

Post-*Dobbs* Abortion Access Routes: A Primer

Jennifer L. Piatt, J.D.
Research Scholar

Deputy Director, Western Region
Network for Public Health Law
Sandra Day O'Connor College of Law
Arizona State University
Jennifer.Piatt@asu.edu

Erica N. White, J.D.
Research Scholar

Staff Attorney, Western Region
Network for Public Health Law
Sandra Day O'Connor College of Law
Arizona State University
EricaWhite@asu.edu

Dobbs v. Jackson Women's Health Organization (2022)

Mississippi enacts law
banning abortion after
15 weeks except in
narrow cases of
medical emergency or
"severe fetal
abnormality"

2018

After district court &
5th Circuit find
Mississippi law
unconstitutional (per
Roe v. Wade), U.S.
Supreme Court agrees
to hear the case

2021

On June 24, 2022, the
Court issued its
decision, fully
overturning *Roe v.
Wade* & *Planned
Parenthood v. Casey*

2022

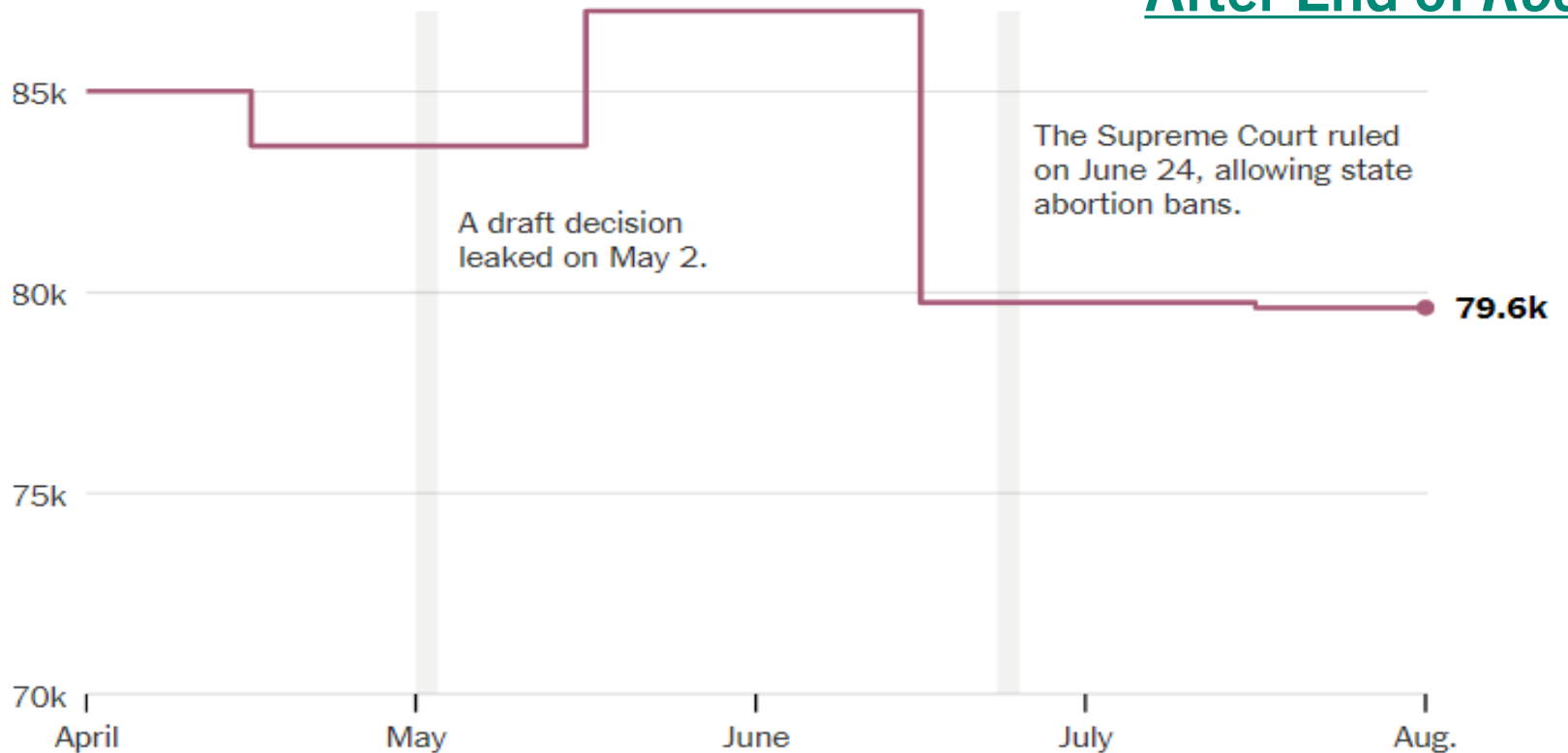
***Held: the Constitution no longer
confers a right to abortion.***

***But other "open
doors" remain...***

Abortion Post-*Dobbs*

Abortions Fell After Dobbs

Legal abortions



Legal Abortions Fell Around 6 Percent In Two Months After End of *Roe*

Requests for Self-managed Medication Abortion Before and After *Dobbs*, JAMA (Nov. 1, 2022)

Table. Requestors' Stated Reasons for Requesting Self-managed Medication Abortion by State Abortion Policy Category at Baseline and After the Formal *Dobbs v Jackson Women's Health Organization* Decision^a

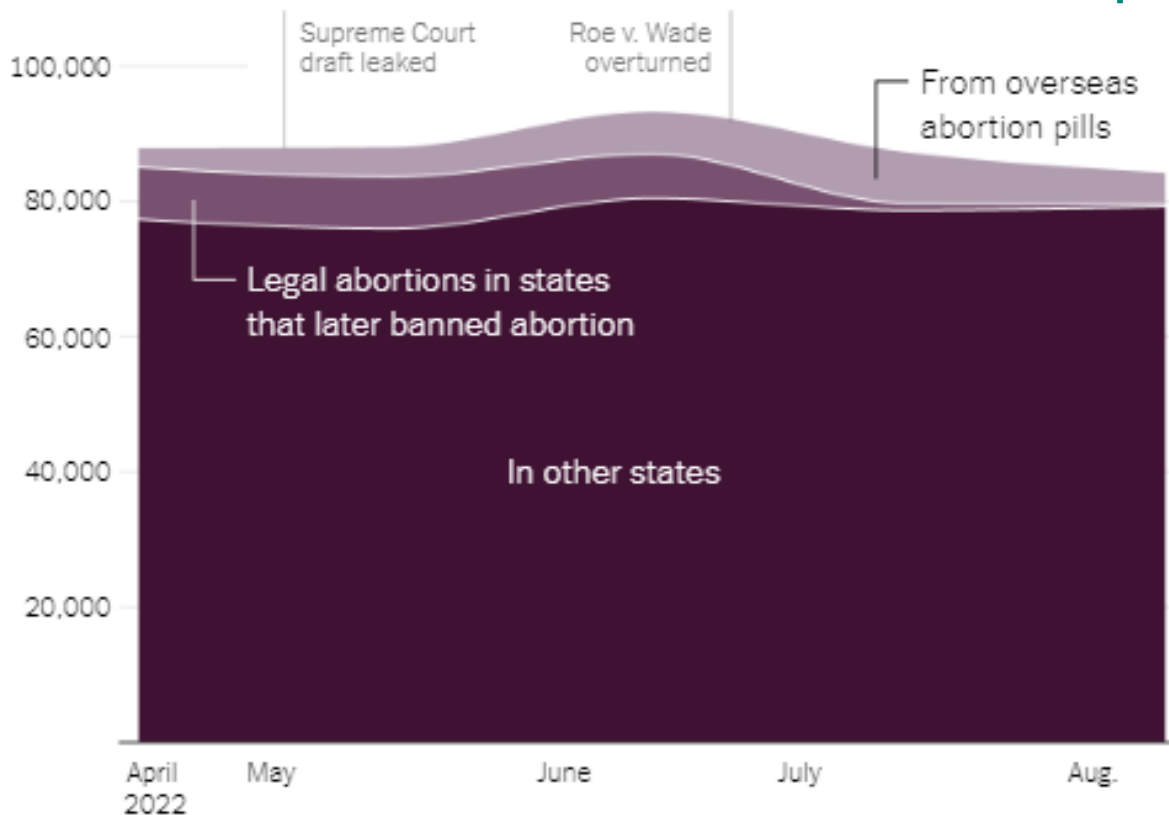
Reason for request, by state's abortion policy after <i>Dobbs</i> decision	Baseline (September 1, 2021, to May 1, 2022), %	After decision (June 24 to August 31, 2022), %	Difference, after decision - baseline, % (95% CI)
No ban likely			
Current legal restrictions	3.2	9.2	6.0 (-1.6 to 13.6)
Possible future restrictions	11.5	14.9	3.4 (-6.5 to 13.3)
6-Week abortion ban	0.6	4.6	4.0 (-1.5 to 9.4)
Likely or possible ban			
Current legal restrictions	8.6	25.5	16.9 (15.2 to 18.7)
Possible future restrictions	12.5	35.5	23.0 (21.1 to 25.0)
6-Week abortion ban	2.3	4	1.7 (0.1 to 2.5)
6-Week ban			
Current legal restrictions	10.7	46.6	35.9 (33.8 to 38.0)
Possible future restrictions	14	35.9	21.9 (19.8 to 24.0)
6-Week abortion ban	3.9	28.9	25.0 (23.3 to 26.8)
Total ban			
Current legal restrictions	31.4	62.4	31.0 (29.7 to 32.4)
Possible future restrictions	22.8	33.2	10.4 (9.1 to 11.7)
6-Week abortion ban	26.6	20.5	-6.1 (-7.4 to -5.0)

Abortion Post-*Dobbs*

As Legal Abortions Fell, Overseas Pill Use Climbed

“Putting both studies together, there were about 2,000 fewer abortions per month, compared with April, when abortion was legal in every state.”

Estimates of abortions in the United States



Post-Dobbs Abortion Access: Open Doors



FDA Preemption



Enforcement Discretion



Expanded Medication
Access



Gubernatorial Pardons



Medicaid Waivers



Pharmacies'
Nondiscrimination Obligations



Telehealth



EMTALA



Mobile Clinics



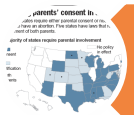
Active Military Access



International Access



EU/PPRE Declaration



Minor Access
Opportunities



Employer Travel Benefits



VA Beneficiaries



Emergency Contraception

Post-*Dobbs* Abortion Access: Open Doors

PATHWAY:

This Primer describes a series of “open door” legal pathways to access abortion services in the U.S. in light of the withdrawal of federal rights to abortion in *Dobbs* and restrictive state abortion laws.

COVERAGE:

Coverage explains who may be able to utilize a specific pathway to access abortion services.

CAVEATS:

Caveats delineate various actual or potential limitations related to accessing abortions via each pathway.



PATHWAY

FDA's authority to approve safe & effective drugs for circulation in interstate commerce may preempt contradictory state laws seeking to limit or restrict medication abortion access, enabling access to medication abortion nationally.

COVERAGE

Pregnant individuals seeking abortion up to 10 weeks gestation.

CAVEATS

Litigation may determine the extent of FDA preemption vis-à-vis state authority over the practice of medicine.



Expanded Medication Access

PATHWAY:

Some physicians may prescribe mifepristone (medication abortion pill) off-label to pregnant individuals seeking abortion past the FDA-approved 10 weeks gestation, as current WHO guidelines favor prescribing up to 12 weeks gestation. Some providers also may prescribe mifepristone & misoprostol via advance provision to individuals at risk of unintended pregnancy. States may also consider expanding the classes of clinicians authorized to provide medication abortion.

COVERAGE:

Pregnant individuals seeking abortion up to 12 weeks gestation or individuals at risk of unintended pregnancy.

CAVEATS:

Access may vary based on individual physician discretion or increased state-level restrictions. Many physicians prescribing up to 12 weeks or as advance provision only provide care via telehealth services, which may be subject to other limits.



Employer Travel Benefits

PATHWAY:

Private companies may cover travel costs for employees or dependents living in states that restrict abortion access. Travel costs could be provided as travel benefits covered through existing health care plans, as direct reimbursement, or through standalone funds.

COVERAGE:

Certain employees or dependents who must travel out-of-state to access abortion care.

CAVEATS:

Litigation may determine if funds used for these purposes may violate state aiding & abetting provisions. Health care plans may face state restrictions if fully-insured, rather than self-funded. Expanded benefits may not cover part-time or hourly workers under existing health care plans.



PATHWAY:

President Biden & the Department of Health & Human Services have expressly encouraged states interested in expanding or protecting abortion access to apply for Section 1115 waivers of Medicaid requirements to potentially receive federal funding for programs designed to help cover travel-related costs for Medicaid recipients seeking abortions across state lines.

COVERAGE:

Medicaid recipients seeking abortions across state lines.

CAVEATS:

No state has yet applied for a waiver, possibly due to the complex application process. The Hyde Amendment bans the use of federal funds to pay directly for abortions, so individuals still need additional funding to pay for the procedure.



PATHWAY:

Telehealth is a safe, available avenue to access medication abortion (mifepristone & misoprostol) enabling physicians to prescribe drugs & provide follow-up care via telehealth consultation. In abortion-hostile states, patients may be able to obtain a prescription using telehealth services which is then filled at an out-of-state pharmacy mailed to or picked up by the patient in an abortion-protective state.



COVERAGE:

Pregnant individuals up to 10 weeks gestation, with some providers prescribing through 12 weeks.

CAVEATS:

FDA previously limited dispensation of mifepristone to use under physician supervision, though FDA recently moved to modify this stringent control. Drugs are only available in states legalizing abortion, subject to litigation. Pharmacies dispensing mifepristone must be certified.

PATHWAY:

Private organizations including [Just the Pill](#) & [Planned Parenthood](#) may operate mobile clinics inside vehicles located near abortion-hostile state borders for medical & [surgical abortion options](#) (in limited cases). Access is currently [available in CO](#), in development in [IL](#), and there are plans to extend access in [CA, NM, NY & WA](#).

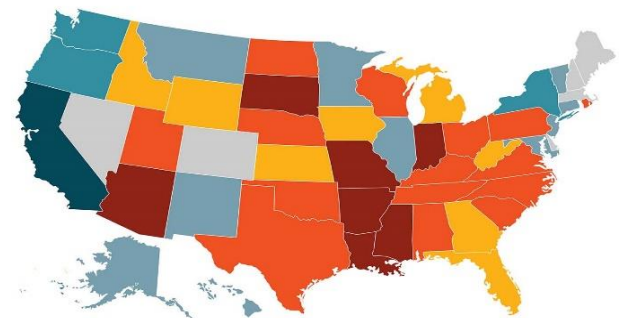
COVERAGE:

Varies depending on site, provider & state law.



CAVEATS:

Uncertain [interstate criminal or civil liability](#). Limited availability of mobile clinics. Patient & staff [safety concerns](#) & travel [costs](#).



PATHWAY:

Dozens of countries have legalized abortion access, including Canada, which has offered to serve as a “safe haven” for Americans to access abortion. Discreet clinics in Mexico (e.g., Tijuana) are providing access as well. Aid Access, based in the Netherlands, ship abortion medications to patients in need around the world from a pharmacy based in India.

COVERAGE:

Varies depending upon country of access; generally pregnant individuals ranging up to 24 weeks gestation depending on method.

CAVEATS:

Patients must cover travel & procedure costs in full. There are extensive waitlists & mailing internationally adds shipping delays. Some state laws ban mailing abortion pills, subjecting patients to threatened enforcement.



Minor Access Opportunities

PATHWAY:

Many states require parental consent or notification before a minor can access abortion care. [15 states](#) (CA, IL, NM, WA, etc.) & Washington, D.C. do not require parental consent for abortion for minors. "[Judicial bypass](#)," court approval for abortion access in place of parental consent, may be an option in [35 states](#).

COVERAGE:

Pregnant minors under the age of 18.

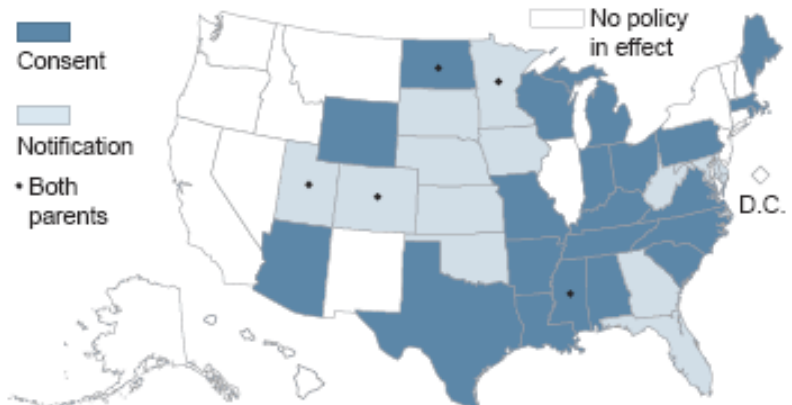
CAVEATS:

[Parental](#) & minor [consent](#) requirements vary; travel [access & costs](#); [judicial bypass](#) laws vary across the states; [liability concerns](#).

Factoring parents' consent in abortion

Thirty-five states require either parental consent or notification for a minor to have an abortion. Five states have laws that require the involvement of both parents.

A majority of states require parental involvement



PATHWAY:

In a September 2022 [memorandum](#) from the Department of Veterans Affairs (VA), the VA clarified its [Interim Rule](#) allowing its employees to provide abortion services to VA beneficiaries in select circumstances, i.e., “when the life or health of the pregnant individual would be endangered if the pregnancy were carried to term or when the pregnancy is the result of rape or incest.”

COVERAGE

Covered abortions for [pregnant veterans & VA beneficiaries](#).

CAVEATS

Potential litigation; since the [VA had not provided abortion services](#) prior to its issuance of the Interim Rule, it will [take time](#) to implement the infrastructure necessary to facilitate provision of abortion services.



Enforcement Discretion

PATHWAY:

Prosecutors have near-absolute discretion over when to prosecute individuals for abortion-related crimes. Post-*Dobbs*, 90+ elected state prosecutors have pledged not to enforce their states' abortion bans or restrictions. Some police chiefs & city councils have also issued memos providing for the de-prioritization of police enforcement of abortion bans.

COVERAGE

Highly variable & dependent on jurisdiction.

CAVEATS

Governors can suspend prosecutors for refusing to prosecute abortions.

Prosecutors are elected officials with fixed or limited terms—newly elected prosecutors may take different stances from their predecessors.



Gubernatorial Pardons

PATHWAY:

State governors who disagree with state laws limiting or criminalizing abortion may pardon or grant clemency to individuals found in violation of these laws. Wisconsin Governor Tony Evers [offered to grant clemency to physicians](#) prosecuted for providing abortions in the state.

COVERAGE

Highly variable; dependent on where one lives.

CAVEATS

Newly-elected governors may choose not to grant pardons; state governors would not be able to pardon federal crimes.



Pharmacies' Nondiscrimination Obligations

PATHWAY:

Post-*Dobbs*, the number of individual pharmacists [refusing to dispense](#) certain medications has increased, due to both personal beliefs & fears of prosecution under strict abortion bans. However, federal civil rights laws [ensure access](#) to comprehensive reproductive health care services. Under [Affordable Care Act § 1557](#) & [Rehabilitation Act § 1557](#), pharmacies cannot discriminate against persons by refusing to dispense medication as prescribed by their physicians.

COVERAGE

Any patient who has been prescribed misoprostol, mifepristone, or methotrexate.



CAVEATS

Anti-discrimination protections for pharmacists' religious beliefs under the [Civil Rights Act Title VII](#) may support refusals to fill a prescription for medications that could be used to induce abortions. Persons ([including corporations](#)) may assert anti-discrimination protections as well under federal or state [Religious Freedom Restoration Acts](#).

Emergency Medical Treatment & Active Labor Act (EMTALA)

PATHWAY:

EMTALA requires most U.S. hospitals to provide screening & stabilizing emergency care. On July 11, 2022, [HHS confirmed](#) that physicians may conclude life-saving abortion care is necessary under EMTALA when pregnant patients present with an “emergency medical condition” (EMC). [EMTALA expressly preempts conflicting state laws.](#)

COVERAGE:

Pregnant patients with an EMC necessitating abortion as treatment at most hospitals.

CAVEATS:

Litigation may determine what is considered an EMC or how state & federal laws intersect. In select challenges (TX, ID), [federal courts have issued contradictory opinions.](#)



Active Military Access

PATHWAY:

The [Under Secretary of Defense released a memo](#) on June 28, 2022, stating that service members, dependents, other beneficiaries & Department of Defense civilian employees [may continue to access “covered abortions”](#) (e.g., if the life of the mother would be endangered if the fetus were carried to term, or if the pregnancy is the result of rape or incest). Active-duty service members may still travel to receive abortion care, not limited to covered abortions.



Source: GAO File Photo.

COVERAGE:

Service members seeking “covered” abortions or traveling for abortions.

CAVEATS:

The military installation must have a medical facility [capable of performing abortion services](#). Service members must seek to take leave to travel for abortions not covered under federal law or if the installation is incapable of providing an abortion. [Obtaining leave can be difficult](#). TRICARE is only available for covered abortions. Thus, if granted leave, there are great [financial barriers in travel & abortion service expenses](#).

EUA/PREP Declaration

PATHWAY

HHS may have authority to issue an abortion-related [Public Readiness & Emergency Preparedness \(PREP\) Act Declaration](#). A PREP Act declaration could convert misoprostol into a covered countermeasure. FDA may issue an [emergency use authorization \(EUA\)](#) to allow unapproved uses of approved drugs, like misoprostol for inducing abortions, rather than its approved use for prevention of NSAID-induced gastric ulcers. A PREP Act Declaration & an EUA may [provide strong liability protections](#) for losses due to the covered countermeasure as well as protections for persons or entities administering or providing the countermeasure.



COVERAGE

Pregnant patients potentially seeking to use misoprostol up to 10 weeks gestation.

CAVEATS

HHS & FDA have not issued a PREP declaration or EUA. Because a PREP Act & EUA would provide a federal liability shield, there may be [state litigation regarding the extent of the liability protection](#) under the Act. Since [mifepristone is already FDA-approved](#) for abortion, it is less likely to receive potential EUA and PREP Act coverage.

Emergency Contraception

PATHWAY

While not a pathway or substitute for abortion access, Americans still maintain a fundamental right to use birth control. [FDA has approved 4 emergency contraception products](#) (e.g., Plan B, *ella*, oral contraceptives, IUDs) which can be taken shortly after unprotected sex to prevent pregnancy. While most require a prescription, Plan B is sold over-the-counter. The Affordable Care Act (ACA) requires most private health plans to cover FDA-approved emergency contraceptives. Online platforms allow individuals to obtain emergency contraception without an in-person appointment.

COVERAGE

Individuals who have had unprotected sex in the last 3-5 days.

CAVEATS

Some states have [restricted](#) emergency contraceptive access; litigation may ensue regarding [contraception/abortion definitions](#).



Acknowledgments

Ask the Network regarding questions or comments:

Jennifer L. Piatt, J.D., jpiatt@networkforphl.org

Erica N. White, J.D., ewhite@networkforphl.org

Special thanks to **Summer Ghaith, Cleo Goeckner, Madisyn Puchebner & C. McKenna Sauer** at ASU's Sandra Day O'Connor College of Law for their research, drafting & formatting assistance.