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USA

# Abortion Rights After Dobbs: The State of the Struggle

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**It's been two and a half years since the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization overturned Roe v. Wade. The dystopian landscape that many activists feared has indeed materialized with 14 states banning abortion, while seven more have severely restricted the procedure – for example, banning abortions after six weeks or 15 weeks — in ways that would have been illegal under the Roe v. Wade decision in effect from 1973-2022.**

It's been two and a half years since the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization overturned Roe v. Wade. The dystopian landscape that many activists feared has indeed materialized with 14 states banning abortion, while seven more have severely restricted the procedure – for example, banning abortions after six weeks or 15 weeks — in ways that would have been illegal under the Roe v. Wade decision in effect from 1973-2022.

Yet, with each high-profile case demonstrating the pain and suffering these bans and limits produce, public opinion moves further and further toward support for abortion rights. Gallup's latest poll on the legality of abortion finds 34% of Americans believe abortion should be legal under any circumstances, nearly matching last year's record-high 35% and above the 27% average since 1975. Another 51% currently say abortion should be legal under certain circumstances, while the percent thinking abortion should be illegal in all circumstances, has fallen to 13%, compared to 21% in 2019.

Fifty-two percent say abortion is "morally acceptable." This is 10 percentage points above the historical average since 2001. Polling by the Public Religion Research Institute found that the percentage of Hispanic Catholics saying abortion should be legal in all cases doubled between March and December of last year, from 16% to 31%.

Changes in public opinion have not yet brought changes to Republican-dominated state legislatures, not surprising when we consider their lop-sided gerrymandered character. Yet Republicans are now on notice, even in very, very red states.

The recent IVF debacle in Alabama signals their problem. The Alabama Supreme court ruled that frozen embryos are children, basing its decision on a 2018 amendment to the Alabama constitution which affirmed fetal personhood. IVF providers announced they would be forced to shut down. Republicans scrambled to pass with lightning-speed legislation that protected IVF practitioners from criminal or civil liability. After Alabama, Republicans in Florida put their proposed fetal personhood legislation on hold. Although the Iowa state house went ahead with a fetal personhood bill, it is unlikely to pass the state senate, which failed to support fetal personhood even before the Alabama IVF ruling. Iowa activists predict that Republicans will also pull back on sending to the 2024 ballot a proposed constitutional amendment stating that there is no right to abortion in Iowa, since it is sure to drive up pro-abortion turnout.

"Exception" for a Pregnant Person's Health or Life

Draconian abortion bans, such as Texas' "heartbeat" bill, have prevented pregnant women with non-viable fetuses or threats to their health from accessing abortion. The Texas law, for example, allows abortion after detection of a heartbeat only if there is a "medical emergency," which the law does not define. Because doctors and hospitals face serious penalties for performing abortions, they are reluctant to act unless and until they are certain the abortion can be legally defended. Inevitably, that means denying abortion care well beyond the point where they would have provided it before the Dobbs decision.

A high-profile case is that of Kate Cox, who needed an abortion because a non-viable fetus was putting her health at risk and was denied. She sought relief through the Texas courts, filing a suit to allow her abortion to proceed. The Travis County Judge, Judge Maya Guerra Gamble, ruled in favor; but the Texas Attorney General, Ken Paxton, appealed to the Texas Supreme Court. He wrote to the hospitals where Cox's doctor had admitting privileges, threatening to prosecute the hospitals if they allowed the abortion to occur. He dismissed Judge Gamble's ruling saying she "is not medically qualified to make this determination." [As if he was!] Ultimately, the Texas Supreme Court ruled against the abortion concluding that: "No one disputes that Ms. Cox's pregnancy has been extremely complicated. Any parents would be devastated to learn of their unborn child's trisomy 18 diagnosis...Some difficulties in pregnancy, however, even serious ones, do not pose the heightened risks to the mother the exception encompasses." By the time of the ruling, Cox had already gone to New Mexico for the procedure.

The Center for Reproductive Rights has filed suit in Texas on behalf of 20 women who had similar experiences. Amanda Zurawski, the lead plaintiff, suffered preterm premature rupture of membranes (PPROM) in her 18th week of pregnancy. Doctors were reluctant to perform an abortion because the fetal heartbeat could still be detected. She eventually developed sepsis and after three days in intensive care delivered a stillborn daughter. Zurawski survived, but her fertility was compromised. District Court Judge Jessica Mangrum's August 4, 2023, ruling on *Zurawski v. State of Texas* clarified that the medical exception in the state's abortion bans enabled physicians to use their "good faith judgment." That is, in consultation with their pregnant patients, they could determine when an abortion was necessary to preserve the patient's health or life.

The Texas AG appealed the ruling, but while the Texas Supreme Court heard the case last November, they have not yet issued their ruling. The Center for Reproductive Rights has filed similar suits in Tennessee and Idaho. Laws that threaten licensure loss and felony convictions are essentially abortion bans, because even when states provide "guidance" about what constitutes a threat to a woman's health or life, doctors rightly fear reprisal. For example, Louisiana has a list of 25 specific "medically futile" conditions where an abortion can be provided. Nonetheless, because doctors are still vulnerable to prosecution should the state decide that they veered over the guidelines, they are reluctant to perform abortions.

Political Organizing for Abortion Rights — Red State Revolt

Since the Dobbs decision, in every state where a referendum on reproductive rights has been placed on the ballot, the election has resulted in defeat for the anti-abortion movement. In 2022, California voted in a constitutional amendment protecting abortion rights, as did Michigan voters, ratifying a sweeping citizen-initiated constitutional amendment protecting reproductive rights. But voters in red states also have weighed in with support for abortion rights. This includes Kentucky and Kansas, where constitutional amendments to ban abortion were defeated, as well as Ohio, where reproductive rights were enshrined in the state constitution.

In Ohio, following the Dobbs decision, a ban on abortion after six weeks (a "heartbeat" law) went into effect. During the period when the ban was in place, a 10-year-old Ohio girl who was raped and impregnated, was forced to travel to Indiana to seek an abortion. The case attracted widespread attention and outrage. In October 2022, a judge stayed the law while it wound its way through the courts. But the threat of its future implementation motivated activists to organize and place a citizen-initiated constitutional amendment on the ballot. The proposed amendment granted an individual right to one's own reproductive medical treatment, including but not limited to abortion. It gave the treating physician the authority to determine, on a case-by-case basis, whether an unborn child is viable, and permitted exceptions to any abortion regulation at any stage of pregnancy necessary to protect the health or life of the pregnant person.

The Republican-dominated legislature attempted to defeat the referendum by holding a special election for their proposed constitutional amendment that would alter the rules for passage from a majority vote to 60%. Voters turned out in record numbers to reject that ploy and then in the next election passed the constitutional amendment by 56.6%.

### Citizen-Initiated Constitutional Amendments

When the Dobbs decision was leaked in the spring of 2022, people began to organize. Photo: Marlaina A. Leppert-Wahl

Seventeen states allow citizen initiatives to modify the state constitution. Abortion rights advocates' success in Ohio has encouraged organizing in other red states where it is possible to put a constitutional amendment on the ballot through a citizen initiative process. Among these are Arizona, Arkansas, Florida, Missouri, Nebraska, and South Dakota.

Arizona: Following Dobbs, a 2022 law banning abortion at 15 weeks unless necessary to preserve a woman's life or "a major bodily function" went into effect. Physicians who violated the law were subject to being prosecuted for a felony with their licenses revoked if convicted. On April 9, 2024, the Arizona Supreme court shockingly ruled that an 1864 law banning abortion (except to save a woman's life) could be enforced. They did, however, send it back to the lower court for further consideration of plaintiff's arguments. This ruling created a political firestorm, pressuring the legislature to repeal the 1864 law. The Governor and Attorney General, both Democrats, announced they will not enforce the law. The 1864 law could go into effect no earlier than two months from the date of the Court's decision.

Meanwhile, Arizonans for Abortion Access, a coalition of reproductive health, rights, and justice organizations, is collecting signatures for a constitutional amendment allowing abortion up to viability. Even after viability it would prevent the state from enacting, adopting or enforcing any law that denies, restricts or interferes with an abortion that, "in the good faith judgment of a treating health care professional, is necessary to protect the life or physical or mental health of the pregnant individual." Organizers must gather nearly 384,00 valid signatures by July 3. On April 2 they announced they had 500,000 signatures already and, with 3,000 volunteers, intend to gather more.

Arkansas: Since the Dobbs decision, abortion has been illegal in Arkansas except to save the life of a pregnant person in a "medical emergency." Arkansans for Limited Government is currently collecting signatures for the Arkansas Abortion Amendment "which will prevent our state government from regulating individuals' freedom to make personal healthcare decisions and will allow doctors to uphold their oaths and 'do no harm'." The proposed amendment legalizes abortion for any reason up to 18 weeks of pregnancy. After that, there are a wide range of exceptions: in cases of rape, incest, fetal anomaly and to "protect a pregnant female's life or to protect a pregnant female from a physical disorder, physical illness, or physical injury."

As in Ohio, the Republican legislature sent a constitutional amendment to voters in 2022 that would have increased the threshold for passing constitutional amendments and other initiated acts from a simple majority to 60%. This was soundly defeated 59% to 41%.

Arkansans for Limited Government have until July 5 to collect 90,704 valid signatures to put the amendment on the November 2024 ballot.

Florida: In 2022, the Florida legislature passed a law banning abortion after 15 weeks with exceptions to save a woman's life or prevent serious physical harm and when a fetus has a terminal medical condition "incompatible with life outside the womb." A lower court ruled that the ban contradicts the privacy right granted by the Florida Constitution. However, this ruling was overturned by the Appeals Court and the law remained in effect. Then, in April 2023, the legislature passed, and Gov DeSantis gleefully signed, a law banning abortion after six weeks, with exceptions for rape and incest. But the six-week ban was paused while a challenge to the 15-week ban was considered by the Florida Supreme Court.

In April 2024 the Court ruled that laws banning abortion did not violate the Florida Constitution's privacy clause. With

five judges appointed by Governor DeSantis, the 6-1 decision overturns a 1989 precedent by the Court, which ruled that the privacy clause covered a woman's abortion decision. That ruling triggered the six-week abortion ban which goes into effect May 1, 2024.

This is a particularly harsh blow because many of those needing abortion who live in nearby Southern states with brutal bans on abortion were able to drive to Florida for their procedure. The six-week ban will make that almost impossible.

Meanwhile abortion rights activists proposed a constitutional amendment where "no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider. This amendment does not change the Legislature's constitutional authority to require notification to a parent or guardian before a minor has an abortion."

Floridians Protecting Freedom has collected more than a million valid signatures to put the measure on the ballot. In an attempt to squash it, the attorney general objected to the measure's wording. But by a narrow 4-3 majority, the Court denied the attorney general's arguments and Amendment 4 will be on the November ballot. The amendment requires a supermajority 60% vote to pass. That is certainly a high bar, but Michigan's and Ohio's amendments, which only required a simple majority, passed by just two to three points below 60%.

Missouri: As of June 24, 2022, abortion is completely banned except in medical emergencies where abortion is necessary to save the pregnant person's life or to prevent serious risk to the pregnant person's physical health. Performing or inducing an abortion is a felony punishable by 5-15 years in prison. There are no exemptions for rape or incest.

Missourians for Constitutional Freedom are organizing for a sweeping constitutional amendment. It establishes a person's "right to make and carry out decisions about all matters relating to reproductive health care including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions. While the general assembly may regulate the provision of abortion after fetal viability, under no circumstance shall the government deny, interfere with, delay or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person."

Advocates must collect signatures from eight percent of voters in six of the state's eight congressional districts. This amounts to more than 171,000 signatures to be collected by May 5. The Governor can decide whether it goes on the August primary or on the November ballot.

Montana: the Montana Supreme Court has continued to uphold the Court's 1999 Armstrong decision, which holds that laws interfering with bodily autonomy violate the state Constitution's right to individual privacy. Consequently, abortion may be performed "until viability." This has not prevented the Republican-dominated state legislature from passing laws limiting access to abortion, including three laws signed by the Governor in 2021: a ban on abortions beyond 20 weeks, elimination of telehealth services for medication abortions and a requirement that abortion providers offer patients the opportunity to listen to the fetal heart tone or view an ultrasound 24 hours before performing an abortion. A judge recently ruled all these laws are unconstitutional.

In the meantime, Montanans Securing Reproductive Rights have submitted a constitutional amendment which would establish "a right to make and carry out decisions about one's own pregnancy, including the right to abortion." The initiative would allow regulation of abortion after the point of fetal viability, but bars the government from interfering if the procedure is "medically indicated to protect the life or health of the pregnant patient."

The Montana Attorney General challenged the amendment's wording; however, after months of delay, the Court denied his petition. Given Montana law, a committee of the state legislature must weigh in either pro or con (but cannot prevent the ballot measure from going forward). There is some debate over whether or not this requirement has been lifted by the Court's decision. But in any case, the legislature must make its determination within 14 days; activists will be gathering signatures by the end of April. To make the November ballot, activists need to submit 60,359 valid signatures from 40 Montana House districts by June 21, 2024.

Nebraska: In May 2023, the state legislature passed a statute banning abortion after 12 weeks. The ban includes exceptions for rape, incest and to save the life of the pregnant person. The ban was part of a bill that also prevented transgender people under 19 from receiving any gender-confirming surgery. The state's chief medical officer — a political appointee who is currently an ear, nose and throat doctor — would set rules for puberty blockers and hormone therapies. There would be some exceptions for minors already receiving treatment before the ban was enacted.

In response, advocates have organized to put a constitutional amendment on the November 2024 ballot. The proposal amends the Constitution "to provide all persons the fundamental right to abortion without interference from the state or its political subdivisions until fetal viability, which is the point in pregnancy when, in the professional judgment of the patient's health care practitioner, there is a significant likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures; or when needed to protect the life or health of the pregnant patient."

The Protect Our Rights campaign began collecting signatures on the approved ballot language in mid-November and has until July 3, 2024, to reach their target of 125,000 signatures

South Dakota: Currently, abortion is entirely banned "unless necessary to save the life of the mother." This law, originally passed in 2005, became effective immediately after the Dobbs decision. Dakotans for Health, a group organized by a former state legislature and political operatives, quickly submitted a proposed constitutional amendment based on the Roe v. Wade framework. This is a controversial move, with many of the usual advocates for constitutional amendments such as the ACLU, Planned Parenthood, and the South Dakota Justice Empowerment Network, which helps people seeking abortions, opposed to the measure. They believe that Roe does not go far enough in protecting reproductive rights. It will allow, as did Roe, the state legislature to impose impediments to abortion access (such as a 24-hour waiting period and limitations on access to medication abortion) as well as denying abortion care to patients who need it later in their pregnancies.

The debate over strategies for securing reproductive rights in South Dakota's constitution is an extreme case of the concrete discussions about the politics of abortion taking place in red states. Last year, Missouri advocates were organizing around two different ballot measures — one the more sweeping proposal now in play while the other only allowing abortion up to 12 weeks. In a state as conservative as Missouri, with a strong evangelical political presence, some activists felt the broader measure would go down to defeat. The same thinking is behind Arkansas' proposal which sets an 18 week limit and Florida's measure which explicitly maintains parental notification for minors seeking abortion.

### Republican Legislators Attempt to Restrict Ballot Measures

Many of the signs in support of bodily autonomy do so with deadly humor. Photo: Marlaina A. Leppert-Wahl

Fearing popular support for constitutional amendments protecting reproductive rights, Republican-dominated state legislatures are fighting to make passage of amendments more difficult. (In many red states where advocates are organizing for an amendment, the Attorney General has attempted to convince the courts to deny the ballot measure. So far, they have not been successful.)

Recently, the North Dakota legislature referred a constitutional amendment for the November 2024 ballot which would make it more difficult to amend the North Dakota constitution by requiring that it be put before the voters twice (once in the primary and if it passes again in the general election). The Missouri legislature is also considering an amendment requiring passage by a majority of voters in five of Missouri's eight congressional districts. Republicans in the Florida legislature propose to raise the vote required for passage from 60% to 66%. But none of these proposals have yet passed the legislature.

### Pushing It Even Further in Blue States

Blue and bluer states are also organizing to enshrine abortion rights in their state constitutions, even when court decisions and the legislature have affirmed those rights. The Vermont legislature proposed, and voters passed the Reproductive Liberty Constitutional Amendment stating, "an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." Vermont allows abortion to be performed at any point during a pregnancy.

In April 2023, the Maryland legislature passed a constitutional amendment which guarantees abortion rights and also shields patients and providers from criminal, civil and administrative penalties relating to bans or restrictions in other states. The amendment required 60% of legislators to vote yes. Before Dobbs, this high bar prevented proponents from winning legislative approval. The amendment goes to the voters in November, when it is very likely to pass.

In Nevada, abortion is currently allowed up to 24 weeks, based on a state-wide referendum passed in 1993. That law may not be changed by legislative vote. Nonetheless, activists are organizing to enshrine that same law into the constitution. Nevadans for Reproductive Freedom must collect 103,000 valid signatures by June 26. Given that in Nevada an amendment only goes into effect if passed in two consecutive elections, if passed this November, the amendment would be on the ballot again in 2026.

In Colorado, with abortion legal at any point in pregnancy, Coloradans for Protecting Reproductive Freedom are organizing to overturn a provision of the state constitution that prohibits public funds for abortion. The group must collect just over 124,000 valid signatures by April 26 to qualify for the November ballot. That total must include two percent of the total registered voters in each of Colorado's 35 state Senate districts.

The ban on public funding for abortion In Colorado was voted into the state constitution in 1984. Advocates believe that in the current political climate voters are ready to expand access of public employees and Medicaid recipients to abortion care. This will be an important test; passage will encourage organizing for public funding in other states.

Constitutional amendments, especially in red states, are unfortunately only the beginning of the fight. While a constitutional amendment opens the door for overturning existing laws, taking anti-abortion laws off the books isn't automatic.

In Michigan, for example, although voters approved a broad reproductive rights package in the state constitution in 2022, there are still three barriers to access: a 24-hour waiting period, use of Medicaid funds for abortion and a parental consent law. Recently, the ACLU, Human Rights Watch and Michigan Organization for Adolescent Sexual Health launched a campaign against forced parental consent laws.

In Ohio, although the constitutional amendment passed, the Republican state legislature has left all laws in place (even those that are unenforceable). The Attorney General has asked the state Supreme Court to reinstate parts of the now unconstitutional six-week ban—for example, that the health care provider check for the presence of a heartbeat. For their part, abortion advocates have filed suit against a law that requires an in-person appointment

where providers are forced to give patients state-mandated and medically misleading information followed by a 24-hour waiting period. They argue that these requirements violate the Ohio Constitution by “burdening, prohibiting, penalizing and interfering with access to abortion, and discriminating against abortion patients and providers.”

### The Viability Limit

Another key debate among reproductive rights activists revolves around whether there should be a limit at the viability of the fetus. Most ballot initiatives permit abortions until viability and set conditions under which late abortions can occur. *Roe v. Wade* determined viability to be in the third trimester (generally after 24 weeks), where an exception could be made if the medical practitioners determined it necessary to preserve the pregnant person's health or life, or in the case of fetal abnormality. This constitutes no more than one percent of all U.S. abortions. Yet, given that there were roughly 1,000,000 abortions last year, 10,000 people every year will need a “post-viability” abortion.

The exceptions may appear “reasonable;” in practice they impose constraints on doctors and hospitals, who are often reluctant to act unless and until it is abundantly clear that a problem pregnancy has to be terminated in order to prevent death or serious bodily impairment. By that time, the person's health has been impaired and the process traumatizing. The best argument against a viability standard is the testimonies of those who have had late-stage abortions.

Labor and reproductive justice come together to demonstrate in Madison, WI. Photo: Marsha Rummel

“Viability” is a slippery term in any case — is a fetus “viable” at 20 weeks with a 5-6% survival rate and a 97% morbidity rate or at 23 weeks, if it has a 27% chance of surviving? While many state laws specify a number of weeks past which abortion is banned (with exceptions), the American College of Obstetrics and Gynecology strongly opposes policymakers’ defining viability in terms of numbers of weeks of pregnancy or “using viability as a basis to limit access to evidence-based care.”

Most activists recognize the problems with the viability standard; however, in states with strong anti-abortion movements, advocates may believe that it is politically necessary to include a viability limit. The proposed constitutional amendments try to undo some of the harm done by “exceptions” in draconian red state laws by leaving exceptions as open-ended as possible. They do not specify a type of bodily harm or use qualifying terms like “serious harm” to health or “medical emergency” in order to provide doctors the most room to use their medical judgment.

Shield Laws to Protect Abortion Providers, Funders and Facilitators

Another route for political organizing is working to pass shield laws in states where abortion is legal. Currently, 15 states have shield laws that protect clinics who provide procedural abortion to patients travelling from states where abortion is banned or severely restricted. Additionally, five states — Massachusetts, Washington, Vermont, Colorado and New York — have shield laws that specifically protect providers who work through telehealth to prescribe and mail abortion medication to patients living in states where abortion is banned or sharply restricted.

For example, Washington's shield law prohibits state officials from enforcing out-of-state subpoenas seeking information related to abortion in the state of Washington. It also prohibits enforcement of out-of-state arrest warrants and any information sought about an individual's abortion. It prevents the governor from extraditing any individuals for out-of-state charges and protects people from civil causes of action related to providing or aiding someone seeking an abortion.

As the laws evolve, they are covering more ground in terms of protection — for example, outlawing technology companies such as Facebook from providing information about patients who access abortion in their states and live in states where abortion is illegal. Additionally, some states, like Washington, are incorporating other kinds of care — such as gender-affirming care which is also now banned in many states—into the practices that are shielded.



Before the passage of these laws, U.S. feminist organizations connected women in states where telehealth for abortion was banned to Aid Access, an international organization located beyond U.S. law, whose doctors prescribed abortion medications which were shipped from India. The downside of international shipping is that the medication could take weeks to arrive. When Massachusetts passed the first shield law protecting telemedicine providers, Aid Access linked up with U.S.-based healthcare providers who were able to prescribe and ship drugs much more quickly — within 3-5 days generally.

### The Fight in Federal Court

While it may have been assumed, following the Dobbs decision, that the main struggles over reproductive rights would take place at the state level, that assumption has been upended by the right-wing strategy to challenge the Federal Drug Administration's approval of mifepristone, one of the two pills used for medication abortion. The other medication, misoprostol, was originally developed to treat certain ulcers and is thus more easily available and less strictly regulated. Mifepristone was first approved by the FDA in 2000, and, combined with misoprostol, results in a 99.6% success rate in terminating first-trimester pregnancies. According to a host of studies, medication abortion carries less risk of complications than having one's wisdom teeth extracted. Medication abortion is now used in 63% of all abortions, compared to 53% in 2020 and 39% in 2017. The recent increase is partly because access to procedural abortion has precipitously declined due to abortion bans.

The right wing wants to use the Comstock Act, which was lampooned in this cartoon, Graphic from The Masses, 1915.

The challenge to the FDA's approval of mifepristone was brought by anti-abortion doctors to an anti-abortion federal court judge in Texas, Matthew Kacsmaryk, who dutifully ruled in their favor. Most strikingly, in his opinion Kacsmaryk agreed with the plaintiffs that sending abortion medications through the mail violates the Comstock Act, passed by Congress in 1873 and updated in 1897 to include a prohibition for "common carriers." The Fifth U.S. Circuit Court of Appeals, the most conservative appeals court in the country, accepted the doctors' standing in the case and upheld their claims, but only in part. The court declined to rule one way or another on the implications of Comstock, preferring instead to base its decision on a narrower argument. (See footnote 8, p. 53 of the opinion.)

The justices concluded that the FDA's approval of mifepristone in 2000 could not be litigated because too much time has passed; but agreed with Kacsmaryk that the FDA's decision in 2021 to allow telehealth prescriptions with medication abortion pills sent through the mail was not adequately supported by scientific and medical research. This decision gravely threatened access to abortion in states where it is banned or restricted.

The Supreme Court heard the case on March 26. In their questioning, both Thomas and Alito referred to the Comstock law. However, the other conservative judges, like the Appellate Court judges (with the exception of Justice Ho), avoided discussion of Comstock. Most commentators agree that even some of the conservative justices found the plaintiffs' "legal standing" to bring the suit questionable. They predict that the Court will rule in favor of the FDA on the narrow basis of plaintiffs' lack of standing, thereby allowing the current protocols to continue, and avoiding the larger issues raised in the case.

The Federal Office of Legal Counsel has already released an opinion arguing that the Comstock Law does not in fact prohibit mailing medications used in abortion, since they are used to also treat other medical conditions.

The FDA's policies on medication abortion may come before the Supreme Court again at some point in the future, because another suit, this time brought by pro-choice Attorneys General (from Washington, Oregon, Nevada, Delaware, Arizona, Illinois, Connecticut, Colorado, Vermont, New Mexico, Michigan and Rhode Island), challenges the current FDA rules with regard to mifepristone as overly restrictive and medically unjustifiable.

A ruling by the Supreme Court in favor of those challenging the FDA's decisions with regard to mifepristone, whether

approving fewer restrictions or demanding a rollback on access, would seriously undermine the FDA's authority and open the door to a slew of court challenges — for example, to vaccines.

Emergency Medical Treatment and Active Labor Act

In late April, the Supreme Court will hear another case, *Idaho v. United States*, which was initiated by the Biden Administration, arguing that Idaho's current law criminalizing abortion except to protect the life of a pregnant person violates the Emergency Medical Treatment and Active Labor Act (EMTALA). The EMTALA, passed by Congress in 1986, requires hospitals receiving federal Medicare funding to provide stabilizing care in a medical emergency. Originally passed to prevent private hospitals from refusing to provide emergency treatment to poor people, including women in labor, over the years, the EMTALA has been amended and expanded through court cases and administrative interpretation.

The government argues that when an abortion is necessary to stabilize the health of a pregnant woman experiencing an emergency medical condition, a physician must provide an abortion under EMTALA (with the patient's express consent).

The US District court in Idaho sided with the Department of Justice, preventing Idaho's ban from taking effect. Idaho appealed, and in January the Supreme Court lifted the injunction. Abortion is now completely illegal in Idaho, unless necessary to save a woman's life. The Supreme Court will hear oral arguments on the case on April 24, 2024.

Organizing Outside the System: Feminist Support for Medication Abortion

Before medication abortion was available, feminists organized outside the medical system and outside the laws banning abortion to provide safe abortions — most famously, the Jane Collective. The development of medication abortion has fundamentally expanded the opportunities for feminist intervention.

First, medication abortion does not require any skills in using medical instruments such as a speculum or a vacuum aspirator. It does involve knowledge of how the medications work and how to use them. Second, the medications are extremely safe and effective. The vast majority of women using medications to end pregnancy at 12 weeks or less do so without having to access medical care. (The World Health Organization recommends use until 12 weeks, but the FDA rules allow prescribing only up to 10 weeks gestation.) Third, in the event that a woman has to see a doctor or go to an emergency room, the presentation of her symptoms is no different from a natural miscarriage; there is no way for any provider to know that she has purposefully aborted.

Fourth, the protocol for determining if a woman can safely use medication abortion involves a set of standard questions that screen for contraindications such as symptoms of possible ectopic pregnancy, presence of an IUD, and medical conditions that disallow use. Thus, medically trained people are not necessarily required to operate a website that provides access to information and medication. Finally, while one of the abortion medications — mifepristone — is highly regulated, the second abortion medication — misoprostol — is much more easily and widely available. Although the two-medication protocol is preferable for a number of reasons, taking misoprostol alone is safe and effective — 85%-95% success in completing an abortion at less than 12 weeks. [Medication abortion can be, and in many countries is, used for abortions in the second trimester. However, it is considered preferable to do them in a hospital setting where interventions are available if needed.]

Misoprostol was originally developed to treat certain kinds of ulcers. In the 1980s, it was discovered that the drug was useful off-label in the practice of obstetrics and gynecology, including for the medical management of miscarriage, induction of labor, cervical ripening before surgical procedures, the treatment of postpartum hemorrhage and medication abortion. Due to its wide-ranging applications in reproductive health, misoprostol is on the World Health Organization "Model List of Essential Medicines." In many countries where mifepristone is not approved, feminist groups support women accessing and using misoprostol. In the U.S., thus far, the two-pill regimen is available;

however, in some instances women may need to do a misoprostol-only abortion.

Feminist organizations on the web offer comprehensive help for women seeking to access medication abortion. Many of the websites not only provide the medication, but also comprehensive information about how to use it, what to expect during the process, how to know if there is a problem, how one's body returns to normal afterwards.

Aid Access now serves about 7,000 patients a month, nearly 90% in states with bans or severe restrictions. Women who receive the pills are offered supportive services through their website. The Massachusetts Medication Abortion Access Project (The MAP) ships medication to all 50 states and offers a sliding scale payment. Additionally, there are several non-profit and volunteer/community groups helping women who cannot access legal abortion. They are listed on the websites of Plan C and Red State Access.

Providers offering medication abortion through telehealth for women in states where it is banned or severely restricted have found that many patients cannot afford the service and until recently were essentially subsidizing care themselves. Many abortion funds are reluctant to offer financial help to women in banned/restricted states, because those state laws have extensive penalties for any person or organization who facilitates an abortion. Health Care Beyond Borders has stepped up by giving funds not to patients but to providers in shield law states. Currently they support providers who are assisting women in Alabama, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. They can't yet fully support the demand and are campaigning for additional donations.

Plan C, founded in 2015, offers a comprehensive Guide to Pills, which includes tested and vetted sources of pills available through both mainstream and alternate routes (without a prescription). It also provides accurate information about how to do a medication abortion, including a zine (produced by the Reproductive Health Access Project), called Sam's Medication Abortion. Among the resources available on Plan C's website is a link to the Miscarriage and Abortion Hotline. The M&A Hotline does not prescribe but is staffed by clinicians who volunteer to answer calls. About 70 providers volunteer for 6-hour shifts and handle anywhere between 50 to 70 calls a day, answered between 8 a.m. to 2 a.m. ET. Women Help Women, an international feminist organization, has a website developed for U.S. women, SASS – Self-Managed Abortion; Safe & Supported. The site provides not only counseling and information but also a secure web-based communication tool for women seeking help with medication abortion in states where it is banned or restricted.

Information about security and privacy is increasingly important. The Repro Legal Helpline, run by If/When/How: Lawyering for Justice provides free, confidential legal advice and information. While the abortion ban laws "exempt" women from prosecution, prosecutors in red states have used other laws to charge women with crimes. Additionally, anyone who aids or assists a woman is liable to prosecution, including a parent or friend. A mother in Nebraska who assisted her daughter by purchasing abortion medication (her daughter was more than 20 weeks pregnant at the time she aborted and beyond the legal limit in Nebraska) has been jailed for two years. Her daughter, charged for illegally concealing or abandoning a dead body, was sentenced to 90 days.

Advocates organizing grass-roots collectives who support women self-managing abortion have described their approach as "the accompaniment model." They understand their support for individual women to be part of a broader agenda of community-based education and political organizing.

With the Dobbs decision, the white, nationalist, evangelical conservative movement achieved its long-sought goal of taking away women's control over our reproductive life. And now, the Republican Party who catered to them has reaped a political whirlwind. Feminists' creativity, courage and solidarity in this moment is truly inspiring.

## Abortion Rights After Dobbs: The State of the Struggle

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Source: [Solidarity](#).

PS:

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