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Abortion Disorientation

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ABORTION DISORIENTATION

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ABSTRACT

The word “abortion” pervades public discourse in the wake of Dobbs v. Jackson Women’s Health Organization. But do people know what it means? Not only do law and medicine define it differently, but state legislatures have codified wildly different definitions of abortion across jurisdictions. This Article exposes inherent ambiguities at the boundaries of the term, particularly as it intersects with other categories of reproductive health care often viewed as separate, like pregnancy loss and ectopic pregnancy. By juxtaposing statutory text with real people’s experiences of being denied care in states with abortion bans, this Article reveals how those ambiguities cause tragic results.

This Article’s analysis also tracks how antiabortion legislatures have responded to the tragedies of their own making by changing the definition of abortion. Thirteen abortion-hostile states have changed the definition of abortion since Dobbs, eleven of which have added at least one definitional exclusion, most commonly for ectopic pregnancy, miscarriage, or molar pregnancy. States that have expanded abortion rights, on the other hand, have moved in the opposite direction, broadening their abortion definitions as they expand reproductive rights.

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The findings from this Article have a variety of normative implications. First, they demonstrate that “abortion” is an ambiguous term that lacks a fixed meaning. Given that many abortion bans and the long-unenforced Comstock Act leave the term undefined, courts will need to consider canons of construction, context, and history to resolve the term’s ambiguity. Second, the findings strongly support the conclusion that state abortion definitions and ban exceptions are unconstitutionally vague. This analysis cuts against a predominate antiabortion narrative that the laws are clear, yet doctors are willfully or unintentionally misinterpreting them. Finally, the findings underscore how Dobbs created an unworkable framework that moved the complicated experience of pregnancy from the medical to the legal domain, strengthening calls to overturn the decision.

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INTRODUCTION

“Abortion” is a term used widely without explanation. But the word has distinct medical and legal meanings. And even within the law, every jurisdiction has its own definition of abortion. This is the first article to publish a state-by-state comparison of abortion definitions,¹ tracking the definitions both before and after the Supreme Court overturned the constitutional right to abortion in *Dobbs v. Jackson Women’s Health Organization*.² The juxtaposition uncovers important truths about the term’s inherent ambiguities—ambiguities that have hampered pregnant patients’ ability to access reproductive health care that is often considered distinct from abortion. This analysis suggests that “abortion” is an ambiguous term without a plain meaning, that abortion definitions and ban exceptions are unconstitutionally vague, and that the *Dobbs* framework—which rests on a distinction between “elective” and “therapeutic” abortion³—is inherently standardless and functionally unworkable.⁴

By and large, states legally define abortion as an act performed with the intent to terminate a pregnancy.⁵ But the same procedures and medications used for abortion are also used in other contexts—most saliently, for miscarriage care.⁶ Indeed, the medical definition of abortion *includes* pregnancy loss.⁷ The medical community uses the phrase “spontaneous abortion” (as distinct from “induced abortion”)

1. *See infra* Appendix (summarizing the results of the fifty-state survey in chart form).

2. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

3. *See id.* at 301.

4. *See infra* Part IV.

5. *See infra* Part I.B.3.

6. *See infra* Part I.A.

7. *See infra* Part I.A.

to identify a miscarriage.⁸ But the medical terms are not mutually exclusive, and the distinction is medically irrelevant because the treatments are the same.⁹

In law, the distinction between pregnancy loss and abortion is pivotal. Under the antiabortion framing,¹⁰ it is the difference between an innocent, often traumatic event—something worthy of compassion—and a possible crime. State definitions of abortion show that distinguishing these two experiences was forefront in legislators' minds.¹¹ State abortion definitions, particularly in antiabortion states, include various elements and carveouts aimed at avoiding an overbreadth problem in which an abortion ban would prohibit common miscarriage management practices.¹² These definitional strategies include requiring intent to terminate a pregnancy, requiring knowledge that the act will cause fetal death, and excluding the removal of a dead fetus.¹³ Nevertheless, the elements and carveouts are underinclusive: instead of focusing on a pregnancy loss's natural or spontaneous cause, they focus on its effect—that is, whether the fetus has already died.¹⁴ Thus, even if a miscarriage started naturally, under many states' laws, miscarriage care *is* an abortion unless fetal death has been documented.¹⁵ This *de facto* fetal death requirement subsumes other types of care into the definition of abortion, including care for ectopic¹⁶ and molar¹⁷ pregnancies.¹⁸ Ectopic and molar pregnancies

8. *See infra* Part I.A.

9. *See infra* Part I.A.

10. The authors of this Article reject any attempts to bifurcate culpable and nonculpable abortions or therapeutic and elective abortions, and this Article argues that such distinctions are incoherent.

11. *See infra* Part I.B.

12. *See infra* Part I.B.

13. *See infra* Part I.B.

14. *See infra* Parts I.B.4, II.A.

15. *See infra* Part II.A.

16. An ectopic pregnancy is a pregnancy that implants outside the uterus, most commonly in a fallopian tube, where it is nonviable. *See Facts Are Important: Understanding Ectopic Pregnancy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy> [<https://perma.cc/NXW8-ALNN>].

17. A molar pregnancy is a nonviable pregnancy that creates a tumor. *See Molar Pregnancy: Symptoms and Causes*, MAYO CLINIC (Nov. 12, 2022), <https://www.mayoclinic.org/diseases-conditions/molar-pregnancy/symptoms-causes/syc-20375175> [<https://perma.cc/NKQ3-QMET>].

18. *See, e.g.*, Carmen Broesder's story *infra* Part II.A.

may be nonviable, but they are often still growing and therefore not dead when first discovered.¹⁹

Once a patient's treatment is considered an abortion, then she will be subject to a state's abortion ban, if it exists, and denied care unless an exception applies. Scholars have long explained that abortion ban exceptions, particularly health-or-life exceptions, are notoriously vague and narrow, thus significantly harming pregnancy care.²⁰ Yet exceptions only tell half the story. Many exceptions are also baked into abortion *definitions*, which are significantly undertheorized, thus leaving a wide gap in the scholarship. This Article exposes these definitional exclusions and argues that they are similarly ambiguous, contributing to the unsustainable and disorienting patchwork of state abortion legislation.

At the time of writing,²¹ eighteen states have early abortion bans in effect (those that start between conception and six weeks); another four states have previability abortion bans in effect (those that start at twelve, fifteen, or eighteen weeks).²² Almost immediately after abortion bans started to take effect, news stories of providers denying

19. See *Facts Are Important: Understanding Ectopic Pregnancy*, *supra* note 16 (“An ectopic pregnancy in any location is life threatening . . . because *as the pregnancy grows*, it can cause the structure where it is implanted to burst, or rupture.” (emphasis added)); *Molar Pregnancy: Symptoms and Causes*, *supra* note 17 (“A molar pregnancy . . . involves unusual growth of cells called trophoblasts.”). Note that “ectopic pregnancy” can be an ambiguous phrase itself, and some pregnancies that are called “ectopic” can be viable when they are not located in a fallopian tube. See *infra* notes 283–84 and accompanying text.

20. See, e.g., Robyn M. Powell, *Disabling Abortion Bans*, 58 U.C. DAVIS L. REV. (forthcoming 2024) (manuscript at 41–47), https://papers.ssrn.com/abstract_id=4785554 [<https://perma.cc/3SXX-393B>]; Naomi Cahn & Sonia Suter, *Most State Abortion Bans Have Limited Exceptions – But It's Hard To Understand What They Mean*, CONVERSATION (Jan. 26, 2024, 8:21 AM), <https://theconversation.com/most-state-abortion-bans-have-limited-exceptions-but-its-hard-to-understand-what-they-mean-221389> [<https://perma.cc/5DK6-8KH6>]; Teneille R. Brown, *Abortion and the Extremism of Bright Line Rules*, 119 NW. U. L. REV. ONLINE 1, 5 (2024); Dov Fox, *The Abortion Double Bind*, 113 AM. J. PUB. HEALTH 1068, 1068–69 (2023). See generally Yvonne Lindgren, *NextGen Abortion Dystopia* (unpublished manuscript) (on file with author) (describing the “crisis in reproductive healthcare” post-*Dobbs*).

21. This Article reflects changes through the first two years of *Dobbs* and the status of states' abortion definitions and bans as of June 2024. Given the rapidly changing nature of state abortion laws, some changes have already occurred since the final draft's submission. See, e.g., Order on Defendant's Motion for Summary Judgment, Access Indep. Health Servs., Inc., v. Wrigley, No. 08-2022-CV-01608 (N.D. Dist. Ct. Sept. 12, 2024) (holding North Dakota's total abortion ban unconstitutional).

22. Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *States Where Abortion is Legal, Banned, or Under Threat*, WASH. POST (June 29, 2024, 9:00 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalizati-on-roe/> [<https://perma.cc/4MT5-BP5G>].

pregnant people care for ectopic pregnancy, molar pregnancy, miscarriage, stillbirth, devastating fetal anomaly, and life endangerment emerged on a daily basis.²³ These stories showed that the fail-safes within abortion definitions and bans were not preventing the overbreadth problem as intended. As outrage grew, Republican legislatures responded by trying to explicitly exclude certain types of care through their abortion definitions.²⁴ In the two years since *Dobbs*, ten of the twenty-two states with previability abortion bans and three states with abortion-hostile legislatures have altered their definition of abortion, overwhelmingly to exclude more care.²⁵

This Article tracks how abortion-hostile states, responding to medical tragedies they created, are redefining abortion itself. Of the thirteen abortion-hostile states that have changed their definition of abortion since *Dobbs*, eleven added at least one definitional exclusion: three narrowed their definition to exclude some miscarriage care, six excluded ectopic pregnancy treatment, three excluded molar pregnancy treatment, two excluded some care necessary to protect maternal health, two excluded fertility treatment, one excluded lethal fetal anomaly, and one excluded accidental fetal death.²⁶ One type of exclusion—birth control—has been more polarizing. After *Dobbs*, two states *removed* their birth control exclusion when they modified their definition of abortion, while three states added it.²⁷ On the other end of the spectrum, six abortion-supportive states changed their definitions of abortion after *Dobbs*.²⁸ Nearly all moved in the opposite direction, broadening the meaning of abortion as they broadened abortion protections.²⁹ In essence, these progressive states are moving closer to medical definitions, in which the blurriness between abortion and pregnancy loss is accepted and inconsequential.

The Article's descriptive findings support many normative conclusions, three of which the Article discusses at a high level. First,

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Part III.A.1. For descriptions of the terminology, see *infra* notes 389–405 and accompanying text.

26. See *infra* Part III.A.1.

27. See *infra* Part III.A.1. Two states—North Dakota and Wyoming—also added text that would specifically *include* “selective reduction,” where, in a pregnancy of multiples, some pregnancies are terminated to reduce the pregnancy's risks for the pregnant patient and the remaining fetus(es). See *infra* notes 415–17 and accompanying text.

28. See *infra* Part III.B.

29. See *infra* Part III.B.

the analysis demonstrates that “abortion” is an ambiguous term that lacks a fixed meaning.³⁰ Many abortion statutes do not define the term, including some state abortion bans and the long-unenforced Comstock Act,³¹ requiring courts to utilize canons of construction, context, and history to resolve ambiguities. In particular, the rule of lenity demands resolving ambiguous statutes in favor of criminal defendants.³² Second, the Article’s findings demonstrate that abortion definitions and ban exceptions are painfully unclear, supporting litigation efforts that claim they are unconstitutionally vague.³³ This counters the antiabortion narrative that the laws are clear and that doctors are intentionally or unintentionally misinterpreting them. Finally, the Article’s findings suggest that *Dobbs* itself, which rested on a distinction between “elective” and “therapeutic” abortion, suffers from a workability problem.³⁴ It concludes that this distinction is “inherently standardless”³⁵ and “impossible to draw with precision,”³⁶ leading to inconsistent results.³⁷

This Article proceeds as follows. In Part I, it describes the medical definition of abortion and juxtaposes it with each state’s pre-*Dobbs* legal definition. In Part II, it uses this pre-*Dobbs* baseline and a series of patient experiences to explain how state abortion definitions have proven critically overbroad. Part III explains how many abortion-hostile and abortion-supportive states have modified their definition of abortion in response to *Dobbs*. In Part IV, this Article discusses the normative implications of these findings, including that “abortion” is an ambiguous term, that abortion definitions and ban exceptions are

30. See *infra* Part IV.A.

31. See, e.g., FLA. STAT. ANN. § 390.011 (West 1997); IND. CODE ANN. § 16-18-2-1 (West 2013); KY. REV. STAT. ANN. § 311.821 (West 2021); MO. ANN. STAT. § 188.015 (West 2019); S.D. CODIFIED LAWS § 34-23A-1 (2021); 18 U.S.C. §§ 1461–1462.

32. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 296 (2012).

33. See *infra* Part IV.B.

34. See *infra* Part IV.C.

35. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 281 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 991 (1992) (Scalia, J., concurring in part)).

36. *Id.* at 284 (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 921 (2018)).

37. See *id.* at 280–86 (describing the workability doctrine and finding that *Roe* and *Casey* were unworkable, justifying the Court overturning them).

unconstitutionally vague, and that *Dobbs* created an unworkable framework that should be overturned.³⁸

I. ABORTION: A TERM OF ART

Abortion is a medical event and—in some states—a crime. How medicine and law define abortion understandably varies according to the purpose of each field. In medicine, the term’s meaning reflects treatment decisions. In law, especially in the context of a criminal abortion ban, the term’s meaning reflects culpability. This Part provides a description of the medical definition of abortion followed by a state-by-state survey of how states defined abortion prior to *Dobbs*. This Part concludes with a note on the public’s confusion surrounding the meaning of abortion.

A. *The Medical Definition*

For centuries, medical professionals have used the term “abortion” to include pregnancy loss.³⁹ When necessary, providers distinguish between what we colloquially call a miscarriage and an abortion through the terms “spontaneous abortion” and “induced abortion.”⁴⁰ For instance, the preeminent obstetrics textbook, *Williams Obstetrics*, defines the term “abortion” as “the spontaneous or induced termination of pregnancy before fetal viability,” in a chapter called “First- and Second-Trimester Pregnancy Loss.”⁴¹ Similarly, Merriam-Webster’s medical dictionary defines abortion as “the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus: (a) spontaneous expulsion of a human fetus during the first 12 weeks of gestation, compare MISCARRIAGE,

38. Other scholars have suggested additional rationales to undermine the precedential authority of *Dobbs*. See generally Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133 YALE L.J.F. 65 (2023) (arguing that the faulty historical analysis makes *Dobbs* vulnerable in a way similar to *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Overturning *Dobbs* could yield different outcomes that are beyond the scope of this Article. The Court could return to the *Roe/Casey* framework or create a new abortion right that rests on different reasoning and is formulated in a new way.

39. See R.W. Beard, J.F. Mowbray & G.D. Pinker, Letter to the Editor, *Miscarriage or Abortion?*, 326 LANCET 1122, 1123 (1985) (“It seems likely that the words [miscarriage and abortion] have been interchangeable for many centuries.”); *infra* Part IV.A (providing definitions of “abortion” from the 1800s).

40. See Andrew Moscrop, ‘*Miscarriage or Abortion?*’ *Understanding the Medical Language of Pregnancy Loss in Britain; a Historical Perspective*, 39 MED. HUMANS. 98, 99 (2013).

41. WILLIAMS OBSTETRICS ch. 11 at 198 (F. Gary Cunningham, Kenneth J. Leveno, Jodi S. Dashe, Barbara L. Hoffman, Catherine Y. Spong & Brian M. Casey eds., 26th ed. 2022).

and (b) induced expulsion of a human fetus.”⁴² As explored below, the boundaries between abortion and miscarriage remain blurred, and the medical terminology reflects a reality in which the two events cannot be fully distinguished.

Providers did not formally use the term “miscarriage” until the late 1900s. Indeed, the first time that “miscarriage” appeared in the index of the *British Medical Journal* was in 1978, and until 1999, it served as a placeholder that read: “Miscarriage—see abortion.”⁴³ Before the 1960s, the “[d]istinction between ‘abortion’ and ‘miscarriage’ was impossible in clinical practice and meaningless in clinical language.”⁴⁴ For centuries, it was understood that miscarriage can be caused by everyday events like strong emotion, sex, and vigorous activity just as it can be caused by intentional actions—and people perceived no moral difference between the two causes.⁴⁵

This factual and moral conflation of abortion and miscarriage started to shift as states began criminalizing abortion around the turn of the century. But, interestingly, early criminal statutes continued to conflate the two experiences. State abortion bans in the early twentieth century criminalized “procur[ing] the miscarriage” of a woman.⁴⁶ Notably, a few states have active abortion definitions and bans that still use this language.⁴⁷ The appellants in *Roe* acknowledged this overlap in their 1971 brief, noting that induced and spontaneous abortions might occur for the same reason: “For example, a patient infected with rubella (German measles) may abort spontaneously, because her *body* rejects a badly damaged embryo. Another similarly situated patient may seek an *induced* abortion as part of a reasoned *mental* judgment to reject a damaged embryo in favor of a subsequent normal pregnancy.”⁴⁸ In the decades before *Roe*, this legal conflation did not

42. *Abortion, Medical Definition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/abortion#medicalDictionary> [<https://perma.cc/9668-R5SU>].

43. Moscrop, *supra* note 40, at 99.

44. *Id.* at 100.

45. Evan D. Bernick & Jill Wieber Lens, *Original Public Meaning and Pregnancy’s Ambiguities*, 122 MICH. L. REV. 1443, 1485–86 (2024); LARA FREIDENFELDS, *THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF MISCARRIAGE IN AMERICA* 40 (2020).

46. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302–23 (2022) (surveying state abortion bans from the early twentieth century).

47. *See* OKLA. STAT. ANN. tit. 21, § 861 (West 1999) (“Every person who [acts] . . . with intent thereby to procure the miscarriage of [a pregnant] woman . . . shall be guilty of a felony.”); N.C. GEN. STAT. ANN. § 90-21.81A (West 2011) (amended 2023) (“It shall be unlawful . . . to procure or cause a miscarriage or abortion in the State of North Carolina.”).

48. Brief for Appellants at 22, *Roe v. Wade*, 41 U.S. 113 (1973).

affect miscarriage care as it does today.⁴⁹ Yvette Lindgren explains that, in this period, physicians frequently practiced in standalone offices without supervision, thus enjoying wide discretion to provide whatever forms of care they deemed medically necessary.⁵⁰

By the 1980s, public perception had shifted enough that health care professionals started debating whether medical terminology should reflect a distinction between miscarriage and abortion. For instance, the *Lancet* published a letter in 1985 entitled *Miscarriage or Abortion*, arguing that doctors should abandon the term “abortion” for pregnancy loss because hearing their loss referred to as an abortion distressed patients.⁵¹ In the late 1990s, British medical journals published similar letters, noting that abortion was “widely used in the medical literature to describe spontaneous pregnancy loss”⁵² and proposing the term “miscarriage” to “avoid upsetting women when referring to this unhappy outcome of pregnancy.”⁵³ The issue also started popping up within the law. For instance, Louisiana’s Attorney General penned a 1995 opinion stating that “‘missed abortions,’ as defined in *Williams Obstetrics*, 17 ed., were not included in the definition of ‘abortions’” in effect at the time.⁵⁴

Today, many health care providers are more careful with their word choice in conversations with patients.⁵⁵ But, despite some patients’ discomfort with the phrasing,⁵⁶ the broad medical meaning of abortion that includes miscarriage remains in effect.⁵⁷ The American College of Obstetricians and Gynecologists’ (“ACOG”) medical billing guidelines for pregnancy loss interventions align with this

49. Lindgren, *supra* note 20, at 11–12.

50. *Id.*

51. Beard et al., *supra* note 39, at 1123.

52. David J.R. Hutchon & Sandra Cooper, *Terminology for Early Pregnancy Loss Must Be Changed*, 317 *BRIT. MED. J.* 1081, 1081 (1998).

53. David J. Hutchon, Letter to the Editor, *Missed Abortion Versus Delayed Miscarriage*, 104 *BRITISH J. OBSTETRICS & GYNECOLOGY* 753, 753 (1997).

54. La. Att’y Gen. Op. No. 95-450 (Oct. 30, 1995).

55. See Moscrop, *supra* note 40, at 101–03 (finding that, during the second half of the twentieth century, clinicians began to differentiate between miscarriage and abortion in their conversations with patients, using miscarriage to refer to early pregnancy loss).

56. For instance, a miscarriage patient made headlines in 2013 when she tried to get her medical records changed to omit the word “abortion” and the hospital denied her request. *Mom-to-Be Shocked When Miscarriage Called “Abortion” in Medical Records*, FOX 6 NOW MILWAUKEE (July 8, 2013), <https://www.fox6now.com/news/mom-to-be-shocked-when-miscarriage-called-abortion-in-medical-records> [<https://perma.cc/RU9C-3J78>].

57. See, e.g., *WILLIAMS OBSTETRICS*, *supra* note 41, at 198 (“*Abortion* is defined as the spontaneous or induced termination of pregnancy before fetal viability.”).

traditional medical language. The guidelines state that the terms “miscarriage, spontaneous abortion, and early pregnancy loss are used interchangeably” to mean a “nonviable, intrauterine pregnancy with either an empty gestational sac or a gestational sac containing an embryo or fetus without fetal heart activity.”⁵⁸ The guidelines include billing codes for different types of treatments related to “missed abortion” and “incomplete abortion,”⁵⁹ which are often colloquially referred to as missed and incomplete miscarriage.⁶⁰ Since *Dobbs*, these codes have caused significant anxiety amongst providers, some of whom have changed how they chart and code pregnancy loss to avoid concerns surrounding state abortion bans.⁶¹

As these guidelines show, there is no clinical difference between treating complications arising from a spontaneous abortion versus an induced abortion: the same procedures and medications treat both.⁶² Importantly, medicine does not attempt to fully distinguish induced and spontaneous abortions: “[M]edical terminology often overlaps, and definitions of pregnancy-ending interventions are not mutually exclusive.”⁶³ When the categories blur together, institutional policy is often the deciding factor.⁶⁴ For instance, before *Dobbs*, only 42.6 percent of providers surveyed classified the typical surgical abortion procedure, a dilation and evacuation (“D&E”), as an induced abortion at twenty-two weeks gestation where maternal health was threatened

58. *Billing for Interruption of Pregnancy: Early Pregnancy Loss*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/practice-management/coding/coding-library/billing-for-interruption-of-early-pregnancy-loss> [<https://perma.cc/78T6-6VXZ>].

59. *Id.*

60. *See, e.g., Identifying and Treating a Missed Abortion*, HEALTH LINE, <https://www.healthline.com/health/pregnancy/missed-abortion> [<https://perma.cc/T993-C7JA>].

61. *See* Lorena O’Neil, *How Louisiana Doctors Are Quietly Helping Pregnant Patients (and Themselves) Avoid Jail Time*, JEZEBEL (Nov. 2, 2022), <https://jezebel.com/how-louisiana-doctors-are-quietly-helping-pregnant-pati-1849730174> [<https://perma.cc/JHG4-LCZ8>] (“Now, I don’t put abortion in my chart at all . . . I chart ‘missed miscarriage’ or ‘inevitable miscarriage’ instead.”); Rosemary Westwood, *Bleeding and in Pain, She Couldn’t Get 2 Louisiana ERs To Answer: Is It a Miscarriage?*, NPR (Dec. 29, 2022), <https://www.npr.org/sections/health-shots/2022/12/29/1143823727> [<https://perma.cc/2GKS-N2BT>] (“[T]hey’re not going to put anywhere ‘spontaneous abortion’ because that would then flag an investigation on them.”); Sravya Chary, Danielle Pacia & Carmel Shachar, *Abortion Miscoding—Legal Risks for Clinicians and Hospital Systems*, 329 JAMA 1911, 1911 (2023).

62. *See* Rachel Flink-Bochacki, Corinne McLeod, Hannah Lipe, Rachel Rapkin, Stacey Leigh Rubin & Cara Heuser, *Classification of Perivable Pregnancy-Ending Interventions for Maternal Life Endangerment as Induced Abortion*, 123 CONTRACEPTION 1, 2 (2023) (“[M]edical care and long-term outcomes are similar regardless of terminology . . .”).

63. *Id.*

64. *See id.* (describing variations in policy).

by an intrauterine infection.⁶⁵ The rest preferred spontaneous abortion.⁶⁶ Even fewer providers, 21.1 percent, categorized the same scenario as an induced abortion when labor induction was provided.⁶⁷ Notably, under most state abortion definitions, both scenarios would be considered abortions if cardiac activity was present.⁶⁸

Contrary to miscarriage care, ectopic pregnancy treatment—for pregnancies located outside of the uterus—has typically been considered separate from abortion.⁶⁹ An ectopic pregnancy almost always implants in a fallopian tube, which will eventually burst as the embryo grows, causing life-threatening complications and harming future fertility.⁷⁰ But ectopic pregnancies can also “implant in the ovary, peritoneal cavity, cervix, or prior cesarian scar.”⁷¹ The Williams Obstetrics textbook “distinguish[es] intrauterine from ectopic [pregnancies],”⁷² which are treated with drugs and procedures different from those used for spontaneous and induced abortions.⁷³ Yet legal definitions of abortion include ectopic pregnancy treatment if it is not specifically excluded.⁷⁴

When it comes to abortion, the medical community seems to appreciate something that the law does not: the experience of pregnancy is not black and white. As explored below, the law has attempted to draw lines that medicine avoids. This has confused physicians and led to the tragedies described in Part II.

B. The Legal Definition: Surveying Jurisdictions Before Dobbs

The medical definition of abortion has a different purpose than the legal definition. Medical definitions seek to aid doctors’ fundamental goal of treating patients. Treatment decisions are the same for induced and spontaneous abortions: the treatments simply

65. *Id.* at 3.

66. *Id.*

67. *Id.*

68. *See infra* Part II.

69. *See generally, e.g.,* WILLIAMS OBSTETRICS, *supra* note 41, at 198–232 (describing spontaneous and induced abortion in Chapter 11 and ectopic pregnancy in Chapter 12).

70. *See id.* at 220–21 (noting that 95 percent of ectopic pregnancies implant in the fallopian tubes, while the remaining 5 percent can implant in the ovary, peritoneal cavity, cervix, or prior C-section scar).

71. *Id.* at 220.

72. *Id.* at 198.

73. *Id.* at 209–14, 225–32.

74. *See infra* Part II.C.

empty the uterus. Legal definitions, however, have a different aim—especially in criminal law, where the purpose is punitive. Medically, it may not matter whether the miscarriage was induced or spontaneous, but for a state that wants to criminalize the act of ending fetal life, the distinction is pivotal. Under the antiabortion framework, spontaneous abortion deserves compassion and support; induced abortion deserves blame and punishment. The same concerns arise with medically necessary abortions.

As explored below, state legislators have worked hard to tease out these differences, at times utilizing multiple semantic devices to exclude unintentional pregnancy loss and medically necessary care from their abortion definitions. Forty-seven states and the federal government have enacted statutory abortion definitions.⁷⁵ Three states have no formally codified definition in effect: Maryland, New Jersey, and Oregon.⁷⁶ Though each state's definition is different, the definitions share many elements. We explore those elements below, focusing on the definitional landscape before *Dobbs*. Though the problem of ambiguous and overbroad abortion definitions existed before *Dobbs*, the *Roe*-era protection of previability abortion hid many of its consequences.⁷⁷ Part III describes how states have changed their abortion definition since *Dobbs*, and an Appendix at the end of this Article includes a fifty-state survey of the post-*Dobbs* definitional landscape.

1. *Methodology*. To identify state abortion definitions before and after *Dobbs*, we first searched through each state's code in Westlaw using broad search terms, reviewing past versions of the codes to identify changes. We also manually searched each state legislature's website for any abortion-related legislation passed in 2023 and 2024 (January through June) and used Lexis+ AI to double-check our

75. See, e.g., CONN. GEN. STAT. ANN. § 19a-912 (West 2021); see also *infra* Appendix.

76. See *infra* Appendix.

77. Broadly speaking, even though states could not ban abortion prior to viability before *Dobbs*, they could regulate it, and some states regulated it extensively. Before *Dobbs*, a handful of states only had one abortion clinic, and abortion was inaccessible to many either due to distance or price. See, e.g., Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28 J. WOMEN'S HEALTH 1623, 1623 (2019); Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become The First With Zero*, CNN (June 21, 2019, 12:48 PM), <https://www.cnn.com/2019/05/29/health/six-state-s-with-1-abortion-clinic-map-trnd/index.html> [<https://perma.cc/R33H-NVQY>]. Nevertheless, these access issues were eclipsed by the burdens that *Dobbs* imposed.

findings.⁷⁸ Finally, after consulting with research librarians at the University of Chicago Law School, we checked what we had against Bloomberg Law’s Hospital & Provider Regulation: Abortion Services Chart,⁷⁹ a LegiScan search for bills containing “abortion” from 2023 to 2024,⁸⁰ and a Westlaw fifty-state survey with search terms “abortion” and “definition” under the topic “health care.”⁸¹ By using broad search terms across sources, we were able to cast a wide net and pin down an otherwise amorphous collection of laws.

Often, we found that states had many active abortion laws containing different definitions. In those instances, we chose the newest definition, unless the newest definition was contained in a statute that was much less relevant to defining abortion (for instance, a statute about vital statistics compared to one about the legality of abortion). If a statute defining abortion was enacted or became effective after *Dobbs*, we confirmed whether it changed the definition of abortion.⁸² If it did, we listed the abortion definition both before and

78. We searched “How does [state name] define abortion” and “What is the codified definition of abortion in [state name]” for each state in Westlaw using the search bar on the home page, then used the “Jurisdiction” filter on the side of the results page to filter for the state jurisdiction and then filtered further. *See, e.g.*, Search for “How does Florida define abortion”, WESTLAW, <https://1.next.westlaw.com> [<https://perma.cc/6QZY-WFXV>] (last updated Sept. 2, 2024); Search for “What is the codified definition of abortion in Florida”, WESTLAW, <https://1.next.westlaw.com> [<https://perma.cc/7D3E-4MGH>] (last updated Sept. 2, 2024). Searches performed using Westlaw’s AI-assisted legal research tool, AI-Assisted Research, did not reveal any new definitions.

79. *Hospital & Provider Regulation: Abortion Services Chart*, BLOOMBERG LAW, <https://www.bloomberglaw.com/product/health/bbna/chart/44/10001/76e91425591d825f7efa542264f96198> [<https://perma.cc/GZA8-GUBC>] (under Abortion Law Toolkit, click “Chart Builder - Abortion Services” to be routed to a page that says “Hospital & Provider Regulation: Abortion Services” and then click “all” in both the topic and jurisdictions columns—and then click “create”).

80. Results For National Legislative Search About Abortion, LEGISCAN, <https://legiscan.com> [<https://perma.cc/CE3G-T36H>] (click “search” on homepage, then select “All States” in the state field on the lefthand side; then type “abortion” into the keyword search field).

81. Survey report for “Abortion” AND “Definition”, WESTLAW, <https://1.next.westlaw.com> [<https://perma.cc/ZJP6-MKW4>] (last updated July 28, 2024) (on the homepage, click “Tools” and then “Jurisdictional Surveys”; customize survey by selecting the topic “Health Care”; then, add the terms “abortion” and “definition” and click “Create Survey”).

82. In a prior version of this Article, we categorized two states, Oklahoma and Arkansas, as change states because their most recent pre-*Dobbs* abortion definition was different than their post-*Dobbs* definition. However, we re-categorized them as non-change states when we realized the post-*Dobbs* definition utilized an earlier pre-*Dobbs* definition (e.g., abortion was defined as X in 2013, then Y in 2020, and back to X in 2023). We ultimately decided that these were not true change states. All change states include abortion definitions that are appearing for the first time after *Dobbs* in their code. This reclassification of Oklahoma and Arkansas reduced the strength of our birth control claim; previously, it looked like more states had removed the birth control exclusion than added it.

after *Dobbs* to present the change. If it did not, we simply listed the new definition.

After selecting the pre- and post-*Dobbs* abortion definitions, we identified patterns and trends appearing across definitions. We chose to tag fifteen elements and color coded the statutory language by hand accordingly.

- **Intent to Terminate a Pregnancy** (yellow)
- **Known Pregnancy** (dark pink)
- **Clinically Diagnosable Pregnancy** (maroon)
- **Knowledge Action May Cause Fetal Death** (light green)
- **Excludes Ectopic Pregnancy** (light red)
- **Excludes Molar Pregnancy** (dark red)
- **Excludes Fetal Anomaly** (orange)
- **Excludes Removal of a Dead Fetus** (light blue)
- **Excludes Miscarriage Care** (dark blue)
- **Excludes Medically Necessary Abortions** (black)
- **Excludes Certain Health Care Treatments** (grey)
- **Excludes Birth Control** (teal)
- **Excludes Fertility Care** (dark green)
- **Excludes Accidental Fetal Death** (dark purple)
- **Includes Selective Reduction** (light pink)

Two research assistants reviewed our work for both quantitative and qualitative accuracy.

Our research has one major limitation. Many states have multiple active abortion definitions that govern different statutes.⁸³ This

83. For instance, Oklahoma appears to have at least half a dozen abortion definitions or variations currently in effect. See OKLA. STAT. ANN. tit. 63, § 1-757.2 (West 2021); OKLA. STAT. ANN. tit. 63, § 1-756.2 (West 2021); OKLA. STAT. ANN. tit. 63, § 1-756 (West 2019); OKLA. STAT. ANN. tit. 63, §1-740.16 (West 2017); OKLA. STAT. ANN. tit. 63, § 1-737.8 (West 2015); OKLA. STAT. ANN. tit. 63, §1-746.1 (West 2014); OKLA. STAT. ANN. tit. 63, §1-744.1 (West 2013); OKLA. STAT. ANN. tit. 63, §1-745.13 (West 2012); OKLA. STAT. ANN. tit. 63, §1-745.2 (West 2011); OKLA. STAT. ANN. tit. 63, §1-738.7 (West 2007). We used the most recently passed statute. OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022); *see also* OKLA. STAT. ANN. tit. 63, § 1-745.51 (West 2022), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023).

contributes to the confusion surrounding the term. For simplicity, we only listed one definition, choosing based on the standard described above. But we had to make some tough calls.⁸⁴ To mitigate this concern, we included “*see also*” citations in the fifty-state survey to an inexhaustive list of other active definitions. Nevertheless, the survey and this Article may contribute to the false impression that there is only one definition of abortion in every state.

2. *The “Act.”* All states have traditionally defined the abortion act very broadly. In ten jurisdictions, the act of abortion prior to *Dobbs* was simply the termination or interruption of a pregnancy.⁸⁵ Nine states defined abortion broadly as “the use” of something to terminate a pregnancy.⁸⁶ Seventeen states added a version of “prescribing” to the use.⁸⁷ For instance, Mississippi defined (and still defines) abortion as

84. The *Dobbs* opinion leaking in May 2022 created a bit of a legal limbo. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted To Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/7GZM-YDMQ>]. Several states, such as Oklahoma, advanced laws that violated *Roe* but before *Dobbs* was actually in effect. We used the most recently passed statute. OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022). Furthermore, Montana, for example, passed two abortion laws after *Dobbs* within a few weeks of another. The older one was more general, so we chose it over the newer one (a ban on D&E abortions). See MONT. CODE ANN. § 50-20-1002 (West 2023); MONT. CODE ANN. § 50-20-104 (West 2023). Additionally, Tennessee has multiple post-*Dobbs* definitions in effect, and we chose the one in the state’s abortion ban. See TENN. CODE ANN. § 39-15-213 (West 2023); TENN. CODE ANN. § 63-6-1102 (West 2022). This trend is hardly new: since 2015, Arkansas has had several effective laws defining abortion. See ARK. CODE ANN. §§ 20-16-603, 20-16-1601, 20-16-1503 (West 2015). For our comparison, we picked the one that defined “abortion generally” instead of in the context of a particular act. ARK. CODE ANN. § 20-16-1601 (West 2015).

85. CONN. GEN. STAT. ANN. § 19a-912 (West 2021); FLA. STAT. ANN. § 390.011 (West 1997) (amended 2022); IND. CODE ANN. § 16-18-2-1 (West 2013); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023); ME. REV. STAT. ANN. tit. 22, § 1598 (West 2023); NEV. REV. STAT. ANN. § 442.240 (West 1985); N.M. STAT. ANN. § 30-5A-2 (West 2000); OHIO REV. CODE ANN. § 2919.11 (West 1974); S.D. CODIFIED LAWS § 34-23A-1 (2021); VA. CODE ANN. § 16.1-241 (West 2021).

86. ARIZ. REV. STAT. ANN. § 36-2151 (2021); DEL. CODE ANN. tit. 24, § 1782 (West 1995); S. 1909, 103d Gen. Assemb., Reg. Sess. (Ill. 2023); KY. REV. STAT. ANN. § 311.720 (West 2017); MICH. COMP. LAWS ANN. § 333.17015 (West 2012); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989); TENN. CODE ANN. § 37-10-302 (West 1988); W. VA. CODE ANN. § 16-2F-2 (West 2018); WIS. STAT. ANN. § 253.10 (West 2016) (amended 2023).

87. ALA. CODE § 26-23H-3 (2019); ALASKA STAT. ANN. § 18.16.090 (1997); ARK. CODE ANN. § 20-16-603 (West 2015); GA. CODE ANN. § 31-9A-2 (West 2012); IDAHO CODE ANN. § 18-8702 (West 2021); KAN. STAT. ANN. § 65-6701 (West 2023); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1); MINN. STAT. ANN. § 145.4241 (West 2003) (repealed 2023); MISS. CODE ANN. § 41-41-45 (West 2007); MO. ANN. STAT. § 188.015 (West 2019); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN.

“the use or prescription of any instrument, medicine, drug or any other substance or device” to terminate a pregnancy.⁸⁸ Three states also included a variation of “administration” as an action.⁸⁹ Six states defined the act more narrowly—in terms of a treatment or procedure.⁹⁰ For instance, Colorado defined (and still defines) it as “any medical procedure, instrument, agent, or drug used to terminate [a] pregnancy.”⁹¹

In every state, these definitional acts are and have been broad enough to cover common miscarriage care: the act of terminating a pregnancy is not related to whether the pregnancy is alive or dead, in the process of ending spontaneously, or viable or nonviable.⁹² So, if a provider uses medications or procedures to complete a miscarriage, their actions arguably fall within the broad abortion act. However, states have created a variety of mechanisms, described below, aimed at reducing the definition’s overbreadth.

3. *Presence of Intent to Terminate Pregnancy.* Broadly speaking, before *Dobbs*, forty-two states defined abortion as an act completed with an intent to end a pregnancy.⁹³ Thirty-one of those states used language specifying “intent to terminate” a pregnancy or a close variation.⁹⁴ Some of these variations included language that personified

§ 329:43 (2021); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed 2023); S.C. CODE ANN. § 44-41-430 (2016) (repealed 2023); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

88. MISS. CODE ANN. § 41-41-45 (West 2007).

89. H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023); 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982); WYO. STAT. ANN. § 35-6-101 (West 1997) (repealed 2023).

90. CAL. INS. CODE § 10123.1961 (West 2022); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020); WASH. REV. CODE ANN. § 9.02.170 (West 2022); COLO. REV. STAT. ANN. § 25-6-402 (West 2022); UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023); *see* HAW. REV. STAT. ANN. § 453-16 (West 2006) (repealed 2023) (requiring “an operation”).

91. COLO. REV. STAT. ANN. § 25-6-402 (West 2022).

92. *See generally infra* Part II (describing how abortion bans have harmed miscarriage care).

93. *See, e.g.*, IDAHO CODE ANN. § 18-8702 (West 2021); *see also infra* Appendix.

94. ALA. CODE § 26-23H-3 (2019); ARK. CODE ANN. § 5-61-303 (West 2019); CAL. HEALTH & SAFETY CODE § 123464 (West 2002); GA. CODE ANN. § 31-9A-2 (West 2012); HAW. REV. STAT. ANN. § 453-16 (West 2006) (repealed 2023); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); KY. REV. STAT. ANN. § 311.720 (West 2017); ME. REV. STAT. ANN. tit. 22, § 1596 (1989) (amended 2023); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020); MICH. COMP. LAWS ANN. § 333.17015 (West 2012); MINN. STAT. ANN. § 145.4241 (West 2003) (amended 2024); MO. ANN. STAT. § 188.015 (West 2019); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West

the fetus. For instance, South Dakota necessitated (then and now) the “intentional termination of the life of a human being in the uterus,”⁹⁵ and Texas, pre-*Dobbs*, required the “intent to cause the death of an unborn child.”⁹⁶ Three jurisdictions—Arkansas, Georgia, and Ohio—required “purpose[ful]” interruption or termination of a pregnancy,⁹⁷ a mental state with a higher level of intent.⁹⁸

Eleven of the forty-two states instead required intent in the negative—that is, an intent “other than.”⁹⁹ Florida’s statute still in effect is representative, defining abortion as “the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.”¹⁰⁰ Notably, another ten of the forty-two states defined intent in both the positive and the negative pre-*Dobbs*. For example, North Carolina defined abortion as using means “*intentionally* to terminate the pregnancy of a woman known to be pregnant *with an intention other than* to do any of the following: a. Increase the probability of a live birth. b. Preserve the life or health of the child. c. Remove a dead, unborn child.”¹⁰¹

Before *Dobbs*, three states lacked (and still lack) an intent element: Arizona, Pennsylvania, and Virginia.¹⁰² Two of them, Arizona

2011); N.H. REV. STAT. ANN. § 329:43 (2021); N.M. STAT. ANN. § 30-5A-2 (West 2000); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed 2023); OHIO REV. CODE ANN. § 2919.11 (West 1974); OKLA. STAT. ANN. tit. 63, § 1-730 (West 2020); 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982); S.C. CODE ANN. § 44-41-430 (2016) (repealed 2023); S.D. CODIFIED LAWS § 34-23A-1 (2021); TENN. CODE ANN. § 37-10-302 (West 1988); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023); WASH. REV. CODE ANN. § 9.02.170 (West 1992) (amended 2022); W. VA. CODE ANN. § 16-2F-2 (West 2018); WIS. STAT. ANN. § 253.10 (West 2016) (amended 2023); WYO. STAT. ANN. § 35-6-101 (West 1997) (repealed 2023).

95. S.D. CODIFIED LAWS § 34-23A-1 (2021).

96. TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

97. ARK. CODE ANN. § 20-16-603 (West 2015); GA. CODE ANN. § 31-9A-2 (West 2012); OHIO REV. CODE ANN. § 2919.11 (West 1974).

98. *United States v. Bailey*, 444 U.S. 394, 405 (1980) (“In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”).

99. ARK. CODE ANN. § 20-16-603 (West 2015); COLO. REV. STAT. ANN. § 25-6-402 (West 2022); CONN. GEN. STAT. ANN. § 42-515 (West 2023); DEL. CODE ANN. tit. 24, § 1782 (West 1995); FLA. STAT. ANN. § 390.011 (West 1997) (amended 2022); 755 ILL. COMP. STAT. ANN. 55/1-10 (West 2019); IND. CODE ANN. § 16-18-2-1 (West 2013); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023); KAN. STAT. ANN. § 65-6701 (West 2011) (amended 2023); MISS. CODE ANN. § 41-41-45 (West 2007); NEV. REV. STAT. ANN. § 442.240 (West 1985).

100. FLA. STAT. ANN. § 390.011 (West 1997) (amended 2022).

101. N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023) (emphasis added).

102. ARIZ. REV. STAT. ANN. § 36-2151 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989); VA. CODE ANN. § 16.1-241 (West 1997).

and Pennsylvania, account for mental state in another way—by requiring knowledge that the abortion will cause fetal death. This is discussed in more depth below.¹⁰³ Surprisingly, mental state is completely absent from Virginia’s definition, creating one of the broadest abortion definitions: “to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage.”¹⁰⁴

4. *Presence of Provider Knowledge.* In addition to intent, many states have required knowledge—real or constructive—of a patient’s pregnancy. Prior to *Dobbs*, twenty-one states required knowledge that the abortion recipient was pregnant at the time of the abortion.¹⁰⁵ This knowledge element was typically layered on top of intent. For instance, Alabama required (and still requires) “the intent to terminate the pregnancy of a woman *known to be pregnant*.”¹⁰⁶ Colorado and Wisconsin had (and still have) slight variations, requiring that the abortion patient was known or reasonably believed to be pregnant.¹⁰⁷

Conversely, eight pre-*Dobbs* state abortion definitions required a “clinically diagnosable” pregnancy—that is, one that is knowable rather than known.¹⁰⁸ Shifting the goal posts from known to knowable broadens the definition of abortion to potentially cover those who might be deliberately ignorant of a pregnancy.¹⁰⁹ But such “clinically

103. ARIZ. REV. STAT. ANN. § 36-2151 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989).

104. VA. CODE ANN. § 16.1-241 (West 1997).

105. ALA. CODE § 26-23H-3 (2019); ALASKA STAT. ANN. § 18.16.090 (1997); ARK. CODE ANN. § 20-16-603 (West 2015); COLO. REV. STAT. ANN. § 25-6-402 (West 2022); DEL. CODE ANN. tit. 24, § 1782 (West 1995); GA. CODE ANN. § 31-9A-2 (West 2012); 755 ILL. COMP. STAT. ANN. 55/1-10 (West 2019); KAN. STAT. ANN. § 65-6701 (West 2011) (amended 2023); KY. REV. STAT. ANN. § 311.720 (West 2017); MINN. STAT. ANN. § 145.4241 (West 2003); MISS. CODE ANN. § 41-41-45 (West 2007); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed 2023); 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982); S.C. CODE ANN. § 44-41-430 (2016) (repealed 2023); TENN. CODE ANN. § 37-10-302 (West 1988); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); W. VA. CODE ANN. § 16-2F-2 (West 2018); WIS. STAT. ANN. § 253.10 (West 2016) (amended 2023); WYO. STAT. ANN. § 35-6-101 (West 1997) (repealed 2023).

106. ALA. CODE § 26-23H-3 (2019) (emphasis added).

107. COLO. REV. STAT. ANN. § 25-6-402 (West 2022); WIS. STAT. ANN. § 253.10 (West 2016) (amended 2023).

108. ARIZ. REV. STAT. ANN. § 36-2151 (2021); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN. § 329:43 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989).

109. Missed period pills, discussed *infra* note 445, are aimed at helping those who do not want to know if they are pregnant.

diagnosable” language also *limits* the definition of abortion in that a pregnancy cannot be diagnosed until after a fertilized egg implants in the uterus.¹¹⁰ Even though many states define pregnancy as starting at *conception*, only *implantation* triggers the hormone that is necessary to diagnose pregnancy.¹¹¹ It typically takes roughly eleven to fourteen days after conception for enough hormone to accumulate to trigger a positive pregnancy test.¹¹² Thus, the “clinically diagnosable” language has two implications. First, even though antiabortion activists often argue that certain types of birth control are abortifacients because they theoretically prevent implantation,¹¹³ the “clinically diagnosable” text requires implantation and therefore should exclude birth control products.¹¹⁴ Second, this language should also protect providers who prescribe abortifacients to reproductively capable patients for other uses, like to treat ulcers or rheumatoid arthritis, before they could know that they are pregnant.¹¹⁵

Finally, before *Dobbs*, nine states also required knowledge that the termination will “with reasonable likelihood” “cause the death of

110. *Conception*, CLEVELAND CLINIC (Sept. 6, 2022), <https://my.clevelandclinic.org/health/articles/11585-conception> [<https://perma.cc/GSW4-TK9C>].

111. *See id.* (“[J]ust because conception occurs doesn’t mean implantation will” If implantation occurs, “[y]ou begin to release hormones that tell your body a baby is growing inside your uterus.”).

112. *Id.*

113. *See generally* AAPLOG Comm. Op. 7: Embryocidal Potential of Modern Contraceptives (Jan. 15, 2020) (suggesting that certain types of hormonal contraceptives prevent pregnancy after fertilization has occurred and thus are abortifacients). *But see Plan B One-Step (1.5 mg levonorgestrel) Information*, FDA (Dec. 23, 2022), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/plan-b-one-step-15-mg-levonorgestrel-information> [<https://perma.cc/XPK9-XYZZ>] (explaining that “[e]vidence does not support that the drug affects implantation or maintenance of a pregnancy after implantation, therefore it does not terminate a pregnancy”).

114. However, some states define conception as the beginning of life, which might make unclear how the “clinically diagnosable” language will be interpreted in light of the statutory structure as a whole. *See* TENN. CODE ANN. § 39-15-213 (West 2023).

115. *See* Bonnie L. Bermas, Irene Blanco, Rosalind Ramsey-Goldman, Ashira D. Blazer, Megan E.B. Clowse, Cuoghi Edens, Greer Donley, Leslie Pierce, Catherine Wright & Mehret Birru Talabi, Letter to the Editor, *The Impact of US Abortion Policy on Rheumatology Clinical Practice*, 76 ARTHRITIS & RHEUMATOLOGY 485, 485–86 (2023). As discussed below, some providers are also exploring prescribing missed period pills. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317, 386–87 (2024) (“[M]issed period pills are used to induce a period, not terminate a ‘known pregnancy.’ In this situation, an intentional decision to avoid discovering pregnancy could create an after-the-fact impossibility of knowing whether a live pregnancy was ended.”).

the unborn child.”¹¹⁶ This requirement is layered on top of the other elements. Of the eight states that required a “clinically diagnosable” pregnancy, seven—all but Massachusetts—also required knowledge of a “reasonable likelihood” of causing fetal death.¹¹⁷ Alabama required a known pregnancy on top of a “reasonable likelihood” of causing fetal death.¹¹⁸ Arkansas alone did not specify a confirmed or confirmable pregnancy status in addition to this language.¹¹⁹

5. *Exclusions.* Many state abortion definitions have built-in exclusions as to what constitutes an abortion in the eyes of state law. Depending on the state, these might include removal of a dead fetus, ectopic pregnancy, birth control, fetal anomaly, or medical emergency. Importantly, these exclusions are distinct from exceptions within an abortion ban. If conduct falls within a definitional exclusion, *no abortion occurred* under state law. If conduct falls within a ban exception, an abortion did occur, but the abortion was not illegal.

The most common definitional exclusion by far relates to miscarriage care. Before *Dobbs*, thirty-one states specifically excluded the removal of a dead fetus from their definition of abortion,¹²⁰ though

116. ALA. CODE § 26-23H-3 (2019); ARIZ. REV. STAT. ANN. § 36-2151 (2021); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN. § 329:43 (2021); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated* by Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989).

117. ARIZ. REV. STAT. ANN. § 36-2151 (2021); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN. § 329:43 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989).

118. ALA. CODE § 26-23H-3 (2019).

119. ARK. CODE ANN. § 5-61-303 (West 2019).

120. ALA. CODE § 26-23H-3 (2019); ALASKA STAT. ANN. § 18.16.090 (1997); ARIZ. REV. STAT. ANN. § 36-2151 (2021); ARK. CODE ANN. § 20-16-603 (West 2015); DEL. CODE ANN. tit. 24, § 1782 (West 1995); FLA. STAT. ANN. § 390.011 (West 1997); GA. CODE ANN. § 31-9A-2 (West 2012); IDAHO CODE ANN. § 18-8702 (West 2021); 755 ILL. COMP. STAT. ANN. 55/1-10 (West 2019); IND. CODE ANN. § 16-18-2-1 (West 2013); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023); KAN. STAT. ANN. § 65-6701 (West 2011) (amended 2023); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); ME. REV. STAT. ANN. tit. 22, § 1598 (West 2023); MICH. COMP. LAWS ANN. § 333.17015 (West 2012); MINN. STAT. ANN. § 145.4241 (West 2003); MISS. CODE ANN. § 41-41-45 (West 2007); MO. ANN. STAT. § 188.015 (West 2019); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); NEV. REV. STAT. ANN. § 442.240 (West 1985); N.H. REV. STAT. ANN. § 329:43 (2021); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed

thirteen of these states used language referencing removal of a “dead unborn child.”¹²¹ Fourteen of those thirty-one states also specified that the death must be a result of “spontaneous abortion,”¹²² “natural causes in utero,” or “accidental trauma or a criminal assault on the pregnant woman” or on “her unborn child.”¹²³ Theoretically, in these fourteen jurisdictions, if a provider removed dead pregnancy tissue after a pregnant person self-induced an abortion, that conduct could qualify as illegal even though the fetus would have already been dead when the provider intervened.

Importantly, as discussed in depth below, the “dead fetus” exclusion fails to protect many miscarriage patients because a dying fetus might still have a heartbeat or because fetal death can be challenging to diagnose with certainty.¹²⁴ Before *Dobbs*, three states had more protective miscarriage exclusions.¹²⁵ For example, Louisiana’s pre-*Dobbs* definition excluded miscarriage care if there was “a positive diagnosis, certified in writing in the woman’s medical record along with the results of an obstetric ultrasound test, that the pregnancy has ended or *is in the unavoidable and untreatable process of ending due to spontaneous miscarriage.*”¹²⁶ Though Louisiana’s exclusion did not require fetal death, it nevertheless required certifications that could interfere with emergency care and foster fear

2023); OHIO REV. CODE ANN. 2919.11 (West 1974); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just., 531 P.3d 117; TENN. CODE ANN. § 37-10-302 (West 1988); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023); WIS. STAT. ANN. § 253.10 (West 2016) (amended 2023).

121. ALA. CODE § 26-23H-3 (2019); ALASKA STAT. ANN. § 18.16.090 (1997); ARK. CODE ANN. § 20-16-603 (West 2015); GA. CODE ANN. § 31-9A-2 (West 2012); IDAHO CODE ANN. § 18-8702 (West 2021); KAN. STAT. ANN. § 65-6701 (West 2011) (amended 2023); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MO. ANN. STAT. § 188.015 (West 2019); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just., 531 P.3d 117; UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2010).

122. GA. CODE ANN. § 31-9A-2 (West 2012); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN. § 329:43 (2021); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed 2023); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just., 531 P.3d 117; TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

123. KAN. STAT. ANN. § 65-6701 (West 2011) (amended 2023); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023).

124. *See infra* Part II.B.

125. LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020); 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982).

126. LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022).

and uncertainty among providers that they were inadvertently breaking the law.¹²⁷ It also prohibited surgical treatment and required the miscarriage to be completed with “induce[d] delivery.”¹²⁸

Two states and the federal government offered better examples of excluding miscarriage care writ large without prescribing how physicians should define it or requiring physicians to provide proof of the miscarriage. Massachusetts law provided (and still provides) that “‘abortion’ shall not include providing care related to a miscarriage.”¹²⁹ Rhode Island law provided (and still provides) that “[t]he term [abortion] shall not include the administering of any medicine, drug, substance, or thing or the employment of any instrument or means for the purpose of completing an incomplete, spontaneous miscarriage.”¹³⁰ The federal government has used similar language, historically sticking remarkably close to the medical terms. Federal regulations before *Dobbs* defined abortion as “induced pregnancy terminations” and explicitly noted that “[t]his term does not include spontaneous abortions, i.e., miscarriages.”¹³¹ Since *Dobbs*, a more recent federal statute has defined abortion as “intentional termination of a pregnancy” and explicitly excludes “spontaneous, missed or threatened abortion or termination of an ectopic” pregnancy.¹³²

Besides miscarriage care, states have attempted to identify and exclude other types of reproductive health care from their abortion definition. Before *Dobbs*, twelve states excluded the removal of an ectopic pregnancy from their definition of abortion.¹³³ Almost all ectopic pregnancies are in the fallopian tubes, where they are nonviable and life-threatening without treatment.¹³⁴ One state,

127. *Id.*

128. *See id.* (permitting only the removal of a dead fetus or *inducing the delivery* of the uterine contents).

129. MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020).

130. 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982).

131. 45 C.F.R. § 283.2 (1999).

132. 32 C.F.R. § 199.2 (2023).

133. ALA. CODE § 26-23H-3 (2019); ARIZ. REV. STAT. ANN. § 36-2151 (2021); IDAHO CODE ANN. § 18-8702 (West 2021); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.H. REV. STAT. ANN. § 329:43 (2021); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023).

134. *See Facts Are Important: Understanding Ectopic Pregnancy*, *supra* note 16; *Ectopic Pregnancy FAQs*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Feb. 2018), <https://www.acog.org/womens-health/faqs/ectopic-pregnancy> [<https://perma.cc/FBM2-RY58>].

Alabama, excluded fetal anomaly abortions from its definition of abortion pre-*Dobbs*. But the exclusion was limited to “lethal anomal[ies],” defined as “a condition from which an unborn child would die after birth or shortly thereafter or be stillborn.”¹³⁵ Seven states—Arizona, Georgia, Michigan, Oklahoma, Pennsylvania, Texas, and West Virginia—explicitly excluded birth control from their definition of abortion before *Dobbs*.¹³⁶ Another state, Utah, implicitly excluded it by defining abortion to only occur “after implantation of a fertilized ovum.”¹³⁷

Pre-*Dobbs*, two states excluded abortions in certain situations in which the pregnant person’s life or health was threatened.¹³⁸ Alabama’s law, which is still in effect, specifies that abortion does not include “deliver[ing] the unborn child prematurely to avoid a serious health risk to the unborn child’s mother.”¹³⁹ A serious health risk is defined as a condition necessary “to avert her death or to avert serious risk of substantial physical impairment of a major bodily function.”¹⁴⁰ The statute provides that a mental and emotional condition can only meet that standard in certain circumstances.¹⁴¹ Meanwhile, Montana prior to *Dobbs* excluded “an act to terminate a pregnancy with the intent to . . . treat a maternal disease or illness for which the prescribed drug is indicated.”¹⁴²

Before *Dobbs*, however, no states excluded molar pregnancy, a nonviable pregnancy that creates a tumor and threatens the pregnant person’s life.¹⁴³ No states excluded accidental fetal death. Nor did any state specifically exclude fertility treatment, or specifically *include*

135. ALA. CODE § 26-23H-3 (2019).

136. See ARIZ. REV. STAT. ANN. § 36-2151 (2021); GA. CODE ANN. § 31-9A-2 (West 2012); MICH. COMP. LAWS ANN. § 333.17015 (West 2012); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by Okla. Call for Reprod. Just.*, 531 P.3d 117; 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); W. VA. CODE ANN. § 16-2F-2 (West 2018).

137. UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023).

138. *Id.*; MONT. CODE ANN. § 50-20-703 (West 2021).

139. ALA. CODE § 26-23H-3 (2019).

140. *Id.*

141. See *id.* The statute requires that an Alabama psychiatrist must examine the woman and make several documentations. First, she must have a “diagnosed serious mental illness.” *Id.* Second, there must be a “reasonable medical judgment that she will engage in conduct that could result in her death or the death of her unborn child” as a result of the illness. *Id.* Third, termination of the pregnancy must be “medically necessary to avoid the conduct.” *Id.*

142. MONT. CODE ANN. § 50-20-703 (West 2021).

143. See *infra* Appendix.

selective reduction—terminating one or more embryos in a multifetal pregnancy. These changes appeared for the first time after *Dobbs*.

C. Public Meaning and Confusion

Beyond the legal and medical definitions, considerable public confusion persists on what constitutes an abortion, particularly as it intersects with pregnancy loss. Before *Dobbs*, researcher Alicia VandeVusse and coauthors conducted a first-of-its-kind qualitative study probing public perception of the meaning of abortion. The study asked women whether a variety of reproductive health care situations were “definitely an abortion,” “maybe an abortion,” or “definitely not an abortion.”¹⁴⁴ The researchers found that “blurred boundaries between different types of pregnancies and their outcomes emphasize the differences in people’s notions of what constitutes an abortion.”¹⁴⁵

Notably, the study found no consensus on whether something was “definitely an abortion” or “definitely not an abortion,” even among fairly straightforward options like “stillbirth,” which 13 percent of respondents said was definitely or maybe an abortion, or “surgical abortion,” which 33 percent of respondents said was definitely not or maybe an abortion.¹⁴⁶ Only 55 percent of respondents considered emergency contraception—which does not terminate a pregnancy¹⁴⁷—as definitely not an abortion.¹⁴⁸ Though 83 percent of respondents said that a miscarriage was definitely not an abortion, only 64 to 67 percent of respondents chose “definitely not an abortion” when asked about medical or surgical intervention to complete a miscarriage.¹⁴⁹ In contrast, 89 percent of respondents thought “expectant management”—during which patients wait for their miscarriage to complete naturally—was definitely not an abortion.¹⁵⁰ Seventy-nine

144. Alicia J. VandeVusse, Jennifer Mueller, Marielle Kirstein, Joe Strong & Laura Lindberg, “*Technically an Abortion*”: *Understanding Perceptions and Definitions of Abortion in the United States*, SOC. SCI. MED., Oct. 2023, at 1, 3.

145. *Id.* at 7.

146. *Id.* at 4.

147. *Id.* According to the U.S. Food and Drug Administration, “the emergency contraceptive pill sold as Plan B One-Step does not prevent a fertilized egg from implanting in the womb and does not cause an abortion.” Clare Foran, Morgan Rimmer & Ted Barrett, *Senate GOP Blocks Bill To Guarantee Access to Contraception*, KCRA (June 5, 2024, 3:40 PM), <https://www.kcra.com/article/senate-gop-blocks-bill-guarantee-access-contraception/61008545> [<https://perma.cc/WK76-DQ4Z>].

148. VandeVusse et al., *supra* note 144, at 4.

149. *Id.*

150. *Id.*

percent of respondents thought ectopic pregnancy was definitely not an abortion, while 21 percent thought it might be or definitely was.¹⁵¹ The study found additional confusion in the context of an unknown pregnancy—particularly when someone took abortion pills without a pregnancy test. In that context, respondents split fairly equally into the three camps.¹⁵²

The authors noted that “definitions of abortion were varied, sometimes incongruous, and demonstrated significant ambiguity.”¹⁵³ In particular, when considering the difference between abortion and miscarriage, qualitative interviews revealed that “most respondents understood miscarriage to mean a pregnancy ending without intention, choice, or action taken by the pregnant person.”¹⁵⁴ As discussed in more depth below, this suggests that many people think of abortion as part of a set of particular interventions, regardless of whether the pregnancy is currently dead, dying, or alive and healthy. To some extent, this view of naturalness and intent also influenced the categorization of emergency contraceptives. For instance, one respondent viewed emergency contraceptives as a possible abortion because the person “doesn’t want to get pregnant so they take a medication to prevent that from happening.”¹⁵⁵

The findings identified another area of confusion—confusion related to the reason for which abortion is sought. For instance, in response to a scenario in which a pregnancy was ended because a fetus was diagnosed with a fetal anomaly, some respondents rejected the abortion characterization. One said: “I think it’s considered abortion only when you personally know you can take care of a child and you’re being selfish.”¹⁵⁶ The study authors argue that abortion stigma impacts how people define the term,¹⁵⁷ writing that “[r]eticence among respondents to label some pregnancy outcomes as abortions due to the surrounding circumstances reveals that definitions of abortion are mired by stigma associated with the term ‘abortion’ and a subsequent desire to stratify abortion and avoid a singular definition.”¹⁵⁸ Antiabortion advocates play into this stigma. For instance, the

151. *Id.*

152. *Id.*

153. *Id.* at 6.

154. *Id.* at 5.

155. *Id.* at 6.

156. *Id.* at 5.

157. *Id.* at 2.

158. *Id.* at 6.

American Association of Pro-Life Obstetricians and Gynecologists argues that abortions performed to save the pregnant person's life are not abortions at all.¹⁵⁹ As examined above, legislatures are engaged in the same type of exercise when they attempt to definitionally exclude forms of “good” abortions by saying they are not abortions at all.¹⁶⁰

Even abortion *patients* may not realize that they have received an abortion, as defined by law, if the procedure was medically indicated and occurred in a hospital. Social media personality Chrissy Teigen's story is illustrative here. In 2020, Teigen had a placental abruption—the placenta detached from the uterine wall prior to birth¹⁶¹—causing significant bleeding.¹⁶² Around twenty weeks into her pregnancy, her health was threatened enough that she and her doctors decided to induce labor despite the fact that her son, Jack, still had a detectable heartbeat yet would not be able to survive outside the womb.¹⁶³ Though Teigen was an abortion rights activist, she did not realize that she had had an abortion until a year later, when she was reflecting on her experience after the *Dobbs* decision: “It was an abortion An abortion to save my life for a baby that had absolutely no chance. And to be honest, I never, ever put that together until, actually, a few months ago.”¹⁶⁴ This makes sense: before *Dobbs*, many providers reported avoiding the word abortion in similar contexts to save their patients from abortion stigma—and preferring spontaneous abortion, an equally accurate term given that medical terminology is not mutually exclusive.¹⁶⁵

159. *What is AAPLOG's Position on “Abortion to Save the Life of the Mother?”?*, AAPLOG (July 9, 2009) [hereinafter *What is AAPLOG's Position*], <https://aaplog.org/what-is-aaplogs-positon-on-abortion-to-save-the-life-of-the-mother> [https://perma.cc/3TPD-PWZW] (“[A]bortion to save the mother's life.’ We are treating two patients, the mother and the baby, and every reasonable attempt to save the baby's life would also be a part of our medical intervention. We acknowledge that, in some such instances, the baby would be too premature to survive.”).

160. *See supra* Part I.B.5.

161. *See Placental Abruption: Symptoms & Causes*, MAYO CLINIC (Feb. 25, 2022), <https://www.mayoclinic.org/diseases-conditions/placental-abruption/symptoms-causes/syc-20376458> [https://perma.cc/Y3UD-PHWN].

162. *See* Chrissy Teigen, *Hi.*, MEDIUM (Oct. 27, 2020), <https://chrissyteigen.medium.com/hi-2e45e6faf764> [https://perma.cc/W4TJ-ABJW].

163. *See id.* (“I would have an epidural and be induced to deliver our 20 week old, a boy that would have never survived in my belly . . .”).

164. Kimberly Nordyke & Ryan Gajewski, *Chrissy Teigen Reveals She Had an Abortion To “Save My Life for a Baby That Had Absolutely No Chance.”* HOLLYWOOD REP. (Sept. 15, 2022), <https://www.hollywoodreporter.com/news/general-news/chrissy-teigen-miscarriage-abortion-john-legend-baby-jack-1235221899> [https://perma.cc/PU6A-F8JD].

165. *See* Flink-Bochacki et al., *supra* note 62, at 2, 4–5.

Of course, in states that ban abortion, the fact that some miscarriage care *is* abortion care is rapidly becoming clearer to people after *Dobbs*. As explored below, a constant drumbeat of news stories makes this point.¹⁶⁶ Still, there is significant confusion when people experience pregnancy complications in states that ban abortion. For instance, since *Dobbs*, there have been many reports of patients experiencing an inevitable miscarriage being repeatedly sent home without being told that they were miscarrying, that the standard of care before *Dobbs* had been to offer medication or a procedure to speed up an inevitable miscarriage, and that they were denied this care because the fetus’s heart was still beating or because fetal death could not be confirmed—in other words, because such care would be, legally, a potential abortion.¹⁶⁷ This intentional obfuscation was common in Catholic hospitals during the *Roe* era and still continues, even in states that permit abortion.¹⁶⁸

* * *

Unlike the medical definition of abortion, in which miscarriage and abortion are blurred into one category, the legal definitions of abortion utilize many tools to attempt to distinguish abortion from miscarriage and other forms of medically necessary care. Despite these mechanisms, when abortion bans went into effect after *Dobbs*, they immediately proved overbroad. Below, we use case histories to show the overbreadth of abortion definitions and how ambiguities are

166. See *infra* Part II.

167. See, e.g., Kavitha Surana, *Doctors Warned Her Pregnancy Could Kill Her. Then Tennessee Outlawed Abortion*, PROPUBLICA (Mar. 14, 2023, 5:00 AM), <https://www.propublica.org/article/tennessee-abortion-ban-doctors-ectopic-pregnancy> [<https://perma.cc/BB2G-WNJ4>] (“[A] number of pregnant patients [reported they] had bled for weeks, but didn’t understand why. Their providers hadn’t mentioned the word ‘miscarriage’ or offered dilation and evacuation procedures. Instead they were told, ‘Let your body do what it’s going to do.’”); Letter from Bryan Hughes, Tex. State Sen., to Brint Carlton, Tex. Med. Bd. Exec. Dir. (Aug. 4, 2022) (on file with authors) [hereinafter Hughes Letter] (“One mentioned example involves the interference by at least two hospitals of care for premature ruptures of membranes and forcing these patients to be sent home to miscarry without proper pain management or care . . .”).

168. See generally JULIA KAYE, BRIGITTE AMIRI, LOUISE MELLING & JENNIFER DALVEN, AM. CIV. LIBERTIES UNION, *HEALTH CARE DENIED: PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN’S HEALTH AND LIVES* (2016), <http://www.aclu.org/publications/report-health-care-denied> [<https://perma.cc/A8A5-FCWG>] (detailing the firsthand accounts of patients who were denied appropriate care at Catholic hospitals); Remarks at the Ill. Senate Floor Debate on S.B. 1564 61–62 (May 31, 2016) (statement of Sen. Daniel Biss) (transcript available on the Illinois General Assembly website) (summarizing the story of Mindy Swank, who was denied care for a complicated pregnancy at a Catholic hospital).

inherent in the definitions themselves—not, as the antiabortion movement argues, merely in how providers understand the definitions. From there, we describe how states have attempted to contain the post-*Dobbs* damage by changing the very definition of abortion but have failed to create any workable solution.

II. POST-*DOBBS* TRAGEDIES REVEAL THE OVERBREADTH OF STATE ABORTION DEFINITIONS

Abortion has never been fully distinct from other types of reproductive health care.¹⁶⁹ As scholars warned before *Dobbs*, miscarriage care, ectopic pregnancy treatment, and certain types of fertility care have always overlapped with abortion as defined by states.¹⁷⁰ *Roe* and its progeny helped indulge the fiction that abortion is a distinct form of health care: the presence of an abortion right ensured that, even given overlaps, abortion treatment—however defined—was secure.¹⁷¹ *Dobbs* radically changed that reality.¹⁷² Almost immediately after the decision came down, states started banning abortion. While courts have paused several measures,¹⁷³ twenty-two states have successfully enacted viability limits on abortion since *Dobbs*,¹⁷⁴ eighteen of which ban abortion starting at conception or six weeks.

Abortion bans have caused a steady flow of tragedy reported in the media. People have been denied care for ectopic and molar pregnancy; missed, inevitable, and incomplete miscarriage; severe fetal anomaly; and significant maternal health risks.¹⁷⁵ These patients have

169. Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1662 (2023).

170. See *id.* at 1711–16 (describing the effects of abortion regulation on pregnancy loss treatment). Many have noted the possible overlap between *Dobbs* and fertility care. See, e.g., I. Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of Roe v Wade and New Legal Frontiers on the Constitutional Right to Abortion*, 328 JAMA 325, 326 (2022).

171. See Donley & Lens, *supra* note 169, at 1658; *Roe v. Wade*, 410 U.S. 113, 164 (1973) (“A state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.” (emphasis in original)), *overruled by* *Dobbs v. Jackson*. Women’s Health Org., 597 U.S. 215 (2022).

172. See *Dobbs*, 597 U.S. at 231 (overruling *Roe*, 410 U.S. and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

173. See *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (showing that bans have been blocked in Montana and Wyoming) [<https://perma.cc/X69T-JRPV>] (last updated June 28, 2024).

174. Kitchener et al., *supra* note 22.

175. See *infra* Parts II.A–D.

been forced to choose between traveling out of state during a medical emergency or watching their health decline toward death before receiving in-state abortion care under a ban's health-or-life exception.¹⁷⁶ The survivors are left not only with the compounded trauma of losing a pregnancy and nearly dying, but also, in many cases, long-term health consequences.¹⁷⁷ Delaying medically necessary abortion—often in the context of inevitable miscarriage—doubles the pregnant person's risk of severe morbidity.¹⁷⁸

Today, 40 percent of OB/GYNs in states that ban abortion report that “they have personally felt constraints on their ability to provide care for miscarriages and other pregnancy-related medical emergencies since the *Dobbs* decision.”¹⁷⁹ Furthermore, 68 percent reported that *Dobbs* “worsened their ability to manage pregnancy-related emergencies,” 64 percent thought that *Dobbs* would worsen maternal mortality, and 70 percent thought that it would exacerbate race and class disparities.¹⁸⁰ In another study, 93 percent of OB/GYNs in ban states “reported situations in which they or their colleagues could not follow clinical standards due to legal constraints,” and 70 percent reported symptoms of anxiety and depression as a result.¹⁸¹ Patients, too, are feeling the effects: one in three women of reproductive age said that they or someone they know has decided not to get pregnant due to concerns about pregnancy-related medical emergencies since *Dobbs*.¹⁸² This Part surveys these post-*Dobbs* harms

176. See *infra* Parts II.A–D.

177. See, e.g., Anjali Nambiar, Shivani Patel, Patricia Santiago-Munoz, Catherine Y. Spong & David B. Nelson, *Maternal Morbidity and Fetal Outcomes Among Pregnant Women At 22 Weeks' Gestation or Less With Complications In 2 Texas Hospitals After Legislation on Abortion*, 227 AM. J. OBSTETRICS & GYNECOLOGY 648, 649 (2022) (finding that state-mandated expectant management of pregnancy complications in “the periviable period was associated with significant maternal morbidity”).

178. *Id.*

179. BRITNI FREDERIKSEN, USHA RANJI, IVETTE GOMEZ & ALINA SALGANICOFF, *NATIONAL SURVEY OF OBGYNs' EXPERIENCES AFTER DOBBS 3* (2023), <https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf> [<https://perma.cc/CW9E-RMVB>].

180. *Id.*

181. Erika L. Sabbath, Samantha M. McKetchnie, Kavita S. Arora & Mara Buchbinder, *US Obstetrician-Gynecologists' Perceived Impacts of Post-Dobbs v Jackson State Abortion Bans*, JAMA NETWORK OPEN, Jan. 27, 2024, at 5–6.

182. Priya Elangovan, *New AIT Polling on Abortion and Voter Enthusiasm*, ALL IN TOGETHER (Sept. 13, 2023), <https://aitogether.org/republican-motivation-2024> [<https://perma.cc/ANZ4-YADH>].

to explain how abortion definitions have failed to exclude medically necessary treatment for pregnancy complications.

A. Missed or Incomplete Miscarriage

Many people assume that miscarriage is easy to diagnose. But this is not always the case. Though bleeding can be a sign of miscarriage, roughly 25 percent of healthy pregnancies involve some bleeding.¹⁸³ Moreover, it is not uncommon for the fetus or embryo to die before the body recognizes the loss. This is typically called a missed miscarriage, or, medically, a missed abortion.¹⁸⁴ As a result, common miscarriage symptoms happen in healthy pregnancies, and many miscarriages occur before any symptoms appear.

A missed miscarriage is fairly straightforward to diagnose later in pregnancy through the absence of previously established cardiac activity.¹⁸⁵ This type of miscarriage often comes as a shock—people undergo a routine scan only to be told that their baby has no heartbeat and that they have miscarried.¹⁸⁶ But if a loss happens before cardiac activity has been detected—which is when the majority of miscarriages occur¹⁸⁷—the absence of cardiac activity is often not diagnostic; it might simply be too early in the pregnancy for the visualization of cardiac activity.¹⁸⁸ In that instance, a miscarriage diagnosis typically requires a series of ultrasound scans or blood tests over the course of days or

183. Reem Hasan, Donna D. Baird, Amy H. Herring, Andrew F. Olshan, Michele L. Jonsson Funk & Katherine E. Hartmann, *Patterns and Predictors of Vaginal Bleeding in the First Trimester of Pregnancy*, 20 ANN. EPIDEMIOLOGY 524, 524 (2010).

184. See *Identifying and Treating a Missed Abortion*, *supra* note 60.

185. *Miscarriage*, CLEVELAND CLINIC (July 19, 2022), <https://my.clevelandclinic.org/health/diseases/9688-miscarriage> [<https://perma.cc/HE78-P7YH>].

186. See *Identifying and Treating a Missed Abortion*, *supra* note 60.

187. See Mackenzie N. Naert, Hanaa Khadraoui, Alberto Muniz Rodriguez & Nathan S. Fox, *Stratified Risk of Pregnancy Loss for Women with a Viable Singleton Pregnancy in the First Trimester*, 35 J. MATERNAL-FETAL & NEONATAL MED. 4491, 4493 (2022) (finding that after the detection of cardiac activity, the average miscarriage rate drops to 5.4 percent).

188. See Kaitlin Sullivan, “Heartbeat Pills:” Is There a Fetal Heartbeat at Six Weeks of Pregnancy?, NBC NEWS (Apr. 17, 2022, 5:39 PM), <https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-pregnancy-rcna24435> [<https://perma.cc/C47E-EHL5>].

weeks to confirm the pregnancy is not growing.¹⁸⁹ If it is not, then the embryo is confirmed dead.¹⁹⁰

In 2013, the Society of Radiologists issued guidelines on when ultrasound can diagnose a miscarriage.¹⁹¹ The organization concluded that a series of scans over eleven to fourteen days is required unless the pregnancy measures large enough that a viable fetus would have cardiac activity.¹⁹² ACOG has noted that these recommendations are conservative, designed to ensure with 100 percent certainty that no viable pregnancy is accidentally aborted.¹⁹³ Unfortunately, the additional weeks of testing can cause unnecessary delays in care that are emotionally and physically draining and do not offer any medical benefits.¹⁹⁴ Indeed, in some instances, there may be sufficient evidence to feel confident in a miscarriage diagnosis without weeks of follow-up testing.¹⁹⁵ To account for this possibility, ACOG recommends a patient-centered approach that includes considering whether the patient is willing “to postpone intervention to achieve 100% certainty of pregnancy loss.”¹⁹⁶ Nevertheless, even before *Dobbs*, “[d]espite the ACOG guidelines that recommend holistic incorporation of diagnostic imaging criteria, half of US-based OB/GYN residency programs reported rigid adherence to imaging guidelines with restrictive

189. See *Miscarriage: Diagnosis & Treatment*, MAYO CLINIC (Sept. 8, 2023), <https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/diagnosis-treatment/drc-20354304> [https://perma.cc/Z2EA-35X6].

190. *Miscarriage*, CEDARS SINAI, <https://www.cedars-sinai.org/health-library/diseases-and-conditions/m/miscarriage.html> [https://perma.cc/G4NP-4YM9].

191. Peter M. Doubilet, Carol B. Benson, Tom Bourne & Michael Blavias, *Diagnostic Criteria for Nonviable Pregnancy Early in the First Trimester*, 369 *NEW ENG. J. MED.* 1443, 1443 (2013) [hereinafter Doubilet et al., *Diagnostic Criteria*].

192. In the guidelines table, pregnancy failure can be diagnosed only when the pregnancy is large enough that a heartbeat or embryo should be present but is not, or when the embryo on a follow-up scan eleven days to two weeks after the first scan also lacks a heartbeat. *Id.* at 1446.

193. *Early Pregnancy Loss*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/11/early-pregnancy-loss> [https://perma.cc/78A7-CNK9].

194. See Donley & Lens, *supra* note 169, at 1712 (“[F]orcing someone [who knows she is miscarrying] to wait two weeks for treatment is emotionally scarring and serves no clinical purpose.”).

195. See, e.g., Colleen Judge-Golden & Rachel Flink-Bochacki, *The Burden of Abortion Restrictions and Conservative Diagnostic Guidelines on Patient-Centered Care for Early Pregnancy Loss*, 138 *J. OBSTETRICS & GYNECOLOGY* 467, 467 (2021) (describing the author’s personal experience as a physician whose own miscarriage care was delayed to confirm fetal death despite her confidence, in light of sufficient evidence, that her fetus was dead).

196. *Early Pregnancy Loss*, *supra* note 193.

institutional abortion policies being the only independent predictor.”¹⁹⁷ Now that *Dobbs* has allowed abortion bans to take effect, providers have become increasingly risk averse. Many will not provide miscarriage care, regardless of the potential harm to patients, until they can document fetal demise with certainty.¹⁹⁸ This has significantly harmed miscarriage care, as described below.

The perceived need for diagnostic certainty helps explain stories like that of Christina Zielke, who was diagnosed with a missed miscarriage in Washington, D.C., where abortion is legal.¹⁹⁹ Zielke decided to let the miscarriage resolve naturally without treatment.²⁰⁰ In the meantime, she traveled to Ohio for a wedding, where she started bleeding profusely.²⁰¹ She went to the emergency room but was denied treatment and discharged against her wishes until she “could come back in two days for a repeat hormone test to confirm [she] was miscarrying.”²⁰² Without this confirmation, removing the embryo via surgery or medication could constitute an abortion, which was banned after six weeks of pregnancy in Ohio at that time.²⁰³ No one would trust that she had already been diagnosed with a miscarriage in D.C.²⁰⁴ Later that night, she continued to bleed profusely and ultimately passed out in a bathtub filled with blood.²⁰⁵ An ambulance transported her back to the hospital, where she was finally given the lifesaving miscarriage care that she needed.²⁰⁶

Ohio defines abortion as “the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead

197. Aurora Phillips, Sofia Rachad & Rachel Flink-Bochacki, *The Association Between Abortion Restrictions and Patient-Centered Miscarriage Care: A Cross-Sectional Study of U.S. Obstetrics and Gynecology Residency Programs*, 229 AM. J. OBSTETRICS & GYNECOLOGY 41.e1, 41.e6 (2023).

198. See Donley & Lens, *supra* note 169, at 1712.

199. See Selena Simmons-Duffin, *Her Miscarriage Left Her Bleeding Profusely. An Ohio ER Sent Her Home To Wait*, NPR (Nov. 15, 2022, 12:01 PM), <https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio> [<https://perma.cc/48P7-USUH>].

200. *Id.*

201. *Id.*

202. *Id.*

203. See *id.* (“[Zielke] told [Ohio hospital staff] she already had laboratory confirmation [of a miscarriage] weeks earlier in D.C. She tried to show them her medical records on her phone and offered her Ob-Gyn’s contact information, but she says she didn’t get a response.”).

204. *Id.*

205. *Id.*

206. *Id.*

fetus or embryo.”²⁰⁷ Had the Ohio doctors removed Zielke’s pregnancy when she first visited the hospital, they might have purposely terminated a human pregnancy, which would constitute an illegal abortion unless they removed a dead embryo. The providers were clearly unwilling to provide this routine miscarriage care until they could document and confirm fetal demise.

A similar situation occurred in Texas to a woman named Amanda.²⁰⁸ Before *Dobbs*, Amanda had received surgical intervention to remove dead pregnancy tissue after a missed miscarriage.²⁰⁹ When history repeated itself after *Dobbs*, the hospital refused to give her the same treatment.²¹⁰ This was despite the fact that Amanda had received two ultrasounds within a week showing that her fetus had no cardiac activity and that her health had deteriorated enough to warrant an emergency room visit.²¹¹ Hospital notes indicated that a follow-up one week later was necessary to confirm the miscarriage.²¹² In the meantime, Amanda was forced to miscarry at home, where she experienced pain so significant that she was “digging ‘fingernail marks in [her] wall.’”²¹³ She eventually passed the pregnancy in a bathtub filled with blood.²¹⁴ Like Ohio, Texas only exempted the removal of a “dead, unborn child,”²¹⁵ such that Amanda almost surely endured this suffering because providers could not diagnose fetal death with certainty.²¹⁶

Incomplete miscarriage is another circumstance in which delayed medical care can turn an already emotionally fraught experience into a potentially deadly one—as documented online by Idaho mother

207. OHIO REV. CODE ANN. § 2919.11 (West 1974).

208. See Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> [<https://perma.cc/NHP2-8LRH>].

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* Marlena Stell, a woman in Texas, has a similar story: “My doctor had said that since the heartbeat bill had just passed, she didn’t want me to do a D and C. And she asked that I try to miscarry at home.” See Timothy Bella, *Woman Says She Carried Dead Fetus For 2 Weeks After Texas Abortion Ban*, WASH. POST (July 20, 2022, 4:16 PM), <https://www.washingtonpost.com/politics/2022/07/20/abortion-miscarriage-texas-fetus-stell/> [<https://perma.cc/4HYB-R6LD>].

213. *Id.*

214. *Id.*

215. OHIO REV. CODE ANN. § 2919.11 (West 1974); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

216. *Early Pregnancy Loss*, *supra* note 193; Doubilet et al., *Diagnostic Criteria*, *supra* note 191, at 1446.

Carmen Broesder.²¹⁷ Broesder was six weeks pregnant when she felt pain so intense that she could not stand up.²¹⁸ She experienced a torrent of blood exceeding her previous miscarriages.²¹⁹ She went to the hospital, where staff performed an ultrasound confirming the absence of a fetal heartbeat—and sent her home.²²⁰ At her OB/GYN appointment four days later, she received another no-heartbeat ultrasound but was denied surgical treatment and told to return two days later.²²¹ After continuing to bleed excessively, she returned to the emergency room the next day, where she was told that she had completed her miscarriage.²²² Yet her symptoms did not stall.²²³

Fearing for her life, Broesder went to a third hospital.²²⁴ There, doctors found part of the embryo lodged in her cervix, removed some of the remaining tissue, and prescribed a common abortion medication, misoprostol, to complete the miscarriage.²²⁵ From start to finish, Broesder bled for nineteen days.²²⁶ She no longer intends to try to have more children, fearing that it could threaten her life and leave her toddler-aged daughter without a mother.²²⁷ Idaho’s abortion ban criminalizes nearly all abortions except those “necessary to prevent the death of the pregnant woman”—not those necessary to preserve her health.²²⁸ Both pre- and post-*Dobbs*, Idaho excluded the removal of a dead fetus from its definition of abortion.²²⁹ As all these cases

217. See Mary Kekatos, *Idaho Woman Shares 19-Day Miscarriage on TikTok, Says State’s Abortion Laws Prevented Her From Getting Care*, ABC NEWS (Jan. 21, 2023, 1:04 PM), <https://abcnews.go.com/Health/idaho-woman-shares-19-day-miscarriage-tiktok-states/story?id=96363578> [<https://perma.cc/W7QH-LL3M>].

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* Patients throughout the country have also reported that pharmacists are refusing to fill medication for miscarriage management because they worry it might be used for abortion. See, e.g., Belluck, *supra* note 208; Nicole Blanchard, *Boise Pharmacist Refused To Fill Prescription For Miscarriage Meds, Citing Abortion Laws*, IDAHO STATESMAN (Feb. 5, 2024, 2:52 PM), <https://www.idahostatesman.com/news/local/community/boise/article284961042.html> [<https://perma.cc/485S-J6HX>].

226. Kekatos, *supra* note 217.

227. *Id.*

228. IDAHO CODE ANN. § 18-622 (West 2023).

229. IDAHO CODE ANN. § 18-8702 (West 2021); IDAHO CODE ANN. § 18-604 (West 2023).

demonstrate, however, if diagnosing embryotic death with certainty is required by law, pregnant patients suffer.²³⁰

B. Imminent or Inevitable Miscarriage

Losses later in pregnancy also overlap with abortion bans, but for a different reason. Here, typically, fetal death is easy to diagnose by the lack of previously seen cardiac activity. Rather, the problem is inevitable pregnancy loss, in which the pregnant person has begun miscarrying and the fetus will likely not survive but is also not yet dead.²³¹ One of the most common situations leading to inevitable pregnancy loss relates to a condition known as previable preterm premature rupture of membranes (“PPROM”).²³² Previably PPRM occurs when a pregnant person’s water breaks before viability.²³³ For most of these patients, it will be impossible to delay the onset of labor by more than a few days or weeks—at which time the fetus would still be unlikely or unable to survive.²³⁴ All the while, the pregnant person is susceptible to infection, sepsis, and, without treatment, significant morbidity and death.²³⁵ Women in other countries that have banned abortion have died when doctors delayed abortion care after PPRM.²³⁶ Here, pregnancy loss is in process and, in many cases, inevitable. Yet in states that only exempt the removal of a dead—not dying—fetus, efforts to hasten the process are considered an illegal abortion until fetal cardiac activity stops. Other conditions, like Chrissy

230. See Simmons-Duffin, *supra* note 199 (suggesting that requiring certainty puts the patient in danger); Belluck, *supra* note 208 (same).

231. *Miscarriage*, CLEVELAND CLINIC, *supra* note 185.

232. See Nambiar et al., *supra* note 177.

233. See Katrina Kraft, Sabine Schütze, Jochen Essers, Ann-Kathrin Tschürtz, Beate Hüner, Wolfgang Janni & Frank Reister, *Pre-Viable Preterm Rupture of Membranes Under 20 Weeks of Pregnancy: A Retrospective Cohort Analysis for Potential Outcome Predictors*, 278 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 177, 177 (2022) (discussing “preterm premature rupture[s] of membranes”).

234. For instance, in one study, only 27.8 percent of parents who experienced PPRM before twenty weeks of pregnancy (excluding the majority of patients who terminated their pregnancies) took a living child home from the hospital after an extensive neonatal intensive care unit (“NICU”) stay. *Id.* at 178.

235. *Id.*

236. See, e.g., Patrick Smith, *This Woman Died Because of an Abortion Ban. Americans Fear They Could Be Next*, NBC NEWS (July 4, 2022, 7:33 AM), <https://www.nbcnews.com/news/world/woman-died-ireland-abortion-ban-warning-americans-roe-v-wade-rcna35431> [<https://perma.cc/J69-HU7K>].

Teigen's placental abruption, also cause inevitable miscarriage and raise the same concerns.²³⁷

There have been many stories of people denied abortion care for inevitable pregnancy loss.²³⁸ Amanda Zurawski's story out of Texas is one of the most well-known.²³⁹ Zurawski was eighteen weeks into a pregnancy conceived after fertility treatment when her water broke.²⁴⁰ Her doctors told her that even though they could not save her daughter, Willow, they also could not provide an abortion until either Willow's heart stopped or Amanda's health deteriorated to the point that her life was threatened.²⁴¹ Zurawski's health faded faster than her daughter's, and she was finally given a life-saving abortion after she went into septic shock.²⁴² She spent three days in the ICU, where she nearly died.²⁴³ An infection grew in her uterus and threatened her fertility further.²⁴⁴ Zurawski is the lead plaintiff in a lawsuit filed with twenty other Texas patients who were denied medically necessary abortions to challenge the contours of Texas's health exception.²⁴⁵

237. See Danner T. Hodgson, Shahram Lotfipour & J. Christian Fox, *Vaginal Bleeding Before 20 Weeks Gestation Due to Placental Abruption Leading to Disseminated Intravascular Coagulation and Fetal Loss After Appearing to Satisfy Criteria for Routine Threatened Abortion: A Case Report and Brief Review of the Literature*, 32 J. Emergency Med. 387, 388–89 (2007) (describing the case of a woman who needed an emergency abortion after a placental abruption before viability).

238. See, e.g., Kimberlee Kruesi, *More Women Join Challenge to Tennessee's Abortion Ban Law*, AP NEWS (Jan. 8, 2024, 4:05 PM), <https://apnews.com/article/abortion-tennessee-lawsuit-fd630c5f55f605597d8eaa2800abbcfd> [<https://perma.cc/M7F5-Y9SV>]; Susan Szuch, *After Missouri Banned Abortions, She Was Left 'With a Baby Dying Inside.' Doctors Said They Could Do Nothing*, SPRINGFIELD NEWS-LEADER (Oct. 19, 2022, 10:27 AM), <https://www.news-leader.com/story/news/local/ozarks/2022/10/19/missouri-laws-abortion-ban-left-her-with-a-baby-dying-inside-pprom/10366865002> [<https://perma.cc/MF2K-FQ7Y>]; Hannah Thompson, *Wisconsin's Dangerous Abortion Restrictions Threatened My Life And Will Continue To Harm Women*, WIS. EXAM'R (Nov. 13, 2023, 5:15 AM), <https://wisconsinexaminer.com/2023/11/13/wisconsins-dangerous-abortion-restrictions-threatened-my-life-and-will-continue-to-harm-women> [<https://perma.cc/FRW8-AKDH>].

239. See *The Assault on Reproductive Rights in a Post-Dobbs America: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 1–2 (2023) (statement of Amanda Zurawski) (describing the circumstances surrounding her preivable PPRM and subsequent denial of care).

240. See *id.* at 1 (stating that her “membranes ruptured” twenty-two weeks early).

241. *Id.*

242. *Id.* at 2.

243. *Id.*

244. See *id.* (“The preventable harm inflicted on me has already, medically, made it harder than it already was for me to get pregnant again.”).

245. See *Zurawski v. State of Texas*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas> [<https://perma.cc/9TJP-GVZP>] (providing details regarding the lawsuit).

At the time of Zurawski’s medical emergency, Texas defined abortion as an act done “with the intent to cause the death of an unborn child of a woman known to be pregnant,” unless done with the intent to “remove a dead, unborn child whose death was caused by spontaneous abortion.”²⁴⁶ As in the cases above, her miscarriage care was an abortion until her fetus officially died, and before then, her physicians were required to wait until Texas’s life exception was triggered. Notably, Texas’s ban has a very narrow exception for medical emergencies that is only triggered by a “life-threatening physical condition.”²⁴⁷ In 2023, Texas quietly passed a law creating an affirmative defense—generally seen as the least protective type of exception²⁴⁸—for treating previable PPROM or ectopic pregnancy.²⁴⁹ This was a defense hidden within the general penal code, not one ostensibly tied to the abortion ban in any way.²⁵⁰ Indeed, the statute did not mention the word abortion at all—a fact that helped it get passed.²⁵¹

A story similar to Zurawski’s with an even more tragic ending occurred in Ohio when Brittany Watts began miscarrying at twenty-one weeks pregnant.²⁵² She went to the emergency room twice, where hospital records show that she had previable PPROM and was “at significant risk of maternal death, sepsis or complete placental abruption with catastrophic bleeding” but that cardiac activity was still present.²⁵³ Watts left the hospital after waiting eight hours for an ethics board to approve her abortion—even though Ohio’s six-week abortion ban had been enjoined²⁵⁴ and even though she was technically under the twenty-two-week limit of Ohio’s pre-*Dobbs* ban.²⁵⁵ She returned to

246. TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

247. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021).

248. Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KAISER FAM. FOUND. (June 6, 2024), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services> [https://perma.cc/TW8F-HUYU].

249. See 2023 Tex. Sess. Law Serv. Ch. 913 (West) (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 74.552 (West 2023)); Selena Simmons-Duffin, *To Expand Abortion Access in Texas, a Lawmaker Gets Creative*, NPR (Aug. 22, 2023, 5:00 AM), <https://www.npr.org/sections/health-shots/2023/08/22/1195115865/texas-abortion-bans-softened-quietly> [https://perma.cc/EPD4-FRWH].

250. TEX. CIV. PRAC. & REM. CODE ANN. § 74.552 (West 2023).

251. *Id.*; see Simmons-Duffin, *supra* note 249.

252. Remy Tumin, *Ohio Woman Who Miscarried Faces Charge That She Abused Corpse*, N.Y. TIMES (Jan. 11, 2024), <https://www.nytimes.com/2024/01/03/us/brittany-watts-ohio-miscarriage-abortion.html> [https://perma.cc/8GYN-QEKU].

253. *Id.*

254. Kitchener et al., *supra* note 22.

255. Tumin, *supra* note 252.

the emergency room the next day and left again without treatment.²⁵⁶ She had a stillbirth at home on the toilet, where many pregnancy losses occur,²⁵⁷ and flushed part of the fetal remains.²⁵⁸ Unlike the other women in this Section, her horror story did not end there.²⁵⁹ When she sought treatment after the stillbirth, Watts, a Black woman, was reported to the police and charged with “abuse of a corpse.”²⁶⁰ Though a grand jury declined to indict her,²⁶¹ Watts’s story highlights one of many important differences in the experiences of white and Black women post-*Dobbs*: both may be denied care, but as Michele Goodwin has detailed, women of color also face the compounding trauma of criminalization.²⁶²

C. Ectopic and Molar Pregnancies

Ectopic and molar pregnancies also constitute abortions under many state abortion definitions since they are not explicitly exempted from the general definition. Ectopic pregnancies occur when an embryo implants outside of the uterus, typically in a fallopian tube.²⁶³ Molar pregnancies occur when egg and sperm cells improperly join and form a noncancerous tumor.²⁶⁴ In almost all cases, ectopic and molar pregnancies are nonviable, and if not removed, cause life-threatening complications to the pregnant person.²⁶⁵ Yet the fact that a pregnancy cannot survive long-term does not mean that it is already dead. Because treatment that removes a live embryo will kill it, such treatment therefore constitutes an abortion in many states.

256. *Id.*

257. *After a Miscarriage*, MISCARRIAGE ASS’N, <https://www.miscarriageassociation.org.uk/information/miscarriage/after-a-miscarriage> [<https://perma.cc/L6X5-PTYQ>] (“If you miscarry at home or somewhere else that’s not a hospital, you are very likely to pass the remains of your pregnancy into the toilet.”).

258. *See* Tumin, *supra* note 252.

259. *See id.*

260. *Id.*

261. *Id.*

262. *See generally* MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020) (arguing that poor women of color are most affected by the increasing criminalization of miscarriages, still births, and other pregnancy-related laws).

263. *Ectopic Pregnancy*, CLEVELAND CLINIC (Jan. 18, 2023), <https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy> [<https://perma.cc/JR2N-4CUK>].

264. *Molar Pregnancy*, CLEVELAND CLINIC (Dec. 26, 2022), <https://my.clevelandclinic.org/health/diseases/17889-molar-pregnancy> [<https://perma.cc/TM93-BGVU>].

265. *Id.*; *Ectopic Pregnancy FAQs*, *supra* note 134.

Jaci Statton’s story from Oklahoma is illustrative. Statton was eight weeks into a pregnancy when she started bleeding.²⁶⁶ Up until that point, she had felt very ill—dizzy, nauseous, and weak.²⁶⁷ At the hospital, she was told that she had a partial molar pregnancy that could become cancerous or cause her to bleed out.²⁶⁸ There was no way that her pregnancy could survive, but at that time, there was cardiac activity.²⁶⁹ Statton was transferred between many hospitals; none were willing to provide her with care until either the embryo died or her health deteriorated towards death.²⁷⁰ Statton remembers being told, “We cannot touch you unless you are crashing in front of us or your blood pressure goes so high that you are fixing to have a heart attack.”²⁷¹ Eventually, someone connected her to an abortion clinic in Kansas that could see her on short notice. Travelling to this clinic required a terrifying three-hour drive during which, if anything went wrong, she could have died.²⁷² Statton survived—with significant emotional scarring.²⁷³ She decided to get sterilized to ensure that she would never become pregnant again.²⁷⁴

Oklahoma’s prior abortion definition, enacted in 2022 just before the *Dobbs* decision, includes more exceptions than do other statutes—removal of a “dead unborn child,” ectopic pregnancy, and birth control.²⁷⁵ But these exceptions were not enough to protect Statton. Due to cardiac activity, the embryo was not dead.²⁷⁶ As the pregnancy

266. Selena Simmons-Duffin, ‘I’ll Lose My Family.’ *A Husband’s Dread During an Abortion Ordeal in Oklahoma*, NPR (May 1, 2023, 10:44 AM), <https://www.npr.org/sections/health-shots/2023/05/01/1172973274/oklahoma-abortion-ban-exception-life-of-mother-molar-pregnancy> [https://perma.cc/3HBA-WV55].

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *See id.*

273. *Id.*

274. *Id.*

275. Compare H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023) (excepting removal of a “dead unborn child,” ectopic pregnancy, and birth control), with N.M. STAT. ANN. § 30-5A-2 (West 2000) (omitting any explicit exceptions to its definition of abortion as “the intentional termination of the pregnancy of a female by a person who knows the female is pregnant”).

276. H.R. 4327, 58th Leg., 2nd Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just., 531 P.3d at 117 (“An act is not an abortion if [its purpose is to] . . . remove a dead unborn child caused by spontaneous abortion.”); Simmons-Duffin, *supra* note 266.

was in her uterus, it was not an ectopic pregnancy.²⁷⁷ Adding to the confusion, Oklahoma has passed multiple abortions bans since *Dobbs*, some of which have been enjoined,²⁷⁸ its active abortion ban is from a pre-*Roe* law that bans “procur[ing a] miscarriage.”²⁷⁹ So, since Oklahoma lacks a health exception,²⁸⁰ Oklahoma physicians would not treat her until the ban’s life exception was activated.

Ectopic pregnancy in a fallopian tube involves issues very similar to molar pregnancy—a nonviable and still-living early pregnancy that can become life-threatening quickly if left untreated.²⁸¹ Since *Dobbs*, stories have surfaced of people forced to travel for ectopic pregnancy treatment or to wait until the pregnancy ruptured, creating an imminent threat to life and significant harm to future fertility.²⁸²

Very rarely, an ectopic pregnancy can occur in a location other than the fallopian tube, like a cesarean (“C-section”) scar.²⁸³ Some argue that C-section scar pregnancies should not be called ectopic pregnancies, as they typically are, because they are “located within the anatomic boundaries of the uterus” and “unlike a true ectopic pregnancy . . . can result in a live newborn,” despite grave risks to the pregnant person.²⁸⁴ Mayron Michelle Hollis in Tennessee presents an illustrative example of a complex C-section scar ectopic pregnancy. Hollis found out that she was pregnant with her fifth child just months

277. See *Ectopic Pregnancy FAQs*, *supra* note 134.

278. See, e.g., S. 612, 58th Leg., 2d Reg. Sess. (Okla. 2022), *to be codified at* OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022), *invalidated by* Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123 (Okla. 2023) (prohibiting abortion procedures except “to save the life of a pregnant woman in a medical emergency”); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022), *invalidated by* Okla. Call for Reprod. Just., 531 P.3d 117.

279. OKLA. STAT. ANN. tit. 21, § 861 (West 1999).

280. See *id.* (allowing for abortion only when the procedure is necessary to “preserve [the pregnant woman’s] life”).

281. See *Ectopic Pregnancy FAQs*, *supra* note 134 (“An ectopic pregnancy . . . can be a life-threatening emergency that needs immediate surgery . . .”).

282. See, e.g., Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care> [<https://perma.cc/KC32-6JDV>].

283. Danielle M. Panelli, Catherine H. Phillips & Paula C. Brady, *Incidence, Diagnosis and Management of Tubal and Nontubal Ectopic Pregnancies: A Review*, 1 FERTILITY RSCH. & PRAC. no. 15, 2015, at 1.

284. I. E. Timor-Tritsch, *A Cesarean Scar Pregnancy Is Not an Ectopic Pregnancy*, 59 ULTRASOUND IN OBSTETRICS & GYNECOLOGY 424, 426 (2022) (“It is true that most such pregnancies carry a serious risk and the obstetric performance of patients with [C-section scar pregnancies] is poor.”).

after her fourth child was born via C-section.²⁸⁵ The pregnancy implanted in her C-section scar.²⁸⁶ It could have ruptured at any moment, immediately putting her life in jeopardy.

Like all the women above, Hollis was denied an abortion until her health deteriorated near death.²⁸⁷ But unlike the other women, she lived in this limbo for months.²⁸⁸ Given that she had four kids and no expendable income, leaving the state for an abortion was not an option.²⁸⁹ She was in and out of the hospital during her pregnancy.²⁹⁰ When she was twenty-six weeks pregnant, her husband woke to her screaming and slipping on blood pooling around her on the floor.²⁹¹ An ambulance drove them to the hospital for an emergency C-section, during which nearly twenty doctors were in the operating room.²⁹² Though the operation was touch and go throughout, she survived.²⁹³ Her uterus did not.²⁹⁴ Her daughter, Elayna, was born at one pound fifteen ounces and survived after a lengthy neonatal intensive care unit (“NICU”) stay.²⁹⁵

At the time, Tennessee had the strictest abortion law in the country, which made all abortions illegal.²⁹⁶ It provided no exceptions and created an affirmative defense only if the abortion was performed to save the pregnant person’s life or to prevent “substantial and irreversible impairment of a major bodily function”²⁹⁷ When stories like Hollis’s started coming out, pressure began mounting that the law was too harsh.²⁹⁸ Still, in October 2022, the National Right to

285. Surana, *supra* note 167.

286. *Id.*

287. *Id.*

288. *See id.* (detailing Hollis’s diagnosis with an ectopic pregnancy at ten weeks and her inability to seek treatment until she was twenty-six weeks).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *See* TENN. CODE ANN. § 39-15-213 (West 2023) (“A person who performs or attempts to perform an abortion commits the offense of criminal abortion.”); *infra* Appendix (listing the abortion bans in effect in other states at the time).

297. TENN. CODE ANN. § 39-15-213 (West 2023).

298. *See* Kavitha Surana, “We Need To Defend This Law”: Inside an Anti-Abortion Meeting with Tennessee’s GOP Lawmakers, PROPUBLICA (Nov. 15, 2022, 12:00 PM), <https://www.propublica.org/article/inside-anti-abortion-meeting-with-tennessee-republican-lawmakers> [https://perm

Life’s Tennessee affiliate “held a webinar to encourage GOP legislators to hold the line.”²⁹⁹ The group stressed that the law intentionally put the onus on the doctor to prove that a life-saving abortion was justifiable.³⁰⁰ Why? This ensured that “quasi-elective abortions [would be] stopped”—that is, abortions performed due to a patient’s high-risk medical history.³⁰¹ To many in the antiabortion community, Hollis’s story was a triumph, not a tragedy. Nevertheless, in 2023, Tennessee modified its ban to convert its affirmative defense into a traditional life exception and to exclude ectopic and molar pregnancies from its definition of abortion.³⁰²

D. *Fetal Anomaly*

Fetal anomaly raises issues similar to those of the other categories—issues involving a wanted-yet-doomed pregnancy in which the abortion also involves a loss. When a fetal anomaly is so lethal that it is considered “fatal” or “inconsistent with life,” one might wonder how it differs from the nonviable, but still living, pregnancies described above.³⁰³ Other fetal anomalies may be less uniformly fatal but are nevertheless severe and pose a high likelihood of childhood death.³⁰⁴ Denial of abortion care in this context often leads to delayed stillbirth, meaning that the fetus dies in utero, or full-term childbirth followed by perinatal hospice care.³⁰⁵

Continuing a pregnancy that is complicated by fetal anomaly alone may be less risky than an inevitable miscarriage or a nonviable ectopic or molar pregnancy.³⁰⁶ But all pregnancies carry considerable risks,

a.cc/ZAZ7-YU88] (stating that a handful of Republicans have a desire to “clean up” or “clarify” the law based on the real-world implications).

299. *Id.*

300. *Id.*

301. *See id.*

302. 2023 Tenn. Legis. Serv. Ch. 313 (West) (codified as TENN. CODE ANN. § 39-15-213 (West 2023)).

303. *See* Matthew Coffin, Note, *Abortion at the Margins*, 76 STAN. L. REV. 269, 289 (2024); *see also* Greer Donley, *Parental Autonomy over Prenatal End-of-Life Decisions*, 105 MINN. L. REV. 175, 216–21 (2020) (arguing that parents should have a constitutional right based in parental autonomy to terminate pregnancies complicated by severe fetal anomaly as end-of-life care).

304. *See* Donley, *supra* note 303, at 186–87.

305. *See id.* at 186–88, 198–207.

306. Unlike the pregnancy complications listed in prior subsections, where life-threatening risks have been studied and documented, it is less clear to what extent fetal anomaly alone causes risks to the pregnant person’s physical health or life beyond that of a healthy pregnancy: “While

including death, and some fetal anomalies can add risks beyond the baseline risks of pregnancy.³⁰⁷ In other words, without abortion, the pregnant person is forced to endure the risks of pregnancy and childbirth only to watch their child die later on. Indeed, one predictable result of abortion bans—increased infant mortality—is already materializing.³⁰⁸

Countless post-*Dobbs* stories have surfaced in which a pregnant person has been denied an abortion for a severe fetal anomaly. Chloe, a mother from Arizona, is one example.³⁰⁹ She learned at twenty-three weeks that her fetus had alobar holoprosencephaly, a condition in which the brain does not split into two hemispheres.³¹⁰ Doctors said that if the baby—a girl named Laila—survived, she would not live long after birth nor be able to eat or breathe for long on her own.³¹¹ Days

there is some literature available pertaining to the maternal risk of carrying a pregnancy with fetal anomalies to term, there is no current data that accurately reflects the impact of recent legislation on this patient cohort.” Madison Mellquist, Megan Hoedt, Kellie N. Fusco, Rachel Alef, Kaitlyn Dittmer, Henry Ash, Wamika Shoukat, Lorenzo Fonteyn, Salome Herzstein, Allie Heineman & Harvey N. Mayrovitz, *Medical Implications of Restricting Abortions on Women Diagnosed With Fetal Anomalies Following the Overturn of Roe v. Wade: A Scoping Review*, 16 CUREUS, Apr. 25, 2024, at 2, https://assets.cureus.com/uploads/review_article/pdf/238665/20240725-319105-2oiw7t.pdf [<https://perma.cc/U9GQ-NG5G>].

307. See *Maternal Death and Pregnancy-Related Death*, MARCH OF DIMES, <https://www.marchofdimes.org/find-support/topics/miscarriage-loss-grief/maternal-death-and-pregnancy-related-death> [<https://perma.cc/96QD-G8HE>] (last updated Apr. 2024); Shivika Trivedi, *Tips For Managing Pregnancy Symptoms by Trimester*, UCHICAGO MED. (Oct. 13, 2022), <https://www.uchicagomedicine.org/forefront/womens-health-articles/tips-to-manage-common-pregnancy-symptoms-by-trimester> [<https://perma.cc/WK7J-SKMM>].

308. See, e.g., Claire Cain Miller, *In Texas, Infant Mortality Rose After Abortion Ban*, N.Y. TIMES (June 27, 2024), <https://www.nytimes.com/2024/06/26/upshot/texas-abortion-infant-mortality.html> [<https://perma.cc/NE8G-Z9G4>]. Isabelle Chapman, *Nearly Two Years After Texas' Six-Week Abortion Ban, More Infants Are Dying*, CNN (July 20, 2023, 11:33 AM), <https://www.cnn.com/2023/07/20/health/texas-abortion-ban-infant-mortality-invs> [<https://perma.cc/7M75-Z9GQ>]. This increase is not troubling to some in the antiabortion movement: “Many such children were tragically dying before the Texas Heartbeat Act. However, since they were aborted, they were not counted as infant deaths.” Samantha Kamman, *CNN Report Implying Texas Abortion Ban Behind Spike in Infant Deaths is ‘Misleading’: Researcher*, CHRISTIAN POST (July 22, 2023), <https://www.christianpost.com/news/is-texas-abortion-ban-behind-spike-in-infant-deaths.html> [<https://perma.cc/7M75-Z9GQ>] (quoting Michael J. New, *CNN Misleads on Texas's Infant-Mortality Rate*, NAT'L REV. (July 20, 2023, 11:01 PM), <https://www.nationalreview.com/corner/cnn-misleads-on-texas-infant-mortality-rate> [<https://perma.cc/849H-QSHV>]).

309. Katie Kindelan, *Woman Has 44 Hours With Her Baby Born After a Nonviable Pregnancy*, GOOD MORNING AM. (June 24, 2023, 4:26 AM), <https://www.goodmorningamerica.com/wellness/story/44-hours-baby-carried-nonviable-pregnancy-term-after-97451344> [<https://perma.cc/F8NN-ZFC2>].

310. *Id.*

311. *Id.*

later, *Dobbs* came down, teeing up Arizona’s current fifteen-week ban.³¹² Chloe was suddenly ineligible for abortion in her state.³¹³ She arranged flights and scheduled an abortion at a clinic in a different state.³¹⁴ Days before her departure date, however, the clinic canceled her appointment, citing threats after Chloe had documented her experience online.³¹⁵ Unable to obtain another appointment, and at almost thirty weeks pregnant, Chloe continued the pregnancy, becoming extremely depressed.³¹⁶

She gave birth in September 2022.³¹⁷ Laila lived for about forty-four hours, during which she struggled to breathe and “scream[ed] as loud as she could because she could not eat” before going into hospice care.³¹⁸ Chloe was treated for anxiety, depressive disorder, and postpartum depression after the birth; she struggled to care for her older daughter.³¹⁹ Arizona does not exclude fetal anomalies from its abortion definition nor except fetal anomalies from its fifteen-week abortion ban.³²⁰ Notably, many, if not most, fetal anomalies are identified after fifteen weeks.³²¹

Another example is Kelly Shannon, who discovered her fetus was sick while pregnant in Alabama, where the state’s definition of abortion exempts pregnancy terminations for “lethal fetal anomal[ies].”³²² Her fetus had a combination of diagnoses that on their own would not be considered lethal, including Trisomy 21 (Down syndrome), a heart defect, and an abdominal tumor that was growing quickly.³²³ Her physicians felt confident that the combination of conditions meant the fetus would not survive.³²⁴ But a hospital

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *See infra* Appendix.

321. *Diagnosis of Birth Defects*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/birthdefects/diagnosis.html> [<https://perma.cc/6WE5-TX9E>] (last updated June 28, 2023).

322. ALA. CODE § 26-23H-3 (2019); Nadine El-Bawab, *Alabama Mother Denied Abortion Despite Fetus’ ‘Negligible’ Chance of Survival*, ABC NEWS (May 2, 2023), <https://abcnews.go.com/US/alabama-mother-denied-abortion-despite-fetus-negligible-chance/story?id=98962378> [<https://perma.cc/6T96-NDAR>].

323. El-Bawab, *supra* note 322.

324. *Id.*

committee refused to approve it. According to Shannon, “[t]he committee felt that since each condition was by itself potentially survivable—not that they would lead to any kind of quality of life, just that they could potentially lead to life—that under Alabama law they did not think that my case met the criteria for termination.”³²⁵ In the end, Shannon also traveled hundreds of miles, to Virginia, to get the care she needed, paying thousands of dollars out of pocket.³²⁶ Once Shannon’s story went public, the hospital issued a statement saying that it “does not perform *elective* abortions.”³²⁷

The antiabortion movement does not seem fazed by these tragedies. Rather, their longstanding position has been that abortion in the context of fetal anomaly is ableist and that bans are necessary to avoid eugenics.³²⁸ In their view, “[t]he compassionate approach to these heartbreaking diagnoses is perinatal palliative care, which honors, rather than ends, the child’s life.”³²⁹ In other words, their belief is that the status quo is working.

E. *Nonemergent Maternal Health*

Beyond the examples listed above, there is also the concern about pregnancies that threaten the health of the pregnant person, even when the fetus is healthy. Pregnancy is inherently a risky endeavor, especially in the United States, which has the highest maternal mortality among high-income countries by a factor of three.³³⁰ These risks are higher for women of color, especially Black women, and for those with medically complicated pregnancies.³³¹ Conditions can also arise in pregnancy—

325. *Id.*

326. *Id.*

327. *Id.* (emphasis added).

328. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2063–65 (2021).

329. Greer Donley, *What Happened to Kate Cox Is Tragic, and Completely Expected*, N.Y. TIMES (Dec. 17, 2023), <https://www.nytimes.com/2023/12/17/opinion/kate-cox-abortion-texas-excptions.html> [<https://perma.cc/6W3Y-EST5>] (quoting Tex. Right to Life).

330. Jamila Taylor, Anna Bernstein, Thomas Waldrop & Vina Smith-Ramakrishnan, *The Worsening U.S. Maternal Health Crisis in Three Graphs*, CENTURY FOUND. (Mar. 2, 2022), <https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs> [<https://perma.cc/RDH7-38SA>].

331. Powell, *supra* note 20, at 41–47 (noting the significantly increased pregnancy risks for disabled women); Tripti Gupta & Amanda Wen Cai, *Implications of Restricting Legal Abortion Access on Cardio-Obstetrics Care*, AM. COLL. CARDIOLOGY (Aug. 22, 2022), <https://www.acc.org/Membership/Sections-and-Councils/Fellows-in-Training-Section/Section-Updates/2022/08/22/17>

like cancer—which complicate previously uncomplicated pregnancies.³³²

For instance, just after *Dobbs*, gynecologic oncologist Monica Vetter saw Patient M, a Kentucky mother of five who was twenty-one weeks pregnant and had locally advanced cervical cancer.³³³ The recommended treatment—a low dose of chemotherapy and a high dose of radiation—was not an option in pregnancy, and Patient M wanted an abortion.³³⁴ Since there is no maternal health exclusion in the state’s abortion definition,³³⁵ she was dependent on the health exception in the state’s ban. This exception allows for abortion care only “to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.”³³⁶

The hospital panel rejected Patient M’s request for an abortion, deeming her situation ineligible for the medical exception.³³⁷ During her pregnancy, Patient M was given a non-standard treatment, which Vetter said was not thoroughly tested for treating her form of cancer.³³⁸ Nearly three months later, Patient M delivered her baby seven weeks early so that she could begin proper treatment.³³⁹ Though Patient M stabilized,³⁴⁰ it is impossible to predict how the nearly three-month delay in care might affect her cancer’s trajectory over time.

Kate Cox provides another prominent example. Cox and her husband were devastated to learn that after having two children, both delivered via C-section, their third baby had Trisomy 18, a condition that is typically considered fatal.³⁴¹ The Coxes live in Texas, which, as noted, bans abortion unless the pregnant person has a “life-threatening

/46/Implications-of-Restricting-Legal-Abortion-Access-on-Cardio-Obstetrics-Care [https://perma.cc/V7RA-6XBW].

332. *Cancer During Pregnancy*, AM. CANCER SOC’Y, <https://www.cancer.org/cancer/managing-cancer/making-treatment-decisions/cancer-during-pregnancy.html> [https://perma.cc/5L2K-A8RN].

333. Jeannie Baumann, *Abortion Restrictions Weakening Cancer Care, Other Treatments*, BLOOMBERG LAW (Aug. 14, 2023, 5:04 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/abortion-restrictions-weakening-cancer-care-other-treatments> [https://perma.cc/2PZ3-XBPM].

334. *Id.*

335. KY. REV. STAT. ANN. § 311.821 (West 2021).

336. *Id.*; KY. REV. STAT. ANN. § 311.772 (West 2019).

337. Baumann, *supra* note 333.

338. *Id.*

339. *Id.*

340. *Id.*

341. *See* Complaint at 3, 6, *Cox v. Texas*, No. D-1-GN-23-08611 (Tex. Dec. 7, 2023).

physical condition.”³⁴² Neither the definition nor the ban exclude fetal anomalies.³⁴³ When Cox asked about terminating the pregnancy, her doctor explained that they could not do so until the fetus’s heart stopped.³⁴⁴ And if the baby survived to term, her options were bad: she would either have to undergo a third C-section or induction.³⁴⁵ Induction risked uterine rupture, a rare but catastrophic outcome that could kill her or make her infertile.³⁴⁶ A third C-section—undergoing major abdominal surgery once again—also carried risks, and, even more importantly for Cox, might ruin her chance at having a third child.³⁴⁷ Meanwhile, Cox was also at increased risk for gestational diabetes and hypertension and had been suffering symptoms of early labor, including cramping and leaking fluid.³⁴⁸

A Texas judge gave Cox permission to receive an abortion in Texas.³⁴⁹ But the Texas Attorney General threatened to sue any hospital that provided Cox with an abortion.³⁵⁰ He appealed her case to the Texas Supreme Court, which blocked her from getting the procedure.³⁵¹ The court found that there was no evidence that she had a “life-threatening physical condition” as required by the exception.³⁵² She was ultimately forced to leave the state to obtain medical care.³⁵³

F. *Chilling Effect on Adjacent Care*

The chilling effect of abortion bans on reproductive healthcare is enormous. Beyond the genuine or perceived ambiguities described

342. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021).

343. *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017).

344. Complaint at 6, Cox v. Texas, No. D-1-GN-23-08611 (Tex. Dec. 7, 2023).

345. *Id.*

346. *Uterine Rupture*, CLEVELAND CLINIC (Nov. 30, 2022), <https://my.clevelandclinic.org/health/diseases/24480-uterine-rupture> [<https://perma.cc/RBV5-7JML>].

347. *Id.*

348. *Id.* at 5–6.

349. J. David Goodman, *Texas Judge Grants Woman’s Request for Abortion, in Rare Post-Roe Case*, N.Y. TIMES (Dec. 7, 2023), <https://www.nytimes.com/2023/12/07/us/texas-abortion-ruling-exception.html> [<https://perma.cc/HEP4-Y8WV>].

350. See Letter from Ken Paxton, Att’y Gen. of Tex., to The Methodist Hosp., The Women’s Hosp. of Tex. & Tex. Child. Hosp. (Dec. 7, 2023) (on file with authors) (noting that the temporary restraining order issued by the judge would not insulate hospitals from liability for performing an abortion).

351. Donley, *supra* note 303.

352. *In re State*, 682 S.W.3d 890, 892–93 (Tex. 2023).

353. *Texas Woman Who Needs Emergency Abortion Forced To Flee State*, CTR. REPROD. RTS. (Dec. 11, 2023), <https://reproductiverights.org/texas-woman-who-needs-emergency-abortion-forced-to-flee-state> [<https://perma.cc/G6XJ-VUBS>].

above, some providers seem to be refusing to offer any medications or procedures for miscarriage at all, afraid that such care would be interpreted as an abortion despite clear fetal death.³⁵⁴ Pregnant patients are sent home to miscarry alone without medical options, even though medical interventions can reduce risks and time to completion while improving the patient experience.³⁵⁵ For instance, Jess Hamilton had a miscarriage at thirteen weeks in Texas.³⁵⁶ Her miscarriage had a clear diagnosis of fetal death, and yet no provider she saw would schedule a procedure to complete the miscarriage.³⁵⁷ Hamilton was prescribed medication to help the miscarriage progress, but it left her hemorrhaging and in debilitating pain.³⁵⁸ After seeking medical help three times, she nearly died from blood loss after passing out on her bathroom floor.³⁵⁹

Health care providers have appeared to equate particular drugs or procedures with abortion, even though no state defines abortion that way. Patients have reported that some physicians will not prescribe, or pharmacies will not dispense, miscarriage management drugs because they are also used for abortion.³⁶⁰ A new Louisiana law classifying two abortion drugs as “controlled dangerous substances” fuels this fire by ignoring that these drugs are also the gold standard for miscarriage management.³⁶¹ This comes after Louisiana defines “abortion-inducing drugs” to include methotrexate—which can cause abortions in high

354. See, e.g., Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> [<https://perma.cc/NHP2-8LRH>]; Westwood, *supra* note 61 (“Louisiana’s near-total abortion ban . . . has raised fears among physicians that they could potentially be investigated for treating a miscarriage, since the same treatments are also used for abortion.”).

355. See Citizen Petition from the Am. Coll. Obstetricians & Gynecologists to Lauren Roth, Assoc. Comm’r for Pol’y, FDA (Oct. 4, 2022), at 4–6, <https://emaaproject.org/wp-content/uploads/2022/10/Citizen-Petition-from-the-American-College-of-Obstetrician-and-Gynecologists-et-al-10.3.22-EMAA-website.pdf> [<https://perma.cc/3HCC-EAGA>].

356. Bonnie Fuller, *Texas’ Abortion Ban Nearly Killed His Wife. Now He’s Speaking Out*, MS. (June 17, 2024), <https://msmagazine.com/2024/06/17/ryan-hamilton-texas-abortion-miscarriage-women-pregnant-death> [<https://perma.cc/XJ6K-9P97>].

357. See *id.*

358. *Id.*

359. *Id.*

360. See Belluck, *supra* note 208 (“[The uncertain climate has] caused some pharmacists to deny or delay filling prescriptions for medication to complete miscarriages . . .”).

361. Kevin McGill, *Louisiana Governor Signs Bill Making Two Abortion Drugs Controlled Dangerous Substances*, ASSOCIATED PRESS (May 24, 2024), <https://apnews.com/article/abortion-pills-louisiana-controlled-dangerous-substances-0984bfd536a5110997dd9c8264bf9e3> [<https://perma.cc/PAK5-G3GG>].

doses and is also used to treat ectopic pregnancy³⁶²—but to exclude “the use of methotrexate to treat an ectopic pregnancy,” and in the same statute defines abortion as explicitly excluding “the use of methotrexate to treat an ectopic pregnancy.”³⁶³ Even more horrifying is that some miscarriage patients have been forced to undergo a C-section (major abdominal surgery) or labor and delivery (which can take days and requires birthing a dead baby) to avoid anything that resembles an abortion procedure.³⁶⁴ The fear is that a D&E—the safest, least invasive way to remove a dead fetus³⁶⁵—is an abortion, even when the fetus is dead.³⁶⁶ No state defines abortion as a particular drug or procedure, but a drug or procedure’s association with abortion is chilling its use in other, legal contexts.

The same chilling effect can be observed for ectopic pregnancy. For instance, a Texas hospital diagnosed Kelsie Norris-De La Cruz with an ectopic pregnancy it claimed might still be “viable”—and then sent her home,³⁶⁷ months after Texas added its new affirmative defense for removing an ectopic pregnancy in 2024.³⁶⁸ Norris-De La Cruz contacted abortion providers in other states to get care, only to learn that ectopic pregnancy treatment was legal in Texas.³⁶⁹ She was treated at another Texas hospital twenty-four hours later, but the pregnancy

362. Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022, 11:10 AM), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis> [<https://perma.cc/GJ2M-V4TE>].

363. LA. STAT. ANN. § 14:87.1 (2022).

364. See LIFT LA., PHYSICIANS FOR HUMAN RIGHTS, REPRODUCTIVE HEALTH IMPACT & CENTER FOR REPRODUCTIVE RIGHTS, CRIMINALIZED CARE: HOW LOUISIANA’S ABORTION BANS ENDANGER PATIENTS AND CLINICIANS 23 (Mar. 2024), <https://www.liftlouisiana.org/criminalizedcare> [<https://perma.cc/8XGS-VPK6>] (“One emergency medicine physician recounted a situation where a colleague performed a c-section on a patient with . . . a condition that would not result in a viable pregnancy.”).

365. Kate Pettit, Haylea Sweat, Matthew Zuber, Amaya Cotton-Caballero, James Ferguson, Donald Dudley, Annelee Boyle & Christian Chisholm, *Improved Safety of Second Trimester Dilation and Evacuation Versus Induction of Labor in the Management of Fetal Demise or Termination*, Abstract Presented at 37th Annual Meeting of the Society for Maternal Fetal Medicine (Jan. 27, 2017), in 216 AM. J. OBSTETRICS & GYNECOLOGY (SUPP. ISSUE 1), 2017, at S276, S276, <https://www.ajog.org/action/showPdf?pii=S0002-9378%2816%2931180-2> [<https://perma.cc/E6HS-F3K7>].

366. *Id.*

367. Caroline Kitchener, *An Ectopic Pregnancy Put Her Life At Risk. A Texas Hospital Refused To Treat Her*, WASH. POST (Feb. 23, 2024, 6:00 AM), <https://www.washingtonpost.com/politics/2024/02/23/texas-woman-ectopic-pregnancy-abortion> [<https://perma.cc/6GUK-CPLB>].

368. *See id.*

369. *Id.*

had already begun to rupture, and she lost most of her right fallopian tube as a result.³⁷⁰ Providers not involved in Norris-De La Cruz's care told the Washington Post that “ectopic pregnancies . . . can be hard to diagnose on an ultrasound with 100 percent certainty . . . and if the diagnosis is wrong, a doctor might fear potential legal repercussions for terminating a viable pregnancy.”³⁷¹

Reproductive health care is not the only care impacted. Rheumatology patients have also experienced this chilling effect.³⁷² For instance, one of the most common rheumatoid arthritis drugs is methotrexate.³⁷³ Since *Dobbs*, rheumatology patients have sounded the alarm about being denied this medically necessary drug because of fears related to abortion bans.³⁷⁴ Some patients have had to prove sterility to access them.³⁷⁵ Surveys of rheumatologists reveal that abortion bans have chilled rheumatologists' prescriptions of these medications to women of reproductive age for fear that they may accidentally terminate an unknown pregnancy.³⁷⁶ Though it is unlikely that a definition of abortion would encompass such conduct—as there would be no intent to terminate—the chilling effect is very real.

* * *

These stories of medical crises paint a vivid picture of the human costs that state abortion restrictions have created. Pregnancy inherently carries risks like missed or incomplete miscarriage, imminent or inevitable miscarriage, ectopic and molar pregnancy, fetal anomaly, and life- and health-threatening maternal health problems. Unless abortion definitions specifically create exclusions for these forms of care, they can qualify as abortion and fall within a ban's prohibition. At the same time, bans' exclusions themselves are also proving problematic. Merely excluding removal of a dead fetus, for instance, is woefully underinclusive of all miscarriage care.

In response to the barrage of bad press, antiabortion activists and lawmakers frequently retort that their bans do not actually prohibit the

370. *Id.*

371. *Id.*

372. *See* Shepherd & Sellers, *supra* note 362.

373. *Id.*

374. *Id.*

375. *See, e.g., id.* (noting that one patient “decided to get sterilized” so that she could resume taking methotrexate).

376. *See* Bermas et al., *supra* note 115, at 485–86.

treatment at issue and that doctors are to blame for failing to offer this care.³⁷⁷ But this Article demonstrates that the laws are vague and create genuine ambiguities as to what care is covered. Antiabortion legislatures have tried to respond to the damage by modifying the definition of abortion, rather than by expanding or broadening health exceptions. Yet, as we argue below, these ambiguities are a function of the complicated experience of pregnancy and therefore not fixable with clearer statutory language.

III. SHIFTING DEFINITIONAL SANDS IN RESPONSE TO *DOBBS*

In the first two years after *Dobbs*, nineteen states changed how they define abortion.³⁷⁸ Ten of the nineteen currently ban abortion before viability: Georgia, Idaho, Louisiana, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, Utah, and West Virginia.³⁷⁹ Three other states—Kansas, Montana, and Wyoming—have Republican legislatures that are hostile to abortion rights, but courts

377. See, e.g., Kimberlee Kruesi, *Asked To Clear Up Abortion Bans, GOP Leaders Blame Doctors and Misinformation For The Confusion*, ASSOCIATED PRESS (Mar. 11, 2024, 11:50 AM), <https://apnews.com/article/abortion-bans-exceptions-doctors-lawmakers-7cefa4a248076268c789ea05b367f1a> [<https://perma.cc/LMG9-CZ8N>] (“[A]s doctors and patients insist the laws’ exceptions are dangerously unclear . . . GOP leaders accuse abortion rights advocates of deliberately spreading misinformation and doctors of intentionally denying services in an effort to undercut the bans and make a political point.”); Belluck, *supra* note 208 (“He blamed such problems on ‘a breakdown in communication of the law, not the law itself,’ adding ‘I have seen reports of doctors being confused, but that is a failure of our medical associations’ to provide clear guidance.”); Nadine El-Bawab & Mary Kekatos, *‘The Law Is Quite Clear’: Anti-Abortion Doctor Testifies in Support of Texas’ Ban*, ABC NEWS (July 20, 2023, 6:32 PM), <https://abcnews.go.com/US/doctors-testify-confusion-surrounding-texas-abortion-bans/story?id=101521408> [<https://perma.cc/29CN-MSSV>] (“‘The law is quite clear,’ [a Texas OB-GYN] said. ‘The fault lies with the physicians are not [sic] being given guidance’”); Caroline Kitchener & Dan Diamond, *Faced with Abortion Bans, Doctors Beg Hospitals for Help with Key Decisions*, WASH. POST (Nov. 1, 2023, 4:44 PM), <https://www.washingtonpost.com/politics/2023/10/28/abortion-bans-medical-exceptions> [<https://perma.cc/57NC-RRVA>] (“[Florida Senator] Grall said the problem was not the laws themselves but the doctors who are playing ‘games and politics’ by willfully misinterpreting them”). It is worth noting that most antiabortion legislation is drafted by antiabortion activists. See, e.g., *Pro-Life Model Legislation and Guides*, AMS. UNITED FOR LIFE, <https://aul.org/law-and-policy> [<https://perma.cc/8DP9-V7V4>].

378. See, e.g., LA. STAT. ANN. § 40:1061.1.2(C)(1) (2022); see also *infra* Appendix.

379. ARK. CODE ANN. § 5-61-304 (West 2022); GA. CODE ANN. § 16-12-141 (West 2019); IDAHO CODE ANN. § 18-622 (West 2023); LA. STAT. ANN. § 40:1061.1.2 (2022); NEB. REV. STAT. § 71-6915 (West 2023); N.C. GEN. STAT. ANN. §§ 90-21.81A, 90-21.81B (West 2023); N.D. CENT. CODE ANN. §§ 12.1-19.1-02, 12.1-19.1-03 (West 2023); OKLA. STAT. ANN. tit. 21, § 861 (West 1999); S.C. CODE ANN. § 44-41-630 (2023); TENN. CODE ANN. § 39-15-213 (West 2023); UTAH CODE ANN. § 76-7-302 (West 2022); W. VA. CODE ANN. § 16-2R-3 (West 2022).

that have enjoined bans or constitutionally protected abortion rights.³⁸⁰ We refer to these thirteen states, and others states with active or court-blocked previability bans, as abortion-hostile states. These states have changed their definition of abortion in response to the barrage of news stories about patients in medical crises being denied abortion care.³⁸¹

A smaller number of states that protect abortion rights have also changed or added abortion definitions since *Dobbs*. Four states—Hawaii, Michigan, Minnesota, and Washington—changed an existing definition,³⁸² and two states—New York and Vermont—added a first-time definition of abortion to their statutes after *Dobbs*.³⁸³ We refer to these six states, and other states in which abortion remains legal and not under threat, as abortion-supportive states.

This Section focuses first on how the thirteen abortion-hostile states have narrowed their abortion definition since *Dobbs* by increasing definitional exclusions.³⁸⁴ This Section then analyzes the six abortion-supportive states, finding that these jurisdictions have broadened their definitions as they have expanded abortion protections.

380. See KAN. STAT. ANN. § 65-6701 (West 2023) (banning all abortion after viability); MONT. CODE ANN. § 50-20-1003 (West 2023) (banning all abortion); WYO. STAT. ANN. § 35-6-123 (West 2023) (banning all abortion), *enjoined by* *Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

381. See, e.g., John McCormack, *Texas Democrats and Republicans Find Common Ground on Abortion*, NAT'L REV. (June 15, 2023, 6:30 AM), <https://www.nationalreview.com/2023/06/texas-democrats-and-republicans-find-common-ground-on-abortion> [<https://perma.cc/C84G-DFD6>] (“[W]e wanted to remove any doubt and remove any excuse for not giving the care that the moms need in these cases . . . Democrats and Republicans [in Texas] recognize that women were being harmed by this [incorrect] interpretation of the law.”) (“[incorrect]” in original); Kimberlee Kruesi, *Tennessee Governor Signs Narrow Abortion Exemption Bill*, AP NEWS (Apr. 28, 2023, 1:24 PM), <https://apnews.com/article/tennessee-abortion-exemption-f9c1ab86edcfb358f225e7c006cae618> [<https://perma.cc/UZ56-8JZV>]; James Dawson, *Republicans Try To Fix Confusion Over Ectopic Pregnancies and Abortion*, BOISE STATE PUB. RADIO NEWS (Jan. 16, 2023, 1:34 PM), <https://www.boisestatepublicradio.org/politics-government/2023-01-16/republicans-try-to-fix-confusion-over-ectopic-pregnancies-and-abortion> [<https://perma.cc/J86F-6WW6>].

382. 2023 Haw. Legis. Serv. Act 2 (West) (codified as HAW. REV. STAT. ANN. § 453-16 (West 2023)); MICH. COMP. LAWS ANN. § 333.2690 (West 2023); 2023 Minn. Sess. Law Serv. Ch. 70 (West) (codified as MINN. STAT. ANN. § 145.411 (West 2023)); 2023 Wash. Legis. Serv. Ch. 191 (West) (codified as WASH. REV. CODE ANN. § 19.373.010 (West 2023)).

383. 2023 N.Y. Sess. Laws Ch. 57 (McKinney) (codified at N.Y. PUB. HEALTH LAW § 2599-bb-1 (McKinney 2024)); 2023 Vt. Acts & Resolves 8 (codified at VT. STAT. ANN. tit. 8, § 4099e (West 2023)).

384. In Wyoming, the new definition is included in an enjoined ban, but we nevertheless included it in the cohort as evidence of how *legislatures* are responding to the post-*Dobbs* environment. See WYO. STAT. ANN. § 35-6-122 (West 2023), *enjoined by* *Johnson*, 2023 WL 2711603.

A. *Abortion-Hostile States: Narrowing Definitions To Respond to the Dobbs Backlash*

In the thirteen abortion-hostile states that amended their definition of abortion following *Dobbs*, a few trends have emerged. First and foremost, states have attempted to exclude certain types of medically necessary reproductive health care. Second, states have tweaked their knowledge requirements; specifically, more states have chosen to move toward requiring merely “knowable” pregnancies rather than “known” pregnancies. Third, a few states have broadened their act requirement to account for conduct by nonphysician actors and informal networks who assist in medication abortions. This Section concludes by noting how states’ new abortion definitions interact with states’ abortion bans.

1. *Definitional Exclusions.* The most obvious finding of our research is that abortion-hostile states are responding to *Dobbs* by adding definitional exclusions. Thirteen of the fifteen abortion-hostile states that changed their abortion definitions after *Dobbs* added or broadened an exclusion.³⁸⁵ Ten of the thirteen states had already exempted removal of a dead fetus prior to *Dobbs*;³⁸⁶ after *Dobbs*, the remaining three states—South Carolina, West Virginia, and

385. 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)); 2023 Idaho Legis. Serv. Ch. 298 (West) (codified as IDAHO CODE ANN. § 18-604 (West 2023)); 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701 (West 2023)); 2022 La. Sess. Law Serv. Act 545 (West) (codified as LA. STAT. ANN. § 14:87.1 (2022)); 2023 Mont. Laws Ch. 490 (codified at MONT. CODE ANN. § 50-20-1002 (West 2023)); 2023 Neb. Legis. Serv. L.B. 574 (West) (codified as NEB. REV. STAT. ANN. § 71-6914 (West 2023)); 2023 N.C. Legis. Serv. S.B. 20 (West) (codified as N.C. GEN. STAT. ANN. § 90-21.81B (West 2023)); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023)); 2023 S.C. Acts 70 (amending S.C. CODE ANN. § 44-41-610 (2023)); 2023 Tenn. Legis. Serv. Ch. 313 (West) (amending TENN. CODE ANN. § 39-15-213 (West 2023)); 2022 W. Va. Legis. Serv. 3d Ex. Sess. Ch. 1 (amending and reenacting W. VA. CODE ANN. §§ 16-2R-2, 16-2R-4 (West 2022)); 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson*, 2023 WL 2711603. The only state that did not was Utah, which removed its birth control exclusion. 2023 Utah Legis. Serv. Ch. 301 (West).

386. ARK. CODE ANN. § 20-16-603 (West 2015); GA. CODE ANN. § 31-9A-2 (West 2012); IDAHO CODE ANN. § 18-8702 (West 2021); KAN. STAT. ANN. § 65-6701 (West 2011); LA. STAT. ANN. § 40:1061.9 (2013) (redesignated as § 40:1061.1.1 in 2022); MONT. CODE ANN. § 50-20-703 (West 2021); NEB. REV. STAT. ANN. § 71-6901 (West 2011); N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007) (repealed 2023); OKLA. STAT. ANN. tit. 63, § 1-757.2 (West 2021); TENN. CODE ANN. § 37-10-302 (West 1988); UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023).

Wyoming—added this exclusion to their new definitions.³⁸⁷ Today, a total of thirty-five states have a miscarriage exclusion in their definition.³⁸⁸

South Carolina’s new exclusion for removal of a dead fetus does not include specifications for how the fetus died; in contrast, Wyoming’s exclusion applies when the fetal death was “caused by spontaneous abortion or intrauterine fetal demise.”³⁸⁹ As noted above, specifying the cause of death could be an intentional decision to implicate providers who complete an incomplete self-managed abortion—if the fetus did not die naturally, removing it could still constitute an abortion. West Virginia did not opt for the classic and flawed “removal of a dead fetus” language. Instead, it excludes “intrauterine fetal demise,” “stillbirth,” and “miscarriage,” which “includes the medical terms ‘spontaneous abortion,’ ‘missed abortion,’ and ‘incomplete abortion.’”³⁹⁰ Utah also made an interesting change. Utah had already excluded “removal of a dead fetus” before *Dobbs*; after *Dobbs*, it deleted language that defined abortion as “the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.”³⁹¹ This language clearly conflated miscarriage and abortion care, and removing it was likely intended to mitigate confusion.

Before *Dobbs*, only five of the thirteen abortion-hostile states that changed their abortion definition had an ectopic pregnancy exclusion.³⁹² After *Dobbs*, six more states excluded ectopic pregnancy,³⁹³ bringing the total number of states with this definitional

387. 2023 S.C. Acts 70 (amending S.C. CODE ANN. § 44-41-610 (2023)); 2022 W. Va. Legis. Serv. 3d Ex. Sess. Ch. 1 (amending and reenacting W. VA. CODE ANN. §§ 16-2R-2, 16-2R-4 (West 2022)); 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson*, 2023 WL 2711603.

388. *See, e.g.*, IDAHO CODE ANN. § 18-8702 (West 2021); *see also infra* Appendix.

389. *See* S.C. CODE ANN. § 44-41-610 (2023); WYO. STAT. ANN. § 35-6-122(a)(i)(B) (West 2023).

390. W. VA. CODE ANN. § 16-2R-2 (West 2022).

391. UTAH CODE ANN. § 76-7-301 (West 2010); 2023 Utah Legis. Serv. Ch. 301 (West) (amending § 76-7-301).

392. *See supra* note 133 and accompanying text.

393. 2019 Ark. Legis. Serv. Act 180 (West) (codified as ARK. CODE ANN. § 5-61-303 (West 2019)); 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)); 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701 (West 2023)); 2023 N.C. Legis. Serv. S.B. 20 (West) (codified as N.C. GEN. STAT. ANN. § 90-21.81B (West 2023)); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN.

exclusion to eighteen. Unlike the dead fetus exclusion, which has been present in abortion definitions for decades, the ectopic pregnancy exception is of a more recent vintage, as most states added this exclusion in the last five years.³⁹⁴ Louisiana, which already had an exclusion for ectopic pregnancy, added a duplicative exclusion for “[t]he use of methotrexate to treat an ectopic pregnancy.”³⁹⁵

Louisiana’s definition, which was already fairly detailed, added more exclusions.³⁹⁶ It was the only state in the abortion-hostile cohort to add an exception for certain lethal fetal anomalies (joining Alabama³⁹⁷), excluding “[t]he removal of an unborn child who is deemed to be medically futile.”³⁹⁸ However, in addition to the futility requirement, abortion for fetal anomaly is only excluded if it occurs in “a licensed ambulatory surgical center or hospital” and if the provider reports it to the state with a diagnosis following the procedure.³⁹⁹ The Louisiana Department of Health issued a list of conditions that would meet this standard.⁴⁰⁰ But, the list has required updating, and many pregnant patients cannot get these abortions in state.⁴⁰¹

Louisiana was also one of two states to add a maternal health exclusion into the abortion definition itself. The definition excludes: “a medical procedure necessary . . . to prevent the death or substantial risk of death to the pregnant woman due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.”⁴⁰² This language tracks the health exception

§ 12.1-19.1-01 (West 2023)); 2023 Tenn. Legis. Serv. Ch. 313 (West) (amending TENN. CODE ANN. § 39-15-213 (West 2023)); 2023 Wyo. Legis. Serv. Ch. 184 (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

394. *See also infra* Appendix.

395. 2022 La. Sess. Law Serv. Act 545 (West) (codified as LA. STAT. ANN. § 14:87.1 (2022)).

396. *See id.*

397. ALA. CODE § 26-23H-3 (2019).

398. LA. STAT. ANN. § 14:87.1 (2022) (“The diagnosis shall be a medical judgment certified by two qualified physicians and recorded in the woman’s medical record.”).

399. *Id.*

400. Paul Braun, *Louisiana Health Officials Issue List of Conditions That Would Be Exempt From State Abortion Ban*, WWNO (Aug. 2, 2022, 3:48 PM), <https://www.wwno.org/2022-08-02/louisiana-health-officials-issue-list-of-conditions-that-would-be-exempt-from-state-abortion-ban> [https://perma.cc/67XG-PLCP].

401. *See, e.g.,* Ava Sasani & Emily Cochrane, ‘I’m Carrying This Baby Just To Bury It’: The Struggle To Decode Abortion Laws, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/us/politics/louisiana-abortion-law.html> [https://perma.cc/7JAG-TX5A].

402. LA. STAT. ANN. § 14:87.1 (2022).

language that is used in most abortion bans, including Louisiana's.⁴⁰³ However, the statute requires that “the physician shall make reasonable medical efforts . . . to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.”⁴⁰⁴ This language is often interpreted to require physicians to complete the abortion through labor induction or C-section.⁴⁰⁵

Montana changed its maternal health exception from “treat[ment of] a maternal disease or illness for which the prescribed drug is indicated” to “a separation procedure performed because of a medical emergency and prior to the ability of the unborn child to survive outside of the womb with or without artificial support.”⁴⁰⁶ Notably, the phrase “separation procedure” is an antiabortion term that excludes common abortion procedures and requires that the abortion be completed through labor induction or C-section.⁴⁰⁷ Montana's definition of medical emergency is substantially similar to Louisiana's definition, with both specifically excluding “mental [and] . . . psychological conditions.”⁴⁰⁸

Wyoming also added an exclusion for certain maternal health treatment, providing that it is not an abortion to “[t]reat a woman for cancer or another disease that requires medical treatment [that] . . . may be fatal or harmful to the unborn baby.”⁴⁰⁹ In total, four states currently have some kind of narrow definitional exclusion related to maternal health. As discussed below, many states instead prefer to create a life or health exception in their abortion ban.

Three exclusions that did not exist in pre-*Dobbs* abortion definitions have found their way into definitions post-*Dobbs*: molar

403. See *infra* Part III.A.4.

404. LA. STAT. ANN. § 14:87.1 (2022).

405. See Ingrid Skop, *Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child*, CHARLOTTE LOZIER INST. (May 17, 2022), <https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child> [<https://perma.cc/HZT4-569G>].

406. See MONT. CODE ANN. § 50-20-703 (West 2021) (previous definition); 2023 Mont. Laws Ch. 490 (codified at MONT. CODE ANN. § 50-20-1002 (West 2023)).

407. See Skop, *supra* note 405 (arguing that procedures such as C-sections and inductions are possible and preferable to D&E abortions in many cases).

408. MONT. CODE ANN. § 50-20-1002 (West 2023); LA. STAT. ANN. § 1061.1.2 (2022) (“Medical emergency” means a condition that . . . will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.”)

409. 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

pregnancy, fertility care, and accidental fetal death. After *Dobbs*, three states, all abortion-hostile—Idaho, North Dakota and Tennessee—exempted them.⁴¹⁰ Nebraska added two novel definitional exclusions.⁴¹¹ The first excludes “[t]he accidental or unintentional termination of the life of a preborn child.”⁴¹² The second relates to fertility care: “[d]uring the practice of in vitro fertilization or another assisted reproductive technology, the termination or loss of the life of a preborn child who is not being carried inside a woman’s body” is not an abortion.⁴¹³ After *Dobbs*, West Virginia also created an exception for “[i]n vitro fertilization” and “[h]uman fetal tissue research.”⁴¹⁴ Finally, two states added novel *inclusion* language related to selective reduction—where a pregnancy with multiples is reduced, often to reduce the risks for the pregnant person and remaining pregnanc(ies).⁴¹⁵ Selective reduction has existed in a grey area, often not considered an abortion because though a fetus is killed, the pregnancy continues on with the other fetus(es).⁴¹⁶ To avoid the possibility that selective reduction might be permitted, both North Dakota and Wyoming now specify that an abortion includes “eliminat[ing]” a fetus “in a multifetal pregnancy.”⁴¹⁷ This is the first time language like this has appeared in definitions.

One exclusion had more state variation: birth control. Before *Dobbs*, three of the thirteen states in the abortion-hostile cohort

410. 2023 Idaho Legis. Serv. Ch. 298 (West) (codified as IDAHO CODE ANN. § 18-604 (West 2023)); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023)); 2023 Tenn. Legis. Serv. ch. 313 (West) (amending TENN. CODE ANN. § 39-15-213 (West 2023)).

411. 2023 Neb. Legis. Serv. L.B. 574 (West).

412. NEB. REV. STAT. ANN. § 71-6914 (West 2023).

413. *Id.*

414. 2022 W. Va. Legis. Serv. 3d Ex. Sess. Ch. 1 (amending and reenacting W. VA. CODE ANN. § 16-2R-2 (West 2022)).

415. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON ETHICS, COMM. OP. 719, MULTIFETAL PREGNANCY REDUCTION 4 (2017).

416. Radhika Rao, *Selective Reduction: “A Soft Cover for Hard Choices” or Another Name for Abortion?*, 43 J.L. MED. & ETHICS 196, 196 (2015). Scholars have often criticized this exceptionalism as perpetuating the idea of a good versus a bad abortion. *See, e.g., id.* at 197 (arguing that “despite their different appellations, selective reduction and abortion are essentially equivalent acts . . . that should not be segregated and analyzed in strict isolation from each other”).

417. *Compare* N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023), *with* N.D. CENT. CODE ANN. § 12.1-31-12 (2012); *compare* WYO. STAT. ANN. § 35-6-122 (West 2023), *enjoined by* Johnson v. State, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023), *with* WYO. STAT. ANN. § 35-6-101 (West 1997).

excluded birth control from their definition of abortion.⁴¹⁸ After *Dobbs*, West Virginia changed its definition but kept its birth control exclusion.⁴¹⁹ In contrast, when Georgia and Utah changed their definition of abortion after *Dobbs*, they removed it. Georgia removed this text: “The term ‘abortion’ also shall not include the prescription or use of contraceptives.”⁴²⁰ Utah’s new definition omits language that confined abortion to conduct occurring “after implantation of a fertilized ovum,” which as noted above, had the effect of protecting birth control.⁴²¹ Birth control was the only exclusion that any states removed. This is a troubling trend. However, three states, Idaho, Kansas and Louisiana, *added* a birth control exclusion for the first time after *Dobbs*.⁴²² Idaho now excludes “[t]he use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum within the uterus.”⁴²³ Kansas specifies that abortion “does not include the prescription, dispensing, administration, sale or use of any method of contraception.”⁴²⁴ And Louisiana states that an “[a]bortion-inducing drug shall not mean a contraceptive, an emergency contraceptive, or the use of methotrexate to treat an ectopic pregnancy.”⁴²⁵

418. W. VA. CODE ANN. § 16-2F-2 (West 2018); GA. CODE ANN. § 31-9A-2 (West 2012); *see* UTAH CODE ANN. § 76-7-301 (West 2010) (amended 2023) (defining abortion as “the intentional termination or attempted termination of human pregnancy *after implantation of a fertilized ovum*” (emphasis added)).

419. *See* W. VA. CODE ANN. § 16-2F-2 (West 2018); W. VA. CODE ANN. §§ 16-2R-2, 16-2R-4 (West 2022)); *see also* 2022 W. Va. Legis. Serv. 3d Ex. Sess. Ch. 1.

420. *See* GA. CODE ANN. § 31-9A-2 (West 2012); 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)) (amending statute).

421. 2023 Utah Legis. Serv. Ch. 301 (West) (amending UTAH CODE ANN. § 76-7-301 (West 2010) to remove the language regarding implantation of a fertilized ovum).

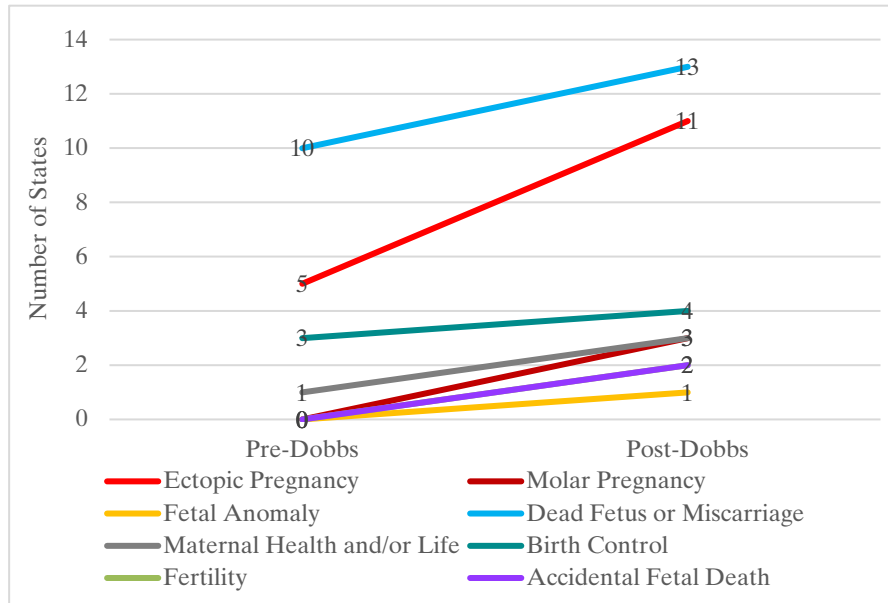
422. 2023 Idaho Legis. Serv. Ch. 298 (West); 2023 Kan. Legis. Serv. Ch. 88 (West); 2022 La. Sess. Law Serv. Act 545 (West).

423. IDAHO CODE ANN. § 18-604 (West 2023).

424. KAN. STAT. ANN. § 65-6701 (West 2023).

425. LA. STAT. ANN. § 14:87.1 (2022).

Figure 1. Change in Definitional Exclusions in the Thirteen Abortion-Hostile States that Changed Their Abortion Definition Post-Dobbs



Taking a step back to look at the current definitions in all jurisdictions: thirty-five exclude miscarriage when the fetus is dead, four of which have broader miscarriage exclusions;⁴²⁶ eighteen exclude ectopic pregnancies;⁴²⁷ nine exclude birth control;⁴²⁸ four exclude some abortions related to maternal health;⁴²⁹ three exclude molar pregnancies;⁴³⁰ two exclude lethal or medically futile fetal anomalies;⁴³¹

426. See, e.g., 23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982); see also *infra* Appendix.

427. See, e.g., N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023); see also *infra* Appendix.

428. W. VA. CODE ANN. §§ 16-2R-2, 16-2R-4 (West 2022); LA. STAT. ANN. § 14:87.1 (2022); IDAHO CODE ANN. § 18-604 (West 2023); ARIZ. REV. STAT. ANN. § 36-2151 (2021); 18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); see also MICH COMP. LAWS ANN. § 333.2803 (West 2024); MICH. COMP. LAWS ANN. § 333.2690 (West 2023).

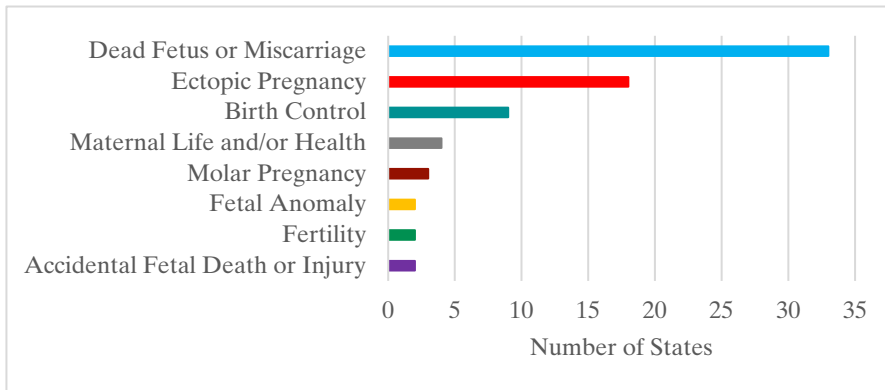
429. See ALA. CODE § 26-23H-3 (2019); LA. STAT. ANN. § 14:87.1 (2022); MONT. CODE ANN. § 50-20-1002 (West 2023); WYO. STAT. ANN. § 35-6-122 (West 2023), *enjoined by* Johnson v. State, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

430. IDAHO CODE ANN. § 18-604 (West 2023); N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023); TENN. CODE ANN. § 39-15-213 (West 2023).

431. LA. STAT. ANN. § 14:87.1 (2022); ALA. CODE § 26-23H-3 (2019).

two exclude fertility care; and one excludes accidental fetal death.⁴³² As explored in Part III.B, eleven states lack any definitional exclusions;⁴³³ almost all of them are abortion-supportive states.⁴³⁴ Only one is abortion-hostile: South Dakota.

Figure 2. Number of Exclusions in All Jurisdictions Post-Dobbs



2. *Knowledge and Intent.* There was a lot of movement related to knowledge elements in the abortion-hostile states that changed their definition of abortion. One state, Utah, previously had no pregnancy knowledge requirement and added a requirement for a known pregnancy to its definition of abortion.⁴³⁵ Another two states, Nebraska⁴³⁶ and Montana,⁴³⁷ went from requiring a clinically diagnosable pregnancy—that is, a knowable pregnancy—to requiring a known pregnancy. As noted above, requiring a known pregnancy

432. NEB. REV. STAT. ANN. § 71-6914 (West 2023); W. VA. CODE ANN. § 16-2R-4 (West 2022).

433. CAL. HEALTH & SAFETY CODE § 123464 (West 2002); COLO. REV. STAT. ANN. § 25-6-402 (West 2022); CONN. GEN. STAT. ANN. § 19a-912 (West 2021); HAW. REV. STAT. ANN. § 453-16 (West 2006) (repealed 2023); MINN. STAT. ANN. § 145.411 (West 2023); N.M. STAT. ANN. § 30-5A-2 (West 2000); N.Y. PUB. HEALTH LAW § 2599-bb (McKinney 2019); S.D. CODIFIED LAWS § 34-23A-1 (2021); VT. STAT. ANN. tit. 8, § 4099e (West 2023); VA. CODE ANN. § 16.1-241 (West 2021); WASH. REV. CODE ANN. § 19.373.010 (West 2023).

434. See *infra* Part III.B; Kitchener et al., *supra* note 22.

435. See UTAH CODE ANN. § 76-7-301 (West 2010); 2023 Utah Legis. Serv. Ch. 301 (West) (amending § 76-7-301 to add a knowledge requirement).

436. See NEB. REV. STAT. ANN. § 71-6901 (West 2011); 2023 Neb. Legis. Serv. L.B. 574 (West) (amending NEB. REV. STAT. ANN. § 71-6914).

437. See MONT. CODE ANN. § 50-20-703 (West 2021); 2023 Mont. Laws Ch. 490 (amending MONT. CODE ANN. § 50-20-1002).

provides additional reassurances to providers who may incidentally cause an abortion—for instance, by prescribing an abortifacient to a patient whom they do not know is pregnant for a non-pregnancy-related use, like arthritis.⁴³⁸ News stories have suggested that female patients are being denied abortion medications for other uses.⁴³⁹ Nebraska’s new exclusion related to accidental abortions is also likely aimed at reassuring these providers.⁴⁴⁰

However, five abortion-hostile states have moved in the opposite direction, dropping the requirement of a known pregnancy.⁴⁴¹ Of those five states, three of them changed from a known pregnancy to a clinically diagnosable—that is, knowable—pregnancy.⁴⁴² The other two states dropped the requirement completely.⁴⁴³ All five of these states, however, also added a provision requiring knowledge that the act will, in reasonable likelihood, cause fetal death.⁴⁴⁴ It is possible that states were responding to new prescribing practices for abortion pills when they removed their “known pregnancy” requirements. For instance, some providers are exploring the practice of prescribing the medication

438. See Cohen et al., *supra* note 115, at 386–87; *supra* notes 372–75 and accompanying text.

439. See, e.g., Shepherd & Sellers, *supra* note 362.

440. NEB. REV. STAT. ANN. § 71-6914 (West 2023).

441. See 2019 Ark. Legis. Serv. Act 180 (West) (codified as ARK. CODE ANN. § 5-61-303 (West 2019)); 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)); 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701 (West 2023)); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023)); 2023 S.C. Acts 70 (amending S.C. CODE ANN. § 44-41-610 (2023)); 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

442. Compare N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007), S.C. CODE ANN. § 44-41-430 (2016), and WYO. STAT. ANN. § 35-6-101 (West 1997) (repealed 2023), with 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023)), 2023 S.C. Acts 70 (amending S.C. CODE ANN. § 44-41-610 (2023)), and 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

443. Compare ARK. CODE ANN. § 20-16-603 (West 2015), GA. CODE ANN. § 31-9A-2 (West 2012), and KAN. STAT. ANN. § 65-6701 (West 2011), with 2019 Ark. Legis. Serv. Act 180 (West) (codified as ARK. CODE ANN. § 5-61-303 (West 2019)), 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)), and 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701 to remove to knowledge of pregnancy requirement).

444. See 2019 Ark. Legis. Serv. Act 180 (West) (codified as ARK. CODE ANN. § 5-61-303 (West 2019)); 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)); 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023)); 2023 S.C. Acts 70 (amending S.C. CODE ANN. § 44-41-610 (2023)); 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by Johnson*, 2023 WL 2711603.

in advance of a future pregnancy or to initiate a late period without a pregnancy test.⁴⁴⁵ Antiabortion legislators may have viewed the known pregnancy requirement as exposing a loophole that they could close. At least one abortion-hostile state, North Carolina, made a more explicit attempt to address this issue in 2023. It defined “abortion-inducing drug” as drugs “prescribed specifically with the intent of causing an abortion, whether or not there exists a diagnosed pregnancy at the time of prescription or dispensing, for the purposes of the woman taking the drugs at a later date to cause an abortion rather than contemporaneously with a clinically diagnosed pregnancy.”⁴⁴⁶

The modifications made to the intent element were minor with one exception: Kansas, one of the states that added a provision on knowledge of fetal death, removed its intent provision altogether, now only requiring knowledge that the act may cause fetal death.⁴⁴⁷ Utah moved toward more personhood language, from “intentional termination . . . of human pregnancy” to “intent to cause the death of an unborn child.”⁴⁴⁸

445. Cohen et al., *supra* note 115, at 360–62. There is a burgeoning movement to provide “missed period pills” for people whose periods are late but have not taken a pregnancy test. *Id.* at 360–61, 387. If a provider prescribes these drugs when there is no known pregnancy, even if pregnancy is suspected, they (at least theoretically) would not be performing an abortion if the definition requires a known pregnancy. *Id.* at 387. The same ambiguities exist when providers prescribe abortion pills in advance of a possible pregnancy, a practice known as advance provision. *Id.* at 361–62.

446. N.C. GEN. STAT. ANN. § 90-21.81 (West 2011) (amended 2023).

447. See 2023 Kan. Legis. Serv. Ch. 88 (West) (amending KAN. STAT. ANN. § 65-6701).

448. See 2019 Ark. Legis. Serv. Act 180 (West) (codified as ARK. CODE ANN. § 5-61-303 (West 2019)); 2023 Utah Legis. Serv. Ch. 301 (West) (amending UTAH CODE ANN. § 76-7-301 (West 2010)).

Figure 3. Change in Intent and Knowledge Elements in the Thirteen Abortion-Hostile States that Changed Their Abortion Definition Post-Dobbs

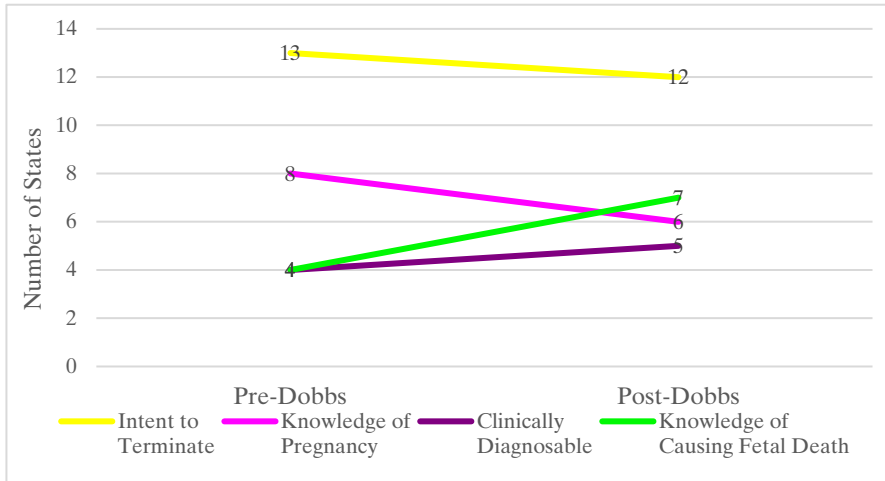
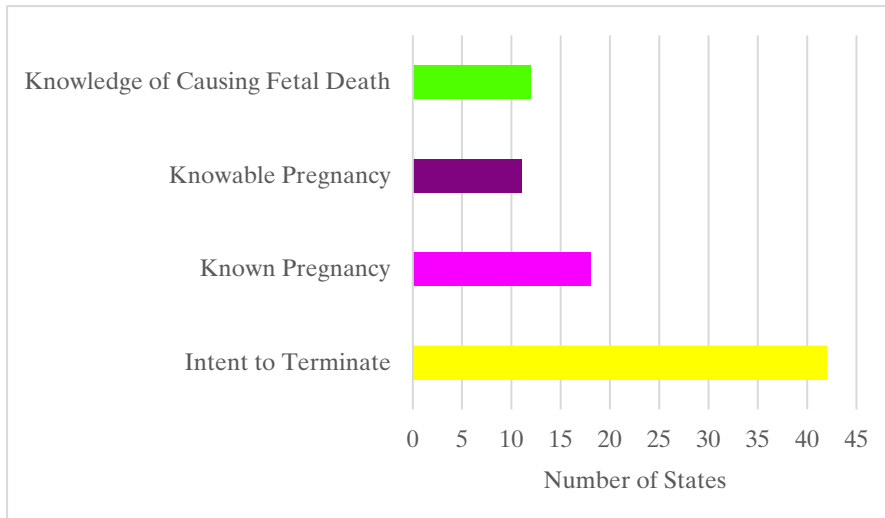


Figure 4. Intent and Knowledge Definitional Elements in Post-Dobbs Abortion Definitions



3. *Act.* Many of the abortion-hostile states that redefined abortion after *Dobbs* also included new, broader “act” language, potentially exposing more people to liability. One state, North Dakota, added the act of “selling” into its abortion definition, defining it as “the act of using, *selling*, or prescribing” anything with the intent to cause an abortion.⁴⁴⁹ The addition of “selling” captures people who sell abortion pills but are not “prescribers.”⁴⁵⁰ Before *Dobbs*, abortion pills were largely accessed through U.S. health care providers at abortion clinics, who wrote prescriptions.⁴⁵¹ The online, often international or informal markets for selling medication abortion were nascent.⁴⁵² But in recent years, the paths to those markets have become well-worn, and many people buy abortion pills online from international pharmacies or individuals online without any prescription at all.⁴⁵³ Abortion-hostile states know this and are broadening the scope of conduct included in their abortion definition accordingly.

In a similar vein, two abortion-hostile states—Georgia and Louisiana—added “administering” to the list of abortion actions.⁴⁵⁴ Georgia now defines abortion as “the act of using, prescribing, or *administering* any instrument, substance, device.”⁴⁵⁵ Louisiana also added “providing” to this list.⁴⁵⁶ These new terms may be a response to the post-*Dobbs* reality in which informal networks of people are helping others access abortion medication for free.⁴⁵⁷ These networks would not be captured by the “selling” language, but could be captured by “administering” or “providing.” “Provide” can also be broad enough to cover those who help with the logistics of abortion—schedulers who help plan travel, abortion funds that help cover costs,

449. N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023) (emphasis added).

450. See Cohen et al., *supra* note 115, at 364.

451. Cf. *id.* at 326–28 (“The old rule forced patients to travel to pick up a prescription they could safely take at home without any provider supervision.”).

452. See *id.* at 327.

453. See *id.* at 330.

454. See 2019 Ga. Code Ann. Adv. Legis. Serv. Act 234 (West) (codified as GA. CODE ANN. § 16-12-141 (West 2019)); 2022 La. Sess. Law Serv. Act 545 (West) (codified as LA. STAT. ANN. § 14:87.1 (2022)).

455. GA. CODE ANN. § 16-12-141 (West 2019) (emphasis added).

456. 2022 La. Sess. Law Serv. Act 545 (West) (codified as LA. STAT. ANN. § 14:87.1 (2022)).

457. Cohen et al., *supra* note 115, at 381, 383.

volunteers who drive patients to clinics or lodge them.⁴⁵⁸ In contrast, Wyoming removed a reference to administering.⁴⁵⁹

4. *Interplay between Abortion Bans and Definitions.* So far, this Article has discussed only how states define abortion. Notably, the bans themselves contain exceptions that work in tandem with the definitions. Compared to ban exceptions, definitional exclusions are more removed and protective for providers: in the eyes of the state, no abortion occurred at all. Once an abortion has occurred, it is subject to an abortion ban by default but excepted from liability if it meets an exception. Most states require providers to report information about abortions to the state, so the occurrence of an abortion opens up the possibility of a state investigation into whether an exception was truly justified.⁴⁶⁰ Such an investigation never occurs if conduct falls outside of the ban completely.

States seem to be developing a preference for where to put exceptions. Ectopic pregnancy, molar pregnancy, and miscarriage care are much more likely to be definitional exclusions, whereas fetal anomaly, life endangerment, maternal health, and accidental fetal death are much more likely to be exceptions or affirmative defenses to a ban. Birth control appears in both definitions and bans with roughly the same frequency.

Twenty-two states have active previability abortion bans: fourteen bans start at conception, four start at six weeks of pregnancy, two start at twelve weeks, one starts at fifteen weeks, and one starts at eighteen weeks.⁴⁶¹ Every single abortion ban has an exception to save the patient's life.⁴⁶² Most states' bans provide an exception "to avert" or

458. See *id.* at 381–83 (“Many other organizations and networks, along with people in states with fewer restrictions on helping friends in states with abortion bans, share the goal of making it easier for people to discover and obtain abortion pills outside the formal healthcare system.”).

459. See WYO. STAT. ANN. § 35-6-101 (West 1997) (repealed 2023); 2023 Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. § 35-6-122 (West 2023)), *enjoined by* Johnson v. State, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

460. *Abortion Reporting Requirements*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements> [<https://perma.cc/3FRU-FCQ9>] (last updated Sept. 1, 2023).

461. See *Tracking Abortion Bans Across the Country*, *supra* note 173.

462. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/SQG8-HUSM>] (last updated May 1, 2024).

“to prevent” the death of a pregnant patient.⁴⁶³ A few instead permit abortion to “save” or “preserve” the life of a pregnant patient.⁴⁶⁴

Most states’ bans also have a narrow exception to preserve the health of the pregnant person.⁴⁶⁵ Six states’ bans lack any health exception: Arkansas,⁴⁶⁶ Idaho,⁴⁶⁷ Mississippi,⁴⁶⁸ Oklahoma,⁴⁶⁹ South Dakota,⁴⁷⁰ and, arguably, Texas.⁴⁷¹ The remaining bans all have health exceptions that involve slight variations of the language “necessary . . . to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman.”⁴⁷² The life or health

463. See, e.g., ALA. CODE §§ 26-23H-4, 26-23H-3 (2019); GA. CODE ANN. § 16-12-141 (West 2019).

464. See, e.g., IND. CODE ANN. § 16-34-2-1 (West 2022); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023) (defining “medical emergency” as it is defined in IOWA CODE ANN. § 146B.1 (West 2023): “a situation in which an abortion is performed to preserve the life of the pregnant woman”); ARK. CODE ANN. § 5-61-304 (West 2022) (excluding from its ban abortions performed “to save the life of a pregnant woman in a medical emergency”).

465. See, e.g., N.D. CENT. CODE ANN. §§ 12.1-19.1-02, 12.1-19.1-03 (West 2023).

466. ARK. CODE ANN. § 5-61-304 (West 2022).

467. IDAHO CODE ANN. § 18-622 (West 2023).

468. MISS. CODE ANN. § 41-41-45 (West 2007).

469. OKLA. STAT. ANN. tit. 21, § 861 (West 1999). The Oklahoma Supreme Court has interpreted the life exception in Oklahoma’s pre-*Roe* statute to not require an imminent medical emergency. *Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1131 (Okla. 2023) (“Requiring one to wait until there is a medical emergency would further endanger the life of the pregnant woman and does not serve a compelling state interest.”).

470. See, e.g., S.D. CODIFIED LAWS § 22-17-5.1 (2005).

471. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021). Texas’s language is confounding as it allows abortion if there is “a serious risk of substantial impairment of a major bodily function,” but only if it results from “a life-threatening physical condition.”

472. See, e.g., TENN. CODE ANN. § 39-15-213 (West 2023). Some states hide this language in a definition. See IND. CODE ANN. § 16-34-2-1 (West 2022) (banning abortion except in the case of a “serious health risk to the pregnant woman”); IND. CODE ANN. § 16-18-2-327.9 (West 2022) (defining “serious health risk” as “a condition that exists that has complicated the mother’s medical condition and necessitates an abortion to prevent death or a serious risk or substantial and irreversible physical impairment of a major bodily function” in “reasonable medical judgment”); N.D. CENT. CODE ANN. § 12.1-19.1-03 (West 2023) (excepting abortions performed to prevent a serious health risk for a pregnant person from criminal liability); N.D. CENT. CODE ANN. § 12.1-19.1.01 (West 2023) (defining “serious health risk” as “a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function”); ALA. CODE § 26-23H-4 (2019) (permitting abortion in the case of a “serious health risk” to the pregnant person); ALA. CODE § 26-23H-3 (2019) (defining a “serious health risk” to a pregnant person as one that “in reasonable medical judgment . . . so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function”); IOWA CODE ANN. § 146B.1 (West 2023) (defining “medical emergency” as necessary “to preserve the life of the pregnant woman

exceptions in nine states specifically exclude threatened self-harm, mental health issues, or psychological illnesses.⁴⁷³ Thus, pregnancy-induced suicidal ideation can never justify abortion in these states. This “is particularly egregious given that” mental health crises “account for more deaths during pregnancy or the year following it than any other health condition.”⁴⁷⁴ Alabama is less absolute: the law creates a rebuttable presumption that suicidal ideation is insufficient.⁴⁷⁵

In six states, even if a patient meets the life or health exceptions, the law also requires that the abortion be performed in a way that gives the fetus the best chance at life, except for in rare circumstances.⁴⁷⁶ As noted above, this language is often read to require an abortion by labor induction or a C-section and excludes common abortion procedures, which kill the fetus but are often safer, quicker, and may be less traumatic.⁴⁷⁷ This tracks the definitional exclusions, in which two of the four exclusions for maternal health also prevent abortion procedures.⁴⁷⁸ As other scholars have noted, “Legislators have decided that some experience of one’s infant, if only childbirth itself, is necessary to grasp the profound nature of what is at stake in the decision to separate from one’s baby.”⁴⁷⁹ In other words, to obtain a

whose life is endangered by a physical disorder, physical illness, or physical injury . . . or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman”); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023) (adopting the definition of medical emergency established in § 146B.1).

473. See, e.g., H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023) (defining “medical emergency” and its exceptions as it is defined in IOWA CODE ANN. § 146B.1 (West 2023): “not including psychological conditions, emotional conditions, familial conditions, or the woman’s age”); IDAHO CODE ANN. § 18-622 (West 2023) (“No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself . . .”); see also *infra* Appendix.

474. Brown, *supra* note 20, at 14 (emphasis omitted).

475. See ALA. CODE § 26-23H-3 (2019).

476. See IDAHO CODE ANN. § 18-622 (West 2023); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2022); S.C. CODE ANN. § 44-41-640 (2023); TENN. CODE ANN. § 39-15-213 (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021).

477. See Pettit et al., *supra* note 365; Greer Donley & Jill Wieber Lens, *Second Trimester Abortion Dangers*, 62 B.C. L. REV. 2145, 2178–79 (2021).

478. See, e.g., LA. STAT. ANN. § 14:87.1(1)(b)(ii) (2022) (excluding “[t]he removal of a dead unborn child or the inducement or delivery of the uterine contents” from its abortion definition); MONT. CODE ANN. § 50-20-1002(1)(b)(ii) (West 2023) (excluding from its abortion definition “a separation procedure performed because of a medical emergency and prior to the ability of the unborn child to survive outside of the womb with or without artificial support”).

479. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 119 (2017).

medically necessary abortion, the state forces patients to go through one of the defining experiences of motherhood: childbirth.⁴⁸⁰

Nine states, moreover, have exceptions to their abortion ban for fetal anomalies, but only in certain contexts. In Florida and South Carolina, the anomaly must be “fatal.”⁴⁸¹ West Virginia and Indiana, as well as Wyoming’s blocked ban, require the anomaly to be “lethal” or “nonviable.”⁴⁸² Georgia, Iowa, and Utah both require a version of “incompatible with life.”⁴⁸³ North Carolina characterizes the condition vaguely as “a life-limiting anomaly.”⁴⁸⁴ Wyoming added this exception only after its first ban was enjoined and it passed a new one. Legislators in Arkansas, Idaho, Kentucky, North Dakota, Tennessee, and Texas have rejected bills that would add a fetal anomaly exception into their state ban.⁴⁸⁵

Eight abortion-hostile states, as well as Wyoming and Oklahoma’s blocked bans, provide an exception or affirmative defense for medical treatment that results in the accidental or unintentional injury or death of the fetus.⁴⁸⁶ Two states, Nebraska and West Virginia, include this exception in their definition.⁴⁸⁷ As discussed above, this is most likely to cover providers who may inadvertently cause a miscarriage by treating a person whom they do not realize is pregnant. In three states, this is still an affirmative defense.⁴⁸⁸ Finally, six states have an exception

480. Donley & Lens, *supra* note 169, at 2179.

481. FLA. STAT. ANN. § 390.0111 (West 2023); S.C. CODE ANN. § 44-41-660 (2023).

482. See W. VA. CODE ANN. § 16-2R-3(a)(1) (West 2022); W. VA. CODE ANN. § 16-2R-2 (West 2022); IND. CODE ANN. § 16-34-2-1 (West 2022); WYO. STAT. ANN. §§ 35-6-123, 35-6-124 (West 2023), *enjoined by* Johnson v. State, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023).

483. GA. CODE ANN. § 16-12-141(a)(4) (West 2019); UTAH CODE ANN. § 76-7-302(2)(b)(ii) (West 2022); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023).

484. N.C. GEN. STAT. ANN. §§ 90-21.81(4d), 90-21.81B(4) (West 2023).

485. Kavitha Surana, *Some Republicans Were Willing To Compromise on Abortion Ban Exceptions. Activists Made Sure They Didn't*, PROPUBLICA (Nov. 27, 2023, 5:00 AM), <https://www.propublica.org/article/abortion-ban-exceptions-trigger-laws-health-risks> [<https://perma.cc/M48J-9FQU>].

486. ARK. CODE ANN. § 5-61-304 (West 2022); GA. CODE ANN. § 16-12-141 (West 2019); IDAHO CODE ANN. § 18-622 (West 2023); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2022); OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022); S.C. CODE ANN. §§ 44-41-630, 44-41-640 (2023); TENN. CODE ANN. § 39-15-213 (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021); WYO. STAT. ANN. §§ 35-6-123, 35-6-124 (West 2023), *enjoined by* Johnson, 2023 WL 2711603.

487. NEB. REV. STAT. ANN. § 71-6914(1)(b)(iv) (West 2023); W. VA. CODE ANN. § 16-2R-4(a)(4) (West 2022).

488. See ARK. CODE ANN. § 5-61-304(d) (West 2022); GA. CODE ANN. § 16-12-141(h)(1) (West 2019); OKLA. STAT. ANN. tit. 63, § 1-731.4(B)(4) (West 2022).

for birth control in their ban, compared to nine states that include it as an exclusion in the definition. The decision to exclude birth control in a ban as opposed to in the definition could be intentional—it suggests that birth control may be an abortion, but that it is a permissible one.

Since *Dobbs*, a handful of states have modified their ban to add exceptions, although notably, most efforts to broaden or add health exceptions have been rejected.⁴⁸⁹ As discussed above, Texas added affirmative defenses for physicians treating ectopic pregnancy and previsible PPRM—however, it did so by modifying its general penal code without mentioning the word “abortion” or amending the state’s abortion ban.⁴⁹⁰ Two other states—Idaho and Tennessee—modified their ban to change affirmative defenses to exceptions.⁴⁹¹ Idaho’s still only excepts life-saving abortions, while Tennessee’s exception now also includes health (excluding self-harm and mental health).⁴⁹² And after the courts enjoined North Dakota’s original ban, which only had an affirmative defense to save the patient’s life, the legislature passed a new law with a life or health exception (excluding self-harm or mental health), as well as an accidental fetal death exception.⁴⁹³ Like North Dakota’s, Wyoming’s first abortion ban was enjoined,⁴⁹⁴ so Wyoming passed another ban containing new exceptions—for molar pregnancy, lethal fetal anomaly (as noted), and contraception.⁴⁹⁵

South Carolina’s new ban offers several notable exclusions. After its original six-week ban was blocked by the courts, it passed a new ban

489. Surana, *supra* note 485.

490. 2023 Tex. Sess. Law Serv. Ch. 913 (West) (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 74.552(a) (West 2023)).

491. 2023 Idaho Legis. Serv. Ch. 298 (West) (codified as IDAHO CODE ANN. § 18-604(1) (West 2023)); 2023 Tenn. Legis. Serv. Ch. 313 (West) (amending TENN. CODE ANN. § 39-15-213(c)(1) (West 2023)).

492. 2023 Idaho Legis. Serv. Ch. 298 (West) (codified as IDAHO CODE ANN. § 18-604(9) (West 2023)); 2023 Tenn. Legis. Serv. Ch. 313 (West) (amending TENN. CODE ANN. § 39-15-213(c) (West 2023)).

493. See N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007), *enjoined by* Wrigley v. Romanick, 988 N.W.2d 231 (N.D. 2023); 2023 N.D. Legis. Serv. Ch. 122 (West) (codified as N.D. CENT. CODE ANN. §§ 12.1-19.1-01(a), 12.1-19.1-01(5), 12.1-19.1-03(1) (West 2023)).

494. See generally Johnson v. State, No. 18732 (Wyo. Dist. Ct. Aug. 10, 2022) (enjoining H.R. 92, 66th Legis., Budget Sess. (Wyo. 2022)).

495. See Wyo. Legis. Serv. Ch. 184 (West) (codified as WYO. STAT. ANN. §§ 35-6-123, 124 (West 2023)). Wyoming’s second ban has also been enjoined. See Johnson v. State, No. 18853, 2023 WL 2711603, at *2 (Wyo. Dist. Ct. Mar. 22, 2023).

in 2023 that attempted to clarify the health exception.⁴⁹⁶ Like those of other states, South Carolina’s health exception uses the phrase “serious risk of a substantial and irreversible impairment of a major bodily function.”⁴⁹⁷ The new ban added a list of several medical conditions that were “presumed” to meet the standard and justify abortion under its ban: “molar pregnancy, partial molar pregnancy, blighted ovum, ectopic pregnancy, severe preeclampsia, HELLP syndrome, abruptio placentae, severe physical maternal trauma, uterine rupture, intrauterine fetal demise, and miscarriage.”⁴⁹⁸ South Carolina’s ban further asserts that “[t]he enumeration of the medical conditions in this item is not intended to exclude or abrogate other conditions that satisfy the exclusions.”⁴⁹⁹ However, “psychological or emotional conditions” are not included,⁵⁰⁰ and the abortion is to be completed in a way that could “save the life of an unborn child” unless it would “adversely affect the life or physical health of the pregnant woman.”⁵⁰¹

In addition to South Carolina’s ban, only one state’s abortion ban has an exception for molar pregnancy (Wyoming’s ban, which is currently enjoined), only one state’s ban has an exception for ectopic pregnancy (West Virginia’s ban), and only one state’s ban has an exception for miscarriage (Iowa’s ban).⁵⁰² This suggests a preference to exclude ectopic pregnancy, miscarriage care, and molar pregnancy definitionally rather than through a ban exception.

496. See Fetal Heartbeat and Protection from Abortion Act, 2021 S.C. Acts Act 1, *enjoined* by Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023); S.C. CODE ANN. §§ 44-41-630, 44-41-640, 44-41-660 (2023).

497. S.C. CODE ANN. § 44-41-640 (2023).

498. *Id.*

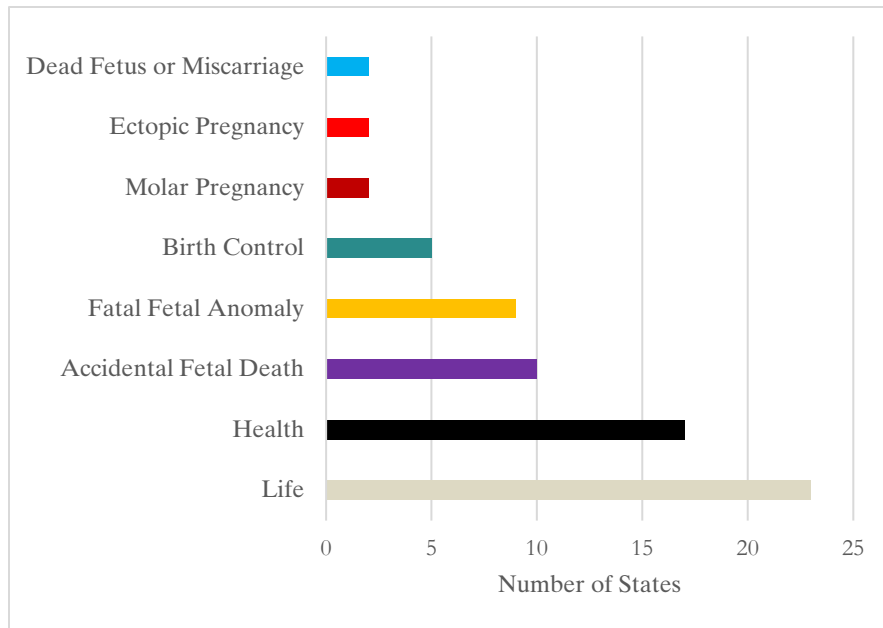
499. *Id.*

500. *Id.*

501. *See id.*

502. See WYO. STAT. ANN. § 35-6-124 (West 2023), *enjoined* by Johnson v. State, No. 18853, 2023 WL 2711603 (Wyo. Dist. Ct. Mar. 22, 2023); W. VA. CODE ANN. § 16-2R-3 (West 2022); H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023) (excepting “[a]ny spontaneous abortion, commonly known as a miscarriage, if not all of the products of conception are expelled”).

Figure 5. Popularity of Health-Related Ban Exceptions (Including Enjoined Bans)



B. *Abortion-Supportive States: Broadening Definitions and Protections at Once*

Within the smaller sample of abortion-supportive states, four states changed their definition of abortion after *Dobbs*,⁵⁰³ and two states added definitions for the first time.⁵⁰⁴ Unlike abortion-hostile states, which made their definitions longer and more complicated to exclude more types of care,⁵⁰⁵ abortion-supportive states moved in the opposite direction: their definitions became broader and simpler. Exclusions and intent elements were removed. The two abortion-supportive states that added definitions for the first time followed this trend by including broad definitions without exclusions.⁵⁰⁶

503. See, e.g., MINN. STAT. ANN. § 145.411 (West 2023); see also *infra* Appendix.

504. VT. STAT. ANN. tit. 8, § 4099e (West 2023); N.Y. PUB. HEALTH LAW § 2599-bb-1(A) (McKinney 2024).

505. See *supra* Part III.A.

506. VT. STAT. ANN. tit. 8, § 4099e (West 2023); N.Y. PUB. HEALTH LAW § 2599-bb-1(A) (McKinney 2024).

Minnesota previously defined abortion as “intentionally terminat[ing] the pregnancy of a female known to be pregnant” unless done with the intent “to remove a dead fetus.”⁵⁰⁷ In 2023, Minnesota passed a law protecting abortion rights and removing abortion restrictions.⁵⁰⁸ The law created a new definition of abortion, which removed the knowledge of pregnancy requirement and the dead fetus exemption, opting for broader and simpler language. Abortion is now defined as an act done “with the intention of terminating, and which results in the termination of, pregnancy.”⁵⁰⁹ Minnesota also added broadening language to describe the act, defining abortion as “an act, procedure or use of any instrument, medicine or drug which is *supplied or prescribed for or administered* to an individual.”⁵¹⁰ Abortion-hostile states broadened the act of abortion by adding “selling,” “administering,” and “procuring” to render more behavior illegal; Minnesota’s addition of “supplying” and “administering” expands the scope of the protected act.

Washington altered its definition of abortion as part of its 2023 My Health My Data Act,⁵¹¹ a privacy law aimed at ensuring that data-handling entities properly secure personal health data in the aftermath of *Dobbs*. Similar to Minnesota’s new definition, Washington’s definition also became broader, albeit marginally so. The legislature removed language that defined abortion as “medical treatment” that was “intended to induce” abortion except for the purpose of producing a live birth.⁵¹² Now, Washington defines abortion as “the termination of a pregnancy for purposes other than producing a live birth.”⁵¹³ Hawaii made a similar change. It used to define abortion as “an operation,”⁵¹⁴ but removed that language in 2023 and now defines abortion as “an intentional termination of the pregnancy.”⁵¹⁵ Both states have therefore broadened abortion outside of the clinical setting.

507. MINN. STAT. ANN. § 145.4241 (West 2003).

508. *Know Your Rights to Abortion and Reproductive Healthcare in Minnesota*, THE OFF. MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/abortionrights> [<https://perma.cc/DK54-T2JY>] (explaining the 2023 changes to Minnesota’s abortion laws).

509. MINN. STAT. ANN. § 145.411 (West 2023).

510. *Id.* (emphasis added).

511. 2023 Wash. Legis. Serv. Ch. 191 (West) (codified as WASH. REV. CODE ANN. § 19.373.010 (West 2023)).

512. *See id.*; WASH. REV. CODE ANN. § 9.02.170 (West 2002).

513. WASH. REV. CODE ANN. § 19.373.010(1) (West 2023).

514. HAW. REV. STAT. ANN. § 453-16 (West 2006).

515. 2023 Haw. Legis. Serv. Act 2 (West) (codified as HAW. REV. STAT. ANN. § 453-16(d) (West 2023)).

Michigan also adopted an updated abortion definition, albeit circuitously, in 2024.⁵¹⁶ It was the one abortion-supportive state that bucked this trend of broadening abortion definitions, making changes that did not significantly change the definition.⁵¹⁷

Two abortion-supportive states previously lacked any codified definition of abortion but have added one since *Dobbs*, opting for simple, broad language. For instance, Vermont recently defined the term in a law mandating insurance coverage for abortion.⁵¹⁸ The state defined the term simply and broadly as “any medical treatment intended to induce the termination of, or to terminate, a clinically diagnosable pregnancy except for the purpose of producing a live birth.”⁵¹⁹ New York codified the simplest definition in any jurisdiction, defining abortion as “the termination of a pregnancy pursuant to” the regulations that make abortion lawful.⁵²⁰

These broad definitions that lack any exclusions would be alarming in states that ban abortion, as they would almost certainly cover and prohibit important types of reproductive health care. But in an abortion-supportive state, a broad definition increases the scope of the law’s protection. Though the sample here is small, this trend tracks the landscape of abortion-supportive states from a bird’s eye view as well. Of all jurisdictions, only twelve states have no definitional exclusions: California, Colorado, Connecticut, Hawaii, Kentucky, Minnesota, New Mexico, New York, South Dakota, Vermont, Virginia, and Washington.⁵²¹ All but two of these states support abortion rights (see Figure 6 below).⁵²²

516. 2023 Mich. Legis. Serv. Ch. 209 (West) (amending MICH. COMP. LAWS ANN. § 333.2803 (West 2024)).

517. The main changes were to add a diagnosable pregnancy requirement and tweak the miscarriage exclusion. *Compare id. with* MICH. COMP. LAWS ANN. § 333.17015(2)(a) (West 2012).

518. 2023 Vt. Legis. Serv. 15 (West).

519. VT. STAT. ANN. tit. 8, § 4099e (West 2023).

520. N.Y. PUB. HEALTH LAW § 2599-bb-1(A) (McKinney 2024).

521. CAL. INS. CODE § 10123.1961 (West 2022); COLO. REV. STAT. ANN. § 25-6-402 (West 2022); CONN. GEN. STAT. ANN. § 42-515 (West 2023); HAW. REV. STAT. ANN. § 453-16 (West 2023); KY. REV. STAT. ANN. § 311.720 (West 2017); MINN. STAT. § 145.411 (West 2023); N.M. STAT. ANN. § 30-5A-2 (West 2000); N.Y. PUB. HEALTH LAW § 2599-bb-1(A) (McKinney 2019), S.D. CODIFIED LAWS § 34-23A-1 (2021); VT. STAT. ANN. tit. 8, § 4099e (West 2023); VA. CODE ANN. § 16.1-241 (West 1997); WASH. REV. CODE ANN. § 19.373.010 (West 2023).

522. Kitchener et al., *supra* note 22.

IV. NORMATIVE IMPLICATIONS: PLAIN MEANING, VAGUENESS, AND WORKABILITY

The findings from this Article raise many potential legal issues for future consideration. This Part explores a handful of them at a high level, which will hopefully be developed in future work. First, this Article supports the conclusion that the word “abortion” is ambiguous and lacks a plain meaning in statutes where it is undefined. Ambiguous criminal statutes should be interpreted in favor of defendants. Second, the Article demonstrates that abortion definitions and ban exceptions are unclear, bolstering arguments that they are unconstitutionally vague. This Part also counters a predominate antiabortion narrative: that the laws are clear, and doctors are to blame for the confusion. Third and finally, it considers whether these issues reveal a workability problem with the *Dobbs* framework, which allows states to ban “nonelective” abortions. If so, it helps build the case that *Dobbs* must be overturned.⁵²³

A. *Abortion Is an Ambiguous Term That Lacks a Fixed or Plain Meaning*

One of the clearest conclusions from this Article is that “abortion” is an ambiguous term that lacks a fixed meaning. The Article has demonstrated that the medical, legal, and public understandings of the term are different.⁵²⁴ In medicine, “abortion” includes miscarriage; legal definitions, on the other hand, try to exclude miscarriage, although these efforts often fail.⁵²⁵ The public has demonstrated substantial confusion as to whether active interventions for miscarriage are also abortion care.⁵²⁶ As another example, in medicine, ectopic pregnancy treatment is seen as separate from miscarriage and abortion because the pregnancy is not in the uterus and the treatments differ; in law, however, the placement of the pregnancy is irrelevant, and ectopic pregnancy treatment is an abortion unless specifically excluded.⁵²⁷ Finally, medically indicated abortions for severe fetal anomaly or the health of the pregnant patient are typically—although not always—

523. This post-*Dobbs* moment demands creative lawyering and long-term strategizing. See David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1 (2022) (exploring updated strategies for defenders of abortion rights post-*Roe*).

524. See *supra* Part I.

525. See *supra* Part I.

526. See *supra* Part I.C.

527. See *supra* Part I.A–B.

considered abortions in law and medicine, but the public is less sure if they constitute an abortion.⁵²⁸ Indeed, recently, antiabortion activists have argued that life-saving abortions are not abortions at all.⁵²⁹

The meaning of the word “abortion” has also shifted over time.⁵³⁰ This Article has found that in the past two years alone, nineteen states have changed the legal definition of abortion to respond to *Dobbs*.⁵³¹ States with abortion bans are adding exclusions to exempt more categories of reproductive health care, while states that protect abortion rights have broadened their definition as they have expanded the right.⁵³² As the map below demonstrates, this has resulted in greater polarity in legal definitions based on state political ideology.⁵³³ These definitional changes underscore that the meaning of abortion is both responsive to, and driven by, politics.⁵³⁴ In other words, the public’s understanding of abortion shifts in response to political events, and legislatures change the legal definition of abortion as a political act. The medical definition of abortion, however, has stayed relatively constant.⁵³⁵

528. *See supra* Part I.

529. *What is AAPLOG’s Position*, *supra* note 159; Ingrid Skop, *Medical Indications for Separating a Mother and Her Unborn Child*, CHARLOTTE LOZIER INST. (May 17, 2022), <https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child> [https://perma.cc/XG7A-C27K] (“[A]n induced abortion should not be confused with a medical indication for separating a mother from her unborn child.”).

530. *See supra* Part III.

531. *See supra* Part III.

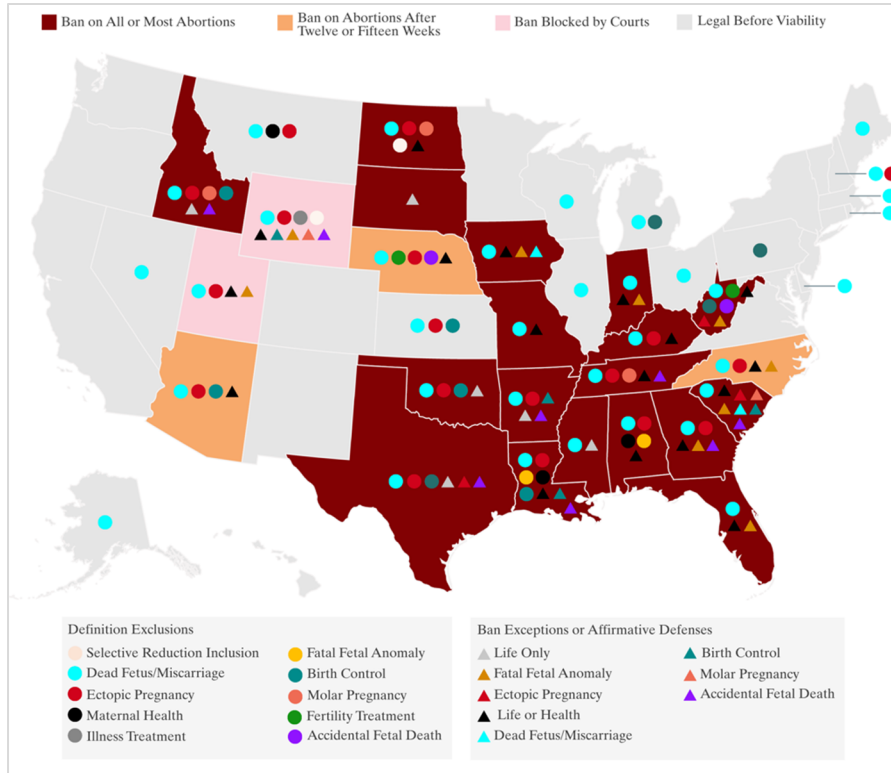
532. *See supra* Part III.

533. *See infra* Figure 6.

534. *See supra* Part III.

535. *See supra* Part I.A.

Figure 6. State-by-State Abortion Definition Exclusions and Ban Exceptions (Through June 2024)



Understanding that “abortion” is an ambiguous term whose meaning has shifted over time calls into question whether the term has a plain meaning, and if so, what it might be—particularly, as applied to miscarriage; ectopic and molar pregnancy; terminations for medical reasons; fertility treatment; and birth control. Thus, if statutes leave the term undefined, or if the definition itself is ambiguous, courts will need to resolve the ambiguities. Many state abortion bans, for instance, do not define the term.⁵³⁶ Courts can use various tools to interpret ambiguous text, including canons of interpretation, context, and legislative history.⁵³⁷ For criminal cases, the rule of lenity applies, and

536. See e.g., FLA. STAT. ANN. § 390.011 (West 1997); IND. CODE ANN. § 16-34-2-1 (West 2022); KY. REV. STAT. ANN. § 311.772 (West 2019); MO. ANN. STAT. § 188.015 (West 2019); S.D. CODIFIED LAWS § 22-17-5.1 (2005).

537. See generally SCALIA & GARNER, *supra* note 32.

courts should resolve ambiguous statutes in favor of the defendant.⁵³⁸ Conservative textualists, like Justice Antonin Scalia, have been some of the biggest proponents of this canon, arguing that “when the government means to punish, its commands must be reasonably clear” and that “[w]hen they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice (DOJ) or its state equivalent.”⁵³⁹ Thus, in any criminal proceedings for providing unlawful abortions, the ambiguities inherent in the term “abortion” should be resolved in favor of the defendant.

The plain meaning of abortion is especially salient right now as antiabortion activists are attempting to revive the dormant but unrepealed abortion provisions of a federal law known as the Comstock Act.⁵⁴⁰ The Comstock Act was passed in 1873, before women had the right to vote,⁵⁴¹ and declares many things “nonmailable,” including anything “designed, adapted, or intended for producing abortion,” or anything “obscene, lewd, lascivious, indecent, filthy or vile.”⁵⁴² Antiabortion activists have advocated for a broad, acontextual, and ahistorical reading of this statute to essentially ban abortion nationwide by shutting down shipping.⁵⁴³ The Comstock Act does not define the word “abortion.”⁵⁴⁴

Law professors Reva Siegel and Mary Ziegler have detailed how the statute was never intended to stop legal or medically indicated

538. *United States v. Santos*, 553 U.S. 507, 514 (2008). *See generally* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918 (2020) (arguing that federal courts should apply the rule of lenity).

539. SCALIA & GARNER, *supra* note 32, at 299.

540. *See* 18 U.S.C. §§ 1461–1462. Antiabortion activists are trying to revive and misuse this zombie law. *See* Cohen, Donley & Rebouché, *Abortion Pills*, *supra* note 115, at 342–47; Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2025) (manuscript at 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751 [<https://perma.cc/MJ7Q-Z3JD>].

541. Siegel & Ziegler, *supra* note 540, at 3, 35–41 (describing the relationship between the movement for suffrage and the movement related to reproductive autonomy).

542. 18 U.S.C. § 1461.

543. Siegel & Ziegler, *supra* note 540, at 69–71 (describing Jonathan Mitchell and other revivalist’s arguments that Comstock creates a national abortion ban).

544. *Id.* at 74 (arguing that there is no plain meaning of “abortion” in the Comstock Act); 18 U.S.C. § 1461.

abortions.⁵⁴⁵ Indeed, when the law’s abortion provisions were enforced from the late 1800s through the early 1900s, the Comstock Act never barred physicians from providing abortions as health care, which was legal at the time.⁵⁴⁶ Before the law stopped being enforced in the 1930s, federal courts also resoundingly rejected the law’s application to legal abortion care.⁵⁴⁷ In December 2022, the Biden Administration issued a memorandum explaining how the Comstock Act does not apply to legal abortions and requires a specific intent to violate an abortion law.⁵⁴⁸ Nevertheless, if former president Donald Trump wins the 2024 presidential election, the Comstock Act will likely become a major issue for the Supreme Court to evaluate. Two Justices, Samuel Alito and Clarence Thomas, have already signaled support for its revival.⁵⁴⁹

What does “abortion” mean under the Comstock Act, given that the statute left it undefined? Does it include miscarriage care? Ectopic or molar pregnancy treatment? Fetal anomaly abortions? Health-saving abortions? Life-saving abortions? Birth control? Fertility care? There are no enumerated exceptions, so if the antiabortion interpretation succeeds,⁵⁵⁰ people may only be able to access care that is not deemed an “abortion.”⁵⁵¹ This might explain why antiabortion groups now argue that life-saving abortions are not abortions at all, but

545. *Id.* at 7 (“Courts reasoned that the Comstock Act’s obscenity provisions did not apply to the doctor-patient relationship, even as the kinds of exempted health-related mailings evolved over the life of the statute.”).

546. *Id.*

547. *See generally* Memorandum Op. for the Gen. Couns. U.S. Postal Serv., Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions (Dec. 23, 2022) (“By the middle of the century, the well-established, consensus interpretation was that none of the Comstock Act provisions, including section 1461, prohibits a sender from conveying such items where the sender does not intend that they be used unlawfully.”).

548. *Id.*

549. Dan Diamond, *Alito and Thomas Kept Bringing Up Comstock. That Scared Abortion Rights Supporters*, WASH. POST (Mar. 26, 2024), <https://www.washingtonpost.com/health/2024/03/26/comstock-act-supreme-court-abortion-pill> [<https://perma.cc/77PL-QYBS>].

550. Many textualists reject reading the text literally without context. Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1042 (2023) (noting that scholars criticized “a ‘literalist’ approach that failed to ‘acknowledge that language has meaning only in context’”).

551. Comstock operates by barring shipping and importation. *See* 18 U.S.C. § 1461 (barring the mailing of “[e]very paper, writing, advertisement, or representation that any article, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose”); *see also* 18 U.S.C. § 1462 (barring importation of “any drug, medicine, article, or thing designed, adapted, or intended for producing abortion”). Comstock does not criminalize or concern abortion care. Siegel and Ziegler also note that Comstock contains two scienter requirements that the products be shipped with an unlawful purpose, which excludes medically indicated care. Siegel & Ziegler, *supra* note 540, at 75–76.

rather involve physicians “treating two patients,” one of whom—the fetus—may not survive.⁵⁵² It might further underscore why antiabortion states have increasingly moved to exclude miscarriage, ectopic pregnancy, molar pregnancy, and other types of reproductive health care from the definition of abortion.⁵⁵³ This Article’s analysis indicates that there are no clear answers about whether abortion includes these categories of care. The term is simply ambiguous. As noted above, resolving this textual ambiguity will require courts to utilize the kind of linguistic and historical context that Siegel and Ziegler describe. They explain how the text surrounding “abortion” in the Comstock Act, combined with the term’s history, makes clear that medically indicated abortions, broadly defined, were never covered.⁵⁵⁴

Antiabortion activists who want to interpret Comstock in isolation and under its original meaning will be forced to grapple with the following problem: if there was a contemporaneous plain meaning for abortion in 1873, it would almost certainly include miscarriage care.⁵⁵⁵ Medical textbooks at the time defined abortion *as* miscarriage.⁵⁵⁶ For instance, an 1865 dictionary of medical science defined abortion as:

The expulsion of the foetus before the seventh month of utero-gestation, or before it is *viable*. The causes are referable either to the mother, and particularly to the uterus; or to the foetus and its dependencies. The causes, in the mother, may be:—extreme nervous susceptibility, great debility, plethora, faulty conformation, &c; and it is frequently induced immediately by intense mental emotion, violent exercise, &c. The causes seated in the foetus are its death, rupture of the membranes, &c.⁵⁵⁷

552. *What is AAPLOG’s Position*, *supra* note 159; Skop, *supra* note 529.

553. *See supra* Part III.A.1.

554. Though there are debates about what counts as context, textualists generally support the use of context to resolve ambiguity. Grove, *supra* note 550, at 1046; William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1660 (2023); Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2044–45 (2022); John O. McGinnis, *The Contextual Textualism of Justice Alito*, 14 HARV. J.L. & PUB. POL’Y 671, 671–72 (2023). Siegel and Ziegler look to both linguistic and historical context in defending their interpretation of Comstock. Siegel & Ziegler, *supra* note 540, at 24–27.

555. Siegel & Ziegler, *supra* note 540, at 75.

556. *See* J. THOMAS, COMPREHENSIVE MEDICAL DICTIONARY 11 (1874), <https://babel.hathitrust.org/cgi/pt?id=hvd.hw2azz> [<https://perma.cc/Q7WR-7WLA>] (“Abortion: from abo’rior, abortus, to ‘miscarry.’ The morbid expulsion of an immature *foetus*; a miscarriage.”).

557. ROBLEY DUNGLISON, A DICTIONARY OF MEDICAL SCIENCE 5 (1874), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112107864925> [<https://perma.cc/T6FJ-JY23>].

An 1871 manual of midwifery describes abortion as the “premature expulsion of the embryo” before four months, whereas such expulsion is called “miscarriage” when it occurs between four to six months and “premature labor” after that.⁵⁵⁸ Regular dictionaries also conflated the terms. Webster’s 1874 dictionary defined abortion as “[t]he act of miscarrying; expulsion of an immature product of conception.”⁵⁵⁹ Other dictionaries from that year define abortion as “untimely birth; miscarriage”⁵⁶⁰ or “the act of bringing forth what is yet imperfect; premature delivery; miscarriage.”⁵⁶¹

It is important to appreciate that at the time the Comstock Act was enacted, there were no pregnancy tests or ultrasounds; there was no way to ascertain the status of the fetus before the pregnant person felt fetal movement at quickening around sixteen to eighteen weeks into pregnancy.⁵⁶² These unknowns made it impossible to distinguish between menstrual regulation,⁵⁶³ abortion, and miscarriage care—all of which simply emptied the uterus.⁵⁶⁴ Nor did people distinguish contraception.⁵⁶⁵ This is probably why a legal encyclopedia from 1909 specifically states that “the state of pregnancy is not dependent on the foetus continuing to have life, and therefore it is no defense to a charge of abortion that at the time the defendant’s act was committed the foetus had ceased to have vitality.”⁵⁶⁶ Thus, without context, the plain

558. ALFRED MEADOWS, A MANUAL OF MIDWIFERY 186 (1871), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112045813893> [<https://perma.cc/2EAX-BRTN>].

559. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 3 (1873), <https://babel.hathitrust.org/cgi/pt?id=uga1.32108003063875> [<https://perma.cc/DKE2-QSMV>].

560. ALEXANDER REID, A DICTIONARY OF THE ENGLISH LANGUAGE 14 (1873), <https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t8qc19d8n&seq=20&q1=abortion> [<https://perma.cc/EH A7-PJ74>].

561. JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 6 (1873), <https://babel.hathitrust.org/cgi/pt?id=hvd.32044086908860&seq=82&q1=abortion> [<https://perma.cc/79D E-N4W2>].

562. Bernick & Lens, *supra* note 45, at 1471–75.

563. Menstrual regulation was a widespread practice to induce a late period without knowledge of pregnancy. Donley et al., *supra* note 115, at 360–61; Donley & Lens, *supra* note 169, at 1697.

564. As historian Lara Freidenfelds has explained, there was little to no “distinction[] between contraception, abortion, and miscarriage[s]” before quickening, and “no obvious moral distinction [existed] between intervening before or after conception.” FREIDENFELDS, *supra* note 45, at 38.

565. *Id.*; Siegel & Ziegler, *supra* note 540, at 75.

566. WILLIAM M. MCKINNEY & DAVID S. GARLAND, ENCYCLOPAEDIA OF LAW AND PRACTICE 152 (1909), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112105424123&seq=152&q1=abortion> [<https://perma.cc/K5K8-XW9N>].

meaning of “abortion” in 1873 would almost certainly include miscarriage care, and the originalist, antiabortion interpretation of the Comstock Act would also bar shipping medicines and articles for miscarriage. This anomalous result would further harm reproductive health care.⁵⁶⁷

An appeal to modern understandings of abortion, on the other hand, generates all the ambiguities found in this Article: fifty states with different definitions—almost all of which conflict with the medical definition—and a confused public.⁵⁶⁸ Moreover, even if litigants or courts tried to explicitly exclude miscarriage from the Comstock Act to avoid this result, this Article has detailed how such efforts have profoundly failed. Excluding “miscarriage” by judicial fiat does not help physicians understand whether an inevitable or imminent miscarriage with cardiac activity is a miscarriage or an abortion in the eyes of the law.⁵⁶⁹ Nor does it explain whether physicians need to confirm fetal death *with certainty* for missed or incomplete miscarriages before treating patients.⁵⁷⁰ Nor does it stop the chilling effect for all miscarriage care when adjacent medical treatment—abortion care—is criminalized.⁵⁷¹

B. Abortion Definitions and Ban Exclusions Are Unconstitutionally Vague

This Article not only raises interpretive issues regarding the meaning of abortion when undefined in statutory text but also provides evidence to challenge abortion bans on the grounds of vagueness. Under the void for vagueness doctrine, a criminal statute can be so overbroad or unspecific that it becomes unconstitutionally unjust to enforce.⁵⁷² This occurs when it “fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.”⁵⁷³ The doctrine implicates several different canons and doctrines central to enforcing justice: adequate notice to the accused, constitutional avoidance, and lenity towards the defendant.⁵⁷⁴

567. See *supra* Part II.A.

568. See *supra* Part I.C.

569. See *supra* Part II.B.

570. See *supra* Part II.A.

571. See *supra* Part II.F.

572. *United States v. Davis*, 588 U.S. 445, 447 (2019).

573. *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

574. See *Davis*, 588 U.S. at 464–65.

Specifically, a criminal statute is unconstitutionally vague if it fails to provide the notice necessary to satisfy due process requirements or violates separation of powers principles by “hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges” instead of legislatures.⁵⁷⁵

In applying the vagueness doctrine, courts often consider the severity of the penalties, with criminal penalties requiring greater clarity “because the consequences of imprecision [for civil penalties] are qualitatively less severe.”⁵⁷⁶ In the context of abortion restrictions, the potential penalties—and thus the potential consequences stemming from vagueness—are enormous. The criminal penalties exceed fines or minor jail sentences and potentially expose providers to years or even life in prison.⁵⁷⁷ Providers also fear the loss of their medical licenses and ability to practice medicine.⁵⁷⁸ Compounding these concerns, state law often requires physicians to report any abortions they provide, inviting state scrutiny and second-guessing about their judgment calls.⁵⁷⁹

There is a long history of abortion rights litigants successfully challenging abortion laws on vagueness, particularly related to health exceptions. For instance, in *People v. Belous*,⁵⁸⁰ the California Supreme Court considered a state criminal abortion law allowing abortions only when “necessary to preserve” the pregnant person’s life.⁵⁸¹ The court invalidated California’s ban in 1969 (years before *Roe v. Wade*)

575. *Id.* at 451.

576. *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982)); *see also* *Mo., K. & T. Ry. Co. of Tx. v. State*, 100 S.W. 766, 767 (Tex. 1907) (“[T]he more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law.”).

577. *See* Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022), <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572> [<https://perma.cc/N7J8-CUFM>] (describing variation in state abortion penalties, where twelve state bans at the time involved prison sentences ten years or higher, and Texas allowed life in prison).

578. *See* Selena Simmons-Duffin, *Doctors Who Want To Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky> [<https://perma.cc/2CBY-KD5B>] (expressing fear of imprisonment, fines, and loss of a medical license).

579. *Abortion Reporting Requirements*, *supra* note 460. Professor Yvette Lindgren has also explored how tort law has transformed in the decades between *Roe* and *Dobbs*, creating other sources of risk beyond state criminal law. Lindgren, *supra* note 20, at 23–29.

580. *People v. Belous*, 458 P.2d 194 (Cal. 1969).

581. *Id.* at 197–98.

because “necessary” and “preserve” were too vague.⁵⁸² The court concluded that the ambiguity would create chilling effects so great that they threatened all reproductive health care in the state:

The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous, and because [the law] authorizes—and requires—the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.⁵⁸³

In 1979, years after *Roe*, the Supreme Court considered the Pennsylvania Abortion Control Act in *Colautti v. Franklin*,⁵⁸⁴ invalidating two portions of the statute as impermissibly vague.⁵⁸⁵ The first provision used unclear language about whether physicians were bound to a subjective or objective standard when evaluating fetal viability.⁵⁸⁶ The second required physicians to use an abortion technique most likely to result in a live birth.⁵⁸⁷ The Court found this unclear because it was “uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a ‘trade-off’ between the woman’s health and additional percentage points of fetal survival.”⁵⁸⁸ More recently, in *Stenberg v. Carhart*,⁵⁸⁹ the Supreme Court invalidated as overbroad a state statute banning an abortion procedure that the statute described as delivering “a substantial portion” of the fetus.⁵⁹⁰ When the Court reviewed a nearly identical federal ban on the same procedure a few years later that substituted “substantial” for clearer, anatomical language, the Court upheld it.⁵⁹¹

582. *Id.*

583. *Id.* at 206.

584. *Colautti v. Franklin*, 439 U.S. 379 (1979).

585. *Id.* at 390, 397.

586. *Id.* at 391.

587. *Id.* at 397.

588. *Id.* at 400.

589. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

590. *See id.* at 922, 939–40 (“Even if the statute’s basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures. . . . Both procedures can involve the introduction of a ‘substantial portion’ of a still living fetus, through the cervix, into the vagina . . .”).

591. *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (“Unlike the statutory language in [the state ban] that prohibited the delivery of a ‘substantial portion’ of the fetus Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.”).

Notably, all these issues remain salient in today's abortion definitions and bans. The *Belous* court suggested that the vague language in the California ban's life exception would cause a chilling effect on reproductive health care that we are indeed seeing today as a result of state abortion bans.⁵⁹² And just as the *Stenberg* Court found the word "substantial" too vague when used to describe an abortion procedure, the word is used in nearly every abortion ban's health exception, which typically requires a "serious risk of *substantial* impairment of a major bodily function."⁵⁹³ The vagueness of "substantial" in the health exceptions is compounded by the equally vague terms "serious" and "major." Moreover, many state bans contain a version of the provision struck down in *Colautti*, which required an abortion to be performed in a way that creates the best chance of life for the fetus unless a vague health exception is met.⁵⁹⁴ As the *Colautti* Court noted, this language fails to provide guidance on how tradeoffs between the fetus and pregnant person should be made or whose life should be prioritized.⁵⁹⁵

Even prior cases where vagueness challenges failed reveal opportunity. For instance, in *United States v. Vuitch*,⁵⁹⁶ the Supreme Court held that a Washington, D.C. restriction allowing abortions "necessary for the preservation of the mother's life or health" was not impermissibly vague because it "is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."⁵⁹⁷ This analysis must be considered in the context of the Court's determination that "health" is a broad term that must include mental health.⁵⁹⁸ A few years later, in *Doe v. Bolton*,⁵⁹⁹ the Court considered whether it was impermissibly vague for a statute to require that a provider find that the abortion is "necessary" based upon "his best clinical judgment."⁶⁰⁰ The Court said it was not too vague, citing *Vuitch*, because "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the

592. See *supra* notes 581–83 and accompanying text. Professor Robyn Powell has argued that this chilling effect is particularly harmful for disabled people. Powell, *supra* note 20 at 62–63.

593. See *supra* notes 472–73 and accompanying text.

594. See *supra* note 476 and accompanying text.

595. *Colautti v. Franklin*, 439 U.S. 379, 397–401 (1979).

596. *United States v. Vuitch*, 402 U.S. 62 (1971).

597. *Id.* at 71–72.

598. *Id.*

599. *Doe v. Bolton*, 410 U.S. 179 (1973).

600. *Id.* at 191.

woman’s age—relevant to the well-being of the patient . . . This allows the attending physician the room he needs to make his best medical judgment.”⁶⁰¹

Thus, in both *Vuitch* and *Doe*, the Court denied a vagueness challenge by interpreting the ambiguous words as broadly as possible to the benefit of the plaintiffs. This interpretive maneuver is not available today given that most abortion bans explicitly reject such a broad interpretation. As detailed above, exceptions typically require an objective finding⁶⁰² of significant *physical* health complications, which often explicitly exclude mental health, much less social concerns.⁶⁰³

Since *Dobbs*, vagueness challenges have started to pop up again.⁶⁰⁴ This Article provides evidence that abortion definitions and exceptions are indeed too vague and causing grave harm.⁶⁰⁵ Polls of physicians confirm this statutory analysis, finding that 70 percent of U.S.-based doctors are confused over what defines a life-threatening emergency.⁶⁰⁶ As one doctor put it:

I never imagined colleagues would find themselves tracking down hospital attorneys before performing urgent abortions, when minutes count, [or] asking if a 30% chance of maternal death or impending renal failure meet the criteria for the state’s exemptions, or whether

601. *Id.* at 192.

602. *See, e.g.*, *State v. Zurawski*, 690 S.W.3d 644, 662 (Tex. 2024).

603. *See supra* Part III.A.4.

604. *See, e.g.*, Amended Verified Petition For Temporary Restraining Order & Preliminary & Permanent Injunction Enjoining the Implementation or Enforcement of La. R.S. ss 40:1061, 14:87.7, and 14:87.8 at 13–15, *June Med. Servs. v. Landry*, No. C-720988, 2022 WL 2824316 (La. Dist. Ct. July 11, 2022) (challenging, in part, the vagueness of Louisiana’s abortion definitions); *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KAISER FAM. FOUND. (Feb. 17, 2023), <https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker> [<https://perma.cc/CNW3-2S44>]; Anita Wadhvani, *Three Judge Panel Hears Arguments Over ‘Unconstitutionally Vague’ Exceptions to Abortion Ban*, TENN. LOOKOUT (Apr. 5, 2024, 5:00 AM) <https://tennesseelookout.com/2024/04/05/three-judge-panel-hears-arguments-over-unconstitutionally-vague-exceptions-to-abortion-ban> [<https://perma.cc/VC9Y-N5S9>].

605. *See supra* Part II; *see also* Brian G. Slocum & Nadia Banteka, *Fair Notice and Criminalizing Abortions*, 113 J. CRIM. L. & CRIMINOLOGY 747, 769 (2024) (“While the new criminal [abortion] statutes are varied, they suffer from the same vague features that the Court has recently found to be constitutionally invalid.”).

606. Annie Burky, *Most Physicians Unclear on ‘Life-Threatening Emergencies’ Under Abortion Bans: Survey*, FIERCE HEALTHCARE (Sept. 13, 2022, 7:30 AM), <https://www.fiercehealthcare.com/providers/most-physicians-unclear-what-are-life-threatening-emergencies-under-abortion-bans-survey> [<https://perma.cc/GE3B-RBTZ>].

they must wait a while longer until their pregnant patient gets even sicker.⁶⁰⁷

Medical emergencies are not a light switch—they can “occur slowly, then all at once.”⁶⁰⁸ And although “uncertainty is inherent to medicine,” the combination of deep confusion and exorbitant penalties chills even “[r]elatively straightforward protocols, such as managing ectopic pregnancies and miscarriages.”⁶⁰⁹

Antiabortion courts, legislatures, and medical boards have seemed uninterested in creating guidance to remedy vagueness. For instance, the Texas Supreme Court encouraged the Texas Medical Board to issue clarifying guidance on the state abortion ban’s exception to protect the pregnant patient’s life after the court failed to do so itself.⁶¹⁰ But the Board chose to only repeat the statutory language and urge doctors to explain in the medical record how they met the statutory standard.⁶¹¹ Thus, the clarifying rules clarified nothing—a failure two justices on the Texas Supreme Court later chastised.⁶¹² Another example is from South Dakota, where the legislature passed a law requiring the Department of Health to create a video specially designed to clarify when abortions are lifesaving.⁶¹³ As this Article was

607. Simmons-Duffin, *supra* note 578.

608. Brown, *supra* note 20, at 13.

609. Danielle Czarnecki, Danielle Bessett, Hillary J. Gyuras, Alison H. Norris & Michelle L. McGowan, *State of Confusion: Ohio’s Restrictive Abortion Landscape and the Production of Uncertainty in Reproductive Health Care*, 64 J. HEALTH & SOC. BEHAV. 470, 480 (2023) (noting that physicians “do not typically wonder whether providing evidence-based medicine will result in a felony charge or loss of medical licensure”). Confusion is only exacerbated when “[m]edical exceptions to abortion laws . . . are not defined in medical terms and are unlikely to capture the full range of medical circumstances.” *Id.*

610. *In re State*, 682 S.W.3d 890, 894 (Tex. 2023) (“The Texas Medical Board, however, can do more to provide guidance in response to any confusion that currently prevails.”); *id.* at 894 n.5 (“The Board could assess various hypothetical circumstances, provide best practices, identify red lines, and the like. It has provided such needed guidance in other contexts . . .”).

611. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021), <https://www.tmb.state.tx.us/idl/B83AF6D7-C6E7-FD3F-BDE0-3719D43BE5FF> [<https://perma.cc/NCT5-7EEC>]; Neelam Bohra, *Texas Medical Board proposes new guidance for abortion medical exceptions*, TEX. TRB. (Mar. 22, 2024), <https://www.texastribune.org/2024/03/22/texas-medical-exception-board-abortion-guidance> [<https://perma.cc/87BW-VYW7>].

612. *State v. Zurawski*, 690 S.W.3d 644, 676 n.6 (Tex. 2024) (Busby, J., joined by Lehrmann, J., concurring) (“But instead of fulfilling its own obligation to speak clearly and specifically, the Board has proposed a regulation that does nothing more than restate the relevant statutes.”).

613. Kimberlee Kruesi, *GOP State Lawmakers Refuse to Revisit Abortion Bans, But Some Say They’ll Offer More Clarity on Rules*, PBS NEWSHOUR (Mar. 11, 2024, 1:36 PM), <https://www.pbs.org/newshour/health/gop-state-lawmakers-refuse-to-revisit-abortion-bans-but-some-say-they-l-offer-more-clarity-on-rules> [<https://perma.cc/N4EZ-FW85>].

going to press, the video was released.⁶¹⁴ Though the video provides a nonexhaustive list of life-threatening conditions that could justify an abortion in South Dakota, the video makes clear that even these rare circumstances do not fully provide safe harbor: “We are not saying that ending a pregnancy would be absolutely necessary in every one of these situations. . . . [Rather,] it *could* be legal under South Dakota law.” The video also ends with a disclaimer that it is “not legal advice” nor “legally binding.” Such nonbinding recommendations specifically refusing to provide any legal protection seem unlikely to reduce actual physician risk aversion.

Even if states wanted to create clearer rules, it would be hard to know how to effectively do that without creating lists of medical conditions, which have their own problems. For instance, the American College of Obstetricians and Gynecologists has said that “it is impossible to create an inclusive list of conditions that qualify as ‘medical emergencies.’”⁶¹⁵ ACOG argues that health can deteriorate at different paces for different patients; that medical conditions not concerning on their own can be life-threatening when experienced together; and that pregnancy itself can exacerbate conditions that are not life-threatening in nonpregnant patients.⁶¹⁶ Thus, lists will inevitably draw arbitrary lines and leave people behind.⁶¹⁷ States that want to ban abortion are therefore forced to choose between vague standards and arbitrary lines, underscoring that this is an arena that should have been left to medicine, not law.

C. *Dobbs Is Unworkable*

Beyond challenges to antiabortion laws, the findings in this Article also support a future challenge to *Dobbs* itself on the ground of unworkability—a factor that can cut against *stare decisis* and call into question the case’s sustainability. *Stare decisis* generally requires courts to abide by their past decisions, even if they disagree, because

614. *Id.*

615. *Understanding and Navigating Medical Emergency Exceptions in Abortion Bans and Restrictions*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Aug. 15, 2022), <https://www.acog.org/news/articles/2022/08/understanding-medical-emergency-exceptions-in-abortion-bans-restrictions> [<https://perma.cc/C55B-M8B7>].

616. *Id.*

617. Nancy Davis’s story is demonstrative: though Louisiana’s Department of Health created a list of “medically futile” fetal anomalies to clarify the vague term, her baby’s diagnosis was not on the list despite consensus that it was fatal. She was forced to travel out of state for care. Sasani & Cochrane, *supra* note 401. Kelly Shannon’s story, *see supra* Part II.D, is also illustrative.

the law values consistency and reliance.⁶¹⁸ However, there are factors that help a court consider whether a precedent should be overruled notwithstanding that general rule.⁶¹⁹ One of those factors is the workability of the rules the precedent imposed.⁶²⁰ If the precedent has proved unworkable—that is, it leads to incoherent, arbitrary, or inconsistent results—then there may be good reason to overturn it despite *stare decisis*.⁶²¹ Thus, in building a future case to overturn *Dobbs*, it will be critical to explain how the *Dobbs* framework has greenlit a patchwork of abortion laws that are functionally unworkable, inherently standardless, and incoherent.

This strategy borrows from the antiabortion playbook. As Ziegler has documented, the antiabortion movement developed and honed the workability doctrine in its fifty-year quest to overturn the foundational abortion rights cases,⁶²² *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶²³ And ultimately, in *Dobbs*, the Court justified overruling its abortion precedents in part on the grounds that *Roe* and *Casey* were unworkable.⁶²⁴

The *Dobbs* Court explained that a precedent is workable if “it can be understood and applied in a consistent and predictable manner.”⁶²⁵ The Court then attacked as *unworkable* *Casey*’s undue burden standard, which deemed abortion regulations unconstitutional if they imposed an undue burden on the abortion seeker.⁶²⁶ The Court found that “*Casey*’s ‘line between’ permissible and unconstitutional restrictions ‘has proved to be impossible to draw with precision.’”⁶²⁷ It repeated Justice Scalia’s longstanding criticism that the undue burden standard is “inherently standardless” because “undue” is too vague and difficult to apply.⁶²⁸ The *Dobbs* Court criticized the *Casey* Court’s attempts to clarify the meaning of “undue” as a “substantial obstacle”

618. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 263–64 (2022).

619. *Id.* at 267–68.

620. *Id.* at 280–81.

621. *Id.*

622. Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1219–28 (2018).

623. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

624. *Dobbs*, 597 U.S. at 286.

625. *Id.* at 281.

626. *Id.*

627. *Id.* at 284 (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 881 (2018)).

628. *Id.* at 281 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 992 (1992) (Scalia, J., dissenting)).

to abortion, finding the clarification as ambiguous as the original phrase: “[W]hether a particular obstacle qualifies as ‘substantial’ is often open to reasonable debate. . . . Huge burdens are plainly ‘substantial,’ and trivial ones are not, but in between these extremes, there is a wide gray area.”⁶²⁹ Finally, the Court explained that the undue burden standard is unworkable because whether a burden is undue is a person-specific inquiry and therefore difficult for courts to evaluate on the whole.⁶³⁰

Though many of the problems described in this Article are statutory, they can also be traced back to *Dobbs* itself, which rested on a distinction between “elective” and “therapeutic” abortions. The *Dobbs* Court granted certiorari to consider whether “all pre-viability prohibitions on *elective* abortions are unconstitutional.”⁶³¹ The Court held that they were not, finding that the state’s interest in preventing abortion “for nontherapeutic or elective reasons” is a legitimate interest that provided a rational basis for a fifteen-week ban with exceptions for life-threatening emergencies and fatal fetal anomaly.⁶³² The *Dobbs* Court did not define “elective,” but presumptively, “elective” cannot include lifesaving abortions, which Justices have long assumed to be constitutionally required.⁶³³ Whether abortions in the context of maternal health, fetal anomaly, miscarriage, or ectopic and molar pregnancy are “therapeutic” when not immediately life-threatening is an open question.⁶³⁴ The findings from this Article strongly suggest that reproductive health care cannot be neatly distinguished in this way, and that attempts to do so will lead to “inherently standardless” and arbitrary line drawing. In other words,

629. *Id.*

630. *Id.* at 281–83.

631. *Id.* at 234 (emphasis added).

632. *Id.* at 301; MISS. CODE ANN. § 41-41-191 (West 2018) (defining “severe fetal abnormality” as “incompatible with life outside the womb” and defining “medical emergency” as “necessary to preserve the life of a pregnant woman”).

633. *See, e.g., Dobbs*, 597 U.S. at 339 n.2 (Kavanaugh, J., concurring); *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective.”).

634. One could argue that *Dobbs* did not disturb *Roe* and *Casey*’s demand that exceptions be provided for a woman’s life or *health*.

there is no workable way to distinguish an elective and therapeutic abortion.⁶³⁵

Every pregnancy carries risks that are substantial and include death. This is especially true in the United States, where the maternal mortality rate is the highest of any high-income country by a factor of three and increases significantly each year.⁶³⁶ In 2021—the year with the latest-available data—over 1,200 women died from pregnancy-related causes.⁶³⁷ Though six women died in 2020 as a result of abortion,⁶³⁸ the risk of death from childbirth is roughly fourteen times higher.⁶³⁹ Abortion also immediately stops the physical side effects and other health risks associated with pregnancy, which can be debilitating or cause substantial impairments. For instance, pregnancy often causes nausea and vomiting, joint and ligament pain, and shortness of breath, among many other side effects; it also increases the risk and severity of contracting viruses, like the flu or COVID-19, and of developing serious conditions like blood clots, depression, and high blood pressure.⁶⁴⁰ In other words, every abortion saves pregnant people from potentially life-threatening and substantial health risks. How can courts and prosecutors decide when the life- and health-threatening

635. Legal scholars have long criticized attempts to distinguish “good” abortions—which tend to be those obtained in wanted pregnancies for medical reasons—and “bad” abortions, which tend to be everything else. *See, e.g.,* Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle over Late Term Abortion*, 10 *YALE J.L. & FEMINISM* 397, 430–31 (1998). The issues addressed in this Article apply equally to viability lines that allow states to ban abortion after viability, as most states do. For instance, when Kate Dineen was 33 weeks pregnant, she learned her son had suffered a massive stroke. Even though she lived in Massachusetts, which supports abortion rights, the state’s viability ban meant she had to travel for care. Shirley Leung, *Traveling Out of State For an Abortion: A Nightmarish Journey That Some Massachusetts Women Face, Too*, *BOSTON GLOBE* (May 21, 2022) <https://www.bostonglobe.com/2022/05/21/business/traveling-out-state-an-abortion-nightmarish-journey-that-some-massachusetts-women-face-too> [<https://perma.cc/5MZX-UAWD>].

636. Taylor et al., *supra* note 330.

637. Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, *NAT’L CTR. HEALTH STATS.* (Mar. 16, 2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm> [<https://perma.cc/FLQ8-4QMU>].

638. *See* Katherine Kortsmit, Antoinette T. Nguyen, Michele G. Mandel, Lisa M. Hollier, Stephanie Ramer, Jessica Rodenhizer & Maura K. Whiteman, *Abortion Surveillance — United States, 2021*, *MORBIDITY MORTALITY WKLY. REP.* (Nov. 24, 2023), <https://www.cdc.gov/mmwr/volumes/72/ss/ss7209a1.htm> [<https://perma.cc/4QBD-MFCW>].

639. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in The United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 215 (2012).

640. *See e.g.,* Trivedi, *supra* note 307; *Pregnancy Complications*, *CTRS. FOR DISEASE CONTROL AND PREVENTION* (May 15, 2024), <https://www.cdc.gov/maternal-infant-health/pregnancy-complications> [<https://perma.cc/Z3ME-DDFT>].

risks become substantial enough to justify abortion if they are present in every pregnancy?⁶⁴¹ Courts have grappled with this dilemma when evaluating health exceptions.⁶⁴² The difference between elective and therapeutic abortion is one of degree and not of kind: any line drawn will be “inherently standardless” and “impossible to draw with precision.”⁶⁴³

The same arbitrary line drawing will be necessary in the context of fetal anomaly. The Mississippi law at issue in *Dobbs* had an exception for “severe fetal abnormality,” defined as “incompatible with life” “regardless of the provision of life-saving medical treatment.”⁶⁴⁴ The Court seemed to categorize these abortions as “[t]herapeutic.”⁶⁴⁵ But deciding which fetal anomaly abortions are “therapeutic” will also be arbitrary. Take two examples, Trisomy 13 and Trisomy 18. Until recently, these two conditions were uniformly considered “incompatible with life,” as the average baby born with these conditions survives less than two weeks.⁶⁴⁶ However, patient advocates both within and outside of the antiabortion movement have started to reject this terminology, arguing that these mortality numbers are driven by a refusal to provide aggressive treatment on the basis of futility.⁶⁴⁷ Indeed, a small subset of these babies—roughly 10 percent—can live up to ten years with the most aggressive treatment.⁶⁴⁸ If “fatal” means 100 percent certainty of death in infancy despite aggressive

641. Other scholars have also highlighted the inherent ambiguities in the abortion bans’ health and life exceptions. See *supra* note 20 and accompanying text.

642. For instance, in *Zurawski*, the Texas Supreme Court considered that all pregnancies carry risks and overturned the district court’s order because it “opens the door to permit abortion to address any pregnancy risk,” and therefore “is not a faithful interpretation of the law.” *State v. Zurawski*, 690 S.W.3d 644, 665 (Tex. 2024). It found that “ordinary risks attendant to pregnancy” cannot qualify for the life exception in Texas. *Id.* Similarly, when the Texas Supreme Court rejected Kate Cox’s abortion, it said: “No one disputes that Ms. Cox’s pregnancy has been extremely complicated. . . . Some difficulties in pregnancy, however, even serious ones, do not pose the heightened risks to the mother the exception encompasses.” *In re State*, 682 S.W.3d 890, 892–93 (Tex. 2023).

643. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 281, 284 (2022) (citations omitted).

644. MISS. CODE ANN. § 41-41-191 (West 2018).

645. See *Dobbs*, 597 U.S. at 301.

646. Donley, *supra* note 303, at 183–84.

647. See, e.g., Tracy K. Koogler, Benjamin S. Wilfond & Lainie Friedman Ross, *Lethal Language, Lethal Decisions*, 33 HASTINGS CTR. REP. 37, 38 (2003) (“If institutions aggressively treated all of these children who were born alive, the three- to five-year survival rate might even improve drastically, although survival into the teens would likely remain rare.”).

648. Katherine E. Nelson, Laura C. Rosella, Sanjay Mahant & Astrid Guttman, *Survival and Surgical Interventions for Children with Trisomy 13 and 18*, 316 JAMA 420, 424–25 (2016).

treatment, then almost no condition meets this standard. But once more wiggle room is introduced to establish fatality—maybe certain death in childhood (not infancy) would be enough, or a highly likely infant death (not certain death), or fatality absent standard treatments (not aggressive care)—the lines will be “inherently standardless” and “impossible to draw with precision.”⁶⁴⁹ Fetal anomalies as a class involve significant uncertainty and a spectrum of outcomes that are nearly impossible to predict.⁶⁵⁰

The confusion surrounding medical emergencies and fetal anomalies has spawned a whole class of litigation that is already yielding inconsistent results—a key indicator of unworkability, according to *Dobbs*.⁶⁵¹ For instance, the Biden Administration has argued that federal law mandates emergency rooms to provide medically necessary abortions that might not be immediately life-threatening, trumping state abortion bans that are less protective.⁶⁵² The Fifth and Ninth Circuits were on the cusp of a split regarding whether the federal statute preempted state law⁶⁵³ when the Supreme Court granted certiorari in 2024 to hear the Ninth Circuit case.⁶⁵⁴ A few months later, the Court decided to dismiss the writ of certiorari as improvidently granted without reaching the merits.⁶⁵⁵ The case was returned to Idaho, where litigation will continue, and the Supreme Court will almost certainly decide the case in the coming years. In the meantime, where a pregnant person lives will determine if her emergency room is bound to provide emergency abortion care—

649. *Dobbs*, 597 U.S. at 281, 284.

650. See Donley, *supra* note 303, at 183–84 (explaining the range of possibilities for babies diagnosed with Trisomy 13 and 18).

651. See *Dobbs*, 597 U.S. at 284.

652. Memorandum from Karen L. Tritz, Dir., Surv. & Operations Grp. & David R. Wright, Dir., Quality, Safety & Oversight Grp., to State Surv. Agency Dirs., REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS (QSO-21-22-HOSPITALS-UPDATED JULY 2022), CTRS. MEDICARE & MEDICAID SERVS. at 4 (July 2022), <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf> [<https://perma.cc/M5H4-TU89>].

653. See generally *United States v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022); *United States v. Idaho*, 83 F.4th 1130 (9th Cir. 2023), *reh'g en banc granted*, *opinion vacated*, 82 F.4th 1296 (9th Cir. 2023); *Texas v. Becerra*, 89 F.4th 529 (5th Cir. 2024).

654. See generally *United States v. Idaho*, 82 F.4th 1296 (9th Cir. 2023), *cert. granted*, 144 S. Ct. 540 (2024).

655. See generally *Moyle v. United States*, 144 S. Ct. 540 (2024), *cert. dismissed*, 144 S. Ct. 2015 (2024).

emergency rooms in the Fifth Circuit are not required to, whereas in Idaho, they must.⁶⁵⁶

Moreover, there are at least four active lawsuits in Idaho, Oklahoma, North Dakota, and Tennessee challenging the contours of required medical exceptions under state constitutional law.⁶⁵⁷ The only state where this issue has been resolved is Texas, where the Texas Supreme Court has stepped in twice to overturn district court opinions protecting some medically necessary abortions.⁶⁵⁸ In both the Kate Cox and Amanda Zurawski cases, the court refused to acknowledge the claims of women harmed by the state's abortion ban, instead blaming the doctors for confusion.⁶⁵⁹ The Texas Attorney General's Office has argued that state tort law, through medical malpractice, should instead be the vehicle to vindicate excessive delays in accessing medically necessary abortion care.⁶⁶⁰

The *Dobbs* framework, in which states may ban “elective” abortion throughout pregnancy, seems to depend on a central premise: that states can effectively isolate and criminalize “nontherapeutic” abortions without subsuming medically necessary reproductive health care. This Article suggests that this cannot be accomplished in any workable way. States' attempts to distinguish elective and therapeutic abortion are either illogical and arbitrary or “impossible to draw with precision” and “inherently standardless.”⁶⁶¹ Pregnancy does not create black and white realities. There is no clear line between elective and therapeutic abortion. Indeed, state attempts to carve out “therapeutic” abortions have already sowed deep confusion and generated inconsistent results—key indicators of unworkability. At the very least, the last two years have shown that the rules created by *Roe* and *Casey* were more workable than the mess *Dobbs* has left.

656. Caroline Kitchener & Dan Diamond, *Abortion Ruling Leaves Pregnant Women, Doctors In Limbo Over High-Risk Care*, WASH. POST (June 27, 2024, 1:45 PM), <https://www.washingtonpost.com/health/2024/06/27/abortion-supreme-court-emergency-care-emptala> [<https://perma.cc/5Y2V-VW9V>].

657. *Center Expands Work on Behalf of Patients Denied Abortion Care Despite Grave Pregnancy Complications*, CTR. REPROD. RIGHTS (Sept. 12, 2023), <https://reproductiverights.org/exceptions-complaints-idaho-tennessee-oklahoma> [<https://perma.cc/7DSC-BS3U>].

658. See generally *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024); *In re State*, 682 S.W.3d 890 (Tex. 2023).

659. *Zurawski*, 690 S.W.3d at 653; *In re State*, 682 S.W.3d at 892.

660. Carmel Shachar, Susannah Baruch & Louise P. King, *Whose Responsibility Is It to Define Exceptions in Abortion Bans?*, 331 JAMA 559, 560 (2014).

661. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 281, 284 (2022) (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 921 (2018)).

CONCLUSION

When antiabortion legislators and activists respond to the tragic consequences of abortion bans, they blame doctors. The laws are clear—their story goes—and providers are willfully or unintentionally misinterpreting the law.⁶⁶² These arguments, which appear regularly in media,⁶⁶³ are now being repeated by judges. For instance, when the Texas Supreme Court dismissed Amanda Zurawski’s case, which included over twenty Texans who were denied medically indicated abortions, it said:

A physician who tells a patient, “Your life is threatened by a complication that has arisen during your pregnancy, and you may die, or there is a serious risk you will suffer substantial physical impairment unless an abortion is performed,” and in the same breath states “but the law won’t allow me to provide an abortion in these circumstances” is simply wrong in that legal assessment.⁶⁶⁴

Apparently, physicians are now being expected to practice high-stakes law, where errors risk prison time. This victim blaming ignores the fact that when a physician tried to give Kate Cox a medically necessary abortion in Texas, the Attorney General threatened prosecution.⁶⁶⁵ And when the Biden Administration tried to force Texas emergency rooms to provide medically urgent abortions, Texas sued the Biden Administration to uphold their right to deny them.⁶⁶⁶

This Article puts this antiabortion narrative to rest: the abortion laws themselves are unclear. Their vagueness, coupled with the enormous consequences of violating an abortion ban, explain physicians’ confusion and risk aversion. The tragedies recounted above, plus hundreds like them, are a direct result of lawmakers’ political decisions to “hold the line” in favor of fetal life over maternal health.⁶⁶⁷ Former Republican Tennessee State Representative Bob

662. See *supra* note 377 and accompanying text.

663. *Id.*

664. *State v. Zurawski*, 690 S.W.3d 644, 654 (Tex. 2024).

665. Press Release, Ken Paxton, Attorney General, Texas, *Attorney General Ken Paxton Responds to Travis County TRO* (Dec. 7, 2023), <https://texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-responds-travis-county-tro> [<https://perma.cc/LF3Y-YRVD>].

666. Press Release, Ken Paxton, Attorney General, Texas, *Paxton Sues Biden Admin Over Its Efforts to Force Abortions in Texas* (July 14, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-admin-over-its-efforts-force-abortions-texas> [<https://perma.cc/PN8P-3B8N>].

667. Surana, *supra* note 298.

Ramsey—who was primaried out of office after voting against Tennessee’s abortion ban due to its lack of clear health exceptions—said it best: “The confusion is actually an intent. . . . The more confusing it is, the more likely there will be no abortion in the state of Tennessee. That’s a win for people who are opposed to abortion.”⁶⁶⁸

Republican attempts to surreptitiously correct the tragedies of their own making by redefining abortion are failing. This Article explains in depth why pregnancy is too complicated to legislate. There are no black-and-white lines that divide abortion and miscarriage, lifesaving or nonlifesaving abortions, or therapeutic and elective abortions. The terms are ambiguous, the definitions and ban exceptions are inherently vague, and the *Dobbs* framework, which gave states the impossible task of defining and excluding therapeutic abortions, is hopelessly unworkable.

668. Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html> [<https://perma.cc/C4CT-FRQ6>].

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State	Current Abortion Definition
Alabama	<p>(1) ABORTION. The use or prescription of any instrument, medicine, drug, or any other substance or device with the intent to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. The term does not include these activities if done with the intent to save the life or preserve the health of an unborn child, remove a dead unborn child, to deliver the unborn child prematurely to avoid a serious health risk to the unborn child’s mother, or to preserve the health of her unborn child. The term does not include a procedure or act to terminate the pregnancy of a woman with an ectopic pregnancy, nor does it include the procedure or act to terminate the pregnancy of a woman when the unborn child has a lethal anomaly.</p> <p>(6) SERIOUS HEALTH RISK TO THE UNBORN CHILD’S MOTHER. In reasonable medical judgment, the child's mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function. This term does not include a condition based on a claim that the woman is suffering from an emotional condition or a mental illness which will cause her to engage in conduct that intends to result in her death or the death of her unborn child. However, the condition may exist if a second physician who is licensed in Alabama as a psychiatrist, with a minimum of three years of clinical experience, examines the woman and documents that the woman has a diagnosed serious mental illness and because of it, there is reasonable medical judgment that she will engage in conduct that could result in her death or the death of her unborn child.</p> <p>ALA. CODE § 26-23H-3 (2019); <i>see also</i> ALA. CODE § 26-21-2 (2014); ALA. CODE § 26-23E-3 (2013); ALA. CODE § 26-23B-3 (2011); ALA. CODE § 26-23A-3 (2002); ALA. CODE § 26-22-2 (1997).</p>
Alaska	<p>(1) “[A]bortion” means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that “abortion” does not include the termination of a pregnancy if done with the intent to</p> <ul style="list-style-type: none"> (A) save the life or preserve the health of the unborn child; (B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman’s child; or (C) remove a dead unborn child[.] <p>ALASKA STAT. ANN. § 18.16.090 (West 1997).</p>
Arizona	<p>1. “Abortion” means the use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will cause, with reasonable likelihood, the death of the unborn child. Abortion does not include birth control devices, oral contraceptives used to inhibit or prevent ovulation, conception or the implantation of a fertilized ovum in the uterus or the use of any means to save the life or preserve the health of the unborn child, to preserve the life or health of the child after a live birth, to terminate an ectopic pregnancy or to remove a dead fetus.</p> <p>ARIZ. REV. STAT. ANN. § 36-2151 (2021). Arizona’s fifteen-week abortion ban defines abortion by reference to the above statute. ARIZ. REV. STAT. ANN. § 36-2322 (2022); <i>see also</i> ARIZ. REV. STAT. ANN. § 36-449.01 (2011).</p>

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State	Current Abortion Definition
Arkansas	<p>(1)(A) “Abortion” means the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of a woman, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of the unborn child.</p> <p>(B) An act under subdivision (1)(A) of this section is not an abortion if the act is performed with the purpose to:</p> <ul style="list-style-type: none"> (i) Save the life or preserve the health of the unborn child; (ii) Remove a dead unborn child caused by spontaneous abortion; or (iii) Remove an ectopic pregnancy[.] <p>ARK. CODE ANN. § 5-61-303 (West 2019). This law, passed after <i>Dobbs</i>, copied and referenced the state’s previous abortion definition found in ARK. CODE ANN. § 5-61-403 (West 2021). <i>See also</i> ARK. CODE ANN. § 20-16-1802 (West 2017); ARK. CODE ANN. § 20-16-603 (West 2015); ARK. CODE ANN. § 20-16-602 (West 2023); ARK. CODE ANN. § 20-16-1601 (West 2015); ARK. CODE ANN. § 20-16-1503 (West 2021); ARK. CODE ANN. § 20-16-803 (West 2015); ARK. CODE ANN. § 20-16-1702 (West 2015); ARK. CODE ANN. 20-16-1402 (West 2013); ARK. CODE ANN. § 20-16-1102 (West 2005); ARK. CODE ANN. § 20-16-702 (West 1985).</p>
California	<p>(d) “[A]bortion” means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth.</p> <p>CAL. INS. CODE § 10123.1961 (West 2022). This post-<i>Dobbs</i> definition, found in California’s Insurance Code, did not change the pre-<i>Dobbs</i> definition of abortion found in the Health and Safety code, CAL. HEALTH & SAFETY CODE § 123464 (West 2002).</p>
Colorado	<p>(1) “[A]bortion” means any medical procedure, instrument, agent, or drug used to terminate the pregnancy of an individual known or reasonably believed to be pregnant with an intention other than to increase the probability of a live birth.</p> <p>COLO. REV. STAT. ANN. § 25-6-402 (West 2022); <i>see also</i> COLO REV. STAT ANN. § 13-22-703 (West 2018).</p>
Connecticut	<p>(1) “Abortion” means the termination of a pregnancy for purposes other than producing a live birth. “Abortion” includes, but is not limited to, a termination of a pregnancy using pharmacological agents.</p> <p>Ct Legis P.A. 23-56, 2023 Conn. Legis. Serv. P.A. 23-56 (S.B. 3) (West). This post-<i>Dobbs</i> law did not change the state’s prior abortion definition found in CONN. GEN. STAT. ANN. § 19a-912 (West 2021).</p>
Delaware	<p>(1) “Abortion” means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.</p> <p>DEL. CODE ANN. tit. 24, § 1782 (West 1995).</p>

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Florida	<p>“Abortion” means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.</p> <p>FLA. STAT. ANN. § 390.011 (West 1997). Florida’s abortion ban does not define abortion. FLA. STAT. ANN. § 390.0111 (West 2023).</p>
Georgia	<p>(a)(1) “Abortion” means the act of using, prescribing, or administering any instrument, substance, device, or other means with the purpose to terminate a pregnancy with knowledge that termination will, with reasonable likelihood, cause the death of an unborn child; provided, however, that any such act shall not be considered an abortion if the act is performed with the purpose of:</p> <p style="padding-left: 20px;">(A) Removing a dead unborn child caused by spontaneous abortion; or</p> <p style="padding-left: 20px;">(B) Removing an ectopic pregnancy.</p> <p>GA. CODE ANN. § 16-12-141 (West 2019) (having taken effect after <i>Dobbs</i>).</p> <p>Pre-<i>Dobbs</i> Definition (2012): “Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device with the intent to terminate the pregnancy of a female known to be pregnant. The term “abortion” shall not include the use or prescription of any instrument, medicine, drug, or any other substance or device employed solely to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of a spontaneous abortion. The term “abortion” also shall not include the prescription or use of contraceptives.</p> <p>GA. CODE ANN. § 31-9A-2 (West 2012); <i>see also</i> GA. CODE ANN. § 15-11-681 (West 2013).</p>
Hawaii	<p>“Abortion” means an intentional termination of the pregnancy of a nonviable fetus.</p> <p>HAW. REV. STAT. ANN. § 453-16 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2006): (b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus.</p> <p>HAW. REV. STAT. ANN. § 453-16 (West 2006).</p>
Idaho	<p>(1) “Abortion” means the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean:</p> <p style="padding-left: 20px;">(a) The use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum within the uterus;</p> <p style="padding-left: 20px;">(b) The removal of a dead unborn child;</p> <p style="padding-left: 20px;">(c) The removal of an ectopic or molar pregnancy; or</p> <p style="padding-left: 20px;">(d) The treatment of a woman who is no longer pregnant.</p> <p>IDAHO CODE ANN. § 18-604 (West 2023).</p>

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State	Current Abortion Definition
	<p>Pre-<i>Dobbs</i> Definition (2021): (1) “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to save the life or preserve the health of the unborn child, remove a dead unborn child caused by spontaneous abortion, or remove an ectopic pregnancy.</p> <p>IDAHO CODE ANN. § 18-8702 (West 2021); <i>see also</i> IDAHO CODE ANN. § 18-8801 (West 2022); IDAHO CODE ANN. § 18-502 (West 2011); IDAHO CODE ANN. § 18-604 (West 2006).</p>
Illinois	<p>“Abortion” means the use of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of an individual known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus[.]</p> <p>815 ILL. COMP. STAT. ANN. 505/2BBBB (West 2023). This law, passed after <i>Dobbs</i>, copied and referenced the state’s previous abortion definition found in 775 ILL. COMP. STAT. ANN. 55/1-10 (West 2019).</p>
Indiana	<p>Sec. 1. “Abortion” means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus. The term includes abortions by surgical procedures and by abortion inducing drugs.</p> <p>IND. CODE ANN. § 16-18-2-1 (West 2013). Indiana’s abortion ban did not include a definition of abortion. IND. CODE ANN. § 16-34-2-1 (West 2022). Also, its 2022 law on coerced abortions defines abortion by reference to the 2013 definition. IND. CODE ANN. § 16-34-6-1 (West 2022).</p>
Iowa	<p>1. “Abortion” means the termination of a human pregnancy with the intent other than to produce a live birth or to remove a dead fetus.</p> <p>H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023). This post-<i>Dobbs</i> definition, found in Iowa’s enjoined abortion ban, did not change the previous definition of abortion found in IOWA CODE ANN. § 146B.1 (West 2023). <i>See also</i> IOWA CODE ANN. § 217.41B (West 2023).</p>
Kansas	<p>(a)(1) “Abortion” means the use or prescription of any instrument, medicine, drug or any other means to terminate the pregnancy of a woman knowing that such termination will, with reasonable likelihood, result in the death of the unborn child.</p> <p>(2) Such use or prescription is not an “abortion” if done with the intent to:</p> <ul style="list-style-type: none"> (A) Preserve the life or health of the unborn child; (B) increase the probability of a live birth; (C) remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or the unborn child; or (D) remove an ectopic pregnancy. <p>(3) “Abortion” does not include the prescription, dispensing, administration, sale or use of any method of contraception.</p>

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	<p>KAN. STAT. ANN. § 65-6701 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2011): “Abortion” means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.</p> <p>KAN. STAT. ANN. §§ 65-6701, -6709 (West 2014).</p>
Kentucky	<p>(1) “Abortion” has the same meaning as in KRS 311.720. [§ 311.720: “Abortion” means the use of any means whatsoever to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death.]. However, as used in KRS 311.821 to 311.827, an abortion shall not include the use of any means to terminate the pregnancy of a woman if done with an intent to:</p> <ul style="list-style-type: none"> (a) Save the life or preserve the health of the unborn child; (b) Remove a dead unborn child caused by spontaneous abortion; or (c) Remove an ectopic pregnancy[.] <p>KY. REV. STAT. ANN. § 311.821 (West 2021); <i>see also</i> KY. REV. STAT. ANN. § 213.011 (West 2020). The referenced statute as a whole was found unconstitutional on other grounds, <i>see</i> Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), but the abortion provision was updated in 2017. KY. REV. STAT. ANN. § 311.720 (West 2017). Kentucky’s abortion ban does not define abortion. KY. REV. STAT. ANN. § 311.772 (West 2019).</p>
Louisiana	<p>(1)(a) “Abortion” or “induced abortion” means the performance of any act with the intent to terminate a clinically diagnosable pregnancy with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child . . . by one or more of the following means:</p> <ul style="list-style-type: none"> (i) Administering, prescribing, or providing any abortion-inducing drug, potion, medicine, or any other substance, device, or means to a pregnant female. (ii) Using an instrument or external force on a pregnant female. <p>(b) Abortion shall not mean any one or more of the following acts, if performed by a physician:</p> <ul style="list-style-type: none"> (i) A medical procedure performed with the intention to save the life or preserve the health of an unborn child. (ii) The removal of a dead unborn child or the inducement or delivery of the uterine contents in case of a positive diagnosis, certified in writing in the woman’s medical record along with the results of an obstetric ultrasound test, that the pregnancy has ended or is in the unavoidable and untreatable process of ending due to spontaneous miscarriage, also known in medical terminology as spontaneous abortion, missed abortion, inevitable abortion, incomplete abortion, or septic abortion. (iii) The removal of an ectopic pregnancy. (iv) The use of methotrexate to treat an ectopic pregnancy. (v) The performance of a medical procedure necessary in good faith medical judgment or reasonable medical judgment to prevent the death or substantial risk of death to the pregnant woman due to a physical condition, or to prevent the serious,

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	<p>permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.</p> <p>(vi) The removal of an unborn child who is deemed to be medically futile. The diagnosis shall be a medical judgment certified by two qualified physicians and recorded in the woman's medical record. The medical procedure shall be performed in a licensed ambulatory surgical center or hospital. Upon the completion of the procedure, the physician shall submit an individual abortion report consistent with R.S. 40:1061.21 that includes appropriate evidence of the certified diagnosis.</p> <p>(2)(a) "Abortion-inducing drug" means any drug or chemical, or any combination of drugs or chemicals, or any other substance when used with the intent to cause an abortion, including but not limited to RU-486, the Mifeprex regimen, misoprostol (Cytotec), or methotrexate.</p> <p>(b) Abortion-inducing drug shall not mean a contraceptive, an emergency contraceptive, or the use of methotrexate to treat an ectopic pregnancy. . . .</p> <p>(18) "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, within the reasonable medical judgment of a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy to avert the pregnant woman's death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy.</p> <p>LA. STAT. ANN. § 14:87.1 (2022). This was amended by 2024 La. Sess. Law Serv. Act 246 (S.B. 276) (West). <i>See also</i> LA. STAT. ANN. § 40:1061.1.2 (2022).</p> <p>Pre-<i>Dobbs</i> Definition (2015): (1) "Abortion" or "induced abortion" means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:</p> <ul style="list-style-type: none"> (a) Save the life or preserve the health of an unborn child. (b) Remove a dead unborn child or induce delivery of the uterine contents in case of a positive diagnosis, certified in writing in the woman's medical record along with the results of an obstetric ultrasound test, that the pregnancy has ended or is in the unavoidable and untreatable process of ending due to spontaneous miscarriage, also known in medical terminology as spontaneous abortion, missed abortion, inevitable abortion, incomplete abortion, or septic abortion (c) Remove an ectopic pregnancy. <p>LA STAT. ANN. § 40:1061.9 (2013).</p>
Maine	<p>A. "Abortion" means the intentional interruption of a pregnancy by the application of external agents, whether chemical or physical, or the ingestion of chemical agents with an intention other than to produce a live birth or to remove a dead fetus.</p>

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	ME. REV. STAT. ANN. tit. 22, § 1598 (2023). This post- <i>Dobbs</i> law did not meaningfully change the definition of abortion, previously found in ME. REV. STAT. ANN. tit. 22, § 1596 (1989).
Maryland	No codified definition of abortion.
Massachusetts	<p>“Abortion,” any medical treatment intended to induce the termination of, or to terminate, a clinically diagnosable pregnancy except for the purpose of producing a live birth; provided, however, that “abortion” shall not include providing care related to a miscarriage.</p> <p>MASS. GEN. LAWS ANN. ch. 112, § 12K (West 2020).</p>
Michigan	<p>“Abortion” means that term as defined in section 2803 [§ 333.2803: “Abortion” means a medical treatment that is intended to terminate a diagnosable intrauterine pregnancy for a purpose other than to produce a live birth. Abortion does not include the use or prescription of a drug or device that prevents pregnancy or a medical treatment used to remove a dead fetus or embryo whose death was the result of a spontaneous abortion.]</p> <p>MICH. COMP. LAWS ANN. § 333.2690 (West 2023). This 2024 statute changed the definition it referenced from § 333.17015 to § 333.2803.</p> <p>Pre-<i>Dobbs</i> Definition (2013): (a) “Abortion” means the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a fetus that has died as a result of natural causes, accidental trauma, or a criminal assault on the pregnant woman. Abortion does not include the use or prescription of a drug or device intended as a contraceptive.</p> <p>MICH. COMP. LAWS ANN. § 333.17015 (West 2012); <i>see also</i> MICH. COMP. LAWS ANN. § 400.109e (West 1996); MICH. COMP. LAWS ANN. § 722.902 (West 1993).</p>
Minnesota	<p>Subd. 5. . . . “Abortion” includes an act, procedure or use of any instrument, medicine or drug which is supplied or prescribed for or administered to an individual with the intention of terminating, and which results in the termination of, pregnancy.</p> <p>MINN. STAT. ANN. § 145.411 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2003): Subd. 2. . . . “Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device to intentionally terminate the pregnancy of a female known to be pregnant, with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.</p> <p>MINN. STAT. ANN. § 145.4241 (West 2003).</p>
Mississippi	(1) “[A]bortion” means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus .

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	MISS. CODE ANN. § 41-41-45 (West 2007). This definition is in Mississippi’s trigger ban, which was passed in 2007 but became effective in 2022, and the state has also passed more recent definitions. <i>See also</i> MISS. CODE ANN. § 41-41-405 (West 2020); MISS. CODE ANN. § 41-41-191 (West 2018); MISS. CODE ANN. § 41-41-153 (West 2016); MISS. CODE ANN. § 41-41-105 (West 2013); MISS. CODE ANN. § 41-41-51 (West 1986).
Missouri	<p>(1) “Abortion”:</p> <p>(a) The act of using or prescribing any instrument, device, medicine, drug, or any other means or substance with the intent to destroy the life of an embryo or fetus in his or her mother's womb; or</p> <p>(b) The intentional termination of the pregnancy of a mother by using or prescribing any instrument, device, medicine, drug, or other means or substance with an intention other than to increase the probability of a live birth or to remove a dead unborn child[.]</p> <p>MO. ANN. STAT. § 188.015 (West 2019). Missouri’s abortion ban does not define abortion. MO. ANN. STAT. § 188.017(2) (West 2019); <i>see also</i> MO. CODE REGS. ANN. tit. 19, § 10-15.050 (West 2017).</p>
Montana	<p>(1)(a) “Abortion” means the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn human being.</p> <p>(b) The term does not include:</p> <p style="padding-left: 20px;">(i) an act to remove an ectopic pregnancy; or</p> <p style="padding-left: 20px;">(ii) a separation procedure performed because of a medical emergency and prior to the ability of the unborn child to survive outside of the womb with or without artificial support. . . .</p> <p>(9)(a) “Medical emergency” means a condition that, on the basis of a physician's good faith clinical judgment, makes a separation procedure performed prior to the ability of the unborn human being to survive outside of the womb with or without artificial support necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.</p> <p>(b) The term does not include mental or psychological conditions.</p> <p>MONT. CODE ANN. § 50-20-1002 (West 2023); <i>see also</i> MONT. CODE ANN. § 50-20-104 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2021): (1) “Abortion” means the act of using or prescribing an instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that termination by those means will with reasonable likelihood cause the death of the unborn child. The term does not include an act to terminate a pregnancy with the intent to:</p> <p style="padding-left: 20px;">(a) save the life or preserve the health of the unborn child;</p> <p style="padding-left: 20px;">(b) remove a dead unborn child caused by spontaneous abortion;</p> <p style="padding-left: 20px;">(c) remove an ectopic pregnancy; or</p> <p style="padding-left: 20px;">(d) treat a maternal disease or illness for which the prescribed drug is indicated.</p>

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State	Current Abortion Definition
	MONT. CODE ANN. § 50-20-703 (West 2021).
Nebraska	<p>(1)(a) Abortion means the prescription or use of any instrument, device, medicine, drug, or substance to or upon a woman known to be pregnant with the specific intent of terminating the life of her preborn child.</p> <p>(b) Abortion shall under no circumstances be interpreted to include:</p> <ul style="list-style-type: none"> (i) Removal of an ectopic pregnancy; (ii) Removal of the remains of a preborn child who has already died; (iii) An act done with the intention to save the life or preserve the health of the preborn child; (iv) The accidental or unintentional termination of the life of a preborn child; or (v) During the practice of in vitro fertilization or another assisted reproductive technology, the termination or loss of the life of a preborn child who is not being carried inside a woman's body[.] <p>NEB. REV. STAT. ANN. § 71-6914 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2011): (1) Abortion means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:</p> <ul style="list-style-type: none"> (a) Save the life or preserve the health of an unborn child; (b) Remove a dead unborn child caused by a spontaneous abortion; or (c) Remove an ectopic pregnancy[.] <p>NEB. REV. STAT. ANN. § 71-6901 (West 2011); <i>see also</i> NEB. REV. STAT. ANN. § 28-3,103 (West 2010); NEB. REV. STAT. ANN. § 28-326 (West 2000).</p>
Nevada	<p>“[A]bortion” means the termination of a human pregnancy with an intention other than to produce the birth of an infant capable of sustained survival by natural or artificial supportive systems or to remove a dead fetus.</p> <p>NEV. REV. STAT. ANN. § 442.240 (West 1985).</p>
New Hampshire	<p>I. “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the fetus. Such use, prescription, or means is not an abortion if done with the intent to:</p> <ul style="list-style-type: none"> (a) Save the life or preserve the health of the fetus; (b) Remove a dead fetus caused by spontaneous abortion; or (c) Remove an ectopic pregnancy.

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State	Current Abortion Definition
	N.H. REV. STAT. ANN. § 329:43 (2021); <i>see also</i> N.H. REV. STAT. ANN. § 132.32 (2011).
New Jersey	No current definition. ¹
New Mexico	A. “[A]bortion” means the intentional termination of the pregnancy of a female by a person who knows the female is pregnant. N.M. STAT. ANN. § 30-5A-2 (West 2000); <i>see also</i> N.M. STAT. ANN. § 24-14-2 (West 2009).
New York	(a) “Abortion” shall mean the termination of pregnancy pursuant to section twenty-five hundred ninety-nine-bb of this article. [§ 2599-BB: A health care practitioner licensed, certified, or authorized under title eight of the education law, acting within his or her lawful scope of practice, may perform an abortion when, according to the practitioner's reasonable and good faith professional judgment based on the facts of the patient's case: the patient is within twenty-four weeks from the commencement of pregnancy, or there is an absence of fetal viability, or the abortion is necessary to protect the patient's life or health.]. 2023 NY S.B. 4007 (NS) (West); <i>see also</i> 18 NYCRR 505.2[e] (2023). Before <i>Dobbs</i> , there was no codified definition of abortion. New York has a Reproductive Rights portion of its code, but no definition of abortion is included.
North Carolina	(1) Abortion.--A surgical abortion or a (1) medical abortion, as those terms are defined in this section, respectively. (4e) Medical abortion.--The use of any medicine, drug, or other substance intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to do any of the following: a. Increase the probability of a live birth. b. Preserve the life or health of the child. c. Remove a dead, unborn child who died as a result of (i) natural causes in utero, (ii) accidental trauma, or (iii) a criminal assault of the pregnant woman or her unborn child which causes the premature termination of the pregnancy. d. Remove an ectopic pregnancy. (9b) Surgical abortion.--The use or prescription of any instrument or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to do any of the following: a. Increase the probability of a live birth. b. Preserve the life or health of the child. c. Remove a dead, unborn child who died as the result of (i) natural causes in utero, (ii) accidental trauma, or (iii) a criminal assault on the pregnant woman or her unborn child which causes the premature termination of the pregnancy. d. Remove an ectopic pregnancy.

¹ A statute on Juvenile and Domestic Relations Courts that was held unconstitutional by *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000) defines abortion as “the use of any means to terminate the pregnancy of a female known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus.” N.J. STAT. ANN. § 9:17A-1.3 (West 1999).

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State	Current Abortion Definition
	<p>N.C. GEN. STAT. ANN. § 90-21.81 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2011): Abortion.--The use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to do any of the following:</p> <ol style="list-style-type: none"> a. Increase the probability of a live birth. b. Preserve the life or health of the child. c. Remove a dead, unborn child who died as the result of (i) natural causes in utero, (ii) accidental trauma, or (iii) a criminal assault on the pregnant woman or her unborn child which causes the premature termination of the pregnancy. <p>N.C. GEN. STAT. ANN. § 90-21.81 (West 2011).</p>
North Dakota	<p>1. “Abortion” means the act of using, selling, or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one or more unborn children in a multifetal pregnancy, with knowledge the termination by those means will with reasonable likelihood cause the death of the unborn child. The use, sale, prescription, or means is not an abortion if done with the intent to:</p> <ol style="list-style-type: none"> a. Remove a dead unborn child caused by spontaneous abortion; b. Treat a woman for an ectopic pregnancy; or c. Treat a woman for a molar pregnancy. <p>N.D. CENT. CODE ANN. § 12.1-19.1-01 (West 2023); <i>see also</i> H.B. 1171, 2023 Leg., 68th Sess. (N.D. 2023); N.D. CENT. CODE ANN. § 14-02.1-02 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (2012): 1.a. “Abortion” means the use or prescription of any substance, device, instrument, medicine, or drug to intentionally terminate the pregnancy of an individual known to be pregnant. The term does not include an act made with the intent to increase the probability of a live birth; preserve the life or health of a child after live birth; or remove a dead, unborn child who died as a result of a spontaneous miscarriage, an accidental trauma, or a criminal assault upon the pregnant female or her unborn child.</p> <p>N.D. CENT. CODE § 12.1-31-12 (repealed 2023); <i>see also</i> N.D. CENT. CODE ANN. § 23-16-14 (West 2011); N.D. CENT. CODE ANN. § 12.1-17.1-01 (West 1987).</p>
Ohio	<p>“Abortion” means the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo. Abortion is the practice of medicine or surgery for the purposes of section 4731.41 of the Revised Code.</p> <p>OHIO REV. CODE ANN. § 2919.11 (West 1974). Ohio’s six week abortion ban, which is enjoined, did not define abortion. OHIO REV. CODE ANN. § 2919.195(A) (West 2019).</p>

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State	Current Abortion Definition
Oklahoma	<p>The terms “abortion” and “unborn child” shall have the same meaning as provided by Section 1-730 of Title 63 of the Oklahoma Statutes [§ 1-730: A.1. “Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to remove an ectopic pregnancy, or to remove a dead unborn child who died as the result of a spontaneous miscarriage, accidental trauma, or a criminal assault on the pregnant female or her unborn child . . . B. Nothing contained herein shall be construed in any manner to include any contraceptive device or medication or sterilization procedure.].</p> <p>S.B. 612, 58th Leg., 2d Reg. Sess. (Okla. 2022) (to be codified at OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022)). This 2007 definition is within Oklahoma’s abortion ban, which is currently blocked. <i>See also</i> OKLA. STAT. ANN. tit. 63, § 1-745.51 (West 2022) (codified by H.B. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022)); OKLA. STAT. ANN. tit. 63, § 1-757.2 (West 2021); OKLA. STAT. ANN. tit. 63, § 1-756.2 (West 2021); OKLA. STAT. tit. 63, § 1-756 (West 2019); OKLA. STAT. ANN. tit. 63, §1-740.16 (West 2017); OKLA. STAT. ANN. tit. 63, § 1-737.8 (West 2015); OKLA. STAT. ANN. tit. 63, §1-746.1 (West 2014); OKLA. STAT. ANN. tit. 63, §1-744.1 (West 2013); OKLA. STAT. ANN. tit. 63, §1-745.13 (West 2012); OKLA. STAT. ANN. tit. 63, §1-745.2 (West 2011); OKLA. STAT. ANN. tit. 63, §1-738.7 (West 2007).</p>
Oregon	There is no codified definition of abortion in Oregon. ²
Pennsylvania	<p>“Abortion.” The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.</p> <p>18 PA. STAT. AND CONS. STAT. ANN. § 3203 (West 1989).</p>
Rhode Island	<p>“Abortion” for the purpose of this chapter means administering to a woman, known to be pregnant, any medicine, drug, substance, or thing whatever, or the employment upon her of any instrument or means whatever, with intent to terminate a pregnancy. The term shall not include the administering of any medicine, drug, substance, or thing or the employment of any instrument or means for the purpose of completing an incomplete, spontaneous miscarriage.</p> <p>23 R.I. GEN. LAWS ANN. § 23-4.7-1 (West 1982).</p>
South Carolina	<p>(1) “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to save the life or preserve the health of the unborn child, or to remove a dead unborn child.</p>

² A statute concerning vital statistics defines “[i]nduced termination of pregnancy” as “the purposeful interruption of an intrauterine pregnancy with the intention other than to produce a live-born infant and that does not result in a live birth[.]” excluding “management of prolonged retention of products of conception following fetal death.” OR. REV. STAT. ANN. § 432.005 (West 2013).

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	<p>S.C. CODE ANN. § 44-41-610 (2023); <i>see also</i> S.C. CODE ANN. § 44-41-10 (2023).</p> <p>Pre-<i>Dobbs</i> Definition (2016): (1) “Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device:</p> <ul style="list-style-type: none"> (a) to intentionally kill the unborn child of a woman known to be pregnant; or (b) to intentionally prematurely terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth or of preserving the life or health of the child after live birth. <p>S.C. CODE ANN. § 44-41-430 (2016).</p>
South Dakota	<p>(1) “Abortion,” the intentional termination of the life of a human being in the uterus[.]</p> <p>S.D. CODIFIED LAWS § 34-23A-1 (2021).</p>
Tennessee	<p>(1) “Abortion” means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to terminate an ectopic or molar pregnancy, or to remove a dead fetus[.]</p> <p>TENN. CODE ANN. § 39-15-213 (West 2023); <i>see also</i> S.B. 600, 2023 Leg., Reg. Sess. (Tenn. 2023); TENN. CODE ANN. § 63-6-1102 (West 2022).</p> <p>Pre-<i>Dobbs</i> Definition (1988): (1) “Abortion” means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus[.]</p> <p>TENN. CODE ANN. § 37-10-302 (West 1988); <i>see also</i> TENN. CODE ANN. § 39-15-218 (West 2020).</p>
Texas	<p>(1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:</p> <ul style="list-style-type: none"> (A) save the life or preserve the health of an unborn child; (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or (C) remove an ectopic pregnancy. <p>TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017). Texas’s trigger law defines abortion by reference to this definition. TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001 to .007 (West 2021).</p>
Utah	<p>(1)(a) “Abortion” means the act, by a physician, of using an instrument, or prescribing a drug, with the intent to cause the death of an unborn child of a woman known to be pregnant, except as permitted under this part.</p> <p>(b) “Abortion” does not include:</p>

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	<p>(i) removal of a dead unborn child; (ii) removal of an ectopic pregnancy; or (iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless: (A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and (B) the physician is unable to obtain the consent due to a medical emergency.</p> <p>UTAH CODE ANN. § 76-7-301 (West 2023); <i>see also</i> UTAH CODE ANN. § 76-7a-101 (West 2024).</p>
	<p>Pre-<i>Dobbs</i> Definition (2010): “Abortion” means: (i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician; (ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or (iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.</p> <p>(b) “Abortion” does not include: (i) removal of a dead unborn child; (ii) removal of an ectopic pregnancy; or (iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless: (A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and (B) the physician is unable to obtain the consent due to a medical emergency.</p> <p>UTAH CODE ANN. § 76-7-301 (West 2010).</p>
Vermont	<p>“Abortion” means any medical treatment intended to induce the termination of, or to terminate, a clinically diagnosable pregnancy except for the purpose of producing a live birth.</p> <p>VT. STAT. ANN. tit. 8, § 4099e (West 2023).</p> <p>Before <i>Dobbs</i>, there was no codified definition of abortion. Vermont has a Reproductive Rights portion of their code, but no definition of abortion is within it.</p>
Virginia	<p>“Perform an abortion” means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage as provided in § 18.2-72, 18.2-73, or 18.2-74.</p> <p>VA. CODE ANN. § 16.1-241 (West 1997); <i>see also</i> VA. CODE ANN. § 18.2-71 (West 1975).</p>
Washington	<p>“Abortion” means the termination of a pregnancy for purposes other than producing a live birth.</p>

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	<p>WASH. REV. CODE ANN. § 19.373.010 (West 2023).</p> <p>Pre-<i>Dobbs</i> Definition (1992): “Abortion” means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth.</p> <p>WASH. REV. CODE ANN. § 9.02.170 (West 1992).</p>
West Virginia	<p>“Abortion” means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a patient known to be pregnant and with intent to cause the death and expulsion or removal of an embryo or a fetus. This term does not include the terms “intrauterine fetal demise” or “stillbirth” or “miscarriage” as defined in this section. . . . “Intrauterine fetal demise” or “stillbirth” means the unintended or spontaneous loss of a fetus after the 19th week of pregnancy. . . . “Miscarriage” means the unintended or spontaneous loss of an embryo or a fetus before the 20th week of pregnancy. This term includes the medical terms “spontaneous abortion,” “missed abortion,” and “incomplete abortion”.</p> <p>(a) Abortion does not include:</p> <ol style="list-style-type: none"> (1) A miscarriage; (2) An intrauterine fetal demise or stillbirth; (3) The use of existing established cell lines derived from aborted human embryos or fetuses; (4) Medical treatment provided to a patient by a licensed medical professional that results in the accidental or unintentional injury or death of an embryo or a fetus; (5) In vitro fertilization; (6) Human fetal tissue research, when performed in accordance with Sections 498A and 498B of the PHS Act (42 U.S.C. 289g-1 and 289g-2) and 45 C.F.R. 46.204 and 46.206; or (7) The prescription, sale, transfer, or use of contraceptive devices, instruments, medicines, or drugs. <p>W. VA. CODE ANN. §§ 16-2R-2 to -4 (West 2022).</p> <p>Pre-<i>Dobbs</i> Definition (2018): (1) “Abortion” means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a female known to be pregnant and with intent to cause the expulsion of a fetus other than by live birth. This article does not prevent the prescription, sale, or transfer of intrauterine contraceptive devices, other contraceptive devices, or other generally medically accepted contraceptive devices, instruments, medicines or drugs for a female who is not known to be pregnant and for whom the contraceptive devices, instruments, medicines or drugs were prescribed by a physician solely for contraceptive purposes and not for the purpose of inducing or causing the termination of a known pregnancy.</p> <p>W. VA. CODE ANN. § 16-2F-2 (West 2018).</p>
Wisconsin	<p>(a) “Abortion” means the use of an instrument, medicine, drug or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she may be pregnant and with intent</p>

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	<p>other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus.</p> <p>WIS. STAT. ANN. § 253.10 (West 2016); <i>see also</i> WIS. STAT. ANN. § 48.375 (West 2022); WIS. STAT. ANN. § 20.927 (West 2011).</p>
Wyoming	<p>BLOCKED (a)(i) “Abortion” means the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby. “Abortion” shall not include any use, prescription or means specified in this paragraph if the use, prescription or means are done with the intent to:</p> <ul style="list-style-type: none"> (A) Save the life or preserve the health of the unborn baby; (B) Remove a dead unborn baby caused by spontaneous abortion or intrauterine fetal demise; (C) Treat a woman for an ectopic pregnancy; or (D) Treat a woman for cancer or another disease that requires medical treatment which treatment may be fatal or harmful to the unborn baby. <p>WYO. STAT. ANN. § 35-6-122 (West 2023).</p> <p>Pre-Dobbs Definition (1997): (a)(i) “Abortion” means an act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including the pregnant woman herself, with the intent of producing the premature expulsion, removal or termination of a human embryo or fetus, except that in cases in which the viability of the embryo or fetus is threatened by continuation of the pregnancy, early delivery after viability by commonly accepted obstetrical practices shall not be construed as an abortion[.]</p> <p>WYO. STAT. ANN. § 35-6-101 (West 1997).</p>
Federal Government	<p>Abortion means the intentional termination of a pregnancy by artificial means done for a purpose other than that of producing a live birth. A spontaneous, missed or threatened abortion or termination of an ectopic (tubal) pregnancy are not included within the term “abortion” as used herein.</p> <p>32 C.F.R. § 199.2 (2023).</p> <p>Abortions means induced pregnancy terminations, including both medically and surgically induced pregnancy terminations. This term does not include spontaneous abortions, i.e., miscarriages.</p> <p>45 C.F.R. § 283.2 (1999).</p>

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State	Ban Language
Alabama	<p>Current Total Ban (enacted 2019, effective 2022): (a) It shall be unlawful for any person to intentionally perform or attempt to perform an abortion except as provided for by subsection (b). (b) An abortion shall be permitted if an attending physician licensed in Alabama determines that an abortion is necessary in order to prevent a serious health risk to the unborn child's mother. [§ 26-23H-3: Serious Health Risk To The Unborn Child's Mother. In reasonable medical judgment, the child's mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function. This term does not include a condition based on a claim that the woman is suffering from an emotional condition or a mental illness which will cause her to engage in conduct that intends to result in her death or the death of her unborn child. However, the condition may exist if a second physician who is licensed in Alabama as a psychiatrist, with a minimum of three years of clinical experience, examines the woman and documents that the woman has a diagnosed serious mental illness and because of it, there is reasonable medical judgment that she will engage in conduct that could result in her death or the death of her unborn child. If the mental health diagnosis and likelihood of conduct is confirmed as provided in this act, and it is determined that a termination of her pregnancy is medically necessary to avoid the conduct, the termination may be performed and shall be only performed by a physician licensed in Alabama in a hospital as defined in the Alabama Administrative Code and to which he or she has admitting privileges.].</p> <p>ALA. CODE § 26-23H-4 (2019).</p>
Arizona	<p>Current Fifteen Week Ban (2022): B. Except in a medical emergency, a physician may not intentionally or knowingly perform, induce or attempt to perform or induce an abortion if the probable gestational age of the unborn human being has been determined to be greater than fifteen weeks. [§ 36-2321: “Medical emergency” means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function. “Major bodily function” includes functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.].</p> <p>ARIZ. REV. STAT. ANN. § 36-2322 (2022).</p> <p style="background-color: red; color: black;">BLOCKED Total Ban (enacted 1901, blocked 1973, enforced Sept. 2022, enjoined Oct. 2022): A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life shall be punished by imprisonment in the state prison for not less than two years nor more than five years.].</p> <p>ARIZ. REV. STAT. ANN. § 13-3603 (1901).</p>
Arkansas	<p>Current Total Ban (2022): (a) A person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency. [§ 5-61-303: “Medical emergency” means a condition in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.].</p> <p>(c) This section does not: . . .</p>

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	<p>(2) Prohibit the sale, use, prescription, or administration of a contraceptive measure, drug, or chemical if the contraceptive measure, drug, or chemical is administered before the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure, drug, or chemical is sold, used, prescribed, or administered in accordance with manufacturer instructions.</p> <p>(d) It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury or death to the unborn child.</p> <p>ARK. CODE ANN. § 5-61-304 (West 2019).</p>
Florida	<p>Current Six Week Ban (2022): (1) A physician may not knowingly perform or induce a termination of pregnancy if the physician determines the gestational age of the fetus is more than 6 weeks unless one of the following conditions is met:</p> <p>(a) Two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition. . . .</p> <p>(c) The pregnancy has not progressed to the third trimester and two physicians certify in writing that, in reasonable medical judgment, the fetus has a fatal fetal abnormality. [§ 390.011: "Fatal fetal abnormality" means a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter.].</p> <p>FLA. STAT. ANN. § 390.0111 (West 2023).</p>
Georgia	<p>Current Six Week Ban (enacted 2020, effective 2022): (b) No abortion is authorized or shall be performed if an unborn child has been determined in accordance with Code Section 31-9B-2 to have a detectable human heartbeat except when:</p> <p>(1) A physician determines, in reasonable medical judgment, that a medical emergency exists ["Medical emergency" means a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman.]; . . .</p> <p>(3) A physician determines, in reasonable medical judgment, that the pregnancy is medically futile. ["Medically futile" means that, in reasonable medical judgment, an unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth.]. . . .</p> <p>(h) It shall be an affirmative defense to prosecution under this article if:</p> <p>(1) A licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury to or death of an unborn child; . . .</p> <p>(5) A woman sought an abortion because she reasonably believed that an abortion was the only way to prevent a medical emergency.</p> <p>GA. CODE ANN. § 16-12-141 (West 2019).</p>

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Idaho	<p>Current Total Ban (2023): (1) Except as provided in subsection (2) of this section, every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. . . .</p> <p>(2) The following shall not be considered criminal abortions for purposes of subsection (1) of this section:</p> <p style="padding-left: 20px;">(a) The abortion was performed or attempted by a physician as defined in this chapter and:</p> <p style="padding-left: 40px;">(i) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and</p> <p style="padding-left: 40px;">(ii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or</p> <p style="padding-left: 20px;">(b) The abortion was performed or attempted by a physician as defined in this chapter during the first trimester of pregnancy and: . . .</p> <p>(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.</p> <p>IDAHO CODE ANN. § 18-622 (West 2023).</p> <hr/> <p>Prior Total Ban (enacted 2020, in effect August 2022, replaced by Current Total Ban in 2023): (2) Every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion...</p> <p>(3) It shall be an affirmative defense to prosecution under subsection (2) of this section and to any disciplinary action by an applicable licensing authority, which must be proven by a preponderance of the evidence, that:</p> <p style="padding-left: 20px;">(a)(i) The abortion was performed or attempted by a physician as defined in this chapter;</p> <p style="padding-left: 20px;">(ii) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and</p> <p style="padding-left: 20px;">(iii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself . . .</p> <p>(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.</p>

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State	Ban Language
	IDAHO CODE ANN. § 18-622 (West 2020).
Indiana	<p>Current Total Ban (2022): (a) Abortion shall in all instances be a criminal act, except when performed under the following circumstances:</p> <p>(1) Except as prohibited in IC 16-34-4, before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age of the fetus, if:</p> <p style="padding-left: 40px;">(A) for reasons based upon the professional, medical judgment of the pregnant woman's physician, if either:</p> <p style="padding-left: 80px;">(i) the abortion is necessary when reasonable medical judgment dictates that performing the abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life; [16-18-2-327.9: "Serious health risk", for purposes of IC 16-34, means that in reasonable medical judgment, a condition exists that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function. The term does not include psychological or emotional conditions. A medical condition may not be determined to exist based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in physical harm.] or</p> <p style="padding-left: 80px;">(ii) the fetus is diagnosed with a lethal fetal anomaly[.]</p>
	IND. CODE ANN. § 16-34-2-1 (West 2022).
Iowa	<p>Current Six Week Ban (2023): 2. a. A physician shall not perform an abortion upon a pregnant woman when it has been determined that the unborn child has a detectable fetal heartbeat, unless, in the physician's reasonable medical judgment, a medical emergency or fetal heartbeat exception exists.</p> <p>[§ 146E.1: 3. "Fetal heartbeat exception" means any of the following [and only applies through 20 weeks]: . . .</p> <p>c. Any spontaneous abortion, commonly known as a miscarriage, if not all of the products of conception are expelled.</p> <p>d. The attending physician certifies that the fetus has a fetal abnormality that in the physician's reasonable medical judgment is incompatible with life.</p> <p>4. "Medical emergency" means the same as defined in section 146A.1. [§ 146A.1: "Medical emergency" means a situation in which an abortion is performed to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy, but not including psychological conditions, emotional conditions, familial conditions, or the woman's age; or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman.].</p> <p>6. "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.]</p>
	H.R. 732, 90th Gen. Assemb., Spec. Sess. (Iowa 2023).

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State	Ban Language
	<p>BLOCKED Prior Six Week Ban (2018): 2. a. A physician shall not perform an abortion upon a pregnant woman when it has been determined that the unborn child has a detectable fetal heartbeat, unless, in the physician's reasonable medical judgment, a medical emergency exists, or when the abortion is medically necessary.</p> <p>[§ 146C.1: "Medical emergency" means the same as defined in section 146A.1. [§ 146A.1: "Medical emergency" means a situation in which an abortion is performed to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy, but not including psychological conditions, emotional conditions, familial conditions, or the woman's age; or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman].</p> <p>4. "Medically necessary" means any of the following [and doesn't apply after 20 weeks]: . . .</p> <p>c. Any spontaneous abortion, commonly known as a miscarriage, if not all of the products of conception are expelled</p> <p>d. The attending physician certifies that the fetus has a fetal abnormality that in the physician's reasonable medical judgment is incompatible with life. . . .</p> <p>6. "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.].</p> <p>2018 Ia. Legis. Serv. Ch. 1132 (S.F. 359) (West).</p>
Kentucky	<p>Current Total Ban (enacted 2019, effective 2022): (3) (a) No person may knowingly:</p> <ol style="list-style-type: none"> 1. Administer to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or 2. Use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being. . . . <p>(4) The following shall not be a violation of subsection (3) of this section:</p> <ol style="list-style-type: none"> (a) For a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of the unborn human being in a manner consistent with reasonable medical practice; or (b) Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn human being. . . . <p>(6) Nothing in this section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug, or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.</p> <p>KY. REV. STAT. ANN. § 311.772 (West 2019).</p>

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Louisiana	<p>Current Total Ban (2022): C. No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being. . . .</p> <p>E. Nothing in this Section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.</p> <p>F. It shall not be a violation of Subsection C of this Section for a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.</p> <p>G. Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn child is not a violation of Subsection C of this Section.</p> <p>LA. STAT. ANN. § 40:1061 (2022).</p>
Mississippi	<p>Current Total Ban (2022): (2) No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape.</p> <p>MISS. CODE ANN. § 41-41-45 (West 2007).</p>
Missouri	<p>Current Total Ban (2022): 2. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency. [§ 188.015: "Medical emergency", a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.].</p> <p>3. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 2 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.</p> <p>MO. ANN. STAT. §§ 188.015, .017 (West 2019).</p>
Nebraska	<p>Current Twelve Week Ban (2023): (2) Except as provided in subsection (3) of this section, it shall be unlawful for any physician to perform or induce an abortion:</p> <p style="padding-left: 40px;">(a) Before fulfilling the requirements of subsection (1) of this section; or</p> <p style="padding-left: 40px;">(b) If the probable gestational age of the preborn child has been determined to be twelve or more weeks.</p> <p>(3) It shall not be a violation of subsection (1) or (2) of this section for a physician to perform or induce an abortion in the case of:</p>

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State	Ban Language
	<p>(a) Medical emergency [(3)(a) Medical emergency means any condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the termination of her pregnancy to avert her death or for which a delay in terminating her pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function].</p> <p>(b) No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.].</p> <p>NEB. REV. STAT. ANN. §§ 71-6914 to -6915 (West 2023).</p>
North Carolina	<p>Current Twelve Week Ban (2023): (a) Abortion.--It shall be unlawful after the twelfth week of a woman's pregnancy to procure or cause a miscarriage or abortion in the State of North Carolina.</p> <p>[I]t shall not be unlawful to procure or cause a miscarriage or an abortion in the State of North Carolina in the following circumstances:</p> <p>(1) When a qualified physician determines there exists a medical emergency [(5) Medical emergency.--A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions. For purposes of this definition, no condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.]. . . .</p> <p>(4) During the first 24 weeks of a woman's pregnancy, if a qualified physician determines there exists a life-limiting anomaly in accordance with this Article [(4d) Life-limiting anomaly.--The diagnosis by a qualified physician of a physical or genetic condition that (i) is defined as a life-limiting disorder by current medical evidence and (ii) is uniformly diagnosable.].</p> <p>N.C. GEN. STAT. ANN. §§ 90-21.81 to .81B (West 2023).</p>
North Dakota	<p>Current Total Ban (2023): It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.</p> <p>This chapter does not apply to:</p> <p>1. An abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female. [“Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved. “Serious health risk” means a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function, not including any psychological or emotional condition. The term may not be based on a claim or diagnosis that the woman will engage in conduct that will result in her death or in substantial physical impairment of a major bodily function.]. . . .</p>

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	<p>3. An individual assisting in performing an abortion if the individual was acting within the scope of that individual's regulated profession, was under the direction of or at the direction of a physician, and did not know the physician was performing an abortion in violation of this chapter.</p> <p>N.D. CENT. CODE ANN. §§ 12.1-19-01, -03 (West 2023).</p>
	<p>BLOCKED Prior Total Ban (2007): 2. It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.</p> <p>3. The following are affirmative defenses under this section:</p> <p style="padding-left: 20px;">a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.</p> <p>N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007).</p>
Oklahoma	<p>BLOCKED Current Total Ban (in effect August 2022 to March 2023): B. 1. Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency [“Medical emergency” means a condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself] . . .</p> <p>3. This section does not: . . .</p> <p style="padding-left: 20px;">b. prohibit the sale, use, prescription or administration of a contraceptive measure, drug or chemical if the contraceptive measure, drug or chemical is administered before the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure, drug or chemical is sold, used, prescribed or administered in accordance with manufacturer instructions. . . .</p> <p>4. It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury or death to the unborn child.</p> <p>S.B. 612, 58th Leg., 2d Reg. Sess. (Okla. 2022) (to be codified at OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022)).</p>
	<p>Earlier Total Ban (in effect June 24, 2022): Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.</p> <p>OKLA. STAT. ANN. tit. 21, § 861 (West 1999), enacted by S.B. 1555, 58th Leg., 2d Reg. Sess. The Oklahoma Supreme Court has interpreted this exception to not require “one to wait until there is an actual medical emergency in order to receive treatment when the harmful condition is known or probable to occur in the future.” Oklahoma Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1131 (Okla. 2023).</p>

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South Carolina	<p>Current Six Week Ban (2023): (B) Except as provided in Section 44-41-640, Section 44-41-650, and Section 44-41-660, no person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected in accordance with Section 44-41-330(A). . . .</p> <p>(A) It is not a violation of Section 44-41-630 if an abortion is performed or induced on a pregnant woman due to the existence of a fatal fetal anomaly. [§ 44-41-610: (5) "Fatal fetal anomaly" means that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth.].</p> <p>(B)(3) A physician performing a medical procedure pursuant to item (1) shall make reasonable medical efforts under the circumstances to preserve the life of the pregnant woman's unborn child, to the extent that it does not risk the death of the pregnant woman or the serious risk of a substantial and irreversible physical impairment of a major bodily function of the pregnant woman, not including psychological or emotional conditions and in a manner consistent with reasonable medical practices. A medical procedure shall not be considered necessary if it is performed based upon a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in a substantial physical impairment of a major bodily function.</p> <p>(C)(1) It is not a violation of Section 44-41-630 for a physician to perform a medical procedure necessary in his reasonable medical judgment to prevent the death of a pregnant woman or the serious risk of a substantial and irreversible physical impairment of a major bodily function of the pregnant woman, not including psychological or emotional conditions.</p> <p>(2) It is presumed that the following medical conditions constitute a risk of death or serious risk of a substantial and irreversible physical impairment of a major bodily function of a pregnant woman, not including psychological or emotional conditions: molar pregnancy, partial molar pregnancy, blighted ovum, ectopic pregnancy, severe preeclampsia, HELLP syndrome, abruptio placentae, severe physical maternal trauma, uterine rupture, intrauterine fetal demise, and miscarriage. However, when an unborn child is alive in utero, the physician must make all reasonable efforts to deliver and save the life of an unborn child during the process of separating the unborn child from the pregnant woman, to the extent that it does not adversely affect the life or physical health of the pregnant woman, and in a manner that is consistent with reasonable medical practice. The enumeration of the medical conditions in this item is not intended to exclude or abrogate other conditions that satisfy the exclusions contained in item (1) or prevent other procedures that are not included in the definition of abortion . . .</p> <p>(D) Medical treatment provided to a pregnant woman by a physician which results in the accidental or unintentional injury or death of her unborn child is not a violation of Section 44-41-630.</p> <p>(E) It is not a violation of Section 44-41-630 to use, sell, or administer a contraceptive measure, drug, chemical, or device if the contraceptive measure, drug, chemical, or device is used, sold, prescribed or administered in accordance with manufacturer's instructions and is not used, sold, prescribed or administered to cause or induce an abortion.</p> <p>S.C. CODE ANN. §§ 44-41-630, -640, -660 (2023).</p>

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	<p>BLOCKED Prior Six Week Ban (2021): (A) Except as provided in subsection (B), no person shall perform, induce, or attempt to perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the human fetus the pregnant woman is carrying and whose fetal heartbeat has been detected in accordance with Section 44-41-630.</p> <p>(B) A physician may perform, induce, or attempt to perform or induce an abortion on a pregnant woman after a fetal heartbeat has been detected in accordance with Section 44-41-630 only if: . . .</p> <p style="padding-left: 40px;">(3) the physician is acting in accordance with Section 44-41-690; or</p> <p style="padding-left: 40px;">(4) there exists a fetal anomaly, as defined in Section 44-41-430. [“Fetal anomaly” means that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth].</p> <p>Section 44-41-690. (A) Section 44-41-680 does not apply to a physician who performs a medical procedure that, by any reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman.</p> <p>Section 44-41-660. (A) Section 44-41-650 does not apply to a physician who performs or induces an abortion if the physician determines according to standard medical practice that a medical emergency exists that prevents compliance with the section. [(8) “Medical emergency” means a condition that, by any reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy to avert her death without first determining whether there is a detectable fetal heartbeat or for which the delay necessary to determine whether there is a detectable fetal heartbeat will create serious risk of a substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. A condition must not be considered a medical emergency if based on a claim or diagnosis that a woman will engage in conduct that she intends to result in her death or in a substantial and irreversible physical impairment of a major bodily function.].</p> <p>2021 South Carolina Laws Act 1 (S.1).</p>
South Dakota	<p>Current Total Ban (2022): Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.</p> <p>S.D. CODIFIED LAWS § 22-17-5.1 (2005).</p>

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Tennessee	<p>Current Total Ban (2023): (b) A person who performs or attempts to perform an abortion commits the offense of criminal abortion. Criminal abortion is a Class C felony.</p> <p>(c)(1) Notwithstanding subsection (b), a person who performs or attempts to perform an abortion does not commit the offense of criminal abortion if the abortion is performed or attempted by a licensed physician in a licensed hospital or ambulatory surgical treatment center and the following conditions are met:</p> <p style="padding-left: 40px;">(A) The physician determined, using reasonable medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; and</p> <p style="padding-left: 40px;">(B) The physician performs or attempts to perform the abortion in the manner which, using reasonable medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless using reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk of death to the pregnant woman or substantial and irreversible impairment of a major bodily function.</p> <p>(2) An abortion is not authorized under subdivision (c)(1)(A) and a greater risk to the pregnant woman does not exist under subdivision (c)(1)(B) if either determination is based upon a claim or a diagnosis that the pregnant woman will engage in conduct that would result in her death or the substantial and irreversible impairment of a major bodily function or for any reason relating to the pregnant woman's mental health.</p> <p>(d) Medical treatment provided to the pregnant woman by a licensed physician which results in the accidental death of or unintentional injury to or death of the unborn child shall not be a violation of this section.</p> <p>TENN. CODE ANN. § 39-15-213 (West 2023).</p> <hr/> <p>Prior Total Ban (enacted 2019, in effect 2022, replaced by Current Total Ban in 2023): (b) A person who performs or attempts to perform an abortion commits the offense of criminal abortion. Criminal abortion is a Class C felony.</p> <p>(c) It is an affirmative defense to prosecution under subsection (b), which must be proven by a preponderance of the evidence, that:</p> <p>(1) The abortion was performed or attempted by a licensed physician;</p> <p>(2) The physician determined, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman. No abortion shall be deemed authorized under this subdivision (c)(2) if performed on the basis of a claim or a diagnosis that the woman will engage in conduct that would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health; and</p> <p>(3) The physician performs or attempts to perform the abortion in the manner which, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless in the physician's good faith medical judgment, termination of the pregnancy in that manner would pose a greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health.</p>

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	<p>(d) Medical treatment provided to the pregnant woman by a licensed physician which results in the accidental death of or unintentional injury to or death of the unborn child shall not be a violation of this section.</p> <p>TENN. CODE ANN. § 39-15-213 (West 2022).</p>
Texas	<p>Current Total Ban (amended 2023): (a) A person may not knowingly perform, induce, or attempt an abortion.</p> <p>(b) The prohibition under Subsection (a) does not apply if:</p> <ol style="list-style-type: none"> (1) the person performing, inducing, or attempting the abortion is a licensed physician; (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. [“Reasonable medical judgment” means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.]. (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: <ol style="list-style-type: none"> (A) a greater risk of the pregnant female's death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female. <p>(c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.</p> <p>(d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.</p> <p>TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2022).</p> <p>(a) It is an affirmative defense to liability in a civil action brought against a physician or health care provider for a violation of Section 170A.002, Health and Safety Code, including an action to recover a civil penalty under Section 170A.005, Health and Safety Code, that the physician or health care provider exercised reasonable medical judgment in providing medical treatment to a pregnant woman in response to:</p> <ol style="list-style-type: none"> (1) an ectopic pregnancy at any location; or (2) a previsible premature rupture of membranes. <p>TEX. CIV. PRAC. & REM. § 74.552 (West 2023).</p>

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	<p>Prior Total Ban (2022, without 2023 amendment): (a) A person may not knowingly perform, induce, or attempt an abortion. (b) The prohibition under Subsection (a) does not apply if: (1) the person performing, inducing, or attempting the abortion is a licensed physician; (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. [“Reasonable medical judgment” means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.]. (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: (A) a greater risk of the pregnant female's death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female. (c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function. (d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.</p> <p>TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2021).</p>
Utah	<p>Current Eighteen Week Ban (enacted 2019, in effect June 26, 2022): (2) An abortion may be performed in this state only under the following circumstances: (a) the unborn child has not reached 18 weeks gestational age; (b) the unborn child has reached 18 weeks gestational age, and: (i) the abortion is necessary to avert: (A) the death of the woman on whom the abortion is performed; or (B) a serious physical risk of substantial impairment of a major bodily function of the woman on whom the abortion is performed; or (ii) subject to Subsection (4), two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus has a fetal abnormality that in the physicians' reasonable medical judgment is incompatible with life[.]</p> <p>UTAH CODE ANN. § 76-7-302 (West 2022).</p> <p style="background-color: red; color: black;">BLOCKED Prior Total Ban (in effect June 24, 2022 to June 27, 2022): (1) An abortion may be performed in this state only under the following circumstances: (a) the abortion is necessary to avert:</p>

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	<p>(i) the death of the woman on whom the abortion is performed; or</p> <p>(ii) a serious physical risk of substantial impairment of a major bodily function of the woman on whom the abortion is performed;</p> <p>(b) subject to Subsection (3), two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus has a fetal abnormality that in the physicians' reasonable medical judgment is incompatible with life[.]</p> <p>UTAH CODE ANN. § 76-7a-201 (West 2020).</p>
West Virginia	<p>Current Total Ban (2022): (a) An abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional:</p> <p>(1) The embryo or fetus is nonviable [§ 16-2R-2: "Nonviable" means an embryo or a fetus has a lethal anomaly which renders it incompatible with life outside of the uterus.];</p> <p>(2) The pregnancy is ectopic; or</p> <p>(3) A medical emergency exists. [§ 16-2R-2: "Medical emergency" means a condition or circumstance that so complicates the medical condition of a patient as to necessitate an abortion to avert serious risk of the patient's death or serious risk of substantial life-threatening physical impairment of a major bodily function.].</p> <p>W. VA. CODE ANN. §§ 16-2R-2 to -3 (West 2022).</p>
Wyoming	<p>BLOCKED Current Total Ban (2023): (a) Except as provided in W.S. 35-6-124, no person shall knowingly:</p> <p>(i) Administer to, prescribe for or sell to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting an abortion; or</p> <p>(ii) Use or employ any instrument, device, means or procedure upon a pregnant woman with the specific intent of causing or abetting an abortion.</p> <p>(a) It shall not be a violation of W.S. 35-6-123 for a licensed physician to:</p> <p>(i) Perform a pre-viability separation procedure necessary in the physician's reasonable medical judgment to prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman, provided that no separation procedure shall be deemed necessary under this paragraph unless the physician makes all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of the unborn baby in a manner consistent with reasonable medical judgment;</p> <p>(ii) Provide medical treatment to a pregnant woman that results in the accidental or unintentional injury to, or the death of, an unborn baby; . . .</p> <p>(iv) Perform an abortion on a woman when in the physician's reasonable medical judgment, there is a substantial likelihood that the unborn baby has a lethal fetal anomaly or the pregnancy is determined to be a molar pregnancy.</p> <p>(b) Nothing in this act shall be construed to prohibit the use, sale, prescription or administration of a contraceptive measure, drug, chemical or device if the contraceptive measure, drug, chemical or device is used, sold, prescribed or administered in accordance with manufacturer instructions and is not used, sold, prescribed or administered with the specific intent to cause or induce an abortion.</p>

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	<p>WYO. STAT. ANN. §§ 35-6-123 to -124 (West 2023).</p> <p>BLOCKED Prior Total Ban (2022): (b) An abortion shall not be performed except when necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions[.]</p> <p>H.B. 92, 66th Leg., Reg. Sess. (Wyo. 2022) (amending WYO. STAT. ANN. § 35-6-102).</p>