Navigating the Post-Dobbs World: Key Considerations for Health Care Providers

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I. Introduction

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and holding that the U.S. Constitution does not confer a right to abortion. The case dealt with the constitutionality of a Mississippi law generally prohibiting abortions after fifteen weeks of gestational age, several weeks before a fetus is considered to be viable.[1] Under *Roe* and its progeny, states were prohibited from restricting pre-viability abortions.[2] In upholding the Mississippi law, the Court overruled *Roe* and *Casey*, and held that the U.S. Constitution makes no express reference to abortion, and that the right could not be implicitly found in the First, Fourth, Fifth, Ninth, or Fourteenth Amendments, in which *Roe* and *Casey* had grounded the right, because abor-

[1]Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241-42 (U.S. 2022).

[2]*Id.* at 2242.

tion is not "deeply rooted in th[e] Nation's history and tradition" or "implicit in the concept of ordered liberty."[3]

Dobbs has returned the regulation of abortion to the states. The response has been swift and varied. While some states have passed legislation to re-establish the right to an abortion under state law, other states have trigger laws or new legislation that ban abortions in almost all circumstances, and additional states are working to either enact similar bans or place gestational limits on the procedure.[4]

Dobbs has had a profound impact on health care providers, leaving them to the difficult task of interpreting and complying with a patchwork of new and often conflicting laws. This article provides an overview of some of the key considerations for health care providers arising out of *Dobbs*, including those concerning the possible extraterritorial application of state abortion laws, including shield laws providing certain protections for the provision of reproductive health care (Section I), telemedicine (Section II), privacy obligations under HIPAA (Section III), fertility-related care (Section IV), and emergency care under the Emergency Medical Treatment and Active Labor Act (EMTALA) (Section V).

II. The Potential Extraterritorial Application of State Abortion Laws

One key question that has arisen post-*Dobbs* is whether states with abortion bans can apply their laws extraterritorially to impose liability on providers in states where abortions are legal for providing abortion-related care to out-of-state residents. The question is especially tricky in the context of medication abortions administered via a telehealth appointment. As discussed in Section II, a telemedicine abortion involves a medical consultation conducted via video chat or another modality for communication, during which the medical provider will prescribe medication—an approved two-pill regimen of mifepristone (to block the pregnancy hormone progesterone) and misoprostol (to induce contrac-

[3] *Id.*

[4] *See infra* Section 1. See also *New York Times*, Tracking the States Where Abortion is Now Banned, Jun. 26, 2023. https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

tions)—for the patient to ingest to induce an abortion.[5] Ostensibly, a provider can conduct the medical visit and prescribe the medications to a patient located in a different state. For this reason, telemedicine abortions give rise to novel situations that may invite possible extraterritorial application of abortion restrictions: for example, if a provider in a state where abortion is legal conducts a telemedicine abortion consultation with a patient in a state that prohibits providing or "aiding or abetting" the procurement of an abortion, can that consultation alone run afoul of the state's restrictions?[6] If that same provider sends a prescription for abortion medication to an in-state pharmacy, and the patient travels across state lines to pick up the prescription and takes mifepristone while in that state and misoprostol after returning home, does this mean the abortion took place in a state where abortions are illegal?

To curb the extraterritorial application of other states' abortion bans, various states have adopted laws, either via legislation or executive order, to provide protections to in-state providers facing out-of-state lawsuits or criminal prosecutions resulting from the provision of abortion-related care to women visiting from states with abortion bans.[7] This section provides an overview of such state "shield laws," and outlines key considerations for providers regarding the extraterritorial application of state abortion laws.

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[5]FDA, Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation (Jan. 4, 2023) https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation; Pam Belluck, FDA Will Permanently Allow Abortion Pills by Mail. *New York Times* (Dec. 16, 2021) https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html.

[6]*See* Tex. Health & Safety Code § 171.208(a).

[7]Molly Gamble, Erica Carbajal, and Nika Schoonover, States add protections for healthcare providers who perform abortions for out-of-state residents, *Becker's Hospital Review* (Jul. 13, 2022) https://www.beckershospitalreview.com/legal-regulatory-issues/states-add-protections-for-healthcare-providers-who-perform-abortions-for-out-of-state-residents.html; further, on April 26, 2023, Senator Patty Murray (D-WA) and House Representative Kim Schrier, MD (D-WA), reintroduced S.1297 (Let Doctors Provide Reproductive Health Care Act), which would shield providers furnishing legal abortion care from being subject to out-of-state abortion restriction and from liability for administering legal abortion services to patients from any other state.

A. The Possible Extraterritorial Application of State Laws Limiting Abortion

There is limited precedent for assessing whether one state's laws regulating abortion can be applied to another state.

Only one U.S. Supreme Court case from the 1970s, *Bigelow v. Virginia*, has dealt with extraterritorial application of state laws in the abortion context. In *Bigelow,* the Commonwealth of Virginia convicted the editor of a Virginia-based newspaper for featuring an advertisement for a New York service that would refer people to abortion providers in New York City. This conviction arose under Va. Code Ann. § 18.1-63, which made it a misdemeanor to "encourage or prompt the procuring of an abortion" via circulation or sale of a publication.[8] In 1975, the U.S. Supreme Court overturned the conviction on First Amendment grounds, providing that "[t]he Virginia Legislature could not have regulated the advertiser's activity in New York, and . . . could not have proscribed the activity in that State."[9] The Court further provided that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[10]

Somewhat more recently, in 2007, Missouri's Supreme Court determined that certain provisions of a Missouri abortion law could not apply to out-of-state activity. In *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, the court upheld a narrow interpretation of state law Mo. Rev. Stat. § 188.250, which establishes a civil cause of action against any person who intentionally causes, aids or assists a minor in obtaining an abortion without parental consent or appropriate court order allowing for a judicial bypass of the consent requirement.[11] While upholding the law, the court affirmed that the phrase "aid or assist" in Section 188.250 could not be "constitutionally construed to include . . .

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[8] Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

[9] *Id.* at 822-24.

[10] *Id.*

[11] Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732 (Mo. 2007).

activities such as providing information or counseling," because such activities were protected by the First Amendment.[12] In addition, the court relied on *Bigelow* to hold that the Missouri law could not be read to apply to out-of-state providers because "it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri, and section 188.250 cannot constitutionally be read to apply to such. . .conduct."[13] The court emphasized that "Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect . . . Section 188.250 is valid only to the extent that it applies to in-state conduct . . ."[14]

Even though both *Bigelow* and *Planned Parenthood of Kansas* serve as helpful precedent, it remains to be seen how these cases will be applied to the provision of abortion-related care post-*Dobbs*. *Bigelow* is now nearly 50 years old and was decided on First Amendment grounds.[15] In addition, the applicability of *Planned Parenthood of Kansas* is limited insofar as it was a Missouri case and thus only controlling in Missouri. Further, medication abortion did not exist at the time of *Bigelow* and was not widely used at the time that *Planned Parenthood of Kansas* was decided.[16]

Justice Brett Kavanaugh also addressed extraterritoriality of state abortion laws in his *Dobbs* concurrence. In responding to the question of whether a state may "bar a resident of

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[12]*Id.* at 745.

[13]*Id.* at 742-43.

[14]*Id.*

[15]David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 123 Columbia Law Review, pg. 22 (2022) https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1515&context=fac_articles.

[16]FDA, Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation (Jan. 24, 2023) ("The FDA first approved Mifeprex in 2000 . . .") https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation; Guttmacher Institute, Medication Abortion Now Accounts for More Than Half of All US Abortions (Feb. 2022) (medication abortion comprised 6% of all abortions in the U.S. in 2001, 14% in 2005, 17% in 2008, 24% in 2011, 31% in 2014, 39% in 2017, 53% in 2020, and an estimated 54% as of February 2022) https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions.

that State from traveling to another State to obtain an abortion," he responded, "in my view, the answer is no based on the constitutional right to interstate travel."[17] Justice Kavanaugh's statement suggests that if directly confronted with the issue of extraterritoriality of state abortion laws, the Supreme Court would affirm its prior statements in *Bigelow*, though there is no certainty and the ultimate outcome would depend on the facts of the case before the Court.

It should be noted that there is a general presumption against the extraterritorial application of state criminal laws.[18] Under this premise, if one state passes a law that criminalizes abortion, the law is presumably inapplicable to medical providers in states where abortion is legal. However, the presumption is subject to various exceptions, including under the "effects" doctrine, where an act committed outside of a jurisdiction has "detrimental effects" within that jurisdiction.[19] In addition, providers may face civil, rather than (or, possibly, in addition to) criminal liability for providing abortions to patients from states where abortions are banned. In this regard, state laws that allow for private citizen suits could provide a pathway for extraterritorial application of one state's abortion ban to a provider in a state where abortion is legal.[20] In civil lawsuits, jurisdiction tends to be a much more fact-specific inquiry. For example, in cases where a tort committed out-of-state has effects within the

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[17]Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022).

[18]*See, e.g.*, In re Vasquez, 428 Mass. 842, 848 (Mass. 1999) ("The general rule, accepted as 'axiomatic' by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries").

[19]*See, e.g.*, People v. Betts, 34 Cal. 4th 1039, 1057 (2005) (citing Cal. Penal Code § 781,"When an offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.")

[20]For example, Idaho, Oklahoma, and Texas have each enacted laws that permit private citizens to sue medical practitioners who perform an abortion after a fetal heartbeat is detected. *See* Idaho Code § 18-8807; Okla. Stat. tit. 63, § 1-745.39 (we note that the state Supreme Court struck down this law on May 31, 2023); Tex. Health & Safety Code § 171.208.

forum state, the Supreme Court has recognized a pathway for personal jurisdiction even where all relevant conduct occurred outside of the forum state. In *Calder v. Jones,* a California resident brought a libel action in California courts against a national magazine based in Florida. Despite the offending article having been written, published, and printed solely in Florida, the Court held that the assertion of personal jurisdiction over the magazine and its employees was proper. This is because jurisdiction in a civil matter may be based on a defendant's (1) intentional actions that are (2) expressly aimed at the forum state, and (3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state.[21] In addition, personal jurisdiction can also be established by "substantial connections" with the forum state even without physical presence in the forum state.[22]

More recently, the limits of extraterritorial application of state laws limiting abortion have been tested. In his February 24, 2023 opinion in *Fund Texas Choice v. Paxton*, Judge Robert Pitman for the United States District Court for the Western District of Texas (Austin) held that Texas' "trigger ban," H.B. 1280, "does not regulate abortions that take place outside the State of Texas and cannot even be arguably read to do so." Judge Pitman explained that "it is settled law in Texas that a law will not be given extraterritorial effect unless such intent is clear," and that "H.B. 1280 does not express any intent, much less a clear one, to apply extraterritorially," therefore "there is no plausible construction of the statute that allows the Attorney General or local prosecutor to penalize out-of-state abortions."[23] Additionally, Idaho on April 5, 2023 enacted House Bill 242, which criminalizes transporting a pregnant, unemancipated minor across state lines to procure an abortion.[24] While the provisions of this "abortion trafficking law" pertain to the in-state components

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[21]*See* Calder v. Jones, 465 U.S. 783, 788-89 (1984).

[22]*See* Burger King Corp., 471 U.S. 462, 479 (1985).

[23]Fund Tex. Choice v. Paxton, No. 1:22-CV-859-RP, 2022 U.S. Dist. LEXIS 188460 (W.D. Tex. Oct. 4, 2022) (*citing* Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006) and Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968)).

[24]Idaho Code § 18-623.

of any such travel, it is unclear how, if at all, this state law could have extraterritorial application.

Thus, there are various existing theories pursuant to which states could attempt to apply their laws and police conduct outside their borders. Whether such extraterritorial application of state laws will ultimately pass legal muster in the abortion context is one that will likely to be litigated for years.

B. State Laws and Executive Orders Prohibiting Enforcement of Out-of-State Abortion Bans Could Protect Medical Providers from Intrastate Civil or Criminal Lawsuits

As set forth above, while some states have moved to limit access to abortion, other states—either before the *Dobbs* decision came out or shortly thereafter—adopted shield laws, via legislation or executive order, to provide certain protections to in-state providers facing out-of-state lawsuits or criminal investigations arising out of the provision of abortion-related care to patients visiting from states with abortion bans or restrictions.[25]

These laws attempt to provide civil, criminal, and professional safeguards for in-state medical practitioners.[26] For example, some shield laws prohibit interstate collaboration on abortion-related investigations, arrests, and extradition requests.[27] Other shield laws apply to civil matters, including, but not limited to, private rights of action and other protections, i.e., preventing loss of licensure or professional discipline for providers licensed in-state.

Shield laws have inherent limitations. The laws may protect in-state providers from adverse actions in their home states, but they generally cannot reach across state lines to

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[25] *Supra* note 7, *Becker's Hospital Review* (Jul. 13, 2022).

[26] *Id.*

[27] Oriana Gonzalez, California enacts bill to "shield" abortion providers and patients from state bans, *Axios* (updated Jun. 25, 2022) https://www.axios.com/2022/06/23/california-abortion-shield-providers-texas-roe; Maya Yang, Pro-choice states rush to pledge legal shield for out-of-state abortions, *The Guardian* (May 11, 2022) https://www.theguardian.com/world/2022/may/11/abortion-pro-choice-states-safe-havens-funding-legal-protection.

protect providers from facing lawsuits or investigations originating in another jurisdiction. Further, protections under these shield laws are generally only available to providers if they do not violate the laws of the home state.[28] More importantly, these laws remain untested as of now, and we expect that at least some of them will be challenged in out-of-state litigation.[29] It is difficult to anticipate how these shield laws will function in practice; therefore, this article reviews the legislative and executive intent, and key similarities, of current shield laws.

1. States that Have Enacted Shield Laws

As of this writing, several states have enacted a shield law, an executive order functioning as a shield law, or both, to attempt to provide protections to medical providers facing out-of-state litigation or criminal prosecution. These states include: Arizona,[30] California,[31] Colorado,[32] Connecticut,[33]

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[28]*See generally supra* note 7, *Becker's Hospital Review* (Jul. 13, 2022).

[29]Guttmacher Institute, Eight Ways State Policymakers Can Protect and Expand Abortion Rights and Access in 2023 (Jan. 12, 2023) https://www.guttmacher.org/2023/01/eight-ways-state-policymakers-can-protect-and-expand-abortion-rights-and-access-2023 ("It is important to note that shield laws are untested legal territory, and it is unclear to what degree these measures can secure their intended safeguards. States where abortion is banned may still attempt to prosecute abortion providers in other states, patients who travel for abortion care or anyone who assists them. Nevertheless, enacting shield laws has a large symbolic power, as it signals that the state is invested in legally protecting providers' livelihoods. . .").

[30]Arizona, Executive Order 2023-11, Protecting Reproductive Freedom and Healthcare in Arizona (Jun. 23, 2023) https://azgovernor.gov/office-arizona-governor/executive-order/2023-11.

[31]California, AB-1666 Abortion: civil actions (Jun. 24, 2022) https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1666.

[32]Governor Jared Polis, Governor Polis Takes Action to Protect Reproductive Rights, Freedoms, and Privacy of Coloradans (Jul. 6, 2022) https://www.colorado.gov/governor/news/8386-governor-polis-takes-action-protect-reproductive-rights-freedoms-and-privacy-coloradans; *see* Executive Order D 2022 032 Directing State Agencies to Protect Access to Reproductive Health Care in Colorado.

[33]Connecticut, Public Act 22-19, An act concerning the provision of protections for persons receiving and providing reproductive health care services in the state and access to reproductive health care services in the

Delaware,[34] the District of Columbia,[35] Hawaii,[36] Illinois,[37] Maine,[38] Maryland,[39] Massachusetts,[40] Michigan,[41] Minnesota,[42] Nevada,[43] New Jersey,[44] New Mexico,[45] New York,[46]

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state (effective May 5, 2022) https://cga.ct.gov/2022/ACT/PA/PDF/2022PA-00019-R00HB-05414-PA.PDF.

[34]Delaware, House Bill 455 (Jun. 29, 2022) https://legis.delaware.gov/BillDetail/109604.

[35]District of Columbia, B24-0808—Human Rights Sanctuary Amendment Act of 2022 (signed Nov. 21, 2022) https://lims.dccouncil.gov/Legislation/B24-0808.

[36]HNN Staff, New order protects women who fly to Hawaii for abortions from other states seeking penalties, *Hawaii News Now* (Oct. 11, 2022) https://www.hawaiinewsnow.com/2022/10/11/live-ige-sign-executive-order-protecting-access-reproductive-health-care-services/.

[37]Celeste Bott, New Ill. Law Aims To Protect Out-Of-State Abortion Patients, *Law360* (Jan. 13, 2023) https://www.law360.com/articles/1565801/new-ill-law-aims-to-protect-out-of-state-abortion-patients.

[38]Maine, Executive Order 4: An Order Protecting Access to Reproductive Health Care Services in Maine (Jul. 5, 2022) https://www.maine.gov/governor/mills/official_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive.

[39]Governor Wes Moore, Governor Moore Signs Historic Reproductive Freedom Legislation, Protects Women's Reproductive Rights In Maryland (May 3, 2023), https://governor.maryland.gov/news/press/pages/Governor-Moore-Signs-Historic-Reproductive-Freedom-Legislation,-Protects-Women%E2%80%99s-Reproductive-Rights-In-Maryland.aspx; see S.B. 589, Reproductive Health Protection Act.

[40]Massachusetts, Executive Order No. 600: Protecting Access to Reproductive Health Care Services in the Commonwealth (Jun. 24, 2022) https://www.mass.gov/executive-orders/no-600-protecting-access-to-reproductive-health-care-services-in-the-commonwealth?n.

[41]Michigan, Executive Order No. 2022-4 Unavailability of Interstate Extradition (Jul. 13, 2022) https://content.govdelivery.com/attachments/MIEOG/2022/07/13/file_attachments/2210705/EO%202022-4%20-%20Interstate%20Extradition%20%28with%20signature%29.pdf.

[42]Minnesota, Emergency Executive Order 22-16 Protecting Access to Reproductive Health Care Services in Minnesota (Jun. 25, 2022) https://mn.gov/governor/assets/EO%2022-16_tcm1055-532111.pdf. On April 27, 2023, Minnesota Governor Tim Walz signed the Reproductive Freedom Defense Act into law. This shield law is designed to protect abortion providers and patients who seek abortion care in Minnesota.

[43]Nevada, Executive Order 2022-08 Protecting Access to Reproductive Health Services in Nevada (Jun. 28, 2022) https://medboard.nv.gov/upload

North Carolina,[47] Oregon,[48] Pennsylvania,[49] Rhode Island,[50] and Washington.[51] Some of these states elected a new governor in 2022; as of this writing, there have been no reports of new governors rescinding their predecessors' executive orders, though it is possible an order may be rescinded in the future.[52]

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edFiles/medboardnvgov/content/About/Board/2022/2022-09-16_Agenda_Item_25.pdf.

[44]Governor Phil Murphy, Governor Murphy Signs Legislation to Protect Reproductive Health Care Providers and Out-of-State Residents Seeking Reproductive Services in New Jersey (Jul. 1, 2022) https://www.nj.gov/governor/news/news/562022/20220701a.shtml (noting the bills were A-3975/S-2633 and A-3974/S-2642).

[45]New Mexico, Executive Order 2022-123 Expanding Access to Reproductive Health Care Services (Aug. 31, 2022) https://www.governor.state.nm.us/wp-content/uploads/2022/08/Executive-Order-2022-123.pdf.

[46]Governor Kathy Hochul, Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All (Jun. 13, 2022) https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive.

[47]North Carolina, Executive Order No. 263 Protecting Access to Reproductive Health Care Services in North Carolina (Jul. 6, 2022) https://governor.nc.gov/media/3298/open.

[48]Governors Gavin Newsom (D-CA), Kate Brown (D-OR), and Jay Inslee (D-WA), "Multi-State Commitment to Reproductive Freedom" (Jun. 24, 2022) https://www.gov.ca.gov/wp-content/uploads/2022/06/Multi-State-Commitment-to-Reproductive-Freedom_Final-1.pdf?emrc=93c93c.

[49]Maureen Breslin, Pennsylvania governor signs executive order to protect access to abortion, *The Hill* (Jul. 12, 2022) https://thehill.com/homenews/3556150-pennsylvania-governor-signs-executive-order-to-protect-access-to-abortion/.

[50]Rhode Island, Executive Order 22-28 Reproductive Rights for Rhode Islanders and Those Providing and Obtaining Reproductive Health Care Services in Rhode Island (Jul. 5, 2022) https://governor.ri.gov/executive-orders/executive-order-22-28.

[51]*Supra* note 48, "Multi-State Commitment" (Jun. 24, 2022).

[52]Shrutih Tewarie, Sam Hoff, Abortion Rights Outlook: Implications of the Midterm Elections, *Foley Hoag* (Nov. 11, 2022) https://foleyhoag.com/news-and-insights/publications/alerts-and-updates/2022/november/abortion-rights-outlook/.

2. Key Provisions in Current Shield Laws

As discussed above, several shield laws protect providers from civil actions. For example, certain laws permit providers to countersue in the event of a citizen suit. New York, which passed a slate of shield laws, enacted a measure allowing providers licensed in New York to countersue (in New York) anyone who brings an action under another state's abortion ban.[53] Other shield laws explicitly bar courts in their state from hearing cases applying laws that impose civil liability for seeking or performing abortions. California's shield law holds that any law "of another state that authorizes a person to bring a civil action against a person or entity" who receives, administers, or "aids or abets" an abortion is "contrary to the public policy" of California. Therefore, California courts are prohibited from applying any law imposing civil liability for receiving, seeking, performing or inducing an abortion in cases heard in California courts, or from "enforc[ing] or satisfy[ing] a civil judgment" resulting from the application of such laws.[54]

Some shield laws establish protections in furtherance of possible criminal prosecution of abortion providers. North Carolina's Executive Order No. 263 prohibits any agencies of the Governor's Office from sharing information or resources "in furtherance of any investigation or proceeding that seeks to impose civil or criminal liability or professional sanction upon a person or entity" for providing a legal abortion in North Carolina to an out-of-state patient.[55] Connecticut's law prohibits compliance with extradition requests, and bars state judges from issuing "a summons in a case where prosecution is pending, or where a grand jury investigation has commenced or is about to commence" for violating another state's abortion ban.[56] New Mexico's Executive Order 2022-107 authorizes the Governor to "decline any request received

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[53]*Supra* note 46, New York (Jun. 13, 2022) (S.9039-A permits "a claim for unlawful interference with protected rights" if the provider is sued "in any court, in the United States or any of its territories" and "the allegations against the person, whether civil or criminal, involve . . . providing [lawful abortion services in New York].").

[54]Cal. Health & Safety Code § 123467.5.

[55]*Supra* note 47, North Carolina.

[56]*Supra* note 33, Connecticut.

from. . .any other State to issue a warrant for the arrest or surrender of any person charged with a criminal violation of a law of that other state" that bans abortion.[57] Importantly, state protections against out-of-state prosecutions only apply if the in-state medical providers adhere to their state's laws; for example, North Carolina will not comply with extradition requests "unless the acts forming the basis of the prosecution of the crime charged would also constitute a criminal offense under North Carolina law."[58]

Some shield laws safeguard providers' professional licenses. New York prohibits medical misconduct charges and shields providers who are licensed to practice in New York from any adverse actions from medical malpractice companies in New York on the basis of administering abortion-related services in New York to women traveling from out-of-state.[59] Other protective measures, such as those enacted in Colorado, Massachusetts, and Rhode Island, prevent medical providers from losing their licenses to practice in those states due to out-of-state lawsuits related to providing abortions in-state.[60]

On June 24, 2022, the governors of California, Oregon, and Washington announced a collaborative effort to protect "licensed medical professionals who provide legal reproductive health care services" in California, Oregon, and

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[57]*Supra* note 45, New Mexico.

[58]*Supra* note 47, North Carolina.

[59]*Supra* note 46, New York (Jun. 13, 2022); A.9687-B ("Neither the board for professional medical conduct nor the office of professional medical conduct shall charge a licensee, acting within their scope of practice, with misconduct . . . where such report is determined to be based solely upon the performance, recommendation, or provision of any reproductive health services . . . for a particular patient by such licensee where such patient resides in a state wherein . . . such reproductive health [service] is illegal."); A.9718-B ("Every insurer which issues or renews medical malpractice insurance covering a health care provider licensed to practice in this state shall be prohibited from taking any adverse action against a health care provider solely on the basis that the health care provider performs an abortion . . . that is legal in the state of New York on someone who is from out of the state. Such policy shall include health care providers who legally prescribe abortion medication to out-of-state patients by means of telehealth.").

[60]*Supra* note 7, *Becker's Hospital Review* (Jul. 13, 2022); Colorado, E.O. D 2022 032; Massachusetts, E.O. No. 600; Rhode Island, E.O. 22-28.

Washington.[61] Under the "Multi-State Commitment to Reproductive Freedom," the three governors pledged to prohibit "judicial and local law enforcement cooperation with out-of-state investigations, inquiries, and arrests" related to in-state legal abortions; to not comply with "non-fugitive extradition of individuals for criminal prosecution for. . .providing legal reproductive health care services in our states, and [charging] our state judiciaries with not issuing subpoenas or summons"; and to prevent "personal or professional liability insurers" and licensing boards in their states from penalizing medical providers due to claims arising from other states' abortion bans.[62]

As we explain in this section, the breadth of scope of the shield law varies from state to state. It remains unknown at this time how these shield laws affording protections to providers as well as those establishing a private right of action will ultimately interact with abortion bans and restrictions in other states, and how such interaction(s) will affect medical providers. Providers should familiarize themselves with what kinds of protections shield laws in their states provide (if any) especially in providing abortion-related care to out-of-state patients, given the evolving legal landscape.

III. Telemedicine Post-*Dobbs*

Telemedicine has taken on renewed significance post-*Dobbs*, as there is a subset of providers who provide reproductive health care services to patients remotely. *Dobbs* raises particular questions for providers treating patients across state lines, including states where abortions are either banned or restricted.

To understand the challenges imposed by *Dobbs* on telemedicine, we should first define what we mean by "telemedicine." The Federation of State Medical Boards defines "telemedicine" 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 health care

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[61] *Supra* note 48, "Multi-State Commitment" (Jun. 24, 2022).

[62] *Id.*

provider."[63] The basic elements of telemedicine are data, distance, the expertise to interpret data, and the means to transmit the data to a health care provider.[64] Telemedicine may be synchronous or asynchronous, depending on the needs of the patient and availability of the provider. The data transmitted may include live video, images (X-rays, MRIs, etc.), patient charts, and clinical reports.

A. Background

Since its initial implementation over two decades ago, telemedicine has been successful in connecting physicians and specialists in the United States. Telemedicine has helped to expand access to a variety of services, with the greatest expansion in tele-radiology and tele-psychiatry.[65] Adoption of telemedicine has been uneven, as it is often difficult or impossible for patients in areas with poor quality internet connections to access telemedicine services.[66] Demand for telemedicine increased substantially during the COVID-19 pandemic. In response, the federal government has worked to increase broadband access[67] and allowed for medication abortions to be conducted without an in-person physician office visit.[68]

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[63]Federation of State Medical Boards, The Appropriate Use of Telemedicine Technologies in the Practice of Medicine, Section 4 Definitions, April 2022. https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf

[64]*See* Colin Zick, Compensation for Telemedicine Services: Current Issues and the Future Prospects, 2 J. MED. & L. 117 (1998).

[65]Maryam Hyder and Juniad Razzak, Telemedicine in the United States: An Introduction for Students and Residents, J. Med. Internet Res. (2020). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7690251/

[66]Heather Lani, Poor Broadband access in rural areas limits telemedicine use: study, Fierce Healthcare, (2019). https://www.fiercehealthcare.com/tech/poor-broadband-access-rural-areas-limits-telemedicine-use-study

[67]See Federal Communications Commission, Affordable Connectivity Program. https://www.fcc.gov/acp. *See also* Federal Communications Commission, Coronavirus. https://www.fcc.gov/coronavirus#:~:text=The%20program%20will%20provide%20a,for%20households%20on%20Tribal%20lands.

[68]See Pam Belluck, FDA will allow Abortion Pills by Mail during the Pandemic, New York Times, (April, 13, 2021) https://www.nytimes.com/2021/04/13/health/covid-abortion-pills-mailed.html

B. Telemedicine and its Impact on Reproductive Health Care

Early in a pregnancy, a patient seeking an abortion has a choice between a suction curettage (surgical) abortion and a medical (or medication) abortion.[69] Unlike a surgical abortion, medication abortion can be done completely remotely, with "medical consultations occur[ing] over video chat, phone call, or text message, and the medications [being] sent through the mail."[70] Medical abortion consultations include a review of the patient's medical history and the patient's medical eligibility for a medication abortion, as well as informing the patient as to on how the medication works, and its relative risks and benefits.[71]

Two prescription medicines are used in medication abortions: Mifepristone (also knowns as RU-486) and misoprostol. The patient takes mifepristone first. Mifepristone works through blocking progesterone, a hormone needed for a pregnancy to continue.[72] Misoprostol, the second drug, can be taken in the next 48 hours; it causes cramping and bleeding to empty the uterus, contractions similar to an early miscarriage.[73]

Mifepristone and misoprostol are available under a single, shared system risk evaluation and mitigation strategy from the U.S. Food and Drug Administration (FDA), known as the Mifepristone REMS Program, which sets forth the require-

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[69]https://www.uclahealth.org/medical-services/obgyn/family-planning/patient-resources/medical-vs-surgical-abortion

[70]Sarah Jacoby, What's it like to get a telemedicine abortion? Here's what to know, Today.com, (2022). https://www.today.com/health/health/abortion-pills-online-telemedicine-abortion-rcna34583

[71]Farah Yousry, Telemedicine abortions just go more complicated for health providers, NPR (2022). https://www.npr.org/sections/health-shots/2022/09/26/1124360971/telemedicine-abortion-medication-ban

[72]FDA, Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, Accessed Jan. 25, 2023. https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation

[73]Pam Belluck, FDA Will Permanently Allow Abortion Pills by Mail. New York Times. Dec. 16, 2021. https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html

ments that must be followed for mifepristone for medical termination of pregnancy through ten weeks gestation.[74]

Under the Mifepristone REMS Program, mifepristone must be dispensed by or under the supervision of a certified prescriber or by certified pharmacies for prescriptions issued by certified prescribers. Under the Mifepristone REMS Program, mifepristone may be dispensed in-person or by mail. On January 3, 2023, the FDA issued additional guidance allowing for mail order pharmacies to ship these abortion medications.[75] The Justice Department also released guidance stating that the federal law prohibiting "mailing obscene or crime-inciting matter," 18 U.S.C. § 1461, does not prohibit the mailing of abortion-inducting drugs where the sender lacks the intent that the recipient of the drugs will use them unlawfully.[76] The FDA guidance provides that since "there are manifold ways in which recipients in every state may lawfully use such drugs, including to produce an abortion," and "the mere mailing of such drugs to a particular jurisdiction is an insufficient basis for concluding that the sender intends them to be used unlawfully."[77] This means that even in states with very restrictive abortion bans, so long as they have a least one exception, such as permitting abortion in cases of rape or incest or if the life of the pregnant person is at risk, there is a conceivable lawful intent for the mailed medications.[78]

FDA's approval of mailing abortion medications is not the end of the story. In the wake of the *Dobbs* decision, several

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[74]FDA, Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation

[75]*Id.*

[76]Department of Justice, Application of the Comstock Act to the Mailing of Prescription Drugs that can be used for Abortions. Dec. 23, 2022., https://www.justice.gov/olc/opinion/file/1560596/download

[77]Department of Justice, Application of the Comstock Act to the Mailing of Prescription Drugs that can be used for Abortions. Dec. 23, 2022., https://www.justice.gov/olc/opinion/file/1560596/download

[78]Department of Justice, Application of the Comstock Act to the Mailing of Prescription Drugs that can be used for Abortions. Dec. 23, 2022., https://www.justice.gov/olc/opinion/file/1560596/download

states have passed laws limiting access to medication abortions, including restricting or forbidding dispensing abortion-inducing medications through telemedicine. Those states with these restrictive laws now have a justification under their state laws to inquire as to whether pregnant patients have ordered and/or taken abortion-inducing medications, in violation of state law. In addition to state laws restricting access to medication abortions, as of this writing, a challenge to the validity of the FDA's approval of mifepristone is pending before the Fifth Circuit.[79] In a separate lawsuit pending before the U.S. District Court for the Eastern District of Washington, a group of 17 states and the District of Columbia have filed a challenge to the FDA's updated REMS for mifepristone on the grounds that the REMS restrictions place an economic and administrative burden on patients and providers that create barriers to access the medication.[80]

Since *Dobbs* was decided, abortion clinics in states where abortions remain protected have seen an increase in requests for appointments from residents of states where abortions are restricted. To handle this influx of patients, providers have looked to telemedicine, and the volume of telemedicine abortions has grown.[81] Some states with restrictive abortion laws have responded by enacting legislation banning abortion in all forms, including abortions by medicine prescribed using telemedicine.[82] Other states have adopted other forms of restrictions on the use of telemedicine, such as requiring the prescribing physician to be present with the patient seeking abortion-inducing medication or requiring the patient to have an ultrasound—which must be done in-person—before

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[79]Alliance for Hippocratic Medicine v. FDA, No. 23-10362 (5th Cir.); *State of Washington et al. v. U.S. Food and Drug Administration et al.*, No. 1:23-cv-03026 (E.D. Wash.).

[80]*State of Washington et al. v. U.S. Food and Drug Administration et al.*, No. 1:23-cv-03026 (E.D. Wash.).

[81]Sarah Jacoby, What's it like to get a telemedicine abortion? Here's what to know, Today.com, (2022). https://www.today.com/health/health/abortion-pills-online-telemedicine-abortion-rcna34583

[82]See Guttmacher Institute, Medication Abortion, Jun. 1, 2023. https://www.guttmacher.org/state-policy/explore/medication-abortion; See also New York Times, Tracking the States Where Abortion is Now Banned. Jan. 6, 2023. https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

an abortion is allowed.[83] Still other state laws require patients receiving care via telemedicine to be physically present in the state for their virtual appointment, even if the provider is located in a different state from the patient's state of residence.[84] In a few states, it is now a crime to dispense abortion medications in the mail (a position that conflicts with the Department of Justice guidance under federal law).[85] The result of all these state laws is confusion for patients and providers as to what could trigger a potential lawsuit or criminal action against them.

C. Privacy Issues Regarding Telemedicine Abortions in a Post-*Dobbs* World

Separate from the long-running debate regarding the role of constitutional privacy rights and abortion, is the issue of personal privacy in the medical decision-making and the privacy of individual medical decisions. The real and practical issues of privacy are implicated whether a patient is in an abortion clinic or connected to a health care provider in a telemedicine appointment. And that telemedicine appointment requires a strong and stable internet connection, which

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[83]See Stephanie Innes, Retail pharmacies may now dispense abortion pills but not in Arizona, AZ Central. Jun. 22, 2023. https://www.azcentral.com/story/news/local/arizona-health/2023/01/22/arizona-laws-exclude-residents-from-expanded-access-to-abortion-pills/69816564007/; See also Laurie Sobel, Amrutha Ramaswamy, and Alina Salganicoff, The Intersection of State and Federal Policies on Access to Medication Abortions via Telehealth, Kaiser Family Foundation, Feb. 7, 2022. https://www.kff.org/womens-health-policy/issue-brief/the-intersection-of-state-and-federal-policies-on-access-to-medication-abortion-via-telehealth/?msclkid=8c114b89d13211eca6dea82126d2f377

[84]Lindsey Tanner and Matthew Perrone, Medication abortion is common; here's how it works, AP News, July 2, 2022. https://apnews.com/article/abortion-covid-science-health-2d52ebf9efc6ef06f03e788fecd13013.

[85]Pein Huang and Mara Gordon, Telehealth abortion demand is soaring. But access may come down to where you live. NPR, (2022). https://www.npr.org/sections/health-shots/2022/05/20/1099179361/telehealth-abortions-are-simple-and-private-but-restricted-in-many-states

may not be available in a patient's home or other private place.[86]

In locating information about reproductive health care, some pregnant people may use search engines like Google to find an abortion provider. However, it is well-understood that companies like Alphabet (Google's parent), Meta (Facebook's parent), and Apple can and do store user search histories, and user location data.[87] For example, researchers have found that internet searches for abortion pills and abortion clinics stayed in the activity timeline of a user, and Google Assistant sends reminders to users about getting an abortion after it was put on a calendar.[88] The location tracker also kept the directions to an abortion clinic for months.[89] Google alone received more than 50,000 subpoenas, search warrants, and other data requests in the first half of 2021.[90] In states where abortion is not legal, such information could be sought by local law enforcement and used against prospective and actual patients.

To date, there is no data to show if or how law enforcement data requests changed post-*Dobbs,* but a Nebraska police investigation that occurred during the summer of 2022 provides a suggestion of what could happen in the future. In that case, local police issued a warrant to Meta, seeking to have Facebook turn over messages, which the police planned

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[86]Zachary Predmore and Julia Rollison Telemedicine Abortion? It's Not as Easy as It Sounds. The RAND Blog. (2022). https://www.rand.org/blog/2022/08/telemedicine-abortion-its-not-as-easy-as-it-sounds.html

[87]Alfred Ng, 'A uniquely dangerous tool': How Google's data can help states track abortions, Politico, July 18, 2022. https://www.politico.com/news/2022/07/18/google-data-states-track-abortions-00045906

[88]Johana Bhuiyan, Googling Abortion? Your Details aren't as private as you think. The Guardian, Nov. 29, 2022. https://www.theguardian.com/world/2022/nov/29/abortion-rights-us-google-roe-dobbs

[89]Johana Bhuiyan, Googling Abortion? Your Details aren't as private as you think. The Guardian, Nov. 29, 2022. https://www.theguardian.com/world/2022/nov/29/abortion-rights-us-google-roe-dobbs

[90]Bobby Allyn, Privacy advocates fear Google will be used to prosecute abortion seekers, WBUR, (2022). ttps://www.wbur.org/npr/1110391316/google-data-abortion-prosecutions

to use to determine if a woman had aborted a pregnancy.[91] The information gained from the warrant led to felony charges against the woman who had the abortion.[92]

At present, it seems the state that is most likely to utilize these warrants is Texas. Texas law allows private citizens to sue anyone who aids or abets and abortion. A Google transparency report also showed that Texas sent the second highest number of warrant requests to Google.[93] These types of requests have been challenged in the courts, with varying outcomes. The most common objection to these types of warrants is that they violate the Fourth Amendment's ban on unreasonable searches.[94] However, a Fourth Amendment objection would likely not apply in the context of the Texas law that gives a cause of action to a private citizen.[95]

Restrictive state abortion laws like those in Texas may cause patients to seek an abortion provider in another state and drive long distances to receive care. This creates obvious issues for patients, but it also creates issues for providers. In particular, providers have to decide if they want to see out-of-state patients, and possibly be subject to laws of other states,[96] even if they do not practice medicine there. Providers also have to decide if they want to practice telemedicine across state lines, which has medical licensure implications. For telemedicine abortions, the general rule is that a physi-

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[91]Martin Kaste, Nebraska cops used Facebook messages to investigate an alleged illegal abortion. NPR. Aug. 12, 2022. https://www.npr.org/2022/08/12/1117092169/nebraska-cops-used-facebook-messages-to-investigate-an-alleged-illegal-abortion

[92]Martin Kaste, Nebraska cops used Facebook messages to investigate an alleged illegal abortion. NPR. Aug. 12, 2022. https://www.npr.org/2022/08/12/1117092169/nebraska-cops-used-facebook-messages-to-investigate-an-alleged-illegal-abortion

[93]See Alfred Ng, 'A unique dangerous tool': How Google's data can help states track abortions., Politico (2022). https://www.politico.com/news/2022/07/18/google-data-states-track-abortions-00045906; See also https://services.google.com/fh/files/misc/supplemental_information_geofence_warrants_united_states.pdf

[94]Bobby Allyn, Privacy advocates fear Google will be used to prosecute abortion seekers, NPR, (2022). https://www.npr.org/2022/07/11/1110391316/google-data-abortion-prosecutions

[95]See Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (explaining that the Fourth Amendment applies only to government action)..

[96]*See* supra Section I.

cian must be licensed in the jurisdiction where the patient is located. This can result in scenarios where either the patient or the provider is located in a state where abortion is illegal. State abortion laws generally target the provider and not the patient.[97]

One provider who is licensed in both Indiana and New Mexico described the complicated logistics that result from these laws, noting, "I just think it's a crazy thing to think I will drive 1 1/2 hours to Illinois to use my New Mexico [medical] license to help people driving from Texas to New Mexico to get their abortion. It's just, like, madness."[98]

As set forth above in Section I, adding to the "madness" is the fact that some states have enacted shield laws to protect individuals who travel to receive or provide abortion in the state.[99] It remains to be seen how these shield laws may impact the provision of telemedicine abortions.

IV. Post-*Dobbs* HIPAA Implications for Health Care Providers

Following the Supreme Court's decision in *Dobbs*, health care providers may more frequently find themselves grappling with federal and state laws on disclosure of health information, especially when faced with subpoenas or other requests for reproductive health information from states or private litigants looking to enforce state abortion laws or restrictions. Patients also have a heightened interest in preventing disclosure of their reproductive health information post-*Dobbs*. Even though state laws do not (yet) impose liability on individuals seeking abortions, there have been

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[97]Elizabeth Nash and Isabel Guarnieri, 13 States Have Abortion Trigger Bans- Here's What Happens When Roe is Overturned. Guttmacher Institute. (June 2022). https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned

[98]Farah Yousry, Telemedicine abortions just go more complicated for health providers, NPR (2022). https://www.npr.org/sections/health-shots/2022/09/26/1124360971/telemedicine-abortion-medication-ban

[99]Guttmacher Institute, Abortion Policy in the Absence of Roe. (Jan. 1, 2023). https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (State shield laws will be discussed in more detail in another section)

movements in some states to allow for the prosecution of a person seeking abortion care.[100]

Against this backdrop, one law that received renewed attention post-*Dobbs* is the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA established a federal standard for the disclosure or use of health information, allowing for disclosures with and without a patient's knowledge or consent, based on the circumstances.[101] This section will discuss how HIPAA, and its implementing regulations, apply to the disclosure of reproductive health care information post-*Dobbs*.

A. Overview of HIPAA

1. Background

HIPAA directly applies to "covered entities" and their "business associates." HIPAA requires "covered entities" and their "business associates" to adequately safeguard protected health information (PHI). The term "covered entities" refers to three types of health care entities: health plans, health care clearinghouses, and health care providers that transmit any health information in electronic form related to a transaction covered under HIPAA.[102] HIPAA defines "health care provider" as providers of medical and health care services, such as physicians, hospitals, laboratories, and medical equipment suppliers.[103] A "business associate" is a person or entity that either provides services to, or performs functions

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[100]*See e.g.,* B. Ellis & M. Hicken, These male politicians are pushing for women who receive abortions to be punished with prison time, CNN (Sep. 21, 2022), https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html.

[101]Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, August 21, 1996, 110 Stat. 1936.

[102]45 C.F.R. § 160.103.

[103]*Id*. (note that the exact definition of "health care provider" is affected by definitions provided in the Social Security Act for terms "provider of services.")

on behalf of, a covered entity that involve the use or disclosure of PHI.[104]

The U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) administers and enforces the HIPAA Privacy Rule,[105] which is one of the implementing regulations of HIPAA,[106] that regulates the use and disclosure of PHI. HIPAA defines "PHI" as a subset of "individually identifiable health information" that is "(i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any other form or medium."[107]

"Individually identifiable health information" includes a patient's name, address, date of birth, telephone number, Social Security number, and medical record numbers.[108] It also includes information related to the physical or mental health or condition of an individual, health care that was provided to an individual, or payment for the provided health care services.[109]

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[104]45 C.F.R. § 160.103; *see also* HHS, Business Associates (last accessed Feb. 6, 2023), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html (For example, a business associate could serve claims processing or administration, data analysis, quality assurance or billing functions for the covered entity. However, a business associate cannot be a part of the covered entity's workforce).

[105]HHS OCR, *Summary of the HIPAA Privacy Rule* (last updated Oct. 19, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html. State Attorneys General also have the ability to enforce HIPAA, although they rarely do so.

[106]45 C.F.R. Parts 160–164 (the other implementing regulations to HIPAA include the Security Rule, the Breach Notification Rule, and the Enforcement Rule).

[107]45 C.F.R. § 160.103 (note that the term specifically excludes individually identifiable health information in certain education records, which are often covered by Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99), and employment records held by a covered entity in its role as an employer).

[108]*See* Summary of the HIPAA Privacy Rule, *supra* note 104; *see also* 45 C.F.R. § 164.514(b)(2)(i).

[109]*See* Summary of the HIPAA Privacy Rule, *supra* note 104; *see also* 45 C.F.R. § 160.103.

2. Disclosure of Protected Health Information Under HIPAA

Under HIPAA, covered entities may not use or disclose PHI except as permitted or required by the Privacy Rule.[110] Violating the HIPAA Privacy Rule can lead to civil and/or criminal sanctions.[111] Individuals have no private right of action under HIPAA.

Covered entities must distinguish between when HIPAA, and its implementing regulations, permit versus require disclosure of PHI. There are only two situations in which the Privacy Rule *requires* covered entities to disclose PHI: (1) when the patient, or the patient's personal representative, request access to or disclosure of the patient's PHI,[112] and (2) when HHS is investigating or determining whether the covered entity is HIPAA-compliant.[113]

Health care providers are *permitted* to disclose PHI for the types of activities that health care providers regularly engage in, including treatment, payment, and health care operations. No patient authorization is needed for such uses, as it is presumed such authorization would be granted.[114] The Privacy Rule also allows disclosure of PHI to the individual who is the subject of that information, again based on the presumption that an individual would consent to the disclosure.

Moreover, covered entities may use or disclose PHI to the extent required by law, or for valid law enforcement purposes.[115] Notably, because HIPAA *permits* disclosure in those circumstances, the covered entity cannot use HIPAA as a reason to evade requests for disclosure of PHI.

HIPAA also provides a disclosure exception for public health purposes, such as when a public health authority is conducting public health surveillance (e.g., COVID-19) and

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[110] 45 C.F.R. Part 160; Part 164, Subparts A and E.

[111] *See* Summary of the HIPAA Privacy Rule, *supra* note 104.

[112] 45 C.F.R. § 164.502(a)(2).

[113] *Id.*

[114] 45 C.F.R. § 164.502(a)(1).

[115] 45 C.F.R. § 164.512(a).

interventions to prevent or control disease, injury, or disability.[116]

B. Post-*Dobbs* OCR Guidance on the HIPAA Privacy Rule

On June 29, 2022, in response to the *Dobbs* decision, HHS OCR released guidance on the disclosure of reproductive health care information under the HIPAA Privacy Rule (the "OCR Guidance").[117]

The OCR Guidance first reminds covered entities that they cannot use or disclose PHI without an individual's signed authorization unless the Privacy Rule expressly permits or requires the use or disclosure.[118] Specifically, when the disclosure of an individual's PHI is required by another law (e.g., a state law), health care providers are permitted under HIPAA to comply with the other law through disclosure of requested PHI.[119] Moreover, if a covered entity declines to produce PHI to state authorities in such a situation, that decision to refuse to produce the PHI is not protected by HIPAA. Conversely, if state law does not expressly compel the health care provider to disclose PHI or if the request for the disclosure is not enforceable in the court of law (e.g., because it is unconstitutional), the provider cannot disclose the PHI under the 'required by law' exception.

Health care providers may encounter situations where a state abortion law compels disclosure of PHI, but the constitutionality of that state law is being challenged in court. If the state law is unconstitutional, the request for disclosure would not be valid, and the provider may have the right to challenge it. However, health care providers cannot simply ignore the request. Instead, the provider should verify whether the state has been enjoined from enforcing the law

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[116]45 C.F.R. § 164.512(b).

[117]HHS, *HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe* (Jun. 29, 2022), https://www.hhs.gov/about/news/2022/06/29/hhs-issues-guidance-to-protect-patient-privacy-in-wake-of-supreme-court-decision-on-roe.html

[118]HHS, *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care* (Jun. 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html

[119]*See id; see also* 45 C.F.R. § 164.512(a)(1) & (f)(1).

compelling disclosure. The provider may also take legal action to challenge the validity of the request and argue that the law does not provide a valid exception for disclosure under HIPAA.

Even in instances where the state abortion law meets the requirements for disclosure under HIPAA, it is important to remember that the HIPAA disclosure exception allows health care providers to only disclose what is "required by law" and nothing more. If the health care provider discloses more than is required to comply with state law, it could constitute a HIPAA violation.[120]

The OCR Guidance also provides that under the Privacy Rule, health care providers are also permitted, but not required, to disclose PHI for law enforcement purposes[121] and pursuant to a court order, warrant, subpoena, or summons.[122] Conversely, the Privacy Rule does not permit disclosure in response to informal (sometimes coercive) requests by law enforcement that are not accompanied by a court order or other mandate enforceable in court.

As set forth above, the Privacy Rule also allows the disclosure of PHI if the health care provider has a good faith belief that "the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. . .."[123] However, the OCR Guidance has clarified that this exception would not permit a health care provider to report, for the purpose of preventing an abortion, a pregnant patient's statement that the patient intends to seek an abortion in another state where it would be legal.[124] This is because a "statement indicating an individual's intent to get a legal abortion, or any other care tied to pregnancy loss, ectopic pregnancy, or other complications related to or

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[120]*See* HIPAA Privacy Rule and Disclosures, *supra* note 117.

[121]*See id; see also* 45 C.F.R. § 164.512(f)(1).

[122]*See* HIPAA Privacy Rule and Disclosures, *supra* note 117. While disclosure is permissive under the HIPAA Privacy Rule in these circumstances, failure to disclose pursuant to a court order could cause the provider to face contempt proceedings. Thus, the application of the Privacy Rule should be carefully considered when responding to court orders or subpoenas.

[123]*Id.*

[124]*See id*.

involving a pregnancy does not qualify as a 'serious and imminent threat to the health or safety of a person or the public.' "[125] OCR believes that disclosure of this information would also be inconsistent with professional ethical standards and harmful to the patient.[126]

C. Key Considerations for Health Care Providers

Post-*Dobbs*, health care providers should anticipate facing difficult decisions that require them to balance their obligations under state laws and HIPAA. They may face an increased demand for information from state law enforcement as more states limit or ban access to abortion through criminal sanctions.[127] Depending on the validity and extent of state demands for PHI, compliance with the demands could result in a violation under HIPAA. Before making the disclosure, providers should confirm whether the state law expressly mandates disclosure and that the demand is valid.[128] If a health care provider opposes sharing information despite receiving a valid subpoena for information, the provider may also try to quash the subpoena with a supporting reason for defying the request.

To maintain compliance with HIPAA and evolving state abortion laws, health care providers should revisit their policies and procedures and ensure those incorporate the OCR Guidance as well as any state law requirements. They should also educate and train their personnel on when the disclosure of PHI is mandated, permitted, or prohibited, and practice dealing with requests for PHI in high-pressure, publicly visible situations.

In addition, health care providers should also be careful in sharing information with third parties. State law enforcement may try to obtain information from third parties with whom health care providers or their business associates incidentally share information. For example, conduits like

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[125] *Id*.

[126] *Id.*

[127] *See New York Times*, Tracking the States Where Abortion Is Now Banned, (Jul. 18, 2022), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

[128] *See* 45 C.F.R. § 164.512(e).

Internet Service Providers may occasionally have access to PHI, but do not count as "business associates" under HIPAA,[129] allowing state authorities to potentially target them to bypass HIPAA. Health care providers that provide or assist in accessing reproductive health care services should check their data collection, sharing, and retention policies for vulnerabilities. They should also consider encrypting their patient data and limiting what information they share and with whom they share it, to avoid inadvertently releasing PHI.

V. Post-*Dobbs* Considerations for IVF Providers

The U.S. Centers for Disease Control and Prevention (CDC) defines "assisted reproductive technology," or ART, as the term appears in the Fertility Clinic Success Rate and Certification Act of 1992 (FSRCA),[130] as "all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization ["IVF"], gamete intrafallopian transfer, zygote intrafallopian transfer, and such other specific technologies . . ."[131] According to the Mayo Clinic, IVF is "the most effective form" of ART.[132] IVF involves combining an extracted oocyte (egg) with sperm outside of the woman's uterus; if the egg becomes fertilized and begins to develop into an embryo, the embryo is implanted in the woman's uterus, where it will ideally result in pregnancy and childbirth.[133]

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[129]78 Fed. Reg. 5565, 5571 (Jan. 25, 2013).

[130]42 U.S.C. § 263a-1—Assisted reproductive technology programs (102 P.L. 493, 106 Stat. 3146); *See also* CDC, Assisted Reproductive Technology (ART), What is Assisted Reproductive Technology? https://www.cdc.gov/art/whatis.html.

[131]42 U.S.C. 263a-7

[132]Mayo Clinic, In vitro fertilization (IVF), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716.

[133]*See* Cleveland Clinic, What is IVF?, https://my.clevelandclinic.org/health/treatments/22457-ivf.

On July 25, 1978, the first baby conceived via IVF was born.[134] Since then, IVF has posed unique legal, political, and ethical challenges. For example, embryos outside of the uterus, or *ex vivo* embryos, have been the subject of extensive litigation in state and federal courts, focused mostly on who should have custody of frozen embryos.[135] In clinical research, the Dickey-Wicker Amendment, which has been attached to appropriations bills since 1996, restricts federal funding for research that creates or destroys human embryos.[136] Presently, the FSCRA, which requires fertility clinics to report success rates to the government, is the only federal law regulating infertility.[137]

The *Dobbs* decision has added to the legal challenges raised by IVF procedures. As various states have moved to either ban or restrict abortions post-*Dobb*s, these laws have raised two key questions for IVF providers: (1) whether a law determines that human life begins at fertilization; and (2) whether a law defines an embryo developed outside of a woman's body as a legal "person." If a law banning or restricting abortions answers both these questions with a "yes," then the destruction of an embryo during an IVF cycle, either internally (i.e., medically necessary removal of implanted embryos) or externally (i.e., disposal of unused embryos), could be considered an illegal abortion, absent clear exemptions in the law for IVF. Additionally, fetal "personhood" statutes, meaning laws that ban abortion by treating unborn humans (i.e., fetuses) as "people" could be applied to embryos created via IVF.

As of this writing, there is no federal law establishing

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[134]*See* Katharine Dow, Looking into the Test Tube: The Birth of IVF on British Television, Med. Hist., vol. 63(2), pp. 189–208 (2019) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6434648/pdf/S0025727319000061a.pdf.

[135]Jenny Gross and Maria Cramer, The Latest Issue in Divorces: Who Gets the Embryos?, *New York Times* (Apr. 3, 2021) https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html.

[136]Megan Kearl, Dickey-Wicker Amendment, 1996, *The Embryo Project Encyclopedia* (Aug. 27, 2010) https://embryo.asu.edu/pages/dickey-wicker-amendment-1996; Henry T Greely, The death of Roe and the future of ex vivo embryos, *Journal of Law and the Biosciences*, Volume 9, Issue 2, July-December 2022, lsac019, https://academic.oup.com/jlb/article/9/2/lsac019/6623922.

[137]42 U.S.C. § 263a-1—Assisted reproductive technology programs (102 P.L. 493, 106 Stat. 3146).

fetal personhood, and only one state, Louisiana, explicitly establishes personhood for embryos developed during IVF.[138] In addition, most state laws banning abortion contain carveouts for IVF. However, some laws, including certain bans that establish fetal personhood, can be interpreted to encompass embryos developed via IVF. Such laws could have a significant impact on IVF providers.

A. Overview of In Vitro Fertilization

A single IVF procedure requires multiple steps throughout a four-to-six-week period, beginning with the woman taking medication to grow multiple oocytes, which will then be extracted from her ovaries.[139] According to the Society for Assisted Reproductive Technology (SART), generally eight to 15 oocytes are retrieved during an IVF cycle.[140] The retrieved eggs are then externally inseminated in a laboratory and placed in an incubator to allow for initial embryonic development.[141] After three to six days of external development, the most viable-looking embryos can be implanted into the woman's uterus.[142]

An IVF cycle might yield more viable embryos than desired for a single pregnancy.[143] While the woman can elect to have multiple embryos transferred into her uterus, the CDC, SART, and the American Society for Reproductive Medicine (ASRM) generally recommend transferring a single embryo.[144] Furthermore, guidance from ASRM and SART recommends an ideal number of transferred embryos—gen-

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[138]LA-RS 9 § 129.

[139]SART, ART: Step-by-Step Guide, https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/art-step-by-step-guide/.

[140]*Id.*

[141]*Id.*

[142]*Id.*

[143]*Id.*

[144]ASRM, Guidance on the limits to the number of embryos to transfer: a committee opinion, Fertility and Sterility® Vol. 116, No. 3, (Sep. 2021) fhttps://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/guidance_on_the_limits_to_the_number_of_embryos_to_transfer.pdf;; CDC, Assisted Reproductive Technology (ART), Single Embryo Transfer, https://www.cdc.gov/art/patientResources/transfer.html; SART,

erally, one or two at most—based on embryonic quality, patient age, and other factors.[145] However, if multiple embryos are transferred, and more than one attach to the uterus, it might be medically necessary to terminate some of the attached embryos to allow one embryo to develop.[146] Remaining embryos that are not transferred can be frozen and stored to allow for future attempts at pregnancy.[147] Unused embryos can also be donated to another woman, given to a laboratory for research purposes, or discarded.[148]

B. Current Legal Landscape—Federal Law

Other than the reporting measures under FSRCA, federal law is silent on IVF and embryonic personhood as it applies to pregnancy and fertility. On December 15, 2022, U.S. Senators Patty Murray (D-WA) and Tammy Duckworth (D-IL), and House Representative Susan Wild (D-PA-07) introduced the Right to Build Families Act of 2022, which sought to ensure patient access to ART and prevent any prohibition on providers who administer ART, such as IVF.[149] Specifically,

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ART: Step-by-Step Guide, https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/art-step-by-step-guide/.

[145]SART, Frequently Asked Questions, https://www.sart.org/patients/frequently-asked-questions/; ASRM, Guidance on the limits to the number of embryos to transfer: a committee opinion, Fertility and Sterility® Vol. 116, No. 3, (Sep. 2021) https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/guidance_on_the_limits_to_the_number_of_embryos_to_transfer.pdf.

[146]Erin Sutton et al., The 2023 State Legislative Sessions: The Next Abortion Battleground, *Health Affairs* (Jan. 17, 2023) https://www.healthaffairs.org/content/forefront/2023-state-legislative-sessions-new-abortion-battleground.

[147]SART, ART: Step-by-Step Guide, https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/art-step-by-step-guide/.

[148]SART, Frequently Asked Questions, https://www.sart.org/patients/frequently-asked-questions/.

[149]U.S. Senate Committee on Health, Education, Labor & Pensions (HELP), Murray, Duckworth, Wild Introduce Bill to Protect Right to Build a Family Through IVF as Extreme Republican Abortion Bans Threaten Access (Dec. 15, 2022) https://www.help.senate.gov/chair/newsroom/press/murray-duckworth-wild-introduce-bill-to-protect-right-to-build-a-family-through-ivf-as-extreme-republican-abortion-bans-threaten-access.

the bill prohibited states from taking actions to "prohibit or unreasonably limit . . . any health care provider from performing [ART] treatments or procedures; or providing evidence-based information related to [ART]," among other protections.[150] The bill did not contain language specific to embryonic development, storage, or destruction. However, this bill was blocked in late December 2022.[151] On April 25, 2023, Senator Duckworth and House Representatives Gerry Connolly (D-VA-11), Nancy Mace (R-SC-01), Eleanor Holmes Norton (D-DC-At large), and Debbie Wasserman Schultz (D-FL-25) introduced the bipartisan Family Building FEHB Fairness Act (H.R. 2828), which would require health plan carriers under the Federal Employees Health Benefit (FEHB) program to cover IVF and ART.[152] As of this writing, there is no federal ban on IVF, nor any measure targeting IVF providers, under consideration.

Similarly, there is no Supreme Court decision establishing fetal personhood. The majority opinion in *Dobbs* explicitly declined to establish fetal personhood, noting that the Court's ruling "is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."[153] Furthermore, on October 11, 2022, the Court denied *certiorari* to *Doe v. McKee*, which sought to appeal Benson v. McKee, 273 A.3d 121 (R.I. 2022), a Rhode Island Supreme Court decision denying fetal personhood.[154]

C. Current Legal Landscape—State Law

At the state level, fetal personhood varies by jurisdiction; a routine IVF procedure in one state might be a crime in

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[150]S. 5276, Sec. 3. Right To Assisted Reproductive Technology, 3-4 (Dec. 15, 2022) https://www.congress.gov/117/bills/s5276/BILLS-117s5276is.pdf.

[151]Oriana Gonzalez, Republicans block Dem request to pass bill to protect IVF Access, *Axios* (updated Dec. 20, 2022) https://www.axios.com/2022/12/20/republicans-block-ivf-fertility-bill-roe.

[152]Senator Tammy Duckworth, Duckworth, Connolly Introduce Bipartisan Bill to Expand Access to IVF, Other Assisted Reproductive Technology (Apr. 25, 2023), https://www.duckworth.senate.gov/news/press-releases/duckworth-connolly-introduce-bipartisan-bill-to-expand-access-to-ivf-other-assisted-reproductive-technology.

[153]Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022).

[154]Doe v. McKee, 143 S. Ct. 309 (2022).

another. Following the *Dobbs* decision, several states enacted measures limiting or banning abortion. As of June 26, 2023, there are 14 states with near total abortion bans in effect, while several other states have restricted abortions after a certain gestational period.[155] In the last decade, states that have introduced or passed bills (including pre-*Dobbs* bills) to limit abortion or establish fetal personhood at conception have generally sought to exempt fertility procedures from such bans.[156] That said, as of December 31, 2022, seven states introduced bills that sought to ban abortion by establishing fetal personhood.[157] If applied broadly, such personhood laws could "implicate and even ban IVF and certain other ART procedures."[158]

1. States with Laws Directly Addressing the Personhood of an Embryo

As of the time of this article, only one state, Louisiana, has a law explicitly establishing the personhood of an embryo developed during IVF. The law provides that "[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridi-

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[155]*New York Times*, Tracking the States Where Abortion Is Now Banned (last updated Jun. 26, 2023) https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (noting "total abortion ban" means a ban without any gestational limits; Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin currently have total bans).

[156]Erin Heidt-Forsythe et al., Roe is gone. How will state abortion restrictions affect IVF and more?, *Washington Post* (Jun. 25, 2022) https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/.

[157]Guttmacher Institute, State Legislation Tracker (2022), Bans Abortion by Establishing Fetal Personhood (last updated Jan. 15, 2023) https://www.guttmacher.org/state-policy (the seven states are Arizona, Iowa, Ohio, Oklahoma, South Carolina, Vermont, and West Virginia); Erin Sutton et al., The 2023 State Legislative Sessions: The Next Abortion Battleground, *Health Affairs* (Jan. 17, 2023) https://www.healthaffairs.org/content/forefront/2023-state-legislative-sessions-new-abortion-battleground (noting that Georgia moved to expand tax credits to unborn children).

[158]ASRM, States' Abortion Laws Potential Implications for Reproductive Medicine (last revised Oct. 10, 2022) https://www.asrm.org/advocacy-and-policy/reproductive-rights/summary-reports/state-abortion-laws-potential-implications-for-reproductive-medicine/.

cal person or through the actions of any other such person."[159] Under this law, IVF providers must either implant or freeze any viable unused embryos developed during IVF. Nonviable embryos can be discarded after 36 hours.[160]

Previously, Florida and Georgia considered legislation to establish embryonic personhood, though no such bills have been introduced.[161] On March 16, 2023, New York legislators introduced A5566, and on May 12, 2023, Missouri bill H.B. 167 was referred to the House Committee on Children and Families; both bills would establish fetal personhood, if enacted.[162] However, neither bill has been brought to a full vote.

2. States with Abortion Laws that Explicitly Exclude IVF

Some state personhood laws contain clear carve-outs for *ex vivo* embryos.[163] For example, Kansas' 2021 personhood law,

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[159]LA-RS 9 § 129.

[160]Henry T Greely, The death of Roe and the future of ex vivo embryos, *Journal of Law and the Biosciences*, Volume 9, Issue 2, July-December 2022, lsac019, https://doi.org/10.1093/jlb/lsac019.

[161]Elizabeth Nolan Brown, GOP Lawmaker Blocks IVF Protection Bill, *Reason* (Dec. 22, 2022) https://reason.com/2022/12/22/gop-lawmaker-blocks-ivf-protection-bill/. (In 2021, South Dakota considered House Bill 1248, which would have required fertility clinics to provide annual reports to the state Department of Health detailing the number of embryos created, transferred into a woman's uterus, stored, and disposed during the previous calendar year. Additionally, clinics would have been required to share the location of stored or transferred embryos and the purpose for transfer or destruction of embryos. This bill, which ultimately did not pass, and did not prohibit the destruction of embryos, is an example of the types of laws states may use to regulate and track IVF procedures; *see* S.D. House Bill 1248, https://sdlegislature.gov/Session/Bill/22432/216201).

[162]Guttmacher Institute, State Legislation Tracker, Abortion Bans, Bans Abortion by Establishing Fetal Personhood (updated Jun. 1, 2023), https://www.guttmacher.org/state-legislation-tracker; Missouri House Bill No. 167, https://house.mo.gov/billtracking/bills231/hlrbillspdf/0191H.01I.pdf; NY State Assembly Bill A5566, https://www.nysenate.gov/legislation/bills/2023/A5566.

[163]*See generally* ASRM, States' Abortion Laws: Potential Implications for Reproductive Medicine (Oct. 2022) https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/dobbs/state_abortion_laws_p2_oct_22.pdf.

which declares that life begins "at fertilization," contains language permitting medical providers to dispose *ex vivo* embryos that have not been implanted: "The use of any drug or device that inhibits. . .implantation of an embryo and disposition of the product of in vitro fertilization prior to implantation are lawful in this state."[164] Arizona's enjoined 2021 personhood law, which grants personhood rights at conception, specifically prevents any cause of action against lawful IVF providers.[165] Further, the Ohio Court of Appeals held in 2019 that "an embryo that has not been implanted into the uterus of a woman does not constitute a 'distinct human entity' and is therefore not entitled to the rights and protections of a person."[166]

Additionally, some state officials issued statements to clarify ambiguous language in abortion bans. For example, on October 20, 2022, Tennessee Attorney General Jonathan Skirmetti (R) issued Opinion No. 22-12, which determines that Tennessee's 2019 abortion ban—a law currently in effect—does not prohibit destruction of an embryo "created outside a woman's body," meaning Tennessee does not determine destruction of an *ex vivo* embryo to be an abortion "unless and until [the embryo] is 'living . . . within' a woman's body."[167]

3. States with Ambiguous Laws that Could be Interpreted to Apply to IVF

Various state trigger laws, which immediately went into effect after *Dobbs*, refer to embryos within a woman's body (without any clear reference to ART or IVF).[168] For example, Idaho, which defines "abortion" as "any means to intention-

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[164]Kan. Stat. Ann § 65-6702(a).

[165]A.R.S. § 1-219(B)(1).

[166]Penniman v. Univ. Hosps. Health Sys., 130 N.E.3d 333, 339 (Ohio Ct. App. 2019).

[167]Tennessee—Office of the Attorney General, Opinion No. 22-12 Applicability of the Human Life Protection Act to the Disposal of Human Embryos that Have Not Been Transferred to a Woman's Uterus (Oct. 20, 2022) https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2022/op22-12.pdf; Tenn. Code Ann. § 39-15-213.

[168]*See generally* ASRM CPL, The Potential Impact of States' Abortion Trigger Laws on Reproductive Medicine (last revised Jul. 1, 2022) https://

ally terminate the clinically diagnosable pregnancy of a woman," defines "pregnancy" as "reproductive condition of having a developing fetus in the body and commences with fertilization."[169] Wyoming defines "abortion" as the "expulsion, removal or termination of a human embryo or fetus," "conception" as "the fecundation of the ovum by the spermatozoa," and "pregnant" as "that condition of a woman who has a human embryo or fetus within her as the result of conception."[170] These abortion bans could be interpreted to prohibit selective removal of multiple embryos, post-implantation, during an IVF procedure.

Further, it is possible that laws with broad language could be interpreted to apply even to *ex vivo* embryos pre-implantation, absent clear exceptions or further clarification. For example, in Virginia, a bill for the 2023 legislative session, House Bill No. 1395, establishes personhood "at the moment of conception," with "conception" defined as "the process of combining the male gamete with the female gamete, resulting in a fertilized ovum or zygote."[171] Notably, the bill does not contain clear IVF exceptions.[172] This language could therefore be interpreted to apply to *ex vivo* embryos, pre-implantation and post-implantation.

Utah's 2020 trigger law prohibits, under Section (1)(a)(i), the "intentional. . .or attempted termination of human pregnancy after implantation of a fertilized ovum," and, under Section 1(a)(ii), the "intentional. . .or attempted killing of live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician."[173] Notably, while Section (1)(a)(i) specifically only prohibits the destruction of post-implantation embryos, it is possible to interpret Section (1)(a)(ii) to apply to pre-implantation embryos, as the law

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www.asrm.org/globalassets/_asrm/advocacy-and-policy/dobbs/cpl-report_impact-of-state-trigger-laws-on-reproductive-medicine_final.pdf.

[169]Idaho Code § 18-604.

[170]Wyo. Stat. Ann. § 35-6-101(a).

[171]Virginia, HOUSE BILL NO. 1395 (prefiled and ordered printed Nov. 30, 2022; offered on Jan. 11, 2023) https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+HB1395.

[172]*Id.*

[173]Utah Code Ann. § 76-7-301(1)(a)(i)–(ii).

does not define "unborn child," and absent a definition, "unborn child" may be interpreted to include embryos developed during an IVF procedure that are not implanted.[174]

D. Future Considerations

Looking ahead, state lawmakers might continue to introduce and pass legislation that could intentionally or indirectly affect IVF providers. Generally, state abortion bans have sought to avoid targeting IVF, either through deliberate carve-outs or post-enactment clarification. However, some state laws could impact routine IVF practices, making it important for IVF providers to closely watch developments in this space.

VI. Post-*Dobbs* Provider Obligations under EMTALA

The Emergency Medical Treatment and Labor Act (EMTALA) was passed by Congress in 1986 to ensure patients access to emergency medical care regardless of ability to pay. EMTALA requires hospitals with an emergency department to provide individuals seeking examination or treatment for a medical condition with an appropriate medical screening examination."[175] If the hospital determines that there is an emergency medical condition from this screening, the hospital must provide "such treatment as may be required to stabilize the medical condition,"[176] or transfer the patient, if the patient requests the transfer or if the medical benefits of the transfer outweigh the risks, such as when the hospital does not have the capability to stabilize the condition.[177]

Following the Supreme Court's decision in *Dobbs,* EMTALA has raised important questions about the treatment emergency care providers in states with abortion bans are required to provide to pregnant patients experiencing a

[174]ASRM CPL, The Potential Impact of States' Abortion Trigger Laws on Reproductive Medicine, 21-22 (last revised Jul. 1, 2022) https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/dobbs/cpl-report_impact-of-state-trigger-laws-on-reproductive-medicine_final.pdf.

[175]42 U.S.C. § 1395dd(a)

[176]42 U.S.C. § 1395dd(b)

[177]42 U.S.C. § 1395dd(b) and (c)

medical condition that may require termination of the pregnancy. In July 2022, shortly after the *Dobbs* decision was issued, HHS issued guidance providing that if a physician believes a patient experiencing an emergency medical condition requires an abortion to stabilize the condition, the physician is required under EMTALA to provide that treatment, "irrespective of any [applicable] state laws."[178]

HHS's EMTALA guidance has resulted in two separate lawsuits. In the first, the state of Texas has filed suit against the Biden Administration, arguing that EMTALA does not authorize the federal government to compel health care providers to perform abortions.[179] In the second, the Biden administration has filed suit against the state of Idaho, arguing that the state's abortion law, which does not provide an exception for the health of the pregnant patient, directly conflicts with EMTALA's requirements, and should thus be preempted.[180] The ultimate outcome of these two cases will be important for health care providers and determine whether federal law can preempt state abortion laws in situations where patients exhibit an emergency medical condition.

A. Background on EMTALA

EMTALA defines an "emergency medical condition," as a "medical condition with acute symptoms of sufficient severity that, in the absence of immediate medical attention, could place the health of a person in serious jeopardy, or result in a serious impairment or dysfunction of bodily functions or

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[178]Centers for Medicare & Medicaid Services Memorandum, July 11, 2022 https://www.cms.gov/files/document/qso-22-22-hospitals.pdf

[179]Attorney General of Texas Press Release, *Paxton Sues Biden Admin Over Its Efforts to Force Abortions in Texas*, July 14, 2022, https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-admin-over-its-efforts-force-abortions-texas; *see also* Thomas Barker and Alexander Somodevilla, Foley Hoag Client Alert, *Two Lawsuits on EMTALA's Role in a Post-Dobbs World* (Aug. 9, 2022) https://foleyhoag.com/news-and-insights/publications/alerts-and-updates/2022/august/two-lawsuits-on-emtalas-role-in-a-post-dobbs-world/

[180]US Department of Justice Press Release, *Justice Department Sues Idaho to Protect Reproductive Rights,* Aug. 2, 2022. https://www.justice.gov/opa/pr/justice-department-sues-idaho-protect-reproductive-rights; Barker & Somodevilla. *Two Lawsuits on EMTALA's Role in a Post-Dobbs World.*

any bodily organ."[181] With respect to pregnant persons, EMATALA includes within the definition of an "emergency medical condition," placing the health of the pregnant person or the unborn child in "serious jeopardy," or, where the pregnant person is having contractions, that there is either insufficient time to safely transfer the person to another hospital, or that the transfer could threaten the health or safety of the person or unborn child.[182] EMTALA defines "to stabilize" as:

> to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition.[183]

Hospitals and physicians that violate EMTALA risk federal civil monetary penalties as well as possible exclusion from Medicare[184] and civil litigation in federal court from any individual who "suffers personal harm" by a violation of EMTALA.[185] EMTALA preempts any "[s]tate or local law," that "directly conflict with," the requirements under the statute.[186]

B. Post-*Dobbs* Guidance from HHS

On July 11, 2022, shortly after the U.S. Supreme Court issued its decision in *Dobbs,* HHS issued guidance to "remind hospitals of their existing obligation to comply with EMTALA,"[187] including by providing an abortion "[i]f a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA," and "abortion is the

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[181] 42 U.S.C. § 1395dd(e)(1)

[182] 42 U.S.C. § 1395dd(e)(1)

[183] 42 U.S.C. § 1395dd(e)(3)

[184] HHS OIG, The Emergency Medical Treatment and Labor Act: The Enforcement Process, (2001), 7, https://oig.hhs.gov/oei/reports/oei-09-98-00221.pdf

[185] 42 U.S.C. § 1395dd(d)(2)

[186] 42 U.S.C. § 1395dd(f)

[187] Centers for Medicare & Medicaid Services Memorandum, July 11, 2022 https://www.cms.gov/files/document/qso-22-22-hospitals.pdf

stabilizing treatment necessary to resolve that condition."[188] The HHS guidance provides various examples of "emergency medical conditions" involving pregnant patients, including "ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features."[189]

The guidance instructs physicians and hospitals that they are obligated to comply with EMTALA even if doing so would violate the laws of the state in which the hospital is located. In situations where a state law prohibits abortions without exception, or where the exception is more "narrowly drawn" than the definition of "emergency medical condition" under EMTALA, the guidance provides that state law is preempted.[190] Further, the guidance also cautions that a hospital cannot rely on state law as the basis for a transfer. "Fear of violating state law through the transfer of the patient cannot prevent the physician from effectuating the transfer nor can the physician be shielded from liability for erroneously complying with state laws that prohibit services such as abortion or transfer of a patient for an abortion . . .."[191]

On the same day that HHS issued its guidance, the HHS Secretary also released a letter addressed to health care providers, reiterating that the "EMTALA statute protects [health care providers'] clinical judgment and the action that [they] take to provide stabilizing treatment to [their] pregnant patients, regardless of the restrictions in the state."[192] Similar to the HHS guidance, the letter provides that any state law that prohibits abortions without excep-

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[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] HHS Secretary Letter to Health Care Providers, July 11, 2022 https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf; *See also* Centers for Medicare & Medicaid Services Memorandum, July 11, 2022, https://www.cms.gov/files/document/qso-22-22-hospitals.pdf

tions for the life and health of the pregnant person is preempted by EMTALA.[193]

C. Idaho and Texas Lawsuits

1. Texas v. Becerra

On July 14, 2022, three days after the release of HHS's EMTALA guidance, the Texas Attorney General sued HHS challenging the guidance as exceeding statutory authority, and as being issued improperly in violation of the Administrative Procedure Act's notice-and-comment rulemaking process.[194] Texas also argued that the HHS guidance unlawfully requires health care providers to perform abortions in situations that are outlawed under Texas law, infringing on Texas' right to create and enforce its own laws.[195] Two anti-abortion provider groups, the American Association of Pro-Life Obstetricians and Gynecologists, and the Christian Medical and Dental Association, joined the lawsuit. Both groups argued that the HHS guidance coerced physicians into providing elective abortions in violation of their statutory and constitutional rights.[196] Texas sought a declaratory judgment that the HHS guidance "is unlawful, unconstitutional, and unenforceable," and a preliminary injunction prohibiting the federal government from enforcing the HHS guidance.[197]

The District Court agreed with Texas and the providers groups, and on August 24, 2022, preliminarily enjoined HHS from enforcing the guidance in Texas. The Court held that the HHS guidance "goes well beyond EMTALA's text, which protects both mothers and unborn children."[198] The court found that EMTALA does not preempt Texas abortion law because EMTALA only preempts state law where it directly

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[193]HHS Secretary Letter to Health Care Providers, July 11, 2022, https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf

[194]State of Texas Amended Complaint, 24

[195]State of Texas Amended Complaint, 14.

[196]State of Texas Amended Complaint, 29

[197]State of Texas Amended Complaint, 30-31.

[198]Texas v. Becerra, Memorandum Opinion and Order, Document 73, 1 2022 U.S. Dist. LEXIS 151142

conflicts with EMTALA's requirements.[199] Because EMTALA is silent as to the obligation of providers where both the pregnant person and the unborn child face an emergency medical condition, the court found there was no direct conflict.[200] The court also found that the HHS guidance violated the Medicare Act's prohibition of federal interference with the practice of medicine.[201]

In early 2023, at the request of the parties, the court issued a partial final order and converted the preliminary injunction into a permanent injunction.[202] The Biden Administration has appealed the partial final order and as of this writing, the case is pending before the Fifth Circuit.[203]

2. U.S. v. Idaho

A few weeks after Texas commenced its EMTALA lawsuit, on August 2, 2022, the Department of Justice sued the State of Idaho on the grounds that Idaho's abortion "trigger" law conflicts with and is preempted by EMTALA because outside of providing a narrow affirmative defense to prevent the death of the pregnant person or in cases of reported rape or incest, the law prohibits abortions in all circumstances even where medically necessary to stabilize the health of the patient.[204]

On August 24, 2022, the court preliminarily enjoined the state of Idaho from enforcing its abortion law to the extent it

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[199]Texas v. Becerra, Memorandum Opinion and Order, Document 73, 1 2022 U.S. Dist. LEXIS 151142

[200]Texas v. Becerra, Memorandum Opinion and Order, Document 73, 44-45 2022 U.S. Dist. LEXIS 151142

[201]Texas v. Becerra, 2022 U.S. Dist. LEXIS 151142,

[202]*Texas v. Becerra*, Amended Judgment, No. 5:22-CV-185-H, Document #109

[203]*Texas v. Becerra*, Notice of Appeal, Case: 23-10246 Document #1.

[204]US Complaint, 11. Idaho's abortion "trigger" law criminalizes abortions and only provides physicians an affirmative defense (which is to be proven by a preponderance of the evidence) where the physician "determine[s], in his good faith," that the abortion [i]s necessary to prevent the death of the pregnant woman, or in cases of reported rape or incest. Idaho Code § 18-622

conflicts with EMTALA-mandated care.[205] The court found that Idaho's law is likely preempted by EMTALA because (1) it is impossible for physicians to comply with both the Idaho law and EMTALA ("Impossibility Preemption"), and (2) because the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," insofar as it will deter physicians from providing abortions in some emergency situations, frustrating Congress's intent in ensuring adequate emergency care for all patients at Medicare-funded hospitals under EMTALA ("Obstacle Preemption).[206] Both the State of Idaho and the Idaho Legislature have filed motions for reconsideration of the preliminary injunction order.[207] The case was appealed to the Ninth Circuit, and the Idaho Legislature was allowed to intervene in the case.[208] As of this writing, the appeal remains pending before the Ninth Circuit.

Even though the Texas and Idaho lawsuits have thus far led to conflicting results, these lawsuits likely signify the beginning of a long battle concerning the provision of abortion-related care under EMTALA.

VII. Conclusion

The aftermath of *Dobbs* introduced profound—and continuously evolving—challenges for health care providers. Several issues might be litigated for years to come. For the time being, health care providers should ensure they remain current on requirements within their states and under federal law. As the legal landscape continues to change, providers should update existing protocols and procedures (or if necessary, adopt new ones) concerning the provision of reproductive health care. This is especially critical for providers who practice in multiple states or administer care to patients across state borders.

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[205]United States v. Idaho, No. 1:22-cv-00329-BLW, 2022 U.S. Dist. LEXIS 153174 (Aug. 24, 2022).

[206]*United States v. Idaho*, at * 20-39.

[207]*United States v. Idaho*, Dkt #97 and Dkt #101.

[208]*United States v. Idaho*, No. 1:22-cv-00329-BLW, Document #131; *see also United States v. Idaho*, No. 1:22-cv-00329-BLW, Document #141.