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Post-Dobbs Abortion Access for Federally-Incarcerated Women: Federal Legislative Options and Implications

I. Introduction

May 2, 2022, deemed an event of "grave betrayal of trust" by Justice Samuel Alito, is a day that history books will one day recognize as the unprecedented leak of a majority Supreme Court opinion that would go on to overrule nearly 50 years of precedent less than eight weeks later.[1] "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each state from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[2] In the final words of a 108-page majority opinion, Justice Alito effectively relegated the primary role of abortion regulation to the elected representatives of the states and eliminated what was a substantive, constitutional right to access abortion.[3] Millions cried tears of joy while millions of others cried out in sorrow and fear, initiating nationwide protests of both celebration and calls to action.[4] Regardless of personally-held beliefs or which state one lives in, one thing is inarguable: every American woman lost a nationally-recognized *constitutional* right to choose abortion on June 14, 2022.[5] Some women, however, feel the burden of that loss far greater than others.

The impact of the Court's decision in *Dobbs* will be felt most strongly by those who already experience systematic barriers or discriminatory obstacles to accessing healthcare, including people of color, indigenous people, people with disabilities, young people, undocumented people, low-income people, and those living in more rural areas.[6] One such population, small yet significant, is women who are incarcerated in federal prisons under the authority of the Bureau of Prisons (BOP). As a distinct population from women in state or private prisons, federally-incarcerated women may be uniquely impacted by the *Dobbs* decision because of the sheer uncertainty it presents for the future of abortion access in federal prisons. Even the BOP itself is unsure of the specific actions it plans to take in light of the revocation of abortion as a constitutional right and the relegation of regulation power to the states.[7] Congress, through the BOP, may preventively address the disparate, significant implications *Dobbs* has on its inmates, namely whether it plans to federally regulate abortion access in federal prisons or not, under which constitutional authority, and to what extent.

This article addresses the impacts of the *Dobbs* decision on the abortion access of federally-incarcerated women and the legislative options available to Congress to address those impacts. Numerous intersectionalities and populations of women have been and will continue to be impacted by the relegation of abortion regulation primarily to the state-level, but federally-incarcerated women are a population situated at a crossroad between the custody of the federal government and the potential application of state-contingent law. Part II discusses the historical background of the abortion debate and its regulation in the United States, the more narrowed historical background of the BOP's regulation of abortion access for its inmates, and the present status of abortion regulation nationally and as a federally-incarcerated inmate.[8] Part III establishes that Congress has legislative authority to regulate abortion access for federal inmates despite the *Dobbs* decision through its jurisdiction over federal prison land, the inapplicability of the Assimilative Crimes Act to federal employees, and both express and implied preemption theories.[9] Part IV outlines the constitutional authority Congress derives from the Necessary and Proper Clause which enables it to act within its scope in regulating abortion access for federal inmates post-*Dobbs*.[10] Finally, Part V discusses numerous legislative options available to Congress in seeking to federally regulate abortion access or not, and the policy and practical implications thereof.[11]

II. Historical Background

A. Abortion Regulation History

The use of abortion as a practice to terminate pregnancy, though often considered a topic of modern political and religious debate, has been utilized by international populations for centuries.[12] The fluctuating history of abortion practice, regulation, judicial review and legislation demonstrates the nuanced principles underlying the practice, and its development is critical to understanding how Congress should approach abortion regulation in post-*Dobbs* society.

1. Pre-regulated Practice of Abortion

Abortion existed as an unregulated practice at least as early as 1550 BC, where the Egyptian Ebers Papyrus first recorded evidence of an intentionally induced abortion.[13] Primitive cultures in varying countries documented and referenced the use of non-surgical abortion techniques which they developed through trials of observation and adaptation during the pre-modern medicine era.[14] Despite the lack of modern safeguards, the unregulated practice of abortion was entrusted to midwives, as were many other female health practices,[15] and a woman could receive an abortion without the interference of religious, legal, or social forces.[16] In fact, the practice of abortion was commonplace and practiced "with little or no sense of shame."[17] The history of abortion regulation originated within Roman populations primarily concerned with population growth, yet widespread regulation pertinent to the woman's choice to access abortion began in the 13th century and quickly evolved into substantially morality-based restrictions.[18]

2. Early American Abortion Regulation

In the United States, the regulation of abortion did not prominently manifest until 1847, when the formation of the American Medical Association marked the professionalization of medicine and abortion

practices began to be scrutinized.[19] The criminalization of abortion rose rapidly in the following century and every state had abortion restriction laws of varying degrees by 1880.[20] 30 years later, all states had nearly complete abortion bans and both the stigma surrounding abortion and maternal deaths resulting from illegal, unsafe abortions increased.[21] In a matter of less than 100 years, a multi-century unregulated practice had become a highly-criminalized procedure notoriously marked by shame and immorality.

As a result of the rising number of deaths caused by illegal abortions, abortion regulation reform was desperately urged by doctors, Planned Parenthood, and the American Law Institute (ALI).[22] In 1959, the ALI proposed a model penal code advocating for exempted, legalized abortion for instances of rape, incest, fetal deformity, and danger to the mother's health.[23] In the following decade, states began to adopt ALI model abortion laws and repeal their early 19th-century legislation prohibiting abortion "after quickening," demonstrating a revival in reviewing outdated abortion laws and its underlying principles.[24] The ever-changing scene of abortion regulation at the state level necessitated the Supreme Court's review and resolution of the constitutionality of legislation regulating and restricting abortion.

3. Judicial History

In 1971, the Supreme Court granted certiorari on its first case involving abortion. In *United States v. Vuitch*, the Supreme Court upheld a District of Columbia law which permitted abortion only to preserve a patient's "psychological and physical well-being."[25] However, it was not until 1973 that the Supreme Court decided its landmark case of *Roe v. Wade*, along with its companion decision, *Doe v. Bolton,* collectively establishing a constitutional right to abortion.[26]

In *Roe v. Wade* the Court held that a Texas statute regulating abortion violated a woman's constitutional right to decide whether to receive an abortion and terminate her pregnancy.[27] In the decision delivered by Justice Blackmun, the Court established a constitutional basis for its holding that, "…states may not categorically proscribe abortions by making their performance a crime."[28] The Court established that the Fourteenth Amendment of the United States Constitution included a right to personal privacy which extended to a woman's decision of whether or not to carry a pregnancy, a right that the Court deemed fundamental and one which only a compelling state interest could justify limitation.[29] In ruling as such, the Court grounded its holding upon a trimester framework and fetal viability, whereby the viability of the fetus was directly linked to the compelling state interest.[30] The decision in *Roe* effectively established a woman's constitutional right to

decide whether or not to terminate her pregnancy by abortion prior to fetal viability and extended this right beyond fetal viability in exceptional circumstances.[31] Similarly, in *Doe v. Bolton,* the Court struck down a Georgia statute which required abortions be performed in certain hospitals, that they be pre-approved by a committee of the hospital, and that two physicians be required to concur on the decision.[32] The *Doe* decision both affirmed and extended the holding in *Roe* by asserting that states could not implement stringent procedural requirements that would render abortions unreasonably difficult to obtain. These companion decisions laid the constitutional framework for the role states would assume in a woman's right to choose an abortion. However, the Court in both decisions failed to resolve a number of additional questions which led to a plethora of "post-*Roe* litigation," including the question of when life begins.[33]

In *Webster v. Reproductive Health Services*, the Court loosened the standard of review applied to state abortion regulations by upholding a Missouri restriction on the use of public employees and facilities for abortion procedures.[34] The plurality opinion, though not overruling *Roe*, criticized the viability and trimester framework as an indicator of state interest and increased the likelihood that state abortion regulations would be deemed constitutional.[35] Though this case was limited in scope, this decision demonstrated that the constitutional right set forth in *Roe* could not yet expect consistent or predictable enforcement.

In *Planned Parenthood of Se. Pa. v. Casey*, the constitutionality of a Pennsylvania abortion regulation was challenged in light of the loosened standard of review in *Webster*.[36] In its decision, the Court abandoned the trimester framework from *Roe* and adopted an undue burden standard, emphasizing that "… not all of the burdens imposed by an abortion regulation were likely to be undue…" during the first trimester.[37] Although adopting the new standard, *Casey* reaffirmed the holding in *Roe* in an opinion deduced to three points: (1) a woman has a right to choose to access abortion pre-viability without undue state interference; (2) the state has discretion to implement abortion restrictions post-viability contingent upon an exception for danger to the mother's life; and (3) the state has legitimate interests in both the life of the fetus and the health of the mother.[38] The undue burden standard coexisted with the essential holding of *Roe* while permitting more state restrictions to pass the constitutionality review.[39] The holdings of *Roe* and *Casey* were the guiding authorities for the review of state abortion regulations and a woman's right to choose an abortion for decades.[40]

4. Legislative History

Following the Court's decision in *Roe,* there was a stark increase in legislative proposals involving abortion, some of which sought to restrict access to abortion and others attempted to secure a woman's right to choose, demonstrating the impact of the Court's decisions on Congress' perception of a need to act.[41] Numerous legislative initiatives were utilized, including constitutional amendments and statutory provisions.[42] While, to date, no constitutional amendment has successful passed in either the House or the Senate, S.J. Res. 3 was introduced during the 98th Congress and was sent to the Senate floor, receiving a considerably longer period of review than other proposed amendments.[43] Upon consideration in 1983, S.J. Res. 3, which would have effectively reinstated state authority to primarily regulate abortion access, was defeated for not having obtained the

necessary two-thirds vote.[44] Contrarily, statutory provisions under the authority of Section 5 of the Fourteenth Amendment, have attempted to avoid the complexity of amending the Constitution and prohibit abortion by bill.[45] While these grandiose statutory provisions have ultimately failed, various, more tailored versions of bills limiting abortion access have been successful, including the Hyde Amendment which defined the scope of medically-necessary abortions and limited federal expenditures for abortion procedures.[46] Ultimately, federal legislation seeking to secure or eliminate any right to abortion access has proven unsuccessful despite versatile and numerous attempts.

B. History of Abortion Regulation by the BOP

Throughout the tumultuous regulation history of abortion at the national level, courts have been tasked with clarifying how to apply their abortion-related decisions to niche situations and populations. One such issue is whether, and to what extent, the decisions apply to incarcerated individuals. In addition to loss of freedom, incarcerated people lose various other rights, including their right to privacy, right to vote, and even some First Amendment rights.[47] However, courts have consistently held that the right to decide whether to continue a pregnancy or have an abortion is not among the rights that are lost as a consequence of incarceration.[48] In fact, the Supreme Court held that prisons are obligated to provide for the serious medical needs of inmates in *Estelle v. Gamble,*[49] and the Third Circuit asserted that abortion falls within the scope of "serious medical need."[50]

Prisoners incarcerated in a federal prison, as unique from those incarcerated in state or privatized prisons, are subject to the numerous federal regulations and BOP policies addressing a federal prisoner's right to abortion.[51] The United States Code vests control and management power of federal penal and correctional institutions in the Attorney General to promulgate rules and provide for the care and treatment of federal inmates.[52] The Attorney General, through the BOP, implements federal code and regulations such as 28 C.F.R. Section 551.23, which expressly states that, "[t]he inmate has the responsibility to decide either to have an abortion or to bear the child."[53] The regulation asserts that, upon the inmate's satisfaction of procedural requirements, "the Clinical Director *shall* arrange for an abortion to take place."(emphasis added).[54] Consequently, while inmates in state and private prisons may experience either or both policy or procedural barriers to abortion access, federally-incarcerated women reap a statutory right to abortion contingent upon a few nominal procedural prerequisites.[55]

The federal right is further echoed in the BOP's Program Statements for Female Offenders.[56] The 1996 Program Statement on Birth Control, Pregnancy, Child Placement and Abortion includes the language of 28 C.F.R. Section 551.23 verbatim, but also includes pertinent commentary to explain the practical applications of the statute in the prison environment.[57] Similarly, the 2021 Program Statement of the Female Offender Manual reiterated the language of 28 C.F.R. Section 551.23 while modifying other portions of the manual to accommodate for advances in gender-responsive language and other modernized law.[58] The section outlining an incarcerated woman's access to abortion had not changed from 1996 to 2021, demonstrating a commitment by the BOP to enforce and implement the federal statutory right granted to inmates in 28 C.F.R. Section 551.23.

The BOP, through the Attorney General and the Department of Justice, has historically upheld a federally-incarcerated woman's right to abortion on grounded statutory authority to the fullest extent permitted by *Roe* and *Casey*. It was not until the Court's decision in *Dobbs* that the language of the Female Offender Manual on Birth Control, Pregnancy, Child Placement and Abortion was substantively modified, and even so, very minorly.[59]

C. Post-Dobbs Status of Abortion Regulation and BOP Policy

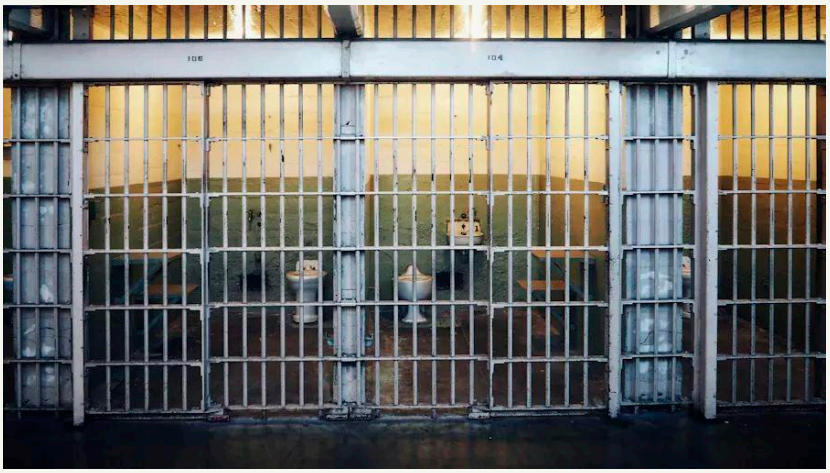
The Court's leaked, controversial opinion in *Dobbs v. Jackson Women's Health* (2022) effectively revoked *Roe* and *Casey* and relegated the power to legislate and restrict abortion access primarily to the state level.[60] A Mississippi women's health clinic challenged the constitutionality of the Gestational Age Act, which prohibited abortions after 15 weeks and imposed penalties against abortion providers.[61] Mississippi argued that there is no constitutional right providing for abortion, while Jackson's Women's Health Organization asserted that autonomy is an essential element protected by the Due Process Clause, citing *Roe* and *Casey* as long-standing precedent.[62] Ultimately, the Court ruled in favor of the state of Mississippi and upheld the constitutionality of the Gestational Age Act.[63] In so opining, the Court asserted that since abortion access was not "deeply rooted" in American history and tradition, and since the doctrine of stare decisis is not absolute, the *Roe* and *Casey* precedents should not be followed and the power to regulate or prohibit abortion is returned to primarily the states and their people.[64]

The decision was promptly met with displays of celebration, protests of anger, and thirteen so-called "trigger bans", which many states had prepared in order to instantaneously effectuate abortion bans or restrictions.[65] Less than a year after the decision took effect, twelve states have enacted near-total abortion bans, three states have attempted to pass near-total bans but have been blocked by state courts, and three more states are expected to ban or restrict abortion in the foreseeable future.[66] Other states, including California, quickly took measures to secure abortion access by passing propositions to amend state constitutions to expressly permit and protect the procedure.[67]

The localized regulation of abortion and varying policies has created confusion and inconsistency for all, yet the impacts of the *Dobbs* decision are expected to effect marginalized populations more severely, including low-income communities, racial and ethnic minorities, and incarcerated women.[68] Incarcerated women in state or privatized prisons will be subject to the abortion regulations applicable in that particular state.[69] The implications of locally-regulated abortion access for state inmates who cannot participate in interstate travel like their free counterparts or for those who may be involuntarily transferred are to be inevitably explored by future litigation. However, for federally-incarcerated women, the current status of BOP regulations and federal law is far less indicative of what federal abortion access looks like in a post-*Dobbs* world and whether or not 28 C.F.R. Section 551.23 is still enforceable is a complex issue. The BOP produced a Change Notice to its Female Offender Manual on July 8, 2022, just two weeks after the *Dobbs* decision, which had one minor change to the Abortion section.[70] The policy deleted text which read: "Staff shall have knowledge of, and shall be guided by, applicable

Federal and state laws and regulations," seemingly in direct rebuttal to the *Dobbs* decision revitalizing state power in legislating abortion access.[71] From the timing and substance of the Change Notice, it appears that the BOP considers its Program Statement, implementing 28 C.F.R. Section 551.23, as presently enacted and enforceable, particularly since the substantive language was republished and unamended following the *Dobbs* decision.[72] Further, a BOP spokesperson reported that, without commenting on the future of the BOP potential policy options to protect the abortion access of its inmates, she encourages interested persons to visit its Female Offenders webpage for current information, a webpage which reiterates that abortion access for federal inmates is a statutorily protected right.[73] Accordingly, 28 C.F.R. Section 551.23 and the subsequent BOP policy are arguably current, though their efficacy if judicially challenged is more unclear.

Alternatively, the BOP's policy and the federal regulation granting such authority may simply have been the legislative manifestation of the Court's decisions in *Roe* and *Casey*, precedents which no longer have authority. In asserting that abortion was a constitutional right pre-*Dobbs*, the Court had removed the people's ability to substantially influence abortion access at the state level through their elected representatives. Post-*Dobbs*, however, the people have been returned their power to influence locally elected officials at the state level, perhaps revoking the authority for 28 C.F.R. Section 551.23, and rendering it unenforceable. In either alternative federally-incarcerated women's access to abortion is much less clear than it was pre-*Dobbs* and the applicability of 28 C.F.R. Section 551.23 is now questionable. However, despite the *Dobbs* decision's relegation of primary regulation power to local and state governments, and regardless of the applicability or enforceability of 28 C.F.R. Section 551.23, Congress may still have options to regulate abortion access in federal prisons but must establish both legislative jurisdiction and constitutional authority to do so.



III. Establishing Federal Legislative Jurisdiction

A. Federal Legislative Jurisdiction

It is undisputed that the federal government exerts some extent of control over federal prisons and its inmates according to statutory authority and given that federal prisons are erected on land in federal custody.[74] The BOP, operating under its parent agency of the U.S. Department of Justice, is statutorily granted the authority to manage federal prisons and provide for the care and custody of federal inmates.[75] 18 U.S.C.A. Section 4042 establishes that the BOP, under the authority vested in the Attorney General by 18 U.S.C.A. Section 4001, is responsible for the management of regulation of "all Federal penal and correctional institutions."[76] As a law enforcement agency under a federal executive department of the federal government, jurisdiction and federal

law applicability is necessary to effectuate the duties outlined in the aforementioned statues. However, since federal jurisdiction is asserted over land situated within state domains, the extent to which federal jurisdiction versus state jurisdiction applies is critical to determining who bears the burden of criminal law enforcement and under which circumstances.[77]

The federal government obtains either partial or exclusive jurisdiction over land it lawfully acquires from a state either by consent or cession, depending on the agreement developed between the particular state and the federal government.[78] Concurrently, 18 U.S.C. Section 7(3) extends "special maritime and territorial jurisdiction" (SMTJ) of the federal government to any land acquired for the use of the United States, which courts have held to include, among other things, land acquired for the maintenance and erection of federal prisons under the BOP.[79] Despite SMTJ operating as a statutory standard outlining areas of undisputed federal jurisdiction, the characteristics governing the extent of such federal jurisdiction can be broken down even further.[80]

The extent to which federal law applies to federal land situated in state domain is largely dependent on the category of federal ownership the land belongs to.[81] There are three types of federal land ownership correlating to three varieties of federal jurisdiction: proprietary, concurrent, and exclusive.[82] In proprietary jurisdiction, the federal government does not take over the state's obligations of law enforcement, though the Property Clause of the Constitution still authorizes Congress to enact and enforce necessary regulations to protect the federal property.[83] The proprietary jurisdiction category of federal land ownership represents the largest percentage of federal land, and allows the United States to acquire property within the borders of the state without acquiring jurisdiction.[84] Federal prisons, however, are not held in proprietary jurisdiction since courts have expressly extended SMTJ to land acquired for federal prisons and SMTJ inherently requires either concurrent or exclusive jurisdiction.[85]

Concurrent jurisdiction, or partial jurisdiction, exists where the federal government shares law enforcement responsibilities with the state.[86] Meanwhile, exclusive jurisdiction exists where the federal government assumes sole jurisdiction to enforce law upon its land.[87] Presently, concurrent or exclusive legislative jurisdiction can be acquired through constitutional consent outlined in Article I, Section 8, Clause 17, through cession by the state with express acceptance by the federal government, or by the reservation of such jurisdiction upon the granting of statehood to a territory.[88] In so acquiring either concurrent or exclusive jurisdiction over federal land, both inherently within the umbrella of SMTJ, the federal government assumes legislative authority either partially or in its entirety.[89] While the distinction between concurrent and exclusive jurisdiction is significant in many contexts, either concurrent or exclusive legislative jurisdiction is sufficient to enable Congress to explore federal regulation options for abortion access in federal prisons.[90] The important conclusion is that federal prisons are not held in proprietary jurisdiction, so the federal government retains legislative authority.

Therefore, the federal government has at minimum, partial legislative jurisdiction over the federal prison system and its land.The Property Clause of the Constitution establishes that federal law is applicable to property

under the jurisdiction and custody of the government, rendering state law generally inapplicable.[91] If Congress sought to implement a federal regulation for abortion access in federal prisons, the Property Clause would support its validity given the nature of federal prison ownership. However, there are limited circumstances in which state criminal law may still infiltrate federal jurisdictions, and since abortion restrictions and bans across the country render criminal punishment, Congress must analyze the applicability of state abortion laws despite its legislative jurisdiction over federal prisons.[92]

B. Assimilative Crimes Act

Subsequent to the government's acquisition under federal legislative jurisdiction, state civil laws continue in effect until abrogation by Congress unless inconsistent with the federal law or intended governmental use of the property.[93] As a result, if state civil law is in effect at the time of acquisition and does not conflict with federal law or the intended purpose of the land, the law would continue in effect over the federal land despite its originating at the state level. This generality does not extend to state criminal law, however, since the attachment of federal jurisdiction removes state court authority to try crimes committed on federal land.[94] Consequently, existing state criminal law generally loses enforceability and is replaced with federal criminal law.[95] However, the inapplicability of state criminal law to land under federal jurisdiction is not absolute, and there are particular circumstances in which state criminal law will be enforceable against actions conducted on federal land.[96]

1. Historical Background

The Constitution's Enclaves Clause provides that states generally may not legislate with respect to land qualified as a federal enclave.[97] As a result, there existed substantial gaps in applicable criminal law within federal enclaves, particularly because nineteenth-century federal statutory criminal law was limited, leaving opportunities for a number of considerably immoral crimes to be committed within federal enclaves with few consequences.[98] To remedy this defect, 18 U.S.C.A. Section 13, or the Assimilative Crimes Act (ACA), was enacted.[99] The ACA is a federal statute which permits state criminal law to assimilate and apply to actions committed within federal enclaves which would not be otherwise punishable by federal criminal law.[100] In other words, the ACA allows for state law to gap-fill only if an "act of Congress" does not criminalize the same action, and permits prosecution in federal court subject to the punishment outlined by the state law.[101] The ACA's most notorious and recurring application is the assimilation of state law prohibiting driving while under the influence when there was no federal criminal law equivalent, but the ACA has assimilated various other state criminal laws including those against battery, disorderly conduct, kidnapping, sex crimes, theft, and more.[102]

2. Application of the ACA to Federal Prisons

The ACA expressly applies to SMTJ, and therefore is inherently applicable to land acquired for the erection and maintenance of federal prisons.[103] Therefore, where federal criminal law does not criminalize behavior that would otherwise be punishable by existing state criminal law in which the federal land is situated, the state's criminal law would fill the gaps, as was the original intent of Congress.[104] If, for example, a federal

inmate housed in a prison in Texas were to commit a crime within the prison that was expressly criminalized by Texas state law but the BOP and Congress had not criminalized the act, the inmate would be prosecuted under the state criminal law in federal court.[105] The potential assimilation of state criminal law into federal prisons is an essential factor in determining Congress' legislation options for abortion access in federal prisons, particularly in wake of the criminalization of abortion care.[106]

In absence of a federal regulation authorizing abortion access for federal inmates, the prerequisite circumstances triggering application of the ACA are present in states with abortion restrictions and bans: an action committed on federal land which is not prohibited by federal law is criminalized by state law, and the individuals criminalized by the particular state law would be subject to prosecution in federal court.[107] As such, if Congress elects not to reimplement a regulation similar to 28 C.F.R. Section 551.23 post-*Dobbs*, the ACA will assimilate the applicable criminal law in states which have criminalized abortion to actions in furtherance or assistance of abortion provision within the federal prison. A substantial shift has thus occurred: a substantive right to abortion access which once existed for all federally-incarcerated women is now the very same action which may elicit criminal prosecution. However, there are also avenues through which Congress could avoid the assimilation of state abortion laws within federal prisons.

3. Application of the ACA to Federally-Authorized Inmate Abortion Access

There exists an important distinction between the application of the ACA where there is an *omission* of federal criminalization of the state-criminalized conduct versus where there is a federal law *authorizing* conduct on federal land that state law would otherwise criminalize.[108] Congress may choose to reimplement a regulation similar to 28 C.F.R. Section 551.23 or a different, yet still protective regulation post-*Dobb*s which may substantially limit the application of the ACA to state laws criminalizing abortion, a limitation that is not likewise effectuated by the absence of federal regulation.[109]

The traditional application of the ACA requires a congressional intent analysis, specifically whether or not Congress intended for a particular state law to be assimilated on federal land.[110] Where there is a federal authorization or regulation of conduct that is criminalized by state law, it is presumed that Congress did not intend for state law to assimilate and trump the federal law, rather the federal regulation would preempt assimilation.[111] The ACA is not proper, therefore, where "its application would interfere with the achievement of federal policy" or where the state law has been "displaced by specific laws enacted by Congress."[112] For example, Christopher Schroeder, Assistant Attorney General, determined that by virtue of the Supremacy Clause, states may not criminalize federal employees' performance of federally-authorized duties on federal land, meaning state law does not assimilate where an

express federal authorization exists, specifically as to conduct of federal employees.[113] Though the slip opinion is limited to express federal authorization of behavior by federal employees, the congressional intent analysis is indicative of how the ACA would apply to any federally-authorized behavior committed on federal land.[114]

The ACA was intended to act as a gap-filler, yet where there is federal law which expressly permits certain behavior, there is no gap to fill but rather a deliberate federal intention to authorize the action.[115] If state criminal law were able to assimilate over the express federal authorization, the Supremacy Clause would be contradicted and result in the "direct and intrusive regulation by the State of the Federal Government's operation of its property..."[116] A similar conclusion was reached by the 9th Circuit, holding that a California state law requiring the National Park Service to post particular signage on federal land would not assimilate via the ACA, asserting that "…states may not directly regulate the Federal Government's operations or property."[117] The court further emphasized that the assimilation of the California law would create an irreconcilable conflict with federal policy, one which would also arise by assimilating criminalizing state law into federal prisons and thereby impeding the work of federal employees authorized to perform such work on federal land.[118]

Additionally, the direct regulation of federal employee conduct, regardless of whether they are within the boundaries of a federal enclave or not, is generally immunized from state laws that directly regulate it absent the consent of the federal government.[119] If the ACA were to assimilate state law criminalizing authorized behavior of federal employees on federal prison land, it would operate against the presumption that state law cannot control the conduct of a federal employee acting in pursuance of United States laws and would, again, contradict with the Supremacy Clause.[120] Consequently, the application of the ACA is not solely contingent upon whether there is an omission of federal criminalization of the same act, but instead considers whether there may be any other congressional enactment, particularly one authorizing actions of federal employees.[121]

Therefore, if Congress were to expressly authorize federal employees to procure and provide for abortion access for federal inmates via a federal regulation, the application and assimilation of criminalizing state law pertinent to the performance of the procedure or assistance thereof would become ineffective, at least to the extent that the regulation authorized. A federal regulation similar to 28 CFR Section 551.23 for example, according to Schroeder, would at minimum protect federal employees from prosecution on the basis of state abortion laws whether at the prison or not, since the Bureau's professional staff would be expressly authorized to assist in the provision of abortion access, to which state criminal law could not assimilate.[122] This specific protection from prosecution, however, is contingent upon the authorized behavior being performed by an immunized federal employee.[123] While the BOP is likely to consider the efficacy of federal employees providing services to inmates, such as "abortion pills,"[124] surgical abortion procedures for federal inmates are often not performed by federal employees, but rather by independent providers and doctors at abortion-providing clinics and hospitals in the community, raising a larger jurisdictional obstacle.[125]

C. Federal Preemption for Non-Federal Employees

Further complexities arise where state criminal laws target non-federal employee individuals with varying degrees of involvement in abortion provision, including medical providers and those offering assistance to a woman seeking an abortion. The aforementioned inapplicability of the ACA is contingent upon the federally-authorized behavior being performed by a federal employee, in the case of 28 C.F.R. Section 551.23, the prison warden and clinical director.[126] Arrangements must be made if a federal inmate adheres to a few procedural requirements and persists in her request for abortion, arrangements which include transport outside of the prison to receive the procedure.[127] Local and community hospitals contract with the federal government to provide medical services to federal inmates that prisons or BOP medical centers are either not capable of or simply do not provide themselves, classifying the participating hospitals and clinics as federal contractors.[128] However, federal contractors are not considered federal employees, rendering federal contractor providers performing abortion services on federal inmates susceptible to liability yet unprotected by a federal-authorization preemption theory of the ACA.[129] As such, the preemption of the ACA's assimilation is not effective to protect non-federal healthcare providers performing the procedure for a federal inmate at a local hospital, community clinic, or other capable medical facility. However, the doctrine of preemption is multi-faceted, and there are two theories of preemption by which Congress could extend the federal statutory protections of 28 CFR Section 551.23 or similar statute to federal contractors for the purpose of abortion provision.

Preemption establishes that law of a higher authority trumps law of a lower authority when the two are in conflict, or that federal law preempts state law as codified in the Supremacy Clause of the Constitution.[130] The preemption "…applies regardless of whether the conflicting laws come from legislatures, courts, administrative agencies, or constitutions," and in circumstances of uncertainty as to preemptive effect, the Supreme Court will rely on the legislative intent of the federal law.[131] While there is a presumption against preemption, courts have refused to apply the presumption on numerous grounds, one of which being that the relationship between federal agencies and the entities it regulates is inherently factual in character, implying that the presumption is not likely to apply to BOP regulation of its facilities.[132] There is both express preemption, where explicit preemptive language is utilized and the federal intent is clearly to displace conflicting state law, and implied preemption which can be further broken down into impossibility preemption, obstacle preemption, and field preemption, each of which represent an implicit preemptive intent in the pertinent federal law's structure or purpose.[133] Viable express and implied avenues both exist to effectively displace state abortion law, thereby protecting non-federal healthcare providers and federally-incarcerated women from state liability.

1. *United States v. Texas*: A Relevant Preemption Analysis

The federal preemption of state abortion laws for both federal employees and federal contractors was argued thoroughly in *United States v. Texas*.[134] The United States challenged Texas's S.B. 8, notoriously known as the "heartbeat act," seeking declaratory action on a variety of legal grounds including federal preemption.[135] The

United States argues that federal employees' and federal contractors' compliance with both 28 C.F.R. Section 551.23 and S.B. 8 is physically impossible and, alternatively and at the very least, that S.B. 8, stands as an obstacle to the accomplishment of federal obligation.[136] To the extent that S.B. 8 prevents the provision of abortion in Texas, there exists a conflict between the obligations required by S.B. 8 and the binding language of 28 C.F.R. Section 551.23, holding that BOP staff shall arrange for the abortion to take place, threatening aider-and-abetting liability.[137] The district court held that S.B. 8 violated the preemption doctrine by conflicting with the laws and regulations governing abortion provision by federal agencies, "… easily constitut[ing] a case where 'compliance with both federal and state regulations is a physical impossibility,'" and that the United States was substantially likely to succeed on the merits of its preemption claims.[138] The arguments effectuated by the United States and the substantial likelihood of success on the merits of a preemption claim are equally applicable to the preemption doctrine's effect on state abortion laws post-*Dobbs*, particularly to federal contractors.[139]

2. Implied Preemption Theory

State abortion laws criminalizing healthcare providers may be federally preempted by 28 C.F.R. Section 551.23 or a similar regulation on an impossibility theory for federal contractors, just as S.B. 8 was displaced by 28 Section C.F.R. 551.23.[140] Compliance with both binding language requiring the provision of abortion access at the request of the federal inmate simultaneously with state law prohibiting the conduction of the same procedure is physically impossible and opens federal contractors and employees up to state liability if acting in pursuance of federal law, or vice a versa. Where compliance with conflicting state and federal law presents a physical impossibility, conflict preemption applies and the federal law displaces the state law, meaning that a federal regulation authorizing abortion access for federal inmates would preempt state law criminalizing its provision, including the conduct of federal contractors, who do not reap protections of preemption of the ACA by federal authorization.[141]

Alternatively, if states argue that state law criminalizing or restricting abortion does not rise to the level of physical impossibility, it is abundantly clear that state law criminalizing healthcare providers who contract to provide services for federal inmates in pursuance of a federal statute would be preempted on an obstacle preemption theory. Obstacle preemption, as a theory of implied preemption, would displace the operation of state abortion law where it would interfere with the legislative and federal intent of 28 C.F.R. Section 551.23 or other federal regulation.[142] Applying this theory to abortion access for federal inmates, it is clear that state criminalization or restriction of federal contractors in providing abortions to federal inmates in pursuance of the federal intent to provide such care upon request presents a substantial obstacle to the federal regulation, and is

consequently preempted. Therefore, despite the inapplicability of the ACA preemption theory to non-federal healthcare providers and consistent with the district court's predictions of the federal government's preemption arguments, the presence of an authorizing federal BOP regulation with the intent to provide abortion care for federal inmates effectively preempts state laws restricting or criminalizing healthcare providers on a physical impossibility theory and, alternatively, an obstacle preemption theory.[143]

3. Express Preemption Theory

Finally, in navigating post-*Dobbs* abortion access for federal prisoners, Congress may choose to pass a new federal law, promulgated by the BOP as a federal regulation, which expressly preempts application of state law to federal inmates, federal employees, and federal contractors. "Express preemption occurs when a federal statute or regulation contains language that explicitly says that the law preempts state law."[144] When so unequivocally set forth, the main substantive question before a court is whether the state law being challenged is within the scope which the federal regulation or statute sought to preempt.[145] If the legislative intent of Congress is to preserve a federal inmate's access to abortion regardless of in which state they are placed, it may implement a federal regulation expressly indicating that its intent is to preempt any state law which may criminalize, restrict, or otherwise act as an undue obstacle to the provision of the abortion procedure for the inmate, extending over the inmate herself, federal employees, and federal contractors. In so doing, state abortion laws would become effectively inapplicable to abortion provision for federal inmates and non-federal healthcare providers would be protected from liability in performing the procedures. While the language of the federal regulation with express preemption will almost certainly depend on the composition of Congress and the political, ethical, and policy agendas thereof, express preemption is yet another avenue through which Congress retains constitutional authority to regulate abortion care for its federal inmates, including an extension of protection to individuals involved in its provision.

In conclusion, the federal government continues to have the legislative jurisdiction to regulate abortion access for federal inmates, despite the decision in *Dobbs* and the relegation of regulation primarily to the state level. Through concurrent or exclusive jurisdiction over federal prisons, Congress has the power to regulate conduct and procedure in BOP facilities, and the ACA cannot assimilate state criminal law to conduct which the federal government expressly authorizes for its employees, on or off of federal prison land. Further, even non-federal employees, those who qualify as federal contractors, are within the legislative jurisdiction of the federal government under various theories of federal preemption which effectively displace conflicting state law. As such, regardless of the location and the employment classification of individuals involved in the provision of abortion access for federal inmates, Congress has numerous available options available within the scope of its legislative authority to preserve federal inmate abortion access post-*Dobbs*, just as it was pre-*Dobbs*.

IV. Establishing Congressional Authority

While Congress has established legislative jurisdiction over federal prisons[146], the federal government must also have a legitimate, constitutional authority to regulate behavior within prisons in order to lawfully do

so. Despite the Court's relegation of abortion regulation to primarily the state level, Congress presently retains the authority to enact federal legislation regulating abortion access for federal inmates post-*Dobbs*. As further delineated in *United States v. Comstock,* Congress' vested authority by the Necessary & Proper Clause of the United States Constitution coupled with the custodial role the federal government assumes over its inmates elicits legitimate constitutional authority to implement regulations pertinent to abortion access in federal prisons.[147]

A. Necessary & Proper Clause

Congress' scope of legislative authority is limited to its enumerated powers as outlined in Article I, Section 8 of the United States Constitution.[148] However, the Necessary & Proper Clause (NPC) extends congressional authority to further encompass implied and incidental powers which are conducive to the exercise of its enumerated powers.[149] Consequently, the absence of an enumerated congressional power to regulate abortion in federal prisons does not render Congress powerless to act if such regulation would be necessary and proper to exercise one of Congress' enumerated powers, an analysis which determines whether the proposed federal regulation, "…constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."[150] Courts have interpreted the rational relation analysis to operate like a chain-link connection system, where the strength of the chain between the enumerated power and the proposed federal statute under the NPC is the proper inquiry, not the mere number of links in the chain.[151] The chain of congressional power has been upheld in the context of federal prison regulations pertinent to health and safety of inmates, despite the absence of an enumerated congressional power to do so, inherently indicating that that health and safety regulations are rationally related to Congress' enumerated power.[152]

The first link in the congressional power chain between an enumerated power and the regulation of abortion access for federal inmates is the exercise of any enumerated power utilized to prohibit conduct, be it the regulation of commerce, general welfare, or otherwise.[153] The NPC then operates to allow the enactment of rationally-related criminal law to punish such prohibited conduct, forming the second link in the chain.[154] In order to enforce federal criminal law enacted under the authority of the NPC, Congress, "can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there."[155] The step from enacting federal criminal law to erecting federal prisons in facilitation of its enforcement represents the third link in the congressional power chain. Further, in establishing a federal prison system, Congress can form a fourth link in the chain by implementing laws under the NPC which regulate the administration of its facilities and effectuate its custodial role, including prisoners' access to medical care, education, and safe habitation.[156] The absence of an enumerated power to regulate abortion access in federal prisons is irrelevant given the rational relation between regulating inmates well-being and the enumerated powers of Congress, despite being several links down the chain of congressional power.[157] Therefore, the regulation of federal prisoners, including their medical care, is within the constitutional authority of Congress under the NPC and, as such, is one of the most efficacious

theories Congress can pursue to legitimize implementation of 28 C.F.R. Section 551.23 or a novel regulation post-*Dobbs*.

B. Comstock Background

Prior to *Comstock,* the federal government had enacted 18 U.S.C. Section 4248 authorizing the detainment of sexually dangerous prisoners beyond their release date to provide for ongoing psychiatric and judicial review of the individual's status.[158] A group of offenders who would fall within the statute's scope challenged it on the theory that Congress had exceeded the scope of its legislative authority.[159] The issue before the Court was whether 18 U.S.C. Section 4248 was constitutional under the NPC's implied and incidental powers.[160] Ultimately, the Court held that the NPC grants Congress a broad authority to enact law in furtherance of exercising its enumerated powers and that the custodial role Congress assumes over federal prisoners, "…supports the conclusion that [Section] 4248 satisfies 'review for means-end rationality.'"[161] The Court effectively extended the NPC multiple links to the federal prison environment and upheld the regulation of federal inmates as a rationally-related means to the end of exercising an enumerated power, relying heavily on the unique custodial role that Congress assumes over federal inmates.[162]

C. Comstock Custodial Analysis

The *Comstock* court asserted that the congressional authority to regulate federal prisons under the NPC is, in part, derived from the unique relationship the federal government assumes in incarcerating individuals under federal law.[163] Congress becomes a custodian of its inmates, assuming a role of responsibility for their care and protection upon incarceration, and is thereby granted the constitutional power to act accordingly.[164] As such, Congress has a legitimate interest in the responsible administration of its prison system, including the protection of inmates from one another and themselves, and the protection of the public from its inmates.[165] While *Comstock* focused primarily on the responsibility of the federal government to protect the public from federal inmates, the language of the opinion expressly extends this custodial responsibility to the safety of the prisoners themselves.[166] This custodial duty is recognized by the federal government, as expressed in 18 U.S.C.A. Section 3621(i)(1), requiring that the BOP ensure a minimum standard of health for its inmates, including access to necessary medical care, mental health care, and medication.[167]

The *Dobbs* decision has not revoked the custodial role recognized by Congress and expressed in *Comstock.* The relegation of abortion regulation authority to primarily the state level does not interfere with the chain of congressional power which places the federal regulation of abortion access for federal inmates within the scope of the NPC. Therefore, the BOP persists as a custodian of its inmates, including those who request abortion access, and the responsibility of appropriate administration of the prisons and its prisoners is still in effect. Consequently, Congress has both the legislative jurisdiction and the constitutional authority to pursue a new or updated federal regulation for abortion access within federal prisons despite the *Dobbs* decision, and the implementation of such regulation would coincide both with the legitimate congressional authority of the NPC and the custodial role it holds over federal inmates.

V. Policy-Based Regulation Options and Implications

Although Congress has both the authority and jurisdiction to regulate abortion access for federal inmates post-*Dobbs*, the mere existence of the authority and jurisdiction is not sufficient, and just as the federal government may choose to act upon its fulfilled prerequisites of authority and jurisdiction, it may also choose not to. There are numerous reasons why Congress would choose a particular course of action, but perhaps the most influential in today's political era is the policy interests of the federal government, particularly as they pertain to such a divisive issue as abortion access. Congress' increasing partisan nature means that the policy interests of American citizens' elected representatives are likely to be a driving force in whether, and if so how, Congress implements a federal regulation.[168] Ultimately, the course of action decided upon by Congress on will be reflective of a number of factors, including policy interests, practicality and ethics, and more. Though by no means limiting, the following presents three potential courses of action within the scope of Congress' authority through which the federal government could advance a national policy on federal abortion access: (1) the endorsement of state-contingent abortion access in the absence of a federal regulation; (2) a federal regulation with limited express or holistic express preemption; and (3) an amendment to the BOP Designation Criteria.

A. State-Contingent Access for Federal Inmates: No Federal Regulation

One potential option available to Congress is simply the endorsement of an absence of a federal regulation for abortion access in federal prisons, either by intentional failure to renew 28 C.F.R. Section 551.23 or the failure to implement an updated, post-*Dobbs* policy. The absence of a federal regulation preserving abortion access for federally-incarcerated women would trigger the application of the ACA to federal prisons in states which criminalize abortion provision and the applicable state criminal law would assimilate.[169] Congress therefore would either explicitly or implicitly endorse the application of state abortion laws to federal inmates, resulting in "state-contingent" abortion access.[170] Assuming no additional action is taken by Congress to address federally-incarcerated women as a uniquely impacted population of the *Dobbs* decision, the implications of state-contingent abortion access are readily imaginable, because the federal prison system's abortion access would closely resemble that of the state prison system, operating contingent upon state abortion laws.[171] There are numerous reasons why Congress may choose to rely on state abortion law to dictate federal inmate abortion access post-*Dobbs*, yet there arealso various risks and drawbacks to taking such an arguably inactive approach.

1. Positive Implications

Among the policy and practicality benefits of state-contingent abortion access for federal inmates are the appearance of alignment and conformity with the Supreme Court and the short-term practicality of a more inactive course of action. Perhaps the greatest advantage of state-contingent abortion access is that it arguably aligns most closely with the language the Supreme Court advanced in *Dobbs* since it more holistically relegates the primary regulation of abortion access to local and state governments.[172] Cohesion amongst the three branches of government is an important contributor to the perceived legitimacy of each branch, and Congress' relinquishing of federally regulating abortion access for its inmates may give the appearance of a more unified

federal government.[173] Another important policy implication is that Congress may, depending on its political composition, have a political, ethical, or moral interest in choosing not to act upon its authority to enforce a federal regulation, as would likely be the policy interest of a predominantly pro-life Congress. Finally, undoubtedly the inactive option available to Congress is the most practical in the short-term since it does not consume resources or times to not act. Congress is inundated with bill considerations, hearings, votes and more, and the opportunity to relegate regulation to the state governments in accordance with the literal language of the Supreme Court vests an attractive advantage. As such, the policy implications both from the macro level of federal government cohesion and from the micro level of the personal policy pursuits of individual Congresspeople, in combination with the sheer ease of inaction present a host of policy and practicality advantages attributed to state-contingent access.

2. Negative Implications

However, despite the advantages of state-contingent abortion access, the inaction evokes numerous drawbacks, including the likelihood of increased litigation, inconsistency among various BOP facilities, and the potential for a lazy or complacent appearance of Congress. Firstly, and likely most unfortunately, the failure to implement a federal regulation and the endorsement of state-contingent abortion law for federal inmates is likely to produce increased litigation brought by federally-incarcerated women. Courts have historically held that a woman does not lose her right to access abortion as a result of incarceration, so while free women may either experience protected abortion access in their state or, alternatively, have the capability to travel interstate to access abortion if living in an abortion ban state, an incarcerated woman could potentially have neither.[174] Even more problematic, a woman held in federal custody may be designated by the BOP to a prison outside of her domicile state and consequently subjected to state abortion law that otherwise would have been inapplicable to her, losing her right to access abortion unintentionally.[175] Not only did the language in the *Dobbs* opinion fail to overrule the holdings of the courts which have upheld a woman's right to access abortion while incarcerated, it failed to address the implications on the prison population entirely.[176] As such, the potential for loss of abortion access due to state-contingent abortion law paired with inmate immobility is judicially impractical in the long-term due to the likelihood of litigation on behalf of incarcerated women generally, but federally-incarcerated women specifically.

Further, federal prisons under federal statutory authority would be governed by inconsistent state abortion law, which would create opportunities for inconsistent management and operation of the federal prison system at large. As a federal agency operating 122 institutions across 36 states, consistency is a valuable asset to the regulation and facilitation of the BOP, as demonstrated by the current consolidation of resources, policies, and regulations.[177] The application of inconsistent state law across federal prisons presents novel obstacles that the BOP must regulate around, despite the custodial role it holds over its inmates and despite the statutory authority granted to it to regulate and manage the well-being and actions of its inmates.[178]

Finally, despite the ease with which Congress could defer to state-contingent abortion access, the

appearance of inaction and laziness of Congress may ultimately work against it in the long-term, especially given that the majority of Americans disagreed with the Court's decision in *Dobbs*.[179] While the cohesion of the federal government at large is often positive, if that cohesion is against the policy interests of the majority of Americans, the implications are unlikely to boost favor and perceptions of legitimacy in the Court or Congress, but rather disfavor and resentment at the disparate treatment of vulnerable populations, which is an incredibly important policy implication particularly for an elected representative body. Overall, the policy and practicality advantages of state-contingent abortion access are met with numerous equivalent drawbacks. Nonetheless, a course of action wherein Congress elects to not act on its legislative jurisdiction and constitutional authority to regulate federal inmate abortion access is a viable option available post-*Dobbs*, and ought to be considered as such.

B. Federal Regulation with Express Preemption

Another course of action available to Congress is the implementation of a federally-preemptive regulation to displace state abortion law as it would otherwise apply to BOP inmates, either (though potentially both) expressly preempting on-site medical abortions and its providers from state liability or expressly preempting all individuals involved, including off-site federal contractors, from state liability. This option would require a rewriting of 28 C.F.R. Section 551.23 or a completely novel regulation to ensure that the implications of the federal regulation were not merely implicit, but expressly preemptive of the applicable state law, demonstrating a clear and unequivocal federal intent to displace state law.[180] The Supreme Court has interpreted the legislative intent of varying express preemption clauses to carry different weight depending on the specific language utilized.[181] One preemptive clause which may be particularly useful for Congress in drafting a federal regulation preempting state abortion law are those displacing "state laws concerning … subjects '*covered*' by federal laws and regulations" [emphasis added].[182] The Court has historically interpreted "coverage" preemption clauses to apply when federal law substantially subsumes the subject seeking to be regulated, in this case, abortion access for federal inmates.[183] The implementation of a new or rewritten federal regulation to preserve abortion access for federal inmates is within the legislative jurisdiction and constitutional authority of Congress and the BOP, but the nature and language of the express preemption will indicate to what extent the protection applies to different groups of people, an extent which is likely to depend on the ethical, practical, and political agendas of Congress.

1. Limited Preemption

A federal regulation Congress may choose to implement is one permitting abortion access for federal prisoners via on-site administration of "abortion pills," typically either mifepristone with misoprostol or misoprostol alone.[184] An express preemptive clause can be included showcasing a clear, unequivocal federal intent to displace state law criminalizing or restricting healthcare providers for their involvement in

administering a medical abortion, thereby allowing federal contractors to come on-site to counsel inmates, administer the pill, and perform appropriate risk management and follow-up procedures.[185] The limited extent of a federal regulation for medical abortions is less blatantly contentious than one which protrudes into local and community hospitals, as it avoids the commingling of federal inmates and free citizens at the same hospital, each potentially under a different restriction or law for the same procedure. A limited-scope federal regulation sufficiently "covering" abortion access for federal inmates by authorizing the use of FDA-approved medication and expressly preempting individuals involved in its administration effectively subsume the topic area of federally-incarcerated abortion access and protect non-federal employees.

a. Positive Implications

The benefits of a limited-scope federal regulation include minimized confusion among healthcare providers and the elimination of transportation costs for federal inmates or the BOP.[186] If the express preemptive language of the regulation extends only to providers who come on-site to the prison and administer medical abortions, though limiting in its methodology, the dichotomy of protected services being performed on prison property and unprotected services being performed in local and community hospitals is compartmentalized enough to decrease confusion and difficulty that commingling of policies presents. Further, according to the BOP Female Offender Manual, the BOP is not bound to pay transportation costs of a federal inmate to an appropriate medical facility but may choose to do so.[187] However, transportation costs either payable by the inmate or the BOP can be distributed to funding other worthwhile resources by providing on-site services in the form of medical abortion under this federal regulation by eliminating transportation costs for abortion access altogether. As such, reduced confusion and costs in the ever-evolving legislative landscape of abortion access are among the benefits of a limited-scope federal regulation with express preemption.

b. Negative Implications

Despite clear benefits, a limited-scope federal regulation also has drawbacks, including the uncertain future of medical abortions and the time constraints on when medical abortions can be used. The future of FDA-approved abortion pills is increasingly uncertain post-*Dobbs*, with a plethora of attempted medical abortion bans and active litigation on the provision of abortion pills in abortion ban states.[188] The availability and production rates of abortion pills are subject to substantial change contingent on pending litigation, and this uncertainty is a severe drawback to the limited-scope of the preemption clause to medical abortions if BOP seeks to preserve abortion access, given that surgical abortion would be left non-preempted. Additionally, abortion pills have a more constrained timeline of recommended use compared to surgical abortion.[189] While surgical abortions often take place up to viability, or 24-28 weeks after a woman's last period, the FDA does not recommend the use of abortion pills after 10 weeks following the woman's last period, which could develop into a drawback depending on the circumstances surrounding the woman's decision.[190] Overall, a novel, limited-scope federal regulation governing inmate access to medical abortions and expressly preempting healthcare providers who administer the pill on-site has both substantial benefits and consequences stretching

beyond the non-exhaustive implications discussed. However, a regulation to this extent is a viable option available to Congress in determining how to navigate the regulation of abortion access for federal inmates post-*Dobbs*.

2. Complete Preemption

Congress may also choose a more holistic approach by implementing a federal regulation that preempts conduct off-site, within community and local hospitals. By implementing a regulation similar to 28 C.F.R. Section 551.23 but adding express language preempting federal contractors and other assisting individuals at community hospitals from state abortion law, Congress may more holistically preserve federal inmates' access to abortion. No such express preemption clause is attached to 28 C.F.R. Section 551.23 presently or previously because such language was not necessary pre-*Dobbs,* given that healthcare providers were not subject to liability for the lawful performance of abortion on federal inmates. Post-*Dobbs*, however, Congress may add expressly preemptive language effectively subsuming the topic of abortion access for federal inmates by "covering" the conduct of non-federal healthcare providers pursuant to the federal intent to preserve abortion access for its inmates. While certainly more holistic than the limited-scope federal regulation, Congress should consider all efficacious legislative options for adapting federal regulation of abortion post-*Dobbs*, and in drafting an expressly preemptive regulation to displace state abortion law application to abortion access of federal inmates, Congress acts within its legislative jurisdiction and constitutional authority.

a. Positive Implications

Depending on the political, ethical, and policy interests of Congress at any given time, a policy-forward action of more intrusively regulating abortion access for federal inmates and preserving their right to choose may best serve the interests of the federal government, but alternatively may harm it. Congress is an elected body, and the decisions made by representatives and senators will inevitably be driven by pleasing constituents, who often have strong ethical and political opinions themselves. What may be the largest downfall of a more intrusive, federally-preemptive regulation may also be its greatest strength, since six in ten Americans believe abortion should be legal in all or most cases.[191] The BOP policy has historically preserved an inmate's right to access abortion, and if its policy interests are substantially the same post-*Dobbs*, a completely preemptive federal regulation is the most holistic approach to achieving that policy goal. Nonetheless, the policy implications of a completely preemptive regulation, being positive or negative, will rely significantly on the composition of Congress at the time of the regulation's inception.

Further, while a more limited regulation may decrease healthcare provider confusion on applicable law, a more completely preemptive regulation promotes inmate access consistency, substantially minimizing the chances that federal inmates are misled or incorrect about their applicable abortion accessibility. Consistent enforcement of abortion access for federal inmates regardless of their state also benefits the BOP, a federal agency operating 122 institutions, by reducing discrepant policy and minimizing confusion in its administration.[192] The pursuit of policy interests and the reduction of confusion among federal inmates and the

BOP are just two of the positive implications rendered by a completely preemptive federal regulation.

b. Negative Implications

A more intrusive preemption clause on an implied preemption theory is likely to be heavily-opposed, especially given the commingling of federal inmates with federally-preemptive abortion access and free citizens without such protections within the same hospitals. The Court has held that varying preemptive phrases were ineffective to displace state laws depending on the language, and states may try and challenge the infiltration of otherwise illegal surgical abortions in community hospitals on a language basis, particularly states who have taken a more holistic approach to abortion bans.[193] Finally, perhaps the biggest drawback to an extensive federally-preemptive regulation protecting healthcare providers and preserving federal inmates' right to choose is the disparate abortion access between federal inmates and free citizens in abortion ban or restriction states. As a general principle, prisoners reap fewer rights and freedoms than their free counterparts, loss of which rights is seen as a legitimate punishment for illegal action.[194] If federal inmates in abortion restrictive or ban states can access abortion procedures while incarcerated yet their free counterparts within the same state cannot, under any circumstances, the disparate access is fundamentally backwards from the general principle. Whether this drawback is simply an unforeseen consequence of the *Dobbs* decision that the Court did not preventatively consider, the access disparity is a substantial flaw in a completely preemptive federal regulation preserving abortion access for inmates.

The implementation of a federal regulation with express preemption to protect involved individuals from state liability is an efficacious avenue available to Congress post-*Dobbs*. Whether the regulation is limited to preempting providers who come on-site and administer medical abortions or is more aggressive and preempts healthcare providers and assisting individuals off-site, or even if it falls somewhere in between, Congress should analyze potential preemptive regulations it could implement in assessing all of its viable options for regulating federal inmate abortion access post-*Dobbs*.

3. Amendment to BOP Designation Criteria for Inmate Placement

Finally, if seeking to effectively limit political contention and operate proactively, Congress should consider amending BOP's designation criteria utilized in determining the placement of an inmate, an option that presumes the application of state-contingent abortion access. According to the vested rulemaking authority of the Attorney General by 5 U.S.C. Section 552(a) and delegated to the Director of the BOP in 28 CFR Section 0.96(q), the federal government is authorized to amend its rules and regulations as deemed necessary.[195] Instead of reactively assessing abortion access for federal inmates and determining the applicable law case by case as the issue arises, an amendment to the BOP designation criteria would proactively assess abortion access for a federal inmate to determine whether there would be a significant loss or gain of abortion rights upon placement, particularly though not limited to scenarios where the inmate is placed in a prison outside of her state of domicile. To determine the efficacy of an amendment, it is essential to first evaluate the current BOP designation criteria which currently requires the analysis of five express considerations.

1. Current BOP Designation Criteria

The BOP places inmates in particular institutions based primarily on five considerations: (1) security and staff supervision required by the inmate; (2) security and staff supervision provided by the institution; (3) the medical classification of the inmate and the care level of the institution; (4) the inmate's program needs, including medical treatment; and (5) various administrative factors, including availability, release residence, judicial recommendations, and more.[196] Further, the BOP attempts to place inmates within 500 driving miles of their release residence, but occasionally is unable to do so due to security, population, or program concerns.[197] The BOP has the sole responsibility in ultimately determining the placement designation of the offender in accordance with Program Statement 5100.08, the aforementioned designation criteria, and the referral decisions considered by the DSCC.[198]

The current designation criteria considers the inmate's medical needs in determining their placement, yet does not expressly include abortion access either as an independent cause of consideration or as an inclusion under the umbrella terms of "medical classification" and "medical treatment."[199] Given the Court's revocation of the substantive constitutional right to abortion, it is foreseeable that the current designation criteria language may be interpreted as exclusive of abortion access as a relevant consideration. In fact, differential abortion access was an irrelevant consideration prior to *Dobbs* because abortion was federally-regulated and abortion access discrepancies in federal prisons across different states were less likely. Presently, however, the potential exists for drastic loss or gain of abortion access without the express consideration of such a loss or gain pursuant to the inmate's placement. If Congress chooses to endorse a public policy of preserving abortion access for federal inmates, the BOP should expressly consider abortion access as a factor in placing an inmate to a particular institution, applicable to all who are capable of pregnancy upon designation, not limited to women who are pregnant at the time of designation.[200] The amendment should impose an onus of acknowledgement of any differential abortion access, based on applicable state abortion law, that may occur by placing an inmate across state lines, particularly where there would be a substantial loss of access to abortion. The substantive content of the amendment will largely depend on the policy agenda of the BOP but may also choose to consider an inmate's consent to differential access, capacity issues, evolving state law, and other confounding factors.

2. The Role of Interstate Travel on Inmate Placement

One of the most discussed consequences of the *Dobbs* decision is the uncertain role that interstate travel plays in whether a woman in accessing abortion in different states.[201] The 14th amendment provides American citizens the right to travel between states and the *Dobbs* decision did not expressly prohibit interstate travel as a means for women in states with abortion restrictions to access the procedure in more lenient or protective states.[202] Nonetheless, the right to interstate abortion access has not gone uncontested, prompting some states have to issue commitments to act as safe havens for travelling individuals whose domicile states seek to criminalize their accessing abortion.[203] Therefore, free women still experience a safety net of interstate travel, though inarguably less convenient and inclusively accessible. However, "…pregnant people who are incarcerated

in states where abortion is illegal or severely restricted . . . are going to suffer disproportionately [to free women], because they don't even have the option to travel elsewhere."[204] This disproportionate impact is exacerbated when contextualized with the fact that federally-incarcerated women are, on average, placed at greater distances from their homes than male inmates, increasing the chance that women are placed across state lines.[205]

Courts have continuously upheld a woman's right to access abortion during incarceration,[206] a right which is unlikely to justifiably revoke merely because an inmate is substantially less mobile than her free counterparts. The underlying principle advanced by these courts is not overruled by the *Dobbs* decision,rather states which preserve abortion access still may not prohibit access of abortion for incarcerated women on the basis of their incarceration. Likewise, women in trigger ban or restrictive states are not currently prohibited from travelling to access abortion in neighboring, preserving states, and the women incarcerated in their prisons should not lose that right merely on the basis of their incarceration or immobility according to precedential principles. The designation of federally-incarcerated women, therefore, may expressly consider differential abortion access as a factor in placement to avoid any unilateral loss of choice that is unresolvable by simple interstate travel, effectuating greater compliance with common law perspectives on the relationship between abortion access and incarceration.

a. Positive Implications

The option of amending the BOP designation criteria has unique policy and practicality benefits, including proactivity as a means to reduce litigation and little administrative burden. The largest practical benefit unique to the amendment option is its proactivity. The amendment would enable the differential abortion access analysis to take place prior to placement, and upon accurate understanding of applicable state law, eliminate numerous confounding obstacles elicited by the other two courses of action like applicability of the ACA and preemption challenges. Proactivity would inevitably limit litigation of jurisdictional issues and would resolve the underlying issue without comingling federal law and state law. The substantive practicality of a proactive amendment outweighs the practicality of both the state-contingent abortion access option and the federal regulation with express preemption option in the long-term by reducing litigious confounding variables and by remaining expressly within an authority unaltered by *Dobbs*.[207] Further, the amendment procedure is administratively practical since amendments to BOP regulations are governed by already existing procedure.[208] The substantive and administrative practicality of a small amendment to the BOP designation criteria increase the efficacy likelihood of this course of action.

Further, the policy implications of this option are less abrasive as compared to the aforementioned options. Abortion is obviously a highly contentious topic in America, perhaps more now in the post-*Dobbs* era than before, so any action or inaction pertaining to abortion access is inevitably to be met with both opposition and support.[209] However, as compared to Congress' inaction resulting in state-contingent abortion access for federal inmates and compared to a modern federal regulation preempting state law and preserving abortion, the BOP amendment is the least policy-forward because it establishes a lesser federal interest in whether or not

abortion should be protected. A more reserved policy approach to a highly contentious debate may be the most effective means of preserving abortion access for federal inmates, rendering less hostile opposition. Proactively considering differential abortion access for federal inmate placement hinges less upon whether the state or federal government should have the final say on the inmates' abortion access and more upon whether the inmate is losing a right historically held to be retained upon incarceration, the latter of which is far less central to the abortion debate at large. Consequently, there would likely be pro-choice activists who claim that the amendment is not policy-forward or aggressive enough, just as there would be pro-life activists contesting abortion access for federal inmates entirely. If the BOP's policy is to continue to preserve abortion access for federally-incarcerated women, the amendment would be a safer place to begin, but is certainly not sufficient to protect abortion access for all federal inmates in each state. Conclusively, the policy implications for the amendment option available to the federal government are neither zero nor substantial and may in fact be the most effective means of middle-grounding protected abortion access.

b. Negative Implications

The most significant drawback of the amendment is that it may actually serve to undermine the policy interests of the BOP, specifically for women who are domiciled in states with both an abortion ban and prison capacity. For example, if a woman lives and is convicted in a state with an abortion ban, there is no substantial loss of right to abortion access by placing her in an available federal prison within her domicile state, and the placement would be compliant with the amended designation criteria. The amendment, therefore, only significantly protects women who already reap protected abortion access from their domicile states. Meanwhile, women who live in states with abortion bans or restrictions may be rendered immobile within a federal prison in their state, yet compliant with the terms of the amendment, and they would not be afforded the same preemptive protections effectuated by a more aggressive federal regulation. Yet, a vast BOP amendment that specifically asserted that all women be designated to federal institutions with protected abortion access would offset the capacity balances for female-housing institutions and likely create the same jurisdictional and authority issues the federal regulation option creates. There is no substantive difference between placing all federally-incarcerated women where they have access to abortion via state law and ensuring that all federally-incarcerated women have abortion access no matter their placement by expressly preempting applicable state law with a federal regulation. In either scenario, federally-incarcerated women have access to abortion, the distinctions becomes collateral to the underlying purpose of each method. Therefore, the particularity of the amendment, though at times running contrary to BOP policy, is critical to limit contention and increases practicality as distinct from a federal law with express preemption. As such, given

that the policy stance currently held by the BOP is to review policy options for protecting abortion access for its inmates[210], the amendment option is not as holistically protective as the federal regulation option, but rather simply a starting point.

The BOP designation criteria amendment is a significant course of action available to Congress to supplement the potential unilateral loss of abortion access created by the relegation of abortion regulation to primarily the state level. The amendment option is substantively and administratively practical and less contentious policy-wise than other options Congress has within its constitutional authority and legislative jurisdiction, rendering a more nationally-beneficial cost-benefit analysis. Though the amendment would not be as holistic as the federal regulation with express preemption option, it presents a viable avenue the BOP can quickly implement to begin pursuing its policy interests in preserving abortion access for federal inmates.

VII. Conclusion

The *Dobbs* decision has already had numerous impacts on the landscape of abortion access and regulation, some of which are presently concrete and others inevitably evolving into questions of law and fact that beg a further analysis of the *Dobbs* opinion. Federally-incarcerated women present a niche population that are substantially impacted by the effects of state-regulated abortion policy in unique, severe ways. The right to access abortion care and facilities while incarcerated in federal prisons demoted from a statutorily-protected right of the woman to a difficult question which requires a thorough analysis of the legislative jurisdiction and constitutional authority of the BOP, Congress, and the federal government at large.

Through its legislative jurisdiction and constitutional authority, Congress retains the power to regulate abortion access within its federal prisons. The policy and practicality implications of choosing to regulate or remain disinterested in abortion access for federal inmates, a highly partisan political issue in modern America, will likely be the driving factor in Congress' next steps. Congress ought to consider every efficacious legislative avenue available it properly fulfills its custodial role over federally-incarcerated women, and although clearly non-exhaustive, the aforementioned options are each plausible, within the jurisdiction of Congress, and constitutionally permissible.

Federally-incarcerated women represent one population, among many others, who will bear the impacts of the *Dobbs* decision in numerous unforeseen ways. Regardless of political or ethical stance, it is evident that the *Dobbs* opinion has opened the door for dozens of follow-up questions pertaining to its applicability in niche situations, including fetal personhood as it relates to carpool lane usage[211], the legal uncertainty for both mothers and doctors in miscarriage circumstances[212], and the application of state-regulated abortion policies to federally-incarcerated women. By analyzing the legislative options concretely available to Congress in an era of otherwise overwhelming legal uncertainty, the application of the *Dobbs* decision in unforeseen scenarios will become more clear and the disparate impacts of unforeseen consequences to unique populations will become more manageable.

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[194] *See Prisoners'*Rights, Cornell L. Sch., https://www.law.cornell.edu/wex/prisoners%27_rights (last visited Apr. 1, 2023).

[195] *See Control, Custody, Care, Treatment, and Instruction of Inmates,* 51 FR 47178-02 (Dec. 30, 1986).

[196] *See id*.

[197] *See id*.

[198] *See id*.

[199] *See id*.

[200] A numerically minute number of women will become pregnant while incarcerated, and the amendment to the BOP criteria would not preserve abortion access for this population if limited to women who are pregnant at the time of designation. *See e.g.*, Joe Tacopino*, NJ Women's Prison Inmates Pregnant After Sex with Transgender Prisoner*, N.Y. Post (Apr. 14, 2022), https://nypost.com/2022/04/14/edna-mahan-womens-prisoners-pregnant-after-sex-with-transgender-inmate/.

[201] *See* David Ochoa,*Will Women be Able to Travel to Other States to Have an Abortion?,* Wave (June 26, 2022,

6:24 PM PDT), https://www.wave3.com/2022/06/27/will-women-be-able-travel-other-states-have-an-abortion/.

[202] *See id*.

[203] *See West Coast States Launch Multi-State Commitment to Reproductive Freedom, Standing United on Protecting Abortion Access,*Off. of Governor Gavin Newsom(Jun. 24, 2022), https://www.gov.ca.gov/2022/06/24/west-coast-states-launch-new-multi-state-commitment-to-reproductive-freedom-standing-united-on-protecting-abortion-access/.

[204] *See* Sussman, *supra* note 69.

[205] *See* 2022 Change Notice, *supra* note 51.

[206] *See* Kasdan, *supra* note 48.

[207] *See Control, Custody, Care, Treatment, and Instruction of Inmates,* 51 FR 47178-02 (Dec. 30, 1986).

[208] *See id.*

[209] *See* Linda J. Beckman, *Abortion in the United States: The Continued Controversy,* Sage J. Vol. 27, Iss. 1(Feb. 1, 2017), https://journals.sagepub.com/doi/abs/10.1177/0959353516685345?journalCode=fapa.

[210] *See* Bublé, *supra* note 7.

[211] *See* Vanessa Romo, *Pregnant Woman who Claimed Her Fetus was an HOV Lane Passenger Gets Another Ticket*, NPR (Sept. 2, 2022), https://www.npr.org/2022/09/02/1120628973/pregnant-woman-dallas-fetus-hov-lane-passenger-ticket.

[212] *See* Charlotte Huff, *Ripple Effects of Abortion Restrictions Confuse Care for Miscarriages,* Kaiser Fam. Found. (May 11, 2022), https://khn.org/news/article/ripple-effects-of-abortion-restrictions-confuse-care-for-miscarriages/.