

ACCESS DENIED: AN IMMEDIATE DISCRIMINATORY IMPACT ON WOMEN WITH CHRONIC ILLNESS AFTER *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

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I. INTRODUCTION

Myisha Malone-King is a forty-one-year-old woman living in Baltimore, Maryland with Crohn's disease.¹ Myisha is a cancer survivor and the CEO of a chronic illness virtual community called Game of Crohn's Chronic Illness.² When Myisha's primary care doctor called her to tell her that he would no longer be prescribing her methotrexate—a medication commonly used in the treatment of Crohn's and other chronic illnesses—she was shocked.³ On that same day, her team of Crohn's specialists contacted her to inform her that because methotrexate can cause a pregnancy to terminate, it will no longer be on her treatment plan.⁴ Moreover, her

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¹ Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortion-bans-aren-t-only-healthcare-being-denied-women-n1296928>.

² *Id.*

³ *Id.*

⁴ *Id.*

insurance company ultimately informed her that the cost of methotrexate⁵ would no longer be covered by her insurance.⁶

The following week, she received a letter from her doctor and her insurance company explaining that the Supreme Court had overturned *Roe v. Wade*, and she now had to find an alternative medication for her chronic illness.⁷ It is worth noting that Maryland—where Myisha resides—is a state that protects the right to abortion for women.⁸

Crohn's patients are not the only group of women who experience issues accessing medication.⁹ In fact, many female users of reproductive age are facing restrictions on their medication as a result of the Court's decision.¹⁰ For example, methotrexate also aids in the treatment of other chronic illnesses, such as rheumatoid arthritis, lupus, and cancer.¹¹ Not only is methotrexate used to treat women who experience miscarriages and ectopic pregnancies, but according to the Arthritis Foundation ("Foundation"), it is one of the most commonly prescribed drugs for inflammatory arthritis; thus, the uncertainty around methotrexate affects a significant number of people.¹² As of November 2022, the Foundation surveyed patients and collected 524 responses; out of those responses, sixteen patients indicated they experienced difficulty accessing their medication.¹³

⁵ "The price of methotrexate 10-milligram (mg) doses depends on several factors. These include your insurance coverage (if you have it), the form of methotrexate you're prescribed, the pharmacy you use, and your treatment plan." Dedra Weiss, *Methotrexate and Cost: What You Need to Know*, HEALTHLINE (Oct. 30, 2022), <https://www.healthline.com/health/drugs/methotrexate-cost>. According to one source, the average retail price of Methotrexate is around \$71.37. Kristi C. Torres, *Methotrexate Price History & Information*, SINGLECARE, <https://www.singlecare.com/prescription/methotrexate#:~:text=How%20much%20does%20Methotrexate%20cost%20without%20insurance%3F%20Methotrexate,help%20you%20to%20save%20on%20your%20prescription%20medication> (last visited Nov. 19, 2023).

⁶ Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

⁷ *Id.*

⁸ *Id.*

⁹ See Elisabeth Mahase, *US anti-abortion laws may restrict access to vital drug for autoimmune diseases, patient groups warn*, THEBMJ (July 6, 2022), <https://www.bmj.com/content/378/bmj.o1677>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; Linda Rath, *New Barrier to Methotrexate for Arthritis Patients*, ARTHRITIS FOUND. (June 30, 2022), <https://www.arthritis.org/about-us/news-and-updates/new-barrier-to-methotrexate-for-arthritis-patients> (noting that methotrexate is the first medication prescribed for rheumatoid arthritis, psoriasis, psoriatic arthritis, lupus, and juvenile idiopathic arthritis (JIA)).

¹³ Celine Castronuovo, *Many Female Arthritis Drug Users Face Restrictions After Dobbs*, BLOOMBERG L. (Nov. 14, 2022, 4:25 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/many-female-arthritis-drug-users-face-restrictions-after-dobbs>.

These restrictions pose a substantial threat to methotrexate users, considering the drug's popularity as well as its safety and effectiveness.¹⁴ Furthermore, it helps with inflammation and controlling the symptoms of Crohn's disease.¹⁵ The rationale for banning methotrexate is weak at best. In order to cause an abortion, a woman would have to take a much higher dosage of methotrexate than the dosage used to treat arthritis.¹⁶ The Arthritis Foundation observed that a rheumatoid arthritis patient may be prescribed a maximum of twenty-five milligrams per week of methotrexate; however, it takes three times that amount to cause an abortion.¹⁷

On July 24, 2022, the Supreme Court rendered its decision in *Dobbs v. Jackson Women's Health Organization*, overturning the historic *Roe v. Wade* by ruling that the United States Constitution does not provide a right to abortion.¹⁸ The Supreme Court avers that its decision returned the authority to regulate abortion to the people through their elected state representatives.¹⁹ However, following the Court's decision in *Dobbs*,²⁰ some states have restricted access to medications that have a secondary effect of inducing abortions, thus creating a ripple effect for women of childbearing age.²¹

This Note addresses whether refusing to refill an individual's prescription based on a side effect of that medication constitutes discrimination on the basis of sex. Considering the disproportionate effect this has on women with chronic illnesses, this Note argues that *Dobbs* has had a disparate impact on women with chronic illnesses because those women have been denied their prescription medications in some instances simply because they may have the ability to become pregnant.²²

Part II of this Note will discuss the *Dobbs* decision and the impact it has on rights that were protected for fifty years after *Roe v. Wade*. Part III will discuss state laws relating to abortion where they concern abortifacient

¹⁴ Linda Rath, *New Barrier to Methotrexate for Arthritis Patients*, ARTHRITIS FOUND. (June 30, 2022), <https://www.arthritis.org/about-us/news-and-updates/new-barrier-to-methotrexate-for-arthritis-patients>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortion-aren-t-only-healthcare-being-denied-women-n1296928> [hereinafter Plank]; Elisabeth Mahase, *US anti-abortion laws may restrict access to vital drug for autoimmune diseases, patient groups warn*, THEBMJ (July 6, 2022), <https://www.bmj.com/content/378/bmj.o1677> [hereinafter Mahase]; Jen Christensen, *Women with chronic conditions struggle to find medications after abortion laws limit access*, CNNHEALTH (July 22, 2022, 7:11 AM), <https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html> [hereinafter Christensen].

²² *Id.*

medications. Part IV will examine various anti-discrimination statutes and show how denial of medication amounts to sex discrimination. Part V will examine the relevant parts of the Affordable Care Act (ACA) and discuss how denying women medication on the basis of sex violates the ACA. This Part will also examine protections for persons with disabilities under the Act. Part VI will provide an overview of the policy considerations and the impact on physicians and other healthcare workers while establishing why this particular event only adds to the uphill battle many women face in obtaining a diagnosis and treatment for their chronic illness. Finally, Part VII will propose a law as a solution to the problem faced by physicians that is unduly affecting women with chronic illnesses. The proposed solution will provide protection for physicians treating women with chronic illnesses when their treatment plans are affected by abortion regulations in the states. The law will act as a “shield” for these physicians and patients who may face fear and confusion in the wake of *Dobbs*.

II. LIBERTY AND RELIANCE INTERESTS

Fifty years ago, the Supreme Court recognized a woman’s right to an abortion under the Constitution in *Roe v. Wade*.²³ In *Roe*, the plaintiff brought a declaratory and injunctive relief action claiming that Texas criminal abortion laws were unconstitutional.²⁴ The statute at issue prohibited obtaining or attempting an abortion except on medical advice for the purpose of saving a mother’s life.²⁵ The plaintiff was a pregnant, single woman purporting to sue on behalf of herself and all other women similarly situated.²⁶ The Supreme Court recognized a substantive due process right, holding that the Constitution protects a woman’s personal privacy, including the right to an abortion.²⁷

After the Court found such privacy interest was inherently part of the Constitution, it reaffirmed *Roe* in *Planned Parenthood v. Casey*, relying on the doctrine of stare decisis, stating that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should

²³ *Roe v. Wade*, 410 U.S. 113, 154 (1973), *abrogated by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *and overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

²⁴ *Id.* at 120.

²⁵ *Id.* at 117-18.

²⁶ *Id.* at 121.

²⁷ *Id.* at 153.

fail.”²⁸ *Casey* was not the last of the *Roe* line of decisions.²⁹ For the past five decades, women and the courts have relied on *Roe v. Wade* as legal precedent protecting the constitutional right to privacy.³⁰

Then, in 2022, the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women’s Health Organization*, reasoning that

[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey*³¹ now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³²

The *Dobbs* Court—by characterizing the liberty interest differently than the interest articulated in *Roe*—overruled decades of precedent and ignored any reliance interest that women may have on access to certain reproductive healthcare.³³ The Supreme Court previously found a liberty interest in a right to abortion within the constitutional right to privacy.³⁴ The *Roe* Court stated,

[The] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.³⁵

However, the Court in *Dobbs* found no such liberty interest to be a part of the Constitution.³⁶ The majority in *Dobbs* held that the Constitution does not reference abortion and stated that there is no right to abortion protected by the Constitution, including in the Due Process Clause of the Fourteenth Amendment.³⁷ Further, the Fourteenth Amendment protects some rights not

²⁸ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

²⁹ See Doe v. Bolton, 410 U.S. 179 (1973), *abrogated by* Dobbs, 142 S. Ct. at 2228; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Gonzales v. Carhart, 550 U.S. 124 (2007); Whole Woman’s Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by* Dobbs, 142 S. Ct. at 2228.

³⁰ *Id.*

³¹ *Planned Parenthood of Se. Pa.*, 505 U.S. at 833.

³² *Dobbs*, 142 S. Ct. at 2242.

³³ See *id.*

³⁴ *Roe v. Wade*, 410 U.S. 113, 166 (1973), *abrogated by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

³⁵ *Id.* at 153.

³⁶ *Dobbs*, 142 S. Ct. at 2242.

³⁷ *Id.*

mentioned in the Constitution, but any right falling under this Amendment must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³⁸ In sum, the *Roe* Court characterized the liberty interest at issue as similar to the rights recognized in past decisions³⁹ involving matters such as intimate sexual relations, contraception, and marriage; whereas the *Dobbs* Court—choosing not to characterize the liberty interest in the same way the precedent had—found that abortion was fundamentally different because it involves the interests of a fetus.⁴⁰

The differing definitions of the liberty interests at issue permitted the Court to surpass the chain of Supreme Court precedent upon which *Roe* was founded.⁴¹ *Roe* characterized the liberty interest under the Fourteenth Amendment as a right to privacy, discussing the relationship between the woman and the physician while also balancing the interests of the state and the fetus.⁴² Those interests were ultimately founded and developed through a long line of Supreme Court precedent recognizing a right to privacy in marital, sexual, and health matters and the rights of a person to control their own familial decisions—including, among other things, establishing a home, bringing up a family, and marrying.⁴³ To the contrary, *Dobbs* characterized the liberty interest as a right to abortion and found that no such right exists in the Nation’s history and tradition.⁴⁴ In characterizing the liberty interest in this way, the Court failed to consider the long history and tradition that women have enjoyed in directing their own healthcare and the reliance interest women may have on this particular freedom.⁴⁵

For instance, Myisha Malone-King⁴⁶ was shocked to learn that she had no choice in the matter of whether she would be permitted to obtain her

³⁸ *Id.*

³⁹ See also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right to marital privacy as it relates to the decision to use contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a freedom to marry or not to marry in the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing, within the Fourteenth Amendment, the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men).

⁴⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

⁴¹ *Roe v. Wade*, 410 U.S. 113 (1973), *abrogated by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *overruled by* *Dobbs*, 142 S. Ct. at 2228.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Dobbs*, 142 S. Ct. at 2242.

⁴⁵ See generally *Planned Parenthood of Se. Pa.*, 505 U.S. at 855-56, *overruled by* *Dobbs*, 142 S. Ct. at 2228 (discussing the possible reliance interest after almost twenty years following the *Roe* decision).

⁴⁶ Myisha is the subject of our current case mentioned in the introduction. See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

medication following the *Dobbs* ruling.⁴⁷ In that case, the medication was not even being used for abortion purposes; Myisha was simply trying to manage her chronic illness in accordance with the treatment plan she and her physician had discussed—this is just one example of the implications that the Court failed to consider in overturning *Roe*.⁴⁸

In the past, when the Supreme Court considered whether to overturn precedent, the Court reviewed the reliance interests that prior decisions created.⁴⁹ In doing so, the Court considers the extent to which individuals, organizations, society, or other stakeholders have relied on the precedent, to what extent they have relied, and to what detriment if the precedent is overturned.⁵⁰ The Supreme Court stated, “Traditional reliance interests arise ‘where advance planning of great precision is most obviously a necessity.’”⁵¹ However, the Supreme Court, in *Planned Parenthood v. Casey*, held the following as it relates to the reliance interest families possess relating to abortion:

The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.⁵²

This holding in *Casey* encompasses much of the reliance interest *Roe* created for women in this Nation.⁵³ Justice Scalia once stated, “The doctrine of stare decisis protects the legitimate expectations of those who live under the law.”⁵⁴ Additionally, the Supreme Court in *Casey* stated, “The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Clarke D. Forsythe, *A Draft Opinion Overruling Roe v. Wade*, 16 GEO. J. OF L. & PUB. POL'Y 445, 485 (2018).

⁵⁰ *Id.*

⁵¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022).

⁵² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁵³ *Id.*

⁵⁴ Kate Shaw & Steven Mazie, *There's a Glaring Weakness in Justice Alito's Case Against Roe v. Wade*, TIME (May 27, 2022, 11:20 AM), <https://time.com/6182093/roe-v-wade-alito-abortion-reliance-interests/>.

who have relied reasonably on the rule's continued application.”⁵⁵ The cost of repudiating *Roe* is not only that it strips rights from all women who have relied on the ruling, in terms of the availability of abortion services, but as is presented in this Note, also those who rely on the continued access to certain medications to simply manage their chronic illnesses in accordance with the plans they have created with their physicians.⁵⁶ The repudiation of *Roe* articulated in *Dobbs* creates a chilling effect on the patient-doctor relationship and has garnered uncertainty among the medical community.⁵⁷ It is women living with chronic illnesses who are bearing the burden, at least in some respects.⁵⁸

The *Dobbs* majority declined to recognize the type of reliance interests the *Casey* Court acknowledged, stating that “assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter.”⁵⁹ The Court ultimately found that the reliance interest articulated in *Casey* was too difficult for the Court to adequately assess and required empirical data that courts would not be able to analyze.⁶⁰ According to the majority in *Dobbs*, the Supreme Court cannot adequately assess the effects of a woman’s right to choose on society and the particular impact on women as a whole.⁶¹ However, while *Casey* recognized that some hold the view that abortion is an unplanned activity and that, to some, this may be enough not to find a reliance interest, the Court ultimately concluded that a reliance interest exists in “people [that] have organized intimate relationships and made choices that define their views of themselves and their places in society.”⁶² These people have social and economic reliance on abortion in the event contraception should fail.⁶³

Thus, the *Casey* Court concluded that the availability of abortion has largely facilitated the ability of women to participate equally in economic and social life.⁶⁴ The *Dobbs* Court opined that the fact that women will be greatly affected by the decision is reconciled by the fact that women have political power and the ability to participate in the political system.⁶⁵ While not articulated directly by *Casey*, certain reliance interests were directly

⁵⁵ *Planned Parenthood of Se. Pa.*, 505 U.S. at 855, *overruled by Dobbs*, 142 S. Ct. at 2228.

⁵⁶ Kate Shaw & Steven Mazie, *There's a Glaring Weakness in Justice Alito's Case Against Roe v. Wade*, TIME (May 27, 2022, 11:20 AM), <https://time.com/6182093/roe-v-wade-alito-abortion-reliance-interests/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

affected or possibly put in danger by the *Dobbs* decision that will not be adequately reconciled by women's ability to participate in politics.⁶⁶ A major example includes the interest women with chronic illness have in accessing their medication.⁶⁷ The *Casey* Court observed that

[s]ince the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.⁶⁸

The *Dobbs* Court opined that in order to assess the reliance interest resulting from *Roe*, it would need empirical evidence to measure the effects of abortion rights on society—and that, ultimately, it is too empirical of a question for the Court to evaluate.⁶⁹ However, there exists a wealth of empirical data and a great need for advanced planning in care for women with chronic illnesses.⁷⁰ A doctor and patient must meet and create a care plan that works for the patient's chronic illness and the patient herself.⁷¹ Chronic illness diagnoses require many trips to the doctor and sometimes specialists who perform lab work and other tests.⁷² Then, after considering the time expended and financial costs of repeated doctor visits and tests, it is relatively easy to assess the burden that women with chronic illness face in simply obtaining a diagnosis and preliminary treatment.⁷³ Now, imagine what happens when the Court decides to overturn fifty years of settled law, and these women are forced to change their treatment plans as a result of two factors: (1) they may or may not have the ability to become pregnant, and (2) their medication (in a much higher dosage) has the ability to cause an abortion.

While the *Dobbs* Court made it clear that no other constitutional rights will be affected by the Court's ruling,⁷⁴ the ruling has implications for any persons who may have the ability to become pregnant.⁷⁵ Evidence of

⁶⁶ *See id.*

⁶⁷ Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855-56 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁶⁹ *Dobbs*, 142 S. Ct. at 2277.

⁷⁰ *Id.*; *see also* Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁷¹ *See* Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275-78 (2022).

⁷⁵ *See* Plank, *supra* note 21; Mahase *supra* note 21; Christensen, *supra* note 21.

additional constitutional consequences the Court failed to consider can be found when women attempt to access their medications and are met with resistance due to confusion in the medical profession over the implications of the Supreme Court's ruling.⁷⁶

The consequences of the *Dobbs* ruling cannot be ignored. Women who may or may not have the ability to become pregnant have been denied access to their medication.⁷⁷ The American College of Rheumatology issued guidance to legislatures in July 2022, pushing them to pass legislation that would protect patients and healthcare professionals who are being prescribed or are prescribing methotrexate.⁷⁸ Some states have banned abortions outright, while other states have imposed barriers for those wishing to have medication abortions.⁷⁹ These barriers have implications for women prescribed medications such as methotrexate—that may be used as an abortifacient in the facilitation of medication abortion—even when that is not the purpose of their prescription, a concept demonstrated in Myisha Malone-King's case.⁸⁰

III. STATE LAW

Over half of the abortions in the United States are facilitated through medication,⁸¹ which involves a prescription for drugs to assist in the abortion.⁸² The drug combination used to accomplish a medication abortion

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ Celine Castronuovo, *Many Female Arthritis Drug Users Face Restrictions After Dobbs*, BLOOMBERG L. (Nov. 14, 2022, 4:25 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/many-female-arthritis-drug-users-face-restrictions-after-dobbs>.

⁷⁹ See TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

⁸⁰ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

⁸¹ The Cleveland Clinic defines medication or medical abortions as “a procedure in which medication (prescription drugs) is used to end a pregnancy. It does not require surgery and is performed through the ninth week of pregnancy. It involves taking two medications—mifepristone and misoprostol. Mifepristone works by blocking the hormone progesterone.” *Medical Abortion*, CLEVELAND CLINIC (Oct. 21, 2021), <https://my.clevelandclinic.org/health/treatments/21899-medical-abortion>. The lack of progesterone stops the growth of the fetus in the uterus then the misoprostol causes the lining of the uterus to shed. *Id.*

⁸² Brendan Pierson & Nate Raymond, *Explainer: Can abortion pills overcome U.S. state bans?*, REUTERS (June 24, 2022, 4:49 PM), <https://www.reuters.com/world/us/can-abortion-pills-overcome-us-state-bans-2022-06-24/>.

consists of a prescription for mifepristone⁸³ followed by misoprostol.⁸⁴ Methotrexate, while not used for what is commonly referred to as a “medication abortion,” has been classified by some state laws as a drug that can induce abortions.⁸⁵ States like Texas that have restrictive abortion policies have limited methotrexate’s use and, ultimately, have negatively impacted women with chronic illnesses.⁸⁶ The Texas statute defines an abortion-inducing drug as:

[A] drug, a medicine, or any other substance, including a regimen of two or more drugs, medicines, or substances, prescribed, dispensed, or administered with the intent of terminating a clinically diagnosable pregnancy of a woman and with knowledge that the termination will, with reasonable likelihood, cause the death of the woman's unborn child.⁸⁷

The statute goes on to explain that the “off-label use of drugs” is included for drugs that have “abortion-inducing properties” that are “prescribed, dispensed, or administered with the intent of causing an abortion.”⁸⁸ Texas legislatures specifically listed the Mifeprex regimen,

⁸³ It should be noted that the United States Supreme will hear a case in early 2024, which may impact the ability to get mifepristone through the mail, even for residents of states which allow such conduct. The Supreme Court will review a decision by the Fifth Circuit upholding the requirement that women will be forced to see a doctor three times prior to receiving a prescription for the drug. Some speculate that the decision undermines the FDA’s rigorous drug approval process and its authority as a regulatory authority. See Sarah Varney, *U.S. Supreme Court to Hear Case About Access to the Abortion Pill Mifepristone*, NPR ILL. (Dec. 14, 2023, 4:58 AM), <https://www.npr.org/2023/12/14/1219246992/u-s-supreme-court-to-hear-case-about-access-to-the-abortion-pill-mifepristone>; see also *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab'ys, L.L.C. v. All. Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), & *cert. granted sub nom. U.S. Food & Drug Admin. v. All. Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023), & *cert. denied sub nom. All. Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-395, 2023 WL 8605749 (U.S. Dec. 13, 2023) (Physicians providing pregnancy-related health care, including emergency care after unsuccessful medication abortions, and national associations of such physicians, brought judicial-review action alleging that Food and Drug Administration's (FDA) accelerated approval of brand-name mifepristone, an abortion-inducing drug, amendments to approval that lightened prior protections, approval of generic version, and decision that it would not enforce an agency regulation requiring drug to be prescribed and dispensed in person violated the Administrative Procedure Act (APA). Drug manufacturer and distributor intervened.)

⁸⁴ Brendan Pierson & Nate Raymond, *Explainer: Can abortion pills overcome U.S. state bans?*, REUTERS (June 24, 2022, 4:49 PM), <https://www.reuters.com/world/us/can-abortion-pills-overcome-us-state-bans-2022-06-24/>.

⁸⁵ TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023); see also Jen Christensen, *Women with Chronic Conditions Struggle to Find Medications After Abortion Laws Limit Access*, CNNHEALTH (July 22, 2022, 7:11 AM), <https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html>.

⁸⁶ *Id.*

⁸⁷ TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

⁸⁸ *Id.*

misoprostol (Cytotec), and methotrexate.⁸⁹ However, the legislature provided an exemption for drugs that “may be known to cause an abortion but [are] prescribed, dispensed, or administered for other medical reasons.”⁹⁰ Prior to *Dobbs*, Texas banned medication abortions after seven weeks of pregnancy and made it a crime to send the abortion medication through the mail.⁹¹ The Texas law was a trigger ban on abortion, and Texas’s ban on abortion came into effect on August 25, 2022.⁹² The Texas statute provides that a person “may not knowingly perform, induce, or attempt an abortion” except under limited circumstances, such as a life-threatening condition to the mother caused by the pregnancy.⁹³ This is just one of many states that have restricted abortion following *Dobbs*.⁹⁴

Tennessee enacted a trigger ban on abortions in 2019 that criminalizes performing or attempting to perform an abortion on a woman.⁹⁵ Further, the ban criminalizes attempts to procure a miscarriage through the administration of any substance with the intent to procure a miscarriage or the use of any instrument with that intent.⁹⁶ The statute makes exceptions for cases where it is necessary to prevent death or serious permanent bodily injury to the mother.⁹⁷ Subsequently, in 2020, Tennessee enacted a statute banning “chemical abortions.”⁹⁸ This statute explicitly prohibits medication abortions, which consequently regulates a doctor’s ability to prescribe Mifeprex and misoprostol.⁹⁹ It is statutes like what Texas and Tennessee have enacted that have resulted in confusion for medical professionals and have caused women with chronic illnesses to be denied certain medications to treat their chronic illnesses.¹⁰⁰

The denial of medication for women with chronic illness is not limited to states that have statutes restricting abortion.¹⁰¹ It has also occurred in states

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see also Eleanor Klibanoff, *Texas now bans medical abortions after seven weeks of pregnancy*, THE TEX. TRIB. (Dec. 2, 2021), <https://www.texastribune.org/2021/12/02/texas-ban-medical-abortion/#:~:text=The%20law%20makes%20it%20a%20felony%20to%20provide,Texas%20term%20their%20pregnancies%2C%20according%20to%20state%20data>.

⁹² Att’y Gen. of Tex., Advisory on Texas Law Upon Reversal of *Roe v. Wade*, Opinion Letter (June 24, 2022), available at <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf>.

⁹³ *Id.*

⁹⁴ See TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023); TENN. CODE ANN. § 39-15-201 (2021).

⁹⁵ TENN. CODE ANN. § 39-15-201 (2021).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Tennessee Code Annotated defines a chemical abortion as “the use or prescription of an abortion-inducing drug dispensed with intent to cause the death of the unborn child.” *Id.* at §39-15-218.

⁹⁹ *Id.* at § 39-15-201.

¹⁰⁰ See *id.*; TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

¹⁰¹ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

without these regulations on abortion.¹⁰² Myisha Malone-King, who lives in Maryland, was denied her medication as a result of confusion resulting from the *Dobbs* decision.¹⁰³ Maryland has a statute protecting women's right to choose, which states,

[T]he State may not interfere with the decision of a woman to terminate a pregnancy: (1) Before the fetus is viable; or (2) At any time during the woman's pregnancy, if: (i) The termination procedure is necessary to protect the life or health of the woman; or (ii) The fetus is affected by genetic defect or serious deformity or abnormality.¹⁰⁴

Thus, even in states like Maryland, measures need to be taken to prevent the disproportionate effects that women with chronic illnesses have suffered as a result of the confusion surrounding the implications of *Dobbs*. Part IV of this Note defines discrimination on the basis of sex and argues that medical professionals have facilitated discrimination against women as a direct result of the *Dobbs* decision.

IV. WHAT IS DISCRIMINATION ON THE BASIS OF SEX?

According to the United States Equal Employment Opportunity Commission (EEOC), sex discrimination occurs when someone is treated unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.¹⁰⁵ The EEOC's definition of sex-based discrimination is congruent with the Supreme Court's definition.¹⁰⁶ Constitutional challenges alleging discrimination on the basis of sex are premised on either the Fourteenth Amendment¹⁰⁷ or the Fifth Amendment's¹⁰⁸ equal protection guarantees.¹⁰⁹ The *Dobbs* Court rejected

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ MD. CODE ANN., HEALTH-GEN. § 20-209 (2022).

¹⁰⁵ EEOC, *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sex-based-discrimination> (last visited Nov. 25, 2023).

¹⁰⁶ *See Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

¹⁰⁷ The Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁰⁸ While there is no explicit Equal Protection Clause in the Fifth Amendment, the Supreme Court has held that the Equal Protection analysis of the Fifth Amendment is the same as the analysis under the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214–18 (1995).

¹⁰⁹ *See generally* Jody Feder, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, CONG. RSCH. SERV. (Dec. 30, 2015), <https://sgp.fas.org/crs/misc/RL30253.pdf>.

the concept that a right to abortion could be grounded in the Equal Protection Clause of the Fourteenth Amendment.¹¹⁰ The Court acknowledged, in dicta, that neither *Roe* nor *Casey* found it appropriate to invoke this theory but proceeded to assert that no equal protection violation could be found here.¹¹¹ Thus, the *Dobbs* Court concluded that the theory grounding a right to abortion in the Equal Protection Clause is “squarely foreclosed by [the Court’s] precedent” despite the fact that neither *Roe* nor *Casey* invoked the Equal Protection Clause.¹¹²

Further, a state’s regulation of abortion is not a sex-based classification and thus is not subject to the “heightened scrutiny” that applies to such classifications.¹¹³ The *Dobbs* Court determined that the right to abortion cannot be grounded in the Equal Protection Clause by examining the line of authority that the Court has developed on sex-based discrimination and relating it to the *Casey* opinion.¹¹⁴ This line of cases dates back to *Reed v. Reed*.¹¹⁵ Likewise, the current definition of sex-based discrimination has evolved from a significant body of Supreme Court cases, recognizing that sex-based discrimination violates the Equal Protection Clause of the Fourteenth Amendment.¹¹⁶ Thus, in order to determine whether the denial of prescription medication to women suffering from chronic illness falls under the Court’s definition of sex-based discrimination, it will be helpful to consider a limited history of the Supreme Court’s basis for finding sex-based discrimination.

Courts have struggled with defining sex discrimination since the establishment of Title VII.¹¹⁷ When this issue was presented before various courts and judges, the courts attempted to define sex discrimination.¹¹⁸ As the “final arbiter of meanings,” the Supreme Court issued its decision in *Geduldig v. Aiello*,¹¹⁹ appearing to have finally defined the meaning of sex

¹¹⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983); *United States v. Virginia*, 518 U.S. 515 (1996).

¹¹⁶ See *id.*

¹¹⁷ See Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975).

¹¹⁸ *Id.* at 442.

¹¹⁹ *Geduldig*, 417 U.S. at 484 (considering an action that challenged the constitutionality of a provision of a California program that, in defining ‘disability,’ excludes from coverage certain disabilities resulting from pregnancy).

discrimination.¹²⁰ However, this was not the first case considered by the Supreme Court relating to sex discrimination.¹²¹

In 1971, the Supreme Court, for the first time, determined that the Fourteenth Amendment prohibits discrimination on the basis of sex.¹²² The Court in *Reed v. Reed* held that an Idaho statute which provides that “as between persons equally qualified to administer estates males must be preferred to females, is based solely on a discrimination prohibited by and is violative of the equal protection clause of the Fourteenth Amendment.”¹²³ *Reed* played a fundamental role in the development of constitutional protections against sex-based discrimination.¹²⁴

Shortly after *Reed*, the Court heard *Frontiero v. Richardson*, which challenged a federal statute governing quarters allowance and medical benefits for members of the uniformed services.¹²⁵ In that case, Sharron Frontiero, a United States Air Force lieutenant, sought an increased quarters allowance plus housing and medical benefits for her husband.¹²⁶ The Court observed that if Lieutenant Frontiero had been a man, the benefits would have automatically been granted with respect to the wife of a male member of uniformed services; however, the Air Force denied Lieutenant Frontiero’s application for additional benefits because she failed to demonstrate that her husband was dependent on her for more than half of her support.¹²⁷

The Court stated that statutes created solely for administrative convenience that allow spouses of male members of the uniformed services to be identified as dependents, but provide that spouses of female members of the military are not dependents unless they are dependent for over half of their financial support, violate the Due Process Clause of the Fifth Amendment.¹²⁸ The Court reasoned that such statutes require a female member to prove the dependency of her husband while a male member receives automatic approval for increased quarters allowances upon showing that he and his spouse are lawfully married.¹²⁹ In making this decision, the Court observed that:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special

¹²⁰ Zimmerman, *supra* note 117 at 442.

¹²¹ See *Reed v. Reed*, 404 U.S. 71, 75 (1971).

¹²² Lenora M. Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 HARBINGER 149, 150 (2019).

¹²³ *Reed*, 404 U.S. at 75.

¹²⁴ Brent Huff, *Reed v. Reed: Some Background*, CASETEXT (Sep. 17, 2015), <https://casetext.com/analysis/reed-v-reed-some-background>.

¹²⁵ *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).

¹²⁶ *Id.* at 680.

¹²⁷ *Id.*

¹²⁸ *Id.* at 688.

¹²⁹ *Id.*

disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”¹³⁰

This has implications in today’s society. Women attempting to access their medication are denied access simply because they may have the ability to become pregnant.¹³¹ Healthcare workers are uncertain of their state’s laws and the effects of the *Dobbs* decision on their state’s laws—this has resulted in confusion surrounding whether drugs like methotrexate are legally allowed to be prescribed to women because of its alternative use as an abortifacient.¹³² Alternatively, men with chronic illnesses have not had the same experiences following the *Dobbs* decision. This is evident because there have been no reported cases relating to a man being denied medication following *Dobbs*. Men have not been met with the same burden that women suffering from chronic illness have since the Supreme Court’s decision in *Dobbs*.

There has been fear and confusion surrounding prescriptions of certain drugs like misoprostol and methotrexate for people who have the ability to become pregnant because of the secondary effects or uses of those drugs.¹³³ Women have been denied access to their prescriptions and have been forced, in some cases, to change their treatment plans, causing discomfort resulting from the discontinuation of their medication.¹³⁴ It is obvious that following such discontinuation, women have been prevented from participating in certain pain management techniques for their chronic illnesses, which could have severe effects on their lives.¹³⁵ For example, according to the Mayo Clinic, “Crohn’s disease is a type of inflammatory bowel disease (IBD)” that “causes swelling of the tissues (inflammation) in your digestive tract, which can lead to abdominal pain, severe diarrhea, fatigue, weight loss and malnutrition.”¹³⁶ Methotrexate is a drug that is typically prescribed to people with Crohn’s Disease who do not respond well to other medications.¹³⁷ The drug reduces inflammation by targeting the immune system, which produces

¹³⁰ *Id.* at 680.

¹³¹ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

¹³² Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, THE NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>.

¹³³ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ Mayo Clinic, *Crohn’s Disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/diagnosis-treatment/drc-20353309> (last visited Nov. 25, 2023).

¹³⁷ *Id.*

the substances that cause the inflammation.¹³⁸ Thus, methotrexate is a pain management drug that may have drastic effects on a person's life if they are forced to discontinue it.¹³⁹

Imagine that you are suffering from chronic pain that makes it difficult to get out of bed in the morning and causes you extreme discomfort while performing your daily obligations of going to work, taking care of your family, and doing household chores. Now, imagine that you are given a drug that makes your life much easier by reducing the amount of pain and discomfort that you are in on a daily basis, and you finally feel better and are able to function with some relief. But then your doctor calls you with no warning and tells you that you can no longer have a prescription for that wonder drug.¹⁴⁰ That would undoubtedly be mentally and physically exhausting and painful for the women who have been put in these situations. The drug that was once helping them live their lives is no longer available to them, despite the fact that they had no intention of using it for abortion purposes, despite how much it was actually helping them, and despite the fact that there are no reports that their male counterparts have had no interruption to the same drug.¹⁴¹ Now these women have been forced to change treatment plans in many cases, which required another doctor visit, imposing on them a higher financial burden and time burden than their male counterparts have experienced.¹⁴² Thus, just as women in the military applying for spousal benefits should not face a higher burden than men, women attempting to access their medication for the treatment of their chronic illnesses should not face a higher burden simply because they may have the ability to become pregnant.¹⁴³

Dobbs addressed sex discrimination in its finding that abortion regulations are not subject to heightened scrutiny, which has been applied to sex discrimination cases.¹⁴⁴ The Supreme Court justified its reasoning that laws regulating abortion are not subject to heightened scrutiny by relying on *Geduldig v. Aiello*.¹⁴⁵ The Court stated in *Geduldig*, “regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext designed to effect an invidious discrimination against members of one sex or the

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁴¹ *Id.*

¹⁴² Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

¹⁴³ See *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

¹⁴⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022).

¹⁴⁵ *Id.*

other.”¹⁴⁶ Similarly, the *Dobbs* Court relied on prior precedent set forth in *Bray v. Alexandria Women's Health Clinic*,¹⁴⁷ which previously stated that the goal of preventing abortion does not in itself constitute invidious discrimination against women.¹⁴⁸ Moreover, in *Geduldig v. Aiello*, the Court included a footnote¹⁴⁹ that clarified the Court’s definition of discrimination on the basis of sex.¹⁵⁰ The language in the footnote indicates, “[T]he Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one or the other sex.”¹⁵¹ Construed more broadly, the footnote creates a general limitation on the definition of sex-based discrimination.¹⁵²

The regulation at issue in *Geduldig* was a California program that provided disability coverage for various conditions, excluding pregnancy.¹⁵³ California denied that there was any sex-based motivation for the exclusion of pregnancy and provided several reasons.¹⁵⁴ California argued that pregnancy is a voluntary condition and a period of unemployment could be planned for—despite pregnancy being the only voluntary disability to receive such treatment.¹⁵⁵ Likewise, the State argued that pregnancy and birth are normal physiological functions—despite the high probability of pregnancy resulting in surgery or even death.¹⁵⁶ Finally, the State objected to the increased cost that covering pregnancy as a disability would require, stating that the program would be too expensive to continue if it were to cover pregnancy.¹⁵⁷ The district court rejected the State’s arguments and granted

¹⁴⁶ *Id.*

¹⁴⁷ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993).

¹⁴⁸ *Dobbs*, 142 S. Ct. at 2245-46.

¹⁴⁹ Footnote 20 of the *Geduldig* opinion reads: “The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson* involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. [citations omitted].” *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

¹⁵⁰ See Zimmerman, *supra* note 117, at 446.

¹⁵¹ *Id.* at 442.

¹⁵² *Id.*

¹⁵³ *Id.*; *Geduldig*, 417 U.S. at 485.

¹⁵⁴ Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442 (1975); *Geduldig*, 417 U.S. at 487.

¹⁵⁵ Zimmerman, *supra* note 117, at 442; *Geduldig v. Aiello*, 417 U.S. 484, 490 (1974).

¹⁵⁶ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 493.

¹⁵⁷ *Id.*

summary judgment for the plaintiffs on finding that the exclusion was not rationally related to a legitimate purpose, and thus, it violates equal protection.¹⁵⁸ The Supreme Court majority in *Geduldig* reversed, focusing on preserving the fiscal integrity of the insurance plan.¹⁵⁹ The Court found that the State's cost justification for the pregnancy disability exclusion met the constitutional review standard under the Equal Protection Clause.¹⁶⁰ The Court's argument follows the traditional argument against finding sex discrimination in regulations excluding pregnancy—since there can be no direct comparison of treatment between men and women regarding a trait possessed by only one sex, no sex discrimination issue can be said to exist.¹⁶¹

In the current situation, the conditions at issue are various types of chronic illnesses.¹⁶² People who may have the ability to become pregnant have been denied their prescriptions or forced to change their treatment plans despite the fact that their male counterparts have not been presented with the same burden.¹⁶³ Whether the Court would find this is invidious discrimination on the basis of sex hinges on the Court's characterization of the current practice at issue.¹⁶⁴ If the Court found that the alleged discrimination was the result of pregnancy as a condition, then it may not find there has been sex discrimination in this case based on the *Geduldig* decision.¹⁶⁵ However, the alleged sex discrimination in this case is not discrimination based on the condition of pregnancy; it is simply discrimination based on the ability of a woman to become pregnant.¹⁶⁶ Women have been denied their prescriptions or forced to change their prescriptions even in cases where they no longer have the ability to become pregnant—whether that is due to their age, the fact that they have undergone a hysterectomy, are not sexually active, have been prescribed birth control, or have simply been diagnosed with infertility.¹⁶⁷ Thus, because women—regardless of their condition—have been denied their prescription medication

¹⁵⁸ *Geduldig*, 417 U.S. at 491.

¹⁵⁹ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 497.

¹⁶⁰ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 496.

¹⁶¹ Zimmerman, *supra* note 117, at 442; *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

¹⁶² See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortion-bans-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁶³ See *id.*

¹⁶⁴ See *Geduldig*, 417 U.S. at 497.

¹⁶⁵ See *id.* (holding that the Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one sex).

¹⁶⁶ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortion-bans-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁶⁷ See Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

or forced to change treatment plans, the situation at hand can be distinguished from *Geduldig*.¹⁶⁸

The Supreme Court considered sex discrimination as it relates to benefits for pregnant women again in *General Electric Company v. Gilbert*.¹⁶⁹ In that case, female employees sued their employer under Title VII of the Civil Rights Acts of 1964, asserting that the employer's disability plan discriminated on the basis of sex in denying benefits for disabilities arising from pregnancy.¹⁷⁰ The Court held that an employee disability plan that excludes disabilities resulting from pregnancy does not constitute sex discrimination violative of Title VII of the Civil Rights Act of 1964.¹⁷¹ The Court based its reasoning on the *Geduldig* decision and further found that no additional evidence was presented to support a finding that the plan invidiously discriminated on the basis of sex.¹⁷² Interestingly, in the dissent, Justice Brennan took issue with the fact that the EEOC had explained that excluding pregnancy from benefits plans is contrary to the purpose of Title VII, and the majority rejected the EEOC's interpretation and applied *Geduldig* instead.¹⁷³ Additionally, a Title VII violation can be proved without evidence of intent.¹⁷⁴ The plaintiff must show that the classification has the effect of discriminating on the basis of sex.¹⁷⁵ In the present case, the plan allows benefits for all injuries and sicknesses, except one that is applicable only to women and not men.¹⁷⁶ This practice constitutes sex discrimination in violation of Title VII.¹⁷⁷

Congress specifically acted in response to *Gilbert* and narrowed the reasoning in both *Gilbert* and *Geduldig*.¹⁷⁸ However, it is worth noting that the Supreme Court has continually returned to *Geduldig*'s reasoning to make its decisions regarding sex discrimination despite Congress' intent to narrow those decisions.¹⁷⁹ The *Dobbs* decision is an example of this.¹⁸⁰

The Supreme Court once again considered sex-based discrimination as it relates to Title VII¹⁸¹ in *Newport News Shipbuilding & Dry Dock Company*

¹⁶⁸ See *Geduldig v. Aiello*, 417 U.S. 484, 486 (1974).

¹⁶⁹ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 135.

¹⁷² *Id.* at 136.

¹⁷³ *Id.* at 149 (Brennan, J., dissenting).

¹⁷⁴ *Id.* at 150.

¹⁷⁵ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 150 (1976) (Brennan, J., dissenting).

¹⁷⁶ *Id.* at 153.

¹⁷⁷ *Id.* at 160.

¹⁷⁸ See Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Reaches Full Term*, 52 IDAHO L. REV. (2016).

¹⁷⁹ See *id.*

¹⁸⁰ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022).

¹⁸¹ Title VII defines discrimination on the basis of sex stating, "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical

v. EEOC.¹⁸² *Newport News* involved an employee benefit plan that covered pregnant female employees but did not cover the male employee's wives for pregnancy-related benefits.¹⁸³ In *Newport News*, the Court held that limiting coverage on an employer's health insurance plan discriminates against male employees in violation of Title VII, as amended by the Pregnancy Discrimination Act (PDA).¹⁸⁴ The Court stated that the limitation—which “provide[s] its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions” but that “provided less extensive pregnancy benefits for spouses of male employees”—discriminates against those male employees.¹⁸⁵ The Court further reasoned that the PDA “makes it clear that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan.”¹⁸⁶ This means that when the employer health plan gave married male employees a benefit package for their dependent that was less inclusive than the coverage provided to female employees for the same benefits, it was discrimination on the basis of sex.¹⁸⁷

Along similar lines, the denial of prescription medication for women with chronic illnesses coupled with the fact that men have not experienced the same phenomena signals a denial of healthcare that is discrimination on the basis of sex under the Supreme Court's reasoning in *Newport News Shipbuilding & Dry Dock Company*.¹⁸⁸ As the Court found in *Newport News*, under Title VII, if an employer's health insurance plan refused to cover medication, such as methotrexate, just because the woman may have the ability to be pregnant, it could be considered sex discrimination.¹⁸⁹ Thus, if a woman lives in a state that outlaws abortion (or, for that matter, does not outlaw abortion) and her employer's medical insurance plan refuses to cover her medication used for chronic illness management, it is discrimination on the basis of sex under Title VII.¹⁹⁰ The sex-based discrimination resulting from the denial of prescription medication to women suffering from chronic illnesses can also be examined under the Affordable Care Act.¹⁹¹

conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.” 42 U.S.C. § 2000e(k).

¹⁸² *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 671 (1983).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 670, 685.

¹⁸⁶ *Id.* at 670.

¹⁸⁷ *Id.*

¹⁸⁸ *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983).

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ 42 U.S.C. § 18116 (“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964

V. THE AFFORDABLE CARE ACT

There are two ways that women with chronic illnesses may be able to recover based on discrimination under the Affordable Care Act.¹⁹² This Section of this Note examines two different classifications that may be found within the Affordable Care Act for women suffering from chronic illness.

A. Sex-Based Discrimination under the Affordable Care Act (ACA).

One purpose of the Affordable Care Act is to protect individuals against sex-based discrimination while participating in any health program or activity where they are receiving federal financial assistance.¹⁹³ Section 1557 applies to any health program or activity that receives funding from the Department of Health and Human Services (HHS).¹⁹⁴ This includes (1) “hospitals that accept Medicare or doctors who receive Medicaid payments”; (2) the Health “Insurance Marketplaces and issuers that participate in those Marketplaces”; and (3) “any health program that HHS itself administers.”¹⁹⁵ The Section 1557 final rule¹⁹⁶ makes it clear that discrimination based on an individual’s sex or pregnancy, childbirth, and related medical conditions amounts to sex discrimination under the Affordable Care Act.¹⁹⁷ Further, “individuals cannot be denied health care or health coverage based on their sex.”¹⁹⁸ Under the Affordable Care Act, women must be treated equally to men in the health care they receive and the insurance coverage they obtain.¹⁹⁹ Finally, the rule provides that in order to run a sex-specific health program

(42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”).

¹⁹² See *id.*

¹⁹³ U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, 460 & 45 C.F.R. pts. 86, 92, 147, 155, 156).

¹⁹⁷ U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

or activity, the entity must demonstrate “an exceedingly persuasive justification” for such a program.²⁰⁰ The health program or activity must be “substantially related to the achievement of an important health-related or scientific objective.”²⁰¹

In an article discussing the Affordable Care Act’s purpose in prohibiting sex and gender-based discrimination, HHS Secretary Xavier Becerra states, “It is the position of the Department of Health and Human Services that everyone—including LGBTQ people—should be able to access health care, free from discrimination or interference, period.”²⁰² This statement reflects the intent behind the Department of Health and Human Services in enforcing Section 1557.²⁰³ Everyone should be able to access healthcare free from discrimination or interference by a third party.²⁰⁴ However, that intent is not furthered when women are denied their medications based on an assumption of their ability to become pregnant.²⁰⁵

In the same article, the American Hospital Association, a national organization representing and serving all types of hospitals, healthcare networks, and their patients and communities, references Section 1557, stating, “All patients deserve access to care and to be treated with dignity and respect throughout the health delivery system. Patients should also never feel discouraged from seeking medical treatment due to fear of discrimination. We are pleased to see these important protections restored.”²⁰⁶ The organization’s mission is to ensure “that members’ perspectives and needs are heard and addressed in national health policy development, legislative and regulatory debates, and judicial matters.”²⁰⁷ The organization is more than qualified to recognize the importance of certain changes in healthcare legislation, and it should be noted that it identified a need to curb discrimination in health care.²⁰⁸

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰³ See U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

²⁰⁴ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰⁵ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁰⁶ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰⁷ AHA, *About the AHA*, AM. HOSP. ASSOC., <https://www.aha.org/about> (last visited Nov. 20, 2023).

²⁰⁸ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

The Affordable Care Act was intended to strengthen health care for women in all age groups.²⁰⁹ The Office of the Assistant Secretary for Planning and Evaluation identified several purposes for the Affordable Care Act as it relates to women.²¹⁰ The Office observed that the Act “improves coverage for important preventative services and maternity care, promotes higher quality care for older women, and ends the gender discrimination that requires women to pay more for the same insurance coverage as men.”²¹¹ The Office specifically identified improvement in chronic disease management, which is beneficial to older women because they are more likely to suffer from a chronic condition than men.²¹²

Thus, it is clear that the legislative intent behind the ACA is to decrease discrimination on the basis of sex.²¹³ In the wake of *Dobbs*, women have been denied their prescription medication or forced to change treatment plans as a result of confusion resulting from the *Dobbs* decision.²¹⁴ This is directly contrary to the intent of the Affordable Care Act articulated by the government.²¹⁵ The ACA provides for a method of enforcement for discrimination under the Civil Rights Act of 1964, Title VI, Title IX, Section 794, and the Age Discrimination Act.²¹⁶ As previously argued, because a higher burden has been imposed on women with chronic illnesses than their male counterparts, it is likely discrimination on the basis of sex and the ACA would provide for an additional enforcement mechanism.²¹⁷

B. Disability Discrimination under the ACA

Furthermore, the Affordable Care Act provides protection for people suffering from chronic illnesses because that would constitute discrimination on the basis of disability.²¹⁸ No provision in the Affordable Care Act specifically mentions discrimination for chronic illness.²¹⁹ However, if persons with chronic illness qualify under the law as disabled, then Section

²⁰⁹ Alison Cuellar, et al., *The Affordable Care Act and Women*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION (Mar. 19, 2012), <https://aspe.hhs.gov/reports/affordable-care-act-women-0>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *See id.*

²¹⁴ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²¹⁵ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²¹⁶ 42 U.S.C. § 18116.

²¹⁷ *See* *Geduldig v. Aiello*, 417 U.S. 484 (1974); *see also id.*

²¹⁸ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²¹⁹ *Id.*

1557 protects them.²²⁰ Congress outlined the definition of a person with a disability under the law in the Americans with Disabilities Act Amendments of 2008 (ADA).²²¹

The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”²²² This includes “manual tasks, seeing, hearing, eating, sleeping, walking, standing, speaking, learning, and concentrating.”²²³ Additionally, when “major bodily functions” are impaired, a person may be considered disabled.²²⁴ Major bodily functions include the “immune system, normal cell growth, digestive, bladder, neurological, respiratory, circulatory, [and] endocrine” impairments.²²⁵ Therefore, persons with chronic illnesses may be covered as long as they can demonstrate that they meet the criteria set out under the Americans with Disabilities Act.²²⁶ Women with chronic illness often experience significant and painful episodes relating to their disabilities.²²⁷ For example, according to the Mayo Clinic, symptoms of Crohn's disease can range from mild to severe.²²⁸ Symptoms include “diarrhea, fever, fatigue, abdominal pain and cramping, blood in your stool, mouth sores, reduced appetite and weight loss, pain or drainage near or around the anus due to inflammation from a tunnel into the skin (fistula).”²²⁹ These symptoms may be debilitating or cause an impairment in a person's ability to participate in everyday life.²³⁰

“Legally defined, many chronic illnesses can cause a disability, both temporary and ongoing.”²³¹ Additionally, chronic illnesses affect the immune system and may cause digestive impairments.²³² These impairments are parallel to the considerations in the ADA used to determine whether a person is disabled.²³³ Based on these symptoms, a woman with a chronic

²²⁰ *Id.*

²²¹ *Id.*

²²² 42 U.S.C. § 12102.

²²³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Mayo Clinic Staff, *Crohn's Disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/symptoms-causes/syc-20353304> (last visited Nov. 20, 2023).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Caroline Igo & Dawnthea Price Lisco, *Chronic Illness and Disability: Key Differences and How to Get Support*, CNET (Nov. 6, 2022, 12:00 PM), <https://www.cnet.com/health/medical/chronic-illness-and-disability-key-differences-and-how-to-get-aupport/>.

²³¹ *Id.*

²³² Mayo Clinic Staff, *Crohn's disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/diagnosis-treatment/drc-20353309> (last visited Nov. 21, 2023).

²³³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

illness may be able to argue she is disabled under the ADA.²³⁴ Thus, she may be able to argue that denial of medication is disability discrimination.

VI. POLICY CONSIDERATIONS

There are several policy considerations resulting from the disparate impact on women with chronic illnesses following the decision in *Dobbs v. Jackson Women's Health Organization*. This part of the Note discusses the implications of the Court's decision on physicians and their duty to their patients—namely, women suffering from chronic illnesses. One commentator has suggested that doctors and patients are absent from the Supreme Court's decision in *Dobbs*, unlike the preceding decision in *Roe v. Wade*, which was doctor-patient centered.²³⁵

This lack of consideration for healthcare providers has carried over in ways that were not predicted by most speculating on the decision.²³⁶ As a result of *Dobbs*, women with chronic illnesses have been prevented from accessing their medication.²³⁷ Because a provider's denial of prescribed medication is not a new phenomenon, it should not have been lost on the *Dobbs* Court that such denial could be a consequence of its decision.²³⁸ In one particular instance, a woman was denied her contraceptive at a Walgreens pharmacy.²³⁹ The pharmacist cited religious reasons as to why he would not fill the prescription.²⁴⁰ In another instance, "a woman who was having a miscarriage was denied a pregnancy-terminating drug at a Walgreens in Peoria, Arizona."²⁴¹ In yet another instance, "a transgender woman was denied hormones her doctor had prescribed for her by a CVS in Fountain Hills, Arizona."²⁴² Further, it is not uncommon for a pharmacist to deny filling an opioid prescription.²⁴³ Healthcare providers are clearly caught

²³⁴ See *id.*

²³⁵ Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, SHOTS, HEALTH NEWS FROM NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines>.

²³⁶ *Id.*

²³⁷ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²³⁸ See Elizabeth Chuck, *Can a pharmacist legally deny a patient a prescription? It depends.*, NBC NEWS (July 28, 2018, 9:25 AM), <https://www.nbcnews.com/news/us-news/can-pharmacist-legally-deny-patient-prescription-it-depends-n894871>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Katie Bennet, JD, *When Opioid Prescriptions Are Denied*, PRAC. PAIN MGMT. (May 6, 2019), <https://www.practicalpainmanagement.com/resources/ethics/when-opioid-prescriptions-are-denied>.

in the middle of the legal fight for abortion rights.²⁴⁴ For patients, the consequences of being denied their medication can range from frustrating to life-threatening.²⁴⁵

Another shocking example involves a woman who lives in eastern Tennessee.²⁴⁶ A pharmacist denied her access to her medication until the doctor called to confirm that the methotrexate would not be used as an abortifacient.²⁴⁷ What is shocking about this example is that the woman was forty-eight years old and had a hysterectomy—this meant she could not have become pregnant.²⁴⁸ There are many implications for healthcare providers and sometimes devastating consequences for the women who are denied access to their medication.²⁴⁹ The woman in this situation expressed that after being denied her medication, she felt devastated and angry.²⁵⁰ Further, the delay caused her symptoms—including joint pain, weakness, and fatigue—to significantly worsen.²⁵¹ This uncertainty constitutes an additional burden women with chronic illnesses must confront.²⁵²

Similarly, a patient from Texas was confronted with the choice of possibly being denied medication in the wake of Texas's abortion ban or revising her treatment plan.²⁵³ The new plan put her at a higher risk for infections like COVID-19, yet again increasing the burden on this patient who already carried the weight of Crohn's disease.²⁵⁴ Another patient from Louisiana, a state with a trigger ban,²⁵⁵ was denied access to her Cytotec, which is used to make IUD insertion less painful, after the law was triggered.²⁵⁶ According to guidance released by the Biden Administration, these barriers to healthcare constitute discrimination on the basis of sex or disability.²⁵⁷ It is apparent that pharmacists and doctors have been fearful

²⁴⁴ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.*

²⁵⁰ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵⁷ U.S. Dep't of Health & Hum. Serv., *Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services*,

after the *Dobbs* decision.²⁵⁸ Even in states that protect women’s abortion rights, women have faced unforeseen consequences from the *Dobbs* decision.²⁵⁹ A woman in Illinois²⁶⁰ faced difficulty in having her methotrexate prescription refilled at Walgreens.²⁶¹ She suffers from a connective tissue disorder and developed severe psoriatic arthritis after a COVID-19 infection.²⁶² She had never had a problem having the prescription filled until after the *Dobbs* decision.²⁶³

These restrictions will continue to impact women with chronic illness disproportionately.²⁶⁴ It is already more likely that these women will live in poverty and have difficulty accessing health care, and the burden impacts these women as a result of religious beliefs they may or may not hold.²⁶⁵ Thus, steps need to be taken to reduce the burdens these women face.

VII. THE SOLUTION

Doctors and pharmacists need clear guidance on what situations they are allowed to deny class D²⁶⁶ or class X drugs.²⁶⁷ Further, women suffering from chronic illnesses deserve clear guidance and protection from legislatures on when they are in danger of being denied access to their medication. On July 29, 2022, Massachusetts passed a “shield law” with strong protections for healthcare workers who provide abortion services to patients living outside the state—both those who travel to Massachusetts for care and those who receive care in their home states from Massachusetts providers via telemedicine.²⁶⁸ The law:

HHS.GOV (July 14, 2022), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html>.

²⁵⁸ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵⁹ *Id.*

²⁶⁰ Illinois has laws protecting abortion.

²⁶¹ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Drugs are classified as class D or class X when they carry serious risks to pregnant people. *Id.*

²⁶⁷ Drugs are classified as class D or class X when they carry serious risks to pregnant people. Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁶⁸ Carrie N. Baker, *Groundbreaking Massachusetts Law Protects Telemedicine Abortion Providers Serving Patients Located in States Banning Abortion*, MS. (Aug. 18, 2022), <https://msmagazine.com/2022/08/18/massachusetts-abortion-law/>.

- prohibits the extradition of Massachusetts providers who lawfully provide abortion care in Massachusetts to a resident of a different state where the procedure is illegal;
- prevents Massachusetts law enforcement officers or employees from providing information or assistance to any federal or state law enforcement agency or private citizen in relation to an investigation or inquiry into protected reproductive healthcare services;
- creates a new civil remedy for providers in Massachusetts to countersue if they are the subject of criminal prosecution or civil lawsuits filed by someone outside of the state, enabling them to recover an amount equal to the damages assessed in these out-of-state lawsuits;
- protects providers' professional licenses from any negative impacts of being sued by a resident of a state where abortion is illegal for providing legal abortion care in Massachusetts; and
- keeps malpractice insurance within reach for providers when they face out-of-state civil lawsuits for providing lawful abortion care in Massachusetts.²⁶⁹

This Note proposes that a similar law be enacted federally to protect physicians in all states, but especially states like Tennessee and Texas that have enacted abortion bans that affect medication, such as methotrexate. The law would prohibit the extradition of state physicians or medical professionals who provide women with otherwise lawful care and tools to manage their chronic illnesses.

Similar to the Massachusetts law, an ideal law would protect a professional's license from negative impacts as long as they are providing otherwise lawful care to women with chronic illnesses. Additionally, there would be provisions that keep malpractice insurance in reach for professionals who provide such care. It may also be helpful to create an available action for countersuit in the event that a physician is subject to out-of-state prosecution. Finally, the law would prevent state law enforcement officers or employees from providing information or assistance to any federal or state law enforcement agency or private citizen in relation to an investigation or inquiry into protected care for chronic illnesses.

A "shield law" similar to the one proposed would aid in putting medical professionals' minds at ease and, therefore, help protect both the medical professional and the patient. The proposed law should read similarly to the following provisions:

²⁶⁹ *Id.*

- A. Any medical professional providing or assisting a provider in the care or management of a chronic illness shall not be subject to extradition to any other jurisdiction where the care is otherwise lawful outside of the State's law prohibiting certain care—namely, with the purpose of accomplishing or performing or causing an abortion in the patient.
- B. Law Enforcement shall not provide any protected information relating to the medical care, treatment, or reproductive health of a patient with chronic illness. This includes the ability of the patient to reproduce or any stated present, future, or past care relating to the patient's reproductive health. This provision also prohibits any information from being shared with other state or federal law enforcement agencies relating to prescription medication to treat women with chronic illness where the intent of the agency is to pursue prosecution of the patient or the provider for the use of an otherwise lawful prescription.
- C. This provision establishes a mechanism for suit by physicians and patients who have been criminally charged in connection with the care of said patient's chronic illness. This provision allows for recovery from the other party if they are prosecuted for any method of otherwise lawful care for the purpose of managing the patient's chronic illness. The provision entitles the party to recover an amount equal to the damages assessed in these out-of-state lawsuits;
- D. Medical professionals may not be penalized or disciplined in connection with the care of a patient with a chronic illness where no negligent or reckless care has been provided to the patient. This provision protects medical professionals from professional license penalties that a state may attempt to impose for participation in the care of patient(s) with chronic illnesses in connection with regulations on abortion.
- E. A medical malpractice insurance agency may not deny coverage for a medical professional solely for the provider's participation in the care of a patient suffering from a chronic illness. The denial of coverage must be made in connection with other issues for which an insurance company generally and reasonably denies coverage.

VIII. CONCLUSION

Women suffering from chronic illness have been disproportionately affected by the *Dobbs* decision.²⁷⁰ The Equal Employment Opportunity Commission and the Supreme Court have provided guidance on what constitutes discrimination on the basis of sex, and denying access to medication for women with chronic illness, while providing that same medication to men with chronic illness, falls under discrimination on the basis of sex.²⁷¹ Further, the Affordable Care Act defines what constitutes sex-based discrimination and makes it unlawful for doctors and pharmacists to deny treatment based on a patient's ability to become pregnant.²⁷² The ADA also provides an additional avenue based on disability status-based discrimination as a person suffering from chronic illness often meets the Americans with Disabilities Act's definition of a disabled person.²⁷³ Finally, there are several policy considerations involving the treatment of patients and the actions of physicians and other healthcare professionals.²⁷⁴ These parties need legislative guidance on what is lawful following the *Dobbs* decision.

Had the proposed "shield law" been enacted when *Dobbs* had been decided, Myisha would have had a much different experience.²⁷⁵ Physicians, pharmacists, and insurance companies would have been at ease despite the trigger bans on abortion enacted around the country.²⁷⁶ Medical providers would not have experienced such fear and confusion as a result of the differing state laws.²⁷⁷ The proposed "shield law" protects physicians from

²⁷⁰ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁷¹ EEOC, *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sex-based-discrimination> (last visited Nov. 25, 2023).

²⁷² 42 U.S.C. § 18116 ("Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.").

²⁷³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²⁷⁴ See Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, SHOTS, HEALTH NEWS FROM NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines>.

²⁷⁵ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁷⁶ *See id.*

²⁷⁷ *See id.*

possible liability or criminal indictment in connection with regulations on abortion and the medical care of women with chronic illnesses. The law would make great progress toward helping to reduce the burdens that women with chronic illnesses face.²⁷⁸

²⁷⁸ See Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.