

## Medication Abortion and the Post-*Dobbs* Legal Landscape

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Since the decision in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> the case that overturned *Roe v. Wade*, over a third of states ban abortion from the earliest moments of pregnancy.<sup>2</sup> Several more states would have enforced near total abortion bans but for court injunctions.<sup>3</sup> At the same time, over a dozen states had passed laws or enacted constitutional amendments to protect state-based abortion rights.<sup>4</sup> These states protect mostly unencumbered access to pre-viability abortion and vary in their approaches to post-viability abortions.<sup>5</sup> In the last year, twelve states and Washington, D.C. have passed so-called shield laws, which are new statutes that seek to protect in-state providers from out-of-state lawsuits.<sup>6</sup> Among various provisions, shield laws seek to protect in-state providers, and those that assist them, from another state's investigations of reproductive healthcare that is legal in the shielding state. Likewise, shield laws foreclose the extradition of a provider not fleeing from justice, and prohibit in-state medical boards

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>2</sup> Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *Abortion Is Now Banned or Under Threat in These States*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe> (reporting that Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin ban most or all abortions but that the bans in Arizona, Indiana, North Dakota, Ohio, South Carolina, Utah, and Wyoming are currently enjoined).

<sup>3</sup> *Id.*

<sup>4</sup> *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Feb. 1, 2023), <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

from recognizing the disciplinary suits from out-of-state entities when related to the provision of legal reproductive health care.<sup>7</sup>

These laws are not just prophylactic measures. Interstate conflict promises to shape the legal landscape, particularly as states seek to impose their policy choices as widely as possible, even across state lines. For example, the Texas Freedom Caucus plans to introduce legislation creating a private cause of action, like Texas's Heartbeat Statute, SB 8, to punish people assisting anyone leaving the state to receive a legal abortion in another state.<sup>8</sup> Similarly, the National Right to Life Campaign has drafted model legislation that seeks to punish providers serving out-of-state minors and the people helping minors leave a ban state.<sup>9</sup> Constitutional arguments could upend such restrictions—a right to travel or protection for interstate commerce under the U.S. Constitution—but these arguments are largely untested and underdeveloped as applied to abortion.<sup>10</sup>

The conflict is interjurisdictional, too, as the current federal government takes measures to protect abortion rights. Consider actions and arguments that the Biden Administration has expressed or implied in support of abortion access. As alluded to by Attorney

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<sup>7</sup> See generally David Cohen, Greer Donley, Rachel Rebouché, & Isabelle Aubrun, *Abortion Shield Laws*, 51 J.L. MED. & ETHICS (forthcoming 2023) (on file with authors). Some statutes also permit countersuits for providers and those assisting them who are sued out-of-state for lawful care provided in state. *Id.* (manuscript at 3–4). Also, the Massachusetts shield law, for example, defines protected reproductive health care “regardless of the patient’s location.” MASS. GEN. LAWS ch. 12, § 11/½(a) (2022). This effectively defines the protected care as where the provider is, counter to the typical means of defining care as where the patient is.

<sup>8</sup> *Texas Freedom Caucus Releases 88th Session Priorities*, TEX. FREEDOM CAUCUS (Feb. 8, 2023), <https://www.freedomfortexas.com/blog/post/texas-freedom-caucus-releases-88th-session-priorities>.

<sup>9</sup> Memorandum from James Bopp, Jr., Gen. Couns., Nat’l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon, to Nat’l Right to Life Comm. 14 (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>. SB 8 went into effect in September 2021, before *Dobbs*, and banned abortion after detection of a fetal heartbeat or at around six weeks. SB 8 was likely unconstitutional under then-standing precedent, but it survived court challenges nevertheless. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2497 (2022) (declining to enjoin the enforcement of SB 8 while emphasizing that the decision was “not based on any conclusion about the constitutionality of Texas’s law”); *Whole Woman’s Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (directing the district court to “dismiss all challenges to the private enforcement provisions of the statute”).

<sup>10</sup> David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 26 (2023) [hereinafter Cohen, Donley, & Rebouché, *New Abortion Battleground*].

General Garland, the regulation of mifepristone, the first drug in a medication abortion, by the Food & Drug Administration (FDA) could preempt state bans on abortion pills.<sup>11</sup> The FDA has approved mifepristone as a safe and effective method for terminating a pregnancy up to ten weeks of gestation, but state abortion bans (and other restrictions on abortion pills) contradict these FDA regulations.<sup>12</sup> If federal regulation preempts these laws, states would not be able to ban or overregulate medication abortion.<sup>13</sup> Whether federal preemption applies is a complicated and contested question, and, for preemption theory to work, federal courts must answer that question in the affirmative.

Professor David Cohen, Professor Greer Donley, and I explored these interjurisdictional and interstate conflicts in *The New Abortion Battleground*, published in the Columbia Law Review.<sup>14</sup> It is not only abortion *law*, however, that is experiencing a seismic shift right now, but also abortion *practice*. The future battle over abortion after *Dobbs* will center on the regulation and use of medication abortion. The subject of our article, *Abortion Pills*, forthcoming in the Stanford Law Review, focuses on that battle.<sup>15</sup>

Medication abortion is a two drug regimen taken over 24 to 48 hours that ends pregnancy before ten (and, off label, up to twelve or thirteen) weeks of gestation.<sup>16</sup> The emergence of virtual clinics, which offer mailed medication abortion through telehealth, followed a court decision that temporarily enjoined one of the FDA's restrictions on mifepristone.<sup>17</sup> In December 2021, the FDA permanently lifted that

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<sup>11</sup> Press Release, Dep't of Justice, Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.

<sup>12</sup> David S. Cohen, Greer Donley, & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 12–17, 42) (on file with author) [hereinafter Cohen, Donley, & Rebouché, *Abortion Pills*].

<sup>13</sup> *Id.*

<sup>14</sup> Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 10, at 26 (2023).

<sup>15</sup> *Id.*

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

<sup>17</sup> *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, No. TDC-20-1320, 2020 WL 8167535, at \*1 (D. Md. Aug. 19, 2020). *See also* Carrie N. Baker, *Online Abortion Providers Cindy Adam and Lauren Dubey of Choix: "We're Really Excited About the Future of Abortion Care"*, MS. MAG. (Jan. 14, 2022), <https://msmagazine.com/2022/01/14/abortion-pills-california-colorado-illinois-online-abortion-cindy-adam-lauren-dubey-choix>.

rule, which required patients to collect, in person, mifepristone from a healthcare facility.<sup>18</sup> Of the 20,000 drugs regulated by the agency, and the sixteen with the same restrictions, mifepristone was the only one that patients had to retrieve at a healthcare facility but could take at a location of their choosing.<sup>19</sup> Mifepristone can now be mailed to patients by a certified provider,<sup>20</sup> which is defined as someone who can “date pregnancies accurately,” “diagnose ectopic pregnancies,” and “provide. . . surgical intervention” or “have made arrangements for others to provide such care.”<sup>21</sup>

Also, beginning in January of 2023, pharmacies may seek certification to dispense mifepristone. The FDA announced that pharmacy certification will require pharmacies, among other things, to agree to particular record keeping, reporting and medication tracking efforts, and designate a representative to ensure compliance.<sup>22</sup> Additionally, these pharmacies must track and verify receipt of shipments to patients and record the lot number from each package of mifepristone dispensed.<sup>23</sup> Thus far, both Walgreens and CVS have indicated a willingness to seek certification.<sup>24</sup>

Abortion on Demand (AOD) is “the first large-scale telehealth abortion service run by a U.S.-based provider.”<sup>25</sup> Intake is conducted

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<sup>18</sup> See Response Letter from FDA CDER to American Association of Pro-Life Obstetricians and Gynecologists and American College of Pediatricians, U.S. FOOD & DRUG ADMIN. (Dec. 17, 2021), <https://www.regulations.gov/document/FDA-2019-P-1534-0016>.

<sup>19</sup> Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 654 (2022).

<sup>20</sup> See Letter from Patrizia A. Cavazzoni, Dir., Ctr. for Drug Evaluation & Rsch., FDA, to Donna J. Harrison, Exec. Dir., Am. Ass’n Pro-Life Obstetricians & Gynecologists & Quentin L. Van Meter, President, Am. Coll. of Pediatricians (Dec. 16, 2021), <https://www.regulations.gov/document/FDA-2019-P-1534-0016> [<https://perma.cc/JWH9-XJN6>].

<sup>21</sup> *Questions and Answers on Mifeprex*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex> (last visited Mar. 10, 2023).

<sup>22</sup> *Mifepristone REMS*, FOOD & DRUG ADMIN. (Jan. 2023), [https://www.accessdata.fda.gov/drugsatfda\\_docs/remis/Mifepristone\\_2023\\_01\\_03\\_REMS\\_Full.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/remis/Mifepristone_2023_01_03_REMS_Full.pdf).

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

<sup>24</sup> Pam Belluck, *VS and Walgreens Plan to Offer Abortion Pills Where Abortion Is Legal*, N.Y. TIMES (Jan. 5, 2023), <https://www.nytimes.com/2023/01/05/health/abortion-pills-cvs-walgreens.html>.

<sup>25</sup> Rachel Rebouché, *Remote Reproductive Rights*, 48 AM. J.L. & MED. 244 (2022). See also Carrie N. Baker, *Abortion on Demand Offers Telemedicine Abortion in 20+ States and Counting: “I Didn’t Know I Could Do This!”*, MS. MAG. (June 7, 2021),

through an automated process, and informed consent relies on a pre-recorded video.<sup>26</sup> Gestational age is assessed by a home pregnancy test and reporting the date of the first day of the last menstrual period.<sup>27</sup> AOD prescribes medication abortion for up to ten weeks of pregnancy for individuals aged eighteen and older in order to avoid any parental involvement restrictions.<sup>28</sup> The platform AOD complies with telehealth regulations as well as federal and state privacy laws.<sup>29</sup> AOD operates the same in every state with an exception of Georgia and Minnesota, which have 24-hour waiting periods.<sup>30</sup> It takes within a week to receive the pills and costs hundreds of dollars less than a clinic-based procedure.<sup>31</sup> AOD operates in twenty states and Washington, D.C.<sup>32</sup>

Although the provision of medication abortion has shifted in significant ways, there are caveats worth emphasizing. For one, teleabortion depends on various forms of privilege—utilizing smartphones and having a stable internet connection, or having an uncomplicated pregnancy—which, because of U.S. health disparities, is more likely the case for wealthier and white people.<sup>33</sup> For another, even with remote care, the need for clinical spaces—for abortion past ten or twelve weeks, or when a patient is not a candidate for telehealth—will not disappear. Telehealth cannot assist those who need aspiration or procedural abortion. Nevertheless, state policy, in jurisdictions supportive of abortion rights, could invest in telehealth generally to reduce disparities and continue to lift restrictions on telemedicine, which many states have done in response to the COVID-

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<https://msmagazine.com/2021/06/07/abortion-on-demand-telemedicine-abortion-fda-rems-abortion-at-home>.

<sup>26</sup> Susan Rinkunas, *Exclusive: First Large-Scale Telemedicine Abortion Service Launches in U.S.*, MARIE CLAIRE (Oct. 1, 2021), <https://www.marieclaire.com/health-fitness/a36028641/abortion-on-demand-telemedicine-service-launch>.

<sup>27</sup> See *Pregnancy Calculator*, ABORTION ON DEMAND, <https://abortionondemand.org/pregnancycalculator> (last visited Apr. 6, 2023).

<sup>28</sup> See *Frequently Asked Questions*, ABORTION ON DEMAND, <https://abortionondemand.org/faq> (last visited Apr. 6, 2023).

<sup>29</sup> *Id.*

<sup>30</sup> See Baker, *supra* note 27.

<sup>31</sup> See Rinkunas, *supra* note 26.

<sup>32</sup> *Id.*

<sup>33</sup> Camille A. Clare, *Telehealth and The Digital Divide as a Social Determinant of Health During the COVID-19 Pandemic*, 10 NETWORK MODELING ANALYSIS IN HEALTH INFOMATICS & BIOINFORMATICS 25, 25–26 (Apr. 3, 2021), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8019343/pdf/13721\\_2021\\_Article\\_300.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8019343/pdf/13721_2021_Article_300.pdf).

19 pandemic. They also can join interstate licensure compacts,<sup>34</sup> which could distribute the services of providers across the states that permit telehealth for abortion.<sup>35</sup>

In addition to telehealth services, mailed medication abortion is also available online no matter where you live. The non-profit organization Aid Access works with providers and pharmacies located outside the United States and mails abortion medication to people in all states, even where abortion or teleabortion is prohibited.<sup>36</sup>

Along with these developments have been a number strategies to restrict access to medication abortion. The Alliance for Hippocratic Medicine sued to remove mifepristone from the market by claiming that the FDA acted outside its statutory power when the agency approved it twenty-three years ago.<sup>37</sup> “This lawsuit is also one of several efforts to rely on a nearly-150-year-old federal law, the Comstock Act,” that seeks to ban mailing abortion pills anywhere.<sup>38</sup> A federal district court in Texas ordered the FDA to suspend mifepristone’s approval, and the Fifth Circuit stayed the district court’s holding only as applied to the FDA’s 2000 approval of mifepristone (leaving in effect the district court’s stay of FDA actions after 2000).<sup>39</sup> In April 2023, and at the time of writing, the U.S. Supreme Court has stayed the Fifth Circuit’s order, keeping in place the FDA regulation of mifepristone.

In addition, because medication abortion is taken over more than one day, debates about where an abortion occurs have consequences for which state law applies.<sup>40</sup> Moreover, anti-abortion efforts are beginning to target information, manufacture, and distribution related to medication abortion.<sup>41</sup> As the complications of enforcing

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<sup>34</sup> See *Information Release, INTERSTATE MED. LICENSURE COMPACT COMM’N* (June 29, 2022), [https://www.imlcc.org/wp-content/uploads/2022/06/IMLCC\\_Information-Release\\_June-29-2022\\_Physicians-licensed-in-multiple-states-1.pdf](https://www.imlcc.org/wp-content/uploads/2022/06/IMLCC_Information-Release_June-29-2022_Physicians-licensed-in-multiple-states-1.pdf).

<sup>35</sup> Cohen, Donley, & Rebouché, *Abortion Pills*, *supra* note 12.

<sup>36</sup> David Ingram, *A Dutch Doctor and the Internet Are Making Sure Americans Have Access to Abortion Pills*, NBC NEWS (July 7, 2022), <https://www.nbcnews.com/tech/tech-news/dutch-doctor-internet-are-making-sure-americans-access-abortion-pills-rcna35630>. Obtaining and taking mifepristone and/or misoprostol without a healthcare provider’s involvement could expose people to threat of prosecution, especially the already marginalized. See Cohen, Donley, & Rebouché, *Abortion Pills*, *supra* note 12.

<sup>37</sup> Complaint at 94–101, *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-cv-00223-Z (N.D. Tex. Nov. 18, 2022).

<sup>38</sup> Cohen, Donley & Rebouché, *Abortion Pills*, *supra* note 12.

<sup>39</sup> *All. for Hippocratic Med.*, No. 22-cv-00223-Z (N.D. Tex. 2022).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.*

these measures arise, states could turn their attention not only to providers and those who assist them, but also to the people who take abortion pills.

At the same time, abortion supporters are taking measures to increase access to medication abortion. At the federal level, two lawsuits will test the argument that FDA regulation preempts contradictory state laws on mifepristone, an argument described above.<sup>42</sup> Another lawsuit asked that a federal district court compel the FDA to remove remaining restrictions on mifepristone, such as requiring that only certified providers prescribe the medication or that patients and providers sign a duplicative informed consent form.<sup>43</sup> And there are proposals yet to be explored: “states [could allow] pharmacists to prescribe medication abortion, creating a workaround that mimics over-the-counter provision without violating federal food and drug law.”<sup>44</sup>

Then there are strategies that “exploit loopholes in abortion bans, including advanced provision—the dispensation of abortion pills before a potential unwanted pregnancy in the future—and menstrual regulation or ‘missed period pills’—dispensation to induce a period without taking a pregnancy test.”<sup>45</sup> In the same vein, advocates for abortion rights have publicized information about self-managed abortion through formal and informal networks.<sup>46</sup>

These efforts, for and against medication abortion access, will shape the definition of abortion, change who is culpable for abortion crimes, and invite intrusions into health and personal privacy. To take the first, pills challenge traditional definitions of abortion, given that the drugs in a medication abortion are used for various purposes, such as miscarriage management, and blur the line between abortion and

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<sup>42</sup> Complaint at 29–30, *GenBioPro, Inc. v. Sorsaia*, No. 3:23-cv-00058 (S.D. W. Va. Jan. 25, 2023); Complaint at 35–36, *Bryant v. Stein*, No. 1:23-cv-77 (M.D. N.C. Jan. 25, 2023).

<sup>43</sup> See Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 10, at 57–58. Eighteen attorneys general unsuccessfully argued before a federal district court in Washington state that the court should order the FDA to lift the remaining restrictions on mifepristone. *Washington v. U.S. Food & Drug Admin.*, No. 1:23-CV-3026-TOR, 2023 U.S. Dist. 61776 LEXIS (E.D. Wash. Apr. 7, 2023).

<sup>44</sup> Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 10, at 4.

<sup>45</sup> *Id.*

<sup>46</sup> Amna Nawaz, *Abortion Providers Create Mobile Centers Along Border of State Banning Procedures*, PBS NEWS HOUR (Feb. 3, 2023), <https://www.pbs.org/newshour/show/abortion-providers-create-mobile-centers-along-border-of-state-banning-procedures>.

pregnancy loss.<sup>47</sup> Even as states try to police medication abortion, pills cannot be stopped. But “they can be pushed underground, deepening a public health and criminal justice crises.”<sup>48</sup>

At this moment of dynamism, bold and novel arguments are needed to support pregnant people’s right to seek an abortion and to address how the provision of abortion care has changed and will change.<sup>49</sup> We should expect and embrace disagreement as advocates and lawyers pursue long-term strategies to advance reproductive justice. Those efforts need to happen with the full recognition that past movements for reproductive justice have too often sidelined the participation and perspectives of marginalized groups.<sup>50</sup> Strategies responsive to *Dobbs* should center race, class, disability, sexual orientation, immigration status, and gender identity in the next phase of scholarship and advocacy. And the challenge of resources remains—who can travel, take time off work, find childcare, gain access to information, or use the internet. These obstacles predated *Dobbs*; they have been foundational to abortion access, and they are all the more salient now.

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<sup>47</sup> See Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1665–66 (2022).

<sup>48</sup> Cohen, Donley & Rebouché, *Abortion Pills*, supra note 12. See generally MICHELE B. GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 119 (2020).

<sup>49</sup> See David S. Cohen, Greer Donley, & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 2 (2022) (“What strategies should govern the abortion rights movement going forward? To that end, we identify three themes: (1) trying creative, sometimes novel, approaches to put the antiabortion movement into a defensive posture, (2) expecting and embracing disagreement among abortion rights supporters, and (3) playing the long game.”).

<sup>50</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 56–57, 1003 (1997) (canvassing the racism that has underscored the reproductive rights movement); Loretta J. Ross et al., *Just Choices: Women of Color, Reproductive Health and Human Rights*, in *POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION* 147, 147 (Jael Silliman & Anannya Bhattacharjee eds., 2002); JENNIFER NELSON, *MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN’S HEALTH MOVEMENT* 167–92 (2015) (describing the ways in which the mainstream reproductive rights organizations ignored issues of race).