The Fight for Reproductive Rights: An Analysis of State Attorneys General Tools – SAW Paper

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The Legal & Political Importance of State Attorneys General

Introduction

Reproductive rights—which include the right to a safe and legal abortion; contraception; autonomy over when and how to have children; and adequate care for those seeking to have children—have been the subject of intense political debate.[1] There is a spectrum of belief on these rights, however, the public overwhelmingly supports access to contraception—around 90 percent of Americans believe condoms and birth control pills should be legal in all or most cases—and abortion—61 percent believe abortion should be legal in all or most cases.[2] Despite this support, there has been a wave of restrictions severely limiting or banning legal and safe abortions in states and cities across the United States.[3] The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[4]—where the plaintiff was represented by the Mississippi Attorney General—overturned *Roe v. Wade*[5] and *Planned Parenthood v. Casey*,[6] thereby eliminating constitutional protections for abortion and opening the door to states to make their own policies absent federal law. However, the roll-back of rights has already been going on for decades. Opponents of reproductive rights have been fighting (and succeeding) to restrict

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[1] Stacy Weiner, *Abortion in America: From Roe to Dobbs and beyond*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES (Sept. 21, 2023), https://www.aamc.org/news/abortion-america-roe-dobbs-and-beyond; Pew Research Center, *America's Abortion Quandry*, PEW RSCH. CTR. (May 5, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/; Sarita Gupta & Silvia Henriquez, *In the wake of Roe, a resurgent fight for reproductive justice*, FORD FOUNDATION (Jan. 19, 2023), https://www.fordfoundation.org/news-and-stories/stories/in-the-wake-of-roe-a-resurgent-fight-for-reproductive-justice/; Michael Wear, *The Abortion Debate Is No Longer About Policy*, THE ATLANTIC (May 28, 2019), https://www.theatlantic.com/ideas/archive/2019/05/abortion-debate-no-longer-about-policy/590323/.

[2] Geoffrey Skelley & Holly Fuong, *How Americans Feel About Abortion And Contraception*, FIVETHIRTYEIGHT (July 12, 2022), https://fivethirtyeight.com/features/abortion-birth-control-poll/; Pew Research Center, *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/.

[3] Annalies Winny, *Abortion Restrictions and the Threat to Women's Health*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (May 19, 2023), https://publichealth.jhu.edu/2023/a-year-without-roe.

[4] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).

[5] Roe v. Wade, 410 U.S. 113 (1973).

[6] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

reproductive rights beyond abortion including everything from contraceptive access to robust maternal healthcare to banning comprehensive sexual education in schools.[7] This paper discusses the legal developments and the rollback of federal protections for these rights in more depth in the history section of this introduction.

While the public greatly supports these rights, elected officials, including State Attorneys General (AGs), are split along party lines. The Democratic Attorneys General Association (DAGA) requires support of abortion rights as a precondition of endorsement.[8] While the Republican Attorneys General Association (RAGA) staunchly supports limiting reproductive rights, writing in a June 2022 fundraising email, "every donation will help Republican Attorneys General combat the Democrats' pro-abortion agenda and stand tall for life."[9] Due to the hyperpartisanship around this issue, Democratic Attorneys General are the AGs who support reproductive rights. This paper specifically addresses the powers and strategies that pro-reproductive rights AGs can use to protect these rights. As a shorthand, this paper will reference AGs who favor protecting reproductive rights as pro-AGs and those that oppose reproductive rights as anti-AGs.

This paper provides a robust overview of the legal tools available to state attorneys general to protect reproductive rights. In examining each potential power, this paper also analyzes whether the tool itself has led to more restriction or expansion of these rights. In other words: would reproductive rights and legal protections be reduced or expanded in the absence of

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[7] Winny, *supra* note 3.

[8] Democratic Attorneys General Association (DAGA) issued a statement in 2019 that support of reproductive rights was a precondition to receive the organization's endorsement. Democratic Attorneys General Association, *Democratic Attorneys General Association Announces Reproductive Rights Protection Requirement for Candidate Endorsements*, DAGA (Nov. 18, 2019), https://dems.ag/daga-choice-announcement-2019/.

[9] Judd Legum, *The hypocrisy of abortion as a corporate perk*, POPULAR INFORMATION (June 27, 2022), https://popular.info/p/the-hypocrisy-of-abortion-as-a-corporate.

the legal tool? Ultimately, this paper hopes to do two things: (1) present a roadmap for pro-AGs hoping to maximally protect reproductive rights in their state and beyond; and (2) assess the legal tools of AGs as expansive or regressive when it comes to reproductive rights. The second goal, of course, is greatly influenced by the legal philosophies and postures of state and federal judges; this analysis is done under the current situation where the federal judiciary (including the U.S. Supreme Court) leans conservative and anti-reproductive rights.

The introduction first provides a background of the history of reproductive rights in the United States. This section is divided into three subsections which generally track major eras of legal regulation of reproductive rights: (1) Pre-*Roe*—the Early Republic to 1973; (2) From *Roe* to *Dobbs*—1973 to 2022; (3) *Dobbs* and Beyond. After the introduction, this paper examines seven tools available to AGs. Part I examines nationwide injunctions, discusses the critiques against and arguments for the availability of this legal tool, discusses uses of these powers in the context of reproductive rights, and finally, offers an assessment of nationwide injunctions as a mechanism which expands or contracts reproductive rights. Part II examines the consumer protection powers of AGs, applies these powers to two major areas where pro-AGs can protect reproductive rights, and assesses this power as regressive or expansive. Part III discusses the antitrust power of AGs, lays out a roadmap how this power can be used to preserve reproductive rights by looking at past applications, and finally, determines if the tool is used to expand or contract these rights. Part IV applies the analysis to the charitable trust doctrine, examines prior applications of the power to protect reproductive rights, gives recommendations to pro-AGs on how to wield the power most effectively, and assess the effect of this power on reproductive rights. Part V looks at the Duty to Defend and constitutional nondefense,[10] assesses the power in

[10] "Duty to Defend" is a term that refers to an attorney general's obligation to defend the legality of their state's laws in court when challenged. Constitutional non-defense is a counterargument to this duty which

the context of reproductive rights, offers recommendations to pro-AGs, and offers an assessment of the expansive versus regressive nature of the power. Part VI examines AGs powers within the context of state and local law conflicts, analyzes current situations implicating reproductive rights, gives recommendations to pro-AGs on how to most effectively wield this power, and finally, assesses the tool as one helpful or harmful to the fight for reproductive rights. Part VII discusses the political power of many AGs to draft ballot initiative language, gives pro-AGs recommendations based on past initiatives and polling data, and lastly, assesses this tool as protective or harmful to reproductive rights. Part VIII discusses the bully pulpit power. Finally, this paper offers conclusions on the role and power of pro-AGs in the fight for reproductive rights.

History of Reproductive Rights

1. Pre-Roe - Early Republic to 1973

The United States has a long history of regulating reproductive rights. In the Early Republic, prior to the 1820s, abortions were generally allowed and routinely performed by midwives. Common law allowed abortions prior to "quickening"—the point where the fetus can move. In the mid-1800s, many states began to criminalize abortion and in 1873, the U.S. Congress passed the Comstock Act which made selling or distributing contraception across state lines a federal crime.[11] In the early 1900s, birth control became more widespread and accessible with the rise of the First Wave of Feminism and greater activism around women's autonomy in both being able to have political autonomy through the vote and being able to control their

posits that when an AG believes the law is in conflict with the state or federal constitutions, they do not have a duty to defend the law. Where there is a legitimate conflict in the AG's judgement, they are entitled to decline to defend the law.

[11] Lesley Kennedy, *Reproductive Rights in the US: Timeline*, HISTORY.COM (July 13, 2023), https://www.history.com/news/reproductive-rights-timeline.

bodies and their reproductive choices.[12] The Comstock law was also limited in its scope by the Second Circuit which allowed physicians to distribute contraceptives.[13]

By the 1960s, reproductive rights were greatly expanded with patients having greater access than any time before. In 1960, the FDA approved oral contraception marking a huge advance in access and care. The Supreme Court in *Griswold v. Connecticut* (1965) affirmed the right for a married couple to use contraception striking down Connecticut's ban on the care and affirming the privacy rights of the couple.[14] The Supreme Court extended the right to contraception to unmarried couples in *Eisenstadt v. Baird* (1972) on equal protection grounds reasoning that if married couples had a right to contraception, so too did unmarried ones and single people.[15]

At this time, Second Wave Feminism is growing and making strides in protecting reproductive freedom. In 1970, four states legalized abortion—Alaska, Hawaii, New York, and Washington. New York allowed all patients to receive care, without a residency requirement, and estimated nearly 400,000 patients received abortion care in the first two years of legalization. There was still widespread criminalization, however, when, in 1966, California attempted to prosecute nine doctors for performing abortions on women who had Rubella and a high chance of complications, there was intense protests and support for the doctors from the medical community.[16] The prosecutors eventually dropped the case.

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[12] Grace Davis, *History of Feminism*, PRINCETON GENDER AND SEXUALITY RES. CTR. (last visited Nov. 27, 2023), https://www.gsrc.princeton.edu/history-of-feminism.
[13] United States v. One Package, 86 F.2d 737 (2d Cir. 1936).
[14] Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[15] Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).
[16] Carole Joffe, *30 YEARS AFTER ROE VS. WADE / The San Francisco 9 -- an abortion milestone*, SFGATE (Jan. 22, 2003), https://www.sfgate.com/opinion/openforum/article/30-YEARS-AFTER-ROE-VS-WADE-The-San-Francisco-9-2678014.php.

2. From Roe to Dobbs - 1973 to 2022

In 1973, the Supreme Court heard *Roe v. Wade* and held there is a constitutionally protected right to abortion. The ruling used the three trimester structure to determine how states could regulate abortion. In the first trimester, the right to abortion was unrestricted. In the second trimester, the state could not ban abortion, but could implement some restrictions for the patient's health. In the third trimester, the state is free to regulate or ban abortion, except where it is medically necessary for the health of the pregnant person.

Roe brought about a huge increase in reproductive rights with legal abortion available in all fifty-states. However, the success was not without its critics. *Roe* has been highly criticized by those who were pro- and anti-abortion. People in favor of reproductive rights, like Justice Ruth Bader Ginsberg, have argued that the right to abortion would have been better protected through gradual change which centered on women's rights instead of the physician and the right to privacy.[17] Those against abortion argued that the Supreme Court legalized what they believed to be murder.[18]

The decision brought about a growth in the Conservative movement including organizations dedicated to reversing *Roe* and limiting access to reproductive care. The Conservative legal movement, including organizations like the Federalist Society, grew largely out of their response to *Roe* led by many on the religious right.[19] These organizations aimed to enforce a theocratic outlook on the world by growing their influence in the judiciary and

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[17] Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, THE UNIV. OF CHICAGO THE L. SCH. (May 15, 2023), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.

[18] *A Stunning Approval for Abortion*, TIME, Feb. 5, 1973, at 50, https://time.com/vault/issue/1973-02-05/page/64/.

[19] Ilyse Hogue, *A "WOODSTOCK" FOR RIGHT-WING LEGAL ACTIVISTS KICKED OFF THE 40-YEAR PLOT TO UNDO ROE V. WADE*, THE INTERCEPT (May 10, 2022, 1:45 PM), https://theintercept.com/2022/05/10/roe-v-wade-federalist-society-religious-right/.

government.[20] The Federalist Society is credited by many for the current conservatism of the federal judiciary.[21]

In the decades following *Roe*, state and federal lawmakers began to roll these rights back by limiting access and increasing barriers. In 1977, the first amendment prohibiting federal Medicaid dollars to be used for abortion procedures, called the Hyde Amendment, was passed in Congress.[22] The Amendment seriously restricted abortion access for low-income individuals. In 1984, the federal government, through an executive order by President Reagan, prohibited any organization that received foreign aid family planning dollars from performing or discussing abortion as a viable medical option.[23]

In 1992, one of the most significant changes to abortion rights and the regulatory landscape reached the Supreme Court. In *Planned Parenthood v. Casey,* the Court drastically changed the legal constitutional protections afforded to abortion. *Casey* created a new standard to draw regulatory ability around fetal viability where abortion could be entirely banned after viability and regulated prior as long as the regulation was not an "undue burden" which would place a ""substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[24]

Under this new standard, states began to place even more burdens on patients seeking abortion—like regulating hallway size, doctor hours, requiring admitting privileges of doctors,

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[20] *Id.*
[21] *Id.*
[22] ACLU, *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion,* ACLU (Dec. 1, 1994), https://www.aclu.org/documents/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion#:~:text=Wade%20was%20decided%2C%20Congress%20passed,carrying%20the%20pregnancy%20to%20term.
[23] KFF, *The Mexico City Policy: An Explainer*, KFF (Jan. 28, 2021), https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/. This rule is one of the most partisan, having been rescinded and reinstated along party lines since its inception.
[24] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

limiting the timeline for certain procedures, requiring invasive exams before allowing the procedure, and more—and the judiciary continued to rule on these restrictions. A study from the Guttmacher Institute found that from 1973 to 2015, states enacted more than 1,000 laws restricting access to abortion.[25] Over 250 of these laws were enacted from 2010 to 2015. In another study, the institute found 108 abortion restrictions enacted in 2021 alone.[26]

During this period, the Conservative legal movement worked to restrict access to reproductive rights in numerous other ways as well. In 2007, the Supreme Court reversed a prior ruling from 2000 which struck down a Nebraska law banning partial birth abortions without an exception for the life of the patient; the new ruling allowed a complete ban passed by Congress which had an exception for life but not for the health of the patient to go forward.[27] In *Burwell v. Hobby Lobby*, the Supreme Court ruled that closely held private companies do not have an obligation to provide birth control coverage under the Patient Protection and Affordable Care Act's mandate to provide preventative care which the HHS determined included contraception if they have a sincerely held religious belief against the practice.[28]

3. ***Dobbs* and Beyond**

The *Dobbs* decision marked the most significant change in the reproductive rights landscape since *Roe*. The 6-3 decision authored by Justice Samuel Alito overruled *Roe* and

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[25] Guttmacher Institute, *Last Five Years Account for More Than One-quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INSTITUTE (Jan. 13, 2016), https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe.

[26] Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INSTITUTE (Dec. 16, 2021), https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century.

[27] Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES (Apr. 19, 2007), https://www.nytimes.com/2007/04/19/washington/19scotus.html; *see generally* Gonzales v. Carhart, 550 U.S. 124 (2007).

[28] Planned Parenthood Action Fund, *Burwell v. Hobby Lobby and Birth Control*, PPAF (last visited Nov. 27, 2023), https://www.plannedparenthoodaction.org/issues/birth-control/burwell-v-hobby-lobby#:~:text=The%20Court%20ruled%20against%20birth,ruling%20set%20a%20new%20precedent.

Casey and held the Constitution does not protect the right to abortion. The opinion reasoned that at the time the Constitution was written, there was no protection for abortion and many states criminalized it, therefore, the founders could not have intended the right to come from the right to privacy. Further, the framers did not intend to include a right to abortion within the Due Process Clause or the Fourteenth Amendment. In the decision, Alito routinely places abortion as a state political question, writing: "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[29] He concluded the opinion with "We now overrule [*Roe* and *Casey*] and return that authority [to regulate abortion] back to the people and their elected representatives."[30] In discussing the political power of women, he said that the decision, "allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."

In Alito's framing of the issue, it seems to suggest that abortion should be a political, not a legal one. Since *Dobbs* was issued, many states have passed or made more restrictive their bans on abortion. In the year after the decision, twenty-five states banned abortion prior to viability with fourteen instituting bans at conception.[31] There have also been a number of other exacting restrictions making access more difficult. Some states have even taken efforts to prevent residents from seeking abortion in places where it remains legal by punishing anyone who

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[29] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).
[30] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).
[31] Andrew Beck, *Idaho Attorney General Prohibits Out-of-State Referrals for Abortion; Health Care Providers Sue*, ACLU OF IDAHO (Apr. 5, 2023), https://www.aclu.org/press-releases/idaho-attorney-general-prohibits-out-of-state-referrals-for-abortion-health-care-providers-sue; Rebecca Goldman, *Abortion Rights and Access One Year After* Dobbs, LEAGUE OF WOMEN VOTERS (Aug. 2, 2023), https://www.lwv.org/blog/abortion-rights-and-access-one-year-after-dobbs#:~:text=Abortion%20Bans%20Pre%2D%20and%20Post%2DDobbs&text=As%20of%20June%202023%2C%20one,at%2020%2D22%20weeks%20LMP.

assists.[32] This raises important questions that will make its way back to the Supreme Court. While Alito may claim abortion is purely a political issue, when it involves such personal and important decisions of half the population, there are serious rights implicated and thus, legal battles to be fought.

Despite the wave of rollbacks, there has also been intense political activism to strengthen abortion rights. Since *Dobbs*, seven states have voted to amend their state constitutions to include a constitutional right to abortion and others are slated to vote on protections for 2024.[33] Many state officials have run on this issue including judges.[34] Abortion will remain an important and salient political issue for years to come and AGs will no doubt play an important role in protecting rights in their states.

I. Nationwide Injunctions

As Congress appears more unable to pass federal legislation year after year, many AGs turn to the federal courts to enact their preferred federal policy, including but not limited to on reproductive rights. In the past two decades, there has been a growing trend where AGs across the political spectrum turn to federal courts to enact "nationwide injunctions" to halt a particular federal law or practice while the litigation proceeds through the federal courts.[35] These

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[32] Brendan Pierson, *Abortion providers sue Alabama to block prosecution over out-of-state travel*, REUTERS (July 31, 2023), https://www.reuters.com/legal/abortion-providers-sue-alabama-block-prosecution-over-out-of-state-travel-2023-07-31/.

[33] Julie Carr Smyth, *Ohio voters enshrine abortion access in constitution in latest statewide win for reproductive rights*, AP (Nov. 7, 2023), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270; Adam Edelman, *Abortion rights groups seek ballot measures in 9 more states in 2024*, NBC NEWS (Nov. 22, 2023), https://www.nbcnews.com/politics/2024-election/abortion-rights-groups-seek-ballot-measures-9-states-2024-rcna125177.

[34] Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. TIMES (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/us/politics/wisconsin-supreme-court-protasiewicz.html; Marc Levy, *Democrat Dan McCaffery wins open seat on Pennsylvania Supreme Court*, AP (Nov. 7, 2023), https://apnews.com/article/pennsylvania-election-state-supreme-court-5303f2c0d2145c3c0d162e565cfda7b7.

[35] Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 Ariz. St. L.J. 359, 363–64 (2022).

injunctions are most often granted at the preliminary stage and have been used in a number of high profile and deeply contentious political issues, including President Obama's expansion of the DACA (Deferred Action for Childhood Arrivals) program to the children's parents; President Trump's Travel Ban; vaccine mandates; climate change; and more.[36]

These injunctions, issued by a district court, prevent a governmental body from enforcing legislation on any person and is not limited to the parties requesting the injunction in the particular case.[37] Each federal district court is equally empowered to issue nationwide injunctions.[38] The preliminary injunction issued by the district court must meet four factors: (1) substantial success on the merits; (2) substantial threat of irreparable harm if the injunction is not issued; (3) the threatened injunction outweighs the harm done if the injunction is granted; and (4) the injunction is in the public interest.[39] However, in some circuits like the Ninth Circuit the last two factors can serve more as elements where if one is particularly strong, the other may be weaker and the overall test is still satisfied.[40] The standard of "likelihood of success" on the merits gives leeway to courts and critics argue is detrimental.[41] The injunction remains in place unless stayed by a higher court or until there is a final ruling on the merits.[42] These injunctions

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[36] *Id*.
[37] Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 Lewis & Clark L. Rev. 335, 338 (2018).
[38] *See* Dishman, *supra* note 35, at 360. *See also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (observing that "the scope of injunctive relief is dictated by the extent of the violation established," and not by geography).
[39] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
[40] All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) ("[A] stronger showing of one element may offset a weaker showing of another.")
[41] In his concurrence in *Trump v. Hawaii*, Justice Clarence Thomas argued against nationwide injunctions saying they "are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts." Trump v. Hawaii, 138 S. Ct. 2392, 2425, 201 L. Ed. 2d 775 (2018) (Thomas, J. concurring).
[42] Katherine B. Wheeler, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 204 (2017).

often remain in place for while the case pends through a years-long litigation process. Recent trends show that it is typical that the party who does not control the presidency will be much more likely to seek nationwide injunctions challenging federal law.[43] State attorneys general hold a special role and wield particular power when it comes to obtaining nationwide injunctions from federal judges.

States have two advantages when it comes to obtaining nationwide injunctions: (1) they are more likely to have successful standing arguments levied against the federal government due to the "special solicitude" doctrine;[44] and (2) states have broader discretion in choosing where to file, allowing AGs to handpick the court (and in many cases the judge) to hear the case.[45] First, states are advantaged through more lenient standing requirements. The state standing doctrine emerged in *Massachusetts v. EPA*. The Supreme Court laid out this doctrine, noting that states "are not normal litigants for the purposes of invoking federal jurisdiction" because of their rights as sovereigns.[46] In order to have standing, the party bringing the suit "must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that

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[43] *See* Dishman, *supra* note 35, at 363–65.

[44] Massachusetts v. EPA, 549 U.S. 497, 518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (holding the state had a right to challenge EPA regulations under their power as sovereigns). *But see* United States v. Texas, 599 U.S. 670, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (holding Texas and Louisiana had no standing to sue the Biden administration for a policy to decline to deport undocumented immigrants except those that posed a threat to national security, public safety, or border security as the controversy is not one the courts typically have the ability to resolve as it is an executive branch policy creating a political question).

[45] Adam Liptak, *Texas' One-Stop Shopping for Judge in Health Care Case*, N.Y. TIMES (Dec. 24, 2018), https://www.nytimes.com/2018/12/24/us/politics/texas-judge-obamacare.html; Nate Raymond, *US judicial panel to examine 'judge shopping' reforms*, REUTERS (Oct. 18, 2023), https://www.reuters.com/legal/government/us-judicial-panel-examine-judge-shopping-reforms-2023-10-17/. While the ability to select the court, and even judge, is a strong strategic advantage for litigants, this is also one of the major critiques leveled against this power. This critique is discussed in more depth in Part I.A.2.

[46] *Massachusetts*, 549 U.S. at 518.

injury."[47] A state is more readily able to meet this standard, particularly when it comes to tracing the federal government's actions encroaching on the state's role as a sovereign over its citizens. Second, states are advantaged through forum shopping. Because district courts can set their own rules for case assignment, many districts assign cases to the sole judge assigned to a division (a sub-division of the court's territory). This allows AGs to select the judge to hear a case, something Texas AG Ken Paxton has done nearly 32 times when suing the Biden Administration according to a Justice Department official.[48]

By overturning *Roe* and *Casey*, the Supreme Court in *Dobbs* threw the issue of abortion back to the states. While the Court's intent[49] was to remove itself from the abortion debate, the federal judiciary has become increasingly involved with controversies emerging on travel for abortion and states right to out of state health information. Further, various states have passed laws to enforce restrictions through the judiciary, like Texas's Bounty Law which allows private citizens to sue individuals who assist someone in obtaining an abortion and forces those who assist to pay up to $10,000.[50] While some legal commentators expected *Dobbs* to reduce the federal judiciary's role in the abortion debate, time has shown the role of judges has only grown.

This Part analyzes nationwide injunctions as an AG tool in protecting reproductive rights. First, subsection A lays out the major arguments for and against nationwide injunctions from the lens of legal standing and the proper role of the court as a co-equal branch. Second, subsection B

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[47] *Id.* at 518 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 581, 112 S.Ct. 2130, 119 L.Ed.2d 351).
[48] Liptak, *supra* note 45; Raymond, *supra* note 45.
[49] The Court's intent is taken from its own statement in *Dobbs*, however, it can be argued that some justices, instead wanted greater judiciary control over the issue. For a more in-depth discussion of this argument, see Kimberly Wehle, *The Supreme Court Just Keeps Deciding It Should Be Even More Powerful*, THE ATLANTIC (Mar. 13, 2023), https://www.theatlantic.com/ideas/archive/2023/03/supreme-court-decisions-conservative-justices-dobbs/673347/.
[50] Emma Bowman, *As states ban abortion, the Texas bounty lar offers a way to survive legal challenges*, NPR (July 11, 2022), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law.

examines the use of nationwide injunctions in the context of reproductive rights and explores cases brought under the Obama, Trump, and Biden administrations. Lastly, subsection C offers an assessment of nationwide injunctions as a tool to protect reproductive rights and provides recommendations to pro-AGs on using the tool.

A. Traditional Arguments For and Against The Use of Nationwide Injunction

1. Traditional Arguments in Favor of Nationwide Injunctions

The two major arguments proponents make to support the use of nationwide injunctions are (1) nationwide injunctions are necessary to ensure complete relief for a plaintiff, particularly, where issues go beyond state lines, and (2) nationwide injunctions are necessary for uniform application of federal law.

First, proponents argue that nationwide injunctions are necessary to assert rights against federal government overreach and are needed when a geographically limited injunction would not address the plaintiff's harm. States must also be empowered to obtain nationwide injunctions otherwise, the federal government can ignore grievances while the litigation proceeds.[51] This is particularly true in contexts where an injunction would be meaningless if (or unable to be) applied to one state. For example, in the immigration context, an injunction limited to one state would not grant the plaintiff state any relief, demonstrated in the nationwide injunction granted in *Hawai'i v. Trump*, enjoining the implementation of a federal policy banning individuals from certain countries from immigrating to the United States.[52] States are typically plaintiffs in suits where the issue cannot be limited to one state alone like environmental protection or food

[51] JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM 1 (2021), https://crsreports.congress.gov/product/pdf/R/R46902.
[52] Hawai'i v. Trump, 859 F.3d 741 (9th Cir. 2017), *vacated as moot* Trump v. Hawai'i, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017).

safety.[53]

Second, nationwide injunctions ensure there is uniform application and interpretation of federal law. If injunctions were only allowed to apply to the individual plaintiffs, each district court could lay down a different rule, resulting in a near impossibility to interpret and implement federal law. Advocates argue that uniformity is an important principle where "fragmented implementation of federal law would lead to confusion or be impossible to implement in practice."[54] While most injunctions make their way to higher courts when there are competing rulings, the ability to have opposite rulings in district courts sitting in different circuits is high. The only way for such a controversy to be solved would be for a case to make its way to the Supreme Court, potentially causing uncertainty for anyone affected by the regulation or law which can be particularly impactful when talking about uncertainty for doctors and patients.

2. Traditional Arguments Against Nationwide Injunctions

The three major arguments opponents make against nationwide injunctions are (1) nationwide injunctions are inconsistent with constitutional limitations on the judicial branch; (2) the injunctions encourage judge and forum shopping; and (3) nationwide injunctions allow federal judges to legislate from the bench, which undermines public legitimacy in the courts.

First, opponents[55] argue that nationwide injunctions violate the Constitution by granting injunctions far beyond the litigants in the specific case that grants the injunction to those that

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[53] Amanda Frost, *The Role and Impact of Nationwide Injunctions: Written Testimony for the House Committee on the Judiciary, Subcommittee on the Courts, Intellectual Property, and the* Internet, Nov. 30, 2017, at 4–6, https://ssrn.com/abstract=3104789.

[54] *Id.* at 8.

[55] One of the most notable critics of the nationwide injunction is former attorney general Jeff Sessions who published a memorandum critiquing the practice when he was serving as the United States Attorney General. *See generally* JEFF SESSIONS, OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUST., LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS (Sept. 13, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions.

would lack standing to bring their own case. In practice, nationwide injunctions serve as universal injunctions and prevent the defendant, here, the federal government, from enforcing the law or action against any person. This amounts to judicial overreach where judges are not just deciding the case before them. Opponents argue that nationwide injunctions undermine Article III standing requirements. One such skeptic, Justice Clarence Thomas wrote in a concurrence:

> I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.[56]

As Justice Thomas points out, the huge increase in the use of nationwide injunctions by litigants has led some jurists to rethink their applicability and legitimacy.

Second, nationwide injunctions encourage litigants, particularly AGs (both pro- and anti-Reproductive Rights), to forum shop and in some situations, to handpick the judge that hears the case. As any federal judge is equally empowered and able to issue nationwide injunctions, litigants are encouraged to forum shop in order to find judges with favorable legal and often political views.[57] Many of the AGs injunctions filed in the Obama-era were in Texas (and in front of a select number of judges), whereas under Trump, the injunctions were most often brought in the Ninth Circuit.[58] Beyond selecting the forum, the structure of certain federal district courts, which have single judge divisions, allows litigants to select the exact judge who will hear their case.[59] While proponents of these districts argue that they are necessary to allow remote and rural areas to have access to nearby courts, opponents say the ability to handpick a judge

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[56] Trump v. Hawaii, 138 S. Ct. 2392, 2425, 201 L. Ed. 2d 775 (2018).
[57] *See generally* Dishman, *supra* note 35.
[58] *Id.* at 398–401.
[59] Abbie VanSickle, *Schumer Asks Judicial Policymakers to End Single-Judge Divisions in Texas*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/11/us/politics/schumer-judge-selection-texas.html.

undermines a fair judiciary and public trust.[60]

Lastly, opponents argue that nationwide injunctions allow federal judges to legislate from the bench which undermines the public legitimacy of the courts. Further undermining legitimacy in the courts is the politicization of these injunctions and cases against the federal government. Both Republican and Democrat AGs routinely brag about winning cases against an opposite party executive.[61] Nationwide injunctions encourage the politicization of the AG as a stepping stone to higher office reducing public trust in the AG office and the judiciary as fair rather than a political tool.

Further undermining legitimacy is the public image of the judiciary as a roadblock to progress. At the outset of cases, there is often minimal and sometimes speculative information about the harm or effects of the legislation or regulation at issue. When judges issue a far reaching injunction on limited information, it often has the effect of invalidating the normal legislative process and undermines the normal operation of the executive and legislative branches.[62] While of course the judiciary should serve as a check on the co-equal branches, when

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[60] Josh Blackman, *About Single-Judge Divisions*, THE VOLOKH CONSPIRACY (Feb. 5, 2023, 3:33 PM), https://reason.com/volokh/2023/02/05/about-single-judge-divisions/#:~:text=These%20single%2Djudge%20divisions%20were,cases%20to%20single%2Djudge%20divisions (supporting the use of single-judge divisions as necessary to ensure rural communities have access to courts); *but see* Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018) (arguing judge-shopping enabled through single-judge divisions has harmful effects and leads to a politicization of the judiciary).

[61] Bob Ferguson, the Washington AG, issued a press release where he stated that "This will be Ferguson's 34th lawsuit against the Trump Administration, and he has not lost a case." Press Release, Bob Ferguson, Attorney General of Washington, AG Ferguson to file lawsuit challenging President Trump's "gag rule" impacting family planning providers (Feb. 25, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-file-lawsuit-challenging-president-trump-s-gag-rule-impacting-family. Former Texas AG and current Governor Greg Abbot defined his role as "I go into the office, I sue the federal government, and then I go home." Eleanor Klibanoff, *Part 2: Texas backlast to Obama fueled conservative drive to reinterpret U.S. Constitution*, TEXAS TRIBUNE (July 31, 2023), https://www.texastribune.org/2023/07/31/texas-federal-courts-conservative-takeover-obama-paxton/.

[62] Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 Notre Dame L. Rev. 1985, 1992 (2019). *See also* Frost, *supra* note 53 at 9.

nationwide injunctions are issued in situations where there is little likelihood of irreparable damage, the judiciary is an impediment and not a check.[63] The actual or even appearance of undermining the legislative and executive branches reduces the public's trust in the courts and rule of law.

B. Nationwide Injunctions and Reproductive Rights

Both the critiques and benefits of nationwide injunctions are seen when it comes to reproductive rights in actions by pro- and anti-AGs. First, this section looks at the actions taken prior to the *Dobbs* decision challenging federal law during the Obama and Trump Administration regarding contraception access and federal funding for healthcare facilities that discuss abortion services. Second, this section looks at cases that have been brought in a post-*Dobbs* environment dealing with the right to access safe and legal abortion, primarily brought by anti-AGs seeking to restrict these rights. Lastly, this section examines if the cause of reproductive rights has been harmed or advanced by the use of nationwide injunctions.

1. Pre-*Dobbs*

The Obama administration, on May 18, 2016 and as part of its implementation of the Affordable Care Act, issued through the Health and Human Services (HHS) department a regulation called Nondiscrimination in Health Programs & Activities which prevented physicians and health care plans which receive federal financial assistance from discriminating against individuals "on the basis of sex" under four federal nondiscrimination statutes.[64] HHS interpreted prohibited discrimination "on the basis of sex" under Title IX of the Education Amendments of

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[63] Matthew Erickson, Who, What, and Where: A Case for A Multifactor Balancing Test As A Solution to Abuse of Nationwide Injunctions, 113 Nw. U. L. Rev. 331, 337–40 (2018).

[64] Chris Geidner, *Federal Judge Halts Obamacare Transgender, Abortion-Related Protections Nationwide*, BUZZFEED (Dec. 31, 2016), https://www.buzzfeednews.com/article/chrisgeidner/federal-judge-halts-obamacare-transgender-abortion-related-p; Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

1972 as preventing discrimination based on gender identity and termination of pregnancy.[65] A coalition of eight states, led by Texas AG Ken Paxton, sued the Obama administration to prevent implementation of the policy. The states argued that the rule interpretation is invalid because Title IX itself adheres to a biological definition of sex as that assigned at birth and it contains exceptions for religion and abortion which should be incorporated into the rule. They objected and interpreted the rule as requiring the coverage and performance of procedures related to gender transition and abortions. However, the HHS argued the rule simply required a non-discriminatory design and implementation of medical coverage and care. The plaintiffs sued in the Northern District of Texas, a single-judge district, and Judge Reed O'Connor heard the case. Judge O'Connor issued a nationwide injunction and prevented the implementation of the rule in regard to nondiscrimination on the basis of gender identity and termination of pregnancy.[66] The order determined the states had standing based on the costs of training and implementing policy changes to be in compliance with the new rules. Judge O'Connor determined the plaintiffs had a likelihood of prevailing under the Administrative Procedure Act and the Religious Freedom Restoration Act and issued a nationwide injunction. After attempts at interlocutory appeal that were unsuccessful, the HHS ultimately revised the rule and Judge O'Connor issued a final order vacating the previous one.

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[65] 81 Fed. Reg. 31376–31473, (May 18, 2016) (codified at 45 C.F.R. § 92).

[66] Judge O'Connor was often the judge that anti-AGs turned to enjoin Obama administration policies which protected reproductive rights, gay individuals, and transgender individuals. Judge O'Connor had also issued injunctions in other cases prohibiting the Obama administration from implementing rules allowing transgender students to use the facilities aligned with their identity and another rule requiring employers to provide married same-sex couples equal benefits of the Family and Medical Leave Act. Kevin Krause, *A look at the low-key Texas judge who tossed Obamacare shows a history of notable conservative cases*, DALLAS NEWS (Dec. 18, 2018), https://www.dallasnews.com/news/courts/2018/12/18/a-look-at-the-low-key-texas-judge-who-tossed-obamacare-shows-a-history-of-notable-conservative-cases/; *see generally Burwell*, 227 F. Supp. 3d. at 366.

Under the Trump Administration, a number of pro-AGs used nationwide injunctions to halt policies that would undermine access to reproductive rights. In 2017, the Trump Administration issued interim rules from its Health and Human Services department that would expand religious and moral exemptions to providing contraception coverage for employer provided health plans as required by the Affordable Care Act preventative care mandate. The rules expanded the exceptions granted to closely held corporations by the Supreme Court in *Hobby Lobby*.[67] The new rules applied to "all non-profit and for-profit entities, whether closely held or publicly traded."[68]

There were two cases, one led by Pennsylvania and one led by California. AGs from Pennsylvania and New Jersey sued the administration over the policy which they claimed would "implement[] new religious and moral exemption rules that would allow virtually any company to deny women health insurance coverage for no-cost contraception." After filing the lawsuit in Philadelphia, they received a nationwide injunction to prevent the implementation of the interim rules.[69] The California case, joined by 15 other states, also received an initial nationwide injunction in federal district court, however, the 9th Circuit narrowed the scope of the injunction to just the 16 members of the coalition.

The Pennsylvania action was the more expansive of the two cases, eventually making it to the Supreme Court. The nationwide injunction issued by U.S. District Judge Wendy Beetlestone in Philadelphia determined that Pennsylvania had standing under its quasi-sovereign

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[67] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
[68] Pennsylvania v. Trump, 281 F. Supp. 3d 553, 563 (E.D. Pa. 2017), aff'd sub nom. Pennsylvania v. President United States, 930 F.3d 543 (3d Cir. 2019), as amended (July 18, 2019), *rev'd and remanded sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020), and *rev'd sub nom.* Pennsylvania v. President United States, 816 F. App'x 632 (3d Cir. 2020). The rules also eliminated requirements that employers who decline to provide this coverage has to notify HHS.
[69] The injunction was granted by Judge Wendy Beetlestone in the Eastern District of Pennsylvania.

interest in protecting the health of its residents and due to the new rules allowing employers to opt-out, the financial burden of providing this healthcare will fall to the state.[70] Judge Beetlestone found the state met the additional requirements to issue a nationwide injunction preventing the Trump administration from enforcing the interim rules. After the Trump Administration issued the final rules (which were largely the same), Judge Beetlestone enjoined the enforcement of the final rules as well. The Trump Administration appealed the injunction to the 3rd Circuit, which affirmed the lower court's ruling. Again, the Administration appealed to the Supreme Court, which found that the HHS, Labor, and Treasury did have authority to exempt businesses under their religious beliefs from the contraception mandate in a 7-2 decision.[71] While the case ultimately was unsuccessful in preventing the implementation of the policy in the long-term, the injunction did allow individuals to have access to contraceptive care while the case was pending. In fact, the nationwide injunction issued by Judge Wendy Beetlestone noted that over 30,000 women would lose contraception coverage under the Trump administration's rule.[72] While the case was pending the injunction ensured more women could access contraception and not be burdened with additional cost for this vital care.

Similarly, after the California case received an initial injunction, the administration appealed to the Ninth Circuit which felt the district court abused its discretion in issuing a nationwide preliminary injunction. In limiting the injunction to the sixteen plaintiff states, the court wrote, "The scope of an injunction is dependent as much on the equities of a given case as the substance of the legal issues it presents, and courts must tailor the scope to meet the

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[70] *Trump*, 281 F.Supp.3d at 566–67. The court determined this met both standing requirements laid out in Massachusetts v. EPA.
[71] SCOTUSblog, *Trump v. Pennsylvania*, SCOTUSBLOG (last updated Aug. 10, 2020), https://www.scotusblog.com/case-files/cases/trump-v-pennsylvania/.
[72] *Trump*, 281 F.Supp.3d at 582.

exigencies of the particular case."[73] The court felt the district court abused its discretion in awarding a nationwide injunction as the record failed to show that an injunction tailored to the plaintiff states would not fully prevent the economic harm they detailed to themselves and the record did not sufficiently demonstrate the nationwide harm of the proposed rule.[74] The California case injunction was eventually vacated and remanded to the Ninth Circuit by the Supreme Court in light of the decision in the Pennsylvania case.[75] As mentioned above, the injunction ultimately did not prevent the implementation of the rule, however, it did ensure millions had access to vital care for two years while the case made its way through the judiciary.

Intent on rolling back reproductive rights, the Trump Administration through its HHS issued a rule which would deny Title X federal funds to family planning organizations that provide abortion referrals or even discuss abortion. A multistate coalition of AGs led by Washington AG Bob Ferguson sued to block the rule under Title X. The AGs received nationwide injunction in three different federal district courts to block the Trump Administration's HHS from denying federal family planning money to organizations which give abortion referrals.[76] The case was then appealed and consolidated with the twenty states and private organizations. The Ninth Circuit Court of Appeals struck down the injunction. The court reasoned that HHS and the public would face greater harm under an injunction—through

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[73] California v. Azar, 911 F.3d 558, 584 (9th Cir. 2018) (quoting Int'l Refugee Assistance Project, 137 S.Ct. at 2087 (citations omitted)) (internal quotations omitted).
[74] *Id.* at 584.
[75] *Dep't of Health & Hum. Servs. v. California*, 141 S. Ct. 192, 207 L. Ed. 2d 1117 (2020).
[76] Pam Belluck, *Judge Temporarily Blocks Trump Rule on Abortion Referrals*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2019/04/25/science/title-x-injunction-abortion-referrals.html; Lydia Wheeler, *Nationwide Injunction Blocks 'Gag Rule' on Abortion Referrals*, BLOOMBERG LAW (April 25, 2019), https://news.bloomberglaw.com/health-law-and-business/nationwide-injunction-blocks-gag-rule-on-abortion-referrals; Brionna Aho, *AG Ferguson to file lawsuit challenging President Trump's "gag rule" impacting family planning providers*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL (Feb. 25, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-file-lawsuit-challenging-president-trump-s-gag-rule-impacting-family.

administrative costs and spending taxpayer money in a manner the department determined was illegal—than the plaintiffs, including the states, would face if the rules went into effect.[77] After the Ninth Circuit heard the case on its merits, it determined the rules did not violate the First Amendment as physicians can still discuss abortion as a medical option, they just cannot give referrals.[78] Again, the make-up of the federal judiciary creates an uphill battle for pro-reproductive rights AGs to protect these rights. In both cases, AGs merely delayed the implementation, albeit only slightly in the Title X funding case. However, delay is important as a harm reduction tactic even if it was not ultimately successful. Washington alone served 91,284 patients using Title X funding in 2017. Access to contraception and abortion even temporarily gives individuals autonomy over their bodies and can mean financial freedom.[79]

2. Post-*Dobbs*

After *Dobbs*, abortion regulation has largely been determined state by state with few federal protections, however, those against abortion rights have worked to take away federal rights and impose their will nationwide. When examining nationwide injunctions in the context of reproductive rights in the post-*Dobbs* era, it is imperative to discuss both *Alliance for Hippocratic Medicine v. FDA*—a lawsuit seeking to reduce access to Mifepristone, an abortion medication—and *State of Washington v. FDA*—a lawsuit aiming to maintain and expand access to Mifepristone.[80] *Alliance* is led by private plaintiffs, however, anti-AGs have contributed

[77] California by & through Becerra v. Azar, 927 F.3d 1068, 1080 (9th Cir. 2019).
[78] California by & through Becerra v. Azar, 950 F.3d 1067 (9th Cir. 2020).
[79] Access to reproductive healthcare has been linked to better economic outcomes due to the burden of raising a child, particularly in the United States which lacks a comprehensive social safety net. Jacqueline E. Darroch, Vanessa Woog, Akinrinola Bankole & Lori S. Ashford, *Adding it up: Costs and Benefits of Meeting the Contraceptive Needs of Adolescents*, GUTTMACHER INSTITUTE (May 2016), https://www.guttmacher.org/report/adding-it-meeting-contraceptive-needs-of-adolescents.
[80] Order Granting in Part Plaintiffs' Motion for Preliminary Injunction, State of Washington et al v. United States Food and Drug Administration et al (No. 1:2023cv03026) (E.D. Wash. 2023) (ECF No. 80).

heavily in supporting the case. *Washington* is led directly by state plaintiffs represented by pro-AGs. In both cases, the AGs are playing instrumental and important roles.

First, this paper will examine *Alliance for Hippocratic Medicine v. FDA*. The Alliance for Hippocratic Medicine, an organization which incorporated in Amarillo, Texas just months after the *Dobbs* decision, made up of anti-abortion organizations with close ties to Republican politics, filed a case against the FDA to invalidate decades-long approval. Anti-AGs from 22 states filed Amicus Briefs in support of a preliminary injunction to prevent the prescription of Mifepristone nationwide. Mifepristone is the most widely prescribed abortion pill medication.[81] It is prescribed during the first seven to ten weeks of pregnancy. It is not only used for abortions, but also is crucial in providing care for people experiencing miscarriages.[82] In 2020, Mifepristone accounted for about half of medication abortions with a success rate of 99.4 percent, only a 0.4 risk of major complications, and a mortality rate of 0.00064 percent.[83] Mifepristone was approved for use by the FDA over 20 years ago through the same process as all other medications. The generic was approved in 2019 and in 2021, the FDA approved its prescription in cases of telemedicine and for mail across state lines, something the Plaintiffs challenged as violating the Comstock Act of 1873.[84] In fact, it is subject to a more stringent regulatory framework than other drugs.[85]

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[81] Amy Schoenfeld Walker, Jonathan Corum, Malika Khurana & Ashley Wu, *Are Abortion Pills Safe? Here's the Evidence.*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/interactive/2023/04/01/health/abortion-pill-safety.html.
[82] *Id.*
[83] Laurie Sobel, Alina Salganicoff & Mabel Felix, *Legal Challenges to the FDA Approval. Of Medication Abortion Pills*, KFF (Mar. 13, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-the-fda-approval-of-medication-abortion-pills/.
[84] All. for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-CV-223-Z, 2023 WL 2825871, at *9–10, 14 (N.D. Tex. Apr. 7, 2023).
[85] This is the argument in Washington v. FDA. *See Washington*, (No. 1:2023cv03026) (E.D. Wash. 2023).

Plaintiffs claimed that the FDA abused its authority in approving the drug and focused on six different administration decisions going back to 2000.[86] The Plaintiffs argue that the FDA ignored medical science, bowed to political pressure, and placed "women and girls" in danger by approving the drug and through subsequent changes in guidance and prescription requirements—allowing the drug to be used up to ten weeks of gestational age, reducing the number of doctor visits required, approving a generic version, and allowing prescription through telehealth and mail services, among others.[87] Anti-AGs have argued that Mifepristone is a threat to women's health. Ken Paxton, the Texas AG, issued a press release which was titled, "AG Paxton Defends Women's Health and Safety in Multi-state Amicus."

In pursuing this case, the organization that filed the case turned to the single-judge district in Amarillo where Judge Kacsmaryk sits to pursue their case. Kacsmaryk[88] who is against abortion and issued a nationwide injunction preventing access to the drug for every person in every state in the United States.[89] By filing in a single-judge district to put the case before an anti-abortion judge, the Plaintiffs were judge-shopping to get an outcome informed by politics instead of legal reasoning. Critics argue that Kacsmaryk was legislating from the bench.[90]

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[86] Perry Stein, Robert Barnes & Ann E. Marimow, *In a divided nation, dueling decision on abortion pill*, WASH. POST (Apr. 9, 2023), https://www.washingtonpost.com/politics/2023/04/09/abortion-ruling-texas-washington-clash/.
[87] Complaint at 4–7, *Alliance*, 2023 WL 2825871.
[88] Kascmaryk, prior to his appointment, worked for First Liberty Institute, a Conservative, Christian law firm in Texas. His firm worked on cases attempting to reduce access to contraception and opposing LGBTQ+ rights. Eleanor Klibanoff, *Federal judge at center of FDA abortion drug case has history with conservative causes,* THE TEXAS TRIBUNE (Mar. 15, 2023), https://www.texastribune.org/2023/03/15/federal-judge-amarillo-abortion-fda/.
[89] Press Release, Ken Paxton, Attorney General of Texas, AG Paxton joins Amicuws Brief Defending Women's Health and Safety (Aug. 5, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-joins-amicus-brief-defending-womens-health-and-safety; Stein, *supra* note 86.
[90] Charlie Savage & Pam Belluck, *Judge's Ruling Against Abortion Pill is Filled with Activists' Language*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/abortion-pill-ruling.html.

Kacsmaryk's order received intense criticism with critics arguing that the ruling stretched the limits of basic law making exceptions and logical leaps to allow the case to proceed. The four major areas of challenge were to: (1) the holding that doctors had standing based on "emotional distress" from prescribing the drug; (2) a holding that the claims brought 22 years after the initial approval were within the statute of limitations; (3) its adherence to baseless scientific claims; and (4) the clear bias in the language evidenced through the use of "unborn human" as opposed to the medical term "fetus."[91]

First, the theory of standing necessitates the plaintiffs demonstrate a substantial threat of harm. The Plaintiffs, here, fail to meet the threshold as their theory of harm is based on the idea that Mifepristone causes harm to patients who take it—an unfounded claim as Mifepristone has been widely used with rarely reported complications—which will then lead to an increase in the number of patients who go to these doctors, then overburdening their practices. This argument requires a series of logical leaps—that the drug which has been on the market for decades will cause a flood of patients, that this flood will lead to an increase in these doctor's practices, and finally, that the doctors will be unable to care for this increase in patients which will cause distress. This series of "logical gymnastics" does not rise to the particular demonstrated harm required to issue an injunction.

Second, Kascmaryk held that the challenge of the FDA's original approval in 2000 was not beyond the statute of limitations because of the "reopening doctrine."[92] Kacsmaryk argued

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[91] Kate Shaw, *The Abortion Pill Ruling is Bad Law, and the Biden Administration Should Fight It*, N.Y. TIMES (Apr. 9, 2023), https://www.nytimes.com/2023/04/09/opinion/abortion-pill-case-decision.html; Adam Unikowsky, *Mifepristone and the rule of law*, SUBSTACK: ADAM'S LEGAL NEWSLETTER (Mar. 3, 2023), https://adamunikowsky.substack.com/p/mifepristone-and-the-rule-of-law; *see also* Sobel, *supra* note 83.

[92] *Alliance*, 2023 WL 2825871 at *10 (citing *Chenault v. McHugh*, 968 F. Supp. 2d 268, 275 (D.D.C. 2013); *see also Battle v. Sec'y U.S. Dep't of Navy*, 757 Fed. Appx. 172, 175 (3d Cir. 2018)).

that because the FDA issued new guidance related to Mifepristone in 2016 and 2021, each decision constituted a re-opening of the original approval. This reasoning is unfounded in the factual record as the FDA did not reconsider the original approval for safety or prescription, but merely considered current regulatory standards. This reasoning, taken to its logical conclusion, would allow every FDA decision going back to its inception able to be reconsidered after updating guidance on any drug. This argument is clearly against the very principles of finality at the core of statute of limitations doctrine.

Finally, the third and fourth major critiques demonstrate one of the major critiques leveled against nationwide injunctions: the politicization and legislating of the courts. By failing to rely on tested and reliable scientific evidence, the order takes as true the biased and skewed reports presented by the plaintiffs. Further, Kascmaryk demonstrated his bias in the order through the language used. Using "unborn human" instead of the scientific definition "fetus" indicates Kascmaryk's inclination, not to mention that based on different accounts, he is against abortion. A single judge issuing an injunction preventing any doctor in any state from prescribing a drug that has been widely used for decades is a serious undermining of the executive branch where the agency sits and the legislative branch which determined that the country's medical decisions are best left to an agency who are experts in medical science.[93]

After Judge Kascmaryk's order was issued on April 7, 2023, the U.S. Department of Justice (DOJ) appealed to the Fifth Circuit which refused to lift the injunction, however, narrowed the scope to enjoin the post-2016 changes to the drug's regulation. Anti-AGs joined as amici curiae for the plaintiffs with a coalition of 20 states. Pro-AGs also field as amici on behalf of the FDA and other defendants with 23 states and DC joining. The new injunction allowed

[93] 21 U.S.C. §§ 321(p), 355; *see also id.* § 393(b)(2)(B) (establishing the FDA).

Mifepristone to be prescribed under rules before a 2016 revision issued by the FDA. Again, the DOJ appealed to the Supreme Court which, after issuing and extending a temporary stay, granted a stay of the lower court's decision allowing Mifepristone to stay on the market. When the case returned to the Fifth Circuit, it reinstated its ruling to restrict the drug on the basis of pre-2016 regulation, however, the Supreme Court's stay extended the stay in the event certiorari is requested which it was. This case has caused uncertainty for doctors and patients through the sweeping and changing regulatory framework.

This paper will now turn to *State of Washington v. FDA*. In *State of Washington*, 12 pro-AGs—additional plaintiffs joined bringing the number to 18 AGs from 17 states and the District of Columbia, led by the state of Washington—brought suit against the FDA under their parens patriae capacity to protect their "quasi-sovereign interest in the health and well-being of [their] residents."[94] The AGs argue that the FDA's restrictions on Mifepristone which place it in a higher category of restrictions reserved "for medications that demonstrate risks of serious side effects such as death, incapacity, or birth defects"[95] violate its statutory authority under the Federal Food, Drug, and Cosmetic Act—the act that authorized the FDA—as Mifepristone does not meet this standard of danger. The AGs argue that this stringent treatment is motivated by bias and not scientific evidence as the FDA does not place many drugs, such as Viagra, with higher complication rates into this category.[96] The AGs requested a nationwide injunction. The preliminary injunction sought was to prevent 2023 FDA rules from going into effect and to prevent the FDA from reducing access in any manner.[97]

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[94] Complaint at 13, State of Washington et al v. United States Food and Drug Administration et al (No. 1:2023cv03026) (E.D. Wash. 2023) (ECF No. 1).
[95] *Id.* a 15.
[96] *Id.* at 39–41.
[97] Order Granting in Part Plaintiffs' Motion for Preliminary Injunction at 9, State of Washington et al v. United States Food and Drug Administration et al (No. 1:2023cv03026) (E.D. Wash. 2023) (ECF No. 80).

Judge Thomas O. Rice in the Eastern District of Washington agreed with the AGs, however, only granted the requested preliminary injunction with respect to the 18 plaintiff states.[98] Because the *Washington* decision came down the same day as the *Alliance for Hippocratic Medicine*, the force of each injunction was unclear. After the FDA filed a motion to clarify the scope and applicability to the *Washington* preliminary injunction, Judge Rice asserted that his limited injunction is valid and enforceable because it was: (1) limited to the plaintiff states which the court had jurisdiction over; (2) the *Alliance for Hippocratic Medicine* order was not in force at the time of request for clarification; and (3) the order was stayed by Judge Kascmaryk himself to allow the FDA time to appeal so it to was not in effect when Judge Rice issued his order.[99] Judge Rice's clarification order spent significant time discussing the issues and common critiques of nationwide injunctions, as well as articulating that Ninth Circuit precedent generally discourages issuing nationwide injunctions over injunctions tailored to the plaintiffs before the court.[100] Much of the reasoning Judge Rice gave for his order taking precedence was the limited nature just to the plaintiffs over which he had jurisdiction. The plaintiffs before Judge Rice demonstrated particular harm of the FDA's limitation of Mifepristone giving his argument legal weight. While the plaintiffs did not receive the nationwide injunction that was requested, the limited nature perhaps gave a stronger case for ensuring protections remain in place while the two competing cases make their way through the judiciary. Both *Alliance* and *Washington* will be heard by the Supreme Court to make a final determination on the validity of the FDA's approval of Mifepristone effecting the reproductive

[98] *See generally* Order on Motion to Clarify. State of Washington et al v. United States Food and Drug Administration et al (No. 1:2023cv03026) (E.D. Wash. 2023) (ECF No. 91).
[99] *Id.* at 5–6.
[100] *Id.* at 2–4.

rights of millions of Americans.[101]

C. Assessment of Nationwide Injunctions as a Tool to Protect Reproductive Rights

Overall, the use of nationwide injunctions in the context of reproductive rights is harmful to citizens, judicial credibility, and rule of law. Allowing federal judges, particularly those who were handpicked through "judge shopping" to decide reproductive rights nationwide, is antithetical to notions of democracy and federalism. Because these tools wielded through courts have a high ability for judge bias, the conservative lean of the judiciary greatly constrains pro-AGs power to use the tool to expand rights. Yet, nationwide injunctions have also been helpful tools to prevent executive branch roll-back of legislation, particularly when agencies disregard public comment and settled administrative procedures. For pro-AGs, nationwide injunctions appear to be a defensive tool to prevent anti-rights AGs and a hostile presidential administration from rolling back rights. Given the configuration of the judiciary, it is unlikely that pro-AGs would be able to expand access any time soon. This brings two contradictory assessments of the power to light: (1) the nationwide injunction undermines trust in the judiciary and reproductive rights so AGs should oppose this tool when taking a larger outlook on justice, however, (2) nationwide injunctions are also a uniquely powerful tool that should be used to protect essential constitutional rights so pro-AGs are forced to use it and every other available tool as long as they are available. The pro-AGs cannot be forced to fight with one hand tied behind their backs.

Advocating for an end to this expansive power or at the very least for more limited injunctions, would likely prevent a rollback of these rights. Again, this is particularly true under the current federal judiciary, which is dominated by conservative Republican appointees and

[101] FDA v. All. Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023) (granting certiorari).

were often selected due to their opposition to reproductive rights. However, while these powers are available, pro-AGs should use them to protect reproductive rights. Even where it is unlikely the case will ultimately halt the proposed rule change, maintaining access to these rights while the case is pending is significant. States should aim to protect their citizens as much as possible and to prevent the clawback under any future Republican presidential administration. It is a strong defensive tool that AGs should use when citizen rights are impacted. This may be necessary as states impose even more draconian measures or if a Republican administration wins the presidency in 2024.[102]

As this paper argues, pro-AGs should use every tool at their disposal in order to protect reproductive rights. While nationwide injunctions are not the most protective tool due to the federal judiciary's hostility to these rights, these injunctions should be sought in order to minimize harm if possible.

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[102] Many AGs have publicly expressed support to protect a pregnant person's right to interstate travel to seek medical care. Press Release, Office of Minnesota Attorney General Keith Ellison, Attorney General Ellison moves to protect interstate travel to seek abortion (Sept. 23, 2022), https://www.ag.state.mn.us/Office/Communications/2022/09/23_FundTexasChoice.asp. The issue of interstate travel is becoming increasingly important as pregnant people are denied abortions, even when state laws include exceptions for non-viable pregnancies where the woman's health or life is in danger. In December 2023, a pregnant woman Kate Cox was forced to leave Texas to seek a medically necessary abortion after discovering the fetus had a condition that rendered it non-viable and which would threaten her health and future fertility. Selena Simmons-Duffin, Diane Webber & Michel Martin, *5 things to know about the latest abortion case in Texas*, NPR (Dec. 13, 2023), https://www.npr.org/sections/health-shots/2023/12/13/1218953788/texas-abortion-ban-supreme-court-kate-cox. Texas law prohibits abortion except in cases where the pregnant person's life is in danger or the pregnancy "poses a serious risk of substantial impairment of a major bodily function." *Id.* Cox applied for an emergency order under the second exception which a district court granted. However, AG Ken Paxton appealed the decision claiming Cox's request was for "an elective procedure." He also threatened the hospital that received the order with seeking the maximum penalties if they performed the procedure. Ultimately, the Texas supreme court suspended the lower court order and ultimately, denied it entirely on the grounds that the doctor could not conclusively state her life or health were in danger. The decision has been widely critiqued as placing impossible standards on pregnant people and physicians to determine and prove when a pregnancy (even a non-viable one) will harm a patient's health or life and will likely result in withholding of care in the future. Nadine El-Bawab, Mary Kekatos & Jolie Lash, *Texas Supreme Court rules against woman who sued for an emergency abortion*, ABCNEWS (Dec. 11, 2023), https://abcnews.go.com/US/texas-woman-sued-abortion-now-leaving-state-care/story?id=105558777.

II. Consumer Protection Powers

Consumer protection powers are a cornerstone of a state AG's work. Most offices have a whole department or at the very least designated attorneys dedicated to protecting consumers in the state.[103] These powers are fairly expansive and are often justified as protecting public welfare[104] The AG derives this power from the common law, or *parens patriae* authority, and from a state's Unfair or Deceptive Acts and Practices Act (UDAP) or Consumer Protection Act (CPA).[105] States, of course, bring individual consumer actions, however, they also routinely engage in multistate actions where many states bring similar claims in order to utilize their collective power.[106] This power can be extremely effective and has strong applications in protecting reproductive rights. This paper will discuss its application to privacy rights and the deceptive practices of crisis pregnancy centers.[107]

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[103] NAAG, *Consumer Protection 101* (last visited Dec. 4, 2023), https://www.naag.org/issues/consumer-protection/consumer-protection-101/.

[104] This is a standard that often evokes the question: what is the public welfare? As discussed in the Mifepristone example, the standard of welfare and health can vary greatly. The anti-AGs sought to remove the drug from the market on the idea that it was harming the health of women and girls, while the pro-AGs argued its restriction was a harm to health. For a full discussion, see Part II.B.2. *Parens patriae* literally means parent of the country and originates with the sovereign. The concept was first applied to the English monarchs, but now refers to any state actor.

[105] Theodore Eisenberg and Richard Ieyoub, *State Attorney General Actions, the Tobacco Litigation and the Doctrine of Parens Patriae*, 74 Tul. L. Rev. 1859 (2000). The actual text of the laws of different states varies greatly. Generally, the laws prohibited deceptive or unconscionable business practices. Some states issue fines for violations and are more specific in labeling violations compared to others. These statutes allow "state agencies to protect their citizens by responding quickly to emerging frauds. They give effective remedies that consumers themselves can invoke." CAROLYN CARTER, NATIONAL CONSUMER LAW CENTER REPORT, CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.

[106] One of the strongest examples is the tobacco litigation in the 1990s where the coalition of states achieved far greater gains than would have been possible by any individual state. *See generally* Theodore Eisenberg and Richard Ieyoub, *State Attorney General Actions, the Tobacco Litigation and the Doctrine of Parens Patriae*, 74 Tul. L. Rev. 1859 (2000).

[107] According to the American College of Obstetricians and Gynecologists, CPCs "is a term used to refer to certain facilities that represent themselves as legitimate reproductive health care clinics providing care for pregnant people but actually aim to dissuade people from accessing certain types of reproductive health care, including abortion care and even contraceptive options." American College of Obstetricians

The first area of consumer protection that pro-AGs can influence to protect reproductive rights is consumer privacy, particularly when it comes to healthcare. AGs typically wield this power through prevention and investigation which typically results in a settlement.

Prevention usually takes two major forms: providing information to consumers and engaging with companies on best practices. AG offices can (and many do) provide information to consumers to be able to best protect themselves and their personal data. The Arizona AG Kris Mayes issued a ten-page alert to consumers detailing how different apps collect their data and best practices on how to protect one's private medical information.[108] Other AGs have issued similar alerts.[109] The state resource provides consumers with reliable up to date information that are generally, applicable beyond just one state.

AGs also engage with companies to ensure their privacy protections are up to date and as strong as possible. After the *Dobbs* decision came down, a coalition of ten pro-AGs sent a letter to the CEO of Apple, Tim Cook, to urge him to increase protections for reproductive health data for its users in relation to the Apple health app and other apps featured on the App Store. The

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and Gynocologists, *Crisis Pregnancy Centers: Issue Brief* (last visited Dec. 4, 2023), https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-crisis-pregnancy-centers.

[108] Hannah Cree, *Attorney General Releases New Guidelines on Reproductive Data Privacy*, AZPM (Aug. 17, 2023), https://news.azpm.org/p/news-splash/2023/8/17/217144-attorney-general-releases-new-guidelines-on-reproductive-data-privacy/. The recommendations included using VPNs when engaging in sensitive searches; turning off location data; and logging out of social media apps when visiting clinics as some may track movements even when they state otherwise. The manual also provided step by step instructions on how to implement all the above steps, a necessary step to ensure all individuals can utilize the suggestions. REPRODUCTIVE RIGHTS UNIT, OFFICE OF THE SOLICITOR GENERAL, ARIZONA ATTORNEY GENERAL KRIS MAYES, CONSUMER ALERT: PROTECTING DATA PRIVACY WHEN SEEKING REPRODUCTIVE HEALTH CARE (Aug. 2023), https://mcusercontent.com/cc1fad182b6d6f8b1e352e206/files/07206348-fc4b-e6a5-6f0a-6936376665f8/AGO_Consumer_Data_Privacy_Guidance.pdf.

[109] Press Release from Kwame Raoul, Attorney General of Illinois, Attorney General Raoul Urges Individuals To Protect Their Digital Privacy When Seeking Reproductive Care or Information (July 15, 2022), https://www.illinoisattorneygeneral.gov/News-Room/2022-Press-Release-Archive/202207-15%20CONSUMER%20ALERT%20RAOUL%20URGES%20INDIVIDUALS%20TO%20PROTECT%20THEIR%20DIGITAL%20PRIVACY%20WHEN%20SEEKING%20REPRODUCTIVE%20CARE%20OR%20INFORMATION.pdf.

AGs noted the particularly sensitive categories of data: "location history, search history, and adjacent health data (specifically, all information relating to the past, present, or future reproductive or sexual health of an individual) pose a significant risk to individuals seeking or providing abortions, birth control, or other reproductive health care."[110] The AGs urged Apple to require app developers to: (1) delete non-essential data of those consumers seeking reproductive care; (2) issue clear notices if data may be disclosed to third-parties and a commitment to only due to if compelled by subpoena, search warrant, or court order; and (3) maintain the same level of protections that Apple provides in regards to user health data when the app syncs with Apple device data. The AGs stressed the importance of data security in this area at a time when companies can (and do) predict pregnancy from online activities.[111]

Other AGs have stressed the particular protections and requirements in their own state's laws.[112] In California, the Confidentiality of Medical Information Act (CMIA) requires that apps and companies tracking reproductive health data be held to higher security and disclosure requirements.[113] After a draft of the *Dobbs* decision was leaked, AG Bonta emphasized the higher requirements of these organizations and noted the law has been successfully used against a company in the past for improper storage of sensitive user data.[114]

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[110] Letter from Matthew J. Platkin, Attorney General of New Jersey, with joined by nine additional AGs to Tim Cook, CEO of Apple Inc. (Nov. 21, 2022), https://www.nj.gov/oag/newsreleases22/2022-1121_Apple-final-signature-blocks.pdf.

[111] Shoshana Wodinsky & Kyle Barr, These Companies Know When You're Pregnant—And They're Not Keeping It Secret, Gizmodo (July 30, 2022), https://gizmodo.com/data-brokers- selling-pregnancy-roe-v-wade-abortion-1849148426.

[112] *See* Press Release, Rob Bonta, California Attorney General, Attorney General Bonta Emphasizes Health Apps' Legal Obligation to Protect Reproductive Health Information (May 26, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-emphasizes-health-apps-legal-obligation-protect (California's law); *see also* Press Release, Bob Ferguson, Washington Attorney General, Protecting Washingtonians' Personal Health Data and Privacy, https://www.atg.wa.gov/protecting-washingtonians-personal-health-data-and-privacy (Washington's law).

[113] Press Release, Bonta, *supra* note 112.

[114] *Id.*

The AG office also engages in investigation under the consumer privacy powers. In Massachusetts in 2017, AG Maura Healey investigated an advertising company for "geofencing"—a practice of designating a specific location—around health facilities and targeting advertisements to patients in the facility at the time or after they leave. Her office examined the actions for potential violation of state consumer protection law and ended in a settlement. A press release notes the practice can have consequences for patient privacy by tracking (and inferring) health status through location. Some of the advertisements included messages like "Pregnancy Help," "You Have Choices," and "You're Not Alone."[115] The company was hired to target advertisements to "abortion-minded" women in waiting rooms at health clinics. The AG alleged that the company violated Massachusetts's unfair and deceptive practices acts and settled with the company to desist from geofencing reproductive healthcare facilities.[116]

AGs who oppose reproductive rights have also used the consumer and privacy powers to oppose these rights and punish supporters. AG of Indiana, Todd Rokita, routinely used his power to punish an Indiana doctor who spoke to the news media about an abortion she performed on an 11-year old child who traveled from Ohio to receive the procedure.[117] AG Rokita first sought the

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[115] Press Release, Emily Gainey, Media Contact, Office of Attorney General Maura Healey, AG Reaches Settlement with Advertising Company Prohibiting 'Geofencing' Around Massachusetts Healthcare Facilities (Apr. 7, 2017), https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts-healthcare-facilities. The full order outlining the agreement can be found at: https://www.huntonprivacyblog.com/wp-content/uploads/sites/28/2017/04/nDP.pdf.
[116]. The company denied that its actions constituted a violation of the law. *Id.*
[117] The procedure was legal at the time, although Indiana has since outlawed it. AP News, *Indiana attorney general sues hospital system over privacy of Ohio girl who traveled for abortion*, AP News (Sept. 17, 2023), https://apnews.com/article/abortion-indiana-ohio-lawsuit-e3657f24a24a38fe915e521b210a0089. AG Rokita's handling of this issue, particularly his public comments about the doctor who performed the procedure, have been widely criticized even including a filing of a disciplinary action with the Indiana State Supreme Court Disciplinary Commission. Brandon Smith, *Commission asks state Supreme Court to make public AG Rokita's disciplinary agreement*,

suspension of the doctor's license which failed and is currently suing the hospital system where the doctor works for violating privacy laws.[118]

AGs also have authority under HIPAA to pursue state cases. Ensuring compliance with health privacy is crucial and implicates rights beyond reproductive health. Multistate coalitions of AGs (beyond pro-AGs) have pursued actions for violations and have achieved millions of dollars in penalties for improper handling of patient data.[119]

AGs also have the ability under UDAP and consumer protection power to ensure there are no deceptive businesses operating in the state. When it comes to reproductive healthcare, Crisis Pregnancy Centers (CPCs) often utilize deceptive and unethical practices.[120] California AG Bonta has sued an anti-abortion group and five CPCs for their deceptive practices related to an "abortion pill reversal (APR)" procedure.[121] The CPCs advertise the procedure as safe and effective which works by giving a patient high doses of progesterone hormone. The AG notes there has been no rigorous scientific study to back up this claim. He also notes that the CPC defendants fail to include in patient release forms or informational materials that APR can have life threatening side effects for patients like serious bleeding. Further, the AG notes that even if patients consent to the procedure, they are not given a full range of options by a transparent and competent medical professional making the procedure further unethical and deceptive. In the

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WBAA (Dec. 12, 2023), https://www.wbaa.org/public-affairs/2023-12-12/commission-asks-state-supreme-court-to-make-public-ag-rokitas-disciplinary-agreement.

[118] *Id.*

[119] Steve Alder, *HIPAA Enforcement by State Attorneys General*, THE HIPAA JOURNAL (Sept. 1, 2023), https://www.hipaajournal.com/hipaa-enforcement-by-state-attorneys-general/.

[120] *Crisis Pregnancy Centers*, *supra* note 107. These facilities engage in deceptive practices like overstating the risks of abortion; suggesting links between breast cancer, infertility, and preterm birth; falsely overstating the gestational age as to place a patient outside the period of legal abortion; presenting disturbing images or performing ultrasounds to emotionally manipulate patients; falsely misrepresenting themselves as providing abortion care in advertisements and online sources; and other deceptive tactics. *Id.*

[121] Complaint, California v. Heartbeat International, No. 23cv044940 (Cal. Supp. Cnty Alameda filed Sept. 21, 2023), https://oag.ca.gov/system/files/attachments/press-docs/Complaint.pdf.pdf.

complaint, AG Bonta requests injunctive relief and civil penalties of up to $2,500 for each violation.[122] The case is still pending in California state court.

CPCs have also gotten the attention of anti-AGs seeking to wield their consumer protection power. Texas AG Ken Paxton threatened to sue Yelp after it began labeling crisis pregnancy centers featured on its site after the *Dobbs* decision.[123] The disclaimer on all crisis pregnancy center pages noted that facilities, "typically provide limited medical services and may not have licensed medical professionals onsite." Paxton argues that the labeling is misleading and that abortion providers don't have medical professionals on site but are not labeled with the same disclaimer on Yelp.[124] Yelp asserted that the label was not misleading, however, updated it to: "Crisis Pregnancy Centers do not offer abortions or referrals to abortion providers." AG Paxton concedes this statement was accurate in a press release, but continued to threaten to sue Yelp for violations globally not just limited to Texas. In response, Yelp filed suit against Paxton in the Northern District of California for violating its free speech rights and abusing the power of his office. The next day AG Paxton responded by issuing a press release saying he had sued Yelp and attached a draft of a complaint.[125] However, a docket search as of November 22, 2023 revealed no such suit has yet been filed.

The consumer protection power appears to be an extremely effective and necessary tool of pro-AGs to protect the rights of those seeking reproductive healthcare. These tools ensure that

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[122] *Id.*
[123] Press Release, Ken Paxton, Attorney General of Texas, Attorney General Paxton Sues Yelp Over Discrimination Against Crisis Pregnancy Centers (Sept. 28, 2023), https://texasattorneygeneral.gov/news/releases/attorney-general-paxton-sues-yelp-over-discrimination-against-crisis-pregnancy-centers.
[124] Yelp filed a counter suit in the Northern District of California against AG Paxton for discriminating against them based on their viewpoint. *Yelp Inc. v. Paxton*, 3:23CV04977, (N.D. Cal. Filed Sept. 27, 2023), https://dockets.justia.com/docket/california/candce/3:2023cv04977/418726.
[125] Press Release, Paxton, *supra* note 123.

data and privacy are not just stated goals of companies, but also are put into practice with sufficient resources dedicated to protecting this information. The ability of AGs to disseminate information about data security to consumers is a valuable tool to ensure consumers can protect themselves. The power to communicate with tech companies has also helped to ensure data privacy is a priority. Lastly, the ability to prevent deceptive practices among unethical organizations is key. While it may be abused—like Paxton suing Yelp over admitted true statements—in some cases, this power is crucial to prevent bad actors from taking advantage of a patient who may be in a vulnerable situation and unsure of who to trust. Overall, the consumer protection power is a strong tool for pro-AGs to use when protecting reproductive rights.

III. Antitrust Powers

While antitrust authority is typically thought of as an authority of the federal government, many states had antitrust laws predating the passage of the first federal law regulating antitrust, the Sherman Act of 1890.[126] In modern times, AGs became active in the antitrust space in the 1970s after the Hart-Scott-Rodino Act allowed AGs to maintain federal antitrust suits on behalf of their states and to receive the treble damages allowed under federal law.[127] State law can vary on the authority given to the AG to maintain antitrust suits when it comes to the type of damages alleged—from direct state purchaser to on behalf of consumers—under the Clayton Act. However, the AG has *parens patriae* authority when they seek injunctive relief to prevent damage to their state's economy or when seeking Sherman Act damages on behalf of state consumers. The AG also has authority, as do private plaintiffs, to prevent mergers through

[126] Emily Myers, State Attorneys General Powers and Duties, NAAG, Ch. 15 (Antitrust) 312 (2018).
[127] *Id.* at 313.

injunction. AGs routinely engage in multistate litigation when using antitrust powers.[128] Healthcare mergers are one of the most highly active areas of antitrust litigation for state AGs.[129]

When individual hospitals or hospital systems merge or are acquired, there is nearly always going to be a reduction and change in the care and locations offered. This implicates reproductive healthcare greatly, through an elimination of certain services entirely in the system, a reduction in certain services offered, and a decrease in access by closing facilities. The elimination of reproductive healthcare like abortion, contraception, sterilization, and infertility treatment most often occurs when a Catholic hospital takes over a secular one. At Catholic hospitals, they operated under the Ethical and Religious Directives set by the U.S. Conference of Catholic Bishops which prohibit abortion care, contraception, sterilization, IVF treatment, and often place barriers to patients in dire situations needing miscarriage care. According to the Catholic Hospital Association, one in seven hospital patients is treated at a Catholic hospital. A 2020 report from Community Catalyst, an organization which tracks hospitals operating under Catholic health directives, found that four of the ten largest hospital systems are Catholic operating in 41 states; Catholic hospitals expanded operations to other facilities like urgent cares, pharmacies, and surgery centers; and there are 52 communities that are solely served by a Catholic hospital in their geographic region. Another consequence of the expansion of Catholic hospitals is the restriction of care in secular facilities that are partly owned by such systems. After a secular hospital with 22 percent Catholic ownership was asked about a transfer program to transfer patients seeking abortion to another facility, they responded that their ownership

[128] *Id.* at 318.
[129] *Id.* at 323.

prevents them from providing such an agreement.[130] These restrictions also implicate secular insurance plans and public university systems who may partner with Catholic systems and end up restricting the care of patients. This can be particularly harmful when a state's Medicaid insurance partners with a Catholic system, thereby, eliminating reproductive healthcare for many of the state's poorest residents.[131] The expansion of Catholic hospital systems is a threat ot reproductive healthcare access, however, there are some tools AGs can use to ensure vital care is available to patients.

California AGs are particularly active in hospital system mergers as California law requires AG approval for a merger or acquisition of a non-profit entity.[132] In 2017, California AG Xavier Bacerra was faced with the merger of a Catholic health system, Catholic Health Initiatives, with another religious, although less stringent system, Dignity Health, potentially eliminating reproductive healthcare.[133] The AG's office engaged in months-long review process and conditionally approved the merger. The conditions require the new system to maintain current levels of reproductive healthcare as many Dignity Health hospitals provided greater range of services like contraception care and sterilization treatment compared to Catholic Health Initiatives which does not provide such services. The new system had to maintain services for at

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[130] TESS SOLOMON, LOIS UTTLEY, PATTY HASBROUCK & YOOLIM JUNG, COMMUNITY CATALYST, BIGGER AND BIGGER: THE GROWTH OF CATHOLIC HEALTH SYSTEMS 21 (2020), https://communitycatalyst.org/wp-content/uploads/2022/11/2020-Cath-Hosp-Report-2020-31.pdf.

[131] This situation nearly occurred in Oregon, however, the partnership fell through after opposition from reproductive rights advocates like Planned Parenthood, NARAL, and ACLU of Oregon. *Id.* at 23.

[132] SAMUEL CHANG, KATHERINE GUDIKSEN, THOMAS GREANEY & JAIME KING, CALIFORNIA HEALTH CARE FOUNDATION, EXAMINING THE AUTHORITY OF CALIFORNIA'S ATTORNEY GENERAL IN HEALTH CARE MERGERS (Apr. 2020), https://www.chcf.org/wp-content/uploads/2020/04/ExaminingAuthorityCAAttorneyGeneralHealthCareMergers.pdf.

[133] Neither system provides direct abortion—abortion for the purposes of terminating a pregnancy, rather than in the case of fetal abnormality or necessity to save the life of the patient—however, Dignity Health does provide contraception care and sterilization procedures. Gina Kim, *Nurses air concerns over Dignity Health merger; Official says fears unfounded*, LOMPOC RECORD (Sept. 27, 2018), https://lompocrecord.com/news/local/nurses-air-concerns-over-dignity-health-merger-official-says-fears-unfounded/article_d074806e-8377-5491-a968-91beadec7047.html.

least five years and to notify the AG's office of any reduction in care for an additional five years. While the merger did not necessarily result in an expansion of services, the AG was crucial in preserving current levels of care for at least some time. In 2019, AG Bacerra rejected a merger on the grounds that it was not in the public interest and would result in a reduction of services offered.[134] Major public criticism centered on the fact that the merger of the two religious systems would further erode reproductive rights, especially in the rural communities where the systems operated.

Citizen groups have also urged AGs to use this power. In Connecticut, a Catholic hospital was poised to take over a small rural hospital, however, residents protested the proposal which would restrict reproductive care. The group urged AG William Tong to deny the merger. While his office was reviewing the case, Tong did not provide specifics but said "we need to ensure that any new ownership can provide a full range of care — including reproductive health care, family planning, gender affirming care, and end of life care."[135] Ultimately, the Catholic system withdrew its application to merge due to financial difficulties.

With many hospitals facing extreme financial loss, merger may be inevitable, however, AGs can require or urge the utilization of certain corporate structures to ensure reproductive access. Setting up a separate entity on a particular floor or area of the facility which is not bound by the Catholic directives has allowed the merger to proceed while still ensuring patients have

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[134] Press Release, Rob Bonta, Attorney General of California, California Department of Justice Denies Transaction between Adventist Health and St. Joseph Health Systems (Oct. 31, 2019), https://oag.ca.gov/news/press-releases/california-department-justice-denies-transaction-between-adventist-health-and-st.

[135] Erica Phillips, *Rural CT coalition opposes Catholic hospital takeover of Day Kimball*, CTMIRROR, (Aug. 18, 2022), https://ctmirror.org/2022/08/18/ct-coalition-catholic-hospital-takeover-day-kimball-covenant-health/.

access to vital care.[136] These are usually set up by partnerships or operating agreements for separate organizations. However, in many cases these structures are approved by the local diocese which nearly universally prohibits structures that allow elective abortions.

A number of states are considering expanding the AG's role in reviewing mergers.[137] Overall, the AG antitrust power in the context of reproductive rights is necessary to ensure rural patients maintain levels of access and care. While the power does not affirmatively expand access, it ensures that some of the most vulnerable communities are not left behind. This power appears to be a strong way to maintain levels of access and has limited drawbacks.

IV. Charitable Trust Powers

AGs also have power under the charitable trust doctrine to protect reproductive rights in the hospital merger context. Since not all states have explicit merger antitrust powers, it is important to discuss these powers as an alternative mechanism for AGs to utilize. The charitable trust power is rooted in common law and in state statutes giving the AG supervisory power over charitable trusts.[138] When it comes to hospitals, many (as discussed) are founded as nonprofits. Catholic hospitals adhere to the Directives which prohibit many reproductive health services such as abortion, sterilization, fertility treatment, and contraception. While Catholic hospitals are of course, entitled to free exercise of religion, problems arise when they are the only accessible form of medical care and refuse to provide vital reproductive health services. Given the increase in the mergers of these institutions and the insistence that the formerly secular institution adopt

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[136] Caitlin M. Durand, *Who Blesses This Merger? Antitrust's Role in Maintaining Access to Reproductive Health Care in the Wake of Catholic Hospital Mergers*, 61 B.C. L. REV. 2595 (2020).
[137] Alexis Kayser, *Hospital mergers meet a new major player: state governments*, BECKERS HOSPITAL REVIEW (Feb. 7, 2023), https://www.beckershospitalreview.com/hospital-transactions-and-valuation/hospital-mergers-meet-a-new-major-player-state-governments.html.
[138] Robert Carlson, State Attorneys General Powers and Duties, NAAG, Ch. 12 (Charities) 216 (2018).

the Directive, this can create reproductive health deserts.[139]

In New Jersey, like California, the AG reviews hospital merger petitions and specifically looks at the charitable missions. In 1998, two hospitals proposed a merger, one secular and one Catholic.[140] The AG did not see a change in the charitable mission, however, approved it on the condition that the hospitals seek court approval. While the AG here did not pursue this case, they could have. Instead, the ACLU of New Jersey stepped in and argued the secular hospital, by eliminating reproductive health services to comply with the Directives, was drastically changing its charitable mission. The mission of the secular hospital specifically mentioned its nonreligious nature.[141] A court agreed and the ACLU of New Jersey settled in exchange for a sizable trust set aside for Planned Parenthood to provide reproductive health services for the community. This was a strong, albeit, not wholly successful result.

The AG has a strong authority to ensure that a charity's mission is not altered in such a way that the trustees have breached their fiduciary duties to the beneficiaries.[142] The AG of New Hampshire in 1998 successfully ensured the dissolution of a merger of a secular and a Catholic hospital. The AG demonstrated that by forcing the secular doctors to adhere to the Directives it was a fundamental change in the core mission of the secular hospital. This change required the new entity to show "it was illegal, impracticable or impossible to continue the distinct charitable missions of the two hospitals."[143]

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[139] Alison Manolovici Cody, *Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic*, 57 N.Y.U. ANN. SURV. AM. L. 323 (2000).
[140] *See* Verified Complaint at 11, In re Application of Elizabeth Gen. Med. Ctr. and St. Elizabeth Hosp. For Approval of Consolidation (N.J. Super. Ct. App. Div. Aug. 12, 1998) (No. UNN-C-97-99).
[141] *See* Cody, *supra* note 139.
[142] *Id.* at 342.
[143] *Id.* at 345.

The AG has a unique power in this space as they are generally the only public officer to be able to show standing in these situations. Generally, intended beneficiaries or donors do not have standing to sue to enforce the mission.[144] Because of the unique position of the AGs office and the power that comes from ensuring hospitals uphold their missions and commitment to reproductive rights, this is a strong power. Like with antitrust, even where reproductive rights are legal, access can be an issue. When mergers of nonprofit entities threaten access to reproductive care, the AG should step in to ensure the charitable missions are upheld. Overall, this power is a strong tool that can lead to the expansion of reproductive rights.

V. Duty to Defend / Constitutional Nondefense

The duty to defend and its opposite, constitutional nondefense, is a unique and controversial power of AGs. The duty to defend refers to the duty of state AGs to defend the laws of the state as the chief law enforcement officer. Many AGs, however, decline to defend laws that they feel are inconsistent with the U.S. Constitution or the state constitution under the principle of constitutional nondefense. This power to decline the duty to defend is typically justified under a theory of executive separation of power. Most, 43, AGs are popularly elected with only 5 being appointed by the governor. Further, the history of the office as distinct from the sovereign[145] rather than merely subservient demonstrates that there is a separation of office and power. Part of this power is the ability for the AG to exercise independent judgment as to the legitimacy in pursuing or defending litigation. Where an AG finds the law to be unconstitutional, they no longer have an obligation to defend or enforce it. In many cases where the AG declines to defend the law, other individuals can step in to defend it including third-parties and other state

[144] Robert Carlson & Caitlin Calder, *Chapter 12: Protection and Regulation of Nonprofits and Charitable Assets*, in STATE ATTORNEYS GENERAL POWERS AND DUTIES NAAG 215, 223 (2018).
[145] Gregory Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L.J. 513, 515–20 (2015).

officials.[146]

Critics argue that use of this power violates the role and power that the people entrusted into the state's AG; turns the AG into a partisan figure; erodes the system of checks and balances; turns the office of AG into a partisan figure; and diminishes public trust in their officials.[147] Proponents of this power argue that the AG's role is to defend laws in earnest and to decline to defend those they believe are counter to state and federal constitutions. Whole papers can be (and have been) written on the critiques and benefits of this power, however, this paper only briefly notes these arguments and will focus on the use of constitutional nondefense in the reproductive rights context.

State AGs have already utilized the constitutional nondefense power in the immediate aftermath of the *Dobbs* decision. Both Michigan and Wisconsin had longstanding laws on their books which outlawed and criminalized abortion.[148] The Michigan law prohibited abortion in all cases unless the pregnant person's life was in danger and charged anyone who assisted in prohibited abortion with a felony. The law enacted in 1931 and remained state statute, however, was unenforceable as long as *Roe* remained good law.[149] After the draft decision of *Dobbs* was leaked indicating the Supreme Court's intention to overturn *Roe*, the Michigan AG, Dana Nessel,

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[146] Katherine Shaw, *Constitutional Nondefense in the States*, 114 Colum. L. Rev. 213, 251–55 (2014).
[147] John Suthers, *A 'veto' AGs shouldn't wield*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html.
[148] In Wisconsin, the AG affirmatively sued the Republican leaders in the state legislature chambers after they refused Governor Tony Evers's request to repeal the 1849 law through the state legislature. The AG instead asked the court to invalidate the law. Press Release, Wisconsin Dept. of Justice, Gov. Evers, AG Kaul Announce Direct Legal Challenge to Wisconsin's 1800s-era Criminal Abortion Ban (June 28, 2022), https://www.doj.state.wi.us/news-releases/gov-evers-ag-kaul-announce-direct-legal-challenge-wisconsin%E2%80%99s-1800s-era-criminal; Kaul v. Kapenga, No. 2022-CV- (Wis. Cir. Ct. Dane Cty filed June 28, 2022), https://www.doj.state.wi.us/sites/default/files/news-media/6.28.22_Criminal_Abortion_Ban_Complaint.pdf.
[149] Press Release, Governor Gretchen Whitmer, Whitmer Statement on Ruling in *Dobbs v Jackson* (June 24, 2022), https://www.michigan.gov/whitmer/news/press-releases/2022/06/24/whitmer-statement-on-ruling-in-dobbs-v-jackson.

argued that the Michigan state constitution protected the right to abortion and she would refuse "to enforce this draconian law that will endanger their lives and put to jeopardy the health, safety and welfare of the lives of each and every woman in the state of Michigan."[150] Planned Parenthood of Michigan along with a physician sued the AG to prohibit the enforcement of the law. AG Nessel declined to defend the law[151] in court in response to a preliminary injunction requested by the plaintiffs which the judge granted. In response, the Michigan Assembly and Senate, with Republican majorities, filed to intervene and were granted leave to do so.[152] A Michigan Court of Claims judge granted the injunction on the grounds that the 1931 law "violate[s] the rights to liberty … bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act and is unconstitutionally vague" and permanently enjoined the AG from enforcing the law.[153] Critics of the decision argued both that plaintiffs lacked standing and that the judge misinterpreted the Michigan constitution, however, the controversy ultimately became moot when Michigan passed a constitutional amendment in 2022 which explicitly enshrined the right to abortion in the state constitution.[154] Ultimately, the 1931 law was not enforced in Michigan even temporarily. It is unclear how influential the AG's non-defense was in the success of the case (prior to the passage of the amendment), however, it likely had some influence which ultimately prevented the enforcement

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[150] Hannah Farrow, *Michigan AG refuses 'draconian' 1931 abortion law*, POLITICO (May 8, 2022), https://www.politico.com/news/2022/05/08/michigan-ag-refuses-draconian-1931-law-00030912.
[151] Response to Plaintiffs' April 7, 2022 Motion for Preliminary Injunction, Planned Parenthood of Michigan v. Attorney General of the State of Michigan, 2022 WL 1909658 (2022).
[152] Motion of the Michigan House of Representatives and Michigan Senate to Intervene as Defendants and for Reconsideration, Planned Parenthood of Michigan v. Attorney General of the State of Michigan, 2022 WL 1909658 (2022).
[153] Planned Parenthood of Michigan v. Attorney General of the State of Michigan, No. 22-000044, 2022 WL 7076177 (Mich. Ct. Cl. Sep. 07, 2022)
[154] ACLU, *In Michigan, a Historic Victory for Abortion Rights*, ACLU: NEWS & COMMENTARY (Apr. 6, 2023), https://www.aclu.org/news/reproductive-freedom/in-michigan-a-historic-victory-for-abortion-rights.

of a draconian law for any period of time in Michigan.

While it is becoming increasingly rare for a state to have a legislature which is anti-reproductive rights (majority Republican) with statewide officers who are pro-reproductive rights (Democrats), it still does occur. The split is often in states that are fairly even in their politics, but have high levels of gerrymandering in their state legislatures. One such state is North Carolina. Party registration shows that 43 percent are Democrats and 41 percent are Republicans with 17 percent who did not identify with a party, yet, the state legislature has a super-majority of Republicans.[155] The state routinely elects Democrats to statewide office and currently its Attorney General Josh Stein is a Democrat.[156]

In 2023, the state legislature passed a ban on abortion after 12-weeks, instituted barriers and burdens on patients by requiring a 72-hour waiting period, requiring an "intrauterine documentation," and preventing medication abortion after 70 days.[157] Planned Parenthood South Atlantic challenged the law on the grounds that it violates due process. AG Stein was a named defendant however exercised his constitutional nondefense power and even spoke at a hearing for an injunction alongside the plaintiffs. In defending his nondefense decision, Stein said "my obligation is to the United States Constitution. That's what I swear my oath to and to North

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[155] Pew Research Center, *Party affiliation among adults in North Carolina,* PEW RSCH. CTR. (last visited Dec. 4, 2023), https://www.pewresearch.org/religion/religious-landscape-study/state/north-carolina/party-affiliation/; Gary Robertson & Hannah Schoenbaum, *Party switch gives GOP veto-proof control in North Carolina*, AP NEWS (Apr. 5, 2023), https://apnews.com/article/north-carolina-party-switch-republican-01af019aa58fd44f0e2110c32a48c4c0.

[156] Dawn Baumgartner Vaughan, *Democratic Gov. Cooper reelected as GOP maintains NC legislative control. What's next?*, THE NEWS & OBSERVER (Nov. 4, 2020), https://www.newsobserver.com/news/politics-government/election/article246965327.html; Press Release, NAAG, Josh Stein: North Carolina Attorney General (last visited Dec. 4, 2023), https://www.naag.org/attorney-general/josh-stein/.

[157] Gary Robertson, *Judge blocks 2 provisions in North Carolina's new abortion law; 12-week near-ban remains in place*, AP NEWS (Sept. 30, 2023), https://apnews.com/article/north-carolina-abortion-law-hospitals-pill-296d7e870d72c3ff2467f1c390453faa.

Carolina law when it is not inconsistent with that Constitution."[158] AG Stein argued the plaintiffs' motion for a temporary injunction should be granted because the law was unconstitutional due to its vagueness. However, he argued, even if the legislature remedied the deficiencies, it would still violate the Due Process Clause—by requiring hospitalization for surgical abortions after 12-weeks and by requiring documentation of intrauterine pregnancy which may be impossible in early stages—and the First Amendment—by prohibiting physicians from informing patients on how to obtain abortions out of state.[159] While the case was proceeding, the state legislature amended the statute to clarify some ambiguities and to delay implementation of some provisions. Because of the changes, the federal court in the Western District of North Carolina granted the injunction narrowly to enjoin the enforcement of the intrauterine pregnancy documentation requirement and the hospitalization requirement for abortions after 12-weeks in the case of rape or incest.[160] The case is continuing in district court. It is difficult to measure the exact impact AG Stein's decision to decline to defend the law had on the granting of the injunction, the office of the AG was likely given sufficient weight and had a positive impact on the result.

While the nondefense is not the strongest tool in the AG's arsenal, it can be effective and useful. The situation where an AG is pro-reproductive rights while the legislature or governor is anti-reproductive rights is becoming increasingly rare. In the cases where it does happen, the AG

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[158] Michael Hyland, *NC Attorney General Josh Stein won't defend state over 'sloppy' abortion law*, WAVY (June 29, 2023), https://www.wavy.com/news/north-carolina/nc-attorney-general-josh-stein-wont-defend-state-over-sloppy-abortion-law/#:~:text=%E2%80%9CMy%20obligation%20is%20to%20the,law%20as%20a%20political%20move.

[159] Defendant AG Joshua Stein's Memorandum of Law Regarding Plaintiffs' Motion for Temporary Restraining Order, Planned Parenthood South Atlantic v. Stein, No. 1:23-CV-480 (M.D. N.C. filed June 27, 2023) (ECF 27).

[160] Order Granting in Part Temporary Restraining Order, Planned Parenthood South Atlantic v. Stein, No. 1:23-CV-480 (M.D. N.C. filed June 30, 2023) (ECF 31).

can help to enjoin the laws from going into effect or where full enjoinment is not possible, to minimize the harm done. While the resources of the AG's office cannot (and should not) overcome or undermine legitimate legislative process, a strong advocate ensuring the laws do not violate due process and indiscriminately cause physicians and patients to be burdened by restrictions and uncertainty concurrently is important. Nondefense in the reproductive rights context is an important, albeit, fairly limited power.

VI. State and Local Law Conflicts

State laws on the powers divided between state and local governments vary from state to state. Generally speaking, there are two main legal traditions: Dillon's Rule and home rule. In states that follow the Dillon's Rule construction, "a municipal corporation's powers are limited to those granted in *express words*; ... *necessarily implied or necessarily incident* to the powers expressly granted; ... *absolutely essential* to the declared objects and purposes of the corporation, and that any fair doubt as to the existence of a power is resolved ... against the corporation."[161] Under home rule, "a state delegat[es]...power to a local government that allows the locality certain latitude in powers of self-government."[162] The case law in each state can greatly determine the balance of powers, however, each interpretation does not stand alone. The division of powers is important when it comes to state preemption of local law. In an increasingly divided world, where cities are increasingly liberal and rural areas conservative, preemption has large implications for self-government.

As the state's chief legal officer, the AG is routinely involved in preemption fights. Like with the duty to defend, the makeup of the state's government can see the AG as aligned with or

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[161] Lauren Phillips, *Impeding Innovation, State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2231 (2017) (internal quotations omitted).
[162] *Id.* at 2232.

counter to the legislature. State governments have passed a number of state laws to limit or undermine local government efforts to protect abortion. For example, Tennessee restricted local governments from covering abortion services in municipal health insurance coverage. A number of states including Texas, Tennessee, and Florida have enacted measures to prevent local governments from paying for travel to, childcare for, or the abortion itself sought out of state.[163] There have also been instances where a conservative city enacts restrictions in a pro-choice state. Some cities in New Mexico have outlawed abortion which has led the state government to seek preemption laws.[164]

In 2022, Temecula, a city in California was considering a proposal to ban abortion within the city. AG Bonta issued a letter to the city council saying the city cannot "limit an individual's ability to exercise their right to reproductive choice and bodily autonomy" continuing, "Our office will not hesitate to take legal action should a local regulation conflict with California state law."[165] The resolution ultimately failed.[166] While an individual city would not have had an enormous impact on the right to an abortion, AG Bonta ensured that no one had increased barriers to access who lived in the city and affirmed the rights of every Caliofornian to abortion, no matter where they live. In New Mexico, where many cities have passed bans, the AG Raúl Torrez filed a petition with the state supreme court to invalidate the

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[163] Gaby Goldstein & LiJia Gong, *Republicans Are Systematically Blocking Cities' Ability to Protect Abortion*, THE NEW REPUBLIC (June 20, 2023), https://newrepublic.com/article/173776/republicans-blocking-cities-ability-protect-abortion-preemption.

[164] *See* Caitlin Dewey, *Activists Aim for Supreme Court With Local Abortion Bans in Blue States*, STATELINE (Feb. 27, 2023), https://stateline.org/2023/02/27/activists-aim-for-supreme- court-with-local-abortion-bans-in-blue-states/.

[165] C Mandler, *California attorney general warns town against abortion ban as governor signs 13 reproductive health bills*, CBS NEWS (Sept. 27, 2022), https://www.cbsnews.com/news/california-warns-temecula-city-abortion-ban-newsom-signs-reproductive-health-bills/.

[166] California City News, *After State's Warning, Temecula Leaders Kill Proposed Abortion Ban*, (Sept. 27, 2022), https://www.californiacitynews.org/policy/after-state%E2%80%99s-warning-temecula-leaders-kill-proposed-abortion-ban. It was the second city resolution banning abortion to fail.

bans.[167] The petition was granted and the case is currently pending a hearing.[168] Again, the AG is affirming the right to abortion in their state.

In St. Louis, the city is in a fight with the AG over an abortion fund it created to allow residents to travel to obtain abortion in states where it is legal. The city could present a roadmap to effective ways to protect abortion rights in a state where the procedure is banned.[169] Of course, many states are working to ensure it has as strong as possible preemption laws to prevent this situation.

The state and local government power is important, albeit one that requires an alliance between the state legislature and the AG to be most effective. This power ensures that local governments cannot burden their residents and deny access to reproductive health services. While the cities that have banned abortion within pro-choice states only cover about 1 million people, this is still a significant number of people who may face dire situations. This power does restrict rights in some manner by preventing local governments from pooling resources or covering services through insurance, however, the ability to prevent local governments from creating a patchwork of law within a pro-choice state has a much greater impact on access. Protecting abortion within a pro-choice state should be a paramount priority for the AG, one that they are able to achieve through the preemption power.

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[167] Press Release, Raúl Torrez, Attorney General of New Mexico, New Mexico Attorney General Extraordinary Writ on Local Abortion Bans Advances (Mar. 31, 2023), https://www.nmag.gov/new-mexico-attorney-general-extraordinary-writ-on-local-abortion-bans-advances/#:~:text=Albuquerque%2C%20NM%20%E2%80%93%20Today%2C%20the,reproductive%20healthcare%20in%20their%20communities.

[168] Petitioner's Brief in Chief, State of New Mexico v. Board of County Commissioners for Lea County, No. S-1-SC-39742 (S.C. of N.M. filed Apr. 20, 2023), https://www.nmag.gov/wp-content/uploads/2023/04/State-ex-rel-Torrez-v.-Cities-and-Counties-Brief-in-Chief.pdf.

[169] Ashley Winters, *Reproductive Equity Fund Bill Is Signed by STL Mayor and Missouri Attorney General Files to Block It*, ST. LOUIS AM. (July 28, 2022), https://www.stlamerican.com/news/local_news/reproductive-equity-fund-bill-is-signed-by-stl-mayor-and-missouri-attorney-general-files-to/article_82f0158a-096d-11ed-ac7e-4732613b1107.html.

VII. Ballot Language Power

In the United States, there are 27 states which have some form of direct democracy and allow voters to directly enact law.[170] Many AGs have a unique influence over the state's political elections through the writing or approval of ballot descriptions and titles. AGs derive this power from state statutes.[171] In 7 states, AGs have the sole power to write the ballot descriptions. In 7 states, AGs share the ballot writing power with another executive official or a board of individuals. In 6 states, AGs have approval power over the ballot language, however, it is relatively rare for AGs to strike down the description (or initiative entirely), although it does of course happen.[172] States in their election laws require neutral, descriptive language[173] in the ballot descriptions, although, in practice there are partisan biases. Ballot language is intensely litigated, particularly, on controversial issues, like reproductive rights. The standard of review that most courts apply is a deferential one, giving significant power and responsibility to the AG (or other elected officials).[174] Ballot language may influence on voters' preferences, particularly when it comes to contentious issues like LGBTQ+ rights and abortion.[175] Critics argue that AGs descriptions are biased as they are partisan elected officials which leads to a corruption of free

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[170] Suzan G. LeVine, *The United States & Direct Democracy*, U.S. EMBASSY IN SWITZERLAND AND LIECHTENSTEIN: THE LEVINE LINE (Sept. 29, 2014), https://ch.usembassy.gov/the-united-states-direct-democracy/#:~:text=This%20interactive%20map%20of%20states,initiatives%20and%2024%20have%20referenda.

[171] National Conference of State Legislatures, *Initiative and Referendum Processes* (Jan. 4, 2022), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes.

[172] Devon Hesano, *Ohio Attorney General Twice Rejects Ballot Language for Citizen-Led Redistricting Commission*, DEMOCRACY DOCKET (Sept. 15, 2023), https://www.democracydocket.com/news-alerts/ohio-ag-twice-rejects-ballot-language-for-citizen-led-redistricting-commission/.

[173] California's law requires that the AG "give a true and impartial statement of the purpose of the measure." CAL. ELEC. CODE § 9051(2)(c) (West 2023).

[174] Ben Christopher, *Critics demand fairer prop ballot labels and summaries, but lawsuits tend to flame out*, CAL MATTERS (Aug. 7, 2020), https://calmatters.org/politics/2020/08/california-proposition-descriptions-lawsuits-attorney-general/.

[175] Craig M. Burnett & Vladimir Kogan, The Case of the Stolen Initiative: Were the Voters Framed? (June 15, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643448.

and fair elections.

There have been a number of high-profile and significant ballot measures implicating reproductive rights in recent election cycles, particularly, after *Dobbs*. In September of 2023, the AG of Arkansas rejected a ballot measure to repeal the tax on menstrual hygiene products on the grounds that the measure was too vague.[176] The popular title of the measure was "An Act to Exempt Feminine Hygiene Products from Sales and Use Tax" with the full ballot title reading:

> An act to exempt feminine hygiene products from sales and use tax effective January 1, 2024. Defining "feminine hygiene products" as tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property designed for feminine hygiene in connection with the human menstrual cycle.

In Arkansas, the AG has the authority to approve or reject the proposed ballot title. Tim Griffin, the AG, rejected the ballot measure on the grounds that the definition of "feminine hygiene products" was different from the definition in Streamlined Sales and Use Tax Agreement which is a compact among states to uniformly define and administer sales tax to create ease for product sellers.[177] Griffin claimed that because the product definitions varied, it was unclear whether passage of the measure would make Arkansas non-compliant with the Streamline Agreement. After the rejection, the Arkansas Period Poverty Project submitted a revised version based on the AG opinion letter and the revision was approved.[178]

In California in 2022, Proposition 1 was on the ballot which was a constitutional amendment to add protections for abortion into the state constitution. The measure submitted contained the following text:

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[176] https://ag-opinions.s3.amazonaws.com/uploads/2023-084.pdf.
[177] AP News, *Arkansas AG sets ballot language for proposal to drop sales tax on diapers, menstrual products* (Oct. 11, 2023), https://apnews.com/article/menstrual-hygiene-products-sales-tax-ballot-arkansas-6e17ae2ea80abb65a24684c3d4fef4a6.
[178] *Id.*

That Section 1.1 is added to Article I thereof, to read:

> SEC. 1.1. The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.[179]

The ballot was titled as "CONSTITUTIONAL RIGHT TO REPRODUCTIVE FREEDOM. LEGISLATIVE CONSTITUTIONAL AMENDMENT." and the summary was the following:

> Amends California Constitution to expressly include an individual's fundamental right to reproductive freedom, which includes the fundamental right to choose to have an abortion and the fundamental right to choose or refuse contraceptives. This amendment does not narrow or limit the existing rights to privacy and equal protection under the California Constitution. **Fiscal Impact:** No direct fiscal effect because reproductive rights already are protected by state law.[180]

The fiscal impact report is determined by the Legislative Analyst's Office, a nonpartisan office of the state legislature.

AG Bonta's description of the amendment makes a strong case for reproductive freedom by using language like "freedom" and "fundamental rights."[181] It also ensures that opponents

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[179] Legislative Analyst's Office, *Proposition 1, Constitutional Right to Reproductive Freedom. Legislative Constitutional Amendment*, LAO (Nov. 8, 2022), https://lao.ca.gov/BallotAnalysis/Proposition?number=1&year=2022.

[180] California Secretary of State, *California General Election November 8, 2022, Constitutional Right to Reproductive Freedom. Legislative Constitutional Amendment* (last visited Dec. 4, 2023), https://vigarchive.sos.ca.gov/2022/general/propositions/1/.

[181] It is also worth noting that neither the text of the amendment, the summary, or the title use "woman" or "female" when describing the amendment. This language is both harmful in terms of excluding trans and non-binary individuals who may become pregnant or use oral contraceptives. Further, abortion and contraception access affects all Californians regardless of gender as access to reproductive care is crucial to achieving a fair and well-functioning society. *See* Kyle Bukowski, *The Gendered Language of Abortion*, PLANNED PARENTHOOD OF THE PAC. SW. (Jan. 28, 2021), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/blog/the-gendered-language-of-abortion; National Academies, *Resources on Reproductive Health, Equity, & Society*, (last visited Nov.

cannot misstate or obscure the amendment's effects through arguments about equal protection or privacy. The amendment itself and Bonta's summary is a strong example of protecting reproductive rights through direct democracy. Opponents critiqued the amendment itself, and not Bonta's description. Opponents particularly claimed the amendment was vague and appears to allow abortion up until a due date. This interpretation of the amendment was strongly rejected by constitutional scholars.[182] Bonta himself noted that he would defend the measure in court and "if there needs to be some clarification, it can be clarified by a court without striking it down."[183] Bonta typically does not endorse or support ballot measures, however, he did throw his support behind Proposition 1. California voters passed Proposition 1 with 66 percent voting for the measure.[184] While California already had strong protections of these rights (and was unlikely to roll them back), the measure demonstrates strong commitment to these rights among California's electorate and is important to affirm where other states nearby may be restricting their protections.

In Missouri, there is an ongoing fight over reproductive rights ballot questions for the 2024 election. Proponents of reproductive rights represented by the ACLU of Missouri submitted six ballot questions to the Secretary of State, Jay Ashcroft, and the Attorney General, Andrew

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27, 2023), https://www.nationalacademies.org/topics/reproductive-health-equity-society#:~:text=Equitable%20access%20to%20high%2Dquality,and%20innovation%2C%20and%20population%20impacts.

[182] Melody Gutierrez, *California Politics: What constitutional law experts say about the abortion ballot measure*, LA TIMES (Oct. 14, 2022), https://www.latimes.com/california/newsletter/2022-10-14/california-politics-abortion-measure-gas-taxes-ca-politics.

[183] *Id.*

[184] Grace Ashford et al., *California Proposition 1 Election Results: Constitutional Right to Reproductive Freedom*, N.Y. TIMES (Dec. 20, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-california-proposition-1-constitutional-right-to-reproductive-freedom.html.

Bailey, in early 2023.[185] Each initiative was a different phrasing of a new § 36 to Article I of the Missouri Constitution called "The Right to Reproductive Freedom Initiative" to enshrine protections for abortion and contraception access in the state constitution.[186] After the State Auditor, Scott Fitzpatrick, determined that the ballot measures would cost the state and local governments $51,000 a year and sent the report to Bailey in March, Bailey refused to certify this number to the voters and instead claimed the measure would cost $51 billion. Bailey alleged the cost would come from losing federal Medicaid health insurance funding of $12 billion a year and a reduction in the birth rate in the state leading to a reduction in a future tax base. When the state auditor refused to issue an inaccurate fiscal assessment, Bailey refused to certify the amendment which would allow proponents to begin collecting the necessary number of signatures to place the measure on the ballot. The ACLU of Missouri on behalf of proponents sued Bailey, Fitzpatrick, and Ashcroft (who also withheld administrative approval). After a delay of over 50 days, according to the proponents' counsel, a Missouri district court judge ordered Bailey to approve Fitzpatick's initial fiscal summary and certify the proposition within 24 hours. The judge wrote, "[T]he attorney general has no authority to substitute his own judgment for that of the auditor regarding the estimated cost of a proposed measure."[187] Bailey appealed the decision, but ultimately, the Missouri Supreme Court agreed and ordered Bailey to certify.

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[185] Summer Ballentine, *ACLU sues amid Missouri GOP spat over abortion measure cost*, AP NEWS (May 4, 2023), https://apnews.com/article/abortion-missouri-ballot-attorney-general-auditor-fbe60ab843041b3509c5275e8a703207.

[186] Kelly v. Fitzpatrick, No. WD 86594, 2023 WL 7141040 (Mo. Ct. App. Oct. 31, 2023), *reh'g and/or transfer denied* (Nov. 3, 2023). The versions varied in the exceptions they allowed and the explicit protections. For a full list of the petitions and their variance, see Fitz-James v. Ashcroft, No. WD 86595, 2023 WL 7141416 at app'x (Mo. Ct. App. Oct. 31, 2023), *reh'g and/or transfer denied* (Nov. 3, 2023).

[187] Kurt Erickson, *Judge rejects Missouri attorney general's bid to rewrite ballot language on abortion issue*, ST. LOUIS POST DISPATCH (June 20, 2023), https://www.stltoday.com/news/local/government-politics/judge-rejects-missouri-attorney-generals-bid-to-rewrite-ballot-language-on-abortion-issue/article_078d9a2e-0f7b-11ee-93a4-973375f7ae8a.html.

Once the measure was approved by Bailey, Ashcroft drafted his summaries of the propositions. Ashcroft's summaries of the different initiative versions were generally similar, for discussion purposes, this paper will look at only one of the summaries in full used for three of the petitions. The summary read:

> Do you want the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
> - nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
> - allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
> - require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

Proponents challenged the language used in the summaries as argumentative and misleading. The first two bullet points were used in all summaries identically. The third bullet replaced "Fetal Viability" with "24 weeks" for two initiatives. In another initiative, the third bullet read: "require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding[.]" Lastly, the last bullet for one petition read: "prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures?" The AG's office defended Ashcroft's summaries.

The circuit court agreed with proponents that the summaries were argumentative and specifically cited the following phrases: "dangerous, unregulated, and unrestricted abortions,"

"from conception to live birth," "without requiring a medical license," "without ... potentially being subject to medical malpractice," "nullify longstanding Missouri law," "the right to life," "partial-birth abortion," "including a minor," "end the life," "unborn child," "at any time," "potentially including tax-payer funding," and "prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures." The circuit court judge Jon Beecham rewrote which Ashcroft appealed. The appellate court affirmed Beecham's new summaries, however, had a few minor revisions. The appellate court issued new summaries for each initiative, however, here, I am including just one as an example[188]:

> Do you want to amend the Missouri Constitution to:
>
> - establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
> - remove Missouri's ban on abortion;
> - allow regulation of reproductive health care to improve or maintain the health of the patient;
> - prohibit government discrimination against persons providing or obtaining reproductive health care;
> - allow abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman; and
> - declare government funding of abortion is not required?

Ashcroft indicated he plans to appeal the ruling and the initiative's fate on the 2024 ballot remains unclear.

Anti-reproductive rights officials around the country have worked to keep initiatives off

[188] Fitz-James v. Ashcroft, No. WD 86595, 2023 WL 7141416 at *15 (Mo. Ct. App. Oct. 31, 2023), *reh'g and/or transfer denied* (Nov. 3, 2023).

their state's ballots in light of the extraordinary support and passage of these rights. As noted, since *Dobbs*, 9 states have inscribed these protections into their state's constitutions. The Florida AG is also currently fighting in the state supreme court to prevent a reproductive rights amendment from going on the ballot in 2024.[189]

Popular initiatives have proven to be a powerful tool of reproductive rights advocates who seek to protect access to contraception and abortion as available in as many states as possible. AGs play an important role in the initiative process by writing descriptions, certifying signature and procedural requirements, and through defending the state government's decisions. While there are many anti-AGs who use this power to deny people both reproductive rights and their voting rights, courts generally apply procedural safeguards fairly. While this is an increasingly powerful tool for the reproductive rights movement, the AG role is not crucial. While there is some impediment in the gamesmanship and in some cases, bad faith denials of anti-AGs, overall, it doesn't appear that this power has stopped the passage of these initiatives. Rather, it appears that this power of the AG is mostly procedural and as such, is not a powerful tool to protect or contract reproductive rights, even where the direct democracy power remains an extremely powerful tool of the movement as a whole.

VIII. Bully Pulpit

State AG offices can also use the informal power of the bully pulpit to protect rights by giving information to people; raising attention to an issue; by advocating to legislators and executives; and encouraging businesses to act. Many individuals turn to AG pages to obtain up to date and reliable information on legal issues such as abortion. Many states, including Illinois,

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[189] Brendan Farrington, *Florida attorney general, against criticism, seeks to keep abortion rights amendment off 2024 ballot*, LA TIMES (Nov. 1, 2023), https://www.latimes.com/world-nation/story/2023-11-01/florida-attorney-general-against-criticism-seeks-to-keep-abortion-rights-amendment-off-2024-ballot.

DC, and California, issued "know your rights" documents to give information on the legal status of reproductive healthcare in their states.[190]

Although the AG is an executive office, AGs also have power in crafting and influencing legislation. As individuals who engage with the practical application of these laws, the AG can serve a crucial role in ensuring the most effective legislation is passed and advise lawmakers. When the Biden Administration was considering regulations related to patient data under HIPAA, both anti- and pro-AGs submitted letters.[191] A coalition of twenty-four pro-AGs sent a letter to the Biden Administration in support of proposed rules to prevent access of protected health information for civil, criminal, and administrative proceedings where reproductive care, including abortion, was legal. The anti-AGs opposed the proposal with their own letter. AGs also use their bully pulpit power to encourage businesses to act in certain ways. Anti-AGs sent Walmart and CVS letters to urge them to discontinue prescribing medication abortion through

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[190] Press Release, Kwame Raoul, Attorney General of Illinois, Guidance for the Public and Law Enforcement Aimed at Increasing Awareness of Reproductive Rights Under Illinois Law (June 1, 2022), https://www.illinoisattorneygeneral.gov/News-Room/2022-Press-Release-Archive/202206-01%20ISSUES%20GUIDANCE%20ON%20REPRODUCTIVE%20RIGHTS%20IN%20ILLINOIS.pdf; Rob Bonta, Attorney General, *Reproductive Rights*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE (last visited Dec. 4, 2023), https://oag.ca.gov/reprorights#:~:text=Your%20Abortion%20Rights,you%20are%20seeking%20an%20abortion.

[191] Press Release, Rob Bonta, Attorney General of California, Attorney General Bonta Co-Leads Coalition of 24 States in Support of Stronger Federal Protections for Reproductive Health Data Privacy (June 16, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-co-leads-coalition-24-states-support-stronger-federal. The legality applies to healthcare and abortion sought in a state where the care is legal and under federal law namely the Emergency Medical Treatment & Labor Act which requires abortion in cases where it is medically necessary to protect the life of the patient. For the AG letter in support, see Letter from Rob Bonta, joined by 23 additional Attorney Generals, to Xavier Becerra, Secretary of the U.S. Department of Health and Human Services (June 16, 2023), https://oag.ca.gov/system/files/attachments/press-docs/HIPAA%20Privacy%20Rule%20Comment%20Letter.pdf. For a discussion of the lettersent by AGs opposed, see Steve Benen, *Why Replican state AGs are seeking out-of-state medical records*, MSNBC: MADDOWBLOG (July 18, 2023), https://www.msnbc.com/rachel-maddow-show/maddowblog/republican-state-ags-are-seeking-state-medical-records-rcna94935.

the mail.[192] Pro-AGs responded by issuing their own letter.[193]

The bully pulpit power is an important tool to help get information out to residents, to pressure political and business leaders, and to support the reproductive rights movement. While it is not necessarily one that is able to have immediate and widespread results, it is a necessary tool to try to protect and grow these rights. Using one's voice in a powerful office that receives media attention is an important way to help people get resources and to build political change in the long term.

Conclusion

State AGs are in a unique position to protect reproductive rights with a number of different tools at their disposal. While nationwide injunctions appear to be the most powerful (even if they are more effective at limiting rights), they are not the only tool to be used. And, if reforms are successful in curbing the use of nationwide injunctions, AGs will need to continue to rely on other available tools in order to protect reproductive rights. The AGs office has a number of other tools at its disposal including consumer protection, antitrust, charitable trust doctrine, constitutional nondefense, state and local law powers, ballot language power, and the bully pulpit.

The second most powerful tool which can help protect these rights is the consumer protection power. Not only is it firmly rooted in the common law and core responsibilities of the office, it gets at the heart of the fight for reproductive rights as a fight for the welfare of all

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[192] Press Release, Ken Paxton, Attorney General of Texas, Paxton Warns CVS and Walgreens on the Illegalities of Sending Abortion Pills Through the Mail (Feb, 14, 2023), https://texasattorneygeneral.gov/news/releases/paxton-warns-cvs-and-walgreens-illegalities-sending-abortion-pills-through-mail.

[193] Nathaniel Weixel, *Democratic AGs urge CVS, Walgreens to continue with plans to dispense abortion pills*, THE HILL (Feb. 16, 2023), https://thehill.com/policy/healthcare/3862108-democratic-ags-urge-cvs-walgreens-to-continue-with-plans-to-dispense-abortion-pills/.

people and the state as a whole. This power can ensure people's private health data is protected and that they are not taken advantage of by deceptive actors. It is not only an option to use this tool, but an imperative in order to protect the welfare of one's people.

While these powers fall into a spectrum of power and ability to protect reproductive rights, they are not incompatible with each other. A truly comprehensive plan to protect reproductive rights will encompass use of all their powers, as broadly as possible. Each has unique assets and limitations, but when used together can become a sum greater than their parts.