NOTE

"THIS AIN'T TEXAS":[1] THE THIRTEENTH AMENDMENT'S ROLE IN CHALLENGING RESTRICTIONIST STATES' EXTRATERRITORIAL SURVEILLANCE OF PEOPLE SEEKING ABORTIONS AND GENDER-AFFIRMING CARE

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ABSTRACT

Since the Supreme Court in Dobbs v. Jackson Women's Health Organization *overturned* Roe v. Wade, *holding that the right to choose to have an abortion is no longer constitutionally protected, twelve states have totally banned abortions and seven states have severely restricted abortions early in pregnancy. Bans on gender-affirming care have proliferated as well with twenty-four states now banning safe and medically necessary surgery and medication for transgender youth. Restrictionist states have not stopped at their borders; some have imposed criminal and civil penalties for seeking and facilitating abortions and gender-affirming care in other states. Imperative for extraterritorial enforcement efforts are modern digital surveillance tools that enable restrictionist states to track people's interstate activities. This is not a bug of new state laws,*

1. BEYONCÉ, *TEXAS HOLD 'EM, on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024). Throughout this Note, each section is framed by lyrics from Beyoncé's COWBOY CARTER album because it matches the structure of Thirteenth Amendment claims—recognizing America's unjust past in order to overcome modern injustices that linger as a result of that history. To combat how Black voices have been historically excluded from or marginalized in the retelling of America's cultural and musical history and how Beyoncé herself was excluded by the white mainstream country music industry, COWBOY CARTER highlights Black influences on Southern culture and establishes a path forward that celebrates, uplifts, and makes space for such influences. *See* Candice Norwood, *With 'Cowboy Carter,' Black country music fans are front and center, at last*, THE 19TH (Mar. 29, 2024), https://perma.cc/A8HG-755M (explaining how the album reclaims and builds on country music's roots in "the sounds of Black musicians" after a one-hundred-year-long exclusion from the genre); Alice Randall, *How Beyoncé Fits Into the Storied Legacy of Black Country*, TIME (Mar. 28, 2024), https://perma.cc/DGC9-PWJL ("Beyoncé raises this question: If country owes a significant debt to Black culture, what in America doesn't?"). Moreover, because this Note extrapolates from the oppression of Black women in America to advance a broader Thirteenth Amendment challenge for all menstruating, pregnant, and transgender people, Beyoncé's lyrics serve as a reminder that "Black women as liberators have a long history of leading the way and have created spaces of resistance through their very embodiment." Janell Hobson, *Whose Flag, Whose Symbol? Notes on Beyoncé, Reclamations and (Black) Lady Liberty*, MS. (Mar. 21, 2024), https://perma.cc/T3MF-KJ4J; *see also* Taylor Crumpton, *Beyoncé Is Boldly Defying Country's Stereotypes*, TIME (Mar. 29, 2024), https://perma.cc/S4JF-8VQ2.

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but rather a feature of oppressive laws throughout this country's history. Dating back to chattel slavery, private and public actors have worked together to surveil the interstate movement of Black women, particularly when that travel threatened businesses' ability to profit off Black women's reproductive capacities. Arising from slavery's capitalist structure, racist and sexist tropes about Black women, and intrastate and interstate surveillance used to prevent Black women from achieving reproductive freedom, today's surveillance of menstruating and pregnant people and transgender youth seeking health care in other states where such care is legal is a "badge [or] incident" of slavery, prohibited by the Thirteenth Amendment.

This Note proceeds as follows. Part I illustrates the landscape of abortion and gender-affirming care restrictions, highlighting that their enforcement is likely to rely on private and public actors extraterritorially surveilling people through digital tools. Part II argues that safe haven states' shield laws and federal proposals aimed at preventing information disclosure to restrictionist states about residents who seek and facilitate extraterritorial care will be inadequate to wholly protect them from prosecution or civil liability in their restrictionist home state. Part III demonstrates how the Thirteenth Amendment might be able to fill the gaps because such a constitutional claim could structurally challenge both private and public actors' surveillance of people crossing state lines to obtain life-saving care.

INTRODUCTION

"History can't be erased
Are you lookin' for a new America?"[2]

In 1851, four slave-catchers "pursued and captured a little boy and a poor washwoman" in Pennsylvania, a state that had outlawed slavery at that time.[3] The little boy was Henry Dellam and the poor washwoman was Hannah Dellam, his pregnant mother.[4] Maryland slaveowner John Perdue claimed that the Dellams were his runaway slaves and, therefore, that they must be "returned" to him pursuant to the Fugitive Slave Act of 1850.[5] Despite conflicting witness testimony regarding the Dellams' identity, the judge found convincing—above all—the slave-catchers' contradicting testimony, asserting that both Dellams admitted

2. BEYONCÉ, *YA YA*, *on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024).
3. *The Slave Case Concluded—The Victims doomed and sent to their fate!*, PA. FREEMAN (Mar. 20, 1851), https://perma.cc/ZH4M-ZQR3.
4. *The Fugitive Slave Case*, PHILA. PUB. LEDGER (Mar. 10, 1851), https://perma.cc/ZH4M-ZQR3.
5. *Id.*

that they ran away from Perdue.[6] Of no import to the judge was that the Dellams' alleged confessions occurred in a coercive environment, "while in the grip of [their] captors" after a "ruffianly and brutal" seizure and arrest.[7] Ultimately, the judge not only granted Perdue title over Hannah and Henry, but additionally, "consigned" Hannah's newborn to "life long slavery" even though Hannah gave birth while being detained in a free state.[8]

Hannah's story parallels the tactics of modern interstate surveillance of reproductive care seekers, facilitators, and providers.[9] Almost two hundred years ago, the Fugitive Slave Act encouraged vigilante slave patrols to track and capture Hannah and her son in a free state because her reproductive capacity was highly profitable to the business of slavery in other states. Today, "restrictionist"[10] states have explicitly incentivized or implicitly enabled law enforcement and their allied "bounty hunters"—private individuals and commercial data brokers—to use modern surveillance tools to track menstruating, pregnant, and transgender people's activities when they travel to states where such health care is legal.[11]

For example, one Nebraska woman, Jessica Burgess, and her then-seventeen-year-old daughter faced criminal charges after police obtained a warrant to search their private Facebook messages where they discussed the daughter's use of mail-order medication abortion pills.[12] This led the police to discover that the mother and daughter duo buried the fetal remains thereafter.[13] Jessica was charged with two felonies under Nebraska's anti-abortion law, and while the law does not permit prosecution against someone who terminates her *own* pregnancy, Nebraska charged Jessica's daughter under other criminal laws.[14]

Since the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*, holding that the right to abortion is no longer constitutionally protected, twelve states have totally banned abortion, seven states have severely restricted abortion access early in pregnancy, and several other states tried to ban abortions but were overturned by ballot initiative and/or court decisions[15] or are still facing ongoing litigation challenges.[16] Bans on gender-affirming

6. *The Slave Case Concluded—The Victims doomed and sent to their fate!*, *supra* note 3.
7. *Id.*
8. *Id.*
9. *Infra* SECTION III.B.
10. This Note adopts from scholars Aziz Huq and Rebecca Wexler the term "restrictionist" to refer to those states that have passed laws banning or severely restricting abortion, gender-affirming care, and other forms of reproductive care since *Dobbs*. *See* Aziz Z. Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-Roe Era*, 98 N.Y.U. L. REV. 555, 557 n.5 (2023).
11. *Infra* PART III.
12. Shaila Dewan & Sheera Frankel, *A Mother, a Daughter and an Unusual Abortion Prosecution in Nebraska*, N.Y. TIMES (Aug. 18, 2022), https://perma.cc/4MTX-9JYG.
13. *Id.*
14. *Id.*
15. *Infra* note 58.
16. *Infra* note 59.

care[17] for transgender youth have proliferated as well with twenty-four states now banning safe and medically necessary surgery and medication.[18] Restrictionist states have not stopped at their borders; some have imposed criminal and civil penalties for seeking and facilitating abortions and gender-affirming care in other states.[19] Imperative for extraterritorial enforcement efforts are modern digital surveillance tools that enable restrictionist states to track people's interstate activities.[20] This is not a bug of new state laws, but rather, a feature of American laws throughout this country's history.[21] Dating back to slavery, private and public actors have worked together to surveil the interstate movement of Black women, particularly when that travel threatened businesses' ability to profit off Black women's reproductive capacities.[22] Arising from slavery's capitalist structure, racist and sexist tropes about Black women, and intrastate and interstate surveillance used to prevent Black women from obtaining reproductive freedom, today's surveillance of menstruating, pregnant, and transgender people seeking care in other states where such care is legal is a "badge [or] incident" of slavery, prohibited by the Thirteenth Amendment.[23]

This Note proceeds as follows. Part I illustrates the landscape of state abortion and gender-affirming care restrictions, highlighting that their enforcement has relied, in part, on private and public actors extraterritorially surveilling people's actions through digital tools.[24] The legal challenge presented in this Note roots itself in the handful of instances of state or private tracking of interstate abortions and gender-affirming care that have already come to light and the repeated threats by top government officials to seek out such information in order to prosecute care seekers, facilitators, and providers.[25]

To be clear, beyond a few instances detailed in this Note,[26] there is not yet evidence of *mass* surveillance of extraterritorial care seekers or *widespread* prosecution related to interstate abortion travel and obtaining abortion pills by mail. Actually, after *Dobbs*, "out-of-state travel for abortions — either to have a procedure or to obtain abortion pills — more than doubled in 2023 compared with

17. The term "gender-affirming care" includes "a range of social, psychological, behavioral, and medical interventions designed to support and affirm an individual's gender identity when it conflicts with the gender they were assigned at birth." Patrick Boyle, *What is gender-affirming care? Your questions answered*, AAMC (Apr. 12, 2022), https://perma.cc/PF53-AJQE. "[I]nterventions fall along a continuum," encompassing "counseling to changes in social expression to medications (such as hormone therapy)," where a child's "cognitive and physical development" can affect the timing of their interventions. *Id.*

18. *Infra* SECTION I.A.

19. *Infra* SECTION I.B.

20. *Infra* SECTION I.C.

21. *Infra* SECTION III.B.

22. *Infra* SECTION III.B.

23. *Infra* PART III.

24. *Infra* PART I.

25. *Infra* SECTION I.B.

26. *Infra* SECTIONS I.B–C.

2019," totaling over 171,000 patients in 2023.[27] Similarly, transgender youth have not stopped traveling to obtain gender-affirming care nor are there ample accounts of surveillance and prosecution of the people who have helped them seek care extraterritorially. Given the substantial increase in patients seeking health care out of their home states and the documented American history of surveillance deployed against vulnerable populations by law enforcement and profit-driven industries, this Note provides a useful roadmap to challenge the larger scale problems that are likely to balloon once restrictionist laws start to be enforced more aggressively. Upon the resolution of pending litigation determining the constitutionality of certain abortion and gender-affirming care bans and the inauguration of a second Trump Administration and Republican-controlled Congress, creative *constitutional* challenges to the *enforcement* of abortion and gender-affirming care restrictions will be necessary to protect the lives of menstruating, pregnant, and transgender people.

Part II argues that local efforts, safe haven states'[28] shield laws, and federal reform proposals aimed at preventing information disclosure to restrictionist states about residents who seek and facilitate extraterritorial care are potentially inadequate to wholly protect them from prosecution or civil liability in their restrictionist home state.[29]

Part III demonstrates how Thirteenth Amendment constitutional litigation could fill the gaps in protection left over by local efforts, shield laws, and federal proposals because such a claim can structurally challenge *both* private and public actors' surveillance of menstruating, pregnant, and transgender people crossing state lines to obtain life-saving care.[30]

I. THE POST-*DOBBS* RESTRICTIONIST LANDSCAPE

> "*Sixteen carriages drivin' away*
> *While I watch them ride with my dreams away*
> *To the summer sunset on a holy night*
> *On a long black road, all the tears I fight*."[31]

In 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization*[32] overruled *Roe v. Wade*,[33] holding that the right to an abortion

27. Molly Cook Escobar, Amy Schoenfeld Walker, Allison McCann, Scott Reinhard, & Helmuth Rosales, *171,000 Traveled for Abortions Last Year. See Where They Went*., N.Y. TIMES (June 13, 2024), https://perma.cc/4BF6-ST3U.

28. This Note uses the term "safe haven states" to refer to states that both *do not* penalize abortions or gender-affirming care and *do* affirmatively protect from criminal and civil liability nonresidents who travel there from restrictionist states or provide medical care there to out-of-state residents.

29. *Infra* PART II.

30. *Infra* PART III.

31. BEYONCÉ, *16 CARRIAGES*, *on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024).

32. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022) (reversing almost fifty years of precedent by asserting that "*Roe* was egregiously wrong from the start" and that its "reasoning was exceptionally weak" and "has had damaging consequences").

33. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

is no longer constitutionally protected. Writing for the majority, Justice Alito formalistically reasoned that the Constitution does not explicitly reference the right to have an abortion, and "no such right is implicitly protected" by the Due Process Clause of the Fourteenth Amendment because it is not "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."[34]

This Note does not dispute that the "tradition" and "ordered liberty" test adopted in *Dobbs* from *Glucksberg* is the current law, but this Note does *not* accept it as the correct formulation for determining implicit constitutional rights. Contrary to the test's originalist premise, there is no all-encompassing, accurate, and neutral historical narrative from which the Court can discern whether a right is "deeply rooted in this Nation's history and tradition."[35] Further, the test relies on what the ratifiers of the Fourteenth Amendment understood "as part of the guarantee of liberty," which overlooks that only privileged white men were included in ratification and that even they did not promote a frozen-in-time understanding of the Constitution.[36] Therefore, that the ratifiers may not have recognized reproductive rights as "implicit in the concept of ordered liberty" is "perhaps not so surprising" because "both in 1868 and when the original Constitution was approved in 1788" they "did not understand women as full members of the community."[37] By relying solely on "the sentiments of one long-ago generation of men" rather than "accumulated judgments" since then, the *Dobbs* majority made a "catastrophic" decision to "deprive[] women of any control over their bodies" merely because laws in 1868 did so.[38]

The majority further asserted that it was "return[ing] the issue of abortion to the people's elected representatives."[39] As a result, twelve states since the *Dobbs* decision have totally banned abortions and seven states have severely restricted

34. *Dobbs*, 597 U.S. at 231 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

35. Dominant historical narratives mainly reflect the perspectives of those who have long held power in this country. For instance, during slavery, states like North Carolina enacted laws restricting slaves from learning how to read and write in order to prevent rebellion—necessarily limiting the stories we can read today about their lives. *A Bill to Prevent All Persons from Teaching Slaves to Read or Write, the Use of Figures Excepted (1830)*, ANCHOR: A N.C. HIST. ONLINE RES. (2018), https://perma.cc/3DEB-RT65; *see also* Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, 119 MICH. L. REV. 1081, 1082 (2021) (highlighting how dominant American narratives have overlooked white women's substantial part in upholding and benefiting from the ownership and trafficking of Black people).

36. *Dobbs*, 597 U.S. at 374 (Breyer, J., dissenting) (explaining that the ratifiers "understood that the world changes," and thus, "did not define rights by reference to the specific practices existing at the time . . . to permit future evolution in their scope and meaning").

37. *Id*. at 372.

38. *Id*. at 386–87.

39. *Id*. at 232; *see generally* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 733, 806 (2024) (arguing that "the Court displayed a crabbed understanding of the venues and contexts in which democratic deliberation occurs," "imagined the democracy it sought to facilitate as unidirectional," "suggested that political power can be measured by voter turnout alone, overlooking critical metrics like representation in electoral office and in the ecosystem of campaign finance," and relied on "positive law enacted by a polity in which women and most people of color were utterly absent").

abortion access early in pregnancy.[40] Meanwhile, "[t]wenty-four states have enacted laws that ban access to gender-affirming care for transgender youth," and "[n]ineteen of these bans—the vast majority—were enacted in 2023," the year after the *Dobbs* ruling.[41]

This Part provides an overview of restrictionist state laws that target abortion and gender-affirming care in-state and out-of-state, and then it outlines the digital surveillance that has already been used and may be used to a greater degree in the future to enforce restrictionist laws. Access to reproductive and gender-affirming care are inextricably intertwined issues on a constitutional,[42] political,[43] and legislative level.[44] For instance, abortion and LGBTQIA+ rights are bound up in Supreme Court precedent. Justice Thomas has advocated for using *Dobbs* in the future to "reconsider all of [the] Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*," cases related to private and personal autonomy matters—the right to marry and engage in sexual acts for same-sex couples and the right to obtain contraception.[45] Following Justice Thomas's indication that the *Dobbs* holding could extend to other contexts, courts have cited *Dobbs* as precedent for upholding gender-affirming care bans.[46] And conservative advocates have deployed the same lobbying and litigation tactics that they successfully used for anti-abortion laws to enact and defend restrictionist legislation concerning gender-affirming care.[47] Thus, because of the interconnectedness of abortion and gender-affirming care restrictions, this Note analyzes their developments in tandem.

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40. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Jan. 2, 2025), https://perma.cc/VP3B-3N6Z; *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., [hereinafter *Abortion Laws by State*], https://perma.cc/3DD5-83R9.

41. Elana Redfield, Kerith J. Conron, & Christy Mallory, *The Impact of 2024 Anti-Transgender Legislation on Youth*, UCLA SCH. OF L. WILLIAMS INST. 6 (2024), https://perma.cc/UQ25-V8AL.

42. *See, e.g.*, Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1474 (2023) (comparing parental rights related to minors seeking abortions to the parental rights related to minors seeking gender-affirming care).

43. *See, e.g.*, Ariel Cohen, *House GOP eyes trans care as newest battleground issue*, ROLL CALL (Nov. 9, 2023), https://perma.cc/S3KY-K92V.

44. *See* Rose Mackenzie & Arli Christian, *The Intertwined Future of Attacks on Abortion and Gender-Affirming Care*, ACLU (Jan. 18, 2023), https://perma.cc/EZ8Z-GNX2 ("The same lawmakers that don't want people to be able to make decisions about their pregnancies also don't want transgender people to be able to make decisions about their medical care.").

45. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

46. *See, e.g.*, Williams ex. rel. L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (citing *Dobbs* ten times to reject challenges to Tennessee's and Kentucky's gender-affirming care bans).

47. David D. Kirkpatrick, *The Next Targets for the Group That Overturned* Roe, THE NEW YORKER (Oct. 2, 2023), https://perma.cc/DZR8-G5BS (describing how the conservative advocacy organization, Alliance Defending Freedom, "[p]itt[ed] conservative Christian parents, employers, and creative professionals against L.G.B.T. rights," using the same "incremental approach that A.D.F. and its allies had adopted during the long struggle to overturn *Roe*: undermining the precedent bit by bit, by defending parental-notification laws, waiting periods, and so on").

A. LAWS RESTRICTING ABORTION AND GENDER-AFFIRMING CARE WITHIN STATE BORDERS

Current state abortion and gender-affirming care restrictions are complex, varied, and many are not rooted in modern medicine. Broad restrictions are not only unsubstantiated by science and unmotivated by health concerns[48]—they actually *undermine* patient health outcomes, producing potentially fatal consequences for people denied care.[49] More than twenty reputable medical organizations agreed in an amicus brief that banning gender-affirming care "can put patients' lives at risk."[50] And twenty leading medical organizations declared that state laws which ban abortions early in pregnancy are "detrimental to women's physical and psychological health and well-being" because they "dangerously limit[] the ability of women . . . to obtain the health care they need: some will be forced to travel outside the State to obtain an abortion; others will attempt self-induced abortion; and others still will be forced to carry their pregnancy to term . . . an outcome with significantly greater risks to maternal health and mortality."[51]

As restrictionist laws are discussed throughout this Note, it is crucial to understand that the scientifically inaccurate terminology used in these laws makes their prohibitions more dangerous than they appear on the surface and more impermeable to legal challenges because of their misleading definitions. Restrictionist

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48. *See, e.g.*, Brief for American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, American Association of Public Health Physicians, et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (No. 19-1392) (2022), *21 ("In enacting the [Mississippi abortion] Ban, the Legislature relied on a single study to conclude that abortion 'carries significant physical and psychological risks to the maternal patient,' . . . [b]ut the State ignores the rest of that study's findings - which show that, although the risks of abortion marginally increase as pregnancy progresses, abortion is exceedingly safe throughout pregnancy and comparatively safer than continued pregnancy and childbirth.").

49. *See, e.g.*, Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin, & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), https://perma.cc/CM3V-D4SQ (revealing that compared to states without restrictions, in states with abortion bans or restrictions, the maternal mortality rate grew nearly twice as fast, the neonatal death rate in the first 27 days of life was higher, and the death rate for women of reproductive age was 34% higher); Erika L. Sabbath, Samantha M. McKetchnie, Kavita S. Arora, & Mara Buchbinder, *US Obstetrician-Gynecologists' Perceived Impact of Post*-Dobbs v. Jackson *State Abortion Bans*, 7 JAMA NETWORK OPEN (2024), https://perma.cc/94ZS-BYRK (study showing that state abortion bans have spurred "occupational health crises for OB-GYNs intertwined with a maternal health crisis for their patients"); Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David J. Inwards-Breland, & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN (2022), https://perma.cc/SY43-WF28.

50. Brief for American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations as Amici Curiae Supporting Petitioner, United States v. Skrmetti, 144 S. Ct. 2679 (2024) (No. 23-477), 2024 WL 4135277, *26–27 ("[A]dolescents with gender dysphoria who receive puberty blockers and/or hormone therapy experience less depression, anxiety, and suicidal ideation. Several studies have found that hormone therapy is associated with reductions in the rate of suicide attempts and significant improvement in quality of life.").

51. Brief for American College of Obstetricians and Gynecologists, et al., *supra* note 48, at *17–20.

laws and state officials tend to use expansive definitions of "abortion," which are not consistent with medical terminology and thereby encompass other phases of reproductive care—jeopardizing a multitude of reproductive rights beyond abortion,[52] such as menstruation, contraception, and in vitro fertilization.[53] Laws that place restrictions on gender-affirming care and other rights of transgender people often contain the term "biological sex" to reference who is permitted and prohibited from taking certain actions.[54] "Biological sex" is not a medically defined term. Nevertheless, it lends lawmakers "the language of biology to suggest that their motives are to vindicate science rather than to marginalize and exclude transgender individuals."[55] In fact, on the first day of President Trump's second term, he declared that it would be "official policy of the United States government that there are only two genders: male and female," and signed into law an executive order entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which defined "sex," as referring "to an individual's immutable biological classification as either male or female . . . [which] does not include the concept of 'gender identity.'"[56]

This Section first discusses bans on in-state abortion care that have solidified since *Dobbs* and subsequently lays out the recent and rapid proliferation of in-state gender-affirming care restrictions.

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52. *See* Greer Donley & Caroline Kelly, *Abortion Disorientation*, 74 DUKE L. J. 1 (2024) (chronicling the overbroad and arbitrary definitions in abortion statutes across the country); Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233, 1251 (2023) ("[A]n interest in the fetus at all stages of development, untethered from a need for scientific or medical consensus, could result in excessive monitoring and control."); *see, e.g.*, IDAHO CODE § 18-604(5) (2023) (defining "fetus" and "unborn child" interchangeably to mean "an individual organism of the species Homo sapiens from fertilization until live birth").

53. *See, e.g.*, Kim Chandler, *Warnings of the impact of fertility treatments in Alabama rush in after frozen embryo ruling*, AP (Feb. 21, 2024), https://perma.cc/Y36J-SHWP (describing how Alabama's highest court held that frozen embryos can be considered children under state law and thus that the state could sue a fertility clinic for wrongful death over the destruction of frozen embryos).

54. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1848–50 & n.146–50 (2022) (detailing the definitions or lack thereof given by state legislatures to the term "biological sex").

55. *Id*. at 1832–49 (chronicling the history of the term and explaining how "most of these laws either neglect to define 'biological sex' or provide that 'biological sex' is to be determined not based on any aspect of biology, but rather, based on the original birth certificate); *see also* Eli Coleman et al.,* *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT. J. TRANSGENDER HEALTH, S1, S252–53 (2022) (providing a glossary that differentiates between "gender," "sex assigned at birth," and "gender identity," among other terms). *In order to support diverse scholarship, the *Georgetown Journal of Gender and the Law* has adopted a Fair Citation Rule that ensures each author of a source is fairly credited in our citations. However, due to the breadth of authors who contributed to this source, it was not feasible to specifically name each one. We encourage readers to view the source themselves and take note of these authors' important contributions.

56. Executive Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025), https://perma.cc/3XCZ-ZN5T.

1. Abortion Bans

Twelve states have total abortion bans.[57] Several other states have attempted to enact total abortion bans but have been overturned by ballot initiative and/or court decisions,[58] while others are still facing litigation challenges.[59] Total bans criminalize performing abortions, with some that additionally offer civil causes of action for private citizens to bring against facilitators and medical professionals.[60] Seven other states have imposed severe restrictions on accessing abortion early in pregnancy at or before eighteen weeks' gestation:[61] four states have bans after

57. *See* ALA. CODE § 26-23H-4 (West, Westlaw through Act 2025-62 of 2025 Reg. Sess.) (Alabama has life, health, and fatal fetal anomaly exceptions, but no rape/incest exceptions); ARK. CODE ANN. § 5-61-304 (West, Westlaw through Mar. 20, 2025 of 2025 Reg. Sess.) (Arkansas has life exception, but no health, rape/incest, or fatal fetal anomaly exception); IDAHO CODE § 18-622 (West, Westlaw through Ch. 56 of 1st Reg. Sess.) (Idaho has life exception, but no health, rape/incest, or fatal fetal anomaly exceptions); IND. CODE. ANN. § 16-34-2-1 (West, Westlaw through 2024 2d. Reg. Sess.) (Indiana has life, health, rape/incest, and fatal fetal anomaly exceptions); KY. REV. STAT. ANN. §§ 311.720, 723 (West, Westlaw through Mar. 24, 2025) (Kentucky has life and health exceptions, but no rape/incest or fatal fetal anomaly exceptions); LA. REV. STAT. §§ 14:87.1, 14:87.7 (West, Westlaw through 2024 1st Ex., 2d. Ex., Reg., & 3d. Ex. Sess.) (Louisiana has life and health exceptions, but no rape/incest or fatal fetal anomaly exceptions); MISS. CODE ANN. § 41-41-45 (West, Westlaw through Mar. 21, 2025 of 2025 Reg. Sess.) (Mississippi has life exception, but no health, rape/incest, or fatal fetal anomaly exceptions); OKLA. STAT. tit. 21, § 861 (West, Westlaw through 2024 2d. Reg. Sess.) (Oklahoma has life exception, but no rape/incest, or fatal fetal anomaly exceptions); S.D. CODIFIED LAWS § 22-17-5.1 (West, Westlaw through 2025 Reg. Sess.) (South Dakota has life exception, but no rape/incest or fatal fetal anomaly exceptions); TENN. CODE ANN. § 39-15-213 (West, Westlaw through 2025 1st Reg. Sess.) (Tennessee has life and health exceptions, but no rape/incest or fatal fetal anomaly exceptions); TEX. HEALTH & SAFETY CODE § 170A.002 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.) (Texas has life and health exceptions, but no rape/incest or fatal fetal anomaly exceptions); W. VA. CODE ANN. § 16-2R-3 (West, Westlaw through 2025 Reg. Sess.) (West Virginia has life, health, rape/incest, and fatal fetal anomaly exceptions).

58. Missouri had a total abortion ban in place, MO. REV. STAT. § 188.017, but "Missouri voters enshrined abortion rights in their constitution" in the 2024 election and a judge struck down the abortion ban as unenforceable under the new state constitutional amendment. Summer Ballentine, *Missouri voters enshrine abortion rights in a state that has a near-total ban*, AP (Nov. 6, 2024), https://perma.cc/52YA-TFSX; David A. Lieb, *A judge says Missouri's abortion ban isn't enforceable, but there's no start date for abortions*, AP (Dec. 20, 2024), https://perma.cc/L3YL-WSPL.

59. North Dakota had an abortion ban in place. *See* N.D. CENT. CODE § 12.1-19.1-02 (2021) (with life, health, and rape/incest exceptions, but no fatal fetal anomaly exception). In September 2024, a court ruled that it was unconstitutional, but the State's Attorney General is appealing the decision, and the state still retains targeted regulation of abortion providers. *Abortion Laws by State*, *supra* note 40; Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES (updated Jan. 6, 2025), https://perma.cc/95JZ-HJKC.

60. *E.g.*, TEX. HEALTH & SAFETY CODE §§ 171.005, 171.208 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.) (providing a cause of action to sue any person who performs an abortion or "aids or abets" an abortion).

61. Gestational duration is typically "defined as the number of weeks since the person's last menstrual period (LMP), though some states define it as the number of weeks since conception," and such an estimation is used as a tool to "define the arbitrary timelines of abortion bans and restrictions." *Abortion Laws by State*, *supra* note 40; *see* Megan K. Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, GUTTMACHER INST. (Jan. 9, 2020), https://perma.cc/N676-JZRK (Gestational age bans are "propped up with unscientific claims about that stage of pregnancy, such as that a fetus can feel pain or that ending the pregnancy will result in mental health complications.").

six weeks, two states after twelve weeks, and one state after eighteen weeks.[62] Only some of the laws banning and severely restricting abortions offer rare—and almost entirely ineffective—exceptions for preserving the health of the pregnant person, saving a pregnant person's life,[63] remedying cases of rape or incest that have been reported to law enforcement,[64] and/or addressing fatal fetal anomalies.[65]

The reality of almost twenty states banning or severely restricting abortions in varied ways means that they not only penalize performing abortions, but they also chill a broader range of care due to the confusion and fear they instill in doctors, patients, and allies who are hesitant to accidentally encroach on the vague

62. *See* Fla. STAT. § 390.0111 (West, Westlaw through 2024 2d. Reg. Sess.) (6 weeks); GA. CODE ANN. § 16-12-141 (West, Westlaw through Act 1 of 2025 Reg. Sess.) (6 weeks); IOWA CODE § 146E.2 (West, Westlaw through Nov. 5, 2024 from 2024 Reg. Sess.) (6 weeks); N.C. GEN. STAT. § 90-21.81 (West, Westlaw through 2024 Reg. Sess.) (12 weeks); NEB. REV. STAT. § 71-6915 (West, Westlaw through Mar. 21, 2025 of 1st Reg. Sess.) (12 weeks); S.C. CODE ANN. § 44-41-630 (West, Westlaw through 2024 Sess.) (6 weeks); UTAH CODE ANN. § 76-7-302 (West, Westlaw through 2025 Gen. Sess.) (18 weeks).

63. Exceptions for saving the pregnant person's life or to prevent "substantial impairment of a major bodily function" are "unworkable" because they are vague, leaving doctors fearful of violating the law, and refusal is common, especially among physicians asserting religious exemptions. Donley & Kelly, *supra* note 52, at 85, 89; *see, e.g.*, María Méndez, *Texas laws say treatments for miscarriages, ectopic pregnancies remain legal but leave lots of space for confusion*, TEX. TRIB. (July 20, 2022), https://perma.cc/SJ9Z-H9JC (explaining that Texas's vague exemptions for miscarriages and ectopic pregnancies have caused confusion, leading "some hospitals and doctors in the state to deny or delay care" due to "the threat of jail time and six-figure fines" if they perform an abortion in an emergency situation and chilling the seeking of medical care for pregnancy complications). Medical professionals can also refuse to perform any kind of abortion, based on their religious beliefs that have, under the current Supreme Court, been weaponized to infringe on pregnant people's fundamental rights. *See* Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), https://perma.cc/FFY2-Q4SH; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that requiring "closely held corporations" to pay for employees' insurance that includes contraception violates the Religious Freedom Restoration Act); *see also* Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, Symposium 2016 U. ILL L. REV. 1287, 1328–29 (2016).

64. If states have abortion bans or severe restrictions, they should include rape and incest exceptions. However, such exceptions are largely ineffective. First, they "prove too difficult or virtually impossible for a youth to navigate, particularly given hurdles involving the filing of police reports and fear of removal from the family home." Michele Goodwin, *She's So Exceptional: Rape and Incest Exceptions Post-Dobbs*, 91 U. CHI. L. REV. 593, 602 (2024). Second, survivors may not *want* to speak to the police about sexual violence because they fear retaliation from their abuser and/or believe the police would not help or would even escalate the situation. *The Criminal Justice System: Statistics*, RAINN, https://perma.cc/4FLL-PYCF. Third, even if rape is ultimately reported to the police and the victim's narrative fits the narrow definition of "rape" under the exception, she will almost certainly still not be able to access an abortion in her home state since there are no abortion clinics left in restrictionist states, and because many doctors refuse to perform legal abortions out of fear of violating confusing restrictionist laws or refuse based on their religious beliefs as explained in the previous note. *See* Schoenfeld Walker, *supra* note 63.

65. *See* Tonya Mosley, *Abortion opponents push for 'fetal personhood' laws, giving rights to embryos*, NPR: FRESH AIR (Apr. 4, 2024), https://perma.cc/JA53-SDS4 (describing the case of a Tennessee resident, Kathryn Archer, who found out at her 20-week anatomy scan that her fetus had severe abnormalities and had to travel to Washington, D.C. for an abortion, which in total cost her $10,000 and required her to wait three extra weeks for care since abortion clinics in D.C. were booked out).

boundaries of these laws.[66] Even if an individual medical provider is personally willing to offer reproductive care despite a state's limitations, there are very few clinics that are left to provide these services in restrictionist states—resulting in "maternity care deserts."[67] In fact, "[w]ithin 30 days of the *Dobbs* decision, 43 clinics in 11 states had stopped providing abortion care. By 100 days after the decision, this had increased to 66 clinics in 15 states; no abortion-providing facilities operated in the 14 states enforcing total abortion bans."[68]

Laws that explicitly restrict abortions typically do not penalize the abortion-seeker,[69] but rather, target medical providers and/or anyone who "aids and abets" abortion care.[70] For example, in Texas it is a felony, among other disciplinary options, for a doctor to perform an abortion that does not fall under one of the state's limited exceptions.[71] It is also illegal to "provide an abortion-inducing drug to a pregnant woman . . . by . . . mail service" without first "examin[ing] the pregnant woman in person."[72] And Texas allows a private party to bring a civil suit against medical providers and facilitators, providing up to $10,000 for each abortion that the defendant performed, induced, or aided and abetted:

> Any person . . . may bring a civil action against any person who: (1) performs or induces an abortion in violation of [the statute]; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of [the statute] . . .[73]

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66. *See, e.g.*, Paul J. Weber & James Stengle, *Kate Cox sought an abortion in Texas. A court said no because she didn't show her life was in danger*, AP (Dec. 12, 2023), https://perma.cc/N2ZH-WX8U (describing how the case of Kate Cox, who was denied by the Texas Supreme Court an abortion despite her dangerous pregnancy complications, exemplifies how "such bans allow abortions to save a mother's life" but are "vague on how close to death a patient must be to get the procedure").

67. Sarah Maddox, *Miles from treatment and pregnant: How women in maternity care deserts are coping as health care options dwindle*, CBS NEWS (Nov. 27, 2023), https://perma.cc/NQ5N-26BM.

68. Kelly Baden, Joerg Dreweke, & Candace Gibson, *Clear and Growing Evidence That Dobbs Is Harming Reproductive Health and Freedom*, GUTTMACHER INST. (May 2024), https://perma.cc/2SNJ-ZMF8.

69. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 171.065 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.) ("A pregnant woman on whom a drug-induced abortion is attempted, induced, or performed in violation of this subchapter is not criminally liable for the violation.").

70. *See supra* notes 52, 67; *see, e.g.*, ARK. CODE ANN. § 5-61-304 (West, Westlaw through Mar. 20, 2025 of 2025 Reg. Sess.) ("(a) A person shall not purposely *perform or attempt to perform* an abortion except to save the life of a pregnant woman in a medical emergency. (b) Performing or attempting to perform an abortion is an unclassified *felony* with a fine not to exceed *one hundred thousand dollars* ($100,000) or imprisonment not to exceed *ten* (10) years, or both." (emphasis added)).

71. TEX. HEALTH & SAFETY CODE § 171.065 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.).

72. TEX. HEALTH & SAFETY CODE § 171.063 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.); *see* more on telehealth abortion prescriptions in SUBSECTION I.B.3.

73. TEX. HEALTH & SAFETY CODE § 171.208 (West, Westlaw through 2023 Reg., 2d., 3d., & 4th Sess.) (emphasis added).

Only Nevada explicitly imposes criminal penalties on a pregnant person who self-manages an abortion.[74] However, restrictionist states, even before *Dobbs*, applied—or misapplied—other types of criminal laws to punish pregnant people for endangering and terminating their pregnancy, intentionally or unintentionally.[75] Criminal laws known as "fetal protection," "fetal endangerment," "fetal homicide," or "feticide" laws have long allowed states to prosecute pregnant people for action or inaction[76] that *may*, but does not have to, result in pregnancy loss or other harm to the fetus.[77] For example, upon a suspicion of substance use while pregnant, thirty-eight states authorize feticide charges against a pregnant person, even if there is no pregnancy loss and no finding of harm to the fetus, and "five states authorize state courts to commit a pregnant person to substance use treatment without their consent."[78] Even the slightest misstep during pregnancy can be criminalized, especially for poor people who could be prosecuted for not having the financial resources to maintain a "healthy" lifestyle[79] or obtain substance use or mental health treatment.[80] Fetal protection laws also place blame on pregnant people, in particular Black women who suffer higher rates of maternal mortality and worse birth outcomes through no fault of their own.[81] Further, these laws cause medical professionals to abandon their medical judgment and relationship with their patients in order to collect evidence for law enforcement.[82] Fetal

74. *See* NEV. REV. STAT. § 200.220 (West, Westlaw through 83d. Reg. Sess. (2025)).

75. *See Post-Dobbs Pregnancy Criminal Cases*, PREGNANCY JUSTICE, https://perma.cc/S8CL-THAZ (tracking the number, types, and locations of criminal prosecutions after *Dobbs*); LAURA HUSS & GOLEEN SAMARI, IF/WHEN/ HOW: LAWYERING FOR REPROD. JUST., SELF-CARE, CRIMINALIZED: THE CRIMINALIZATION OF SELF-MANAGED ABORTION FROM 2000 TO 2020 (2023).

76. *See, e.g.*, Remy Tumin, *Ohio Woman Who Miscarried Faces Charge That She Abused Corpse*, N. Y. TIMES (Jan. 3, 2024), https://perma.cc/57TD-8U5B (explaining that a woman was charged with "abuse of corpse" when she had a miscarriage in her bathroom and flushed the fetus's remains down the toilet).

77. *Pre-Dobbs Pregnancy Criminal Cases*, PREGNANCY JUSTICE, https://perma.cc/32U5-E5QY (documenting "1,396 cases of criminalized pregnancy in the United States between January 2006 and June 2022").

78. *Fetal Personhood Legal Landscape*, PREGNANCY JUSTICE, https://perma.cc/9PVG-X8MJ.

79. Kira Proehl, Comment, *Pregnancy Crimes: New Worries to Expect When You're Expecting*, 53 SANTA CLARA L. REV. 661, 682 (2013) (hypothesizing that the consumption of risky foods like unpasteurized cheeses, sushi, and deli meats could be the basis for punishing a pregnant person's eating habits).

80. The Editorial Board, *The Feticide Playbook, Explained: A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018), https://perma.cc/Z4GM-UKR3 ("Women who fell down the stairs, who ate a poppy seed bagel and failed a drug test or who took legal drugs during pregnancy . . . all have been accused of endangering their children.").

81. Juanita J. Chinn, Iman K. Martin, & Nicole Redmond, *Health Equity Among Black Women in the United States*, 30 J. WOMEN'S HEALTH 212, 212, 215 (2021); *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 173–74 (1997) (discussing how hospitals choose which pregnant people to screen for substance use based on racially biased criteria).

82. *See* Michele Goodwin, *Fetal Protection Laws*, 102 CALIF. L. REV. 781, 813 (2014) (describing how feticide laws cause "medical staff [to] subordinate medical judgment and diagnosis objectives to their criminal law enforcement responsibilities, which itself introduces problematic norms into the physician-patient relationship," and therefore, prevent patients from seeking needed reproductive care and substance abuse treatment).

protection laws have been proven to be ineffective at advancing better health outcomes for fetuses, infants, and pregnant people, in part, because they deter pregnant women from seeking medical care.[83] Nevertheless, law enforcement's targeting of pregnant people for feticide and related charges has tripled nationwide in the last ten years,[84] and "fetal personhood" legal arguments have proliferated since *Dobbs*.[85]

Fetal personhood theories "extend all legal and constitutional protections to fetuses (and often fertilized eggs and embryos), including the right to life,"[86] and therefore, equalize or even subordinate the rights of a pregnant person to her embryo or fetus.[87] By defining fetuses and embryos as "people," states have co-opted existing child abuse, child endangerment, wrongful death, human trafficking, and other criminal laws to prosecute pregnant women—and their supporters—for both intentional or unintentional actions with regard to their own bodies.[88] Multiple state supreme courts have legitimized the practice of prosecutors applying such laws—that are actually intended to protect children from harm—to

83. *See* Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 475 (2021) (providing ample evidence that feticide laws "undermine[] the ability of mothers to access prenatal care, worsen birth outcomes, and increase both fetal and infant death rates"); Goodwin, *supra* note 82, at 872 ("If using prenatal services is one of the best ways to promote fetal health, chilling that conduct will not achieve government interests.").

84. Anita Wadhwani, *Tennessee leads nation in arresting and punishing pregnant women*, TENN. LOOKOUT (Sept. 21, 2023), https://perma.cc/5XR5-ZVSG.

85. Purvaja S. Kavattur, Somjen Frazer, Abby El-Shafei, Kayt Tiskus, Laura Laderman, Lindsey Hull, Fikayo Walter-Johnson, Dana Sussman, & Lynn M. Paltrow, *The Rise of Pregnancy Criminalization*, PREGNANCY JUSTICE 13, 16 (2023), https://perma.cc/77L6-JDH9 (citing to eleven states that have incorporated "fetal personhood" into their state constitutions or state laws). While they have since proliferated, feticide laws existed during the *Roe* era too. *See* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 31 (2020) (pointing to statistics about the feticide laws that existed in 2020 before *Dobbs*: 24 state laws establishing drug use during pregnancy as child abuse, 26 state laws mandating medical providers report pregnant patients to authorities if they suspect drug use, and 8 state laws strong-arming medical providers to perform toxicology screens).

86. Kavattur, Frazer, El-Shafei, Tiskus, Laderman, Hull, Walter-Johnson, Sussman, & Paltrow, *supra* note 85, at 8.

87. *See* GOODWIN, *supra* note 85, at 36 (defining "proponents of fetal personhood" as those who "argue that no differences in status or rights exist between children and fetuses . . . whether the former are viable or not").

88. *See, e.g.*, Morgan Carmen, *When Any Birth Outcome Can Be a Criminal One*, MS. (Oct. 13, 2023), https://perma.cc/2A73-MS69 (describing the case of one woman who was arrested and charged with a count of felony child abuse when there was evidence of marijuana use during pregnancy, despite that her newborn was not harmed); Eleanor Klibanoff, *Women accused of facilitating abortion in Galveston wrongful-death lawsuit file countersuit*, TEX. TRIB. (May 2, 2023), https://perma.cc/U97W-MW76 (reporting on a man who sued his ex-wife's friends for wrongful death when they helped her get an abortion). Even before *Dobbs*, Bei Bei Shuai was charged with murder and sent to jail in Indiana after attempting to commit suicide by ingesting rat poison when she was thirty-three weeks pregnant. B.S. v. State, 966 N.E.2d 619, 623, 629–30 (Ind. Ct. App. 2012) (rejecting Shuai's argument that the charges against her arose out of a suicide attempt so they cannot be a crime to public health because the charges "are based not on her conduct toward herself, but on her conduct towards" the fetus).

fetuses,[89] and in a recent alarming Alabama Supreme Court case, to stored embryos.[90] In the digital surveillance age, restrictionist states' "interest in the fetus at all stages of development, untethered from a need for scientific or medical consensus . . . result[s] in excessive monitoring and control" of a person from menstruation through pregnancy.[91]

The practice of charging pregnant people under feticide or other criminal laws has persisted for decades. "Between 2006 and 2020, there have been more than 1,300 cases in which women were arrested, detained or prosecuted in legal actions related to their pregnancies, which include abortion."[92] *Dobbs* likely only opened the prosecution floodgates further. Although anti-abortion statutes penalize doctors' performance of abortions and facilitators' aiding and abetting of abortions, while explicitly stating that they cannot be used to prosecute pregnant people, feticide laws and other criminal laws deployed in the name of fetal protection are a backdoor to prosecuting pregnant people for medically performed, self-induced, or accidental pregnancy loss.

2. Gender-Affirming Care Bans

Since 2021, restrictionist states have followed their anti-abortion laws with a rapid increase in laws prohibiting transgender youth from accessing gender-affirming care.[93] Despite that essentially all of the major U.S. medical associations support access to gender-affirming care for minors because of the proven safety of these interventions and the link to better mental health outcomes,[94] approximately half of all states have attempted to or successfully enacted laws that limit access to this care.[95] Twenty-four states have banned gender-affirming medication and surgical care for transgender youth, two states have banned only surgical care for transgender youth, and six of the restrictionist states make it a

89. *See, e.g.*, State v. Green, 474 P.3d 886, 893 (Okla. Crim. App. 2020); Ex parte Ankrom, 152 So. 3d 397, 429 (Ala. 2013) (Parker, J., concurring); Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997); *see also* Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 458, 460 (Ga. 1981) (per curiam) (holding that a viable fetus's constitutional rights overcome a mother's choice to refuse a cesarean section).

90. LePage v. Ctr. for Reprod. Med., 2024 WL 656591, at *1, 5 (Ala. Feb. 16, 2024) (jeopardizing IVF by holding that stored embryos are "children" under Alabama's Wrongful Death of a Minor Act of 1872). A concurring judge supported the holding with citations to the Bible and religious ideology, including that "life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself." *Id.* at *13 (Parker, J., concurring).

91. Fowler & Ulrich, *supra* note 52, at 1251. This is why this Note periodically references the surveillance of both menstruating *and* pregnant people.

92. Safia Samee Ali, *Prosecutors in states where abortion is now illegal could begin building criminal cases against providers*, NBC NEWS (June 24, 2022), https://perma.cc/D7WJ-QL83.

93. *See* Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KFF (Nov. 26, 2024), https://perma.cc/9F4P-RQH9 (tracking anti-gender-affirming care laws from 2021 to 2024).

94. *See Medical Organization Statements*, ADVOCATES FOR TRANS EQUAL., https://perma.cc/A5XA-UG78 (listing leading medical groups that recognize the medical necessity of transgender-related care).

95. *See* Dawson & Kates, *supra* note 93 (listing and describing all current restrictions on gender-affirming care).

felony to provide certain forms of gender-affirming care to transgender youth.[96]

Similar to the anti-abortion laws discussed in the previous Subsection, restrictionist states have banned access to gender-affirming care by enacting laws with criminal and civil penalties for a range of actors. Medical providers can face professional and civil sanctions[97] and/or felony charges if they provide gender-affirming care.[98] Some states target parents; Florida allows the state to remove parents' custody if they help their children seek gender-affirming care, and Texas has defined the action of seeking gender-affirming care for one's child as "child abuse."[99] Under a few statutes, school faculty are prohibited from "aiding and abetting" or "promoting" a minor's access to gender-affirming care.[100] A handful of states offer extremely limited exceptions.[101]

Lawmakers claim that their efforts are intended only to "protect[]" children, "[b]ut really, the policies target gender-diverse young people and aim to restrict providers from delivering what is widely considered best-practice medical care."[102] Fearmongering about transgender people and about gender-affirming care for youth has supported the dominant conservative narrative that restrictionist laws protect children. For example, leaders of Alliance Defending Freedom and the Heritage Foundation, two conservative groups that lobbied state legislatures to enact anti-gender-affirming care legislation, have claimed that gender-affirming care is "experimental," "dangerous," "unproven," and a part of the "predatory transgender industry."[103] President Trump has falsely stated that children have gotten gender-affirming care surgeries at school: "Your kid goes to

96. *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/32P9-WXZ2.

97. *See, e.g.*, GA. CODE ANN., § 43-34-15 (West, Westlaw through 2024 Reg. Sess.) (imposing civil penalties on physicians who provide gender-affirming care).

98. *See, e.g.*, ALA. CODE § 26-26-4 (West, Westlaw through 2024 Reg. Sess.) (making it a felony for medical providers to provide hormone or puberty blockers or perform surgical gender-affirming care).

99. *See, e.g.*, FLA. STAT. § 61.517 (West, Westlaw through 2024 2d. Reg. Sess.); Gov. Greg Abbott, *Letter to Commissioner Masters* (Feb. 22, 2023), https://perma.cc/A6UK-ZBUT (Governor of Texas issuing a directive that defines gender-affirming care as "child abuse").

100. *See, e.g.*, MISS. CODE ANN. § 41-141-5 (West, Westlaw through 2024 Reg., 1st, & 2d. Ex. Sess. effective through July 1, 2024) (prohibiting "aiding and abetting" minors' access to gender-affirming care).

101. *See* Lindsey Dawson & Jennifer Kates, *The Proliferation of State Actions Limiting Youth Access to Gender Affirming Care*, KFF (Jan. 31, 2024), https://perma.cc/K7K9-MADJ (describing exceptions in a few states that allow minors to continue receiving services that they were already receiving before the laws were enacted).

102. Ken Alltucker, *More people are getting gender-affirming care, under attack in many states. Few are kids*, USA TODAY (Aug. 23, 2023), https://perma.cc/XYT6-VFVL (quoting Lindsey Dawson, associate director of HIV policy and director of LGBTQ+ health policy for KFF, a nonpartisan health foundation); *see also* Adeel Hassan, *States Passed a Record Number of Transgender Laws. Here's What They Say*, N.Y. TIMES (Mar. 21, 2024), https://perma.cc/L5HT-HF4E ("Proponents of the bans argue that these operations can be harmful and that children are not mature enough to make decisions about such procedures. Leading medical organizations oppose bans on transition care, citing extensive evidence that such treatment leads to better mental health outcomes, and associating a lack of treatment with higher rates of depression.").

103. Selena Simmons-Duffin & Hilary Fung, *In just a few years, half of all states passed bans on trans health care for kids*, NPR (July 3, 2024), https://perma.cc/CJV3-B4T6.

school and comes home a few days later with an operation."[104] President Trump also signed an anti-transgender executive order on the first day of his second term, justifying it in the name of protecting women: "ideologues who deny the biological reality of sex have . . . permit[ted] men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women."[105] Others have overstated the idea that children will regret their decision to obtain gender-affirming care, but research shows that not even 1% of people regret their decision.[106] In reality, "gender-affirming surgeries for minors are . . . extremely rare and decisions around all gender affirming care involve a meticulous and lengthy process with minor, parental, and medical provider involvement."[107]

Along with bans on gender-affirming care, a host of other attacks on transgender youth rights have multiplied in recent years. For example, several states prohibit transgender students from participating in sports teams or entering bathrooms that align with their gender identity, deny students autonomy over their name and pronouns at school, and restrict what teachers can discuss about gender identity.[108]

In December 2024, the Supreme Court heard oral arguments in *United States v. Skrmetti*.[109] The case arose from a challenge to Tennessee's Senate Bill 1, which prohibits the provision of medical care, including puberty blockers, hormones, and surgery, only when used by transgender youth, but not when used by minors whose gender matches their sex assigned at birth for other purposes.[110] Former Solicitor General Elizabeth Prelogar argued against Tennessee's SB 1, explaining that it created a sex-based classification that the Sixth Circuit did not appropriately evaluate under heightened scrutiny.[111] That standard would have put Tennessee to its burden of proving that its law was tailored to its purported health concerns, which it would have failed to do since "SB 1 [left] the same medications . . . entirely unrestricted when used for any other purpose [other than for gender-affirming care], even when those [other] uses present similar risks."[112]

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104. Matt Lavietes, *Trump repeats false claims that children are undergoing transgender surgery during the school day*, NBC NEWS (Sept. 9, 2024), https://perma.cc/KHJ4-KE29.

105. Executive Order No. 14168, 90 Fed. Reg. at 8615, *supra* note 56.

106. Irving Washington & Hagere Yilme, *Falsehoods About Transgender People and Gender Affirming Care*, KFF HEALTH MISINFORMATION MONITOR (Oct. 10, 2024), https://perma.cc/L2MQ-L2F3. This report also debunks several other myths about gender-affirming care that could not all be discussed at length in this Note.

107. *Id.*

108. *2024 anti-trans bills tracker*, TRANS LEGIS. TRACKER, https://perma.cc/SF7T-7Q34 (last visited Jan. 4, 2025).

109. Transcript of Oral Argument, United States v. Skrmetti, 144 S. Ct. 2679 (2024) (No. 23-477).

110. Elana Redfield, *Understanding* US v. Skrmetti, UCLA SCH. OF L. WILLIAMS INST. (Dec. 2024), https://perma.cc/PF5S-ZTH7.

111. Transcript of Oral Argument at *5, United States v. Skrmetti, 144 S. Ct. 2679 (2024) (No. 23-477) ("SB1 regulates by drawing sex-based lines and declares that those lines are designed to encourage minors to appreciate their sex. The law restricts medical care only when provided to induce physical effects inconsistent with birth sex. Someone assigned female at birth can't receive medication to live as a male, but someone assigned male can.").

112. *Id.* at *6.

The Court is expected to rule in June 2025, and "[i]f the court sides with Tennessee, it could give the green light to states to deny gender-affirming care to over one-third of the trans youth living in the U.S."[113]

Aside from the Supreme Court's impending decision, President Trump's second presidency has ushered in a new era of anti-transgender rhetoric and lawmaking. Just hours after he was sworn in for his second term, he signed executive orders declaring that the federal government would recognize "male" and "female" as the only two sexes, that taxes could not be used to fund "transition services," that government facilities and workplaces would not be required to refer to transgender people using their preferred pronouns, and that the military's protections for transgender servicemembers would be revoked.[114]

B. LAWS RESTRICTING OUT-OF-STATE ABORTIONS AND GENDER-AFFIRMING CARE

Restrictionist states have left thousands of menstruating and pregnant people seeking abortions and transgender youth seeking gender-affirming care with no choice but to travel hundreds, if not thousands, of miles to obtain the care they need in other states.[115] They must overcome lofty, and often impossible, financial, logistical, and safety-related barriers to cross state lines.[116] If forcing people to

113. Redfield, *supra* note 110.

114. Geoff Mulvihill, Ayanna Alexander, & Kimberlee Kruesi, *Trump orders reflect his promises to roll back transgender protections and end DEI programs*, AP (Jan. 20, 2025), https://perma.cc/5ACE-5Y9K.

115. *See* Kimya Forouzan, Amy Friedrich-Karnik, & Isaac Maddow-Zimet, *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, GUTTMACHER INST. (Dec. 7, 2023), https://perma.cc/H86U-2WYE ("Nationally, the number of people who crossed state lines to obtain abortion care more than doubled, reaching 92,100 in the first six months of 2023, compared with 40,600 in half of 2020.").

116. *See* Karen Brooks Harper, *Wealth will now largely determine which Texans can access abortion*, TEX. TRIB. (June 24, 2022), https://perma.cc/4Q5Z-TRSU; Dan Keating, Tim Meko, & Danielle Rindler, *Abortion access is more difficult for women in poverty*, WASH. POST (July 10, 2019), https://perma.cc/Q78D-DEQX (reporting that poor women face financial barriers because they may not have a car, do not have money for gas, buses, or trains and do not have the luxury of taking time off of work); Elizabeth Tobin-Tyler, *A Grim New Reality – Intimate-Partner Violence after* Dobbs *and* Bruen, 387 NEW ENG. J. MED. 1247 (2022) (describing how people experiencing intimate partner violence face increased danger after *Dobbs* if they seek reproductive care, especially when lax access to firearms after *Bruen* heightens the ability of abusers to assert reproductive coercion); David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 12 (2022) (explaining other barriers to traveling out-of-state for people who are undocumented, have disabilities, or are facing medical emergencies); Emma Chinn, Adam Polaski, & Joline Hartheimer, *How Far? The Extreme Travel Burden of Bans on Medically Necessary Care for Transgender Youth*, CAMPAIGN FOR S. EQUALITY 9–10 (July 2024) (estimating a family's cost of traveling out-of-state to obtain gender-affirming care for a transgender minor); *The Impacts of Anti-Transgender Laws and Policies: Evidence from Empirical Research*, ACLU 7 (Sept. 11, 2024) (as of 2023 after restrictive policies were put in place, "the portion of youth in the U.S. living more than an hour drive away from a clinic almost doubled (from 27.2% to 50.0%) and the portion of those living more than four hours away increased from 1 in 100 to 1 in 4"); Luca Borah, Laura Zebib, & Hayley M. Sanders, *State Restrictions and Geographic Access to Gender-Affirming Care for Transgender Youth*, 330 JAMA NETWORK 375, 376 (July 25, 2023) (more than 25% of youth would have to drive at least eight hours round trip to obtain gender-affirming care).

travel out-of-state for care was not enough to chill people from seeking abortions or gender-affirming care, conservative advocates have been clear that "until there is a national ban, the movement will use state powers to stop as many abortions as possible, including outside state borders,"[117] and that they are unwavering in their pursuit to take on cases "across the country opposing liberal policies concerning children and adolescents who identify as transgender."[118]

Before the *Dobbs* ruling came down, David Cohen, Greer Donley, and Rachel Rebouché predicted in their article, *New Abortion Battleground*, the efforts of states to enforce restrictionist laws extraterritorially.[119] Since *Dobbs*, their predictions have largely come true as restrictionist states have attempted to enforce their criminal and civil anti-abortion statutes across state lines through the following mechanisms: (1) the enactment of abortion trafficking laws rooted in the argument that at least part of the offense occurred within the restrictionist state's borders,[120] (2) the threat of using feticide laws and fetal personhood arguments to justify prosecution for actions having "detrimental effects in the [restrictionist] state,"[121] and (3) the prohibition on out-of-state physicians prescribing abortion pills through telemedicine.[122]

1. Abortion Trafficking Laws

The first strand of extraterritorial anti-abortion enforcement involves the enactment of criminal "abortion trafficking" statutes. These statutes make it a crime to assist a minor in obtaining abortion pills or an abortion procedure in another state without the consent of the minor's parent.[123] Although "trafficking" usually means that someone has been "forced, tricked or coerced," the Right to Life of East Texas director, Mark Lee Dickson, and the former Texas Solicitor General, Jonathan Mitchell, co-opted the term to restrict travel for abortion by arguing that trafficking is applicable to the "unborn child" who is "always taken against their will."[124]

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117. Cohen, Donley, & Rebouché, *supra* note 116, at 23 (citing efforts to ban abortion nationwide by the National Right to Life Committee and Americans United for Life).

118. Kirkpatrick, *supra* note 47.

119. *See* Cohen, Donley, & Rebouché, *supra* note 116, at 31 (explaining that although ordinarily criminal laws cannot be used to prosecute people for crimes committed in other states, there are "enough gaps to allow prosecution of a wide variety of crimes that take place outside the jurisdiction of a state").

120. *See id.* at 31–32 (predicting that states could prosecute out-of-state abortions by relying on the idea that some aspects of the crime, including the agreement or "conspiracy" to obtain an abortion and part of the travel to obtain the abortion takes place in the restrictionist state).

121. *See id.* (predicting that recognizing a fetus as a person means that states could prosecute pregnant people, out-of-state abortion clinic employees, and anyone who helped the patient travel, for murder because the "'effects doctrine' allows states to prosecute someone for actions that take place outside the state that have detrimental effects in the state").

122. *See id.* at 33–34 (predicting that difficulties would arise with respect to a patient's taking of abortion pills obtained out-of-state or prescribed by an out-of-state medical provider).

123. *See, e.g.*, IDAHO CODE ANN. § 18-623(1)–(3) (West, Westlaw, through 2025 1st Reg. Sess. of 68th Idaho Leg.) (pending legal challenges); TENN. CODE ANN. § 39-15-201 (West, Westlaw through 2025 1st Ex. Sess. of 114th Tenn. Gen. Assemb.)

124. Caroline Kitchener, *Highways are the next antiabortion target. One Texas town is resisting*, WASH. POST (Sept. 1, 2023), https://perma.cc/7N3Z-2CYG.

Attempting to sidestep the obvious constitutional violation of infringing on residents' right to interstate travel, restrictionist state legislators claim they are merely regulating trafficking *within* their borders. Do not be fooled. These laws are aimed at "block[ing] pregnant people from crossing state lines to obtain the procedure."[125] Although lawmakers cite "child protection" as the reason for the laws, the statutes undermine the well-being of minors seeking care because they "target[] trusted adults, family members, and helpers who assist minors," the very people who are essential allies of "minors who can't tell their parents about their choice" because they "are in very precarious, vulnerable positions at home."[126]

For example, in Idaho an adult who, without the consent of the minor's parent or guardian, helps a minor "procure[] an abortion" or "obtain[] an abortion-inducing drug . . . by recruiting, harboring, or transporting [her] within the state commits the crime of abortion trafficking," even if "the abortion provider or the abortion-inducing drug provider is located in another state."[127] Such a crime is subject to a minimum of two years imprisonment.[128] Nearly identical bills have been enacted or introduced in other states.[129] Oklahoma's House of Representatives has also passed a bill making it a felony to "traffic" medication abortion pills.[130]

The threat of abortion trafficking laws' enforcement is not hypothetical. Missouri Attorney General Andrew Bailey sued Planned Parenthood for helping minors travel to nearby Kansas for abortions without their parents' consent under the state's abortion trafficking statute.[131] Pertinent to the Attorney General's charge was "undercover footage released by the conservative Project Veritas last year purporting to show a Planned Parenthood Great Plains employee offer to arrange an abortion for a 13-year-old in Kansas."[132] This Attorney General's use of video footage, initially obtained by a private actor, exemplifies one of the biggest hurdles to limiting the surveillance of pregnant people attempting to cross state lines—that the surveillance is often performed by private actors who do not

125. Kimberlee Kruesi, *A Tennessee House panel advances a bill that would criminalize helping minors get abortions*, AP (Feb. 13, 2024), https://perma.cc/U2RV-DZRU.

126. Kylie Cheung, *2 States Have Introduced Abortion 'Trafficking' Laws to Prosecute People for Helping Minors Get Care*, JEZEBEL (Jan. 25, 2024), https://perma.cc/X9SZ-55SJ (citing Ashley Coffield, the CEO of Planned Parenthood of Tennessee and North Mississippi, and Kiki Council, a Colorado-based attorney helping minors travel for abortion care) (internal quotation marks omitted).

127. IDAHO CODE ANN. § 18-623(1)–(3) (West, Westlaw, through 2025 1st Reg. Sess. of 68th Idaho Leg.). *But see* Matsumoto v. Labrador, 122 F.4th 787, 795 (9th Cir. 2024) (affirming, in part, a district court's preliminary injunction against the Idaho abortion trafficking law).

128. IDAHO CODE ANN. § 18-623(5) (West, Westlaw, through 2025 1st Reg. Sess. of 68th Idaho Leg.).

129. *See, e.g.*, S.B. 1778, 59th Leg., 2nd Sess. (Okla. 2024); H.B. 1895, S.B. 1971, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024); H.B. 173, 2024 Reg. Sess. (Miss. 2024); REV. STAT. MO. § 188.250 (Mo. 2005).

130. *See* State of Oklahoma House of Representatives, *House Passes Bill to Halt Trafficking of Chemical Abortion Pills* (Mar. 14, 2024), https://perma.cc/PV3D-ZBDR.

131. *See* MO. ANN. STAT. § 188.250 (West, Westlaw through 2024 Reg. Sess. 102d Gen. Assemb.); Brendan Pierson, *Missouri accuses Planned Parenthood of 'trafficking' minors to get abortions*, REUTERS (Feb. 29, 2024), https://perma.cc/S25R-Q62B.

132. Pierson, *supra* note 131.

face the same constitutional constraints as the government but who, nonetheless, infringe on people's privacy and provide such evidence to law enforcement.[133] Although Missouri voters recently overturned the state's abortion ban by approving a state constitutional amendment which enshrines abortion as a constitutional right, the method of enforcement used by the Attorney General is indicative of the kind of process that is likely to be used by other states that have retained their bans or severe restrictions.[134]

Legislatures have aimed to use private citizens to do their law enforcement work in order to skirt their constitutional limitations in another way too—by providing civil suit provisions in "abortion trafficking" laws. Private rights of action allow states and cities to indirectly restrict abortion travel by incentivizing "bounty hunters," people motivated by a civil suit's potential for financial reward, to pursue anti-abortion enforcement for them. Several cities in Texas have made it "illegal to transport anyone to get an abortion on roads within the city or county limits . . . allow[ing] any private citizen to sue a person or organization they suspect of violating the ordinance."[135] The author of this model provision has touted that the private right of action would allow states to "go after abortion funds, organizations that give financial assistance to people seeking abortions, as well as individuals," and would even permit, "a husband who doesn't want his wife to get an abortion [to] threaten to sue the friend who offers to drive her."[136] In a narrower bill, Tennessee would allow parents of a minor to bring a civil lawsuit against the adult charged with "trafficking" her.[137] Although these private rights of action have not given rise to extensive litigation yet, they act as a "ploy to scare people out of seeking the procedure" altogether.[138]

Even absent an explicit "abortion trafficking" statute, prosecutors may use in-state anti-abortion laws or general criminal laws to punish the same conduct. For example, Alabama Attorney General Steve Marshall has threatened to prosecute those who "conspire" within Alabama to help a pregnant person travel out-of-state for an abortion on the theory that the conspiracy portion of the crime occurs in Alabama where abortion is illegal.[139]

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133. *See infra* SECTION I.C.

134. *See* Ballentine, *supra* note 58.

135. Kitchener, *supra* note 124.

136. *Id.*; *see also* Klibanoff, *supra* note 88 (reporting on a man who sued his ex-wife's friends for wrongful death when they helped her get an abortion, albeit not under an "abortion trafficking" statute).

137. H.B. 1895, S.B. 1971, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024).

138. Kitchener, *supra* note 124; *see also* Cohen, Donley, & Rebouché, *supra* note 116, at 48–50 (predicting that civil suit provisions would allow a restrictionist state to issue a final judgment against an out-of-state abortion provider and then for that other state to be required to enforce the judgment under the Full Faith and Credit Clause of the Constitution—with notable exceptions that might make this somewhat difficult in practice).

139. Jacob Holmes, *AG Steve Marshall seeks to prosecute out-of-state abortion care*, ALA. POL. REP. (Sept. 1, 2023), https://perma.cc/SRL6-UUMJ.

2. Feticide Laws and Misapplied Criminal Laws

Prosecutors have threatened to use another tactic to criminalize extraterritorial reproductive care: deploying feticide laws or other criminal laws misapplied to fetuses and embryos.[140] To assert jurisdiction over people committing crimes wholly in other states where such conduct—facilitating and obtaining abortion procedures and medication abortion pills—is legal, restrictionist states rely on the argument that these out-of-state actions have in-state effects.[141] The in-state effects are not those impacting the pregnant person, but rather, those affecting the fetus who is considered a "person" by restrictionist states as discussed above.[142] Now that the Alabama Supreme Court has ruled that embryos are the equivalent of children, actions taken by a pregnant person or medical provider out-of-state, in both the abortion and IVF contexts, could invoke criminal and civil penalties for committing a prohibited action against Alabama's "resident," the fetus or embryo. A state that already prosecutes pregnant people for child endangerment when they consume drugs or alcohol during pregnancy within the state, like Alabama and Oklahoma, will likely apply the same logic to prosecute pregnant people for taking certain actions within a restrictionist state if there is fetal harm or pregnancy loss as a result of those out-of-state actions.[143]

3. Telemedicine Restrictions

Another extraterritorial enforcement mechanism used by restrictionist states is to require in-person visits with a physician to obtain medication abortion pills (e.g., mifepristone and misoprostol), effectively banning telemedicine prescriptions when the prescribing doctor does not reside within the state. Five states require a patient to have an in-person visit, rather than a telehealth visit, to obtain the pills, and fifteen states require that the pills be prescribed by a physician rather than another practice clinician.[144] Despite that "[d]ecades of studies have shown that medication abortion is safe and effective," that "practice clinicians," like physician assistants, can "safely provide medication abortion," and that there is no clinical

140. *See supra* text accompanying notes 75–91.

141. *See* Darryl K. Brown, *Extraterritorial State Criminal Law, Post-Dobbs*, 113 J. CRIM. L. & CRIMINOLOGY 853, 866 (2024) (discussing how state extradition practices apply to the abortion context and arguing that pro-choice states can refuse to extradite their own residents when restrictionist states seek to prosecute them for abortion-related crimes); Cohen, Donley, & Rebouché, *supra* note 116, at 30 (predicting that "[a]n aggressive prosecutor or other state official would not need any specific law governing extraterritorial abortions if existing state law could be applied to legal, out-of-state abortions or to travel to obtain them").

142. *See supra* text accompanying notes 75-91.

143. *See, e.g.*, Cary Aspinwall, *'They railroad them': the states using 'fetal personhood' laws to criminalize mothers*, THE GUARDIAN (July 25, 2023), https://perma.cc/FYG7-7GT8 (describing the case of Quitney Armstead who was charged with chemical endangerment of a child—a law intended to protect children from chemical exposure from home health labs—when, even after she delivered a healthy baby, local police were notified by hospital workers that there were traces of methamphetamine in the baby's system from early in pregnancy).

144. *Medication Abortion*, GUTTMACHER INST. (updated Oct. 31, 2023), https://perma.cc/5NEE-PMY5.

evidence of any issue with the "telemedicine provision of medication abortion," states still "have imposed unnecessary restrictions on medication abortion that only serve to increase barriers to care."[145] One recent example sheds light on this extraterritorial enforcement mechanism. In December 2024, Texas Attorney General Ken Paxton sued a New York-based doctor, Dr. Margaret Daley Carpenter, for prescribing and sending mifepristone and misoprostol to a 20-year-old Texas resident in violation of Texas state law.[146] The case presents a conflict between Texas's restrictionist law and New York's existing shield law which allows it to "refuse to cooperate with attempts by other states to prosecute or sue abortion providers who prescribe and send pills across state lines."[147] The case has not yet been resolved as of this writing, but it is likely to have a significant impact on telehealth abortion pill access throughout the country and will test the constitutional strength of shield laws.

In sum, "abortion trafficking" statutes, feticide laws and fetal personhood arguments, and telemedicine restrictions, are all methods that restrictionist states have harnessed to penalize and chill abortions beyond their borders. They not only infringe on the rights of their *own* residents who travel out-of-state to seek care, but their "natural (and perhaps intended) effect" is "to restrict the availability of medical care for residents of other states" because of the uncertainty they foster in medical providers and facilitators in other states.[148]

4. Future Extraterritorial Enforcement of Gender-Affirming Care Bans

Although the threat of extraterritorial enforcement of gender-affirming care bans is in an earlier stage than the anti-abortion counterpart, restrictionist states have shown that they are not afraid to extend anti-abortion tactics to the gender-affirming care context. For example, in late 2023, Texas Attorney General Paxton requested medical records of Texas youth who received gender-affirming care from a Georgia telehealth clinic and from Seattle Children's Hospital.[149] The medical providers reported that they were asked to share information about the number of Texas children they treated, medications prescribed, diagnoses, and the names of Texas laboratories where tests were administered dating back to

145. *Id.* In states that totally ban abortions, medication abortion pills cannot be obtained in-person either. *E.g.*, IDAHO CODE § 18-617(2) (West, Westlaw through the 1st Reg. Sess. of the 68th Idaho Legis.); TEX. HEALTH & SAFETY CODE § 171.063 (West, Westlaw through the 2023 Reg. 2nd, 3rd and 4th Called Sess. of the 88th Legis. and the Nov. 7, 2023 Gen. Election); OKLA. STAT. tit. 63, § 1-729.1 (West, Westlaw through the 2nd Reg. Sess. of the 59th Legis. (2024)); S.D. CODIFIED LAWS § 34-23A-56 (West, Westlaw through the 2024 Reg. Sess., 2024 Gen. Election, Ex. Ord. 24-1, and Sup. Ct. Rule 24-11); ARIZ. REV. STAT. ANN. § 36-2159(B) (West, Westlaw through 2nd Reg. Sess. of the 56th Legis. (2024), and includes Election Results from the Nov. 5, 2024 Gen. Election).

146. J. David Goodman & Pam Belluck, *Texas Attorney General Sues New York Doctor for Mailing Abortion Pills*, N.Y. TIMES (Dec. 13, 2024), https://perma.cc/WRY8-9ZBP.

147. *Id.* Shield laws are discussed further in Part II.

148. Huq & Wexler, *supra* note 10, at 602.

149. Madaleine Rubin, *Texas attorney general requests transgender youths' patient records from Georgia clinic*, TEX. TRIB. (Jan. 26, 2024), https://perma.cc/9BB6-44UZ.

January 1, 2022, before Texas's ban on gender-affirming care even took effect.[150] As more states continue to enact bans on gender-affirming care and more parents and facilitators travel out-of-state to help minors access such care,[151] it is likely that states will follow the same playbook they have used for criminalizing abortion beyond their borders. These out-of-state enforcement efforts will only proliferate if the Supreme Court in *Skrmetti* holds that the denial of gender-affirming care to transgender youth does not violate the Equal Protection Clause of the Fourteenth Amendment.

C. SURVEILLANCE THREATS

How does Idaho find out that an adult helped a minor cross state lines to obtain an abortion in violation of its "abortion trafficking" statute? How does Nebraska determine that someone has self-managed an abortion through mailed medication abortion pills in violation of abortion, feticide, or other criminal laws? How might an anti-abortion group or ex-boyfriend bring a civil lawsuit in Texas against someone who helped a pregnant person get an abortion in another state? How does a state know that a minor received gender-affirming care in another state?

In today's increasingly digital world, real choice[152] over one's body relies on an individual's ability to access information and make decisions about their medical care through online searches, social media, mobile phone applications, and other technologies.[153] While these tools provide necessary lifelines for people living in restrictionist states, such states depend on modern technologies to collect data on menstruating and pregnant people—and are likely to soon follow suit with transgender youth. Aziz Huq and Rebecca Wexler have described the "exploit[ation] [of] this rich digital environment by following the [patient's] data trial" as the process by which prosecutors and civil plaintiffs "mirror" or, "recreate, an inventory of the pregnant person's activities, movements, conversations, and perhaps even thoughts" to "identify patients who have sought or intend to seek reproductive care covered by a restrictionist state statute."[154]

Although the examples presented below of post-*Dobbs* restrictionist extraterritorial enforcement via digital surveillance are currently few in number, it is

150. *Id.*

151. *See* Suzanne King, *Kansas and Missouri bans may spur families to travel far out of state for gender-affirming care*, THE BEACON (Apr. 5, 2024), https://perma.cc/PS8R-EGB8 (reporting that anti-trans bills in Missouri, a state that introduced 48 bills curtailing LGBTQIA+ rights in 2023, pushed families with transgender children out of the state with 40% of survey respondents considering leaving Missouri).

152. This Note defines "choice" as *meaningful* choice—rather than *superficial* choice—having unrestricted and de-criminalized access to accurate health care information and having financially, legally, and socially feasible means for accessing health care. Despite some significant barriers to meaningful choice pre-*Dobbs*, *Roe* and related cases at least formally "safeguard[ed] particular choices," including "whether and when to have children." *Dobbs*, 597 U.S. at 365, 380 (Breyer, J., dissenting). Justice Breyer's *Dobbs* dissent pointed out that the *Dobbs* majority "wrenched" the choice about whether or not to have an abortion "from women and [gave] it to the States." *Id.* at 409.

153. Huq & Wexler, *supra* note 10, at 568–69.

154. *Id.* at 577.

"doubt[ful] that [these] will be the last such instance[s] in which digital data is used to further restrictionist ends after *Dobbs*."[155] For instance, in response to the district attorneys in some Texas counties who refused to prosecute people under the state's anti-abortion laws, Texas passed Senate Bill 20 which made it "official misconduct," to refuse to prosecute those crimes, leading to prosecutors being removed from office.[156] Further, a number of temporary injunctions ordered by lower court judges against abortion and gender-affirming care bans indicates that these laws have not yet been enforced to their fullest extent—thus, we have not reached the ceiling of their harmful effects.[157] And importantly, the surveillance of care seekers is expected to increase as a result of a second Trump Presidency. Project 2025[158] states:

> The [Center for Disease Control and Prevention]'s abortion surveillance and maternity mortality reporting systems are woefully inadequate . . . Because liberal states have now become sanctuaries for abortion tourism, [the Department of Health and Human Services] should use every available tool, including the cutting of funds, to ensure that every state reports exactly how many abortions take place within its borders, at what gestational age of the child, for what reason, the mother's state of residence, and by what method.[159]

Thus, it appears to be just the beginning of the post-*Dobbs* extraterritorial surveillance era that involves the tracking of pregnant people's online communications, internet searches, menstruation and fertility timelines, geolocation, and a host of other intimate details about reproductive health care.[160] As a result, "[m]any criminal prosecutions that [might have previously] stalled without digital evidence [could now] result[] in convictions either at trial or in plea bargaining because the digital evidence complete[s] the picture of the accused's involvement,

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155. *Id*. at 562.

156. Carter Sherman, *Texas Law Aims to Punish Prosecutors Who Refuse to Pursue Abortion Cases*, THE GUARDIAN, (Sept. 1, 2023), https://perma.cc/5EMW-339P.

157. *See, e.g*., Isabella Volmert, *Lawsuit challenging Indiana abortion ban survives a state challenge*, AP (Apr. 4, 2024), https://perma.cc/T8EB-AZ5U; Mia Maldonado, *Federal judge orders temporary restraining order on Idaho's 'abortion trafficking' law*, IDAHO CAP. SUN (Nov. 9, 2023), https://perma.cc/6UML-9NCW.

158. Adam Wren, Gavin Bade, Alice Miranda Ollstein, & Natalie Allison, *Trump once shunned Project 2025 as 'ridiculous.' Now he's staffing up with them*, POLITICO (Nov. 21, 2024), https://perma.cc/XG87-PAJ3.

159. ROGER SEVERINO, DEPARTMENT OF HEALTH AND HUMAN SERVICES IN MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE, PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT 455 (The Heritage Foundation 2023).

160. *See* Ali, *supra* note 92 (quoting Emma Roth, a staff attorney with the National Advocates for Pregnant Women, who predicts that to build cases, prosecutors and law enforcement "will rely on 'dragnet criminal surveillance tools' such as geofence warrants that seek information on a person's whereabouts, online keyword searches, text messages and medical apps").

state of mind, or intent."[161] The following subparts demonstrate how digital data surveillance techniques have already been applied, and how they are expected to expand in the future to advance restrictionist states' investigations and prosecutions in the abortion and gender-affirming care contexts. These subparts focus on pregnant people for ease of discussion and since they have, thus far, been the main target of such surveillance. But, as previously noted, this Note predicts that similar surveillance tools are likely to be deployed against menstruating people seeking reproductive care broader than abortions and transgender people, youth especially, seeking gender-affirming care.

1. Online Communications

Text and messaging applications provide digital trails for prosecutors seeking to obtain evidence that out-of-state medical providers, financial supporters, and logistical facilitators have helped a restrictionist state resident obtain an abortion either through mailing her medication or organizing travel out of the state.

One Nebraska woman, Jessica Burgess, and her then-seventeen-year-old daughter faced criminal charges because police obtained a warrant to search their private Facebook messages where they discussed the daughter's use of mail-order medication abortion pills.[162] This led the police to discover that the mother and daughter duo buried the fetal remains thereafter.[163] Jessica was charged with two felonies under Nebraska's anti-abortion law, and while the law does not permit prosecution against someone who terminates her own pregnancy, Nebraska charged Jessica's daughter under other criminal laws—mishandling human remains, concealing a death, and false reporting.[164]

Even before reproductive rights were cast aside and fetal personhood arguments were legitimized by *Dobbs*, the tactics that states *are* using now, post-*Dobbs*, were foreshadowed: states used text messages to convict people for sending or using medication abortion pills under other criminal laws, such as feticide and child neglect laws. In Indiana, prosecutors used text messages between Purvi Patel and a friend in 2015 about ordering abortion pills to convict Purvi of feticide and neglect of a child for inducing her own abortion at home—she was sentenced to twenty years in prison.[165] Purvi's feticide and child neglect convictions were eventually vacated by the Indiana Court of Appeals, which determined that prosecuting a pregnant woman under its feticide law was a misuse of the law.[166] However, that court determined that she could be "resentenced on a lower-level child neglect charge that carries a maximum three-year sentence."[167]

161. Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALTIMORE L. REV. 1, 34 (2020).

162. Dewan & Frankel, *supra* note 12.

163. *Id.*

164. *Id.*

165. Ali, *supra* note 92.

166. Rick Callahan, *Woman leaves prison after feticide conviction overturned*, AP (Sept. 1, 2016), https://perma.cc/V2AJ-KRL8.

167. *Id.*

To search a pregnant person's online communications, the government generally needs a warrant, based on probable cause, or a grand jury subpoena, based on reasonableness.[168] However, these law enforcement guardrails "offer only very limited protection" against intrusive searches in the abortion context because the broad scope of criminal liability in restrictionist state laws makes it relatively easy for police or prosecutors to find a "readily pertinent and applicable statutory hook for probable cause."[169] Therefore, if a pregnant person experiences pregnancy loss for any reason and goes to the hospital for medical care, the hospital may notify law enforcement of the pregnancy loss, and under expansive anti-abortion laws, law enforcement would then be able to obtain a warrant and search the patient's text messages. Even if a patient experiences pregnancy loss through no fault of their own, the suspecting doctor or nurse could call police who would be able to search the patient's messages, exposing them to a host of psychological and autonomy harms.[170] This is what happened to Jessica Burgess's daughter.[171] And it is what happened under other criminal laws pre-*Dobbs*. One Virginia woman in 2013 gave birth to a premature baby that ultimately died in the hospital twenty-five weeks into her pregnancy.[172] She was subjected to a criminal investigation, in which a friend told investigators that the woman had tried to induce her own abortion.[173] This led to the police filing a search warrant for her medical records, cell phones, and computers, and both the woman who had suffered the miscarriage and her helper were arrested under felony charges.[174]

2. Search History

A patient's search for information or care can also act as the smoking gun for a prosecution against a pregnant person or others involved with facilitating extraterritorial reproductive care. This type of surveillance is especially harmful because data shows that pregnant people, "prefer the online experience because of the decreased costs, the appeal of not traveling, and having the ability to manage their health in what feels like a private manner."[175]

In Mississippi, Latice Fisher was indicted for second-degree murder after experiencing a stillbirth, and prosecutors used her search history, including how to "buy abortion

168. *See* Huq & Wexler, *supra* note 10, 577–78.

169. *Id*.

170. Danielle Citron and Daniel Solove developed a helpful taxonomy of privacy harms. Applying their framework, even if a patient who has experienced pregnancy loss is never charged, convicted, or imprisoned, there are significant privacy harms the patient has undergone once the police search their text messages. For instance, the privacy harms implicated here could take the form of psychological harms from emotional distress or disturbance, and autonomy harms from coercion, manipulation, or chilling effects. *See generally* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793 (2022).

171. Dewan & Frankel, *supra* note 12.

172. HUSS & SAMARI, *supra* note 75, at 33.

173. *Id*.

174. *Id*.

175. Conti-Cook, *supra* note 161, at 24.

pills" and "misoprostol abortion pill," as evidence in her case.[176] In the increasingly restrictive landscape regarding telemedicine medication abortion, if pregnant people "transact with providers or secure prescriptions online" their "search histories associated with [their] internet protocol (IP) address; details of any financial dealings; and details of any medication and procedures researched or obtained" could be targets of a search.[177]

The manner in which law enforcement might gain access to a particular pregnant person's search history is problematic and likely unconstitutional—yet it continues. Police can obtain "keyword search warrants," which "demand the identity of every person who entered a certain word or phrase into a search engine during a set timeframe and possibly within a defined geographic area."[178] Many rightfully argue, within and outside of the reproductive rights context, that these generalized warrants "permit searches of vast quantities of private, personal information without identifying any particular criminal suspects or demonstrating probable cause to believe evidence will be located in the corporate databases they search," violating the Fourth Amendment's protection against unreasonable searches.[179] Keyword search warrants "have the potential to implicate innocent people who just happen to be searching for something an officer believes is somehow linked to a crime."[180]

3. Geolocation

A pregnant person's physical movements and location information are constantly being recorded by their phone, wearable device, or vehicle, sometimes without their knowledge or informed consent. This amounts to their "geolocation" data. Obtaining a person's geolocation data history can be vital for an investigation that aims to track a person's travel across state lines. For example, "a person who uses Google Maps" or any Google application ". . .while physically accessing an abortion-related service generates a corresponding data trail even if they are not using th[e] app[] for the purpose of securing such access."[181] In the case of one Idaho girl, whose boyfriend and his mother took her to Oregon to obtain an abortion without her parents' consent and were subsequently charged with "kidnapping," police later confirmed their travel through the girl's cell phone geolocation data.[182]

Law enforcement can target anyone within the vicinity of a specific location—like a Planned Parenthood—by obtaining a "reverse location warrant" or

176. *See* Ali, *supra* note 92.

177. Huq & Wexler, *supra* note 10, at 573–74.

178. Chad Marlow & Jennifer Stisa Granick, *Celebrating An Important Victory In The Ongoing Fight Against Reverse Warrants*, ACLU (Jan. 29, 2024), https://perma.cc/8H3H-NFXU.

179. *Id.*

180. Press Release, EFF, *EFF Urges Pennsylvania Supreme Court to Find Keyword Search Warrant Unconstitutional* (Jan. 5, 2024), https://perma.cc/EG23-E94Z.

181. Huq & Wexler, *supra* note 10, at 576.

182. ASSOCIATED PRESS, *A mom and son are charged in Idaho after a teen is taken to Oregon for an abortion*, NPR (Nov. 2, 2023), https://perma.cc/B59M-R4HD.

"geofence warrant."[183] These warrants require entities that store people's geolocation to "identify anyone who was within a defined area during a specific time period."[184] Similar to keyword search warrants, the constitutionality of these generalized warrants is "highly suspect" because they "inevitably sweep up potentially hundreds of people who have no connection to the crime under investigation—and could turn each of those people into a suspect."[185] For years, Google had received and complied with thousands of reverse location warrants from federal, state, and local agencies.[186] However, in December 2023, Google announced changes to its handling of location history data—that it would store location data on a user's device instead of the cloud, that it would delete such data after three months rather than eighteen months, and that data on the cloud would be encrypted.[187] Despite these protections, government agencies can still purchase location data and other personal information from data brokers in the commercial market—effectively circumventing warrant requirements under the Constitution.[188]

Further, while these internal policy updates somewhat insulate Google from being able to comply with geofence warrants, "none of Google's changes will prevent law enforcement from issuing *targeted* warrants for individual users' location data . . . if police have probable cause to support such a search."[189] Hence, if law enforcement receives a tip that someone sought reproductive care out-of-state, they may be able to obtain a targeted warrant.

Tips often come from people close to the pregnant person who oppose their decisions, notably an abusive partner or ex-partner. In the era of connected vehicles,[190] abusive partners who own, co-own, or merely have access to the

183. *See* Jennifer Lynch, *Is This the End of Geofence Warrants?*, EFF (Dec. 13, 2023), https://perma.cc/8DPH-E62X.

184. Marlow & Granick, *supra* note 178.

185. *Id.*; Lynch, *supra* note 183; *see also* Jake Snow, *Cops Blanketed San Francisco in Geofence Warrants. Google Was Right to Protect People's Privacy*, ACLU N. CAL. (Jan. 7, 2024), https://perma.cc/H7J7-A5D8 (providing the findings of a study of geofence warrants issued in San Francisco, sharing that "[t]he warrants in [the] investigation covered numerous places where people might seek medical care, including One Medical, Kaiser Permanente Medical Center, Arthur H. Coleman Medical Center, Bayview Health & Wellness Center, and Good Shepherd Gracenter").

186. *See Google Transparency Report, Global Requests for User Information*, GOOGLE, https://perma.cc/FB2J-H262.

187. Mario McGriff, *Updates to Location History and new controls coming soon to Maps*, GOOGLE (Dec. 13, 2023), https://perma.cc/Z5A2-C8GN; *see also* Ravie Lakshmanan, *Google Maps Timeline Data to be Stored Locally on Your Device for Privacy*, THE HACKER NEWS (June 6, 2024), https://perma.cc/WMP3-E2NF.

188. *See* SHARON BRADFORD FRANKLIN, GREG NOJEIM, CAREY SHENKMAN, & DHANARAJ THAKUR, CTR. FOR DEMOCRACY & TECH., LEGAL LOOPHOLES AND DATA FOR DOLLARS: HOW LAW ENFORCEMENT AND INTELLIGENCE AGENCIES ARE BUYING YOUR DATA FROM DATA BROKERS 7 (Dec. 2021), https://perma.cc/DRU2-XYQ2. *But see* Huq & Wexler, *supra* note 10, at 583 (discussing a federal proposal pending in Congress, which would prohibit government agencies from purchasing certain information from data brokers, requiring them to get a warrant instead) (citing Fourth Amendment Is Not For Sale Act, S. 1265, 117th Cong. (2021)).

189. Lynch, *supra* note 183.

190. *CPPA to Review Privacy Practices of Connected Vehicles and Related Technologies*, CPPA (July 31, 2023), https://perma.cc/XMA8-NENU (citing Ashkan Soltani's, the California Privacy

vehicle's connected smartphone application can track down a pregnant person's real-time location.[191] Accounts of such tracking include the story of Christine Dowdall who tried to escape her abusive husband using her Mercedes-Benz C300 sedan.[192] He ultimately found her location through the Mercedes smartphone application "mbrace," a part of the "Mercedes me" suite of connected vehicle applications.[193] Even though *she* called Mercedes to try to remove her husband's access, *she* was the one paying off the car, and *she* had a restraining order against her husband, Mercedes would not remove her husband's access because the loan and title were in *his* name.[194]

A person's mode of transportation and choice of accommodations when traveling out-of-state can play an outsized role in how much they can be tracked. The risk of confirming both one's identity and destination to law enforcement is estimated to be highest when a person takes a private vehicle or rideshare vehicle to their destination, as opposed to taking buses or subways, and higher when they stay in hotels rather than short-term rentals or private homes.[195] Private vehicle travel is particularly easy to monitor due to significant surveillance on streets and highways.[196] For example, automated license plate readers (ALPRs) photograph vehicles and store data about them, including their license plate number and their date and time in a particular location—which law enforcement can easily link to people's names through government databases.[197]

In combination, individuals who obtain others' geolocation data to bring a civil suit or to tip off law enforcement to get a targeted warrant, private firms that collect smartphone, wearable, or vehicle location information, and state entities that maintain "large stocks of locational data" from highway toll systems and ALPRs

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Protection Agency's Executive Director, definition of connected vehicles as "computers on wheels" that "collect a wealth of information via built-in apps, sensors, and cameras, which can monitor people both inside and near the vehicle").

191. Talya Torres, Note, *Your Car Could Let Your Abuser Track You*, SUFFOLK U. L. SCH. J. HIGH TECH. L. (Mar. 8, 2024), https://perma.cc/AFT2-K8KZ; *see also* Chairwoman Jessica Rosenworcel, *Chairwoman Letters to Automakers on Safe Connected Cars*, FCC (Jan. 11, 2024), https://perma.cc/3PGH-LVZY (asking automakers to explain to the FCC how they use drivers' connected vehicle data and explaining that in the intimate partner violence context "a car is . . . a critical lifeline. . .[i]t is means of escape and independence, and it is often essential for those seeking employment and support").

192. Kashmir Hill*, Your Car is Tracking You. Abusive Partners May Be, Too.*, N.Y. TIMES (Dec. 31, 2023), https://perma.cc/G8JZ-V8MX.

193. *Id.*

194. *Id.* Unfortunately, a domestic abuser will often be the one in the relationship that has the resources and credit score to lease or own a car in their name; financial control is a significant aspect of how domestic abusers maintain their power. *See About Financial Abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://perma.cc/47YE-HYVD.

195. JULIE LEE, NATHAN DARMON, SABAH LOKHANDWALA, ANUSHKA SIKDAR, SOHINI UPADHYAY, & ELENI MANIS, ROADBLOCK TO CARE: BARRIERS TO OUT-OF-STATE TRAVEL FOR ABORTION AND GENDER AFFIRMING CARE, SURVEILLANCE TECH. OVERSIGHT PROJECT 4 (July 18, 2023), https://perma.cc/P7RH-MCNN.

196. *Id.* at 5 (recommending that a safer option is to arrive at a clinic in a locally registered vehicle that would not have a license plate easily identified as an interstate abortion traveler).

197. *Id.*

all equip restrictionist states with the ability to geolocate people at reproductive care clinics in other states.[198]

4. Period and Fertility Trackers

In states that offer private rights of action, individuals—even residents of other states—are empowered to sue abortion providers and facilitators.[199] Data from period and fertility trackers such as the "date of a user's last menstrual period, revealing gestational age," could "help establish whether an abortion took place outside of the specified window for legal abortion."[200] When "combined with location data or search history," period and fertility data "could help identify individuals involved in performing or aiding and abetting abortions—even if the abortion occurs across state lines," enticing bounty hunters, like anti-abortion advocates[201] and abusive ex-partners, to purchase or otherwise access such data.[202] Data from these applications could also be purchased by state law enforcement agencies directly.[203] Consequently, even seemingly benign self-tracking of periods can be weaponized to surveil pregnant residents who seek abortions out-of-state.

5. Patient Health Data

Another tactic that states may utilize to track out-of-state gender-affirming care or abortions is obtaining health information from in-state medical providers. In-state medical providers can access a patient's health data in shared databases regarding patients' gender-affirming care or abortion that took place out-of-state. "Medical providers could. . .use health data to report one another, or to report parents, based on their observations about treatment a transgender person has received elsewhere."[204] As an example, "a patient could travel out of state to access gender-affirming care, and then return to their home state and see a doctor for unrelated care. That doctor may then feel they have a duty to report based on their state law."[205]

This is not a purely hypothetical concern. Even before Texas passed a bill banning best practice medical care for transgender youth, Texas Attorney General Paxton asked that a Texas hospital's parent organization "turn over documents

198. Huq & Wexler, *supra* note 10, at 580–81.

199. *See supra* SUBSECTION I.A.1 for more discussion on civil suit provisions.

200. Fowler & Ulrich, *supra* note 52, at 1273–74.

201. *Id.* at 1272–73 (describing how anti-abortion actors could also purchase period and fertility tracking data to "promote their viewpoints through direct advertisements and other means").

202. *Id.* at 1273 & n.246 (predicting that "motivated actors may include abusive partners with access to a menstruation-tracking app's shared companion account") (citing Karen E.C. Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679, 686–87 (2015) (surveying various types of surveillance technologies that are used in intimate relationships—at stages of sex, romance, fertility, fidelity, and abuse—and raising difficult questions about privacy law and policy even in consensual relationships)).

203. *But see* Huq & Wexler, *supra* note 10, at 581.

204. René Kladzyk, *Policing Gender: How Surveillance Tech Aids Enforcement of Anti-Trans Laws*, PROJECT ON GOVERNMENT OVERSIGHT (June 28, 2023), https://perma.cc/G87K-8R5U.

205. *Id.* (citing Hayley Tsukayama, senior legislative activist at the Electronic Frontier Foundation).

relating to the use of puberty blockers and counseling for trans youth."[206] This type of information could include more than just the care that transgender youth received in Texas—extending to care received elsewhere. To make matters worse, the investigation probe by Paxton arose out of video footage taken by "Project Veritas, a far-right activist group that engages in deceptive practices to do hidden camera-style investigations," which "filmed health care professionals at Dell Children's [Hospital] and other facilities around the country as they discussed gender-affirming care."[207]

Overall, restrictionist states have the tools to go beyond penalizing abortion and gender-affirming care within their state borders and have shown in a few instances that they are willing to enforce state laws extraterritorially. While there is not yet evidence of mass surveillance used for this purpose, the threat of prosecution or civil liability coupled with law enforcement's known surveillance capabilities "[m]ak[es] people constantly feel watched [and] changes behavior . . . [J]ust the idea of using that to make individuals feel like they're always being watched is a way to try to engage in control."[208] Through modern surveillance tools or even just the threat of such surveillance, restrictionist states have sought to enforce their restrictions nationwide, ultimately chilling medical providers, facilitators, and care seekers across the country.

II. EXISTING PROTECTIONS AND PROPOSALS FOR COUNTERACTING RESTRICTIONIST STATES FALL SHORT OF SAFEGUARDING PEOPLE FROM EXTRATERRITORIAL SURVEILLANCE

> "*Can we stand for somethin'?*
> *Now is the time to face the wind*
> *Now ain't the time to pretend*
> *Now is the time to let love in*
> *Together, can we stand?*"[209]

Safe haven cities, counties, and states have made policy choices or passed new laws, regulations, and executive orders (collectively known as "shield laws") intended to prevent restrictionist states from accessing the digital data of care seekers, facilitators, and medical providers across state lines. Meanwhile, advocates, scholars, and federal lawmakers have proposed new federal legislation, regulations, and constitutional arguments to challenge the extraterritorial enforcement of abortion and gender-affirming care bans.

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206. Eleanor Klibanoff, *Texas AG Ken Paxton probing Austin children's hospital following video of social worker discussing transition-related care*, TEX. TRIB. (May 5, 2023), https://perma.cc/U2WY-L5UU.

207. *Id.*

208. Kladzyk, *supra* note 204 (quoting Jake Laperruque, deputy director of the Security and Surveillance Project at the Center for Democracy and Technology).

209. BEYONCÉ, *AMERIICAN REQUIEM*, *on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024).

While these efforts are commendable and necessary, they leave gaps that still allow restrictionist states to track those seeking and facilitating abortions and gender-affirming care in other states.

A. LOCAL EFFORTS

There are a number of local governments within restrictionist states, such as the Austin City Council and the Tucson City Council, that have adopted de-prioritization and funding restrictions "designed to mitigate the potential harm of state abortion bans" by "establish[ing] the criminal enforcement, arrest, and investigation of abortions as law enforcement's lowest priority" and "prevent [ing] or discourage[ing] local officials from using local funds to support abortion investigations or to collect, store, catalogue, or share abortion-related data."[210] In some places, local prosecutors too have pledged to use their prosecutorial discretion to refuse to investigate or charge someone who has broken state law in their jurisdiction.[211]

Both of these local approaches are powerful resistance mechanisms, but they are not long-term solutions. For example, restrictionist states could compel local governments to cooperate with state law, state law enforcement could still pursue their own investigations within these cities, local law enforcement could ignore directives from city council resolutions since they are mere policy recommendations, and the individual support provided by a district attorney or city council member could be fleeting since they are elected positions.[212]

B. STATE SHIELD LAWS

"[T]hrough legislation or executive order, 23 states and Washington, D.C. have shield law protections related to reproductive health care, and 17 states and Washington, D.C. have shield law protections related to gender-affirming health care."[213] There are nine common features of shield laws, and not all safe haven states have each of them: (1) prohibiting the extradition of people who were not in the restrictionist state when they allegedly committed the crime, (2) protecting interstate witnesses by refusing to cooperate with out-of-state requests for people to participate as witnesses in legal actions, (3) preventing the expenditure of state resources on another state's investigation, (4) not revoking medical professionals' licenses when a restrictionist state threatens to do so, (5) prohibiting in-state medical malpractice carriers from affecting a provider's policy based on care provided in the safe haven state, (6) refusing to disclose patients' reproductive health

210. *Using Local Ordinances, Resolutions, and Non-Prosecution Measures to Protect Reproductive Health*, THE NETWORK FOR PUB. HEALTH L. (Sept. 1, 2022), https://perma.cc/NUL6-FTEV; *see, e.g.*, Guarding the Right to Abortion Care for Everyone (GRACE) Act, Austin City Council Res. (2022).

211. *See, e.g.*, *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (May 9, 2023), https://perma.cc/T7KP-S8VE.

212. *See* THE NETWORK FOR PUB. HEALTH L., *supra* note 210.

213. *See* UCLA CTR. FOR REPRO. HEALTH, L., & POL'Y, *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide* (Aug. 2024), https://perma.cc/UB3F-27GZ.

care information to their restrictionist home state, (7) not enforcing or recognizing out-of-state judgements against in-state providers, (8) providing for "clawback lawsuits" that claim that restrictionist states are interfering with reproductive care in the safe haven state, (9) and allowing medical professionals to provide telemedicine care regardless of the patient's location.[214]

For this discussion of digital surveillance, two shield law features are particularly relevant. First, telemedicine protections shield doctors, nurse practitioners, and midwives from criminal and civil liability when they prescribe and send abortion pills to patients in other states. Second, provisions that prohibit cooperation with out-of-state investigations limit information disclosures.[215] One example of a comprehensive shield law is Connecticut's, which prohibits health care providers as well as government actors from sharing or complying with restrictionist states' requests to provide information about a "patient relating to reproductive health care services," and "gender-affirming health care services" they received.[216]

In addition to enacting laws similar to Connecticut's that prohibit health care providers and government entities from disclosing abortion and gender-affirming care information to other states, California's shield laws extend further because of its standing as a hub of large technology companies that are worldwide data collectors.[217] California prohibits electronic communication service providers that are either incorporated in California or have a principal place of business in California—such as Apple, Google, and Meta—from complying with restrictionist states' legal processes.[218] However, the law contains an exception for compliance if search warrants from restrictionist states "include[], or [are] accompanied by, an attestation that the evidence sought is not related to an investigation into, or enforcement of" an abortion restriction.[219]

This Section explains why state shield laws alone are not sufficient to protect access to abortions and gender-affirming care.

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214. David S. Cohen, Greer Donley, & Rachel Rebouché, *Abortion Shield Laws*, 2 NEJM EVIDENCE 2–3 (2023), https://perma.cc/BH5L-CX9Q.

215. Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. TIMES (Feb. 23, 2024), https://perma.cc/GM84-EFWK.

216. CONN. GEN. STAT. §§ 52-146x(a), 52-155b, 52-571n(b), 54-155b (West, Westlaw through 2024 Reg. Sess. & 2024 June Special Sess.). Connecticut defines "covered entities" as those provided in 45 C.F.R. § 160.103 (HIPAA definition). *See* CONN. GEN. STAT. § 52-146x(a).

217. CAL. PENAL CODE § 13778.2(b) (government agencies shall not disclose lawful abortion information to other states); CAL. HEALTH & SAFETY CODE § 123466(b) (no one is compelled to provide abortion information to other states); CAL. BUS. & PROF. CODE § 2253(e) (protecting medical providers from having their licenses revoked); CAL. BUS. & PROF. CODE § 2746.6(b) (same for midwives); CAL. BUS. & PROF. CODE § 2761.1(b) (same for nurse practitioners); Cal. Bus. & Prof. Code § 3502.4(f) (same for physician assistants); CAL. PENAL CODE § 3408(r) (prison staff shall not disclose medical information regarding abortions to other states); CAL. CODE OF CIVIL PROCEDURE § 2029.300(e) (subpoena shall not issue from another state if it is based on that state's laws interfering with "gender-affirming health care or gender-affirming mental health care").

218. CAL. PENAL CODE § 1546.5(a).

219. CAL. PENAL CODE § 1524.2(c)(1).

1. Impending Legal Challenges

Shield laws stand on shaky ground as they continue to be challenged by Republican state legislatures and conservative activists.

In December 2024, Texas Attorney General Paxton charged a doctor based in New York for prescribing abortion pills to a Texas resident in violation of Texas's law, putting the New York shield law in direct conflict with Texas's restrictionist law.[220] In January 2025, that same doctor was indicted by a Louisiana grand jury for prescribing abortion pills to a Louisiana resident.[221] In response to state law conflicts, restrictionist states have considered employing a strategy of claiming that safe haven states are in violation of the Full Faith and Credit Clause of Article IV of the U.S. Constitution.[222] This clause which "obligates states to recognize the laws and judgments of other states," could be used to hold shield laws unconstitutional as interfering with the laws of other states.[223] Dr. Seago from the Texas Right to Life organization has indicated that anti-abortion activists will not cease challenging shield laws, even if it would be difficult: "We can definitely promise that in a pro-life state like Texas with committed elected officials and an attorney general and district attorneys who want to uphold our pro-life laws, this is not something that's going to be ignored for long."[224]

Some may believe that the holding of *FDA v. Alliance for Hippocratic Medicine* means there is no need for shield laws with respect to telemedicine and that the Supreme Court already protected the ability of doctors to prescribe abortion pills from out-of-state.[225] However, the Supreme Court actually never addressed the merits of the issue and thus did not add or remove any protections.[226] Plaintiffs originally brought the *Alliance for Hippocratic Medicine* case under the theory that the Food and Drug Administration (FDA) should have never approved one of the abortion pills, mifepristone, in 2000.[227] As litigation proceeded, the plaintiffs shifted to focusing on the argument that the FDA should not have made it easier to access mifepristone by allowing telemedicine prescriptions, permitting retail pharmacies to administer it, and declaring that it is safe up

220. *See* Goodman & Belluck, *supra* note 146.

221. Pam Belluck & Emily Cochrane, *New York Doctor Indicted in Louisiana for Sending Abortion Pills There*, N.Y. TIMES (Jan. 31, 2025), https://perma.cc/GN54-2UD4.

222. U.S. CONST. art IV, §1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *see* Pam Belluck, *A New Abortion Access Strategy*, N.Y. TIMES (Feb. 22, 2024), https://perma.cc/6XRL-DJXQ.

223. *But see* Diego A. Zambrano, Mariah E. Mastrodimos, & Sergio F.Z. Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 384–85 (hypothesizing that California's shield law will survive a Full Faith and Credit Clause challenge); Haley Amster, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110, 110–11 (2024) (same).

224. Belluck, *Abortion Shield Laws: A New War Between the States*, *supra* note 215.

225. FDA v. Alliance for Hippocratic Med., 602 U.S. 367 (2024).

226. *Id.* at 396–97 (finding that plaintiffs did not have standing to bring a claim).

227. *Id.* at 376–77.

to ten weeks into pregnancy.[228] The unanimous decision held that the plaintiffs, anti-abortion doctors and organizations, did not have standing to proceed on the merits because the "FDA [was] not requiring them to do or refrain from doing anything. Rather, the plaintiffs want[ed] FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain," and "a plaintiff 's desire to make a drug less available *for others* does not establish standing to sue."[229] In short, *Alliance for Hippocratic Medicine* did not obviate the need for shield laws nor did it affect the status quo of prescribing abortion pills from out-of-state because the case never reached the merits.

2. Circumventing Shield Laws Through Machine Learning Inferences

State shield laws that explicitly prevent the disclosure of "abortion," "reproductive care," or "gender-affirming care"-related information are important protections to defend care seekers, facilitators, and providers from restrictionist states' statutes. But, due to modern machine learning tools that enable data processors to make many precise inferences about people from seemingly benign information, there is a lot of detail about a patient's care and interstate travel that private entities and law enforcement can learn with the right data and machine learning tools in their hands, even if the data is not explicitly labeled as reproductive care related.[230] What's more, the government can make further inferences about poor communities and communities of color because it already has a large trove of data about them. The government collects more sensitive information about people who live in poverty because they more frequently rely on government programs,[231] and more sensitive information about Black communities because they are more intrusively policed.[232]

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228. *Id*. at 367.

229. *Id*. at 374 (emphasis in original).

230. *See generally* Anya E. R. Prince, *Location as Health*, 21 HOUS. J. HEALTH L. & POL'Y 43, 52–57 (2021) (describing how location data, like someone being located at a Planned Parenthood, can be used to infer health information); Eric Horvitz & Deirdre Mulligan, *Data, Privacy, and the Greater Good*, 349 SCIENCE 253, 253 (2015) (discussing how machine learning tools infer health information from nonmedical data).

231. For a thorough analysis of how automated systems in benefit administration disproportionately target and collect data from poor people and communities of color, *see* Virginia Eubanks, *The Digital Poorhouse*, HARPER'S MAGAZINE (Jan. 2018), https://perma.cc/XK2S-TXBC ("Automated eligibility systems . . . discourage families from claiming benefits that they are entitled to and deserve. Predictive models in child welfare deem struggling parents to be risky and problematic. Coordinated entry systems, which match the most vulnerable unhoused people to available resources, collect personal information without adequate safeguards in place for privacy or data security.").

232. *See* BARTON GELLMAN & SAM ADLER-BELL, THE DISPARATE IMPACT OF SURVEILLANCE 12–13 (2017), https://perma.cc/M5HD-GJUP (reporting on the "disparate impact of surveillance made manifest through urban policing and social services for the poor").

One example is the ShotSpotter tool used by police departments across the country, which is a surveillance system designed to detect gunfire. "[T]he vast majority of alerts generated by the system turn up no evidence of gunfire or any gun-related crime. Instead, the ShotSpotter system sends police on thousands of unfounded and high-intensity deployments, which are focused almost exclusively in Black and Latinx communities." Press Release, MACARTHUR JUST. CTR., *ShotSpotter Generated Over 40,000*

Studies have shown that social media data can be utilized to infer health data like drug use,[233] mental illness,[234] and postpartum depression.[235] A famous 2012 article first exposed how purchasing habits could be used to infer pregnancy status. In *How Companies Learn Your Secrets*, Charles Duhigg reported on Target's development of a pregnancy-prediction model which, based on years of other customers' purchasing habits, found correlations between particular items purchased by a customer and the possibility that they were pregnant.[236] It predicted, for example, that a customer loading up on calcium, magnesium and zinc was a pregnant person in their first twenty weeks and that a customer purchasing a lot of scent-free soap, extra-big bags of cotton balls, hand sanitizers, and washcloths was a pregnant person near their delivery date.[237] Target then sent advertisements for baby products to people designated by their algorithm as possibly pregnant; one girl's pregnancy was revealed to her father when their house received mailed coupons for baby products that were addressed to his daughter.[238]

If Target data analysts—equipped with only their own customers' purchasing data and now decade-old algorithms—could accurately predict that someone was pregnant and what stage in pregnancy they were at, there is much more that modern machine learning and larger quantities of data can reveal about someone's pregnancy status, gender identity, health care, or travel decisions today. Aziz Huq and Rebecca Wexler described how restrictionist state actors might put these highly accurate inference technologies to use:

Dead-End Police Deployments in Chicago in 21 Months According to New Study (May 3, 2021), https://perma.cc/6GHK-2VSW.

To determine whether someone should be released on bail or be detained before trial, courts have used commercial algorithms, including Northpointe's "COMPAS" tool, to calculate a defendant's risk of recidivism. COMPAS's algorithm was trained on the number of rearrests that other defendants experienced after being released, and therefore, it was racially skewed as a result of the racial disparities in policing. The leading study of the COMPAS tool found that "Black defendants were twice as likely as white defendants to be misclassified as a higher risk of violent recidivism, and white recidivists were misclassified as low risk 63.2 percent more often than black defendants." Jeff Larson, Surya Mattu, Lauren Kirchner, & Julia Angwin, *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), https://perma.cc/DH2L-K6J2.

233. Michal Kosinski, David Stillwell, & Thore Graepel, *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT. ACAD. SCI. U.S.A. 5802, 5802–03 (2013) (inferring drug use from Facebook likes).

234. Jina Kim, Jieon Lee, Eunil Park, & Jinyoung Han, *A Deep Learning Model for Detecting Mental Illness from User Content on Social Media*, 10 SCI. REPS. 11846 (2020) (inferring mental illness from Reddit posts).

235. Munmun De Choudhury, Scott Counts, Eric J. Horvitz, & Aaron Hoff, *Characterizing and Predicting Postpartum Depression from Shared Facebook Data*, in ASS'N FOR COMPUTING MACH., CSCW '14: PROCEEDINGS OF THE 17TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 625, 626 (2014) (inferring postpartum depression from interaction activity on Facebook).

236. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES (Feb. 16, 2012), https://perma.cc/N6UQ-3A53.

237. *Id.*

238. *Id.*

> Just as Target mined its transactional data, so too the restrictionist actor might try to leverage another large pool of data for predictive ends. This may sound implausible now. But several federal agencies, including the Internal Revenue Service and the Securities and Exchange Commission, have developed bespoke predictive tools to mine governmental and private data in order to identify regulatory violations. Is it so far-fetched to suggest that the state of Texas will be lagging far behind in the creative exploitation of retail or social media data? Or that it could simply hire someone to perform this service for it?[239]

In summary, the boundaries of the categories, "reproductive care," "abortion," and "gender-affirming care," used in shield laws to delineate data that needs to be protected from restrictionist states are well-intentioned but, in practice, "when fed into the right algorithm, nearly any data about a person can be used to" reveal this sensitive information.[240]

3. Practical Challenges to the Country's "Web of Protections"

There are a number of real-world, practical challenges that limit shield laws from being wholly effective for those who need care outside of their restrictionist home state.

First, not all states where abortion or gender-affirming care is legal have enacted shield laws. Even though *some* shield laws are better than *none*, the complicated "web of protections" that varies from state to state "means that those interested in taking advantage of a shield law's protections must either closely study the law that covers their jurisdiction or seek out the assistance of an attorney," something most youth, people in crisis, or those without financial resources will not be able to do.[241] Patients are not the only ones whose conduct is chilled when laws are divergent and confusing. Medical providers too "are faced with difficult questions of how to screen potential patients for criminal liability exposure," and therefore, such "litigation uncertainty could lead to a dramatic decline in the provision of abortion nationwide, especially among clinics located close to states with abortion prohibitions."[242]

Second, there is some evidence that it is difficult for safe haven states to ensure that shield laws are complied with by law enforcement. Despite California's prohibition on its agencies disclosing license plate data with restrictionist states in some cases due to the ability to track interstate travelers, "some of California's

239. Huq & Wexler, *supra* note 10, at 586 (internal citations omitted).

240. Daniel J. Solove, *Data Is What Data Does: Regulating Based on Harm and Risk Instead of Sensitive Data*, 118 NW. U. L. REV. 1081, 1081, 1109 (2024) (explaining that it is "easy to use nonsensitive data as a proxy for certain types of sensitive data," so privacy law needs to better address the protection of sensitive data).

241. Cohen, Donley, & Rebouché, *Abortion Shield Laws*, *supra* note 214, at 4.

242. Huq & Wexler, *supra* note 10, at 602.

largest police departments collected and shared license plate data with entities around the country—without having necessary security policies in place, in violation of state law."[243]

Third, private rights of action enable restrictionist states to rely on regular people as their "bounty hunters" who can obtain information in ways that governments and covered private entities are restricted from doing. These civil suit provisions incentivize people who personally know of pregnant and transgender people to act as bounty hunters suing for monetary reward. For someone to bring suit under these laws, they must already suspect that a specific individual has sought illegal health care. Therefore, the bounty hunter may not need to rely on the person's out-of-state digital trail, or the bounty hunter could access a digital trail without law enforcement's probable cause and warrant constraints. These concerns are heightened in the context of domestic abusers who seek to assert reproductive control over their partners.[244] Civil suit provisions, along with child abuse and custody laws in some states, also give a parent license and incentive to harass and threaten their partner or ex-partner over helping their child seek gender-affirming care.[245]

C. FEDERAL PROPOSALS

Civil society groups, legal scholars, and federal agencies have proposed myriad legislative, regulatory, and constitutional challenges to the extraterritorial surveillance of people seeking reproductive and gender-affirming care.[246] While all

243. LEE, DARMON, LOKHANDWALA, SIKDAR, UPADHYAY, & MANIS, *supra* note 195, at 6 (citing Todd Feathers, *California Police Have Been Illegally Sharing License Plate Reader Data*, VICE (Feb. 13, 2020), https://perma.cc/N6ZX-8ZN4 (internal quotation marks omitted)).

244. *See, e.g.*, Adam Edelman, *'Insidious,' 'draconian,' 'cruel': New Texas abortion law empowers vigilantism, experts say*, NBC NEWS (July 24, 2021), https://perma.cc/YJ6L-5XEH ("'Abusive spouses, disapproving parents, angry neighbors or people with no relation at all will all have a legal right to harass.'").

245. *See, e.g.*, Karen Brooks Harper, *His public custody battle helped ignite a movement against transgender health care for kids. Will it carry him to the Texas House?*, TEX. TRIB. (Mar. 14, 2022), https://perma.cc/LKA6-2DCN (discussing how a man reportedly threatened and harassed his ex-wife and caused Texas to investigate her for child abuse, when she—a pediatrician—facilitated their child's social transition and access to therapy).

246. For an overview of the strengths and weaknesses of possible legal strategies, *see* David S. Cohen, Greer Donley, & Rachel Rebouché, *Rethinking Strategy after* Dobbs, 75 STAN. L. REV. ONLINE 1, 2–9 (2022). There are proposals outside of law and policy that have been offered by activists and scholars. Some have stressed the importance of private entities and individuals protecting themselves, at least in part, through self-regulation. *E.g.*, Huq & Wexler, *supra* note 10, at 618–643 (advocating for private firms to legally refuse to cooperate with law enforcement efforts to obtain people's reproductive care information); Fowler & Ulrich, *supra* note 52, at 1302–08 (arguing that private firms should take measures on their own to minimize risk by limiting their data collection and implementing design changes); *id.* at 1308–12 (arguing that civil society groups have an important role to play in educating consumers about privacy risks and arguing that individuals can be activist consumers). And, for obvious reasons, individual self-help is, alone, not sufficient to protect interstate care seekers: "Asking low-income women to engage in digital self-help to avoid abortion prosecutions ignores the 'matrix of vulnerabilities' they face." Elizabeth E. Joh, Dobbs *Online: Digital Rights as Abortion Rights*, *in* FEMINIST CYBERLAW 132 (Meg Leta Jones & Amanda Levendowski eds. 2024)

of these proposals have merit, their shortcomings are highlighted in the discussion below to provide context for the reasons that the Thirteenth Amendment challenge discussed in Part III is a necessary and complementary strategy.[247]

Some scholars have offered ideas for federal legislative reform. Anya Prince argues that federal data privacy law must regulate data brokers and their ecosystem that is "fueled by monetization," regulate data collection methods, and regulate uniformly across the states.[248] Prince concludes that "[o]nly with these broad, sweeping changes to data privacy can we hope to move from reproductive health surveillance to meaningful reproductive health privacy."[249] Aziz Huq and Rebecca Wexler advocate for the "enactment of statutory evidentiary privileges that shield abortion-relevant data from restrictionist warrants, subpoenas, court orders, and judicial proceedings."[250] Samantha Hunt hypothesized a federal statute that codifies telemedicine abortion access.[251] Some advocacy organizations argue that Congress should enact a federal law that "prohibits the criminalization of interstate travel for medical care, and the assistance thereof," and therefore, preempts restrictionist extraterritorial enforcement.[252] However, all of these proposals face similar hurdles. Congress has repeatedly failed to enact even a general federal privacy law—let alone one focused on reproductive rights—despite persistent efforts to do so.[253] In part, this is because "Congress is not nimble and often does not react to privacy concerns in a timely way" and "[b]ig technology firms have fought tooth-and-nail to stop strong privacy laws at every level."[254] Leah Fowler and Michael Ulrich point out that federal legislation will likely "fall short because implementing comprehensive privacy legislation is complex even beyond passage and because law enforcement exceptions will likely continue to

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(citing Mary Madden, Michele Gilman, Karen Levy, & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans,* 95 WASH. U. L. REV. 53, 122 (2017)).

247. This Note focuses on one narrow subset of abortion and gender-affirming care restrictions—their enforcement through extraterritorial digital surveillance. There is a more expansive body of scholarship and litigation focused on facial challenges. For more on abortion litigation, *see State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (last updated Feb. 7, 2025), https://perma.cc/3A9R-7ZYF.

248. Anya E.R. Prince, *Reproductive Health Surveillance*, 64 B.C. L. REV. 1078, 1134 (2023).

249. *Id*. at 1144.

250. Huq & Wexler, *supra* note 10, at 563.

251. Samantha A. Hunt, *Call Me, Beep Me, If You Want to Reach Me: Utilizing Telemedicine to Expand Abortion Access*, 76 VAND. L. REV. 323, 326 (2023).

252. HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER DOBBS, FOLEY HOAG, GLOBAL JUSTICE CENTER, HUMAN RIGHTS WATCH, NATIONAL BIRTH EQUITY COLLABORATIVE, PHYSICIANS FOR HUMAN RIGHTS, PREGNANCY JUSTICE 1, 42–43 (Apr. 18, 2023), https://perma.cc/329N-RXMM.

253. *See also* Kirk J. Nahra, Ali A. Jessani, & Amy Olivero, *New Federal Privacy Bill Draft Hits Congress*, WILMERHALE (Apr. 19, 2024), https://perma.cc/FQB7-EAZ6; *see also* Hayley Tsukayama, *Federal Preemption of State Privacy Law Hurts Everyone*, EFF (July 28, 2022), https://perma.cc/5RTC-MTJZ (arguing that federal legislation should not preempt state privacy laws); *cf*. Prince, *Reproductive Health Surveillance*, *supra* note 248, at 1143 (explaining that the American Data Privacy and Protection Act (ADPPA) was unable to pass because representatives from states that had their own privacy legislation were concerned about the bill preempting their strong state privacy laws).

254. Tsukayama, *supra* note 253.

limit their effectiveness."[255] In addition to the typical obstacles Congress has faced in passing comprehensive legislation, there is almost no chance that Congress will now pass comprehensive legislation protecting abortion and gender-affirming care seekers from extraterritorial surveillance while it is Republican-controlled.

Before *Dobbs*, the typical constitutional challenge to a reproductive care restriction was a Due Process Clause argument—but that is exactly what the Court in *Dobbs* foreclosed.[256] Now, *other* provisions of the Constitution offer new options for combating the extraterritorial enforcement of restrictionist laws.[257] The most salient claims are that restrictionist states seeking to enforce their criminal and civil laws beyond their borders infringe on the right to be free from state laws burdening interstate travel under the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment,[258] and that restrictionist states impose an undue burden on interstate commerce under the Dormant Commerce Clause.[259] Because these suits require that there be some form of state action challenged, they do not address the significant role that private entities play in surveillance—such as private citizens who can now bring civil suits and private companies that track individuals without government participation and then disclose or sell that data to restrictionist states. Remember, a motivator for restrictionist states to include a civil suit provision in anti-abortion and anti-gender-affirming care laws is to circumvent the constitutional limitations on state action that do not similarly limit private action.[260]

Federal regulations are yet another tool for protecting sensitive data. Legal scholars proposed multiple practices that federal agencies could adopt to safeguard reproductive and gender-affirming healthcare data, and some of these suggestions were implemented.[261] In April 2024, the U.S. Department of Health and

255. Fowler & Ulrich, *supra* note 52, at 1297.

256. *See infra* PART I.

257. *See, e.g.*, Cohen, Donley & Rebouché, *supra* note 116, at 2–3 (predicting constitutional battles among states concerning jurisdiction once the right to abortion was revoked by the Supreme Court); Hannah Rahim, *The Constitutionality of Banning Interstate Travel for Abortion*, BILL OF HEALTH (Oct. 16, 2023), https://perma.cc/DWA2-4PMP (providing a brief overview of current constitutional challenges to interstate abortion travel).

258. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

259. U.S. CONST. art. I, § 8, cl. 1; *see, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504 (2019) (interpreting the Commerce Clause that grants Congress the power to pass laws regulating interstate commerce as also providing a limit on states' ability to unduly burden interstate commerce).

260. *See* Emma Bowman, *As states ban abortion, the Texas bounty law offers a way to survive legal challenges*, NPR (July 11, 2022), https://perma.cc/MEC3-XM6S.

261. *See, e.g.*, Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L. J. FORUM 197, 198–200 (2022) (arguing that the seamless flow of medical records due to the federal Information Blocking Rule means that "nothing will protect those records from use by antiabortion actors once they are in the hands of out-of-state providers" and such a result "is a loophole that risks swallowing the protection that these new state laws attempt to offer"); Fowler & Ulrich, *supra* note 52, at 1297 (discussing consumer protection law proposals to ensure that period and fertility tracking applications better inform and protect users' data, but noting the federal government's serious limitations because passing more comprehensive privacy law is complex and because the issue of law enforcement exceptions is not addressed by these solutions); Paul Webster, *Proposal to protect abortion patients'*

Human Services promulgated, pursuant to its authority under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the *HIPAA Privacy Rule to Support Reproductive Health Care Privacy* that seeks to "strengthen privacy protections" for medical records related to "reproductive health care."[262] Under the new rule, regulated entities—health care providers, health plans, health care clearinghouses, and their business associates—are prohibited from "us[ing] or disclos[ing] protected health information" for "criminal, civil, or administrative investigations," for "impos[ing] . . . liability on anyone . . . seeking, obtaining, providing, or facilitating reproductive health care," or for "identify[ing] any person for" one of the first two purposes, where such health care is lawful.[263] Reproductive health care information can still be used or disclosed by the regulated entities for other purposes if the requesting party, including law enforcement, attests that it is not using the information for one of the prohibited purposes.[264]

While this rule is certainly a step in the right direction of protecting out-of-state medical records from being used against care seekers, facilitators, and medical providers, it does not foreclose a number of other data collection tools that can lead restrictionist states' law enforcement and bounty hunters to the same results. HIPAA only covers the four types of entities described above. It does not encompass technology behemoths that facilitate online communications and collect geolocation data, nor does it apply to period and fertility trackers or wearable health trackers. In other words, many private actors' data collection and disclosures to law enforcement are left unaffected by the amended HIPAA rule.[265] More damning to the longevity of the rule is that the Trump Administration will dictate agencies' priorities and has indicated that it might repeal the rule along with other regulatory protections.[266]

This discussion illuminates the need for a complementary or alternative route to challenge state *and* private tracking of interstate reproductive and gender-affirming care seekers, facilitators, and medical providers.

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records faces pushback from Epic, UnitedHealth, STAT (Dec. 7, 2023), https://perma.cc/9U23-XTBY (discussing how healthcare companies have protested proposed regulations that would force medical record systems to be set up to completely segregate reproductive care and gender-affirming care information, and remove them from the record before they are shared with any other facility). *See also* HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 45 C.F.R. pts. 160, 164.

262. HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 45 C.F.R. pts. 160, 164.

263. *See id.* pt. 164.502(a)(5)(iii).

264. *Id.* pt. 164.509.

265. For other critiques of the *HIPAA Privacy Rule to Support Reproductive Health Care Privacy*, *see HHS Issues Final Rule in an Important Effort to Safeguard Reproductive Privacy*, EPIC (Apr. 24, 2024), https://perma.cc/74V6-JNQY.

266. *See* SEVERINO, *supra* note 159.

III. THE THIRTEENTH AMENDMENT CHALLENGE TO THE EXTRATERRITORIAL SURVEILLANCE OF PEOPLE SEEKING ABORTIONS AND GENDER-AFFIRMING CARE

> "*Say a prayer for what has been*
> *We'll be the ones to purify our Fathers' sins*
> *American Requiem*
> *Them old ideas, are buried here*
> *Amen*."[267]

In 2023, Judge Kollar-Kotelly of the United States District Court for the District of Columbia issued an order requesting further briefing from the parties in a case about whether defendants violated the constitutional rights of others when they blocked access to a reproductive care clinic.[268] Before *Dobbs*, the answer would have been obvious—the defendants would have violated the visitors' Fourteenth Amendment right to an abortion by blocking access. After *Dobbs*, however, Judge Kollar-Kotelly pondered this as an open question. Her order suggested that "[o]f those provisions that might contain some right to access to such services, the Thirteenth Amendment" could be the one.[269] And since no parties or amici explicitly raised a Thirteenth Amendment issue in their *Dobbs* briefs, "it is entirely possible that the Court might have held in *Dobbs* that some other provision of the Constitution provided a right to access reproductive services had that issue been raised."[270] While the *Dobbs* Court held that the Fourteenth Amendment did not protect the right to reproductive health services, it did *not* necessarily hold that "*no* provision of the Constitution extends any right to reproductive health services."[271]

Building on the premise that the Supreme Court did not foreclose a Thirteenth Amendment claim after *Dobbs*, this Note argues that the Thirteenth Amendment provides an underutilized,[272] alternative route for challenging restrictionist abortion and gender-affirming care laws that utilize extraterritorial surveillance for their enforcement.

A. THIRTEENTH AMENDMENT FRAMEWORK

What Judge Kollar-Kotelly's Order appropriately[273] brought to light is legal scholarship coalescing around the claim that the Supreme Court overlooked how

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267. BEYONCÉ, *AMEN*, *on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024).

268. Order at *3, United States v. Handy, No. 22-096-CKK (D.D.C. Feb. 6, 2023).

269. *Id.* (emphasis omitted).

270. *Id.* (emphasis omitted).

271. *Id.* at *1–2.

272. One reason that the Thirteenth Amendment is an underutilized constitutional provision is that there has been a "lack of interest convergence," meaning that "civil rights gains seldom happen" because they are not "perceived as advancing, or at least not hindering, the material interests of dominant groups" due to the "misconception that such a remedy would only apply to African-Americans." William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 21–22 (2011).

273. Note that the judge in this case has been criticized for her judicial activism; critics believe she could have decided the case by relying on the federal statutory claim—that the defendants violated the

the Thirteenth Amendment prohibition on slavery and involuntary servitude, separately from the Fourteenth Amendment, protects the right to reproductive care, including the right to an abortion, because practices of "[s]exual violence and pregnancy were common markers of Black women's enslavement throughout the United States."[274] The argument has been that restrictionist abortion laws, which effectively force birth today, cause "involuntary reproductive servitude."[275] The Thirteenth Amendment challenge made by scholars thus far with respect to forced birth is that when "women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the thirteenth amendment. . . because forcing women to be mothers makes them into a servant caste, a group which, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves."[276]

Adding to existing Thirteenth Amendment scholarship that explains how anti-abortion laws amount to unconstitutional involuntary servitude, this Note advances a different claim: that interstate surveillance of menstruating, pregnant, and transgender people is a "badge [or] incident of slavery" prohibited by the Thirteenth Amendment.[277] To be clear, this Note is not arguing that such surveillance is the equivalent of slavery or involuntary servitude. Rather, just as scholars have argued in other contexts—racial profiling[278] and the shackling of pregnant

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Freedom of Access to Clinic Entrance Act (FACE)—without reaching the constitutional question. Even if she reached the constitutional question then she could still have avoided the Thirteenth Amendment issue by relying on the fact that contraception is still clearly protected and, therefore, the defendants blocked access to at least some protected aspects of reproductive care under the Fourteenth Amendment when they blocked the reproductive care clinic. *See, e.g.*, Ian Millhiser, *A federal judge mocks the Supreme Court on abortion*, VOX (Feb. 7, 2023), https://perma.cc/H8L7-UGA6; Dahlia Lithwick & Mark Joseph Stern, *Why a Federal Judge Is Asking if Abortion Is Still Maybe Constitutional*, SLATE (Feb. 8, 2023), https://perma.cc/53QL-82KQ.

274. Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendmen*t, 2022 U. CHIC. LEGAL. FORUM 191, 198, 208 (2022) (arguing that the *Dobbs* Court's purported "originalist" opinion only selectively applied historical texts, ignoring the Framers of the Reconstruction era's explicit intent to eliminate "involuntary sexual exploitation and violence experienced by Black women").

275. *Id.*

276. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 484 (1990); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-10, at 1354 (2d ed. 1988) ("A woman forced by law to submit to the pain and anxiety of carrying, delivering, and nurturing a child she does not wish to have is entitled to believe that more than a play on words links her forced labor with the concept of involuntary servitude."); Jane L. v. Bangerter, 61 F.3d 1505, 1517 (10th Cir. 1995) (not "expressing a view regarding the merit of [the] legal theories," but concluding that "the district court erred in holding the" Thirteenth Amendment claim to be "frivolous").

277. *See* The Civil Rights Cases, 109 U.S. 3, 20–21 (1883) (declaring that "Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents").

278. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 22 (2004) ("[R]acial profiling, even in the absence of Congressional legislation, is a violation of the Thirteenth Amendment, and calls on the judiciary to construe the Amendment to fulfill its promise to rid the freedmen and their descendants of slavery's legacy.").

prisoners[279]—this Note contends that the current surveillance of people seeking abortions and gender-affirming care in other states is "a lingering *vestige* of the slave system and is therefore outlawed by the Thirteenth Amendment."[280]

The Thirteenth Amendment, passed as a part of the Reconstruction Amendments,[281] provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[282] Beyond outlawing "chattel slavery and similar forms of forced labor," the Thirteenth Amendment was intended to "eliminate what [its Framers] called 'the badges and incidents' of slavery: that is, the laws, customs, and social structures that supported slavery or arose therefrom."[283] Supreme Court jurisprudence since the Amendment's enactment has made clear that, "[w]hile the immediate concern was with African slavery, the Amendment . . . was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag."[284] Therefore, although this Note advances a claim on behalf of a population broader than Black women, the chronicling of America's history of interstate surveillance of Black women across state lines during and after slavery described in Section III.B serves to illustrate the modern "laws, customs, and social structures" that were legitimized by, and grew out of, slavery.[285]

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279. *See* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1248–49 (2012) (arguing that the Eighth Amendment's prohibition on "cruel and unusual punishment" should be interpreted against the backdrop of the Thirteenth Amendment's prohibition against the "badges and incidents of slavery" in order to structurally challenge the practice of shackling pregnant prisoners because such a practice is "rooted in" or "facilitate[s] racial dominance").

280. Carter, *supra* note 278, at 21 (emphasis added).

281. Michele Goodwin argues that the *Dobbs* Court did not comprehensively consider the "robust record by the abolitionists in Congress" that would serve to demonstrate how the "Framers of the Reconstruction were not silent on their observations of the involuntary sexual exploitation and violence experienced by Black women," but instead, "[t]heir writings build a more accurate record of the debates and thinking of members of Congress who would go on to draft and defend the Reconstruction Amendments." Goodwin, *supra* note 274, at 208.

282. U.S. CONST. amend. XIII, § 1.

283. William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 584 (2014); *The Civil Rights Cases*, 109 U.S. at 20; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

284. Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) (holding that making it a crime to refuse to perform labor contracted to pay debts is unconstitutional under the Thirteenth Amendment because it constitutes involuntary servitude).

285. Scholars have provided defenses of this expansive interpretation of the Thirteenth Amendment. Nicholas Serafin argues that the "badges metaphor" has always referred "beyond race and chattel slavery" to "state actions or social customs that stigmatized subordinate social groups," (like gender and class) by appealing to legal history and the original public meaning of the metaphor. Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH. L. REV. 1291, 1294, 1311, 1329 (2022). Priscilla Ocen has applied this kind of argument to advocate for a Thirteenth Amendment claim against the shackling of pregnant prisoners, not just Black women prisoners. *See, e.g.*, Ocen, *supra* note 279, at 1249 (explaining that the Thirteenth Amendment challenge to the shackling pregnant prisoners "seeks to

B. EXTRATERRITORIAL SURVEILLANCE OF REPRODUCTIVE AND GENDER-AFFIRMING CARE IS A "BADGE" OF SLAVERY

The techniques and justifications used by restrictionist states to surveil people seeking care in other states trace their roots back to slavery and the laws, customs, and social structures that grew out of that period.

1. The Information Technologies and Surveillance Systems that Upheld Slavery

"Mobility was key to both escape and everyday survival" for enslaved people.[286] Thus, mobility became "the currency of resistance, and the planter class therefore sought to regulate it tightly" by developing mechanisms to track the biometric and other identifying information of Black people.[287] These legal and extralegal mechanisms—information technologies of their day—included candles, ship passenger ledgers, branding, written slave passes and slave patrols, and wanted posters and rewards for runaways.[288] The constant accounting of Black bodies sought to chill Black people's movement within and outside of their states to uphold the profitable enterprise of slavery.

In the 1700s, "lantern laws" were enacted to surveil the movement of Black people at night.[289] For example, under New York City's lantern law passed in 1731, a "lit candle [was] a supervisory device—any unattended slave was mandated to carry one—and [was] part of the legal framework that marked black, mixed-race, and indigenous people as security risks in need of supervision after

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disrupt racialized practices that animate the punitive practices that impact all incarcerated women," and therefore, the "approach is attentive to the ways in which penal practices rooted in racial dominance undergird the treatment of all people within carceral spaces"); *see also* Carter, *supra* note 272, at 22 (clarifying that, rather than "dishonor[ing] the legacies of those who endured centuries of bondage and subjugation and those who worked to secure slavery's end," "viewing the Thirteenth Amendment as solely the province of African-Americans oversimplifies constitutional history"); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1074 (1975) ("There is nothing in this language that confines the enforcement power of Congress to the protection of any particular race or class of persons."); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801 (2010) ("Congress may . . . ban discriminatory private conduct that it reasonably believes will contribute to or produce second-class citizenship.").

286. CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR 16 (Basic Books 2003) (describing mobility as resistance because the more Black people traveled, the harder it was to identify a fugitive slave, and the more contacts they made, the more resources they had).

287. *Id.*

288. GELLMAN & ADLER-BELL, *supra* note 232, at 6 (internal quotation marks omitted) (describing surveillance mechanisms like plantation ledger books that "served as proto-biometric databases, recording the slaves as physical specimens in fine detail," "[t]he slave pass, the slave patrol, the fugitive slave poster," and plantation layouts "that were organized to enable planters and overseers to exercise surveillance and reinforce the subordinate status of enslaved people"); *see also* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 87 (Harv. U. Press 2009) (1845) ("At every gate through which we were to pass, we saw a watchman—at every ferry a guard—on every bridge a sentinel—and in every wood a patrol. We were hemmed in upon every side.").

289. *See, e.g.*, A Law for Regulating Negroes and Slaves in the Night Time, City of N.Y. (1731).

dark."[290] As followed in later periods discussed below, those who stood to profit from the surveillance of Black people—slaveowners—were those empowered with vigilante-style enforcement of lantern laws.[291]

Shortly thereafter, in 1783, the *Book of Negroes* adopted yet another form of surveillance—listing the names and descriptions of each passenger who boarded a ship in New York during the British evacuation after the American Revolutionary War.[292] This ledger was leveraged between the Royalists and the Patriots "as a record in case of claims for compensation" in circumstances where "the British . . . abscond[ed] with" the Patriots' slaves.[293] Essentially, the *Book* recorded the extraterritorial travel of Black people solely for the purpose of compensating slaveowners for stolen "property."

Tracking biometric information upheld slavery because it allowed slaveowners to identify any runaway slaves as their own. The *Book's* "crude inscriptions," including "scar in his forehead," "stout with 3 scars in each cheek," and "stout wench," are indicative of "how the body [came] to be understood as a means of identification and tracking by the state."[294] Moreover, the branding of slaves created another biometric identifier. One notice for the capture of a runaway slave and her children read: "Twenty dollars reward. Ran away from the subscriber, a negro woman and two children; the woman is tall and black, and a few days before she went off, I burnt her with a hot iron on the left side of her face; I tried to make the letter M.'"[295] These notices were common practice. The *Virginia Gazette* "ran an average of 230 runaway notices a year during the eighteenth century, and all of them had one thing in common: they sought to identify people who, as slaves, supposedly had no identity" but for whom "the master class was forced to develop . . . a haphazard system of identification and surveillance."[296]

In conjunction with these notices, slave patrols—groups of armed white men—were "empowered to search homes for runaways, weapons, or supply caches that might indicate escape plans," and Black people had to produce written passes to prove emancipation.[297] The Fugitive Slave Act of 1850 cemented this practice into federal law.[298]

In 1851, the *Pennsylvania Freeman* reported that four "slave-catchers," Solomon Duck, Jacob Strine, Charles Strine, and Thomas Perdu, "pursued and captured a little boy and a poor washwoman" in Pennsylvania, a state that

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290. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 78 (Duke U. Press 2015).

291. *Id.* at 79 ("Mostly, punishment for such transgressions was taken into the hands of the slave owner.").

292. *Id.* at 69; Book of Negroes or Headquarters Papers of the British Army in America, 1783, U.K. Nat'l Archives, PRO 30/55/100.

293. *Id.* at 71.

294. *Id.* at 70, 74.

295. *Id.* at 91–92 (citing BRANDING SLAVES *in* THE ANTI SLAVERY ALMANAC (1840)); *see generally id.* at 128 (arguing that branding served as a biometric identifier and, among other biometric identification technologies, "close[ly] align[ed] with the commodification of blackness").

296. PARENTI, *supra* note 286, at 14.

297. *Id.* at 16–17.

298. *See* The Fugitive Slave Law §§ 6–9 (1850).

outlawed slavery.[299] The little boy was Henry Dellam and the poor washwoman was Hannah Dellam, his pregnant mother.[300] Maryland slaveowner John Perdue claimed that the Dellams were his runaway slaves and, therefore, that they must be "returned" to him under the Fugitive Slave Act.[301] Despite conflicting witness testimony regarding the Dellams' identity, the judge found convincing—above all—the slave-catchers' testimony, asserting that both Dellams admitted that they ran away from Perdue.[302] Of no import to the judge was that the Dellams' alleged confessions occurred in a coercive environment "while in the grip of [their] captors" after a "ruffianly and brutal" seizure and arrest.[303] The judge not only granted Perdue title over Hannah and Henry, but additionally, "consigned" Hannah's newborn to "life long slavery" even though Hannah gave birth while being detained in a free state.[304] A journalist at the *Pennsylvania Freeman* lamented after the case, "[w]e regard the main decision, delivering a mother and babe to the claimant, dooming a child begotten in freedom to hopeless slavery, as a gratuity to the vultures of the slave-market."[305]

2. Capitalism's Reliance on Enslaved Women's Reproductive Capacity

The Dellams' harrowing story is representative of the Antebellum era, when Southern states reinforced slavery and states that outlawed slavery within their borders remained conspirators in the project of slavery by capturing and returning escaped "fugitive" slaves to slaveowners, the "persons . . . to whom such service or labor [was] due."[306] Black women's reproductive capacities made them more profitable to slavery, and therefore, Southern states, slaveowners, and "slave-catchers" or "bounty hunters" were incentivized to surveil Black women across state lines, especially when their reproductive capacities were involved, to uphold this lucrative business model.[307]

The importance of Black women's reproductive capacity to the enterprise of slavery is evidenced by the "numerous judicial cases across slaveholding states that reveal how invested owners were in the reproductive health of black mothers and their unborn children" including "in murder trials that involved pregnant enslaved women as defendants" where "execution dates were halted until their children were born."[308] Michele Goodwin further explains how the system of

299. *The Slave Case Concluded—The Victims doomed and sent to their fate!*, *supra* note 3.
300. *The Fugitive Slave Case*, *supra* note 4.
301. *The Slave Case Concluded—The Victims doomed and sent to their fate!*, *supra* note 3.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* (emphasis omitted).
306. The Fugitive Slave Law §§ 6, 10 (1850).
307. *See* Nnennaya Amuchie, *The Forgotten Victims*, 14 SEATTLE J. FOR SOC. JUST. 617, 639 (2016) ("Regulating Black women's bodies and treating Black women as breeding animals . . . proved profitable for White men; by doing so, they increased the number of new slaves Black women produced. The more slaves, the more free labor.").
308. DEIRDRE COOPER OWENS, MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 43 (U. Ga. Press 2017) (describing *State of Missouri v. Celia, a Slave*, in which a teenage

matriliny played a key role in slavery's capitalist model and the sexual violence and lack of reproductive autonomy enslaved women endured: "Was the offspring of a white man and an enslaved Black woman free or enslaved? Early American law answered this question with painful clarity: offspring would take the status of their enslaved mothers, which further tied capitalism to rape, embedding a horrific practice into the culture of southern economics."[309] And the financial devaluing of elderly enslaved women underscored how they were "deemed worthless in a society that prized black females for their presumed hypersexuality and reproductive abilities."[310]

The surveillance of Black women's movement across state lines, especially when it related to their reproductive capacity, coincided with racist stereotypes about Black women's reproductive health, sexuality, and motherhood. For example, Deirdre Cooper Owens uses the term "medical superbodies" to describe the stereotype that arose when white gynecologists—known as the founders of modern gynecology[311]—experimented with deadly surgical procedures on enslaved women.[312] In doing so, these doctors delegitimized the widespread, unobtrusive, and trusted Black midwifery practice, and peddled myths in medical journals that "enslaved women were impervious to pain," leading to "the black female body [being] . . . hypersexualized, masculinized, and endowed with brute strength because medical science validated these ideologies."[313] Modern researchers have shown that the myth that Black people do not experience the same pain as

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girl who had been repeatedly raped by her enslaver, Robert Newsome, and had borne two of his children and was pregnant with another, was convicted for killing Newsome but her execution was delayed until she gave birth).

309. Goodwin, *supra* note 35, at 1090 (describing how white women upheld the institution of slavery, but since historical narratives downplayed their involvement in this system of oppression, white women too ended up being viewed by courts and legislatures as incapable of independence and autonomy—ultimately inhibiting their own freedom from patriarchal structures as a result of denying their active participation as powerful business people during slavery) (emphasis omitted); *see also* Cynthia Prather, Taleria R. Fuller, William L. Jeffries, IV, Khiya J. Marshall, A. Vyann Howell, Angela Belyue-Umole, & Winifred King, *Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity*, 2.1 HEALTH EQUITY 249, 251 (2018) ("[C]hildbearing during slavery was often intrinsically related to an economic system that benefitted white slave owners more so than a matter of personal freedom . . . Women who were considered 'strong' were sold as breeders and routinely sexually assaulted to birth more children into slavery. Some enslaved females attempted to avoid being sexually exploited for these purposes and aborted their pregnancies as an act of resistance.").

310. OWENS, *supra* note 308, at 56 (explaining that "1 Negro Woman Called Rose" meant she was worth one dollar and was "an indication that she was probably aged or infertile").

311. *Id.* at 108–09 (discussing how Dr. James Marion Sims is known as the "Father of Gynecology" despite his published research being rooted in his abhorrent experimentation and operation on enslaved women).

312. *See id.* at 42–72.

313. *See id.* at 44; *see also* Amuchie, *supra* note 307, at 636 (providing an explanation of other stereotypes first ascribed to Black women during slavery, including the "hyper-sexualized, promiscuous, whore 'Jezebel'" and the "sassy, angry, hot-tempered 'Sapphire,'" and arguing that the stereotypes still exist today).

white people still persists today.[314] The National Black Women's Justice Institute aptly summed up that "Black women, trans and gender nonconforming people's experience of systemic sexual violence during slavery, in domestic servitude, in the workplace, and in our homes and communities has largely remained invisible, obscured and rationalized through deeply entrenched narratives framing Black women and girls as inherently sexually deviant, hypersexual, and inviolable."[315]

Furthermore, institutions and stereotypes that exist today to uphold the exclusion, discrimination, and surveillance of transgender people trace back to the sexual violence, heteronormativity, and eugenics arguments that upheld the capitalist structure of plantations during slavery and white supremacy in the Jim Crow South. A "central feature of slavery," was that "Black women were often forced to bear the children of the white men who claimed ownership over them and raped them," while Black men were prohibited from having sexual relationships with white women who "embodied morality through their sexual and racial purity."[316] As such, "heteronormativity outlawed interracial sexuality between white women and black men, and it assigned white women the responsibility of reproducing in monogamous marriages white heirs or more white masters."[317] Anything outside of the plantation's norms constituted sexual perversion and undermined its profits from slavery. Moreover, slavery allowed "whites—slaveholders and non-slave-holders—the full-fledged legal right and unchecked personal authority to exploit, consume, and destroy the slave's psyche and body in whatever ways they chose."[318] Thus, both the domination over Black men and women and the restrictions on white women, "increased the wealth of slave owners and solidified an enduring association of forbidden sexuality, sexual violence, and blackness."[319]

These rigid gender roles, defined by reference to race, persisted after emancipation through miscegenation laws. By prohibiting interracial relationships, miscegenation laws "proclaimed to protect 'white purity' as they subordinated people assigned to other racial classifications," to "legitimate the concept of whiteness by discouraging the births of children with ambiguous racial identities," and to "preserve generational wealth within white families."[320] However, while "the threat of lynching deterred Black men from pursuing sexual relationships with white women, lynch mobs rarely targeted white men," "white men [continued] to rape and sexually abuse Black women without concern that they

314. Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt, & M. Norman Oliver, *Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between blacks and whites*, PNAS (Apr. 4, 2016).

315. ANDREA J. RITCHIE, EXPANDING OUR FRAME: DEEPENING OUR DEMANDS FOR SAFETY AND HEALING FOR BLACK SURVIVORS OF SEXUAL VIOLENCE, NAT'L BLACK WOMEN'S JUST. INST. 1, 3 (2019), https://perma.cc/A6YF-HKS5.

316. Kathryn Schumaker, *"Unlawful Intimacy": Mixed-Race Families, Miscegenation Law, and the Legal Culture of Progressive Era Mississippi*, 41 L. & HISTORY REV. 773, 780–81 (2023).

317. Aliyyah I. Abdur-Rahman, *"The Strangest Freaks of Despotism": Queer Sexuality in Antebellum African American Slave Narratives*, 40 AFRICAN AMER. REV. 223, 226 (2006).

318. *Id*. at 229.

319. *Id*. at 226–27.

320. Schumaker, *supra* note 316, at 778.

would be prosecuted for either rape or fornication."[321] As a result, only "white men [could] choose their sexual, romantic, and domestic partners despite the state's prohibition on interracial marriage."[322]

It was essential to the profitability of slavery and the retention of wealth and power thereafter that the dominant white male class assert legal and physical control over Black women's fertility through matriliny practices, sexual violence, dangerous medical experimentation, and miscegenation laws. White men enforced a white supremacist hierarchy that prioritized white women's purity and labeled any sexual actions outside of this structure as "sexual deviancy." These core qualities of slavery parallel the justifications used today by those in power to control people's (largely women of color and poor women[323]) decisions about their reproductive capacities and minors' decisions about their bodies to uphold existing capitalist structures. Just one example is that some state legislators have justified bans on gender-affirming care by claiming that hormone treatments cause infertility, despite that the myth has been dispelled.[324] The Southern Poverty Law Center captured how the white supremacist and capitalist narratives rooted in slavery play out today to justify restrictionist legislation:

> The anti-abortion movement is inherently a white supremacist, male supremacist and classist political project. The movement believes women and all those who can become pregnant should be afforded fewer rights, furthering the far right's goals of severely curtailing – through law and cultural practices – the life paths, careers and identities available to women. That goes hand-in-hand with the movement's broader efforts to construct rigid and 'traditional' gender roles by criminalizing, demonizing and restricting the ways LGBTQ+ people can express themselves and build their families.[325]

3. The Rise of Modern-Day Reproductive Surveillance

The stereotypes about Black women that grew out of slavery have persisted since emancipation and have been used to justify modern day surveillance to keep Black women and other marginalized groups subordinated socially, politically, and economically.

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321. *Id*. at 781.

322. *Id*. at 784.

323. "More than 60% of those who seek abortions are people of color and about half live below the federal poverty line . . . And many people of color, including the majority of Black Americans, live in Southern states with some of the most restrictive abortion laws." Zara Abrams, *Abortion bans cause outsized harm for people of color*, 54 AMER. PSYCH. ASS'N 24, 24 (2023), https://perma.cc/E663-WPFF.

324. KATHERINE L. KRASCHEL, ALEXANDER CHEN, JACK L. TURBAN, & I. GLENN COHEN, LEGISLATION RESTRICTING GENDER-AFFIRMING CARE FOR TRANSGENDER YOUTH: POLITICS ECLIPSE HEALTHCARE, 3 CELL REPORTS MEDICINE 1, 3 (2022).

325. Southern Poverty Law Center, *Executive Summary: The Anti-Abortion Movement's Extremist Playbook* (June 13, 2024), https://perma.cc/XN89-6KVH.

In the early 1900s, Congress passed the Mann Act to police sex trafficking, allegedly to protect women from being transported in interstate or foreign commerce for "immoral purposes."[326] Congress delegated to the Federal Bureau of Investigations (FBI) the authority to enforce the Act, and consequently, the ability to determine what was "immoral" in terms of women's sexuality and which "bodies . . . deviated from respectability."[327] In its Mann Act investigations, the FBI "chos[e] some victims to protect, while ignoring" and criminalizing "other women seeking aid."[328] Jessica Pliley explains:

> The Bureau consistently advocated on behalf of women who . . . were white, young, and had reputations for being previously chaste. Sex workers who did not fit this narrow mold frequently found themselves subjected to state surveillance and punitive intervention. In the early twentieth-century, racialized conceptions of morality excluded nonwhite women from the category of the sexually virtuous. When African American women turned to the Bureau for help, they rarely received it.[329]

The implementation of the Mann Act demonstrates that the FBI both ignored the sexual violence that women of color encountered through human trafficking across state lines and country borders and, once again, repurposed earlier myths about Black women to surveil women of color in relation to their reproductive capacity and sexual autonomy. In other words, the FBI's discriminatory enforcement of the Mann Act was legitimized by the stereotypes that grew out of slavery about Black women as hypersexualized, sexually deviant, and impervious to pain.

LGBTQIA+ people were also placed in the sexually deviant category alongside Black women, particularly during the "Lavender Scare." In 1950, Senator Kenneth Wherry and Senator J. Lister Hill created a committee to weed out LGBTQIA+ people in the federal government.[330] Their investigation "culminated in a report titled *Employment of Homosexuals and Other Sex Perverts in Government*, estimating that there were more than 5,000 homosexuals employed by the federal government."[331] Thereafter, President Eisenhower signed an Executive Order banning LGBTQIA+ people from federal government employment, and it is estimated that 5,000 to 10,000 LGBTQIA+ federal employees were investigated, interrogated, and fired.[332]

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326. Mann Act, 18 U.S.C. § 2421 (1910).

327. JESSICA R. PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 1, 4 (Harv. U. Press 2014).

328. *Id.* at 5–6.

329. *Id.* at 5–6.

330. *The Lavender Scare*, ARCHIVES EXPERIENCE NEWSLETTER (Nat'l Archives Found., Washington, D.C.), June 30, 2023, https://perma.cc/EH9G-8F5L.

331. *Id.*

332. *A Proclamation on the 70th Anniversary of the Lavender Scare*, THE WHITE HOUSE (Apr. 26, 2023), https://perma.cc/RUD4-QJAP.

Fast forward to the War on Drugs during the latter part of the 20th century, the same myths, rooted in slavery, about Black women were still being deployed to justify the surveillance of their reproductive capacity across the country. *Ferguson v. City of Charleston* involved the Medical University of South Carolina in 1988 conspiring with local police to secretly target pregnant patients, who were mostly poor and Black women, to identify drug users and arrest them for the possession or distribution of drugs and child neglect—rather than provide them with substance abuse treatment.[333] At that time, "the problem of 'crack babies' was widely perceived . . . as a national epidemic, prompting considerable concern both in the medical community and among the general populace."[334] Accounts of women who tested positive for drug use and were subsequently arrested include those who sat pregnant in a jail cell waiting to give birth, those transported weekly between the jail and the hospital in handcuffs and leg irons, and those kept handcuffed to their bed during delivery.[335]

While the Court ultimately held that these nonconsensual suspicionless drug tests violated pregnant patients' Fourth Amendment right to be free from unreasonable searches, this case serves as an illustration of how racist caricatures about Black women's bodies as impervious to pain and the devaluing of their motherhood led to a broad swath of police, prosecutors, and medical professionals alike feeling justified in their targeting and surveillance of Black pregnant patients. Dorothy Roberts argues, they were "punish[ing] poor Black women for having babies"[336] and describes the blatant parallel to slavery: "The sight of a pregnant Black woman bound in shackles is a modern-day reincarnation of the horrors of slavemasters' degrading treatment of their female chattel."[337]

Today's state-sponsored and private tracking of reproductive and gender-affirming care seekers' online communication, search history, geolocation, period and fertility applications, and medical records is an outgrowth of—and legitimized by—persisting surveillance practices and stereotypes that were essential for the slaveholding class to profit off of slavery and keep Black women, in particular, enslaved. Black women and others who resisted the racial and gendered hierarchy during slavery and the periods that followed were deemed "sexually deviant," "hypersexual," and/or "impervious to pain" because these labels reinforced the norms that upheld white supremacy and, in turn, supported those in power and the major money-making enterprises of the time. Surveillance by state and private actors has long been utilized to enforce laws and social practices that prioritize profits and replace individual autonomy with government control, oversight, and decision-making over people's bodies and life choices (today abortions

333. Ferguson v. City of Charleston, 532 U.S. 67, 71–73 (2001).

334. *Id.* at 70 n.1.

335. Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 943 (1997) (internal citation omitted).

336. *Id.* at 939 (citing Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1445–50 (1991)).

337. Roberts, *Unshackling Black Motherhood*, *supra* note 335, at 944.

and gender-affirming care). Now, the businesses served by interstate surveillance of marginalized populations are not slaveowners, but rather, data brokers and other technology companies that make this data collection not only possible but profitable, and the private "bounty hunters" incentivized by thousands of dollars in rewards to bring civil suits.

This brief—and by no means comprehensive—historical recounting of interstate surveillance arising out of slavery is intended to provide a *starting* place for understanding the present-day surveillance of menstruating, pregnant, and transgender people as a "badge" of slavery.

C. THE THIRTEENTH AMENDMENT FILLS IN THE GAPS LEFT BY OTHER PROPOSALS

The Thirteenth Amendment offers a viable constitutional challenge to the extraterritorial surveillance of reproductive and gender-affirming care, which can circumvent the limitations of other approaches detailed in Part II.

First, it fills the gaps left by safe haven states' shield laws. Because the Thirteenth Amendment is a federal prohibition, it does not fall prey to the interstate disputes under the Full Faith and Credit Clause that state shield laws do.[338] It also does not force legislatures to prospectively choose specific statutory definitions of "abortion," "gender-affirming," or "reproductive" care that can leave other data vulnerable to algorithmic inferences. And, practically, it offers a nationwide solution that does not contribute to the chilling effects of a confusing web of restrictions and protections.

Second, the Thirteenth Amendment challenge avoids reliance on the Republican-controlled Congress and Executive Branch to pass legislation or promulgate regulations respectively. Instead, this constitutional litigation theory can be one argument that lawyers assert as a defense in civil cases or criminal prosecutions or can be used as an affirmative basis for a suit seeking injunctive and declaratory relief against state or local enforcement efforts.

It should be noted that a suit against a state would raise Eleventh Amendment sovereign immunity questions. However, it could be argued that states waived their sovereign immunity in relation to Thirteenth Amendment suits because the prohibition against slavery is so absolute that it is "complete in itself" and thus states "consented" to suit under that provision when they ratified the Amendment.[339] A second option is to sue state *officials* who are tasked with enforcement in their official capacity because they usually[340] cannot claim sovereign immunity as a defense nor can they claim qualified immunity as a defense since it is only available for personal capacity suits.[341] A third avenue is to sue municipal governments arms

338. *See* Brown, *supra* note 141, at 882 ("Federal law intervened in state disagreements over fugitive slave policy, as it did on recognition of same-sex marriages.").

339. PennEast Pipeline Co., LLC v. New Jersey, 594 U.S. 482, 508 (2021).

340. *See* Lewis v. Clarke, 581 U.S. 155, No. 15–1500, slip op. 5–6 (2017).

341. *See* 42 U.S.C. § 1983; Ex parte Young, 209 U.S. 123, 167–68 (1908) (providing the basis to sue an individual officer for prospective relief to correct an ongoing violation of federal law).

because they do not enjoy Eleventh Amendment sovereign immunity.[342] This route would make way for a suit that challenges local law enforcement surveillance or restrictive municipal ordinances.

Third, plaintiffs bringing a Thirteenth Amendment challenge rather than a statutory challenge have a slightly easier Article III standing argument. To have standing to sue in federal court, one of the requirements is that a plaintiff has suffered an injury-in-fact.[343] The Court has defined injury-in-fact to require more than "a bare procedural violation" when a plaintiff asserts a statutory violation—instead, the statutory violation must be asserted along with a concrete injury.[344] In statutory claims involving the infringement of a plaintiff's privacy due to the unlawful collection, storage, or disclosure of sensitive information, the Court has declined to recognize the *risk* of certain privacy harms as constituting a concrete injury.[345] Meanwhile, many privacy laws do not provide a private right of action, and therefore, do not even allow harmed individuals to seek redress and an opportunity to be heard.[346] On the whole, a constitutional violation asserted by a plaintiff or class of plaintiffs under the Thirteenth Amendment can reach the merits of the claim in federal court, rather than being dismissed for lack of standing as statute-based privacy cases often are.

Fourth, and most importantly, the Thirteenth Amendment stands apart from other constitutional challenges because it holds private actors[347]—in addition to government actors—liable through its blanket prohibition against slavery and

342. *See* Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

343. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (holding that the three requirements of standing are that the plaintiff suffered an injury-in-fact, the injury is fairly traceable to the challenged conduct of the defendant, and the injury is likely to be redressed by a favorable judicial decision).

344. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

345. TransUnion LLC v. Ramirez, 594 U.S. 413, 437–39 (2021) (holding that when a credit reporting agency incorrectly labeled thousands of people in a database as being on a terrorist watch list, those plaintiffs did not suffer a concrete harm because that incorrect information had not yet been disclosed to other parties and therefore the risk of harm was not sufficiently imminent to constitute standing); *see generally* Erwin Chemerinsky, *What's Standing After* Transunion LLC v. Ramirez, 96 N. Y.U. L. REV. ONLINE 269, 270–72 (2021) (arguing that *Transunion's* new test for standing—that "standing is permitted under a federal law only if the right protected is one for which there is 'a close historical or common-law analogue'"—is wrong because it limits "the ability of Congress to create rights that are the basis for standing").

346. *See generally* Lauren Henry Scholz, *Private Rights of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639, 1644–45 (2022) (advocating for the inclusion of private rights of action in privacy laws because they "marshal[] resources of the private sector to fund and provide information in dealing with" complicated privacy issues and "have expressive value that cannot be achieved through public regulation").

347. *See, e.g.*, Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 215 (2009) (arguing that inmates in private prisons have a Thirteenth Amendment claim against privately owned and operated prison facilities); Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397, 398 (1999) (arguing that sweatshop laborers, many undocumented immigrants, have a Thirteenth Amendment claim against entities that operate sweatshops).

involuntary servitude. It states that "[n]either slavery nor involuntary servitude . . . shall exist."[348] This language excludes a "state action" requirement, which in other provisions, is worded as "[n]o state shall."[349] The Thirteenth Amendment's language also implies that it is self-executing—that no legislation must be enacted to give it effect and that it provides a private right of action for lay people to bring suits against violators.[350] In the context of surveillance technologies used by restrictionist states to track the interstate movements of people seeking reproductive care in other states, the fact that the Amendment provides a private right of action and holds private and public actors liable, enables a menstruating, pregnant, or transgender person who plans to seek or has already sought care in another state to sue their restrictionist state, data brokers, or "bounty hunters" for tracking them in violation of the Thirteenth Amendment.

CONCLUSION

> "*I'm comin' home*
> *We've come a long way from the rough ride*
> *From the railroads to the rodeos,*
> *Sweet country home*."[351]

The badges of slavery are represented in today's surveillance of menstruating, pregnant, and transgender people who cross state lines to obtain reproductive and gender-affirming care. During chattel slavery, the master class utilized lit candles, ships' passenger ledgers, branding, written slave passes and slave patrols, wanted posters and rewards for runaways, among other surveillance mechanisms, to prevent enslaved people from escaping and to track them down once they did escape. In particular, this relentless watching and control targeted enslaved women because they were the most profitable to the capitalist model of slavery due to their reproductive capacity. The surveillance practices and the racist and sexist tropes that justified those practices during slavery persist in the modern era to uphold race, gender, and class hierarchies and to profit the information economy. This manifests in restrictionist states and private entities harnessing public and private collection of data from online communications, search history,

348. U.S. Const. amend. XIII, §1.

349. *E.g.*, U.S. CONST. amend. XIV, §1 (requiring state action); *see generally* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. R. 1367 (2008) (examining the Thirteenth Amendment's coverage of private action).

350. The former Dean of the University of Pittsburgh School of Law, William Carter, Jr., compellingly clarified the Court's precedent with respect to the Thirteenth Amendment's self-executing nature. Dean Carter explained that in *Memphis v. Greene*, the Court stated that "Congress's power to eliminate the badges and incidents of slavery is 'not inconsistent with the view that the Amendment has self-executing force,' that is, it may provide a direct private cause of action." Carter, *supra* note 272, at 32 n.61 (citing Memphis v. Greene, 451 U.S. 100, 125 (1981)).

351. BEYONCÉ & SHABOOZEY, *SWEET X HONEY X BUCKIIN'*, *on* COWBOY CARTER (Parkwood Entertainment, Capitol Records 2024).

geolocation, period and fertility applications, and patient health data to enforce their abortion and gender-affirming care bans extraterritorially.

Amid the backdrop of battles between restrictionist and safe haven states and inadequate or impractical federal proposals, the Thirteenth Amendment provides a viable, alternative strategy for protecting people from surveillance when they seek care in places where it is legal.

While restrictionist state laws are only in the beginning stages of enforcement, the urgency of dismantling extraterritorial health care surveillance should not be understated. Every day that these enforcement efforts are allowed to continue, they chill medical professionals from providing necessary care out of concern for violating restrictionist states' statutes[352] and discourage people from obtaining life-saving care in other states where such care is legal due to the fear of prosecution or civil liability for themselves and their allies.[353] The numbers are clear: more pregnant people and infants die when abortion is banned or severely restricted,[354] and more transgender youth suffer from depression and suicidality when gender-affirming medical interventions are not available.[355] Morally, it is time to break with America's tradition of imposing interstate surveillance on people's most intimate bodily choices in order to maintain profits and power. Practically, it is necessary to foster new litigation strategies, such as challenges to the *enforcement* of restrictionist laws and the deployment of underutilized constitutional provisions, like the Thirteenth Amendment, to ensure the accessibility of life-saving care for everyone.

352. *See* HUMAN RIGHTS WATCH, *supra* note 252, at 7 ("Medical professionals report that the restrictive legal landscape means that they are generally unsure whether and when medically necessary, and even lifesaving, abortions are legal. They note that such uncertainty causes both healthcare providers and institutions to delay or deny abortion and other reproductive healthcare.").

353. *Id*. at 14 ("New abortion bans and criminalization can be expected to instill fear in pregnant patients and create confusion over potential criminal liability, further reducing access to healthcare for vulnerable populations while increasing punitive surveillance of marginalized women. Pregnant people — even those who wish to continue their pregnancies — may forgo prenatal care to which they are entitled altogether to avoid falling under surveillance.").

354. Declercq, Barnard-Mayers, Zephyrin, & Johnson, *supra* note 49.

355. Tordoff, Wanta, Collin, Stepney, Inwards-Breland, & Ahrens, *supra* note 49.