J. Zettler, *Toward Coherent Federal Oversight of Medicine*, 52 SAN DIEGO L. REV. 427, 430–46 (2015) (examining the states' ability to regulate medical practice under their police powers).

80. Dent v. West Virginia, 129 U.S. 114, 122–23 (1889).

81. Jorge Galva, Christopher Atchison & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, 120 PUBLIC HEALTH REP. 20, 21 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2569983/pdf/phr120s10020.pdf.

82. Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905); Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. OF PUB. HEALTH 576, 576 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449223/pdf/0950576.pdf.

83. *Id.* at 578.

84. *Id.* at 579.

85. Lochner v. N.Y., 198 U.S. 45, 53–54 (1905).

More recently, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court found that Texas laws enacted under its police powers for the "health and safety" of women receiving abortions in the state were too invasive and created an undue burden for women seeking to end a pregnancy in Texas.[86] This suggests that implementing laws under these public health police powers must be done in accordance with the purposes laid out by the Supreme Court to promote public health, wellness, and safety.[87]

IV. CASE STUDY: SOUTH CAROLINA TELEMEDICINE ACT

A. Telemedicine

Telemedicine has been around for over a century, and in recent years, telemedicine has developed rapidly.[88] Telemedicine's popularity skyrocketed in the 1960s–1970s when organizations like NASA, the Department of Defense, and the U.S. Health and Human Services Department began funding research to develop the practice.[89] Currently, over half of all hospitals in the United States use some form of telemedicine, and patient access can be as simple as downloading an app on to their smartphones.[90] This growth in telemedicine has developed the potential to drastically cut down on the medical cost of uninsured patients because, through the expansion of healthcare into rural areas, many laws are in place to require insurance companies to cover these types of visits.[91] A trip to the emergency room without insurance for a common illness can cost between $400–$1,200,[92] and it can still cost between $71–$125 to visit an urgent

86. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).

87. *See Whole Woman's Health*, 136 S. Ct. at 2318 (holding the requirements set by the Texas legislature provided few health benefits for women and created an undue burden on those seeking an abortion).

88. *See id.* at 2296 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992)) (explaining that while a statute may be enacted under a valid state interest, if it has the effect of placing a substantial obstacle in the path of a woman's choice, it cannot be considered a permissible means of serving its legitimate end).

89. *Id.* at 39.

90. *See* DOCTOR ON DEMAND, http://www.doctorondemand.com/ (last visited Dec. 28, 2016) (explaining the steps for a potential patient to use their service).

91. *See generally* Thomas D. Sequist, Theresa Cullen & Kelly J. Acton, *Indian Health Service Innovations Have Helped Reduce Health Disparities Affecting American Indian and Alaska Native People*, 30 HEALTH AFF. 1965 (2011), https://www.ncbi.nlm.nih.gov/pubmed/21976341.

92. DEBT.ORG, EMERGENCY ROOMS VS. URGENT CARES, https://www.debt.org/medical/emergency-room-urgent-care-costs/ (last visited Nov. 18, 2016).

care.[93] The cost of a visit with a physician through commercial providers like Doctor on Demand averages around $50, and it can be lower than that through the use of coupons that the company offers.[94] In addition to reducing monetary cost, telehealth also cuts down on the time it takes to see a physician.[95] While a patient may wait for hours at an urgent care or even longer in an emergency room,[96] the average wait time for a doctor though Doctor on Demand is only fifteen minutes.[97]

In South Carolina ("the State"), telemedicine is defined as "the practice of medicine using electronic communications, information technology, or other means between a licensee in one location and a patient in another location with or without an intervening practitioner."[98] Traditionally, telemedicine was only used in the State to provide specialty consultations at "a faster rate and wider availability to rural residents, allow physicians to monitor patients remotely and from home, and provide education on medical issues."[99] Studies on telemedicine have shown very promising results in rural communities,[100] and one study noted that "telemedicine reduced life expectancy gaps between American Indians and whites from eight years to five years."[101]

B. Goal of the Act

Sponsoring senator, Brian Hutto, believes that the goal of this act is to "massively expand the use of the technology in South Carolina" due to his "realization that the delivery of health care in rural areas is changing."[102] Rural South Carolina lacks public transportation and many areas do not have local hospitals.[103] Due to this, Senator Hutto believes that "telemedicine is going to be something that's particularly important to getting folks in rural

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93. *Id.*

94. *See* DOCTOR ON DEMAND, *supra* note 90 (explaining the steps for a potential patient to use their service).

95. *Id.*

96. DEBT.ORG, EMERGENCY ROOMS VS. URGENT CARES, https://www.debt.org/medical/emergency-room-urgent-care-costs/ (last visited Nov. 18, 2016).

97. *See* DOCTOR ON DEMAND, *supra* note 90 (explaining the steps for a potential patient to use their service).

98. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

99. *See generally* Sequist et al., *supra* note 91.

100. S.C. REVENUE & FISCAL AFF. OFF., *South Carolina Urban and Rural Population (1790-2010)*, http://abstract.sc.gov/chapter14/pop30.html (last visited Jan 7, 2017) (explaining that approximately 33% of South Carolina's population lives in rural areas).

101. Sequist et al., *supra* note 91.

102. Koma, *supra* note 2.

103. *Id.*

areas adequate health care."[104] Recently, the Kaiser Family Foundation reported that South Carolina only has approximately 5,000 specialist physicians, which places South Carolina 26th in the nation.[105] Senator Hutto sees the bill as a way to "vastly expand rural residents' access to specialists."[106] Furthermore, "Schipp Ames, executive director for communications and marketing with the South Carolina Hospital Association, believes the law will let large hospital systems like the Medical University of South Carolina ("MUSC") help fill that specialist void."[107] Telemedicine's goal in South Carolina is to break "down the geographic barriers for patients."[108] Ames explained that if smaller hospitals had relations with "the larger hospitals, then [one] can go right in and have access to specialists that [one] wouldn't normally have access to."[109]

C. Usage of the Term: "Lifestyle Medications"

The exact language used in this bill is that "prescribing of *lifestyle medications* including, **but not limited to**, erectile dysfunction drugs is not permitted unless approved by the [medical] board."[110] The Medical Board updated its Telemedicine Advisory Opinion in August 2016; however, there is no mention of "lifestyle medications" in this opinion.[111] There are multiple issues with this. First, as discussed above, there is no universally accepted definition of "lifestyle medications."[112] Despite this lack of an accepted definition in the legal or medical field, the South Carolina Legislature did not provide a "definitions" section with the Act.[113] In addition, the Medical Board has not provided a definition for these "lifestyle medications" in its advisory opinion.[114] Thus, the only guidance in South Carolina is from a for-profit insurance company that reduces physicians' ability to advocate for their patients and their medical needs.[115] Secondly, there is no evidence that the South Carolina legislature has sought to further define this term since the bill's passage. One can infer that this leaves

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. S.C. CODE ANN. § 40-47-37 (Supp. 2016).
111. Telemedicine, Op. S.C. Medical. Bd. (Aug. 3, 2015).
112. Møldrup, *supra* note 7, at 194.
113. § 40-47-37.
114. Telemedicine, *supra* note 111.
115. BLUECHOICE, *supra* note 20.

citizens, physicians, and attorneys all with a vague term to interpret and at the mercy of insurance companies and pharmaceutical companies. It is important to note that, in a previous version of the bill that did not pass, the language was that the prescription of "lifestyle medications including, but not limited to, hormone replacement therapies, birth control, or erectile dysfunction drugs are not permitted unless approved by the board."[116] This change in language did not clarify what "lifestyle medications" are and did not clarify what they are not.[117] In fact, the phrase "hormone replacement therapies and birth control" was removed, likely due to political pressures, but the "but not limited to" language leaves the door wide open for these to be included in that list.[118] Even though the language was changed to not specifically state "birth control," commercial providers, such as Doctor on Demand, still view birth control as falling into the "lifestyle medications" category and will not prescribe it to women in South Carolina via telemedicine.[119] Therefore, the lack of a clear definition and the use of a vague term in this legislation weakens the overall goal and undermines its public health initiative.

V. REMEDYING THE USE OF THIS TERMINOLOGY

A. A Public Health Perspective

By removing these useful drugs from the telemedicine physician's prescribing powers, the ultimate purpose of using the public health police powers is undermined.[120] Removing the prohibition of prescribing "lifestyle medications" via telemedicine would allow for the public health to possibly be improved overall by reducing obesity, smoking rates, social and emotional impacts of erectile dysfunction, and unplanned pregnancies; however, it would greatly impact rural and impoverished areas of South Carolina.[121] This would lead to a positive public health benefit and contribute to the purpose of the Act.[122]

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116. *See* H.R. 5162, 121st Gen. Assemb., Reg. Sess. (SC 2016).

117. *Id.*

118. *Id.*

119. Telephone Interview with Anonymous Physician, *supra* note 18.

120. Gostin, *supra* note 82.

121. S.C. REVENUE & FISCAL AFF. OFF., *supra* note 100 (explaining that approximately 33% of South Carolina's population lives in rural areas).

122. Zettler, *supra* note 79; *see also* Slaughter-House Cases, 83 U.S. 36, 62 (1872) (explaining that state police powers allow them to create laws that protect the public safety, health, welfare, and morals).

Many men in rural areas may not have the access to see a doctor for erectile dysfunction, and, with it being classified as a "lifestyle medication," their access is cut off even further by an inability to use telemedicine to access treatment and the possibility that insurance will not cover the treatment.[123] Erectile dysfunction is a condition that can be treated with drugs like Viagra and Cialis; however, many men are too self-conscious or embarrassed to seek treatment.[124] Telemedicine is an innovative solution to visiting a doctor in the privacy of your own home, and it would give men another option to treat this stigmatizing health condition.[125] One can infer that more men treated for this condition would intuitively lead to a lower percentage of men suffering from it and hence a lower percentage of relationships and marriages ending in South Carolina as a result of the condition.

Furthermore, due to telemedicine's ability to reach rural and impoverished areas, access to smoking cessation agents through telemedicine would lead to a decrease in the percentage of smokers and would positively affect the current public health of all South Carolina citizens, smokers and nonsmokers.[126] In addition, individuals living in rural and impoverished areas of South Carolina may struggle to see a physician in person for help with obesity; however, with the use of telemedicine, these drugs could become more accessible to individuals of lower socioeconomic status who need help losing weight.[127] Reducing the obesity rate in South Carolina would clearly affect the public health as it would reduce the economic costs of obesity, as well as the negative health effects suffered by those patients.[128] As with erectile dysfunction, being obese has a social stigma which may deter some individuals from seeking help and treatment.[129] Therefore, allowing for telemedicine to treat obese individuals

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123. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

124. *See* Tomlinson, *supra* note 29, at 4.

125. *See generally Telehealth Use in Rural Healthcare Models and Innovations*, RURAL HEALTH INFO HUB (last updated Dec. 21. 2016), https://www.ruralhealthinfo.org/topics/telehealth/project-examples (stating examples of the need to seek treatment in the privacy of one's own home, such as treating depression in elderly veterans).

126. Laniado-Laborin, *supra* note 45, at 75–76 (stating that intensive smoking cessation intervention through clinicians and health care delivery systems should be used to affect public health in the most effective way possible).

127. *See generally Telehealth Use*, *supra* note 125 (stating the need to help obese individuals in rural areas develop healthy lifestyles and how they would benefit from telemedicine).

128. *See generally* Finkelstein, *supra* note 53, at 822 (discussing the financial costs and societal effects of untreated obesity).

129. SM Phelan, et al., *Impact of Weight Bias and Stigma on Quality of Care and Outcomes for Patients with Obesity,* 16 OBES REV. 319, 319–20 (2015).

in the privacy of their own home would allow more access to healthcare and improve the overall public health of South Carolina citizens.[130]

In 2010, approximately 50% of all pregnancies in South Carolina were unplanned, which is 5% higher than the national average.[131] Furthermore, of that 50%, over three fourths of those unplanned births were publically funded by the State.[132] Despite the public benefits and health necessity for access to contraceptives, providers may not prescribe this medication to women via telemedicine in South Carolina due to its classification as a "lifestyle medication."[133] Currently, the State only meets 31% of womens' needs for contraceptive access, and this percentage could be drastically increased with the inclusion of contraception services in telemedicine.[134] Increasing access to contraception to women, erectile dysfunction medication to men, and smoking cessation/anti-obesity agents to all, especially rural and lower socioeconomic individuals, decreases the cost to the public both socially and financially, therefore increasing overall public health and welfare in the State, which is directly in line with the goal and purpose of state police power that this Act was enacted under.[135]

B. Unconstitutional Prohibition of Oral Contraceptives

The provision that prohibits oral contraceptives is particularly questionable because this exclusion unfairly singles out telemedicine providers and women.[136] Hormonal birth control can be prescribed by an in-person physician with a simple series of questions.[137] It is not a common practice for physicians to test for pregnancy unless the patient believes she

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130. *See id.* (stating that stigma can reduce the quality and quantity of medical care that obese patients receive).

131. *State Facts About Unintended Pregnancy: South Carolina*, GUTTMACHER INST., https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-south-carolina (Sept. 2016) [hereinafter GUTTMACHER INST.].

132. *Id.*

133. S.C. CODE ANN. § 40-47-37(C)(6) (Supp. 2016).

134. GUTTMACHER INST., *supra* note 131.

135. *See id.* (stating that unplanned pregnancies are costly to state and federal governments, and that by helping women avoid unintended pregnancies, the cost to the taxpayer decreases).

136. *See generally Birth Control: Medicines That Help You*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Sept. 8, 2016) [hereinafter U.S. FOOD & DRUG ADMIN.] (describing the types of birth control methods that have been approved by the FDA).

137. *See Birth Control*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/teens/going-to-the-doctor/birth-control (last visited Jan. 2, 2016) (explaining what steps a doctor takes before prescribing birth control).

could be pregnant.[138] This series of questions could be performed to the same standard by a telehealth provider, and a woman could receive the same standard of care from the cheaper comfort of her own home.[139]

Furthermore, these restrictions are "medically unnecessary" to safely prescribe oral contraception.[140] Over fifty years ago, in the first case to discuss access to contraceptives, the Supreme Court held that access to birth control is a right and that it is free from governmental intrusion.[141] This view has been furthered throughout the years; however, in a recent opinion, Justice Ginsburg, on the topic of abortion,[142] said that "it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'"[143] The opinion goes on to list other procedures that do not require these medically unnecessary requirements, such as child birth, and have far less complications than those medications.[144] This is analogous to the prohibition on prescribing oral contraception to women in South Carolina via telemedicine.[145] Physicians are permitted to prescribe medication for diabetes management, blood pressure management, and other medications that can lead to life threatening complications if prescribed incorrectly or taken in the wrong dose.[146] These risks range from

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138. *See Going to the Doctor*, PLANNED PARENTHOOD, https://www.planned parenthood.org/teens/going-to-the-doctor/what-to-expect (last visited Jan. 2, 2016) [hereinafter PLANNED PARENTHOOD] (stating that doctors will ask a patient questions in order to decide whether or not a pregnancy test is necessary).

139. *See* Telemedicine, *supra* note 111 (discussing that telemedicine providers and in person providers are to be held to the same standard of care). Due to the nature of telemedicine, a physician would be able to speak to the client in the same matter as any other physician.

140. Mary Brophy Marcus, *Should Birth Control Pills be Available Without a Prescription?*, CBS NEWS (Jan. 4, 2016), http://www.cbsnews.com/news/birth-control-pills-no-prescription-needed-in-oregon/ (opining that the benefits of making birth control more available to women without a prescription outweigh the risks).

141. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

142. *See Medical Versus Surgical Abortion*, U. OF C.A. SAN FRANCISCO MED. CTR., https://www.ucsfhealth.org/education/medical_versus_surgical_abortion/ (last visited Jan 8, 2017) (discussing the medically invasive nature of abortion and the different possible complications).

143. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

144. *Id.*

145. *See id.* at 2321 (stating that when a state "severely limits access to safe and legal procedures, women in desperate circumstances are at a greater risk to health and safety"); *see also* S.C. CODE ANN. § 40-47-37 (Supp. 2016).

146. § 40-47-37(C)(6).

disorientation to cardiac arrest and death.[147] Oral contraception poses none of those risks and can even safely be taken by men, yet it is still prohibited.[148] The symptoms, while uncomfortable, are fairly mild and limited to breast tenderness, discolored urine, drowsiness, vaginal bleeding, headache, emotional changes, nausea and vomiting, and a rash.[149] In fact, taking too much of a pain reliever such as acetaminophen is much more dangerous and can lead to death; however, acetaminophen is openly sold over the counter in everywhere from gas stations to supermarkets across the country.[150]

There is nothing that an inpatient physician could discuss with a patient when prescribing hormonal birth control pills that a telemedicine professional could not ask, and this includes questions about a possible pregnancy or a history of blood clots.[151] While that physician could perform a pregnancy test, this is not a common practice.[152] Additionally, under the Act, both an in-person and telemedicine physician would be held to the same standard of care if there was a rare complication.[153] Because of this, one can infer that there is no rational basis for denying women in South Carolina access to oral contraception via telemedicine.

Oral contraception is currently only a viable birth control method for female citizens.[154] Even under a minimum scrutiny test, otherwise known as a rational basis test, the South Carolina state government would likely be unable to show that the prohibition of telemedicine professionals prescribing oral contraception to consenting, adult females is rationally related to serving a legitimate state interest as opposed to political interests.[155] In

147. *See, e.g.*, Kristin R. Russell, Jonathan R. Stevens & Theodore Stern, *Insulin Overdose Among Patients With Diabetes: A Readily Available Means of Suicide*, 11 PRIM. CARE COMPANION J. CLIN. PSYCHIATRY 258, 258–62 (2009) (showing how dangerous taking or being prescribed the wrong dose of insulin can be for diabetic and non-diabetic patients).

148. *See* U.S. FOOD & DRUG ADMIN., *supra* note 136 (explaining the risks posed by taking hormonal birth control).

149. *See Birth Control Pill Overdose*, MEDLINE PLUS, https://medlineplus.gov/ency/article/002599.htm (last visited Jan. 7, 2017) [hereinafter MEDLINE PLUS] (explaining the mild symptoms experienced after taking a large amount of birth control pills).

150. *See id.* (explaining the life threatening dangers of acetaminophen overdoses).

151. *See* PLANNED PARENTHOOD, *supra* note 138 (explaining what steps a doctor takes before prescribing birth control).

152. *Id.*

153. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

154. *See* U.S. FOOD & DRUG ADM., *supra* note 136 (explaining what types of health problems and patients hormonal birth control methods have been approved for by the FDA).

155. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 781 (1977) (discussing minimum scrutiny).

Oregon, women can purchase hormonal birth control over the counter.[156] In many other states, women can be prescribed birth control via telemedicine.[157] This is because, as previously discussed, hormonal birth control pills impose less immediate risk than almost all of the allowed medications.[158] All of these riskier medications are allowed to be prescribed under the current South Carolina legislation.[159] Furthermore, allowing women to prevent unplanned pregnancy is a legitimate state interest.[160]

VI. CONCLUSION

The South Carolina Legislature should allow the prescription of erectile dysfunction medication, smoking cessation agents, anti-obesity agents, and oral contraceptives via telemedicine to be in line with the spirit of this legislation and the use of police powers to increase public welfare.[161] In order to do this, the Legislature should consider using a different term or having the Medical Board update its advisory opinion to specifically allow the prescription of "lifestyle medications." There are two approaches that could achieve this goal.

A. Action by the Board

The medical profession has historically been a self-regulated profession,[162] and this power has often been used to protect patient interests from political pressures.[163] In fact, *Roe v. Wade* was actually heavily funded and pushed by medical professionals, not because of the issue of abortion but, for preventing encroachment on medical liberty and the ability to do

156. Pam Belluck, *Birth Control Without Seeing a Doctor: Oregon Now, More States Later*, N.Y. TIMES (Jan. 4, 2016), https://www.nytimes.com/interactive/2016/01/04/health/birth-control-oregon-contraception.html?_r=0.

157. Stacey Colino, *Birth Control Without a Doctor's Visit? There's an App for That*, U.S. NEWS & WORLD REPORT (June 30, 2016), http://health.usnews.com/wellness/articles/2016-06-30/birth-control-without-a-doctors-visit-theres-an-app-for-that.

158. *See* MEDLINE PLUS, *supra* note 149 (explaining the mild symptoms experienced after taking a large amount of birth control pills).

159. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

160. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 840 (1992) (discussing the definition of a legitimate state interest).

161. *See generally* Galva, *supra* note 81, at 21.

162. William D. White, *Professional Self-Regulation in Medicine*, 16 AMA J. OF ETHICS 275, 275 (2014).

163. *Id.*

what is best for one's patient.[164] Much of this push for the freedom to make the decisions best for one's patient came from the 1965 outbreak of German measles.[165] Women who contracted the illness had a 50% chance of delivering a severely damaged fetus; however, abortion was outlawed in California, which limited physicians options for optimal patient care.[166]

The Legislature has given the Medical Board explicit authority to decide what drugs will and will not fall into this category of "lifestyle medications."[167] At this point, the Medical Board has failed to use that authority, which has led to a limitation on the medical liberty of physicians licensed in South Carolina and practicing telemedicine.[168] Adding a portion to the advisory opinion would solve all of the constitutionality and public health police power issues with this Act. The addition to the opinion could be as detailed as a clear list of what is and what is not considered a "lifestyle medication" for the purposes of telemedicine in South Carolina, or it could be a simple as saying, "hormonal birth control pills may be prescribed by telemedicine providers."[169] A failure to update this opinion will continue to allow this encroachment on medical liberty and patient access to healthcare.

B. The Legislature and Legislative Intent

The South Carolina Legislature may be teetering on the edge of an unconstitutional prohibition of oral contraceptives, and this provision may be challenged in the future.[170] This could be corrected by changing the wording of the Act; however, this is a long and difficult process that would likely struggle and be heavily political.[171] This can be seen with the passage of the bill after the wording (but not the meaning) of the "lifestyle

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164. *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE (1st ed. 1994).

165. *Id.* at 300.

166. *Id.*

167. S.C. CODE ANN. § 40-47-37 (Supp. 2016).

168. *See* Telemedicine, *supra* note 111; *see also,* Telephone Interview with Anonymous Physician, *supra* note 18.

169. *See* H.R. 5162, 121st Gen. Assemb., Reg. Sess. (S.C. 2016); *but see also* S.C. CODE ANN. § 40-47-37.

170. *See generally* Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (discussing access to contraception).

171. *See, e.g.*, Emily Deruy, *3 Reasons Gun Laws Are Difficult to Change*, ABC NEWS (Dec. 17, 2012), http://abcnews.go.com/ABC_Univision/Politics/reasons-gun-laws-difficult-change/story?id=17997443 (showing how difficult altering legislation can be with an example on gun control laws).

medications" provision was changed.[172] The Legislature can also encourage the Medical Board to put out an updated advisory opinion defining what it considers to be "lifestyle medications," and this would likely be the path of least resistance and the fastest way to provide rural South Carolinians with the healthcare the Act set out to deliver.[173]

Overall, the Act is a wonderful addition to the State's legislation and has the ability to greatly improve the lives of many citizens.[174] It would be a waste to limit the positive potential impacts by allowing two words to go undefined.[175] The solution to remedying the Act, when compared to the difficulty repairing legislation often encompasses, is a simple one, and it is one that both the Board and South Carolina lawmakers should implement for the betterment of South Carolina's citizens, public health, and public welfare.[176]

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172. *See* H.R. 5162, 121st Gen. Assemb., Reg. Sess. (S.C. 2016); *but see also,* S.C. CODE ANN. § 40-47-37.

173. Deruy, *supra* note 171, at 6.

174. *See generally* Cynthia LeRouge & Monica J. Garfield, *Crossing the Telemedicine Chasm: Have the U.S. Barriers to Widespread Adoption of Telemedicine Been Significantly Reduced?*, 10 INT. J. ENVIRON. RES. PUBLIC HEALTH 6472, 6472–84 (2013) (discussing the positive public health benefits that widespread access to telemedicine can have on a community).

175. *Id.*

176. Deruy, *supra* note 171, at 3.

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