



FAQs

The following research is in response to frequently asked questions that have been asked regarding the telemedicine shield bills. For more information, please contact ACT Access at info@theactgroup.org

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1

Why do we need telemedicine shield laws?

Access to abortion in many states is dire, with patients getting medication abortion pills from overseas or through underground networks. This access is often later in pregnancy than is ideal, resulting in a difficult or even traumatizing experience and sometimes medical complications, as well as an increased risk of legal liability as well. Telemedicine abortion access by licensed medical providers serving those in the restricted states is urgently needed.

Telemedicine shield laws are an effective way for legislatures to provide some legal protection from criminal and civil liability for medical providers who seek to provide the full range of reproductive health care services to women and pregnant people nationwide. These providers are acting in response to the dramatic decrease in services for the most marginalized communities as a result of the Supreme Court decision to overturn Roe v. Wade. Providers practicing in states where abortion remains legally available are seeking to serve those denied abortion access elsewhere because they view access to abortion as a human right.

2

Haven't states already passed enough abortion protections?

In the immediate aftermath of the Dobbs v. Jackson Women's Health Organization in June 2022, several abortion-friendly states passed a variety of laws to protect abortion providers and to facilitate access for patients within or traveling to their states. Seven states passed some type of law specifically to help protect providers and to prohibit an abortion-hostile states from taking action against the provision of care to a patient who had traveled to the abortion-supportive state for care. However, in the case of telemedicine, without a shield law, a provider is protected only when both the patient and provider are located in the friendly state.

Telemedicine shield laws are essential for those who cannot or do not want to travel to abortion-friendly states. Five states currently have telemedicine shield laws in place: New York, Massachusetts, Vermont, Washington and Colorado.

3

What are the basic protections shield laws can provide?

Shield laws provide some protections from criminal prosecution, civil claims, and licensing or malpractice censure or revocation for providers of abortion in a state where it is legal. Extending these protections to providers of telemedicine abortion across state lines is an important next step.

Shield laws do not guarantee that a provider in a shield-law state will not be harassed or targeted by anti-abortion law enforcement officials or be subjected to civil legal claims brought by abortion opponents to courts in other states. However, shield laws pledge that New York state officials will not actively participate or be complicit in actions against providers of legally protected reproductive health care, including medication abortion.

Telemedicine shield laws unfortunately will not provide legal protection for patients in states where abortion is banned or criminalized. However, expanding shield laws to cover telemedicine for patients who do not travel to a friendly state can still help by enabling patients to have direct contact with licensed medical providers offering affordable, confirmed FDA-approved medications in a timely manner. Telemedicine shield laws provide protection for telemedicine patients similar to that provided to patients who travel to the state because now states with shield laws will not cooperate in any legal action the telemedicine patient's state may take, making it harder for that action to go forward.

From a financial perspective, many abortion-friendly states have already committed significant funds to assist low-income individuals who travel to their state for abortions and the providers who serve them. However, the need continues to grow, as does the cost of travel. If anti-abortion forces succeed in rescinding FDA approval for one of the abortion medications (mifepristone), this financial and service burden could quickly become untenable. Being able to treat patients through telemedicine to restricted states, can significantly reduce the cost and burden of travel to individuals, abortion funds and supportive states.

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Against what types of legal actions do shield laws provide protection?

Telemedicine shield laws can provide protection by acting to:

- prohibit extradition (removal from an abortion-friendly state to a state where abortion is illegal) of a licensed healthcare provider who lawfully provides telemedicine care while they are physically located within the shield state to a person who is physically located in a state where medication abortion is unavailable, banned or criminalized. This protection is only available if the provider was located in the shielded state during the entirety of the time related to the care.
- prevent shield state law enforcement officials from cooperating with any investigation or inquiry from out-of-state officials regarding reproductive health care services that are legally protected in the shield state;
- shield a provider's state professional license from revocation or other professional censure initiated by people from out-of-state against individuals who are providing reproductive health care services that are legally protected in the shielded state;
- provide legal recourse for a shield state provider who is subjected to a civil lawsuit filed by a person from out-of-state when that care was provided by telemedicine from the shielded state, and
- prohibit medical malpractice insurers from discriminating in coverage for state licensed health care professionals offering legally protected reproductive health care from shielded states to patients located outside of the state.
- prohibit state courts from cooperating with out-of-state subpoenas, deposition notices, summons, and other devices intended to force those in shield states to cooperate with out of state lawsuits and prosecutions.

5

Do shield laws disrupt current telemedicine laws in the shielded states?

The proposed expansions of shield laws do not fundamentally redefine telemedicine in the shielded state. The shield laws simply define legally protected reproductive health care by telemedicine as having taken place where the licensed provider is located when they give care from their state. These shield laws do not define the scope of telemedicine across other fields of medicine.

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Do shield laws create conflicts with existing federal law or with other states' criminal laws, especially regarding extradition practices?

No, shield laws in this way do not create conflicts with federal or constitutional law. In general, states are able to define what does or does not violate their own state laws without implicating other states.

Interstate extradition is a legal proceeding based in constitutional law that allows one state (called the demanding state) to retrieve someone fleeing a crime committed in that state from another state (called the receiving state) to which they have fled. Extradition is for the purpose of standing trial in the demanding state. It requires a judge in the receiving state to authorize an arrest warrant.

However, the constitution only requires extradition (physical removal or arrest) from a state when the accused person has been physically present in the state where the alleged crime was committed. The case law around extradition is clear that it applies only if a person is alleged to have committed a crime while physically present in a state and then fled that state. This doctrine has existed for centuries. The Supreme Court in theory could overturn these precedents, but doing so would change the basics of long-existing extradition law.

Shield laws regarding telemedicine abortion do not raise any problems in this regard. In this scenario, the telemedicine abortion provider is not physically present in the abortion-restricted state when providing care. Therefore, the extradition clause does not require extradition because the provider was never physically in the restricted state and therefore never "fled." States can opt to extradite in a variety of situations, and most states have done so by statute. However, shield laws exempt lawful reproductive health care from this statutory obligation. Under the shield laws, shield state courts and law enforcement officials will not cooperate in physically turning over the charged person from the shielded state.

Some states have earlier versions of shield laws or executive orders that protect providers engaged in lawful reproductive health care from extradition but only when the patient is physically present in the shielded state or a state that permits abortion by telemedicine for telemedicine providers who are practicing across state lines. Telemedicine abortion shield laws (currently passed in NY, MA, VT, CO and WA) provide expanded protection to providers offering services by telemedicine across state lines.

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Do shield laws create conflicts with civil law at the federal or state level and the concept of giving full faith and credit?

No, shield laws do not create conflicts with the Constitution's full faith and credit doctrine. Shield laws also comply with existing civil law procedures between states.

The full faith and credit clause (Article IV, Sec I of the Constitution) requires state courts to respect a judgment by another state's court. Its purpose is to prevent conflict among the states and to create a level of dependability of legal rulings in civil cases from one state to another. It applies only to the final judgment by another state's court, not to subpoenas, depositions, summons, and other such intermediary orders.

It remains up to each individual state whether to recognize an intermediary or evidentiary ruling (subpoenas, discovery orders, and the like) by another state. Every state has procedures in place for doing so as a general matter. Shield laws exempt lawful reproductive health care from these provisions, meaning courts in the shielded state will not recognize or enforce out-of-state orders related to discovery, subpoenas, summons, or any other evidence-procuring procedures regarding lawful reproductive health care in the shield state. The shielded state also has no constitutional obligation to participate in out of state criminal or administrative investigations into legally protected reproductive health care. Shield laws that prohibit such cooperation stand on firm constitutional ground.

In contrast, all states, including shielded ones, are required to respect and enforce a final civil judgment. For example, let's say an abortion opponent files a civil lawsuit in an Alabama court claiming to be damaged by a New York based telemedicine provider who treated a patient in Alabama. The New York provider either loses or defaults, and the Alabama court issues a final judgment against the New York provider. As long as the Alabama court had proper jurisdiction over the provider and the lawsuit is about compensating the plaintiff rather than merely punishing the defendant, that judgment must be respected by the state of New York under the full faith and credit provision of the Constitution. The Alabama plaintiff may now move to collect damages through a New York court.

However, the New York provider has some recourse because New York's shield bill includes what is known as a "clawback provision" that allows the provider to countersue for damages in the New York court against the person tries to enforce an out-of-state judgment against them because they are providing legally protected health care in the state. This provision is intended to deter abortion opponents from bringing civil lawsuits in abortion hostile states and seeking to enforce them in New York.

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Do shield laws affect medical malpractice insurance?

Yes, shield laws protect medical malpractice insurance for providers who engage in lawfully protected reproductive healthcare. If expanded to include telemedicine across state lines, the shield laws would protect these providers as well.

These shield laws prohibit insurers from taking any adverse action against a health care provider solely on the basis that the health care provider provides lawfully protected reproductive healthcare. Adverse action might include refusing to renew or execute a contract, charging more in fees or copayments, or making other unfavorable changes in terms or amount of coverage, or reporting the provider to a government or private entity for potentially violating other state's laws.

Unfortunately, in all shielded states several barriers to accessing medical malpractice insurance coverage remain. This is due to factors such as the lack of clarity with insurers, continued bias against abortion providers generally and medication abortion specifically, and a lack of affordable insurance options for providers who work independently. In order for shield laws to be successfully implemented, particularly for those engaged in telemedicine across state lines, these concerns will have to be addressed by shield state officials and private insurers.

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How does ACT Access help providers launch shielded practices?

Once telemedicine abortion bills are enacted, several barriers to implementation still need to be overcome. Thus, our work includes support for solo practitioners or small group practices dedicated to providing telemedicine abortion. (Large abortion providing organizations are averse to interstate telemedicine abortion services in an uncertain political and legal climate.)

Dedicated clinicians need assistance with establishing a separate business or LLC, setting up electronic medical records systems, obtaining malpractice insurance, creating contracts with Mifepristone and misoprostol distributors as well as other nuts and bolts activities. Medical malpractice coverage for telemedicine-only abortion practices is either non-existent or prohibitively expensive because of the bias against abortion coverage. We have been working to identify investors interested in establishing a "risk management pool" to create independent coverage by working with non-biased insurance agents.

We discuss that civil and criminal law risks still remain for providers and their patients and discuss practices to minimize these risks. Our organization is working in several states to make connections, raise funds, and mentor clinicians so that these barriers can be overcome.

10

What happens if medication abortion (mifepristone) is taken off the market?

Medication abortion in the United States is a two-drug protocol (mifepristone and misoprostol) that can safely terminate a pregnancy up to 11 weeks according to the FDA, or up to 12 weeks as authorized by the World Health Organization. As of 2021 over half of abortions in the United States were medication abortions. Since the Supreme Court overturned Roe v. Wade in 2022, there has been a much greater focus on medication abortion as an option for expanding access to abortion, particularly for those who are most affected by bans and restrictions but lack resources to travel. Many women and pregnant people simply choose medication abortion as a more private or affordable option.

Anti-abortion state officials have banned or restricted access to mifepristone despite the fact that the FDA has approved it as a safe and effective option. Even states that permit legal abortion may have restrictions on telemedicine abortion or other limitations on distribution of the medication (for example, some states require a physician to hand deliver the pills or place other medically unnecessary restrictions on medication abortion). For this reason, prescribing by telemedicine is all the more urgent.

There is deep concern that anti-abortion efforts through federal litigation in Texas may result in mifepristone being temporarily or permanently removed from the US market. (Misoprostol is a much more widely used drug for other purposes and therefore has not been the target of anti-abortion campaigns to date.) Misoprostol-only regimens are an option, and have been used in resource-poor countries when mifepristone is unavailable; however some studies show they are less effective. If FDA-approved mifepristone is unavailable, the need for direct access to telemedicine abortion providers is expected to increase dramatically.

Additional Resources:

New York Times

The Next Phase of the Abortion Fight Is Happening Right Now in New York

Jan. 20, 2023 by Michelle Goldberg

<https://www.nytimes.com/2023/01/20/opinion/new-york-abortion-rights-legislation.html>

Ms. Magazine

New York Shield Law Would Protect Clinicians Mailing Abortion Pills to Patients in Red States

1/19/2023 by Carrie N. Baker

<https://msmagazine.com/2023/01/19/new-york-shield-law-abortion-pills/>

Vox

What an abortion hotline reveals about reproductive care after Roe

Linda Prine, a physician and co-founder of the Miscarriage and Abortion Hotline, describes the new realities for patients in states where the procedure is banned

<https://www.vox.com/the-goods/23580117/linda-prine-abortion-pills-medication-dobbs-roe>

Academic papers on Telemedicine shield laws:

Abortion Pills, Cohen, David S. and Donley, Greer and Rebouche, Rachel, (February 1, 2023). Available at SSRN:<https://ssrn.com/abstract=4335735> or <http://dx.doi.org/10.2139/ssrn.4335735>

The New Abortion Battleground, 123 Columbia Law Review 1 (2023), David S. Cohen, Greer Donley, Rachel Rebouché. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931

For more information about New York or other state's proposed shield law, please contact info@theactgroup.org

