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Abortion Shield Laws

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REVIEW ARTICLE

Abortion Shield Laws

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Abstract

The overturning of *Roe v. Wade* has created new obstacles for physicians providing reproductive healthcare. Cohen et al. review the new development of abortion shield laws, which some abortion-supportive states have passed to protect physicians from attempts by states with abortion bans to enforce their laws beyond their borders.

C. Corey Hardin, M.D., Ph.D.,
Editor

Introduction

When the Supreme Court overturned *Roe v. Wade* this past summer, it purported to return the country to a simpler approach to abortion — that each state would be left to decide whether to ban or permit abortion on its own, through the will of its elected representatives.¹ Since that decision, *Dobbs v. Jackson Women's Health Organization*, 21 states have banned abortion, although state courts have put seven of these state bans on hold pending ongoing litigation. Meanwhile, other states have shored up protection for abortion rights through statutes or constitutional amendments.² As courts rule and legislatures pass new laws, specific states may change their abortion policies, but the bottom line is clear: abortion, at least before viability, is no longer a national right.

Not everything about this new reality is clear, and nothing about the current legal landscape is simple. One of the trickiest questions following the Supreme Court's ruling is to what extent an antiabortion state can limit people from getting an abortion in other states where it remains legal.³ Medical care providers may think that if they follow the laws of the state in which they practice, they are free from legal liability (civil or criminal) regardless of whether they treat in-state or out-of-state patients.

As we have detailed elsewhere,³ there are two possibilities that might allow states with abortion bans to apply their law across state lines. First, states might try to use existing civil or criminal laws against someone in another state, and there are legal doctrines that might allow them to do so. For instance, they could argue that a patient traveling for an abortion in a state where it remains legal has a negative effect in the patient's home state, or they could argue that a patient who opts for a medication abortion and takes the first drug (mifepristone) in the state where abortion is legal but the second drug (misoprostol) in a state where it is illegal had an abortion in the state where it is banned.⁴

Second, legislators in antiabortion states may try to pass new laws that specifically target out-of-state travel for an abortion or that try to criminalize the conduct of those in

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other states who care for the antiabortion state's residents. Space constraints do not permit us to explain these theories in depth here, but suffice it to say that those in the antiabortion movement have begun to police abortions across state lines despite persuasive, although untested, arguments that the federal constitution does not permit it.

In response, seven states have enacted a new type of law referred to as a "shield law" (Fig. 1). The provisions of these laws vary, but, at their core, they seek to protect abortion providers, helpers, and seekers in states where abortion remains legal from legal attacks taken by antiabortion state actors. The purpose of this review is to explain the basic outline of these shield laws for an audience that might need their protection.

There are nine different features of shield laws that are important to understand, although not every state law has every feature discussed here. The descriptions below are general; individual state provisions vary in how they work and what they cover. Before relying on any information in this review, it is important to check the particular laws of

your state and to talk with a lawyer to know exactly what your state's law protects and how it does so.

Nine Features of Shield Laws

1) PROHIBITING NONFUGITIVE EXTRADITION

The Constitution requires states to extradite individuals who are accused of a crime and have fled to another state.⁵ Shield law provisions prohibit extradition of nonfugitives (people who were not in the other state when they allegedly committed the crime) when the person is accused of providing or receiving reproductive health care that is legal in the shielding state. Some states have written these provisions to apply to any conduct (not just abortion) that is not punishable in the shielding state, whereas other states have protection that is specific to lawful reproductive health care.

2) INTERSTATE WITNESS PROTECTION

When it comes to someone in one state being needed as a witness or to give pretrial testimony or information in a

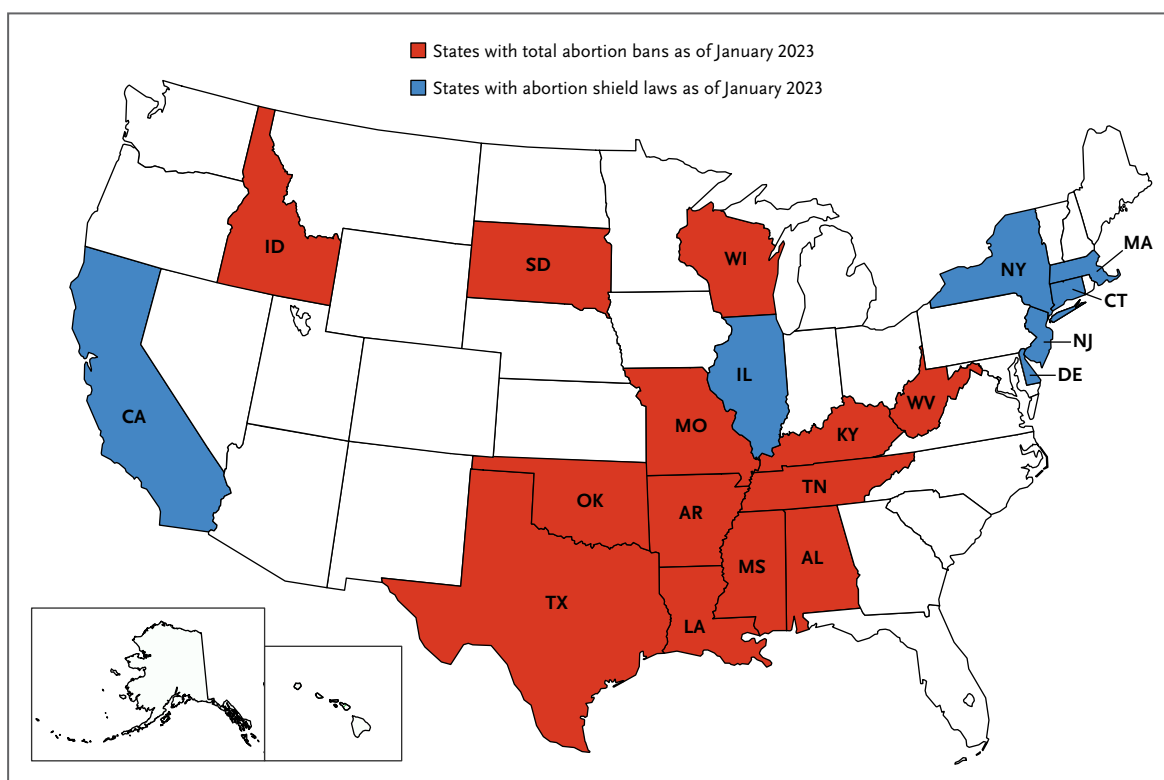


Figure 1. States with Total Abortion Bans and States with Abortion Shield Laws as of January 2023.

civil lawsuit or criminal prosecution in another state, every state has procedures by which the courts will cooperate with the out-of-state proceeding and then require the person to participate with the other state's legal action. Shield laws contain provisions that create exceptions to that cooperation, prohibiting the courts in the state where the abortion took place from issuing a subpoena, an out-of-state witness summons, or a request for discovery in connection with an out-of-state investigation, lawsuit, or prosecution that tries to impose liability, civilly or criminally, for legal reproductive health care. Thus, if a provider cares for a patient traveling from a state where abortion is illegal and there are legal proceedings in that patient's home state, the provider's home-state courts will not force the provider to participate in the out-of-state legal action.

3) PROHIBITING EXPENDITURE OF STATE RESOURCES ON ANOTHER STATE'S INVESTIGATION

The norm in the United States is that if one state is investigating a crime and needs help from another state's law enforcement agencies, the agencies cooperate with one another across state lines. Shield provisions prohibit state officials from expending state resources or using state actors in support of another state's investigation into the provision of legal reproductive health care in the shielding state.

4) LIMITING ADVERSE PROFESSIONAL LICENSING CONSEQUENCES

State licensing boards usually require people with licenses in multiple states to report any discipline against any of their licenses, even if the basis of the discipline occurred outside the state. Shield laws protect licenses from professional discipline or other adverse consequences for providing reproductive health care criminalized in another state but legal in the shielding state. Thus, if a state with an abortion ban suspends or revokes someone's license because of lawfully provided abortion care, the provider's license in the shielding state is protected.

5) MEDICAL MALPRACTICE PROTECTIONS

Medical malpractice carriers usually require people to report adverse disciplinary or legal actions from any state. Shield laws prohibit in-state medical malpractice carriers from taking adverse action against a provider's policy based on lawfully provided abortion care in the shielding state. These provisions would mean a provider's malpractice insurance will not be threatened by caring for patients who travel from states with abortion bans.

6) PROHIBITING DISCLOSURE OF PATIENTS' CONFIDENTIAL INFORMATION

Some shield laws prohibit the disclosure of confidential information, including health information, of those receiving or soliciting reproductive health care in a shield state. Thus, if the patient is from a state with an abortion ban and someone in that state attempts to obtain the patient's medical information related to the patient's abortion, entities in the shielding state will be prevented from providing that information.

7) OUT-OF-STATE JUDGMENTS

Normally, legal judgments against people in one state must be recognized by all states.⁶ That poses a problem if an abortion provider in a state where abortion is legal is sued in an antiabortion state for care provided to its resident who traveled there and the courts of the antiabortion state enter a judgment against the provider. These shield provisions limit state courts from giving effect to judgments entered elsewhere when the conduct was lawful in the shielding state and the Constitution does not require recognition. The judgment would still have legal force in the antiabortion state, but the shielding state would protect the provider from those effects.

8) CLAWBACK LAWSUITS

These provisions create a new type of lawsuit, sometimes called a clawback lawsuit, for people in the shielding state who are charged with or held civilly liable by another state for providing reproductive health care that was legal in the shielding state. The basic claim of this new type of lawsuit is that the person trying to enforce the out-of-state judgment is interfering with reproductive health care in the shielding state, so that person should be liable for that interference in the amount of the judgment from the other state. Thus, these provisions create a mechanism to recoup any damages the provider is liable for in another state.

9) CARING FOR PATIENTS ACROSS STATE LINES

Standard telehealth practice and policy is to consider medical care to have occurred where the patient is located. This means a state with an abortion ban would consider a medical care provider to have broken that state's laws if that provider used telehealth to provide abortion care to a patient located in a state that bans abortion. However, Massachusetts' shield law applies "regardless of the patient's location." This might mean that a Massachusetts provider, licensed and located in Massachusetts, can take advantage of the protections of the state's shield law no matter where

the patient receives the care. Currently a one-of-a-kind provision, this provision poses several open questions regarding how it would work in practice.

So far, seven states have passed shield laws.³ Connecticut led the way with the first in the nation in May 2022.³ (The authors of this review counseled the legislators who drafted Connecticut's bill and submitted testimony in support of the law. The authors have also counseled legislators and advocates in several of the other states that have adopted shield laws as well as those in several states that are considering doing so.) Since then, California, Delaware, Illinois, Massachusetts, New Jersey, and New York have all passed shield laws, and other states are likely to follow suit in 2023.

There are also states with executive orders that cover some of the protections listed above.³ Because executive orders can address only areas of law within the discretion of the executive branch, they cannot have the same breadth as laws passed by legislatures. However, many executive orders cover topics such as extradition, license discipline, and executive agency cooperation. Governors have signed executive orders in 12 states so far: California, Colorado, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Rhode Island, and Washington.

Shield laws are designed to help abortion providers, helpers, and seekers in this post-*Roe* environment. However, as much as these novel laws do, they can never provide complete protection against legal consequences. First, shield laws do not protect providers from consequences in states without shield laws. To use one example, if a shield law protects a professional license from discipline in the shielding state, the license might still be suspended or revoked in other states. To take another example, if a state with an abortion ban issues an arrest warrant for a provider for performing an abortion for one its residents, that provider should be safe from extradition when the provider is physically located in the shielding state but will not be protected if that provider travels to a state without a shield law. Importantly, abortion seekers and helpers who return to an antiabortion state after an abortion enjoy few protections from shield laws.

Second, some parts of shield laws may be challenged in courts, which might strike them down or interpret them narrowly. We believe each of the shield provisions discussed above is constitutional as a general matter and should be upheld by courts.³ However, not every court in the country may agree with us because of different views

about the importance of interstate cooperation or because of negative views about abortion-related matters.

Third, the nuances of different state shield laws create a web of protections that depends on the state where the abortion took place. Shield laws vary with respect to how many of the protections discussed here are included, which types of providers are protected, whether abortion helpers and seekers are covered, which type of care is shielded, and more. This means that those interested in taking advantage of a shield law's protections must either closely study the law that covers their jurisdiction or seek out the assistance of an attorney. Given that shield laws are so new, finding an attorney who can provide this guidance might be difficult.

Despite these challenges, shield laws are one of the bright spots for abortion access in this new environment where there is no national right to abortion. So far, given how new abortion bans and shield laws are, they have not yet needed to be used. However, even if these laws are never used, their mere existence can be an important countervailing force against states that may otherwise consider imposing their abortion bans across state lines. In addition, if those states do try to apply their laws against people in other states, shield laws will be there to blunt the force of doing so and to give providers, helpers, and seekers more confidence about abortion care they offer or obtain.

Disclosures

Author disclosures are available at evidence.nejm.org.

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5. U.S. Const. art. IV, § 2, cl. 2.
6. U.S. Const. art. IV, § 1.