



Health Access Fund

Securing access to medication abortion across the United States

The Health Access Fund is a 501(c)3 organization that is currently supporting an innovative legal strategy to protect and expand access to medication abortion care across the US, with a focus on states where access is banned or severely restricted. Why do we need a novel legal strategy? Because conservatives are winning their decades-long battle to strip women of their human rights.

Abortion access is hanging by a thread in the United States

Access to abortion care has been fragmented and limited in many red states for years, especially for poor women. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* made the situation worse overnight for millions of women. It overturned the core holdings in *Casey* and *Roe*, allowing states to enforce draconian abortion bans with no exceptions for rape or incest. A chaotic state-level battle to protect abortion access has begun, but reproductive rights litigants acknowledge that some of these efforts will at best temporarily protect access. Within months, more than a dozen states have enacted near total abortion bans.

Conservative legislators in many states are drafting ever-more creative abortion restrictions and 2022 broke the record for most anti-abortion laws. A possible solution from Congress will depend on whether Democrats are willing to alter Senate rules and override the filibuster, which has been opposed by key Senators. This means that the courts remain a critical avenue to protect abortion access, particularly if they are faced with a conservative legal argument.

Harnessing a conservative legal approach to secure abortion access

One challenge Health Access Fund is supporting a completely different legal strategy to block state laws that restrict access to medication abortion drugs – one that many conservative judges would think twice about arguing against. The strategy is based on the Supremacy Clause of the Constitution, which establishes that federal law takes precedence over state laws. Congress enacted the 1938 Food Drug & Cosmetic Act and subsequent amendments to grant the Food and Drug Administration the authority to regulate drugs in the US. It is well established that FDA-approved labels preempt conflicting state laws, shown in civil and criminal liability suits brought by individuals. Decades of pharmaceutical product liability and other case law – including Supreme Court decisions penned by conservative justices – solidify these principles. This concept has also been applied to block state efforts to limit availability of FDA approved medications, for example, in Massachusetts a law frustrating access to an FDA-approved drug was enjoined as preempted.

Attorney General Garland signaled the support of the Department of Justice for this strategy on the day *Roe* was overturned: “[We] stand ready to work

with other arms of the federal government that seek to use their lawful authorities to protect and preserve access to reproductive care. In particular, the FDA has approved the use of the medication mifepristone. States may not ban mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."

If successful, our preemption challenges would bar states from banning mifepristone and from requiring conditions of use not in the FDA-approved label, including:

- non-medically indicated ultrasounds,
- waiting periods,
- misleading counseling,
- restrictions on who may prescribe mifepristone,
- hospital admitting privileges, and
- facilities standards.

This legal approach could permanently block bans on medication abortion and many state laws that currently frustrate access to medication abortion care. It could also block future laws designed to hamper access. This approach would ultimately ensure uniform access in all 50 states and could have more impact than any other single approach on access.

Old legal strategies have failed

The current chaos caused by abortion bans and radical anti-abortion laws modeled on Texas's SB 8 makes the situation urgent. Health Access Fund believes it can use the Supremacy Clause to prevail against these laws and hundreds of others already on the books. We need to take action now, particularly to protect access in states where bans

are currently in effect. Even though the Supreme Court has overturned *Roe* and *Casey*, this legal strategy can still prevail.

Moving forward

Health Access Fund is ready to support/fund these lawsuits to as many states as funding will allow. We are prepared to challenge outright bans on both abortion and medication abortion, as well as new and old restrictions and TRAP laws. Health Access Fund is currently working with GenBioPro, Inc., as a plaintiff for these lawsuits. As a manufacturer and distributor of generic mifepristone and misoprostol, GenBioPro has strong legal standing to bring these suits.

The urgent need to protect medication abortion

- Over half of abortions in the US are now medication abortions
- 58% of US women and transgender people live in states hostile to reproductive rights with bans or restrictions on medication abortion
- Abortion bans disproportionately impact the most marginalized groups – young people, poor people, and people of color
- Despite the growing need for medication abortion, access is shrinking