A WOMAN'S RIGHT TO KNOW: STATE ABORTION LAW AND THE DUE PROCESS FAIR NOTICE REQUIREMENT

Abstract: When the Supreme Court overturned *Roe v. Wade* in 2022, the loss of reproductive freedom was not the only health care crisis created by the Court. Across the country, people with chronic conditions, including autoimmune disease, were unable to access their prescription medication after abortion bans imposed restrictions on abortion-inducing drugs. Texas's state medication abortion law, the Woman's Right to Know Act, may prevent those with disabilities from accessing lifesaving medication with abortifacient properties. This unintended consequence puts health care professionals such as doctors and pharmacists at risk of legal liability for simply prescribing the best course of treatment. This Note argues that the Woman's Right to Know Act has left health care professionals unable to understand what conduct is prohibited and provides too much discretion to law enforcement, rendering the law unconstitutionally vague. Clarifying the law and prohibiting provider liability is in the best interests of both patients and providers and will allow health care professionals to continue their work to protect patient health.

INTRODUCTION

In July of 2022, Maryland resident Myisha Malone-King's insurance provider informed her that a prescription for methotrexate, an anti-inflammatory drug used to treat her autoimmune disease, was no longer available.[1] Across

[1] Jen Christensen, *Women with Chronic Conditions Struggle to Find Medications After Abortion Laws Limit Access*, CNN, https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html [https://perma.cc/EL5M-8TVN] (July 22, 2022). Malone-King has an autoimmune disease called Crohn's Disease that attacks the colon. Christensen, *supra*; *Crohn's Disease*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/9357-crohns-disease [https://perma.cc/7NK9-Z9B4]. Crohn's disease can have widespread symptoms that include weight loss, abdominal pain, fatigue, arthritis, kidney stones, and in serious cases, bowl obstructions or malnutrition. *Crohn's Disease*, *supra*. After the Supreme Court's *Dobbs v. Jackson Women's Health Organization* decision in 2022 that overturned its earlier decision in *Roe v. Wade*, pharmacists and doctors faced significant confusion on whether methotrexate, a drug that is used to treat autoimmune disease and some cancers, but also ectopic pregnancies, can be legally prescribed to patients capable of pregnancy. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (holding that *Roe* must be overturned and giving the power to regulate abortion to the states); Christensen, *supra* (providing the factual dilemma that providers face, as methotrexate is used to end an ectopic pregnancy, which has implicated the drug in several state laws restricting abortion). Methotrexate is considered the front-line treatment for rheumatoid arthritis, and generally has very few long-term side effects. *See* Michael E. Weinblatt, *Methotrexate in Rheumatoid Arthritis: A Quarter Century of Development*, 124 TRANSACTIONS AM., CLINICAL & CLIMATOLOGICAL ASS'N 16, 16–19 (2013) (outlining the history of methotrexate as a prescription anti-inflammatory drug, detailing its usage, and highlighting long term tolerance from

the country in Arizona, fourteen year-old Emma Thompson's mother argued with a Walgreens pharmacist as she tried to pick up the same medication used to treat her daughter's juvenile idiopathic arthritis.[2] Becky Schwarz, a twenty-seven-year-old lupus patient in Virginia, received a letter from her physician detailing a pause on her methotrexate prescription.[3] At another pharmacy counter in Missouri, a pharmacist told Annie England Noblin that her doctor needed to provide additional verification before she could pick up her rheumatoid arthritis medication.[4]

Before the *Dobbs v. Jackson Women's Health Organization* decision overturned *Roe v. Wade*, each of these individuals was able to access methotrexate to treat an autoimmune condition.[5] After *Dobbs*, many abortion laws became enforceable that not only banned abortion, but also restricted access to medications with abortifacient qualities like methotrexate.[6] Although these laws have

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most patients). Insurance companies have reportedly been alarmed after changes in abortion laws, resulting in methotrexate restrictions. Christensen, *supra*.

[2] Katie Kindelan, *Mom Speaks Out After 14-Year-Old Daughter Was Denied Arthritis Medication Due to Abortion Law*, GOOD MORNING AM. (Oct. 6, 2022), https://www.goodmorningamerica.com/wellness/story/mom-speaks-14-year-daughter-denied-arthritis-medication-91107896 [https://perma.cc/X75W-T9JV]. Thompson has lived with juvenile idiopathic arthritis since the age of three and had been taking methotrexate to manage her symptoms for ten years. *Id.* Juvenile idiopathic arthritis is an autoimmune disease that can cause joint pain, swelling, stiffness, fatigue, and permanent joint damage. *Childhood Arthritis*, CDC, https://www.cdc.gov/arthritis/childhood-arthritis/index.html [https://perma.cc/BU5J-YCTZ]. Thompson's mother expressed her opinion that the medication had been denied due to confusion regarding her state's latest abortion laws after the overturning of *Roe*. Kindelan, *supra*.

[3] Sonja Sharp, *Post*-Roe, *Many Autoimmune Patients Lose Access to 'Gold Standard' Drug*, L.A. TIMES (July 11, 2022), https://www.latimes.com/california/story/2022-07-11/post-roe-many-autoimmune-patients-lose-access-to-gold-standard-drug [https://perma.cc/8XLQ-JR42]. Schwarz's rheumatologist noted specifically that the pause in access to her medication was due to *Roe*'s reversal. *Id.* Lupus is an autoimmune disease that causes the body to attack itself. *Lupus Basics*, CDC, https://www.cdc.gov/lupus/facts/detailed.html [https://perma.cc/YG6U-U6MV]. It can affect nearly every organ system including joints or connective tissues. *Id.* Schwarz reported that methotrexate significantly improved her symptoms—within a month, many of her symptoms were alleviated including previous mobility issues. Erica Jalal, *Patients Being Barred from Medication No Longer Used for Abortion Post* Roe, ABC NEWS (July 14, 2022), https://abcnews.go.com/Health/patients-barred-medication-longer-abortion-post-roe/story?id=86755133 [https://perma.cc/YZS3-RJ2M].

[4] *See* Christensen, *supra* note 1 (detailing the process that a pharmacy in Missouri enforced after the *Dobbs* decision so that a woman could pick up her methotrexate prescription for rheumatoid arthritis). The updated pharmacy protocol included a new step of personally confirming with the doctor that the drug would not be used for an abortion. *Id.* England Noblin reported feeling humiliated as the pharmacist treated her and her physician "like criminals." *Id.*

[5] *See supra* notes 1–4 and accompanying text (detailing stories of four women who were able to use methotrexate to manage their autoimmune disease prior to the *Dobbs* decision that overturned *Roe*, and highlighting their struggles to pick up their medication afterwards); *see also Dobbs*, 597 U.S. at 231 (holding that the Constitution contains no right to an abortion, returning the decision on abortion law to the states, and overruling *Roe*).

[6] *See* Jamie Ducharme, *Abortion Restrictions May Be Making It Harder for Patients to Get a Cancer and Arthritis Drug*, TIME (July 6, 2022), https://time.com/6194179/abortion-restrictions-methotrexate-cancer-arthritis/ [https://perma.cc/YKU5-ZJPL] (noting that after the *Dobbs* decision,

not specifically restricted access to medications used to treat conditions like autoimmune disease, some patients have still experienced a lapse in care.[7] Medical professionals are confused about changing abortion laws and seek further guidance to avoid liability.[8]

This issue directly impacts health equity in the United States, as autoimmune disease most often affects women, and disproportionately affects people of color.[9] These individuals already face significant health care discrimination, and losing access to essential medication for diseases that can be life-threatening only widens that equity gap.[10]

When ordinary Americans cannot determine if their conduct violates the law, or what the punishment will be, the law in question may be unconstitutionally vague under the Due Process Clause.[11] The Supreme Court utilizes the void for vagueness doctrine to determine if a law (1) provides fair notice to the average American about what constitutes impermissible conduct, and (2) is enforced in a fair and reasonable way.[12] The doctrine helps protect Americans' due process rights by ensuring that they are not unduly punished for a law they cannot understand.[13]

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abortion law began to impact access to methotrexate in several states); Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html [https://perma.cc/TG9F-J9KS] (providing information on which states had abortion laws that went into effect immediately after *Roe* was overturned); *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 171.061, .063, .065 (West 2023) (referring to methotrexate as an abortion-inducing drug and subjecting it to additional restrictions).

[7] *See, e.g.*, HEALTH & SAFETY § 171.061 (targeting the prescription of abortion-inducing drugs, but excluding any medication prescribed for a legitimate medical purpose other than abortion); *supra* notes 1–4 and accompanying text (providing conflicting anecdotes to state abortion laws that claim to provide an exception for medication prescribed for other medical purposes).

[8] *See* J. David Goodman, *Abortion Ruling Keeps Texas Doctors Afraid of Prosecution*, N.Y. TIMES, https://www.nytimes.com/2023/12/13/us/texas-abortion-doctor-prosecution.html [https://perma.cc/TN2K-6CG6] (Dec. 14, 2023) (offering insight into the potential legal consequences that doctors and pharmacists might face when making abortion-related decisions and detailing their concerns and emotions on the matter).

[9] *See infra* notes 178–187 and accompanying text (highlighting that women and people of color have higher rates of autoimmune disease than the rest of the population, and providing context as to how they already face significant health care discrimination).

[10] *See infra* notes 178–187 and accompanying text (providing background on health equity issues that women and people of color experience, and asserting that losing access to essential medication would only worsen this problem).

[11] *See* City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion) (asserting that statutes should be obvious in their meaning so that citizens do not have to guess how to follow the law or know what conduct is prohibited). The Court examines two prongs, the fair notice prong and the arbitrary enforcement prong, to determine if the law is overly vague, which would render it unconstitutional under the Due Process Clause. *Id.*

[12] *See id.* (providing a two-pronged test that the Supreme Court utilizes to determine if a law is unconstitutionally vague). The first prong ensures fair notice and the second prong focuses on arbitrary enforcement. *Id.*

[13] *See* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1055 (2020) (providing context and purpose behind the void for vagueness doctrine and asserting that it

Section 1557 of the Affordable Care Act (ACA) states that health care institutions receiving government funding cannot discriminate based on a number of protected classes, including sex and disability.[14] Despite assertions from both the federal government and the language of state laws that providers will not be prosecuted for prescribing and dispensing methotrexate to treat autoimmune disease based on Section 1557 of the ACA, the legal landscape in states like Texas tells a different story.[15] Regardless of whether providers will be prosecuted in Texas, the state's law on restricting abortion-inducing medication, the Woman's Right to Know Act (Act), is overly vague as it stands.[16] The inclusion of methotrexate in the statutory text combined with the Texas Attorney General's aggressive prosecution strategy puts health care professionals at risk of a felony charge for doing their jobs.[17] Alternatively, if providers refuse to dispense the medication, it creates a barrier to access treatment of chronic conditions and ultimately puts patient health at risk.[18]

This Note[19] argues that as the United States adjusts to a post-*Roe* reality, state laws must clarify what conduct is specifically prohibited when dispensing abortifacient drugs like methotrexate for non-abortion purposes to protect doctors' and patients' due process rights.[20] Part I of this Note provides background on the current state of abortion law and methotrexate access, federal and state guidance, and the void for vagueness doctrine.[21] Part II considers the profes-

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protects the constitutional rights of Americans by giving them the choice of whether to follow the law).

[14] 42 U.S.C. § 18116(a).

[15] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE TO NATION'S RETAIL PHARMACIES: OBLIGATIONS UNDER FEDERAL CIVIL RIGHTS LAWS TO ENSURE NONDISCRIMINATORY ACCESS TO HEALTH CARE AT PHARMACIES (2023), https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html [https://perma.cc/P8DU-SF4G] (providing the U.S. Department of Health and Human Services's (HHS) response to methotrexate restrictions and informing pharmacists that they must continue to provide the medication); TEX. HEALTH & SAFETY CODE ANN. § 171.061(2) (West 2023) (clarifying that any abortion-inducing drug listed or any abortifacient drug that is "prescribed, dispensed, or administered" for another non-abortion use is not included in the term "abortion-inducing drug"); *infra* notes 65–68 and accompanying text (detailing two recent cases filed in Texas that interpret abortion law and provide insight into the legal landscape for patients and physicians in Texas).

[16] *See infra* notes 122–150 and accompanying text (offering analysis of what provisions of the Texas Woman's Right to Know Act (Act) are overly vague).

[17] *See infra* notes 96–107 and accompanying text (analyzing the specific inclusion of methotrexate specifically and the issues this causes for people with autoimmune diseases).

[18] *See infra* notes 106–107 and accompanying text (detailing how potential provider liability for health care providers, particularly pharmacists, can cause a lapse in care for patients with autoimmune disease).

[19] For additional discussion of this topic and analysis of how shield laws to protect providers would help solve this issue, see generally Mallory Maag, Note, *Access Denied: An Immediate Discriminatory Impact on Women with Chronic Illness After* Dobbs v. Jackson Women's Health Organization, 48 S. ILL. U. L.J. 329 (2024).

[20] *See infra* notes 119–150 and accompanying text.

[21] *See infra* notes 24–91 and accompanying text.

sional and legal risks health care providers face.[22] Part III applies the void for vagueness doctrine to the Act, and asserts that considering the potential for significant harm, the state and federal government must clarify the law to protect constitutional rights.[23]

I. A MURKY LANDSCAPE: LEGAL BACKGROUND ON FEDERAL AND STATE GUIDANCE ON ABORTION LAWS AND ABORTION-INDUCING MEDICATION

The Fifth and Fourteenth Amendments of the Constitution grant every U.S. citizen the right of due process.[24] Due process requires that laws be constructed so that ordinary citizens understand how to obey them.[25] A court must be able to determine the meaning of the law's text to declare it sufficiently definite—otherwise, the court will declare the law unconstitutionally vague.[26] This Note explores the issue of access to methotrexate relating to provider liability concerns based on the gap between the federal government's guidance to abide by Section 1557 of the ACA and the Act.[27] This Part provides insight into these two laws and discusses the potential legal consequences for doctors and pharmacists.[28] Additionally, this Part details how the Court has previously

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[22] *See infra* notes 92–111 and accompanying text.

[23] *See infra* notes 112–187 and accompanying text.

[24] U.S. CONST. amends. V, XIV, § 1. The Due Process Clause provides that citizens must be given adequate notice so they can follow the law and that their interests cannot be reduced without appropriate notice. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (finding that posting a legal citation in a newspaper was not sufficient notice for a citizen, as individuals could not provide an answer and be heard). In 1950, in *Mullane v. Central Hanover Bank & Trust Co.*, the Court held that notice was a "fundamental requisite of due process" and that said notice must provide citizens with the information required to modify their conduct. *Id.* at 314 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

[25] *See* City of Chicago v. Morales, 527 U.S. 41, 58 (1999) (plurality opinion) (detailing the purpose of due process's fair notice prong, in that statutes should be obvious in their meaning so that an ordinary citizen need not speculate over the legality of their actions). Due process requires that statutes provide citizens fair notice about what actions are considered prohibited and offer sufficient standards to guide law enforcement to prevent discrimination. *See* Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 788 (2002) (quoting Sessions v. Dimaya, 584 U.S. 148, 156 (2018)) (providing the basic notice requirements outlined in the void for vagueness doctrine).

[26] Mannheimer, *supra* note 13, at 1055; *see* United States v. Harriss, 347 U.S. 612, 620–23 (1954) (analyzing the language behind a lobbying statute and determining the meaning behind each word as well as considering Congress's intent, and finding a definite enough meaning to consider the statute constitutional). Over time, courts have relied more on the second part of the void for vagueness test, or the "arbitrary enforcement" test, which evaluates whether the statute would lead to inconsistent or arbitrary enforcement of the law. *See* Emily Snoddon, Comment, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2307–08 (2019) (providing context for the second prong of the due process test utilized by the Supreme Court, and demonstrating that the Court has moved toward this second prong). In 1999, in *City of Chicago v. Morales*, the Court evaluated this issue regarding a loitering statute that led to arbitrary enforcement. *See Morales*, 527 U.S. at 52 (highlighting the lack of guidance for law enforcement officials as a due process issue).

[27] *See infra* notes 34–91 and accompanying text.

[28] *See infra* notes 34–42 and accompanying text.

evaluated the due process notice requirement in the face of ambiguous statutory language.[29]

Section A of this Part provides a brief background on the state of abortion laws in the United States post-*Roe* and outlines the legal ramifications providers may face.[30] Section B details the requirements of Section 1557 of the ACA and the government's guidance to medical providers for prescribing and dispensing methotrexate.[31] Section C explores the language, requirements, and implications of the Act.[32] Finally, Section D delineates the void for vagueness doctrine and explores how the Court has used it to protect constitutional rights.[33]

*A. The State of Abortion Post-*Roe *and the Resulting Confusion at the Pharmacy Counter*

In 2022, in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, eliminating a baseline right to abortion across the United States.[34] In its wake, nine states instantly enacted their own laws restricting ac-

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[29] *See infra* notes 69–91 and accompanying text.

[30] *See infra* notes 34–42 and accompanying text.

[31] *See infra* notes 43–49 and accompanying text.

[32] *See infra* notes 50–68 and accompanying text.

[33] *See infra* notes 69–91 and accompanying text.

[34] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* on the basis that the right to abortion is not affirmatively present in the Constitution, and therefore it must be left to the states to determine if abortion should remain legal); *see also* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (citing a fundamental right to abortion originating from a constitutional privacy right that extends to bodily autonomy), *overruled by Dobbs*, 597 U.S. at 215; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1993) (plurality opinion) (upholding the right to abortion), *overruled by Dobbs*, 597 U.S. at 215. The Court's opinion focused heavily on states' rights and restricting what it considered inappropriate use of judicial might. *See Dobbs*, 597 U.S. at 228–29 (marking *Roe* as a turning point for states' rights on the issue of abortion, suggesting the Court overstepped by interfering with the states' ability to legislate, and eliminating a political discourse between pro-life and pro-choice advocates within thirty states). The decision sparked a flood of discourse nationwide, ranging from protests in front of the Supreme Court to celebrations from pro-life groups. *See* Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES, https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html [https://perma.cc/NU3U-L2ZD] (Nov. 2, 2022) (providing situational context to the *Dobbs v. Jackson Women's Health Organization* decision and detailing reports of civil unrest following the official announcement). Although the decision provided clarity on the question of whether abortion was a fundamental right protected by the Constitution, it left more questions unanswered, such as how potential exceptions to these bans operate. *See Dobbs*, 597 U.S. at 345–46 (Kavanaugh, J., concurring) (highlighting the additional questions that still remain, like at what point an abortion should be permitted, the legality of interstate abortion travel bans, or whether to consider the desires of the pregnant individual). Justice Thomas was the sole justice to look at cases beyond the abortion context. *See id.* at 331–34 (Thomas, J., concurring) (observing other cases that may be implicated after the Court's decision in *Dobbs*). In his concurring opinion, he stated that based on the line of logic the Court had relied on to reach the *Dobbs* decision, it would also need to reex-

cess to abortion and a total of thirteen states completely banned abortion in the following year.[35] Nevertheless, these bans had more of an impact than just restricting surgical and medical abortion.[36] Notably, this decision triggered instances of methotrexate denial—a drug that is not commonly used in medication abortions, but does treat various autoimmune diseases.[37]

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amine its decisions in cases like *Griswold v. Connecticut* and *Obergefell v. Hodges*. *See id.* (suggesting that the Court should reexamine all substantive due process decisions, which include the Court's decision on birth control access in *Griswold* and same-sex marriage in *Obergefell*).

[35] *See* Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post*-Roe, GUTTMACHER INST., https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe [https://perma.cc/Y2RL-KNWN] (June 16, 2023) (providing a list of states that adopted trigger laws, or laws that went into effect immediately when *Roe* was overturned, and states that later adopted varying levels of abortion bans and restrictions). Trigger bans are restrictions that were enacted prior to the *Dobbs* decision that would completely ban abortion if *Roe* was overturned or abortion was otherwise made illegal. *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/7S8T-5GDM]. These trigger laws went into effect in nine states: Texas, Alabama, Kentucky, Louisiana, Arkansas, Utah, Missouri, South Dakota, and Oklahoma. Baden & Driver, *supra*. Additional bans quickly fell into place and included restrictions on both the method and timing of abortions. *See id.* (highlighting additional bans in states like North Carolina that impose both facility restrictions and a mandatory waiting period). Finally, a number of states have placed restrictions on medication abortions, including a near-complete ban in Wyoming. *Id.*

[36] *See* Baden & Driver, *supra* note 35 (providing examples of additional restrictions that were triggered in the wake of *Dobbs* other than surgical or medical abortion, including restrictions on mailing abortion pills, advanced reporting, and banning travel to another state to receive an abortion or assisting someone to travel out of state to receive an abortion). Physicians were specifically implicated in a number of these laws, with Arkansas revoking a physician's medical license if they mailed abortion pills and Montana introducing additional reporting requirements for physicians prescribing drugs commonly used in abortions. *Id.* (offering additional details on how abortion laws impact physicians and outlining additional requirements that add to a doctor's workload). As the Justices noted, the *Dobbs* opinion was intended to be narrow, and there are exceptions to the abortion bans that need to be explored, particularly bans in the case where the pregnant person's life is in danger. *See Dobbs*, 597 U.S. at 337 (Kavanaugh, J., concurring) (asserting that pro-abortion advocates highlight the benefit abortion can have for gender equality, and how an abortion to save the life of the pregnant person would be an exception for some "Americans of good faith"). But determining whether an individual's life is at risk is much more subjective and challenging than it appears, and doctors must now attempt to decipher what circumstances qualify. *See* Kate Zernike, *Medical Impact of* Roe *Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html [https://perma.cc/B8TS-VN8W] (highlighting how doctors are struggling to determine the legality of treating patients experiencing a medical emergency that might require lifesaving care via abortion). In Ohio, a woman was charged with abuse of a corpse in connection with a miscarriage she had at her own home after she had sought medical care for a pregnancy and the fetus was deemed non-viable. Remy Tumin, *Ohio Woman Who Miscarried Faces Charge That She Abused Corpse*, N.Y. TIMES, https://www.nytimes.com/2024/01/03/us/brittany-watts-ohio-miscarriage-abortion.html [https://perma.cc/6TZW-K73D] (Jan. 11, 2024) (detailing how a woman was charged with abuse of a corpse after she miscarried in her home after visiting an Ohio hospital two days in a row, but received no medical care). Despite doctors stating she was at "significant risk of maternal death," the woman had to wait for the panel of ethics to determine if her life was at risk to avoid legal ramifications for providing an abortion. *Id.*

[37] *See supra* notes 1–4 and accompanying text (offering numerous instances of individuals with autoimmune diseases who were unable to pick up their medication after *Roe* was overturned, even

The *Dobbs* decision introduced legal complexity into the health care system after many state abortion laws created serious consequences for health care professionals performing abortions or prescribing abortifacient medications.[38] In states where abortion is illegal other than in rare exceptions where the pregnant person's life is at risk, physicians risk legal action when determining if a patient's condition is life-threatening.[39] For health care professionals prescribing and distributing methotrexate, the risk can be high and the consequences severe.[40] In Texas, a provider who violates the law and prescribes methotrexate to

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though they had prescriptions written by their physicians specifically to manage an autoimmune disease and not to induce an abortion). Although methotrexate was used for abortion in the past, is currently prescribed for treating ectopic pregnancies, and does have abortifacient qualities, it is no longer used as part of the medical abortion regimen given to patients seeking to end a pregnancy. *See* Jalal, *supra* note 3 (detailing past and present uses of methotrexate and clarifying that it is not part of the typical two-step medication abortion system). An ectopic pregnancy is defined as a pregnancy where "the embryo implants outside of the uterus," and is not ever viable. *Id.* In fact, ectopic pregnancies must be terminated, as they can cause serious harm or even death to the patient. *Id.* A medication abortion is the most common type of abortion, and involves taking a combination of two drugs, mifepristone and misoprostol, under the guidance of a health care professional. *Medication Abortion: Your Questions Answered*, YALE MED. (Sept. 11, 2023), https://www.yalemedicine.org/news/medication-abortion-your-questions-answered [https://perma.cc/W8P9-SGGL].

[38] *See* Zernike, *supra* note 36 (detailing the legal consequences that physicians could face after the *Dobbs* decision, which could include imprisonment of up to six years for performing an abortion that is deemed to be unnecessary in some states, like Wisconsin). In Texas, physicians recommended that Kate Cox receive an abortion to preserve her health and fertility after her fetus was diagnosed with a condition making it incompatible with life, but the Texas Supreme Court disagreed and held that her condition was not life threatening. *See* Goodman, *supra* note 8 (highlighting an example of how the Texas courts disagreed on providing a patient with a medical exemption after her fetus was diagnosed with Trisomy 18, a genetic condition that is incompatible with life, despite physicians suggesting the pregnancy put Cox's health and fertility at risk). In another instance, a ten-year old girl traveled from Ohio to Indiana to receive an abortion after she was sexually assaulted, and the physician who performed the abortion was investigated and eventually disciplined even though the abortion was completely legal in the state. Shalyn Smith Watkins, *Provider Liability Post*-Dobbs, AM. HEALTH L. ASS'N (July 1, 2023), https://www.americanhealthlaw.org/content-library/connections-magazine/article/5289e7b6-0282-473d-98ac-ee0384c2f204/provider-liability-post-dobbs [https://perma.cc/V484-V2N2].

[39] *See* Zernike, *supra* note 36 (reporting on physicians who describe their decision-making process after the *Dobbs* decision and highlighting the difficult calculus physicians must make between the legal consequences of their actions and what is best for the patient). Dr. Alison Haddock, a physician in Texas, reported that physicians are consulting hospital lawyers more frequently in emergent situations to determine what level of severity is enough to make an abortion legal. *Id.* In Louisiana, doctors treated a pregnant patient with a fetal abnormality, and discovered her fetus did not have a skull, and was therefore incompatible with life. Watkins, *supra* note 38. Although the providers determined an abortion would be the best course of action, the specific condition was not listed on the state's exception list, and the doctors therefore refused to perform the abortion over fear of imprisonment and potential fines. *Id.*

[40] *See* U.S. Pharmacist Staff, *Dispensing Abortifacients Becomes Increasingly Complex for Pharmacists*, U.S. PHARMACIST (Oct. 5, 2022), https://www.uspharmacist.com/article/dispensing-abortifacients-becomes-increasingly-complex-for-pharmacists [https://perma.cc/PD2D-2SSK] (describing the legal risks pharmacists face and their uncertainty surrounding prescribing medications like methotrexate). For example, in Tennessee, a provider who "intentionally, knowingly, or reckless-

a pregnant patient may be charged with a "state jail felony."[41] State and federal governments have provided conflicting guidance, resulting in confusion among providers as to how to follow the law, and ultimately, a lapse in care for some patients.[42]

B. Prohibiting Discrimination Based on Sex and Disability: Section 1557 of the ACA

Section 1557 of the ACA prohibits discrimination based on a protected class in certain health care programs that receive funding from the federal government.[43] Although Section 1557 does not explicitly define health care dis-

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ly" violates the law to provide abortifacient medication is guilty of a felony and may be fined up to $50,000. TENN. CODE ANN. §§ 63-6-1104 to -1105 (2024).

[41] TEX. HEALTH & SAFETY CODE ANN. § 171.065(a) (West 2023). A "state jail felony" carries a punishment of up to two years in state jail and a fine of up to $10,000. TEX. PENAL CODE ANN. § 12.35 (West 2023). Several medical professional organizations such as the American Medical Association and American Pharmacists Association expressed concern that these state laws would result in restrictions to medication and put pharmacists and physicians at risk. Press Release, Am. Med. Ass'n, Am. Pharmacists Ass'n, Am. Soc'y Health-System Pharmacists & Nat'l Cmty. Pharmacists Ass'n, Statement on State Laws Impacting Patient Access to Medically Necessary Medications (Sept. 8, 2022), https://www.ama-assn.org/press-center/press-releases/statement-state-laws-impacting-patient-access-necessary-medicine [https://perma.cc/MV3J-WQNK]. The press release specifically highlighted methotrexate as one of the medications at risk, noting that it is the primary treatment for many autoimmune diseases. *Id.* Moreover, the organizations shared a number of challenges reported in accessing medications, including legal counsel recommending that providers prioritize caution over access to medications, and pharmacists being instructed to deny access to prescriptions unless a provider confirms each patient's diagnosis is related to a non-abortion medical need for the medication. *Id.*

[42] *See supra* notes 1–8 and accompanying text (offering patient anecdotes of how their care lapsed when providers failed to fill their methotrexate prescriptions); Watkins, *supra* note 38 (expressing that health care providers are in a gray area that could prove dangerous for providers and patients due to rapidly changing abortion laws across the United States and the lack of precedent in interpreting what is legal or illegal conduct). Kenneth Saag, American College of Rheumatology's President, stated that some rheumatologists are concerned over the potential legal implications of prescribing methotrexate. *See* Rob Volansky, *Denial of Methotrexate Prescriptions Post-*Roe *Yields 'Condemnation,'* HEALIO (July 29, 2022), https://www.healio.com/news/rheumatology/20220728/denial-of-methotrexate-prescriptions-postroe-yields-condemnation [https://perma.cc/8HEN-B77K] (examining the concerns of rheumatologists after the *Dobbs* decision overturned *Roe* and certain trigger laws led to legal concerns over the use of methotrexate).

[43] 42 U.S.C. § 18116(a). In order to make a claim of disparate treatment through Section 1557, a patient must show that they (1) were a member of a protected class, (2) that the defendant to the claim knew of this protected class, and (3) that the defendant discriminated against the plaintiff based on the class. Valarie K. Blake, *An Opening for Civil Rights in Health Insurance After the Affordable Care Act*, 36 B.C. J.L. & SOC. JUST. 235, 264–65 (2016). For the purposes of Section 1557, protected classes include "race, color, national origin, sex, age, or disability . . . ." 45 C.F.R. § 92.1 (2024). The authority for this anti-discrimination provision is based in Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, The Age Discrimination Act of 1975, and § 504 of the Rehabilitation Act of 1973, and it is enforced in accordance with the enforcement mechanisms in these statutes. *Id.* §§ 92.2(b), 92.5(a).

crimination, the U.S. Department of Health and Human Services (HHS) has published additional guidance and regulations to assist with enforcement.[44]

When initial reports emerged after the *Dobbs* decision that methotrexate prescriptions were not being filled, health care advocates questioned the legality under Section 1557.[45] HHS responded and published guidance stating that denying patients with autoimmune diseases access to methotrexate was a potential violation of Section 1557.[46] This non-binding guidance warned health

[44] *See* Blake, *supra* note 43, at 266–70 (providing a number of ambiguous examples that may or may not constitute discrimination under Section 1557, including varying premium rates for smokers, coverage of specific HIV or cancer medication, or benefits for employees that participate in wellness programs); U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 15 (establishing HHS's position on how certain medication dispensing activities can result in Section 1557 violations). In 2020, HHS published a final rule to help clarify some of the confusion surrounding Section 1557. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37160–248 (Jun. 19, 2020) (codified at 45 C.F.R. §§ 92.1–.5). The final rule includes a number of important clarifications and improved accessibility for individuals who are not fluent in English, ensured communication for those with disabilities, and provided regulations around accessibility in both buildings and technology. 45 C.F.R. §§ 92.101–.104 (2024); *see also* Gregory E. Fosheim, Jacob M. Mattinson & Todd A. Solomon, *HHS Issues Proposed Rule Under Section 1557 of the Affordable Care Act: Nondiscrimination in Health Programs and Activities*, MCDERMOTT WILL & EMERY (Aug. 5, 2022), https://www.mwe.com/insights/hhs-issues-proposed-rule-under-section-1557-of-the-affordable-care-act-nondiscrimination-in-health-programs-and-activities/ [https://perma.cc/4Y7C-VP7T] (noting that HHS's rule aimed to reinstate previously-stripped protections for civil rights under federal health programs). The original rule, published in May 2016, interpreted sex discrimination and expanded that definition to include pregnancy termination and gender identity. Fosheim et al., *supra*. In 2020, although HHS clarified accessibility and communication issues, it also amended the final rule to reverse the inclusion of gender identity and abortion, and removed any definition for the term "on the basis of sex," leaving the statute up to interpretation. *Id.* The Biden administration proposed an additional amendment to the rule in 2022. CHRISTINE J. BACK, CONG. RSCH. SERV., LSB10813, PROPOSED HHS RULE ADDRESSING SECTION 1557 OF THE ACA'S INCORPORATION OF TITLE IX 1 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10813 [https://perma.cc/B6KV-S5YH]. The changes in this proposed rule center around Title IX and the elimination of those references in the 2020 amendment. *Id.* at 2. The updated amendment would prohibit discrimination due to gender expression and identity and sexual orientation, and, like the 2016 amendment, declined to incorporate the Title IX exemption for religious beliefs and the Danforth Amendment. *Id.* at 3 (detailing the provisions of the 2022 proposed rule, and highlighting the similarities with the Obama administration's amendment). The Danforth Amendment requires abortion neutrality, which means that Title IX neither outlaws nor requires any group or individual to pay for abortion-related care. 20 U.S.C. § 1688.

[45] *See* Madeline Morcelle, *How Proposed Changes to Section 1557 Strengthen Protections Related to Pregnancy or Related Conditions, Including Abortion*, NAT'L HEALTH L. PROGRAM (Sept. 27, 2022), https://healthlaw.org/how-proposed-changes-to-section-1557-strengthen-protections-related-to-pregnancy-or-related-conditions-including-abortion/ [https://perma.cc/FMG9-NQJA] (stating that a pharmacy either denying a methotrexate prescription or requiring overly complicated verification and reporting requirements would likely constitute a violation under Section 1557 due to sex discrimination).

[46] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 15 (providing pharmacies detailed information on their responsibilities in treating patients and providing specific examples of what may constitute sex and disability discrimination under Section 1557). The Biden administration published this non-binding guidance initially on July 13, 2022, after reports emerged of pharmacies refusing to fill methotrexate or other potentially abortifacient medications not for the purpose of abortion. *See id.* (publishing guidance for pharmacists after the *Dobbs* decision to detail the current law on filling abor-

care providers of potential civil right violations if they denied a methotrexate prescription to a patient based on their sex or disability.[47] But patients still struggled to access their medication even after the federal government's guidance.[48] This is because HHS's guidance is only one piece of the puzzle, and health care providers must also consider state abortion laws.[49]

C. The Woman's Right to Know Act and the Texas Legal Landscape

Texas has historically placed restrictions on abortion, even prior to the *Dobbs* decision.[50] In 2003, Texas passed the Act, which restricted abortion ac-

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tifacient medication). HHS's guidance specifically references a pharmacy's denial of a methotrexate prescription for a patient with rheumatoid arthritis as an example of potential disability discrimination. *Id.* The 2022 Proposed Rule would affirmatively qualify this issue as sex discrimination and help answer provider questions about what is and is not legal. *See* Morcelle, *supra* note 45 (highlighting that the proposed Biden administration final rule provides more protection against sex discrimination and for gender-affirming care). Annie England Noblin had this exact experience at a Walgreens when attempting to pick up her prescription, and immediately filed a complaint with the HHS Office for Civil Rights. *See* Christensen, *supra* note 1 (recounting the experience that a patient with rheumatoid arthritis, which meets the criteria for a disability under Section 1557, had when attempting to pick up a prescription post-*Roe*, and the steps she took to rectify the situation). Noblin also reached out to Walgreens customer service to attempt to get some answers, and confirmed that the pharmacy did not have the same policy for men with a methotrexate prescription. *Id.*

[47] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 15 (emphasizing that pharmacists are required to provide medication that is "lawfully prescribed" to patients in a nondiscriminatory manner under Section 1557). The guidance is clear cut, and states that "as recipients of federal financial assistance . . . pharmacies are prohibited from discriminating on the basis of race, color, national origin, sex, age, and disability . . . ." *Id.* If a pharmacy is accused of non-compliance, the HHS Office for Civil Rights will first investigate, make recommendations for corrective actions, and finally revoke any federal financial aid. AM. MED. ASS'N, AFFORDABLE CARE ACT, SECTION 1557 FACT SHEET 3 (2017).

[48] *See* Ellen Matloff, *One Year After* Dobbs *Decision, Women Blocked from Meds for Conditions Unrelated to Abortion*, FORBES (June 23, 2023), https://www.forbes.com/sites/ellenmatloff/2023/06/23/one-year-after-dobbs-decision-women-blocked-from-meds-for-conditions-unrelated-to-abortion/?sh=4c0503063277 [https://perma.cc/9F9N-P3RZ] (offering evidence that some women with chronic conditions could not access methotrexate in 2023, one year after the *Dobbs* decision and nearly a year after HHS issued new guidance). Myisha Malone-King confirmed that one year after her insurance initially denied her methotrexate prescription, she still could not access her prescription to treat her autoimmune disease. *Id.* She also reported flare-ups in her condition as a result. *Id.* Becky Hubbard, a forty-six year-old patient with rheumatoid arthritis, made the decision to undergo sterilization in order to continue taking methotrexate in August of 2022—the month after the HHS guidance was published. *See* Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022), https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/ [https://perma.cc/6WJM-S9DE] (highlighting the extreme health implications that a loss of access to methotrexate access can have).

[49] *See infra* notes 50–68 and accompanying text (describing the Act and its implications for health care professionals, and detailing how providers must balance both state and federal law in order to avoid potential legal prosecution).

[50] *See* Richa Venkatraman, *Woman's Right to Know Act in Texas (2003)*, EMBRYO PROJECT ENCYCLOPEDIA (July 15, 2021), https://embryo.asu.edu/pages/womans-right-know-act-texas-2003 [https://perma.cc/2H6Q-N35W] (offering the legislative history of Texas abortion law, how Texas law interacts with federal abortion law, and introducing the Act).

cess, and has amended it several times over the course of a decade and a half.[51] Specifically, a 2013 amendment added a subchapter targeting medication abortions.[52] Subchapter D includes methotrexate in the list of abortion-inducing medications, allowing the medication to be strictly regulated.[53] The Act provides an exception, however, for drugs that may be abortifacient but are prescribed to treat another medical condition.[54] Although this presumably protects methotrexate when prescribed to treat autoimmune disease, the lack of precedent and clarity on this specific issue likely leaves enforcement up to the courts.[55] The Act's

[51] *See* Venkatraman, *supra* note 50 (noting the many changes to the Act between 2003–2017 and the various amendments that have added additional abortion restrictions). The first amendment in 2011 required physicians to give the pregnant person an ultrasound before performing an abortion, highlighting the features of the fetus and playing the heartbeat out loud if one existed. *Id.* The following amendments added additional restrictions which further hindered abortion access. *Id.*

[52] *See Abortion Laws: Medical Abortions*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortion-laws/medical-abortions [https://perma.cc/PU87-NY26] (June 19, 2024) (detailing the history of abortion laws in Texas and introducing the law specifically written to regulate medication abortion). Texas initially passed the Act in 2003, which introduced requirements that doctors counsel the pregnant person to provide alternatives to abortion, introduced a twenty-four-hour waiting period prior to having an abortion, and required that abortions performed at or after sixteen weeks occur in an "ambulatory surgical center." *A Recent History of Restrictive Abortion Laws in Texas*, ACLU OF TEX., https://www.aclutx.org/en/recent-history-restrictive-abortion-laws-texas [https://perma.cc/NCL3-ZV9P]. The subchapter, Subchapter D, imposes additional reporting and informational requirements prior to and after a medication abortion, and introduced criminal penalties of a state jail felony for violations. HEALTH & SAFETY §§ 171.063, .065.

[53] *See* HEALTH & SAFETY § 171.061(2) (providing a list of "abortion-inducing drugs" that are restricted under the Act, including "the Mifeprex regimen, misoprostol (Cytotec), and methotrexate"). Although the Mifeprex regimen and misoprostol are common inclusions in a medication abortion, methotrexate is not. *See* Honor Macnaughton, Melissa Nothnagle & Jessica Early, *Mifepristone and Misoprostol for Early Pregnancy Loss and Medication Abortion*, 103 AM. FAM. PHYSICIAN 473, 473 (2021) (detailing the common medications used in a medication abortion, and suggesting the most effective regimens use both mifepristone (Mifeprex) and misoprostol). Methotrexate, although sometimes used to end an ectopic pregnancy, is not part of the typical medication abortion protocol. *See* Jalal, *supra* note 3 (noting that methotrexate was replaced with mifepristone in 2016 for medication abortions). Industry experts like Steven Newmark, the chief legal officer of the Global Healthy Living Foundation, reported that it is notable that the Texas law calls out methotrexate specifically as being included in the definition of "abortion-inducing drug," which may result in access problems for patients in the future. Volansky, *supra* note 42.

[54] *See* HEALTH & SAFETY § 171.061(2) (clarifying that any abortion-inducing drug listed or any abortifacient drug that is "prescribed, dispensed, or administered" for another medication is not included in the term "abortion-inducing drug"). When acknowledging reports of patients struggling to get access to their medications, John Seago, who serves as the Texas Right to Life Legislative Director, called these situations "an awful misunderstanding of the law." Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022), https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages [https://perma.cc/5M96-43MW].

[55] *See* Rose Horowitch, *State Abortion Bans Prevent Women from Getting Essential Medication*, REUTERS (July 14, 2022), https://www.reuters.com/world/us/state-abortion-bans-prevent-women-getting-essential-medication-2022-07-14/ [https://perma.cc/882M-EBC7] (asserting that although the federal government has instructed pharmacists that they must fill methotrexate prescriptions, it may not overcome concerns over state bans); Kimberlee Kruesi & Geoff Mulvihill, *Some State Abortion Bans Stir Confusion, and It's Uncertain if Lawmakers Will Clarify Them*, ASSOCIATED PRESS, https://

mens rea requirement opens prosecution up to any physician who "intentionally, knowingly, or recklessly" violates the law by prescribing an abortion-inducing drug to a pregnant person.[56] Although the Act provides the definitions of these terms, the standards are left to the court's interpretation.[57]

Once the Supreme Court overturned *Roe* and granted states the power to regulate abortion, Texas did just that.[58] Texas enacted two abortion laws: the Texas Heartbeat Act and the Human Life Protection Act of 2021.[59] The Texas Heartbeat Act prohibits abortion if a fetal heartbeat is present and served as Texas's abortion law prior to the *Dobbs* decision.[60] The Human Life Protection

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apnews.com/article/abortion-exception-lawsuit-legislature-confusion-b2808df90937e96887aa4e1f9c565771 [https://perma.cc/3C98-D2VA] (Dec. 20, 2023) (noting that Texas legislators are not meeting on abortion related issues in 2024, and that instead, the Texas courts are beginning to analyze the law). Lawyers in the state report they do not plan to wait on the legislature for further clarity. *Id.* Providers are still "in the 'crossfire'" between what the federal government has instructed, what the state laws say, and their fear of prosecution for a felony charge. Horowitch, *supra*.

[56] HEALTH & SAFETY § 171.065(a).

[57] *See id.* (highlighting that although the law does provide definitions of mental states and prohibited terms, it does not provide details on prohibited activities). The Texas Penal Code gives definitions for different mental states, or mens rea, but does not provide specific examples of what kind of conduct constitutes an intentional, knowing, or reckless violation of the law, leaving such a determination up to judicial interpretation. *See* TEX. PENAL CODE ANN. § 6.03(a)–(c) (West 2023) (providing the definitions of mens rea given in the Texas Penal Code, which describes recklessness only as someone who "is aware of but consciously disregards a substantial and unjustifiable risk . . . [which] constitutes a gross deviation from the standard of care that an ordinary person would exercise").

[58] *See Abortion in Texas*, ACLU OF TEX., https://www.aclutx.org/en/know-your-rights/abortion-texas [https://perma.cc/S7XN-RD3W] (Aug. 29, 2022) (outlining the structure and status of post-*Roe* Texas abortion laws, background information on when they were enacted, and their specifications). Although Texas began introducing legislation that restricted abortion prior to *Dobbs*, the Supreme Court's decision to overturn *Roe* permitted the state's trigger ban to go into effect. *See id.* (including Texas's legislative history from prior to *Dobbs* and explaining how the trigger ban went into effect sixty-two days after *Roe* was overturned).

[59] *See* HEALTH & SAFETY §§ 170A.002(a)–(b), 171.203–.204 (reporting on two laws that (1) prohibit abortion with very few exceptions and (2) outlaw abortion at six weeks of pregnancy). The Texas Heartbeat Bill came into effect in 2021. *Id.* §§ 171.203–.204; JOANNA R. LAMPE & JON O. SHIMABUKURO, CONG. RSCH. SERV., LSB10651, THE TEXAS HEARTBEAT ACT (S.B. 8), *WHOLE WOMEN'S HEALTH V. JACKSON*, AND *UNITED STATES V. TEXAS*: FREQUENTLY ASKED QUESTIONS 1 (2021). The bill prohibited abortion once a fetal heartbeat could be detected, usually at the six-week mark. HEALTH & SAFETY §§ 171.203–.204; *You and Your Baby at 6 Weeks Pregnant*, U.K. NAT'L HEALTH SERV., https://www.nhs.uk/pregnancy/week-by-week/1-to-12/6-weeks/ [https://perma.cc/3V6G-X2VS]. The Human Life Protection Act of 2021 was passed in 2021, but did not go into effect until 2022, and outlawed all abortion in Texas, with rare exceptions. H.B. 1280, 87th Leg., Reg. Sess. § 5 (Tex. 2021); *Abortion in Texas*, *supra* note 58; HEALTH & SAFETY § 170A.002(a)–(b).

[60] HEALTH & SAFETY § 171.204. Prior to *Dobbs*, this abortion ban was one of the strictest in the nation and gave pregnant people seeking an abortion a very small window in which it was legal to obtain an abortion. *See What Does a 6-Week Abortion Ban Even Mean?*, PLANNED PARENTHOOD (Sept. 15, 2021), https://www.plannedparenthood.org/blog/what-does-a-6-week-abortion-ban-even-mean [https://perma.cc/P2GH-UJ6K] (detailing the realities of a six-week abortion ban and how much time that gives an individual to realize they are pregnant, make a decision about the pregnancy, and get an abortion). Most individuals will not realize they are pregnant until a missed menstrual cycle, which is about the four-week point, leaving at most two weeks to find an appointment and have the

Act served as Texas's "trigger law" and prohibits a provider from performing an abortion unless the pregnant person's life is at risk.[61] These laws do not provide an exception for abortion in cases of incest or rape.[62] Texas abortion law does not permit criminal prosecution against an individual who received an abortion, but allows prosecution against a health care provider who performed one.[63] The law also includes a private cause of action that permits a private individual to pursue a civil case against a health care provider who performed an abortion.[64]

After the *Dobbs* decision was announced and these laws officially went into effect, Texas prosecutors began enforcing these statutes, and Texas courts in turn began to interpret them.[65] For example, a woman in Texas faced a murder charge after allegedly self-inducing an abortion, although the charges were later dropped.[66] Additionally, in December 2023, the Texas Supreme Court

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procedure or to have a medical abortion. *Id.* Moreover, 25% of pregnant people do not discover their pregnancy until seven weeks gestation. Bella Miller, Note, *My Uterus, My Choice: Abortion Bans and Property Interests in the Female Body*, 64 B.C. L. REV. 2131, 2150 (2023).

[61] HEALTH & SAFETY § 170A.002; *Abortion in Texas*, *supra* note 58. The goal of the Human Life Protection Act, as noted by the author's statement of intent, was "to end the practice of abortion in Texas in the event . . . the Supreme Court reverses its rulings under *Roe v. Wade* and *Planned Parenthood v. Casey*." GIOVANNI CAPRIGLIONE ET AL., BILL ANALYSIS, H.B. 1280, 87th Leg., Reg. Sess., at 1 (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/analysis/pdf/HB01280E.pdf [https://perma.cc/6MVS-NZ95].

[62] *Abortion in Texas*, *supra* note 58. The Human Life Protection Act states that the only exceptions to the act are if the pregnant person has a "life-threatening" condition due to the pregnancy that puts the patient's life at risk, or risks the loss of a "major bodily function." HEALTH & SAFETY § 170A.002(b)(2). The Texas Heartbeat Act similarly states an exception if a physician believes the pregnant person is experiencing a medical emergency, however the Code does not define what a medical emergency might be. *Id.* §§ 171.201, .205.

[63] HEALTH & SAFETY §§ 170A.004–.005, 171.208. The Texas Heartbeat Act carries monetary penalties of "not less than $10,000 for each abortion the defendant performed or induced," or that the defendant "aided or abetted." *Id.* § 171.208(b)(2). The Human Life Protection Act has an even more severe penalty, as a criminal offense results in a second-degree felony, and a first-degree felony if the fetus dies. *Id.* § 170A.004(b).

[64] *Id.* §§ 170A.005, 171.208(a). In Texas, an individual is suing his ex-wife's friends for assisting her with a medication abortion—which could realistically open the door to a private citizen suing a health care provider who performs an abortion. *See* Lauren Green, *Post*-Roe *Texas: Unanticipated Effects of the Human Life Protection Act of 2021*, BRADLEY (June 7, 2023), https://www.bradley.com/insights/publications/2023/06/post-roe-texas-unanticipated-effects-of-the-human-life-protection-act-of-2021 [https://perma.cc/9G3F-U8NT] (offering insight into how the Human Life Protection Act could make an impact in court and predicting a new litigation strategy to target physicians who perform abortions).

[65] *See infra* notes 66–68 and accompanying text (offering examples of Texas law enforcement and courts taking on the task of interpreting the new state abortion laws).

[66] *See* Mary Ziegler, *Lizelle Herrera's Texas Arrest Is a Warning*, NBC NEWS (Apr. 16, 2022), https://www.nbcnews.com/think/opinion/lizelle-herreras-texas-abortion-arrest-warning-rcna24639 [https://perma.cc/H5V7-36UW] (offering background information and insight into a murder charge brought against a Texas woman with "no legal basis"). The woman allegedly self-induced an abortion and faced a murder charge from the Starr County Sherriff's Department. *Id.* A professor at the University of Texas School of Law stated he believed it was possible the "prosecutors and others involved

reversed an order that would permit Kate Cox to receive an abortion after her fetus was diagnosed with a fatal condition.[67] These instances serve as a reminder that Texas prosecutors, courts, and health care providers are all testing the boundaries of abortion law post-*Roe*.[68]

D. The Void for Vagueness Doctrine and Fair Notice

Ordinary citizens rely on the law to direct their conduct and understand what is outlawed in society.[69] If a law is too vague for citizens to understand, it cannot provide them with fair notice and therefore violates due process.[70] This logic underlies the void for vagueness doctrine, which courts use to analyze the validity of a law.[71] If an appellate court cannot exact a concrete meaning of a

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may be hoping to dissuade people" from attempting to access abortion care at all. *See* Yeganeh Torbati & Caroline Kitchener, *Texas Woman Charged with Murder After Abortion*, WASH. POST, https://www.washingtonpost.com/politics/2022/04/09/abortion-texas-murder-charge/ [https://perma.cc/PBB5-KE2Z] (Apr. 9, 2022) (detailing the potential reasons why Texas prosecutors sought to charge an individual even when the charge was not based in any applicable law). Moreover, the media attention destroyed the individual's privacy, even though a crime was never committed. Stacey Tovino, *Aborted Confidentiality*, 65 B.C. L. REV. 1921, 1942 (2024).

[67] *See* Goodman, *supra* note 8 (highlighting an example of how the Texas courts disagreed on providing a patient, Kate Cox, with a medical exemption after her fetus was diagnosed with Trisomy 18, a genetic condition that is incompatible with life, after physicians suggested the pregnancy risked both her health and fertility). The Texas lower courts granted this exception, but the Texas Supreme Court disagreed—highlighting the differing treatment a litigant could experience depending on the court they visit in Texas, as well as highlighting varied levels of understanding even among judges in Texas. *See id.* (providing background on how the case got to the Texas Supreme Court, and the effect on a patient seeking health care).

[68] *See supra* notes 66–67 and accompanying text (providing two examples as to how the Texas courts are still determining the limits of Texas abortion law and how providers are left to wait and see what the court will decide).

[69] *See* Mannheimer, *supra* note 13, at 1055 (relying on both utilitarian and retributivist understandings of punishment to explain that ordinary citizens can choose whether to conduct themselves in a manner consistent with the law—an opportunity they can only have if the law provides them with those standards of conduct).

[70] *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (asserting that all penal statutes must clearly state the conduct prohibited by the law, and if any statute requires "men of common intelligence [to] necessarily guess at its meaning and differ as to its application," the statute is overly vague and violates the principle of due process). In 1926, in *Connally v. General Construction Co.*, the Court held that criminal statutes must not be vague or uncertain due to the severity of penalties imposed. *Id.* at 393–94. The statute in question prohibited state contractors from paying their workers less than the minimum wage established in the area, but did not define what that wage was or how to calculate it. *Id.* at 388. The Court specifically noted that this law would end up interpreted in a variety of ways depending on the findings of individual juries, which would violate the constitutional protection of due process. *Id.* at 395. A penal statute is defined as "[a] statute by which punishments are imposed for transgressions of the law, civil as well as criminal; [especially], a statute that defines a crime and prescribes its corresponding fine, penalty, or punishment." *Statute: Penal Statute*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[71] *See* Ogale, *supra* note 25, at 788–89 (describing the history of the void for vagueness doctrine and its basis in the Due Process Clause, stating that considering an overly vague statute void is one of the "basic principles" of due process). If the Court analyzes the law and finds there is no way to nar-

law after examining the statutory language and past application by lower courts, it will hold the statute is void for vagueness.[72]

A court will evaluate a statute for vagueness through a two-pronged test: first, the court must determine whether the average citizen would understand what conduct the law forbade; second, the court must decide whether the law creates a possibility of unpredictable or arbitrary enforcement.[73] With respect to the fair notice prong, the court seeks to assure that everyone—not just legal professionals—can understand what is forbidden conduct.[74] Concerning the arbitrary enforcement prong, the court attempts to protect the public by precluding statutes that grant law enforcement officers unlimited latitude to enforce the law.[75]

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row its meaning, then the Court will determine it is unconstitutional because it is "repugnant to the due process clause of the Fourteenth Amendment." *See* Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (finding that because the language of the statute was ambiguous and there was no prescribed meaning, the law was overly vague and inconsistent with the Due Process Clause).

[72] *See Lanzetta*, 306 U.S. at 453–55 (determining that a statute was overly vague and therefore unconstitutional because even after analyzing the dictionary definition of the word "gang" from the statute as well as the examples and interpretations from lower courts, the Supreme Court could not determine a narrow definition of the statute). The Court analyzed the statutory language in a number of different ways, including searching for the plain meaning of the word or phrase in question in the dictionary, considering what a common or accepted meaning for the word is, and looking at additional statutes for potential clarification. *See id.* (examining first the dictionary definition, and then confirming that there is no accepted meaning anywhere within the common law or any other statute).

[73] *See* Snoddon, *supra* note 26, at 2307–08 (detailing the two-pronged test that the Supreme Court has used to decide whether a law is void for vagueness, due to either a lack of fair notice or likelihood of arbitrary enforcement). If either prong of the test is satisfied, a court can find that the statute is unconstitutionally vague. *Id.* at 2308. Although earlier Supreme Court vagueness cases like *Lanzetta v. New Jersey* focused mainly on the language of the statute itself and if an ordinary person would be able to understand it, *Papachristou v. City of Jacksonville* began the Court's crackdown on arbitrary enforcement by local law enforcement officers. *See* Ogale, *supra* note 25, at 802–04 (highlighting the switch to prioritizing the arbitrary enforcement prong). *Compare* Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972) (evaluating vagueness based on law enforcement's ability to apply the law in a discriminatory manner), *with Lanzetta*, 306 U.S. at 458 (evaluating vagueness based on the clarity of the statute's plain language).

[74] *See Papachristou*, 405 U.S. at 162–63 (highlighting the fair notice in the law by arguing that the "poor among us, the minorities, the average householder are not . . . alerted to the regulatory schemes of vagrancy laws . . . they would have no understanding of their meaning and impact if they read them"). The Supreme Court mainly considers a "person of ordinary intelligence" as the standard to assert that the principle does not apply to the way an attorney, a judge, or a legislator would interpret the law, but the way any average American would. *See* Snoddon, *supra* note 26, at 2307 (highlighting the fair notice standard as whether a "person of ordinary intelligence" would understand the law rather than the statute's drafters); *Papachristou*, 405 U.S. at 162–63, 168 (noting that the average individual is not aware of "regulatory schemes" and must be protected therefore by the language of the law itself).

[75] *See Papachristou*, 405 U.S. at 163, 168 (holding that an ordinance was overly vague because it gave unchecked discretion to the local law enforcement in determining what sort of person should be arrested for vagrancy, given there was no commonly accepted definition of the word). The void for vagueness doctrine has been used to specifically target statutes that "invite arbitrary and abusive enforcement . . . ." Ogale, *supra* note 25, at 791–92.

1. The Fair Notice Prong

The Supreme Court initially focused the void for vagueness inquiry on the fair notice element.[76] In 1939, in *Lanzetta v. New Jersey*, the Supreme Court held that a statute criminalizing gang membership was void for vagueness because the law did not provide sufficient context for the ordinary citizen to understand its meaning.[77] After first analyzing the common meaning of each word within the statute and previous lower court decisions, the Court held that because an ordinary citizen would need to guess at the conduct prohibited by the statute, the law was overly vague and therefore unconstitutional.[78]

2. The Arbitrary Enforcement Prong

In more recent cases, the Supreme Court added the arbitrary enforcement component to the void for vagueness inquiry, ultimately eclipsing the fair no-

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[76] *See* Ogale, *supra* note 25, at 804–07 (noting that prior to *Papachristou*, the Court mainly focused on the fair notice prong of the doctrine, but that *Papachristou* marked a switch in analysis).

[77] *See Lanzetta*, 306 U.S. at 458 (holding that the New Jersey statute prohibiting gang membership was void for vagueness and therefore unconstitutional because it did not prohibit one act or type of conduct, but rather a vague and uncertain idea that was not aligned with the Due Process Clause). The statute attempted to target gangsters, but did not define what constituted an actual gang, other than by the inclusion of the phrase "consisting of two or more persons . . . ." *Id.* at 452. Although the Court had a clear understanding of what the purpose of the statute was—to deter criminal activity—it was unable to determine the meaning of the word "gang," finding the statutory definition too broad and too ambiguous to be consistent with the Due Process Clause. *See id.* at 455–58 (confirming the statute's purpose of preventing criminal association but failing to find a clear definition for the word "gang").

[78] *See Lanzetta*, 306 U.S. at 454–55, 458 (defining the word "gang" from the Century Dictionary and Cyclopedia, as well as Webster's and Oxford Dictionaries, and analyzing the lower court decisions, none of which came to any sort of agreement on the definition of the word). The Court also highlighted how the statute did not detail what it would consider membership of a gang to be—whether that required association with other members or specific tasks, or how a citizen might find themselves guilty of joining a gang. *Id.* at 458. The Court has not always held that vague language is unconstitutional; rather that it requires an analysis of the situation's specific facts. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 21 (2010) (holding that although the plaintiffs alleged that terms within the statute were overly vague and therefore unconstitutional, the terms were clear in the context of the plaintiff's specific situation and therefore the law was not overly vague). The Court in *Holder v. Humanitarian Law Project* acknowledged that in the past, notably in *Papachristou*, it willingly struck down statutes with vague language that did not provide an adequate definition, but declined to extend that in this case. *Id.* at 20–21. The plaintiffs wanted to donate funds to an organization which the United States had clearly listed as a terrorist organization, which was against the statute, and the Court held that because the United States already had defined "terrorist organization" and the other terms in question, and they clearly applied to the plaintiffs' situation, the statute was not overly vague. *See id.* at 21–25 (detailing the definitions that the U.S. government had already assigned to the language of the statute, which was relevant and clear to the plaintiffs' desire to donate money to a specific organization). This provided clarity that a general assertion of vagueness is not sufficient for the Court to find the statute void, but rather requires a specific situation complete with facts. *See id.* at 21 (demonstrating that although the statutory language might be overly vague in another context and therefore unconstitutional, the language of the statute in question was specific in the plaintiffs' situation).

tice element and creating the two-part test utilized today.[79] In 1972, in *Papachristou v. City of Jacksonville*, the Court held that a vagrancy statute was void for vagueness.[80] The statute risked unfair administration because it did not provide sufficient guidance to law enforcement officers on what constituted a crime.[81] Moreover, the Court expressed concern that law enforcement could use this unrestricted discretion to target specific groups, namely lower income and minority individuals.[82] As a result, the Court held the statute to be unconstitutionally vague.[83]

In 1999, in *City of Chicago v. Morales*, the Supreme Court primarily relied on the arbitrary enforcement prong in finding that a Chicago loitering stat-

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[79] *See* Ogale, *supra* note 25, at 804 (noting that *Papachristou* is the first case where the Court explicitly utilized the second prong of arbitrary enforcement, and stating that the court had previously utilized the fair notice prong more). *Papachristou* in fact highlighted the second prong, the arbitrary enforcement prong, as the more important of the two, and utilized language that explicitly criticized law enforcement, such as "harsh and discriminatory enforcement . . . against particular groups deemed to merit their displeasure" and "making easy the round-up of . . . undesirables." *See id.* at 804–05 (quoting *Papachristou*, 405 U.S. at 170, 171) (noting two cases, *Kolender v. Lawson* and *City of Chicago v. Morales*, where the court specifically stated that the second prong was more important, and highlighting language from *Papachristou* that demonstrated the Court's seriousness in targeting this arbitrary enforcement). *Compare Lanzetta*, 306 U.S. at 458 (focusing mainly on the textual analysis of the statute and how there was not a commonly accepted understanding of the word "gang"), *with Papachristou*, 405 U.S. at 165–70 (focusing mainly on how this would provide the police department with excessive ability to enforce the law as they saw fit, punishing "particular groups deemed to merit their displeasure" (quoting Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940))).

[80] *Papachristou*, 405 U.S. at 162. The Court held that the statute had cast such a far net that there was no way for an ordinary citizen to determine what conduct was prohibited, and that law enforcement officers would be able to use their own discretion as to what conduct was unlawful. *See id.* at 162–64 (noting that innocent conduct could be targeted due to the vague law). Vagrancy is defined as "the quality, state, or condition of wandering from place to place without a home, job, or means of support other than begging. Vagrancy is generally considered a course of conduct or a manner of living rather than a single act." *Vagrancy*, BLACK'S LAW DICTIONARY, *supra* note 70. This vagrancy law represents a type of "street-cleaning" statute, or ordinance that is targeting a form of minor misconduct that might represent a public nuisance. Ogale, *supra* note 25, at 802 (citing John C. Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215–16 (1985)).

[81] *See Papachristou*, 405 U.S. at 168–70 (asserting that the statute provided no guidance to the police officers who must enforce the law, giving them "unfettered discretion" to punish citizens in the way they best understood it). The vagrancy statute in question did not specify what type of conduct constituted vagrancy, and as such it would allow prosecution and conviction for whatever type of conduct the law enforcement officers and courts decided was illegal. *See id.* at 167–68 (highlighting that because there is no conduct deemed prohibited, the vagrancy law could allow conviction for any conduct desired).

[82] *See id.* at 169–71 (suggesting that laws that permit arbitrary enforcement could be used to target "poor people, nonconformists, dissenters" and asserted that these types of laws could be used to punish those who disagree with law enforcement). The arbitrary enforcement prong helps prevent racial, ethnic, or economic discrimination and has been used to protect equality in access to justice. *See* Ogale, *supra* note 25, at 805 (highlighting how the arbitrary enforcement prong has been used to prevent discrimination against minority groups by ensuring the laws are neutrally enforced).

[83] *See Papachristou*, 405 U.S. at 171 (holding that as the vagrancy statute neither provides fair notice nor provides guidelines to prevent arbitrary enforcement, it is unconstitutionally vague).

ute was overly vague.[84] Notably, the statute lacked guidelines for police on what conduct was prohibited, and gave officers an inordinate amount of discretion to determine what constituted loitering.[85] As law enforcement would have to use completely subjective judgment in enforcing the law, the Court held the statute void for vagueness.[86]

In 2015, in *Johnson v. United States*, the Supreme Court explored another potential avenue for violating the second prong, this time looking to arbitrary enforcement in the courts rather than by law enforcement.[87] Justice Scalia's majority opinion suggested that the failure to determine a manner in which to evaluate the law demonstrates arbitrary enforcement.[88] As the Court could not

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[84] *See* City of Chicago v. Morales, 527 U.S. 41, 59–60 (1999) (plurality opinion) (holding that the city of Chicago's loitering statute was overly vague as the law provided no guidance on appropriate enforcement to law enforcement officials). Although the Justices disagreed about whether the statute could have been read more narrowly, Justice O'Connor explained that as it stood, the ordinance was overly vague. *See id.* at 67–68 (O'Connor, J., concurring) (noting that the statute could be read more narrowly, because it takes into account both the city's desire to quell crime and the need for further clarification on the statute, but that the standard established in *Papachristou* dictates that the Court must declare the law overly vague).

[85] *See Morales*, 527 U.S. at 60–61 (asserting that the statute did not clarify the limits to police discretion and therefore the statute could not be considered valid under the Due Process Clause).

[86] *See id.* (demonstrating that the Chicago police would hold wide discretion and therefore no individual would be able to spend time on the street in Chicago for any purpose without potentially being prosecuted under the loitering statute and being considered a potential gang member); *see also Papachristou*, 405 U.S. at 168 (holding a vagrancy statute unconstitutionally vague because of the "unfettered discretion" it provided to local police officers, thereby providing a significant opportunity for arbitrary enforcement). Although the Court did touch on the fair notice prong, the bulk of the opinion centered around the likely issue of arbitrary enforcement by the Chicago police. *See Morales*, 527 U.S. at 58–59 (utilizing the fair notice prong of the void for vagueness doctrine to invalidate the ordinance because the notice from police to disperse came after the initial offense). As there was no definition of loitering, a loiterer in Chicago would have no way of knowing that their conduct was unlawful until they had already been targeted by police and told to disperse, therefore lacking fair notice. *Id.*

[87] *See* Johnson v. United States, 576 U.S. 591, 598 (2015) (asserting that an unsuccessful inquiry to determine an appropriate standard by which to evaluate conduct violates the void for vagueness doctrine due to likely arbitrary enforcement by the courts). Although the Court did evaluate what constituted the invalid conduct, the majority's main argument rested on the fact that between five courts, not one of them interpreted the law in the same way, or could even agree what to evaluate in order to find an answer. *See id.* at 601 (debating what type of risk should constitute illegal conduct, but mainly considering the validity of the law given judges could not determine how to evaluate it).

[88] *See id.* at 598 (holding that "the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness," and the use of different methods and factors for evaluating the statute in five separate court cases was sufficient to be considered unconstitutionally vague (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921)) (alteration in original)). Unlike in previous cases, where the Court was concerned with arbitrary enforcement by local law enforcement officers, the *Johnson v. United States* Court focused on potential arbitrary enforcement by judges based on the varying standards that the judges utilized in each of the lower courts to evaluate the same statute. *See id.* at 601 (providing insight into the different assumptions and determinations that each judge made in the lower court holdings, which in the Court's eyes constituted arbitrary enforcement). Several courts—including the Supreme Court—could not determine the specific standard by which to evaluate the statute at hand in over five cases, leading the Court to find the statute overly vague and therefore unconstitutional. *Id.* at 598. Justice Scalia noted that of the four lower court decisions the Court ana-

find any agreement within lower courts on enforcement, or even factors to consider, it held that convicting the plaintiff of a felony based on an overly vague law would be a miscarriage of justice.[89]

Ironically, the void for vagueness doctrine is itself notably vague, and the Court is still evaluating how to apply it.[90] Although the doctrine still has room for clarification, it remains an important method for protecting due process rights.[91]

II. A Hard Pill to Swallow: Pharmacists and Provider Liability

With a complicated and confusing landscape infringing on their obligations to patients, pharmacists and other health care providers are on the front lines of the issue of medication access.[92] Pharmacists who do not understand the law have the potential to make a career-ending mistake, and those who feel uncertain and want to avoid liability under the state law may refuse to dispense methotrexate altogether.[93] Ultimately, pharmacists in particular control health care access for patients with autoimmune diseases that rely on medications like methotrexate.[94] This Part explores the harmful outcomes of pharmacists misunderstanding the Act.[95]

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lyzed, three courts evaluated the likelihood of prosecution using three different tests. *Id.* In one of the lower court cases, the court reviewed statistics, and in another the court compared the risk of the crime in question to other enumerated offenses. *See id.* at 599–600 (comparing the differences in approach between the *Begay v. United States* and *Sykes v. United States* cases, as referenced in *Johnson*).

[89] *See id.* at 602 (holding that it would be unconstitutional to sentence someone for a felony charge that carried a fifteen-year minimum sentence on so "shapeless a provision").

[90] *See* Snoddon, *supra* note 26, at 2302 (noting that two Supreme Court cases focusing on the void for vagueness doctrine, both heard in 2010, had dramatically different reasoning and demonstrated the issues and inconsistencies with the Supreme Court's interpretation and understanding of this doctrine). *Compare* Holder v. Humanitarian L. Project, 561 U.S. 1, 21 (2010) (applying the void for vagueness doctrine narrowly and basing the decision solely on fair notice), *with* Skilling v. United States, 561 U.S. 358, 412–13 (2010) (applying the void for vagueness doctrine more broadly and utilizing both fair notice and arbitrary enforcement in its analysis).

[91] *See supra* notes 69–90 (offering a detailed look into how the void for vagueness doctrine has been used to protect the constitutional rights of ordinary Americans through the Due Process Clause).

[92] *See supra* notes 1–8 and accompanying text (offering insight as to why patients were denied access to their methotrexate prescriptions, and highlighting that the legal consequences with which pharmacists have been threatened has impacted health care access for patients with chronic conditions).

[93] *See supra* notes 1–8 and accompanying text (highlighting the outcome of some patients being unable to access their medication after the *Dobbs v. Jackson Women's Health Organization* decision when pharmacists are unsure on the law).

[94] *See supra* notes 34–42 and accompanying text (detailing the role that pharmacists and other health care providers play in assuring access to medications for patients with autoimmune disease, and noting that pharmacists in particular make the final decision on dispensing methotrexate).

[95] *See infra* notes 96–111 and accompanying text (illustrating the real life implications of a knowledge gap among providers and detailing the current work environment for pharmacists in retail stores like CVS and Walgreens, including how pharmacies have responded to *Dobbs*).

The legal landscape of abortion post-*Roe* has continuously evolved since the Court's decision.[96] With ever-changing laws, providers must decide between performing essential medical care and facing the legal consequences or denying access to patients.[97] Specifically, health care professionals in Texas must decide whether to prescribe and dispense methotrexate in accordance with Section 1557 of the ACA, or proceed with caution based on the Act.[98]

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[96] *See* David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html [https://perma.cc/Y5QL-KQMG] (demonstrating the instability of the current state of abortion laws, with a busy legislative agenda of approximately three hundred abortion-related bills proposed from forty different states in Congress in 2023). Rather than focusing on the actual limitations around abortion procedure or abortion-inducing medications, these bills are often aimed at physicians and other health care professionals as a different method of hindering abortions. *Id.* Regardless of the abortion stance, the docket is stacked—as of December 2023, 754 provisions were proposed to increase access to abortion, and 675 provisions were proposed to further limit access to both medical and surgical abortions. Kimya Forouzan & Isabel Guarnieri, *State Policy Trends 2023: In the First Full Year Since* Roe *Fell, a Tumultuous Year for Abortion and Other Reproductive Health Care*, GUTTMACHER INST. (Dec. 19, 2023), https://www.guttmacher.org/2023/12/state-policy-trends-2023-first-full-year-roe-fell-tumultuous-year-abortion-and-other [https://perma.cc/9HNP-E9ZY].

[97] *See* Chen, *supra* note 96 (suggesting that doctors and other health care professionals are stuck in the mix of potential penalties for providing abortion-related health care to patients and are even more confused as abortion laws drastically differ by state). Moreover, pharmacists are concerned about how a lack of clear guidance on the procedures for and potential liability around dispensing abortion-inducing medications will cause many patients to lose access to their health care. *See* U.S. Pharmacist Staff, *supra* note 40 (highlighting the unique plight of pharmacists in relation to the language of many abortion restriction laws that specifically call out abortion-inducing medications, like methotrexate and mifepristone, and the resulting loss of care for patients). State laws that specifically highlight abortion-inducing medication, such as methotrexate, are particularly unclear and have led pharmacists to question their own legal liability. *See id.* (noting that health care professionals, including pharmacists, are unsure of their liability around dispensing abortion-inducing drugs, and whether restrictions apply to medications prescribed for an abortion, medications that happen to induce an abortion, or simply medications with the potential to induce an abortion).

[98] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 15 (providing non-binding guidance to pharmacies that restricting prescription access to medication or products relating to reproductive health care or potentially abortion-inducing drugs may constitute sex discrimination, discrimination on the basis of pregnancy or related conditions, or discrimination on the basis of disability, and that they therefore cannot restrict access to drugs like methotrexate); TEX. HEALTH & SAFETY CODE ANN. §§ 171.061–.065 (West 2023) (listing methotrexate among several abortion-inducing drugs that are subject to criminal penalties if prescribed or dispensed to intentionally, knowingly, or recklessly cause an abortion). Although the HHS guidance has informed pharmacists of the potential violations of federal civil rights laws if they refuse to dispense medication, pharmacies are generally regulated by state laws, and without specific guidance from these states, pharmacists are still left in the lurch. *See* U.S. Pharmacist Staff, *Pharmacists Reactions to Federal Guidance on Reproductive Drugs*, U.S. PHARMACIST (July 26, 2022), https://www.uspharmacist.com/article/pharmacists-reactions-to-federal-guidance-on-reproductive-drugs [https://perma.cc/7MP3-ZN8A] (highlighting the reaction of pharmacists to the initial HHS guidance that was published, emphasizing that the guidance does not clarify gaps between federal and state law, and reiterating the confusion that pharmacists feel in relation to their legal liability). Moreover, some pharmacists have noted that although the HHS guidance has good intent, the guidance actually takes away a pharmacist's individual judgment about what health care and treatment protocol is best for their patients. *Id.*

There is technically no discrepancy regarding the legality of prescribing methotrexate between federal and state law.[99] In reality, however, health care providers must engage in guesswork to avoid prosecution.[100] Because the Act lists methotrexate as an abortion-inducing drug, health care providers prescribing methotrexate are subject to greater scrutiny.[101] Although methotrexate can have serious side effects and is considered a high-risk medication, its abortifacient quality and resulting inclusion in state abortion laws has increased the surveillance of providers.[102]

In theory, to dispense methotrexate without any legal risk, pharmacists in states that restrict abortion must (1) evaluate the constraints of their state abortion law and (2) establish whether they believe the usage of the drug fits those constraints.[103] In Texas, the law suggests that pharmacists must confirm the

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[99] *See* HEALTH & SAFETY § 171.061(2) (defining the meaning of abortion-inducing medication under the Act Subchapter D, but specifically noting that this definition does not include any of these medications that have the potential to induce an abortion but are specifically prescribed or dispensed for a different, noted medical reason). A director at a pro-life advocacy group stated that so long as physicians and pharmacists are not specifically prescribing methotrexate for abortions, rheumatologists will not be penalized for dispensing or prescribing it to their patients. *See* Shepherd & Sellers, *supra* note 48 (noting that anti-abortion activists state that so long as the intent of the provider is not to induce an abortion, access to drugs like methotrexate should not be affected by any anti-abortion laws).

[100] *See* Press Release, Am. Pharmacists Ass'n, New Federal Guidance Confuses an Already Complicated Landscape for Pharmacists (July 13, 2022), https://www.pharmacist.com/APhA-Press-Releases/new-federal-guidance-confuses-an-already-complicated-landscape-for-pharmacists [https://perma.cc/XXR9-85ZN] (noting that despite HHS guidance and state laws stating that methotrexate prescribed for other medical conditions is not prohibited, pharmacists are still unsure of what they should be doing and if it would constitute a violation of a civil rights law).

[101] *See* HEALTH & SAFETY § 171.061(2) (including methotrexate within the definitions of abortion-inducing medication under the Act Subchapter D, indicating that providers could be punished with civil or criminal penalties if their prescription of methotrexate is found to have violated the state law).

[102] *See* Shepherd & Sellers, *supra* note 48 (demonstrating that the regulation of methotrexate became significant after the *Dobbs* decision and that the drug was not regulated as strictly as medications like Accutane prior to the holding). Although methotrexate is highly regulated, it is not regulated as harshly as other potentially abortifacient medications like Accutane. *See id.* (comparing methotrexate to Accutane, an acne treatment that can cause severe birth defects and requires individuals capable of pregnancy to use a form of birth control and prove they are not pregnant each month prior to filling their prescription). Accutane is highly regulated due to severe potential birth defects to a fetus, including intellectual disability, defects of the spine and nervous system, and even spontaneous abortion. Dina H. Zamil, Praneet S. Paidisetty & Leonard K. Wang, *Ignoring the Elephant in the Room—Overregulated Isotretinoin and Unregulated Dietary Supplements in the United States*, 35 BAYLOR UNIV. MED. CTR. PROC. 892, 892 (2022). Beyond taking negative pregnancy tests, patients must log into an online system called iPledge REMS each month and answer questions about what method of birth control they use and comprehension questions about sexual education. *Id.*

[103] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 15 (asserting that pharmacies may violate federal civil rights laws in accordance with Section 1557 of the ACA if they do not dispense medications with abortifacient qualities that are not intended to induce an abortion); HEALTH & SAFETY § 171.061(2) (including methotrexate as one of the medications that are restricted unless prescribed or dispensed for a purpose other than to cause an abortion). This may require a lot of guessing—as even patients who are not capable of pregnancy but appear to be from their sex listed on their medical

specific medical need for methotrexate prior to dispensing.[104] Under a revised retail pharmacy policy, if a prescription does not include a diagnosis code indicating the medication's intended use, the pharmacist must contact the prescribing physician to confirm its purpose.[105] Without confirmation, the retail pharmacy's policy is to deny the prescription.[106] This requirement, although simple

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chart are affected. *See* Maya Yang, *Republican Abortion Bans Restrict Women's Access to Other Essential Medicine*, THE GUARDIAN (Sept. 26, 2022), https://www.theguardian.com/world/2022/sep/26/us-abortion-bans-restrict-access-essential-medications [https://perma.cc/R4AT-4XCE] (providing anecdotal evidence of patients being denied methotrexate at the point-of-sale pharmacy counter, including evidence of individuals who do not have the capacity for pregnancy being denied medication). For example, Jennifer Crow of Tennessee was denied access to her methotrexate prescription at the pharmacy counter because it did not include a diagnosis code—despite the fact that she had a hysterectomy and therefore was incapable of pregnancy. *Id.* Patients like Annie England Noblin reported that her pharmacist questioned the purpose of her methotrexate prescription, and although she ultimately was able to pick up her medication, she felt insulted and concerned about the line of questioning. Horowitch, *supra* note 55.

[104] *See* HEALTH & SAFETY § 171.061(2) (prohibiting dispersion of methotrexate to induce an abortion); Shepherd & Sellers, *supra* note 48 (highlighting how some major pharmacy chains changed the traditional process of filling a prescription to include the additional step of contacting a physician in order to protect the individual pharmacist and their employer). Both CVS and Walgreens have gone on record stating that due to the criminal penalties associated with state laws, they have begun to require that employees confirm that the prescription will not be used to induce an abortion. *Id.* After the *Dobbs* decision, CVS sent a memo to pharmacists located in states with strict abortion laws with instructions to confirm the indication for abortifacient medication prior to dispensing. *See* Laura Weiss, *After* Roe*'s Repeal, CVS Told Pharmacists to Withhold Certain Prescriptions*, NEW REPUBLIC (July 20, 2022), https://newrepublic.com/article/167087/roe-cvs-methotrexate-abortion-pills [https://perma.cc/JPC6-A24W] (providing insight from an anonymous pharmacist on a memo that CVS corporate sent out after the *Dobbs* decision, instructing pharmacists on the new protocol for dispensing possible abortifacient medications to avoid potential liability). When a patient capable of pregnancy attempts to fill their prescription, the internal CVS computer system will display an alert instructing the pharmacist to confirm the diagnosis code listed within the prescription prior to dispensing. *Id.* Diagnosis codes were created to improve the exchange of information between the physicians that prescribed the medication and the pharmacists that dispensed the medication to patients. Ankur Ramesh Shah, Mark D. Boesen, Kimberly D. Harris-Salamone & Terri L. Warholak, *Adding Diagnosis Codes to Prescriptions: Lessons Learned from a Quality Improvement Project*, 15 J. MANAGED CARE PHARMACY 508, 508 (2009). Although diagnostic codes can improve patient outcomes due to increased flow of information, they are not often used, because physicians are concerned about insurance companies denying coverage for off-label usage. *See id.* (offering background on a study of two pharmacy chains in Arizona in implementing a diagnostic coding system, in which they faced four major issues with implementation, one of which was finding both physicians and pharmacists to participate).

[105] *See* Weiss, *supra* note 104 (detailing a memo sent out by CVS that requires pharmacists in states with abortion laws that carry a high risk of criminal liability, which include Texas, Alabama, Idaho, Oklahoma, Montana, and Arkansas, to confirm a diagnosis code before dispensing any methotrexate prescriptions). Still, it is not typical practice to require a diagnosis code, and if a medication does not have a diagnosis code, the pharmacist must contact the prescriber, and they cannot fill the prescription without the confirmation that the drug will not be used to induce abortion. *See id.* (detailing the traditional relationship of diagnosis codes to prescription medication and indicating the pharmacy's new process of handling medication without these diagnosis codes).

[106] *Id.* On the prescriber side, physicians also face concern about patients losing access to methotrexate, and some doctors were advised to clearly label the purpose for the methotrexate prescription and to ensure that the purpose was copied over onto the bottle. *See* Tori Rodriguez, *Methotrexate*

in theory, may be challenging when a pharmacy is unable to reach a physician's office and cannot get a diagnostic code at the point-of-sale.[107]

Retail pharmacies are often understaffed, and their pharmacists are consistently overworked.[108] Many are concerned that the pace of their work makes it challenging to perform their job safely, putting patients at risk.[109] To dispense methotrexate, a pharmacist must make the choice between holding up the rest of their work to abide by the pharmacy policy, denying the prescription altogether, or filling the medication without confirmation.[110] It is within the

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Prescribing in the Post-Roe *Setting*, DERMATOLOGY ADVISOR (Aug. 19, 2022), https://www.dermatologyadvisor.com/home/topics/practice-management/mtx-prescribing-in-the-post-roe-setting/ [https://perma.cc/XTF4-DG4B] (suggesting potential solutions to dermatologists over concerns that pharmacies will not fill prescriptions unless the purpose for methotrexate has been explicitly provided, and it is not for the purpose of inducing an abortion). The American Medical Association's president reported that "some pharmacies are refusing to stock [methotrexate]," which eliminates any possibility of a patient having access to their medication, even after confirmation. *See id.* (highlighting another barrier to medication access for patients).

[107] *See* Shepherd & Sellers, *supra* note 48 (offering insight as to what happens if a diagnosis code is not included on a prescription, and the issues that come with communication between a retail pharmacy and a medical provider's office, leading to a delay in health care access for patients). Jennifer Crow discovered on a Friday before a long weekend that her prescription had been declined by CVS—and with later research, found this was due to a missing diagnosis code—and was left without her prescription for a week, causing symptoms to return after four days. Yang, *supra* note 103 (offering an example of what might happen if there is a missing diagnosis code and how that might affect a patient's ability to access medication).

[108] Thomas Lee, *CVS Pharmacists Are at a Breaking Point, Imperiling Company's Reinvention Plans*, BOS. GLOBE, https://www.bostonglobe.com/2023/11/19/business/cvs-pharmacists-breaking-point/ [https://perma.cc/6JNK-L2KR] (Nov. 19, 2023). Pharmacists at large retail stores have reported significant burnout due to issues with staffing and increased work schedules, with 76% of community-centered pharmacies reporting staffing shortages in the prior six months. *Id.*

[109] *See* Nicole Goodkind, *Mistakes at Work Happen. For Pharmacists, It Can End Their Career*, CNN (Dec. 17, 2023), https://www.cnn.com/2023/12/17/economy/pharmacists-cvs-walgreens-errors/index.html [https://perma.cc/KZH4-WULD] (detailing how the stressful and overwhelming working conditions that pharmacists face inadvertently cause them to make mistakes that might cause harm to patients). According to a survey of pharmacists, 75% of respondents who worked in community or retail locations reported that due to time constraints, they did not feel they could safely carry out their patient care and clinical pharmacy duties. *Id.* There are significant legal consequences for pharmacy errors, as joint liability remains with an employer like CVS if a pharmacist mistakenly labels a medication, puts the wrong pills into a bottle, or fails to check with a provider or confirm a diagnostic code. *See id.* (detailing the consequences that pharmacists may face if any harm results from a mistaken prescription or medication error, and noting that pharmacists often suffer consequences with their state pharmacy board).

[110] Weiss, *supra* note 104 (recapping the process set out by CVS for filling a methotrexate prescription and confirming it is not intended to induce an abortion, and detailing how pharmacists feel forced to make a decision about what is best for them on a legal liability basis and what is best for patients). Pharmacists have reported feeling conflicted on protecting themselves from a potential legal fight and prescribing necessary medications to their patients, noting that lawmakers are getting involved in an unprecedented way, other than involvement in regulating opioids. *Id.* In a study done to explore the effect that abortion restrictions have on health care access and outcomes, restrictions on providers were shown to increase workload and increase costs. Fiona de Londras et al., *The Impact of Provider Restrictions on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence*, 19 REPROD. HEALTH 1, 8 (2022) (highlighting that abortion restrictions were found to not only to block

realm of possibility that a pharmacist who is unable to reach a physician's office could inadvertently dispense methotrexate that causes an abortion.[111]

III. PROPOSED SOLUTIONS ON PROVIDER LIABILITY

Given that states now hold the power to promulgate abortion law, a lack of oversight from the federal government has led to unintended consequences.[112] The lack of clarity between state abortion laws and Section 1557 of the ACA has exposed providers to legal liability and has led to gaps in coverage for patients.[113] Protecting health care access for people with chronic conditions like autoimmune disease necessitates additional oversight from the federal and state governments.[114]

Section A details why the Act is unconstitutionally vague in its current state.[115] Section B suggests possible solutions such as providing clarifying guidance from state and federal officials, removing recklessness from the mens rea requirement of the Act, and re-evaluating provider liability.[116] Section C examines potential impacts of the criminal justice system on health care pro-

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access for patients, but notably increase the workload for providers for additional documentation or mandatory counseling).

[111] *See* Goodkind, *supra* note 109 (noting that pharmacists lacked confidence that they could safely care for patients under understaffed and overworked conditions). Given the overworked status of pharmacies, mistakes can and do happen, with a pharmacy in Virginia finding that a heavy workload for pharmacists led to mistakes in dispensing prescriptions. Bill Chappell, *Have a Complaint About CVS? So Do Pharmacists: Many Just Walked Out*, NPR (Sept. 29, 2023), https://www.npr.org/2023/09/29/1202365487/cvs-pharmacists-walkout-protest [https://perma.cc/6ZE5-D6QK]. In the following investigation, pharmacists were interviewed and stated that a number of incidents occurred due to staffing levels, including: a pharmacist dispensing an additional one hundred Percocet, a pharmacist dispensing an antibiotic to which a patient had stated their young child was allergic, resulting in an emergency room visit, and a prescription error rate of 37% out of two hundred prescriptions. *See* CVS/Pharmacy #8302, Case No. 203229, at 2–4 (Virginia Board of Pharmacy Oct. 7, 2021), https://virginiamercury.com/wp-content/uploads/2021/10/CVS-8302_Board-Order_10-5-21.pdf [https://perma.cc/H5B4-RYCN] (detailing the department of pharmacy's investigation of a Virginia Beach CVS that was severely understaffed and made several critical errors).

[112] *See supra* notes 45–68 and accompanying text (detailing the methotrexate access issue in states with abortion restrictions and examining the reasons why state abortion laws started to impact access to prescriptions for chronically ill patients).

[113] *See supra* notes 43–68 and accompanying text (examining the requirements of both the state abortion laws and the federal guidance regarding the Affordable Care Act to determine why methotrexate access was restricted and determine what gap was left in between where providers were searching for answers).

[114] *See infra* notes 153–168 and accompanying text (detailing possible solutions that would help to reduce the gap in provider knowledge, and emphasizing the importance of why methotrexate access increases health care equity).

[115] *See infra* notes 119–150 and accompanying text (asserting that the Act is unconstitutionally vague as it currently stands because it fails both the fair notice prong and the arbitrary enforcement prong).

[116] *See infra* notes 151–168 (providing potential solutions to the vagueness problem of the Act, including clearer guidance for both the language of the law and enforcement principles, removing recklessness from mens rea, and reconsidering provider liability).

viders.[117] Finally, Section D highlights the importance of this issue to achieve health equity.[118]

A. What Constitutes a Crime? Why the Void for Vagueness Doctrine Proves the Texas Abortion Law is Unconstitutional

The Act should be considered unconstitutionally vague due to both the inability for an ordinary citizen to understand prohibited conduct and the lack of guidance provided to ensure clear and consistent enforcement.[119] Health care providers have not only voiced an inability to discern what conduct is prohibited under the Act, but also what is required of them under state and federal law.[120] As it stands, the Act leaves a gap between federal and state guidance and does not provide enough context for what would be considered "reckless" misconduct.[121]

1. Applying the Fair Notice Prong

The Act uses clear language—complete with definitions—to detail what medications are under scrutiny.[122] Although an average person might not un-

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[117] *See infra* notes 169–177 and accompanying text (highlighting the negative impact that interaction with the criminal justice system can have on an individual, specifically an individual that is falsely accused of a crime).

[118] *See infra* notes 178–187 (highlighting how this issue uniquely touches on issues of health care equity through the lenses of gender and race, and that ensuring access to these prescription medications is essential in achieving health care equity).

[119] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (noting the standard for the void for vagueness doctrine); City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion) (highlighting that a law should be considered unconstitutionally vague if it lacks guidelines for law enforcement officers, as putting too much discretion in their hands could lead to arbitrary enforcement); TEX. HEALTH & SAFETY CODE ANN. §§ 171.065–.066 (West 2023) (providing the details of mens rea for the Act, but failing to provide any details as to what recklessly violating the law may constitute, along with a mandatory requirement for law enforcement officers to enforce the Act).

[120] *See supra* notes 94–98 and accompanying text (offering context from health care providers that are struggling to comprehend their legal liability and duties to their patients with the conflicting state and federal guidance, particularly given the fact that HHS alleged that failing to dispense appropriate medications to patients may be a civil rights violation); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (noting that in accordance with due process, the language of a law must be clear and explicit so that an ordinary individual can determine if their actions would violate it).

[121] *See infra* notes 122–139 and accompanying text (establishing that the mens rea component of this law makes the conduct prohibited overly vague and therefore unenforceable, especially given the inconsistent information from the state and federal government).

[122] *See* HEALTH & SAFETY §§ 171.061(2), .063 (providing a description of the prohibited conduct, stating that an individual may not provide an abortion-inducing drug to a pregnant individual, and that a person who "intentionally, knowingly, or recklessly" does so and therefore violates the law has committed a state jail felony). Although some of this subchapter has been repealed due the *Dobbs v. Jackson Women's Health Organization* decision, most of Subchapter D still stands, and provides specific definitions as to what an abortion is, what is considered an abortion-inducing medication, and even defines the term "provide" to include most actions that would be taken by a health care professional, including dispensing, giving, administering, and more. *See id.* §§ 171.061–.063(b) (detailing

derstand some of the medical terminology, this law is directed toward health care professionals with the ability to prescribe or dispense medication capable of inducing an abortion.[123] Moreover, the law's text explicitly states that methotrexate prescribed for autoimmune disease is not considered an abortion-inducing medication.[124]

In contrast, although the statutory text clearly denotes which medications are included, prohibited conduct is ambiguous without accompanying clarification, particularly when it comes to the conduct of pharmacists.[125] The law explains that a pharmacist may not purposefully provide medication to induce an abortion, but it does not detail what other less obvious actions might violate the law.[126] As pharmacies search for clarification, major retailers took matters

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which provisions of the statute are still good law, as prior to the *Dobbs* decision, it was unconstitutional to prohibit abortion under all circumstances, though Subchapter D placed significant restrictions on physicians and included additional reporting requirements).

[123] *See id.* § 171.062 (noting that the law will be enforced by the Texas Medical Board, suggesting that the law targets physicians and other health care professionals specifically as they are the group that is accountable to the Texas Medical Board). There are no consequences specifically for pregnant people that terminate their pregnancies through medical abortion, as the Act targets health care professionals and others who might aid and abet abortion. *See id.* § 171.065(b) (stating explicitly that pregnant people are not subject to penalties under the Subchapter, even if they induce an abortion, and noting specifically that pregnant individuals are not criminally liable for any violations of the Act). As in *Holder v. Humanitarian Law Project*, the language is not vague in relation to the specific factual situation of a pharmacist understanding what medications are included in the law, and what medical conduct is prohibited. *See* 561 U.S. 1, 21 (2010) (asserting that although the language of the anti-terrorism law may have been vague, the plaintiffs' conduct very clearly fit within the bounds of the provided legal definitions, such that a reasonable person would understand what it meant). The Act is fairly clear in terms of what medications are and are not included within this list. *See* HEALTH & SAFETY § 171.061(2) (including methotrexate and misoprostol within the list of abortion-inducing drugs, and defining terms like "provide," "abortion," and "unborn child").

[124] *See* HEALTH & SAFETY § 171.061(2) (highlighting that the term abortion-inducing drug does not include medications prescribed for a preexisting condition, which would include autoimmune diseases).

[125] *See id.* § 171.065(a) (stating that an individual who intentionally, knowingly, or recklessly commits a violation of the Act constitutes a state jail felony, but does not provide any insight as to what conduct would fall under each of these mens rea requirements compared to a negligence requirement). Health care professionals are concerned about the mounting legal consequences they may face and about having to interpret the laws themselves with little state guidance. *See* Chen, *supra* note 96 (detailing how health care professionals feel stuck in the midst of a legislative war, and are becoming "punching bag[s]"). Many providers feel that they are left without guidance which is putting both themselves and their patients at risk. *See* Goodman, *supra* note 8 (offering insight from physicians that they feel responsibility is lacking, and from the medical boards to state legislature to the courts, no one has undertaken the task of creating guidance that physicians can follow in order to determine what conduct will be prosecuted).

[126] *See* HEALTH & SAFETY §§ 171.063, .065 (including the mens rea that will be considered illegal under the Act, but does not detail what conduct would be considered reckless); *supra* notes 104–107 and accompanying text (outlining the retail pharmacy policies that have recently been enacted in order to protect health care providers and corporations alike from legal liability over prescribing methotrexate). Now under the new policy, pharmacists must confirm the purpose for the medication with the prescribing physician. Weiss, *supra* note 104. Refusal or inability to follow this policy could trigger potential legal consequences. *See id.* (introducing the new CVS policy applicable in states with

into their own hands.[127] Retailers like CVS and Walgreens implemented new procedures at the point-of-sale to verify that medications will not be used to induce abortions.[128] Nevertheless, if a pharmacist does not verify a diagnosis code, which can happen for numerous reasons including willful ignorance or inability due to workload, it could be considered illegal under the Act.[129]

Notably, because a provider has not yet been charged under Texas state abortion law, prohibited conduct is entirely uncertain until it is defined by the courts.[130] As a result, health care providers must guess at the prohibited conduct under both state law and federal civil rights law.[131] As such, the Act lacks

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abortion laws that include civil or criminal penalties and detailing the tasks pharmacists now need to undertake prior to dispensing any drug that could cause an abortion).

[127] *See supra* notes 99–107 and accompanying text (detailing the new process recommended by CVS and Walgreens to reduce any potential legal liability if a pharmacist is filling a prescription for methotrexate or other potentially abortion-inducing medications).

[128] *See supra* notes 99–107 and accompanying text (noting that pharmacies required pharmacists to verify the diagnosis code on the prescription, follow up with the prescribing physician if a diagnosis code is missing, and refuse to fill the prescription until the diagnosis code is provided to ensure it is for a valid purpose other than abortion). Diagnosis codes are not traditionally checked prior to dispensing medication. Weiss, *supra* note 104. This adds another task for already overworked pharmacists, making them even more likely to make errors in the future. *See supra* notes 108–111 and accompanying text (offering context as to the current work environment of pharmacists who feel overworked and providing an example of how this has led to increased errors in the process). Additionally, if a pharmacist is unable to contact the prescribing physician, this may lead to a patient being delayed access to important medication that is completely unrelated to abortion. *See* Shepherd & Sellers, *supra* note 48 (providing a patient narrative where an autoimmune patient could not access her medication as she attempted to pick it up prior to a long weekend, and her provider could not be reached to confirm a diagnosis code).

[129] *See supra* notes 105–111 and accompanying text (highlighting that due to the lack of clarity around the mens rea for the Act, failing to complete a check on a diagnosis code could provide ammunition for prosecutors that a pharmacist was reckless in their behavior and inadvertently dispensed medication that caused an abortion). Pharmacists can and do make mistakes, and their extreme workloads, particularly in retail environments, make this even more likely. *See* Chappell, *supra* note 111 (demonstrating the stress that pharmacists are under an immense amount of stress due to their workload, which can cause errors and put patient health at risk). A pharmacist at a Virginia Beach CVS reported working for approximately twenty-four hours without a break. CVS/Pharmacy #8302, Case No. 203229, at 5 (Virginia Board of Pharmacy Oct. 7, 2021), https://virginiamercury.com/wp-content/uploads/2021/10/CVS-8302_Board-Order_10-5-21.pdf [https://perma.cc/H5B4-RYCN].

[130] *See* Goodman, *supra* note 8 (noting that no health care providers have been charged regarding the Texas state law). Providers began to prepare for the possibility of prosecution after the *Dobbs* decision, and the Texas Medical Board searched for guidance from the legislature in order to keep physicians out of court. *Id.* When a lower court in Texas permitted an abortion via court order for a fetus that was incompatible with life, Attorney General Ken Paxton published a statement that actively threatened medical providers that violated abortion laws. *See* Press Release, Ken Paxton, Att'y Gen. of Tex., Attorney General Ken Paxton Responds to Travis County TRO, (Dec. 7, 2023), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-responds-travis-county-tro [https://perma.cc/WK8W-PXX2] (suggesting that even court orders would not be sufficient for health care providers to avoid prosecution for violating abortion laws).

[131] *See* Press Release, Am. Pharmacists Ass'n, *supra* note 100 (demonstrating the concern that pharmacists feel regarding the current abortion landscape, and asserting that they are in a challenging situation, weighing their own interests against their patients').

the requisite detail to meet the fair notice provision, therefore violating due process.[132]

2. Applying the Arbitrary Enforcement Prong

The arbitrary enforcement prong is the more heavily utilized component in modern void for vagueness analyses.[133] This prong determines whether the legislature has provided clear guidelines for law enforcement officers to appropriately enforce the law.[134] The Act blatantly violates the void for vagueness doctrine by way of this second prong.[135] The ambiguity in the mens rea requirement gives law enforcement officers wide latitude and deference in enforcement.[136] The Court has repeatedly held that a law must provide guidance for law enforcement officials or it will be considered unconstitutionally vague.[137] Although Texas law prohibits any sort of inducement of abortion or prescription or dispersion of abortion medication, it does not provide any

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[132] *See supra* notes 76–78 and accompanying text (providing the Court's view on the fair notice prong of the void for vagueness doctrine, which requires sufficiently clear language within the law so that the ordinary citizen can alter their conduct as not to violate it); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that it would be unconstitutional to permit a law that cast a net wide enough to find any possible offender, and therefore allow the courts to determine who should and should not be punished); TEX. HEALTH & SAFETY CODE ANN. §§ 171.065–.066 (West 2023) (showing the language of the Act, which may lack the requisite clarity).

[133] *See supra* notes 79–89 and accompanying text (demonstrating the Court's preference for the arbitrary enforcement prong over the fair notice prong in more recent cases).

[134] *See* Ogale, *supra* note 25, at 803 (asserting that modern cases focus more on the arbitrary enforcement prong); City of Chicago v. Morales, 527 U.S. 41, 59–60 (1999) (plurality opinion) (holding that a law must be clear and definite, with guidance for enforcement by police in order to be considered constitutional).

[135] *See infra* notes 136–150 and accompanying text (suggesting that the Act has a high potential for arbitrary enforcement because it (1) does not include any guidance for law enforcement officers on how to enforce the act and instead provides them with a mandatory enforcement provision, and (2) has the potential to take on the character of a street-sweeping statute to collect undesirable individuals, as seen in cases like *Papachristou v. City of Jacksonville*).

[136] *See* HEALTH & SAFETY §§ 171.065–.066 (providing the mens rea for a violation of the Act, and instructing state and administrative officials that they "may not decline to enforce" Subchapter D, which deals with abortion-inducing medications); *Morales*, 571 U.S. at 61–62 (focusing on the mandatory language of the law, which required police officers to enforce a loitering law without providing additional guidelines on when enforcement was indeed appropriate). Similar to *City of Chicago v. Morales*, the Act has a mandatory requirement, instructing any state executive or administrator that they must enforce the law, and "may not decline" enforcement due to their own beliefs about what the federal constitution may say—which the Court held as an issue given there are no other guidelines about the law. *See* HEALTH & SAFETY § 171.066 (stating that state executives and other administrators must enforce the Subchapter on abortion-inducing medication); *Morales*, 571 U.S. at 62 (suggesting that the mandatory nature of the law results in the law reaching more innocent conduct, which requires additional guidance for law enforcement officials to ensure there are no questions as to whom should be punished).

[137] *See supra* notes 80–86 and accompanying text (reviewing the Court's prior holdings in which it held that if law enforcement must rely on their individual judgment rather than guidance from the legislature, the law was unconstitutionally vague).

guidelines for officers as to what actions would be considered "intentional, knowing, or reckless."[138] Without a clear enumeration of prohibited conduct in the Act, law enforcement officers and prosecutors have essentially unlimited freedom to enforce the law.[139]

Moreover, when considering Texas' hostile attitude toward abortion and abortifacient medications, the Act may be aggressively enforced.[140] Ken Paxton, the Attorney General of Texas, has publicly endorsed his rigorous prosecution strategy of abortion laws.[141] Paxton's support of strict enforcement runs contrary to the Court's interest in preventing law enforcement's personal prejudices affecting administration, and could open the door for arbitrary enforcement.[142]

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[138] *See* HEALTH & SAFETY § 171.061 (including numerous definitions for specific language of the law, but failing to provide any context as to the actual requirements health care professionals face when encountering abortion-inducing medication). As the new pharmacy policies have now required pharmacists to check a diagnosis code prior to dispensing methotrexate and some other abortifacient medications, it is possible this may become a key part of prosecution under the Act, particularly if a pharmacist were to skip this step and the medication did result in an abortion. *See* Weiss, *supra* note 104 (detailing the memo sent out to CVS pharmacists and suggesting that the diagnosis code is key to preventing legal liability for pharmacists).

[139] *See supra* and *infra* notes 119–150 and accompanying text (highlighting the lack of guidance within the Act, which would provide law enforcement officers with full discretion to determine what they believed should be considered recklessly violating the law, particularly with regard to dispensing methotrexate). In *Morales*, the Court was extremely concerned with the potential for police officers to target individuals on the street based on their own discretion, as the law did not provide an appropriate definition for loitering, and did not provide guidance for the officers on when they should enforce the law. 571 U.S. at 60–61. Here, it is foreseeable that a court might be similarly concerned about the potential for police officers and Texas prosecutors to enforce the law on their own understanding rather than the intention of the legislature. *See* Ziegler, *supra* note 66 (highlighting a past incident where a Texas District Attorney charged a woman with murder for inducing an abortion even though there was no appropriate corresponding law, and suggesting that additional charges that are politically motivated could be filed in the future).

[140] *See* Ziegler, *supra* note 66 (suggesting that there could certainly be politically-motivated enforcement of anti-abortion laws in Texas, and comparing the modern situation to 1960s anti-abortion advocacy, when individuals worked to pass abortion restrictions in a unified political movement). Attorney General Paxton has publicly stated his intention to prosecute Texas abortion law and provide support to any Texas prosecutor that similarly pursues criminal charges against an individual who aided and abetted abortion. Press Release, Ken Paxton, Att'y Gen. of Tex., Updated Advisory on Texas Law Upon Reversal of *Roe v. Wade*, (July 27, 2022), https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20(07.27.2022).pdf [https://perma.cc/J9LE-HFGB].

[141] *See* Press Release, Ken Paxton, Att'y Gen. of Tex., *supra* note 140 (detailing a letter published by the Attorney General of Texas after the *Dobbs* decision, in which he emphasizes his role in enforcing the Texas abortion laws, his support of local prosecutors who enforce Texas abortion laws, and his steadfast commitment to uphold the state abortion laws).

[142] *See id.* (offering Attorney General Paxton's letter after the *Dobbs* decision as evidence of his commitment to enforcing Texas's potentially vague abortion laws); Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1972) (asserting that an overly vague law permits police and prosecutors to target individuals they view as undesirable in some way, despite the fact that they have not engaged in conduct specifically noted under the law as illegal).

Another angle the Court has previously considered regarding the arbitrary enforcement prong is ensuring consistency of court decisions, regardless of jurisdiction or court.[143] If the true authority to uphold the law lies with law enforcement and prosecutors rather than the legislature, the Act could lead to inconsistent enforcement across Texas counties.[144] For example, in 2023, a Texas woman whose fetus was incompatible with life due to a genetic abnormality filed a court order to obtain an abortion.[145] The trial court judge granted the order, but Attorney General Paxton immediately ordered the state to appeal, and the Texas Supreme Court reversed the lower court's decision and blocked the order.[146] Combined with the deference to law enforcement, the discrepancy in court decisions on other abortion-related issues could lead to arbitrary enforcement.[147]

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[143] *See* Johnson v. United States, 576 U.S. 591, 598–601 (2015) (holding that the repeated failure of lower courts to find an acceptable standard to prosecute a law suggests a law may be unconstitutionally vague, and specifically noted that courts could not even agree upon which factors to consider or how to go about evaluating a potential violation of the law).

[144] *See id.* at 598 (highlighting how a failure to have a consistent standard across multiple courts has been considered arbitrary enforcement in the past); *supra* notes 65–68 (noting how Texas lower courts and the Texas Supreme Court have already disagreed on upholding abortion law).

[145] *See* Goodman, *supra* note 8 (describing the experience of Kate Cox, a woman whose fetus was diagnosed with a genetic disorder and petitioned the court for an exception to the state abortion law in order to preserve her fertility and health).

[146] Eleanor Klibanoff, *Kate Cox's Case Reveals How Far Texas Intends to Go to Enforce Abortion Laws*, TEX. TRIB. (Dec. 13, 2023), https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit/ [https://perma.cc/83L2-YDL2] (detailing the legal process that Kate Cox attempted in order to get a medical exception to Texas abortion law, and noting how when the initial state court provided her the medical exemption because it was threatening her health, the Texas Attorney General stepped in and appealed the case to the Texas Supreme Court, who not only came out a different way, but specifically targeted the hospital and providers that Cox intended to visit and threatened legal action through civil suits). The Attorney General's office released a statement after the lower court granted Cox an exemption and sent a letter directly to the hospital where Cox intended to have an abortion, noting that although the temporary restraining order *temporarily* prohibited his office from prosecuting the hospital for performing the abortion, it would not protect them from other civil and criminal penalties. Press Release, Ken Paxton, Att'y Gen. of Tex., *supra* note 130. The Supreme Court of Texas later held that Cox was not entitled to a medical exemption, because despite her physician's assertion that her future fertility and health was at risk, her condition was not life-threatening. Klibanoff, *supra*. The Texas Supreme Court also encouraged the Texas Medical Board to provide more guidance to physicians, effectively passing responsibility over to the entity. *See id.* (stating that it is improper to rule on issues like this without additional guidance from the Medical Board and asserting that doctors need more guidance on complicated legal issues like this one).

[147] *See* Klibanoff, *supra* note 146 (demonstrating the disconnect between the lower Texas courts, which granted the medical exemption for Cox, and the Texas Supreme Court, which stated that a medical condition must be life-threatening in order to receive a medical exemption); *Johnson*, 576 U.S. at 598 (holding that a discrepancy between lower courts, particularly when they cannot determine which factors are essential in evaluating and upholding the law, could indicate that a law is overly vague due to the potential for arbitrary enforcement).

If prosecutors have unlimited discretion in enforcement, pharmacies will be even more restrictive when dispensing methotrexate.[148] This is understandable, as prosecutors in Texas have previously charged individuals for abortion-related crimes even when their conduct was not considered illegal under the corresponding law.[149] When an overly vague law like the Act permits law enforcement to uphold the law based on subjective judgment, conduct like prescribing methotrexate for an autoimmune disease could be unreasonably penalized.[150]

B. Solutions: Clear and Definite Guidance for Health Care Professionals

The state and federal government must adapt to preserve health care access for patients and ensure that health care professionals, like pharmacists, do not unknowingly open themselves to legal liability.[151] As the state law is overly vague as it stands, more clarification is necessary to help health care professionals understand what conduct violates the law, and to provide sufficient guidelines for law enforcement.[152]

1. Clear Guidance from the State and Federal Departments of Health

Pharmacists have repeatedly requested additional guidance from the state and federal governments to determine how best to follow state laws and to

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[148] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1972) (suggesting that arbitrary enforcement would allow police officers or prosecutors to target individuals that are "undesirable"); Rodriguez, *supra* note 106 (noting that pharmacies have ceased stocking methotrexate for fear of prosecution). When Attorney General Paxton disagreed personally with a decision by a lower Texas Court, he used his position to threaten physicians involved because they were planning to perform a court-sanctioned abortion. *See* Press Release, Ken Paxton, Att'y Gen. of Tex., *supra* note 130 (providing insight into the mind state of Attorney General Paxton and demonstrating his personal investment in ensuring physicians who are willing to perform an abortion are held legally liable).

[149] *See supra* note 66 and accompanying text (detailing the experience of a Texas woman who was arrested for murder after a self-induced abortion, despite the fact that there was no corresponding law that carried criminal penalties for pregnant people who had abortions that were either successful or unsuccessful).

[150] *See supra* notes 122–149 and accompanying text (detailing the possibilities that could occur given the vagueness of the Act).

[151] *See* Press Release, Am. Pharmacists Ass'n, *supra* note 100 (asserting that pharmacists are searching for guidance from the federal and state guidance after HHS instructed pharmacists to fill methotrexate prescriptions, as any refusal might constitute a federal civil rights violation). Pharmacists are on the front lines of the Texas abortion battle, and their concern is weighing their own legal interests and providing the best care possible to their patients. *See* Weiss, *supra* note 104 (detailing how pharmacists are torn between protecting themselves and caring for their patients).

[152] *See supra* notes 122–150 and accompanying text (highlighting how the Act is currently overly vague and therefore unconstitutional, and suggesting that additional context as to what conduct is illegal under the law as well as explicit guidance for law enforcement officers). The overly vague law has the potential to be extremely harmful to pharmacists, who must guess at what conduct is prohibited by the law until the Texas courts provide more context and definition to the language of the statute. *See infra* notes 169–177 and accompanying text (providing information on some of the consequences of being charged with a crime, particularly if an individual is falsely accused).

continue providing care to patients.[153] Currently, the Act requires additional levels of scrutiny in dispensing methotrexate, which may result in federal civil rights law violations.[154] The Texas Supreme Court has indicated that the state medical board, rather than the courts, should provide clarification on abortion law.[155] Given the possible severity of punishment, the state and federal departments of health should convene with state medical and pharmaceutical boards to determine how to support health care professionals and craft new guidance.[156] In particular, guidance should specify prohibited conduct and provide clarity on retail pharmacies' diagnostic code requirement.[157]

2. Adjusted Mens Rea Requirement

In its present state, the mens rea requirement of "recklessness" leaves the Act without direction as to what conduct is prohibited, and without enforce-

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[153] *See supra* notes 37–40 and accompanying text (reviewing requests from pharmacists and other health care professionals attempting to discern the state and federal guidance on dispensing abortion-inducing medication, particularly for non-abortion medical purposes). Medical professional organizations have repeatedly stated their concern over the challenging and confusing situation their members faced, and how the laws not only risk health care professionals, but also the wellbeing of patients. *See* Shepherd & Sellers, *supra* note 48 (reviewing interviews with the president of the American Medical Association, and the head of the American College of Rheumatology, which put together a specific task force to attempt to find a solution for its physicians).

[154] *See supra* notes 54–63 and accompanying text (detailing the language of the Act and highlighting the portion that HHS has stated may violate federal civil rights law). Although the federal government attempted to clarify the law and asserted that pharmacies must fill methotrexate prescriptions that are not intended to induce an abortion, pharmacists actually felt this guidance took away their own ability to make the best professional decisions for their patients. Press Release, Am. Pharmacists Ass'n, *supra* note 100.

[155] *See* Klibanoff, *supra* note 146 (noting that the Texas Supreme Court declined to provide a broader ruling, instead focusing on a single case and suggesting that the Texas Medical Board should provide additional guidance for abortion laws). The Texas Supreme Court suggested that it would be helpful for the Medical Board to recommend best practices for health care professionals and outline the red line of the law—but until then providers must guess as to what they are supposed to follow between the state and federal guidelines. *Id.*

[156] *See supra* notes 122–150 and accompanying text (suggesting that due to the lack of detail around the conduct prohibited by the Act, the law is currently unconstitutionally vague and needs additional guidance from both the legislature and the state medical and pharmaceutical boards).

[157] *See supra* notes 101–107 and accompanying text (recapping a policy created by retail pharmacies including CVS and Walgreens after the *Dobbs* decision was announced that required pharmacists to confirm a diagnosis code prior to filling any methotrexate prescription in a number of states, including Texas). Given that pharmacies have set up this standard and it is expected responsibility, it is possible that a pharmacist that either refuses to confirm a diagnosis code or is far too busy to confirm a diagnosis code might violate the Act. *See* Weiss, *supra* note 104 (considering whether the new retail pharmacy policy will constitute a normal part of a pharmacist's role and therefore if failing to do so is a violation of the Act); TEX. PENAL CODE ANN. § 6.03(c) (West 2023) (asserting the definition of recklessness is one who "consciously disregards a substantial and unjustifiable risk" and "its disregard constitutes a gross deviation from the standard of care").

ment guidelines.[158] As the Court has previously held, a law is unconstitutionally vague if it provides unlimited discretion to law enforcement—and a mens rea of intent would provide significantly more guidance to police than the undefined recklessness.[159] Judicial actors cannot understand the nuances of what pharmacists do on a daily basis or what would be considered a gross variation of behavior rising to the level of recklessness.[160] Even with a clearer definition of the term, this standard still leaves the door open for arbitrary enforcement by prosecutors carrying out anti-abortion political strategies.[161] Ensuring that a pharmacist could only be charged if they had the intent to prescribe medication to induce an abortion would provide explicit and necessary guidance to law enforcement.[162] This amended mens rea requirement would arguably eliminate the need for new policies requiring a diagnostic code to distribute methotrex-

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[158] *See supra* notes 136–139 and accompanying text (providing the mens rea requirement of the Act, and detailing why this might be considered unconstitutionally vague as it stands).

[159] *See supra* notes 80–89 and accompanying text (providing background on the Court's previous analysis of the arbitrary enforcement prong, specifically highlighting its concern with leaving too much discretion up to police control). In a study done to examine jurors' understanding of the four mental states, jurors were successfully able to identify intentional or purposeful conduct, knowing conduct, negligent conduct, and blameless conduct. *See* Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1341–42 (2011) (highlighting that in a group of jurors, applicable mens rea states were challenging for the average person to identify, but they were able to identify intent, knowledge, negligence, and innocence). A majority of jurors successfully identified the other three mental states, plus innocence, but more jurors conflated knowledge with recklessness, demonstrating that the average individual could not distinguish between them and did not have a good grasp on what recklessness consists of. *See id.* at 1343 (noting participants' low success rate for recognizing recklessness).

[160] *See* Klibanoff, *supra* note 146 (noting that the Texas Supreme Court specifically asked for more guidance around abortion laws, as it felt that the medical board was in a better position than the judiciary or the legislature to determine what the standard should be). Although police officers likely have a better understanding of mens rea than the average person or juror, the indication that the average individual would likely conflate knowledge and recklessness demonstrates that particularly in a complicated medical situation, a police officer may not understand what conduct constitutes recklessness. *See* Shen et al., *supra* note 159, at 1341–42 (demonstrating that subjects confused the knowing and reckless mental state, which corresponds with a challenge with identifying the appropriate punishment).

[161] *See supra* notes 140–142 and accompanying text (demonstrating that given the arbitrary enforcement potential of the Act and the current political climate in Texas, it would be foreseeable for public officials and prosecutors in Texas to use the law as a street-sweeping statute in order to target pro-abortion medical providers).

[162] *See supra* notes 99–111 and accompanying text (demonstrating the potential harms of the Act as it stands, and emphasizing the Court's previous issues with the potential for arbitrary enforcement). In the past, the Court has emphasized the importance of guidelines for law enforcement, and given the clear misunderstanding between recklessness and knowledge, constraining the mens rea requirement to knowledge or intent would ensure that only conduct that is actually prohibited by the law would be punished. *See supra* notes 99–111 and accompanying text (highlighting how the current law combined with the with the current workload of many retail pharmacists leaves pharmacists unsure of how to follow the law, and noting that it would be easy for a pharmacist to make a blameless error that could constitute reckless behavior from the perspective of law enforcement).

ate, relieving already overworked pharmacists of this burdensome task and ensuring medication access for patients.[163]

3. Reevaluating Provider Liability

Although the federal government has provided non-binding guidance to pharmacies to protect health care access, prohibiting provider liability for dispensing methotrexate prescriptions would accomplish more.[164] When studying the experiences of patients who could not access their medication, a common denominator is that many pharmacists denied the prescription at the retail counter, likely to insulate themselves from liability.[165] If a prescription is missing a diagnostic code and a pharmacist cannot reach the prescribing physician, they cannot dispense the medication and the patient will suffer.[166] Given the current legal status of abortion across the United States, it may not be feasible for the federal government to prohibit all provider liability in abortion cases.[167] Nonetheless, prohibiting liability for pharmacists dispensing essential medication will protect both the health care workers providing care and the patients who rely on these medications.[168]

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[163] *See supra* notes 101–108 (highlighting the potential problems with a new policy that CVS and Walgreens have put into place requiring pharmacy staff to verify diagnosis codes for all methotrexate prescriptions, which will only add more to their already busy workload).

[164] *See The Medical Liability Crisis*, AM. COLL. OF SURGEONS, https://www.facs.org/advocacy/federal-legislation/liability/guide-to-liability-reform/the-medical-liability-crisis/ [https://perma.cc/3AKG-8NS8] (noting that there is a growing issue with medical liability, as current laws leave providers vulnerable and the resulting costs cause health care access issues for patients). As liability costs rise, medical insurance companies are no longer willing to insure providers, who cannot practice without the corresponding liability insurance. *Id.*

[165] *See supra* notes 1–8 and accompanying text (providing experiences of patients who were denied methotrexate prescriptions and connecting these experiences with the increased liability of pharmacists post-*Roe*); *supra* notes 99–111 and accompanying text (highlighting the issues that pharmacists are facing after the *Dobbs* decision, especially considering their already overworked state, and noting that the fear of liability is impacting health care access for patients). Being charged with a crime could not only end a pharmacist's career, but have lasting implications on their life. *See infra* notes 169–177 and accompanying text (detailing the issues that individuals who have been charged with crimes and falsely accused face, including problems with their emotional health, career, and financial health).

[166] *See* Shepherd & Sellers, *supra* note 48 (highlighting patient experiences of missing diagnostic codes, where a pharmacist would not fill the prescription until they had spoken to the prescribing physician, who was not available and resulted in an autoimmune patient being denied their prescription for multiple days, leading to a flare).

[167] *See supra* notes 140–142 and accompanying text (offering insight into the aggressive prosecution strategy by the Texas Attorney General, and the general attitude toward abortion and abortion-related care in the state). After *Dobbs*, abortion restrictions are now left up to the states, and unless Congress passes additional legislation, each state will continue to make its own decisions about provider liability. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 231 (2022) (leaving decisions on abortion laws to elected state officials).

[168] *See supra* notes 158–168 and accompanying text (providing reasons as to why protecting pharmacists will ultimately result in better results for patients).

C. Impact On Health Care Providers

Pharmacists that are accused or charged with a crime under the Act will experience the lasting repercussions of involvement with the criminal justice system even if they are deemed innocent.[169] Individuals who interact with the criminal justice system often suffer emotional trauma and lasting side effects.[170] Potential impacts can include post-traumatic stress disorder, anxiety, and depression.[171]

These effects are magnified when an individual has been falsely accused of a crime.[172] The falsely accused struggle emotionally and face negative consequences in their personal and professional lives.[173] Contesting a false accusation carries societal stigma, which can cause an individual to lose their job,

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[169] *See* Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systemic Literature Review*, 61 MED. SCI. & L. 44, 45–50 (examining the experience of individuals who had been falsely accused of a crime, demonstrating that even people who are not incarcerated still suffer significant side effects as a result of going through the criminal justice system); *supra* note 41 and accompanying text (stating that the punishment for a violation of the Act is technically a state jail felony, which carries the potential punishment of up to two years in prison in a state facility, or a fine of up to $10,000 per violation).

[170] *See* Brooks & Greenberg, *supra* note 169, at 47 (highlighting that individuals who have been wrongfully accused of a crime reported long-term personality changes and severe impact on their mental health, including an inability to go back to their professional or social habits).

[171] *See How Does Being Arrested Affect Your Mental Health?*, GA. SUN (Aug. 12, 2022), https://thegeorgiasun.com/2022/08/12/how-does-being-arrested-affect-your-mental-health/ [https://perma.cc/Q97R-MM5U] (highlighting the challenges that people who have been arrested face, including that approximately 60% of people contacted in a study had experienced post-traumatic stress disorder symptoms after being arrested, as well as experiencing anxiety, depression, and self-hate). The judgment, danger, and loss of control that people feel when they are being arrested can lead to lasting symptoms of anxiety, and the stigma of criminality can result in feeling ashamed and being isolated from loved ones. *Id.* Specifically, individuals who have been arrested may be concerned with how the arrest will affect their future, which can cause depression and a sense of hopelessness. *Id.* (describing some of the emotional feelings that individuals who have been arrested might face as a result of their encounter with the criminal justice system).

[172] *See* Brooks & Greenberg, *supra* note 169, at 47 (noting that the overall emotional impact of being wrongfully accused included many negative effects, and was described by those who had experienced it as having extreme, long-lasting side effects). Christopher Jefferies was falsely accused of murder and was arrested—although later released without being charged—and described his experience as "psychological torture." *Id.* at 45. Herman Atkins, a man who was falsely convicted of rape, spoke about how fearful the entire experience made him, and that the entire interaction with the justice system was crushing. Jamiles Lartey, *"It's Crushing": The Lasting Trauma of the Exonerated*, MARSHALL PROJECT (July 30, 2022), https://www.themarshallproject.org/2022/07/30/it-s-crushing-the-lasting-trauma-of-the-exonerated [https://perma.cc/BCF5-XQZE].

[173] *See* Brooks & Greenberg, *supra* note 169, at 47–49 (detailing the many different effects individuals had experienced after being falsely accused, from emotional impacts of a change of identity and negative impact on psychological health to the practical impacts on their employment and family situations). Many participants in a study examining the effects of being falsely accused reported feeling anxious and that their personalities had permanently changed, and others felt that they were hostile and mistrustful. *Id.*

close personal relationships, or custody of their children.[174] Even those who prove their innocence or have their case dismissed must face the longstanding repercussions of interaction with the system.[175] Texas abortion cases have received significant media attention and it is foreseeable that a pharmacist could come under broad scrutiny.[176] Ensuring that pharmacists have clear guidelines over what constitutes a violation of the Act will prevent innocent people from unnecessary interaction with the criminal justice system.[177]

D. Relevance to Gender and Racial Equity in Health Care Access and Care Quality

Autoimmune disease is a notoriously complicated area of medicine that can significantly affect a patient's quality of life.[178] These diseases are challenging to diagnose and treat, often with few medication options that still cause serious side effects.[179] The fields of reproductive health care and autoimmune disease are intimately intertwined because these diseases primarily affect

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[174] *See id.* at 49–50 (demonstrating that the impact to those wrongfully accused goes far beyond just emotional, with a major financial aspect as individuals had to pay for attorneys or bail, and employment related, as most of the participants of the survey did lose their jobs after being wrongfully accused). Job loss was a major concern for individuals who had been falsely accused, and those who lost their jobs could not find new ones, as the stigma of the criminal justice system followed them. *Id.* at 49.

[175] *See supra* note 66 and accompanying text (highlighting the experience of a woman who was wrongfully charged with murder for a self-induced abortion, and although the Texas district attorney did ultimately drop the charges, her name was still included in multiple media publications, easily identifying her to those outside the system).

[176] *See supra* notes 65–68 and accompanying text (highlighting several Texas abortion cases that made nationwide news and had widespread media coverage); *cf.* Brooks & Greenberg, *supra* note 169, at 45 (describing the experience of Christopher Jeffries, an individual who was wrongfully accused of a crime, and although his case was dropped and no charges were ever filed, he was still repeatedly featured and vilified in the media, with his identity widely shared).

[177] *See supra* notes 152–168 and accompanying text (offering potential solutions that will reduce the questions pharmacists have and therefore reduce potential for legal liability).

[178] *See Autoimmune Disorders Found to Affect Around One in Ten People*, UNIV. OF OXFORD (May 6, 2023), https://www.ox.ac.uk/news/2023-05-06-autoimmune-disorders-found-affect-around-one-ten-people [https://perma.cc/9BC4-55VC] (providing background into autoimmune disease, including types of autoimmune disease, causes, risk factors, and more). Symptoms and side effects from autoimmune diseases range from minor symptoms like dry skin and fatigue to life-threatening issues like organ damage. *See What's the Deal with Autoimmune Disease?*, HARV. HEALTH PUBL'G, HARV. MED. SCH. (Feb. 15, 2021), https://www.health.harvard.edu/diseases-and-conditions/whats-the-deal-with-autoimmune-disease [https://perma.cc/YBR3-843M] (detailing the different side effects of various autoimmune disorders, including multiple sclerosis and lupus).

[179] *See What's the Deal with Autoimmune Disease?*, *supra* note 178 (offering insight into what the potential treatment options for people with autoimmune disease are, and noting that medications can often help reduce the effects of the disease but not the side effects); *Immunosuppressants*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/treatments/10418-immunosuppressants [https://perma.cc/T7EH-SP29] (detailing how prescribers use immunosuppressants for autoimmune conditions, and that they come with "many side effects").

women.[180] Gender disparity in health care access is a major issue in general, affecting everything from research funding to a difference in diagnosis time based on biological sex.[181] Ensuring that women who live with autoimmune disease are able to access the medications that work for them is essential to ensuring gender equity in health care.[182]

Additionally, many autoimmune diseases disproportionately impact people of color, who already face significant health care disparities due to race and ethnicity.[183] Black women experience significantly higher rates of systemic lupus erythematosus, or lupus, than white women.[184] Also, evidence shows that Native American women have higher rates of autoimmune disease.[185] Moreover, studies have shown that people of color have worse outcomes upon treat-

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[180] *See* Fariha Angum et al., *The Prevalence of Autoimmune Disorders in Women: A Narrative Review*, 12 CEREUS 1, 1–3 (2020) (providing medical research connecting autoimmune disease diagnosis to the X chromosome and therefore those who are biologically female, and highlighting that 80% of individuals with autoimmune disorders are biologically female).

[181] *See* Arthur Mirin, *Gender Disparity in the Funding of Diseases by the U.S. National Institutes of Health*, 30 J. WOMEN'S HEALTH 956, 959 (2021) (considering the different ways that health care equity negatively affects women, including failure to include women in clinical trials, and lack of funding for female-dominated disease); Reuters, *Women Are Diagnosed Years Later Than Men for Same Diseases, Study Finds*, NBC NEWS (Mar. 25, 2019), https://www.nbcnews.com/health/health-news/women-are-diagnosed-years-later-men-same-diseases-study-finds-n987216 [https://perma.cc/X9NZ-DTLR] (reviewing a study done on diagnosis timeline, noting that women were diagnosed after men, even though women are more likely to visit the doctor earlier). Gender disparity in health care is a major issue, as only 4% of funding for health care research specifically targets women's health, and male-dominant diseases receive double the funding on average than female-dominant diseases, like autoimmune disease. Priyanka Jain & Laine Bruzek, *In a World Built for Men, We Don't Know Much About Women's Bodies*, FORTUNE (June 10, 2022), https://fortune.com/2022/06/10/world-built-for-men-women-bodies-gender-gap-health-research-medicine-care-jain-bruzek/ [https://perma.cc/CUF9-EYMY] (highlighting the discrepancy between male-dominated disease funding and female-dominated disease funding).

[182] *See supra* notes 178–182 and accompanying text (highlighting the gender disparity in health care and noting that autoimmune disease is much more prevalent in women than men).

[183] *See* David Williams & Toni Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 75, 78–79 (2000) (highlighting the presence of medical racism and noting several categories that contribute, including provider discrimination, institutional discrimination, insurance coverage and more); Natalie Wilson, *Researchers Take a Multifaceted Approach to Understanding Autoimmune Disease Disparities*, MED. UNIV. OF S.C. (May 5, 2022), https://medicine.musc.edu/departments/dom/news-and-awards/2022/may-2022/understanding-autoimmune-disease-disparities [https://perma.cc/7GZ4-NDTK] (highlighting how race has an impact on autoimmune disease that is not closely studied). Some diseases are significantly more common in specific races, and a study of twenty-two autoimmune diseases found that African Americans and Native Americans in particular experienced higher rates. *See* Melissa H. Roberts & Esther Erdei, *Comparative United States Autoimmune Disease Rates for 2010–2016 by Sex, Geographic Region, and Race*, 19 AUTOIMMUNITY REVS. 1, 1–3 (2020) (performing a study to examine rates of autoimmune disease in the population and finding that Native Americans and African Americans have significantly higher rates of disease).

[184] *See* Wilson, *supra* note 183 (analyzing through a study that approximately 90% of people who have been diagnosed with lupus are women, and that the majority of that number are African American—which is far higher than the proportional rate of African Americans in the population).

[185] *See* Roberts & Erdei, *supra* note 183, at 2–3 (finding that Native Americans have a significantly higher rate of rheumatoid arthritis than the general population).

ment of autoimmune disease due to lack of monitoring, socioeconomic status, and inadequacy of health insurance coverage.[186] In order to move closer to achieving health care equity, the federal government must restore medication access for individuals living with autoimmune disease.[187]

CONCLUSION

When the Supreme Court overturned *Roe v. Wade*, abortion access was not the only type of health care affected. Providers were forced to guess whether to follow state laws like the Texas Woman's Right to Know Act or Section 1557 of the ACA, which left patients whose lives depended on access to medications like methotrexate in the crosshairs.

The Act violates the void for vagueness doctrine under both the fair notice and arbitrary enforcement prongs. Pharmacists are unsure what conduct is considered illegal and the law provides unregulated discretion to law enforcement officers. The state and federal governments, with their departments of health and state medical and pharmaceutical boards, must clarify the law to help pharmacists make these decisions. To ensure access to care for all patients and to improve health care equity in the United States, the government should also reconsider the Act's mens rea requirement and provider liability as a whole. By protecting health care professionals from liability and safeguarding medication access for patients, the government can ensure that Texas abortion laws are not overly vague and do not have consequences unrelated to abortion.

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[186] *See* John Paul Nsubuga et al., *Waitlist Mortality and Posttransplant Outcomes in African Americans with Autoimmune Liver Diseases*, 2021 J. TRANSPLANTATION 1, 2, 5 (detailing a study performed on autoimmune liver disease patients and finding that African Americans had worse outcomes due to racial inequities in health care). In a study done on autoimmune liver disease patients on the transplant waitlist, African American patients were more often taken off the waitlist due to their condition deteriorating, which can be caused by a lack of access to quality health care. *See id.* at 5 (highlighting several inadequacies in care, including later referral for transplant than is necessary, and poor health insurance leading to insufficient disease management).

[187] *See supra* notes 178–186 and accompanying text (providing insight as to how autoimmune disease and reproductive health care are closely related and asserting that ensuring access to medication is essential to prevent additional racial and gender disparity in health care).