The American College of Obstetricians and Gynecologists
WOMEN'S HEALTH CARE PHYSICIANS

As the leading medical organization dedicated to the health of individuals in need of obstetric and gynecologic care, the American College of Obstetricians and Gynecologists (ACOG) promotes abortion as a human right and an essential component of comprehensive, evidence-based health care. ACOG is gravely concerned about the impact of the *Dobbs v. Jackson Women's Health Organization* Supreme Court decision on millions of people who will lose access to abortion, as well as the tens of thousands of physicians and other health care professionals who care for them. Absent federal action, the country's already vast division in access will continue to widen, exacerbating dangerous inequities faced by communities who already experience systemic barriers to health care. Further, many obstetrician-gynecologists will endure criminalization for providing essential reproductive health care services and, in some states, prosecution for counseling about abortion.

Therefore, ACOG is submitting recommendations for actions that the federal government, through the leadership of the Department of Health and Human Services (HHS), can take to help mitigate this harmful ruling.

Immediate Policy Needs

- Issue strong guidance affirming requirements to treat ectopic pregnancies and miscarriages under the Emergency Medical Treatment and Labor Act (EMTALA): EMTALA provides rights to any individual who comes to an emergency department and requests examination or treatment.[1] Hospitals must provide appropriate screening and examination to determine if an emergency medical condition (EMC) exists. If an EMC, including ectopic pregnancy or miscarriage is identified, EMTALA requires patients receive stabilizing treatment and transfer regardless of any state laws to specific procedures.[2] In response to the Texas law banning abortion, the Centers for Medicare & Medicaid Services (CMS) released guidance in 2021 on the reinforcement of EMTALA provisions. CMS should reaffirm this guidance and make explicitly clear the requirements for emergency room doctors, hospital staff, and other providers for treating all EMC, including ectopic pregnancies and miscarriages.
- Issue guidance on providing meaningful counsel and referral for abortion in states where abortion is illegal: Title X Regulations require that all clients be offered the opportunity to be provided information and counseling regarding each of the following options: prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. HHS must release guidance to Title X providers on counseling on abortion.
- Issue a clear statement that no physician or health care professional has any duty to report patients seeking, receiving or self-managing abortion care to any law enforcement or regulatory body or agency.
- Issue education for physicians and patients regarding the Health Insurance Portability and Accountability Act (HIPAA) and privacy protection laws: Now more than ever, the protected health information (PHI) of patients and their medical records is essential to protecting the patient-physician relationship, as well as unwarranted prosecution for

essential health care. HHS should issue clear guidance on how HIPAA protects patients and what steps patients can take if they feel their privacy has been compromised.

Intermediate Policy Actions

- Request the Food and Drug Administration (FDA) revise necessary requirements restricting access to mifepristone: As referenced in ACOG clinical guidance, the evidence supports medication abortion as a safe and effective method of providing abortion care. FDA should revise the implementation of the Risk Evaluation and Mitigation Strategies (REMS) and Elements to Assure Safe Use (ETASU) requirements for mifepristone and ensure the process does not add unnecessary and unmitigated burdens for physicians, patients, and pharmacies.
- Request the FDA update the label of mifepristone: Early pregnancy loss is common, occurring in 10% of all clinically recognized pregnancies.[3] Recent evidence demonstrates that mifepristone significantly improves the safe and effective medical management of early pregnancy loss when taken as part of a two-medication regimen.[4,5] A 2018 randomized controlled trial demonstrated that people who received mifepristone in addition to misoprostol experienced increased rates of complete expulsion and required fewer procedures compared to those who received misoprostol alone.[6] Therefore, we ask that the FDA modify the mifepristone label indicating that mifepristone is approved for the use of miscarriage management.
- Approve FDA applications for over the counter (OTC) oral contraceptives: Data support that progestin-only hormonal methods are generally safe and there has been no evidence to support limiting access related to age.[7,8,9] ACOG, along with the American Medical Association (AMA), the American Academy of Family Physicians (AAFP), and the American Public Health Association (APHA) support OTC access to oral contraceptives.[10,11,12,13] ACOG is aware of a partnership between Ibis Reproductive Health and HRA Pharm and anticipate that a progestin-only oral contraceptive application will be filed before the end of this year.[14,15] HHS, along with the FDA, should work quickly to confirm the safety of OTC oral contraceptives and allow access without restrictions as soon as possible.
- Direct CMS to communicate with Medicaid agencies, Marketplace plans, and private plans to cover extensive counseling services for individuals seeking contraceptive care: Counseling for reproductive health care, including contraception and pre-pregnancy care, should be carved out of the payment for office visits and preventive care visits and reimbursed fairly and adequately for the additional time that will be needed to appropriately counsel individuals of the options available to them.
- Direct CMS to request that state Medicaid agencies, Marketplace plans, and private plans cover the full breadth of contraception options allowed under current law: It is imperative that during a lack of access to abortion services, comprehensive contraception options are available – without cost sharing – to all individuals. All payers should be reminded of this requirement through the Affordable Care Act (ACA).
- Reissue guidance to State and Tribal recipients of Family Violence Prevention and Services formula grants regarding the known increased violence against pregnant persons and consider offering discretionary grants for programs and resources specific to intimate partner violence and pregnancy.[16]

- Advance initiatives to address physician mental health and burnout: The Surgeon General issued an advisory addressing the severity of physician burnout due to ongoing systemic challenges and workforce shortages.[17] With possible criminalization hovering over obstetrician-gynecologists in specific states, physicians need support now more than ever.

Long-Term Policy Solutions

- Update conscience protections: HHS should perform an in-depth evaluation on, and if necessary, update, regulations around conscience protections to protect a physician's right to practice ethical, evidence-based care that is consistent with their conscience and from actions against their ability to deliver life-saving care. Conscientious refusals should be limited if they constitute an imposition of religious or moral beliefs on patients, negatively affect a patient's health, are based on scientific misinformation, or create or reinforce racial or socioeconomic inequalities.[18] Physicians and other health care providers have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the abortion services that patients request or require. In an emergency in which referral is not possible or might negatively have an impact on a patient's physical or mental health, providers have an obligation to provide medically indicated and requested care.
- Fund graduate medical education for residents receiving education out-of-state: Payment for graduate medical education (GME) is established by the CMS based on a per resident amount and a hospital's allowable cost for a year.[19] Regulations currently allow for certain care activities outside the facility; consideration should be given to situations where physicians will need to go out-of-state in order to receive the appropriate education to provide comprehensive reproductive health care services and ensure liability protections are extended appropriately.
- Establish and fund a grant program for training in abortion care: As states enact restrictive abortion laws, fewer physicians across the country will learn how to perform abortions, and in states that allow abortion training, programs could see a surge in demand for this skill training. Congress should enact a program to provide grants to cover travel expenses and help support capacity in training states through the reconciliation or appropriations processes.
- Support the FDA in its preemption of state laws restricting access to mifepristone: FDA regulations should preempt state laws relating to mifepristone that are not evidence-based, that interfere with the medically necessary and appropriate use of a safe and effective drug, that frustrate the FDA's regulatory decisions relating to mifepristone, and that have inconsistent policies and laws restricting access to mifepristone. HHS should support the FDA in enforcing its preemption for access to mifepristone.
- Federal contraception coverage requirements: The ACA has provided coverage for contraception as preventive care since 2012, and a subsequent Institute of Medicine report recommended that Health Resources and Services Administration (HRSA) include all FDA-approved contraceptive methods, sterilization procedures, and counseling.[20] HHS should ensure that all regulations that address contraception are updated to ensure broad access to care.
- Direct CMS to work with Medicaid agencies to pay for maternity care on parity with the Medicare Physician Fee Schedule: Pregnancies, at-risk pregnancies, and the rate of maternal mortality are certain to climb without sufficient access to abortion care. A recent

study estimated a total, nationwide abortion ban would increase pregnancy-related deaths by 7% in the first year and 21% in subsequent years, including a 33% increase for Black people.[21] Approximately 42% of all births in the US are funded by Medicaid programs, yet most states pay physicians well under the Medicare Physician Fee Schedule rate.[22] CMS can encourage Medicaid programs to increase payment to support access and ensure maternal and reproductive care does not further deteriorate.

- Expand access to at-home pregnancy tests: As states implement restrictive abortion laws, some people will not know they are pregnant until the gestational age for legal abortion in their state has passed, and others will be forced to remain pregnant for additional days or weeks to travel out of state for abortion care, which can increase the cost of the procedure and eliminate medication abortion as an option. HHS should establish a program that distributes free, at-home pregnancy tests to any person who wants them, potentially via the U.S. Postal Service, and encourage people to regularly test even when they believe their pregnancy odds are low.

Collaborative Actions

- Encourage the Department of Justice (DOJ) to enhance enforcement of the Freedom of Access to Clinic Entrances (FACE) Act of 1994: Threats against physicians providing reproductive health care and their patients will only increase post-*Dobbs*. The FACE Act was implemented to protect these patients and to prevent interference with their obtaining an abortion. DOJ must more actively and fully enforce the FACE Act, as well as explore whether its prohibitions on the threat of force and intimidation could be interpreted more broadly to protect physicians and other health professionals providing abortion care and their patients.
- Encourage the Federal Trade Commission (FTC) to protect individuals' data: HHS should update and expand privacy regulations to explicitly include health-focused applications that collect data on a user's health conditions, symptoms, and outcomes to address any potential data privacy concerns with these applications. Regulations should be enacted in conjunction with any findings from potential FTC investigations being called for by lawmakers to protect mobile data of abortion seekers and individuals using health-focused third-party apps.
- Ask the FTC to issue guidance for patients to report deceptive practices: On ReprodutiveRights.gov, provide information and guidance to report deceptive practices by organizations that provide misleading information related to abortion care.
- Encourage Congress to include maternal health provisions in a reconciliation bill: Because the *Dobbs* decision will increase the number of unplanned births, particularly among uninsured low-income individuals, the reconciliation bill under negotiation in the Senate now must include permanent and mandated 12-month Medicaid postpartum coverage. The *Dobbs* decision comes amidst a maternal mortality crisis in the United States that will worsen as more people are forced to carry pregnancies, including high-risk pregnancies, to term.

- Encourage Congress to pass:

- The Women's Health Protection Act (WPHA): Congress must pass WHPA, which would create a federal safeguard for physicians and their patients against restrictions on safe, medically appropriate care.
- The Equal Access to Abortion Coverage (EACH) Act: Congress must pass the EACH Act to remove the Hyde Amendment, which prevents federal funds from being spent on abortion care. Right now, Congress is debating an appropriations package which could include the repeal of Hyde.
- The Access to Birth Control Act: Congress must ensure patients seeking FDA-approved contraception, including emergency contraception and medication related to contraception, are able to access it in a timely manner and not be prevented from doing so by a pharmacy.
- The Stop Anti-Abortion Disinformation Act: Congress should pass statute that directs the FTC to issue rules to prohibit deceptive or misleading advertising related to the provision of abortion services.
- Legislation to cap cost-sharing of mifepristone under private insurance: As it has considered with respect to insulin, Congress should enact legislation to cap cost-sharing of mifepristone by private payers at a low, fixed amount to make the medication more accessible.
- Legislation to ensure FDA-approved over-the-counter contraception is available without cost-sharing: Once the FDA approves oral contraception available over the counter, legislation will need to ensure it is billable to health insurance and available to patients without cost-sharing.

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