EXPECTING MEDICATION SURVEILLANCE

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*In response to federal financial incentives and mandates, all fifty states, the District of Columbia, and three U.S. territories administer electronic prescription drug monitoring programs (PDMPs). Federal and state policymakers justified the implementation and enhancement of ubiquitous prescription drug monitoring by contending that expansive state drug surveillance was a necessary weapon in the war against the American drug overdose crisis. As is often the case with tools designed for law enforcement surveillance, however, PDMPs have proven susceptible to mission creep. Although pioneer PDMPs were paper-based systems that limited their surveillance to a narrow class of heavily regulated controlled substances, modern PDMPs are powered by sophisticated, algorithm-driven software platforms. Most state PDMPs have the authority to monitor all controlled substances as well as noncontrolled "drugs of concern." Modern PDMPs also share their voluminous, sensitive health information across state lines. This Essay argues that the need for legal reform of these dragnet state prescription monitoring systems is urgent given the ongoing attack on medication abortion and gender-affirming care as well as the heightened policing of pregnancy behaviors post-*Dobbs v. Jackson Women's Health Organization.

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INTRODUCTION

"[E]ach and every American still has a right to their privacy, especially when it comes to their very private, very personal health information."[1]

In response to the first wave of the American overdose crisis, which centered around prescription opioids,[2] federal law enforcement agencies funded and encouraged the states to implement and enhance prescription drug monitoring programs (PDMPs).[3] Today, all fifty states, the District of Columbia, and three territories have authorized PDMPs.[4] PDMPs are electronic surveillance software platforms that collect a litany of sensitive, prescribing-related information about every monitored prescription drug.[5]

In June 2022, the U.S. Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,[6] which held that there is no federal constitutional right to abortion health care.[7] Antiabortion states and activist organizations thereafter began to ramp up initiatives to reduce or eliminate access to abortion health care medications.[8] In the wake of *Dobbs*, officials in abortion-restriction and criminalization states expressed their desire to enhance the surveillance of drug-related and other "suspicious" behaviors of pregnant people.[9] In addition, a growing number of states have begun to ban or place restrictions on patient access to gender-affirming care.[10]

This Essay explains how current state PDMP laws can or could—with very minor modifications—authorize the collection and dissemination of sensitive reproductive health care prescribing data, including information concerning

1. Ahmed Aboulenein, *New Biden Rule Protects Privacy for Women Who Get Abortions*, REUTERS (Apr. 22, 2024, 8:54 PM), https://www.reuters.com/world/us/biden-administration-issues-privacy-rule-protecting-abortion-2024-04-22/ [https://perma.cc/YQV7-V7B3] (quoting U.S. Department of Health and Human Services Secretary Xavier Becerra).
2. *See infra* notes 15–19 and accompanying text.
3. *See infra* note 20 and accompanying text.
4. *See infra* note 25 and accompanying text.
5. *See infra* notes 27–28, 44–48 and accompanying text.
6. 142 S. Ct. 2228 (2022).
7. *Id.* at 2284–85.
8. *See infra* notes 88–92 and accompanying text.
9. *See infra* note 103 and accompanying text.
10. *See, e.g.*, Lindsey Dawson & Anna Rouw, *Half of All U.S. States Limit or Prohibit Youth Access to Gender Affirming Care*, KFF (May 29, 2024), https://www.kff.org/other/issue-brief/half-of-all-u-s-states-limit-or-prohibit-youth-access-to-gender-affirming-care/ [https://perma.cc/ZE5R-7A5P] (noting that, since 2021, twenty-five states have enacted bans on youth gender-affirming care); Maya Goldman, *States Are Limiting Gender-Affirming Care for Adults, Too*, AXIOS (Jan. 10, 2024), https://www.axios.com/2024/01/10/trans-care-adults-red-states [https://perma.cc/CB9M-AZZN] (reporting that "three states have broadly limited or sought to broadly limit transition care for adults," while "lawmakers in at least four states [in 2023] introduced bills that would prohibit people as old as 26 from receiving hormone therapies or gender-affirming surgeries").

gender-affirming health care and medication abortion drugs sourced out of state, to state actors and their law enforcement counterparts in abortion and gender-affirming care criminalization states.[11] It then discusses post-*Dobbs* pregnancy surveillance and the new Health Insurance Portability and Accountability Act[12] (HIPAA) Privacy Rule.[13] This Essay concludes by advancing several legal reforms that the federal government and states that seek to protect reproductive and gender-affirming health care privacy should adopt to safeguard sensitive prescribing information from PDMP collection and dissemination.[14]

I. PRESCRIPTION DRUG MONITORING PROGRAMS

The United States is in the throes of a drug overdose crisis that dates back more than two decades.[15] In 2022, a record 107,941 people died of a drug overdose.[16] The prevailing theory is that the crisis has evolved over multiple "waves" involving increasingly dangerous substances[17] and ever-escalating overdose mortality.[18] According to that narrative, the first wave of the crisis, which occurred from the late 1990s until approximately 2010, was fueled by the fraudulent marketing and mass overprescribing of prescription opioids.[19]

In response to that causal tale, federal law enforcement agencies, including the Bureau of Justice Assistance (BJA), began incentivizing states to stand up PDMPs in the early 2000s by generously funding those state programs.[20] PDMPs were initially developed as law enforcement and regulatory

11. *See infra* Part I.

12. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered titles of the U.S. Code).

13. *See infra* Part II.

14. *See infra* Part III.

15. *See* MERIANNE R. SPENCER, MATTHEW F. GARNETT & ARIALDI M. MININO, NAT'L CTR. FOR HEALTH STATS., DRUG OVERDOSE DEATHS IN THE UNITED STATES, 2002–2022, at 1 (2024), https://www.cdc.gov/nchs/data/databriefs/db491.pdf [https://perma.cc/PNH3-LCHW].

16. *Id.*

17. *See* Daniel Ciccarone, *The Rise of Illicit Fentanyls, Stimulants and the Fourth Wave of the Opioid Overdose Crisis*, 34 CURRENT OPS. PSYCHIATRY 344, 344–45 (2021).

18. *Drug Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (May 14, 2024), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/YNL4-AGSW].

19. *See, e.g.*, *Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/9T4K-CHZJ] (last visited Oct. 12, 2024); A. Jay Holmgren, Alyssa Botelho & Allan M. Brandt, *A History of Prescription Drug Monitoring Programs in the United States: Political Appeal and Public Health Efficacy*, 110 AM. J. PUB. HEALTH 1191, 1191 (2020) (explaining that "[a]lthough the root causes of the US opioid crisis are multiple and complex, there remains a set of conventional narratives that emphasize iatrogenesis—addiction induced via physicians' prescribing behaviors—as an important early driver of the epidemic"); Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221–24 (2009) (describing Purdue Pharma's marketing tactics that increased sales of OxyContin and misrepresented the risks of opioid addiction associated with OxyContin).

20. *See* LISA N. SACCO, JOHNATHAN H. DUFF & AMANDA K. SARATA, CONG. RSCH. SERV., R42593, PRESCRIPTION DRUG MONITORING PROGRAMS 2–3, 15 (2018), https://sgp.fas.org/crs/misc/R42593.pdf [https://perma.cc/32NN-29T7].

surveillance tools designed to detect drug misuse, drug diversion, doctor shopping, and other "suspicious" activities.[21] As the U.S. Department of Justice (DOJ) proudly proclaims, "PDMPs are a valuable tool in successfully conducting . . . prescription drug diversion investigations and have assisted law enforcement for more than 50 years in pursuing investigation of issues ranging from doctor-shopper and pill-mill cases to more complex investigations of organized crime rings."[22]

In 2018, the federal government went beyond financial persuasion and mandated prescription drug surveillance by enacting the Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act.[23] That law requires (1) all states to establish a "qualified" PDMP and (2) all providers to access their state PDMP prior to prescribing certain controlled substances to Medicaid beneficiaries.[24] Consequently, all fifty states as well as the District of Columbia, Puerto Rico, the Northern Mariana Islands, and Guam administer sophisticated, electronic PDMPs today.[25]

Early PDMPs were carbon-paper-based surveillance schemes that limited their information collection to the class of licit prescription drugs deemed at highest risk of misuse—Schedule II controlled substances.[26] Modern PDMPs, on the other hand, are electronic databases that collect and store a litany of prescribing-related information by requiring drug dispensers, such as pharmacists and dispensing prescribers, to enter a trove of data about every PDMP-monitored prescription drug at the point of dispensing.[27] They are powered by surveillance software platforms that utilize proprietary

21. *See* Jennifer D. Oliva & Taleed El-Sabawi, *The "New" Drug War*, 110 VA. L. REV. 1103, 1130–31 (2024); PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., HISTORY OF PRESCRIPTION DRUG MONITORING PROGRAMS 1–2 (2018), https://www.pdmpassist.org/pdf/PDMP_admin/TAG_History_PDMPs_final_20180314.pdf [https://perma.cc/UF95-H46K]; *see also* Grant Victor, Bradley Ray, Brandon del Pozo, Kaitlyn Jaffe, Andy King & Philip Huynh, *Buprenorphine and Opioid Analgesics: Dispensation and Discontinuity Among Accidental Overdose Fatalities in the Indianapolis Metropolitan Area, 2016–2021*, J. SUBSTANCE USE & ADDICTION TREATMENT, July 2023, at 1, 1 (noting that the first wave of overdose deaths, driven by "the misuse of opioid analgesics," prompted "policymakers [to] implement[] guidelines meant to taper or discontinue prescription opioid analgesics, which resulted in most states implementing prescription drug monitoring programs").

22. BUR. OF JUST. ASSISTANCE, JUSTICE SYSTEM USE OF PRESCRIPTION DRUG MONITORING PROGRAMS 8 (2015) (footnote omitted), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Global-JusticeSystemUsePDMPs.pdf [https://perma.cc/4PJY-8K76].

23. 42 U.S.C. § 1396w-3a.

24. *See id.*

25. PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., INTERSTATE PDMP ACCESS AND DATA SHARING ALIGNMENT 1, 18–19 (2021), https://www.pdmpassist.org/pdf/resources/Interstate_PDMP_Access_and_Data_Sharing_Alignment_20210125.pdf [https://perma.cc/Q7HY-HSMD].

26. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., PRESCRIPTION DRUG MONITORING PROGRAMS: A GUIDE FOR HEALTHCARE PROVIDERS 1 (2017), https://store.samhsa.gov/sites/default/files/sma16-4997.pdf [https://perma.cc/RMQ3-N79M]; Jennifer D. Oliva, *Dosing Discrimination: Regulating PDMP Risk Scores*, 110 CAL. L. REV. 47, 74–76 (2022).

27. *See* Elizabeth Pendo & Jennifer Oliva, *Challenging Disability Discrimination in the Clinical Use of PDMP Algorithms*, HASTINGS CTR. REP., Jan.–Feb. 2024, at 3, 3.

algorithms to analyze the voluminous data that they collect and store.[28] PDMPs are creatures of state law.[29] As a result, they are heterogenous across numerous features, including the state agency responsible for their operation, the substances they surveil, the data that they collect about surveilled substances, patients, prescribers, and dispensers, and the entities and individuals that are required or authorized to access the platform.[30]

As of 2024, and unlike their paper-based predecessors, the overwhelming majority of PDMPs (forty-five) monitor all Schedule II through V controlled substances and most (thirty-seven) surveil nonscheduled "drugs of concern" (i.e., noncontrolled prescription drugs that the state has nonetheless determined are subject to monitoring).[31] Nebraska monitors every single prescription drug dispensed within its borders.[32] Certain state PDMPs even have statutory authority to surveil out-of-state prescription drug dispensers, such as mail order and internet pharmacies, that provide monitored substances to state residents.[33] The Alabama legislature, for example, has authorized its PDMP to surveil "[m]ail order pharmacies or pharmacy benefit programs filling prescriptions for or dispensing controlled substances to residents of this state."[34]

PDMP surveillance, therefore, goes well beyond monitoring Schedule II drugs, like prescription opioids, which are characterized by federal law as having a "high potential for abuse."[35] As already noted, all but a handful of PDMPs monitor *all* Schedule II through V controlled substances,[36] which

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28. *Id.*

29. SACCO ET AL., *supra* note 20, at 3.

30. *See* A. Travis Manasco, Christopher Griggs, Rebecca Leeds, Breanne K. Langlois, Alan H. Breaud, Patricia M. Mitchell & Scott G. Weiner, *Characteristics of State Prescription Drug Monitoring Programs: A State-by-State Survey*, 25 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 847, 847, 849–50 (2016); *see also* CTRS. FOR MEDICARE & MEDICAID SERVS., REPORT TO CONGRESS: STATE CHALLENGES AND BEST PRACTICES IMPLEMENTING PDMP REQUIREMENTS UNDER SECTION 5042 OF THE SUPPORT ACT 6–11 (2021), https://www.medicaid.gov/medicaid/data-and-systems/downloads/rtc-5042-state-challenges.pdf [https://perma.cc/XFU7-56N5] (discussing variations across state PDMPs prior to the enactment of the SUPPORT Act).

31. *See PDMP Policies and Capabilities*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., https://www.pdmpassist.org/Policies/Maps/PDMPPolicies [https://perma.cc/5AFX-EN7A] (last visited Oct. 12, 2024) ("Substances Monitored" tab, providing data on PDMP monitoring policies and capabilities); PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., OVERVIEW OF PRESCRIPTION DRUG MONITORING PROGRAMS (PDMPS) 5 (2023), https://www.pdmpassist.org/pdf/resources/PDMPs_Overview_2023.pdf [https://perma.cc/M6W4-3B9Z] (defining "drugs of concern"). The remaining states, Alaska, Kansas, New Hampshire, Oregon, South Carolina, and Vermont, monitor Schedule II through IV controlled substances. *See PDMP Policies and Capabilities*, *supra*.

32. *Drug Overdose Prevention-PDMP Access*, NEB. DEP'T OF HEALTH & HUMAN SERVS., https://dhhs.ne.gov/Pages/Drug-Overdose-Prevention-PDMP-Access.aspx [https://perma.cc/L8HP-PTB2] (last visited Oct. 12, 2024) (explaining that "all dispensed prescriptions are reported to the PDMP").

33. SACCO ET AL., *supra* note 20, at 4.

34. ALA. CODE § 20-2-213(b)(2) (2024).

35. 21 U.S.C. § 812(b)(2)(A).

36. *See supra* note 31 and accompanying text.

> include a number of frequently prescribed medications used to treat a wide range of serious medical conditions, including nausea and weight loss in cancer patients undergoing chemotherapy, weight loss associated with AIDS, anxiety disorders, panic disorders, post-traumatic stress disorder, alcohol addiction withdrawal symptoms, opioid addiction, testosterone deficiency, gender identity/gender dysmorphia, chronic and acute pain, seizure disorder, narcolepsy, insomnia, and attention deficit hyperactivity disorder.[37]

Such expansive prescription drug surveillance by, among others, federal and state law enforcement personnel, is particularly problematic given that, in our modern world of highly specialized medicines, it is often possible to ascertain a person's sensitive health care condition or disease status simply by reviewing their prescription drug records.[38]

Equally concerning is the fact that, like many law enforcement surveillance tools, PDMPs have proven susceptible to mission creep.[39] PDMPs have extended their surveillance tentacles beyond Schedule II drugs to controlled substances that are assigned to Schedules III through V and, therefore, have moderate-to-low "potential for abuse" under federal law.[40] Two-thirds of state PDMPs now monitor noncontrolled prescription drugs that have little-to-no potential for abuse under an expansive "drugs of concern" surveillance category.[41] In addition, state laws generally permit PDMP agencies to subject such unscheduled drugs to PDMP surveillance through a simple rule amendment or other relatively unexacting administrative process.[42]

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37. Brief for Plaintiffs-Intervenors–Appellees at 4, Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin., 860 F.3d 1228 (9th Cir. 2017) (No. 14-35402).

38. *See, e.g.*, Doe v. Se. Pa. Transp. Auth., 72 F.3d 1133, 1138 (3d Cir. 1995) ("It is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs.").

39. *See, e.g.*, *Mission Creep*, THEY ARE WATCHING, https://theyarewatching.org/issues/mission-creep [https://perma.cc/MKM3-FPS8] (last visited Oct. 12, 2024); Patrick G. Eddington, *DEA's Domestic Surveillance 'Mission Creep'*, CATO INST. (Nov. 20, 2023), https://www.cato.org/commentary/deas-domestic-surveillance-mission-creep [https://perma.cc/NA7K-T6Q5].

40. 21 U.S.C. § 812(b)(3)–(5).

41. *See, e.g.*, OHIO ADMIN. CODE 4729:8-2-02 (2024) (requiring gabapentin and drug products containing naltrexone as "[a]dditional drugs to be reported" to the Ohio PDMP in addition to Schedule II through V drugs); D.C. DEP'T OF HEALTH REG. & LICENSING ADMIN., D.C. PRESCRIPTION DRUG MONITORING PROGRAM: ANNUAL REPORT 2019, at 17 (2019), https://dchealth.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/PDMP%20Annual%20Report%202019.pdf [https://perma.cc/48LG-HH5A] (defining "drugs of concern" as "[a] drug that is not a controlled substance, but which is nevertheless identified by the Director [of the District of Columbia Department of Health] or the PDMP Advisory Committee as a drug with the potential for abuse").

42. *See, e.g.*, WASH. ADMIN. CODE § 246-470-020 (2023) (permitting the "pharmacy quality assurance commission" to "add additional drugs to the list of drugs being monitored by the [PDMP] by requesting the department amend these rules"); KAN. ADMIN. REGS. § 68-21-7 (2024) (listing several categories of "drugs of concern" and permitting requests to expand the list to be "submitted in writing to the board").

Although state[43] PDMPs vary across jurisdictions as to the specific substances that they monitor, all fifty-four collect sensitive, patient-identifying prescribing data regarding every monitored drug that is dispensed.[44] Such data includes, but often is not limited to, the name of the drug dispensed, the form of the drug dispensed, the strength and quantity of the drug dispensed, the number of days that a given quantity of the drug is supposed to last ("days supply"), and the date that the drug is dispensed.[45] PDMPs also collect various prescriber and pharmacy identifiers, including Drug Enforcement Administration (DEA) registration numbers,[46] and myriad patient identifiers, such as name, address, zip code, gender, date of birth,[47] and drivers' license or other form of identification.[48] States also have begun to integrate alternative data sources, which are often unrelated to prescription drug prescribing, into their PDMPs. Those sources range from medical marijuana dispensing and naloxone administration information to criminal court and child welfare case information.[49]

State PDMPs grant access to the voluminous information that they collect and analyze to "authorized users."[50] "Authorized user" status varies across jurisdictions but may include prescribers, pharmacists, state medical practice licensing boards, state health departments, correctional supervision, drug treatment providers, drug courts, Medicaid, Medicare, and medical examiners and coroners.[51] In addition, all states permit federal and state law enforcement access to their PDMPs under various conditions.[52]

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43. As used in this Essay, the word "state" is inclusive of all fifty American states, the District of Columbia, and the three inhabited territories that maintain PDMPs.

44. *See* Oliva, *supra* note 26, at 77.

45. *See* EDUC. DEV. CTR., USING PRESCRIPTION DRUG MONITORING PROGRAM DATA TO SUPPORT PREVENTION PLANNING—AT-A-GLANCE! 1–2, 2 n.3, https://solutions.edc.org/sites/default/files/Using-Prescription-Drug-Monitoring-Program-Data-to-Support-Prevention-Planning_0.pdf [https://perma.cc/ZX7U-DBWM].

46. *See* PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., *supra* note 31, at 5.

47. EDUC. DEV. CTR., *supra* note 45, at 2 n.3; *see, e.g.*, IND. CODE § 25-26-24-17 (2024) (detailing information collected by Indiana INSPECT, which is the state's PDMP); 902 KY. ADMIN. REGS. 55:110 (2023) (same as to Kentucky's PDMP).

48. *See* PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., *supra* note 31, at 4.

49. *Id.* at 5; *PDMP Policies and Capabilities*, *supra* note 31 ("Alternative Data Sources" tab).

50. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 26, at 1–2.

51. *PDMP Policies and Capabilities*, *supra* note 31 ("Authorized Uses" tabs).

52. *See* THE PEW CHARITABLE TRS., POLICY CHANGES COULD BOLSTER PRESCRIPTION DRUG MONITORING PROGRAMS 5 (2020), https://www.pewtrusts.org/-/media/assets/2020/04/prescriptiondrugmonitoring_policybrief3_final.pdf [https://perma.cc/Z9DV-SX9W] ("[A]ll states allow law enforcement some degree of PDMP access."); *see also PDMPs Authorized and Engaged in Sending Solicited and Unsolicited Reports to Law Enforcement Agencies*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR. (Oct. 27, 2023), https://www.pdmpassist.org/Content/Documents/pdf/Law_Enforcement_Entity_Table.pdf [https://perma.cc/CP25-JTV5] (noting that only the PDMPs of Kansas, Nebraska, and the Northern Mariana Islands do not have the authority to provide solicited or unsolicited reports to law enforcement); *Nebraska PDMP Profile*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR. (July 1, 2024), https://www.pdmpassist.org/Content/Documents/pdf/state_summaries/Nebraska_Summary_Profile.pdf [https://per

In that connection, it is important to note that PDMP databases are no longer passive electronic storage systems that merely collect voluminous, sensitive prescribing data. They are supported by highly sophisticated surveillance software platforms that continuously analyze PDMP data, evaluate prescribing and dispensing practices and patterns, and generate patient "risk scores" and other red flags.[53] Several states have implemented PDMP software platforms that create informational reports and alerts concerning "high-risk" prescribers and patients that the platform automatically "pushes" to various oversight entities, including law enforcement and professional licensing boards.[54] As a result, regulatory authorities and law enforcement in these jurisdictions need not expend time and resources accessing the PDMP to search for and evaluate so-called "suspicious" conduct.[55] Instead, they are apprised of this information automatically through the PDMP software platform's generation of unsolicited reports.

The DOJ and its agency-funded drug surveillance advocates have encouraged states to adopt unsolicited reporting functionality at a furious clip by characterizing proactive report generation as a PDMP "best practice" and tying its uptake to federal funding.[56] Of the PDMPs that generated unsolicited reports in 2012, just thirteen sent them to state regulatory boards and only twelve to law enforcement.[57] As of 2023, however, thirty-five state PDMPs send unsolicited reports to regulatory boards and twenty-six forward them to state, federal, and/or local law enforcement.[58]

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ma.cc/MWR4-DTUE] (reporting that Nebraska provides PDMP access to law enforcement); *Kansas PDMP Profile*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR. (July 1, 2024), https://www.pdmpassist.org/Content/Documents/pdf/state_summaries/Kansas_Summary_Profile.pdf [https://perma.cc/SY8U-LG7A] (reporting that Kansas provides PDMP access to law enforcement); *Northern Mariana Islands PDMP Profile*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR. (July 30, 2024), https://www.pdmpassist.org/Content/Documents/pdf/state_summaries/Northern_Mariana_Islands_Summary_Profile.pdf [https://perma.cc/P8RP-UHD3] (reporting that the Northern Mariana Islands provide PDMP access to law enforcement).

53. *See* Oliva, *supra* note 26, at 82–84.

54. PRESCRIPTION DRUG MONITORING PROGRAM CTR. FOR EXCELLENCE AT BRANDEIS UNIV., GUIDANCE OF PDMP BEST PRACTICES: OPTIONS FOR UNSOLICITED REPORTING 4 (2014), https://www.ojp.gov/pdffiles1/bja/247135.pdf [https://perma.cc/2FTU-KL7M].

55. *See* PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., *supra* note 31, at 6 (stating that "PDMP data fields can easily be analyzed based on geographic location, types of medications, dispensed medication combinations, overdose risk, and indicators of suspicious activity"); *id.* at 10–11 (noting that "[l]aw enforcement uses . . . PDMP information to identify possible violations of the Controlled Substance Act"); *see also* PRESCRIPTION DRUG MONITORING PROGRAM CTR. FOR EXCELLENCE AT BRANDEIS UNIV., *supra* note 54, at 14–15 (describing how unsolicited reporting to law enforcement assists with investigations).

56. *See* PRESCRIPTION DRUG MONITORING PROGRAM CTR. FOR EXCELLENCE AT BRANDEIS UNIV., *supra* note 54, at 4–5.

57. *Id.* at 6.

58. *PDMP Policies and Capabilities*, *supra* note 31 ("Unsolicited Reports" tab).

The DOJ also has encouraged and incentivized states to opt into integrated networks in which states exchange PDMP data.[59] Today, almost all jurisdictions permit their PDMP to share prescribing information with out-of-state parties.[60] Jurisdictions generally engage in interstate PDMP data sharing by (1) joining a prescription drug monitoring data exchange hub, such as RxCheck, which is funded by the BJA, or PMP InterConnect, which is funded by the National Association of Boards of Pharmacy (NABP);[61] (2) identifying one or more states with which to exchange information; and (3) entering into either memorandums of understanding (MOUs) with those partner states or enacting an Interstate Prescription Monitoring Compact.[62] As of April 2023, thirty-one states share PDMP data with more than thirty sister states through RxCheck or PMP InterConnect.[63]

The federal government has also ensured robust federal-state prescription information sharing for surveillance purposes. The U.S. Department of Veterans Affairs (VA), for example, enacted a rule in 2013 that authorizes VA medical centers to share sensitive, personally identifying prescribing

59. *See* Hallam Gugelmann, Jeanmarie Perrone & Lewis Nelson, *Windmills and Pill Mills: Can PDMPs Tilt the Prescription Drug Epidemic?*, 8 J. MED. TOXICOLOGY 378, 382 (2012) (explaining that "[t]he ability to share PDMP data between states has been a federal goal since 2002"); PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., *supra* note 25, at 2 (BJA-funded report calling interstate data sharing "recommended best practice"); PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., TRACKING PDMP ENHANCEMENT: THE BEST PRACTICE CHECKLIST 9 (2017), https://www.opioidlibrary.org/wp-content/uploads/2019/06/PDMP_2016_Best_Practice_Checklist_Report_20170228.pdf [https://perma.cc/AQ8D-DYS9] (BJA-funded report describing interstate data sharing as "best practice").

60. *See PDMP Policies and Capabilities*, *supra* note 31 ("# of Interstate Data Sharing Partners" tab) (reporting that, as of 2024, fifty-three out of fifty-four PDMPs share data with at least one other state); *RxCheck Hub Connection Status*, RXCHECK, https://www.rx-check.org/HubStatus [https://perma.cc/8KUY-8XHM] (last visited Oct. 12, 2024) (noting that fifty-four out of fifty-four PDMPs are connected to RxCheck hub, one of two PDMP data exchanges); *Connecting to RxCheck Hub*, RXCHECK, https://www.rx-check.org/Hub [https://perma.cc/FY27-VM47] (last visited Oct. 12, 2024) (stating that RxCheck "enables states to securely and efficiently share prescription drug monitoring program (PDMP) data between states"); *NABP's Role in Combating the Opioid Epidemic*, NAT'L ASS'N OF BDS. OF PHARMACY, https://nabp.pharmacy/wp-content/uploads/2021/01/NABP-Combat-Opioid-Epidemic.pdf [https://perma.cc/7UGM-9GGC] (last visited Oct. 12, 2024) (noting that PMP InterConnect, one of two PDMP data exchanges, "facilitates secure and legal interstate data sharing for almost all 54 state and territory PDMPs").

61. *See Connecting to RxCheck Hub*, *supra* note 60; *PMP InterConnect*, NAT'L ASS'N OF BDS. OF PHARMACY, https://nabp.pharmacy/members/programs-services/industry-information-networks/pmp-interconnect/ [https://perma.cc/T6GX-MMLR] (last visited Oct. 12, 2024).

62. Aimee Pehrson, Che A. Solla, Jason Buehler & Matthew Vance, *A Prescription Drug Monitoring Program, Data Sharing, and Upholding States' Rights Under the United States Constitution*, 44 J. PUB. HEALTH POL'Y 102, 106 (2023); *see, e.g.*, KY. REV. STAT. ANN. § 218A.390 (West 2024) (statute enacting Kentucky's Prescription Monitoring Program Compact); ME. STAT. tit. 22, §§ 7261-7274 (2024) (chapter enacting Maine's Interstate Prescription Monitoring Program Compact).

63. Chelsea Richwine & Wes Barker, *Physicians Have Widespread Access to State PDMP Data, but Data Sharing Varies Across States*, HEALTHITBUZZ (Apr. 6, 2023), https://www.healthit.gov/buzz-blog/health-it/physicians-have-widespread-access-to-state-pdmp-data-but-data-sharing-varies-across-states [https://perma.cc/XH3G-RHB3].

information with state PDMPs.[64] The Indian Health Service (IHS) also adopted a policy in 2016 that mandates that federal government-operated IHS facility providers check state PDMPs prior to prescribing opioids to treat chronic pain.[65]

The primary justification for the expansive sharing of federal-state and interstate PDMP data is to stymie attempts by "bad" patients to evade PDMP surveillance by crossing state lines to obtain drugs.[66] In other words, PDMP data sharing is a critical tool for law enforcement to detect and identify individuals engaged in suspicious interstate prescription drug behaviors like "doctor shopping" and drug diversion.[67] A 2019 study of PDMP interstate data sharing, however, found that patients in jurisdictions engaged in border-state data sharing were not less likely to be prescribed opioids for noncancer pain than those in jurisdictions that do not share data with neighboring states.[68] Moreover, even if the study had demonstrated an association between enhanced interstate data sharing and a reduction in opioid prescriptions, which it did not, such a finding would be unhelpful from a public health perspective without additional evidence that reduced opioid prescribing decreases drug overdose mortality or otherwise improves health outcomes.[69]

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64. *See* 38 C.F.R. §§ 1.483, 1.515 (2023). The VA's notice of the rule, which implemented provisions of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 230, 125 Stat. 786, 1159 (2011) (codified at 38 U.S.C. § 5701), notes that these disclosures are permissible under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 C.F.R. pts. 160, 164 (2024), stating that the "VA's authority to disclose the information to PDMPs under the HIPAA Privacy Rule is contained in 45 C.F.R. § 164.512(b), which allows disclosures to an agency or authority responsible for public health matters as part of its official mandate." Disclosures to Participate in State Prescription Drug Monitoring Programs, 78 Fed. Reg. 9589, 9590 (Feb. 11, 2013) (codified at 38 C.F.R. §§ 1.483, 1.515).

65. *See* INDIAN HEALTH SERV., INDIAN HEALTH MANUAL pt. 3, ch. 32, https://www.ihs.gov/ihm/pc/part-3/p3c32/ [https://perma.cc/CPN2-FUFX] (section of the Indian Health Manual implementing new PDMP policy); Mary Smith, *IHS Implements Groundbreaking New Policy Regarding Opioid Prescribing*, INDIAN HEALTH SERV. (Jul. 6, 2016), https://www.ihs.gov/newsroom/ihs-blog/july2016/ihs-implements-groundbreaking-new-policy-regarding-opioid-prescribing/ [https://perma.cc/3XB2-ZMJF].

66. *See PMP InterConnect*, *supra* note 61 ("The benefits of state PMPs are enhanced by PMP InterConnect because the system provides the means for physicians and pharmacists to more easily identify patients with prescription drug abuse and misuse problems, especially if those patients cross state lines to obtain drugs.").

67. *See* BUR. OF JUST. ASSISTANCE, *supra* note 22, at 6–7.

68. *See* Hsien-Chang Lin, Zhi Wang, Linda Simoni-Wastila, Carol Boyd & Anne Buu, *Interstate Data Sharing of Prescription Drug Monitoring Programs and Associated Opioid Prescriptions Among Patients with Non-cancer Chronic Pain*, 118 PREVENTATIVE MED. 59, 63 tbl.4 (2019); *id.* at 62 (stating that the study's results "could not provide evidence to support" the claim that "interstate PDMP data sharing . . . enhance[s] PDMP effectiveness in improving physician safe prescribing of opioids and thus, reduce[s] patient drug seeking").

69. *See Intended and Unintended Health Effects of Prescription Drug Monitoring Programs*, NAT'L BUREAU OF ECON. RSCH. (Mar. 8, 2022), https://www.nber.org/bh-20221/intended-and-unintended-health-effects-prescription-drug-monitoring-programs [https://perma.cc/9PG9-VHQH] ("[S]upply-side restrictions alone are not sufficient to address the misuse of prescription opioids and that such policies in tandem with demand-side interventions, such as improved access to evidence-based treatment for opioid use disorder and related social service supports, may warrant consideration.").

This is notable because, to the extent that PDMP impacts on patient health have been studied, that research has yielded concerning results. Such studies are, at best, mixed as to any association between PDMPs and positive health care outcomes,[70] with one even concluding that "implementation of PDMPs was associated with an 11% *increase in drug overdose mortality*."[71] A separate study similarly found that, while PDMPs decreased prescription overdose deaths, their use increased heroin overdose deaths to such an extent that their harmful health outcomes may outweigh their benefits.[72]

Worse yet, the federal government, which, as described above, has used myriad tactics to force the states to stand up electronic PDMPs and engage in interstate data sharing, recognizes that PDMP use is associated with "several negative consequences."[73] The Centers for Medicare and Medicaid Services (CMS), for example, released a report to Congress examining state PDMP use, in which the agency, citing interviews with key stakeholders, explained that

> [p]atients may feel like they cannot switch doctors because they will be seen as "doctor shopping" even if they are dissatisfied with the quality of the provider's care. Individuals with pain may change medications every few weeks or months even if the other medications are not as effective. Patients who are denied needed pain medications may turn to street drugs, which increase the risk of overdose. Individuals living with pain may also turn to marijuana, which, even if legal, is not regulated. Patients with legitimate pain who cannot get adequate relief are more likely to suffer from depression and have increased rates of suicide. The PDMP can be perceived to force providers to push people into interventions that may be suboptimal and can lead to unintended harms.[74]

Unfortunately, and as CMS acknowledges in this same report, policymaker responses to research that highlights the negative impacts of PDMPs on patient health outcomes is entirely predictable because it is always the same: more is simply more. Like other prescription drug surveillance proponents, CMS contends that PDMPs do *not collect and exchange enough sensitive, personally identifiable prescription data* to have a meaningful impact on the

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70. *See* Oliva, *supra* note 26, at 78–80 (summarizing research which "indicates that prescription-drug surveillance is neither associated with decreases in the nonmedical use of controlled substances nor reductions in drug-overdose mortality rates"); *id.* at 78 n.182 (collecting articles that suggest that there is "scant evidence that PDMPs either improve patient care or enhance access to evidence-based treatment for individuals with [substance use disorder], chronic pain, or other complex conditions for which monitored controlled substances are indicated").

71. Guohua Li, Joanne E. Brady, Barbara H. Lang, James Giglio, Hannah Wunsch & Charles DiMaggio, *Prescription Drug Monitoring and Drug Overdose Mortality*, INJURY EPIDEMIOLOGY, 2014, at 1, 3 (emphasis added).

72. *See* Allison L. Pitt, Keith Humphreys & Margaret L. Brandeau, *Modeling Health Benefits and Harms of Public Policy Responses to the US Opioid Epidemic*, 108 AM. J. PUB. HEALTH 1394, 1398–99 (2018).

73. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 30, at 38.

74. *Id.*

drug overdose crisis.[75] Citing stakeholder interviews, the agency reports that "[c]hallenges of data sharing across [s]tates is . . . [an] impediment to the effective use of PDMPs"[76] and encourages states to expand their PDMPs to surveil the prescribing and dispensing of all prescription drugs.[77] Certain PDMP advocates have gone even further and called on the federal government to create a national PDMP under its Commerce Clause[78] authority to ensure ubiquitous cross-border data sharing.[79]

Advocacy for more extensive state and federal prescription drug monitoring is particularly curious given that the drug overdose crisis has been primarily driven not by prescription opioids but by multiple illicit substances for over a decade.[80] PDMPs do not—and cannot—surveil illicit substances because those drugs are neither prescribed nor dispensed. This critical functional limitation of PDMPs begs the question as to whether these surveillance programs, which have primarily served to disincentivize and drive down the prescribing of lawful prescription opioids, have any ongoing value as a public health policy intervention.

It is nonetheless difficult to imagine the near-term demise of state PDMPs given the considerable funding and infrastructure support the federal government and the states have dedicated to their implementation, enhancement, and interconnectivity. In fact, ambitious policymakers are more likely to look for something new for PDMPs to do, like surveilling additional unpopular prescription drugs, to ensure PDMP longevity. One such easy-to-identify category of potential prescription surveillance targets—medication abortion drugs—is the subject of the following part of this Essay.

II. MEDICATION ABORTION CRIMINALIZATION & SURVEILLANCE POST-*DOBBS*

In June 2022, the U.S. Supreme Court decided *Dobbs*.[81] The *Dobbs* decision overruled *Roe v. Wade*[82] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[83] by holding that there is no right to abortion health

75. *See id.* at 36–38 (describing various barriers to accessing PDMP data that limit their effectiveness); *see also* Pehrson et al., *supra* note 62, at 105–06 (arguing for a federal PDMP due to state-to-state variations in PDMP data sharing and access that limit effectiveness of PDMPs).

76. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 30, at 37.

77. *Id.* at 40.

78. U.S. CONST. art. I, § 8, cl. 3.

79. *See* Pehrson et al., *supra* note 62, at 105–07.

80. *See* Ciccarone, *supra* note 17, at 344–45 (arguing that synthetic opioids, including fentanyl, are driving the current overdose epidemic); John F. Peppin, Robert B. Raffa & Michael E. Schatman, *The Polysubstance Overdose-Death Crisis*, 13 J. PAIN RSCH. 3405, 3405–06 (2020) (calling the overdose crisis a "polysubstance-overdose death crisis" because "the majority of overdose deaths currently involve multiple substances").

81. 142. S. Ct. 2228 (2022).

82. 410 U.S. 113 (1973).

83. 505 U.S. 833 (1992).

care under the U.S. Constitution.[84] In anticipation of *Dobbs*, several states rushed to restrict or criminalize abortion. Before the Court issued *Dobbs*, for example, Idaho, Oklahoma, and Texas enacted "bounty hunter" statutes that permit private citizens to enforce abortion laws and extend their reach to so-called "aiders and abettors."[85] A Texas man recently invoked his state's bounty hunter law and wrongful death statute in a petition to investigate individuals or entities that he contends were "complicit" in the abortion health care his ex-partner received in Colorado—a state where such treatment was and remains lawful.[86] Abortion rights advocates characterized the Texas man's petition to investigate his ex-partner's lawful, out-of-state behavior as "vigilante justice" aimed at intimidating people from crossing state lines to obtain reproductive health care.[87]

After *Dobbs* was decided, abortion-restrictive trigger bans that had laid dormant for years became enforceable law in several jurisdictions.[88] Still other states, like Indiana, enacted new total bans or severely restrictive abortion laws shortly after the decision.[89] More recently, on May 1, 2024, Florida's six-week abortion ban went into effect.[90] That law rendered the residents of southern Florida, who must travel to North Carolina for lawful abortion health care, as "the farthest [individuals] from a legal provider [of abortion] of any highly populated area in the U.S."[91] As of August 2024,

84. *See Roe*, 410 U.S. at 164–66 (finding that a broad restriction on abortion was violative of the Due Process Clause of the Fourteenth Amendment); *Casey*, 505 U.S. at 876, 879 (upholding the constitutional right to an abortion and creating the undue burden standard); *Dobbs*, 142 S. Ct. at 2242 (expressly overturning *Roe* and *Casey*).

85. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/6T43-F4ZN].

86. Caroline Kitchener, *Texas Man Files Legal Action to Probe Ex-Partner's Out-of-State Abortion*, WASH. POST (May 3, 2024, 5:00 AM), https://www.washingtonpost.com/investigations/2024/05/03/texas-abortion-investigations/ [https://perma.cc/U7C3-5ZGH].

87. *Id.*

88. *See, e.g.*, Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post-*Roe, GUTTMACHER INST., https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe [https://perma.cc/5QQM-2XQ5] (June 16, 2023) (identifying nine states that immediately banned abortion upon the *Dobbs* decision due to trigger laws).

89. *See, e.g.*, Morgan Watkins, *After Yearlong Fight, a Near-Total Abortion Ban is Going into Effect in Indiana*, NPR (Aug. 1, 2023, 5:00 AM), https://www.npr.org/sections/health-shots/2023/08/01/1191156197/after-yearlong-fight-a-near-total-abortion-ban-is-going-into-effect-in-indiana [https://perma.cc/RZ64-4FWH] (discussing Indiana's "sweeping ban on most abortions" that the state legislature passed several months after *Dobbs* and went into effect in 2023).

90. David Fischer & Stephany Matat, *Florida's 6-Week Abortion Ban Takes Effect as Doctors Worry Women Will Lose Access to Health Care*, ASSOCIATED PRESS, https://apnews.com/article/florida-abortion-ban-9509a806453e1eab50d118aaecffa2f1 [https://perma.cc/7KW9-5NW4] (May 1, 2024, 7:47 PM).

91. Makiya Seminera & Geoff Mulvihill, *Many Florida Women Can't Get Abortions Past 6 Weeks. Where Else Can They Go?*, ASSOCIATED PRESS, https://apnews.com/article/abortion-florida-ban-north-carolina-clinics-fa6ffb1e0627547356c55a85fb3a715e [https://perma.cc/68KM-2PFN] (May 5, 2024, 2:06 AM).

twenty-two states either criminalize abortion or have in place laws that are more restrictive than *Roe*.[92]

The enactment of these *Dobbs*-sanctioning state abortion laws has motivated initiatives to crack down on the prescribing and dispensing of mifepristone and misoprostol, the two drugs commonly utilized in medication abortion.[93] As of October 2023, fourteen states, which have near-total bans on abortion, also "have separate laws limiting the provision of medication abortion," while another fifteen impose restrictions on access to medication abortion.[94] Just this year, a group of antiabortion activists unsuccessfully attempted to invalidate the federal Food and Drug Administration's (FDA) approval of—and subsequent decisions to lift restrictions on access to—mifepristone,[95] which is proven safer than many low-risk prescription drugs, including penicillin and Viagra.[96] As a trio of legal scholars recently observed, "[w]e are at the beginning of a new war on drugs in this country—this time, a war on abortion pills."[97]

Research estimates that one in four American women will have an abortion by age forty-five given the prevalence of such treatment in the United States.[98] Due at least in part to *Dobbs* and the FDA's 2021 decision to enhance access to medication abortion by, among other things, permitting patients to obtain mifepristone through the mail and without an in-person doctor visit, the rate of medication abortion obtained through the formal U.S. health care system has increased from 53 percent of all abortions in 2020 to

92. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/VY2C-X4VL] (Aug. 23, 2024, 12:26 PM).

93. *See* Alison Durkee, *Mifepristone Ruling: Here Are the Unintended Health Consequences of Attacks on Abortion Pills*, FORBES (Apr. 11, 2023, 7:15 AM), https://www.forbes.com/sites/alisondurkee/2023/04/11/mifepristone-ruling-here-are-the-unintended-health-consequences-of-attacks-on-abortion-pills/?sh=2ee9102b6405 [https://perma.cc/ZC3Z-4LUV].

94. *See Medication Abortion*, GUTTMACHER INST. (Oct. 31, 2023), https://www.guttmacher.org/state-policy/explore/medication-abortion [https://perma.cc/UR F9-BBWM]; Jasmine Cui & Danica Jefferies, *Map: Where Medication Abortion Is and Isn't Legal*, NBC NEWS, https://www.nbcnews.com/health/womens-health/map-pills-medication-abortions-are-legal-rcna70490 [https://perma.cc/HV6F-B9XX] (Mar. 1, 2024, 4:39 PM).

95. *See* FDA v. Al. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024) (denying plaintiffs' challenges to FDA's decisions approving and easing access to mifepristone).

96. *See* Selena Simmons-Duffin, *What's at Stake in the Supreme Court Mifepristone Case*, NPR (Mar. 25, 2024, 10:01 AM), https://www.npr.org/sections/health-shots/2024/03/25/1240282129/mifepristone-supreme-court-fda-medication-abortion-explainer [https://perma.cc/FPE3-UXPG] (discussing implications of challenge before Court's ruling); Annette Choi & Way Mullery, *How Safe Is the Abortion Pill Compared with Other Common Drugs?*, CNN, https://www.cnn.com/health/abortion-pill-safety-dg [https://perma.cc/ZGK9-U2H2] (June 13, 2024, 10:49 AM) (discussing mifepristone's safety in comparison to commonly prescribed drugs).

97. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317, 320 (2024).

98. Rachel K. Jones, *An Estimate of Lifetime Incidence of Abortion in the United States Using the 2021–2022 Abortion Patient Survey*, CONTRACEPTION, July 2024, at 1, 4 (estimating that 24.7 percent of women aged fifteen to forty-four will have an abortion by age forty-five should the 2020 abortion rate in the United States remain constant).

63 percent in 2023.[99] Although the legal challenges to mifepristone were unsuccessful this time,[100] the consequences of a future Supreme Court decision that reinstates the old FDA rule that requires, among other things, an in-person doctor visit to access mifepristone cannot be overstated.

Indeed, invalidation of the FDA rule that permits access to mifepristone via the internet, phone, and mail would severely limit access to medication abortion for pregnant people in abortion-restriction states, as those residents would need to travel to a state in which abortion is legal to access such medication.[101] As recent reporting reveals, "[a]t least 6,000 women every month in states with [abortion] bans are now receiving pills" from just one source: a European-based online clinic called Aid Access.[102] Needless to say, a nationwide reinstatement of the in-person physician visitation requirement to obtain mifepristone would also make medication abortion more difficult to access by pregnant people in states that protect the right to abortion health care.

It is also important to point out that officials in abortion-restriction states have been explicit about their desire to broadly surveil the reproductive health information of their residents and robustly enforce their states' respective abortion bans.[103] States have also undertaken efforts to ban or restrict access to gender-affirming care for youths and, in some cases, for adults.[104] In addition, certain officials have made clear their desire to monitor the sensitive health information of individuals seeking gender-affirming care.[105] Their public objections to the Biden administration's April 2023 proposed rule to enhance privacy protections for reproductive health care information are illustrative.

In the aftermath of *Dobbs*, the U.S. Department of Health and Human Services (HHS) proposed amendments to the HIPAA Privacy Rule "to

99. Rachel K. Jones & Amy Friedrich-Karnik, *Medication Abortion Accounted for 63% of All US Abortions in 2023—An Increase from 53% in 2020*, GUTTMACHER INST. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/medication-abortion-accounted-63-all-us-abortions-2023-increase-53-2020 [https://perma.cc/R4FB-MV2E]. The FDA "removed the in-person dispensing requirement for mifepristone" in December 2021. Laurie Sobel, Alina Salganicoff & Mabel Felix, *Legal Challenges to the FDA Approval of Medication Abortion Pills*, KFF (Mar. 13, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-the-fda-approval-of-medication-abortion-pills/ [https://perma.cc/TC38-4Q8Y]. It finalized those regulation changes in January 2023. Jones & Fredrich-Karnik, *supra*.

100. *See supra* note 95 and accompanying text.

101. *See supra* note 94 and accompanying text.

102. Caroline Kitchener, *Alone in a Bathroom: The Fear and Uncertainty of a Post*-Roe *Medication Abortion*, WASH. POST (Apr. 11, 2024), https://www.washingtonpost.com/politics/interactive/2024/abortion-pill-experience-stories/ [https://perma.cc/V8DE-LWGW].

103. *See, e.g.*, Kelcie Moseley-Morris, *Republican Legislators Push Bills Requiring Government to Collect Reasons for Abortion*, OKLA. VOICE (Feb. 17, 2024, 8:00 AM), https://oklahomavoice.com/2024/02/17/republican-legislators-push-bills-requiring-government-to-collect-reasons-for-abortion/ [https://perma.cc/69Z7-RPWB].

104. *See supra* note 10 and accompanying text.

105. *See, e.g.*, Andrew Atterbury, *DeSantis Targets Trans Health Care in Florida Universities*, POLITICO (Jan. 18, 2023, 6:07 PM), https://www.politico.com/news/2023/01/18/desantis-trans-health-care-florida-universities-00078435 [https://perma.cc/AS7N-LN36].

strengthen privacy protections for individuals' [protected health information] related to reproductive health care."[106] The proposed rule would prohibit HIPAA-covered entities, such as health care providers and insurers, from "using or disclosing an individual's [protected health information (PHI)] for the purpose of conducting a criminal, civil, or administrative investigation into or proceeding against the individual, a health care provider, or other person in connection with seeking, obtaining, providing, or facilitating reproductive health care that": (1) is lawfully provided outside the state conducting the investigation or proceeding; (2) "is protected, required, or authorized by Federal law"; or (3) is provided in the state conducting the investigation or proceeding but is permitted by that state's laws.[107] To justify the need for this new privacy rule, HHS explained that the *Dobbs* decision

> makes it more likely . . . that individuals' PHI may be disclosed in ways that cause harm to the interests that HIPAA seeks to protect but that are not adequately addressed in this context . . . . Some states have already imposed criminal, civil, or administrative liability for, or created private rights of action against, individuals who obtain certain reproductive health care, including pregnancy termination; the health care providers who furnish such reproductive health care; or other persons who facilitate the furnishing or receipt of certain reproductive health care. Other states may follow suit in the future. And in yet other states, law enforcement agencies may attempt to use general criminal laws to prosecute individuals for seeking or obtaining such reproductive health care.[108]

The proposed reproductive health care HIPAA rule was criticized for a dizzying array of reasons by individuals on both sides of the political divide.[109] A group of congressional Democrats, for example, sent a letter to the HHS Secretary in which they argued that the proposed rule's privacy protections were insufficient.[110] They specifically pointed out that the rule was flawed insofar as it (1) continued to permit law enforcement warrantless access to sensitive PHI and (2) only applied to reproductive health care information instead of all PHI, much of which is similarly sensitive (e.g., mental health treatment information).[111]

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106. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23507 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164).

107. *Id.* at 23522 (The proposed rule "would also prohibit a regulated entity from using or disclosing an individual's PHI for the purpose of identifying an individual, health care provider, or other person for the purpose of initiating such an investigation or proceeding against the individual, a health care provider, or other person in connection with seeking, obtaining, providing, or facilitating reproductive health care that is lawful under the circumstances in which it is provided.").

108. *Id.* at 23507 (footnote omitted).

109. *See, e.g.*, Alice Miranda Ollstein, *Biden's HIPAA Expansion for Abortion Draws Criticism, Lawsuit Threats*, POLITICO (Jul. 18, 2023, 12:22 PM), https://www.politico.com/news/2023/07/18/biden-hipaa-expansion-abortion-00106694 [https://perma.cc/45TL-P3CF].

110. Letter from Sen. Ron Wyden, Sen. Patty Murray & Congresswoman Sara Jacobs to Xavier Becerra, Sec'y of Health & Hum. Servs. 1 (Jul. 18, 2023), https://www.wyden.senate.gov/imo/media/doc/wyden-led_hhs_surveillance_letter_71823.pdf [https://perma.cc/6UMZ-HNSH].

111. *See id.* at 1–2.

Nineteen Republican attorneys general, on the other hand, submitted a public comment opposing the proposed rule as federal overreach.[112] They argued, among other things, that the rule would block state officials from easy access to information concerning their residents' reproductive health services and, thereby, stymie their ability to conduct abortion health care-related civil and criminal investigations.[113] They also contended that the rule would "obstruct state laws concerning experimental gender-transition procedures for minors (such as puberty blockers, hormone therapy, and surgical interventions)."[114] The Biden administration enacted a final version of the rule on April 26, 2024, that became effective on June 25, 2024.[115] In response to public comments and congressional concerns, HHS significantly amended the HIPAA Privacy Rule as it pertains to permissible reproductive health information disclosure in its final rule. Importantly, the final rule requires covered entities to presume that the reproductive health care at issue in any external request for information was lawful, and proscribes covered entities from rebutting that presumption unless they have actual knowledge or factual information that demonstrates a "substantial factual basis" to the contrary.[116]

The above-referenced Republican attorneys general were not the only vocal opponents of enhanced federal reproductive health care privacy protections. Former executive branch administration officials, including Roger Severino, who served as President Donald J. Trump's director of the HHS Office for Civil Rights, also railed against the proposed rule on states' rights grounds.[117] More recently, former President and current Republican presidential nominee Trump stated in an April 30, 2024 *Time* interview that antiabortion states should be left alone to regulate reproductive health care how they see fit, "including monitoring women's pregnancies."[118]

In that vein, states have long surveilled the drug-related behaviors and other so-called "suspicious" activities of pregnant people.[119] Between 1973 and 2022, there were over 1,800 arrests of pregnant people for crimes for

112. Nineteen State Att'ys Gen., Comment Letter on Proposed HIPAA Privacy Rule to Support Reproductive Health Care Privacy (June 16, 2023), https://www.ag.ky.gov/Press%20Release%20Attachments/2023.06.16%20Comment%20Letter%20of%20the%20Mississippi%20Attorney%20General%20et%20al.%20(as%20filed).pdf [https://perma.cc/NGH2-XTL3].

113. *See id.* at 5–6.

114. *Id.* at 14.

115. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976 (Apr. 26, 2024) (codified at 45 C.F.R. pts. 160, 164).

116. *See id*. at 33014–16.

117. *See* Ollstein, *supra* note 109.

118. Eric Cortellessa, *How Far Trump Would Go*, TIME (Apr. 30, 2024, 7:00 AM), https://time.com/6972021/donald-trump-2024-election-interview/ [https://perma.cc/FXL4-ZJ7N].

119. *See, e.g.*, Valena E. Beety & Jennifer D. Oliva, *Policing Pregnancy "Crimes*", 98 N.Y.U. L. REV. ONLINE 29, 36 (2023) (discussing "hyper-surveillance . . . of predominantly poor, Black, pregnant women who suffered from substance use disorders" during the 1980s).

which being pregnant was a necessary element of the crime.[120] Although states dedicate significant resources to surveilling illicit pregnancy drug use,[121] they have also brought child-welfare cases against pregnant people for using licit medications prescribed by their physicians.[122] There is, of course, serious concern that states will ramp up and expand pregnancy surveillance post-*Dobbs*.[123] As one reporter aptly put it, "[h]aving a glass of wine, eating deli meats and soft cheeses, exercising too hard, getting up to take care of your other children during your doctor-ordered bedrest, [or] taking your prescribed antidepressants . . . are all actions that . . . could serve as grounds for arrest" of pregnant people in post-*Dobbs* America.[124]

III. THE URGENCY OF PDMP DATA COLLECTION & EXCHANGE REFORM

Predictions that pregnant people will face enhanced surveillance and criminalization post-*Dobbs* have been widely discussed by academics and publicized by the media.[125] Little attention, however, has been devoted to

120. *See* PURVAJA S. KAVATTUR, SOMJEN FRAZER, ABBY EL-SHAFEI, KAYT TISKUS, LAURA LADERMAN, LINDSEY HULL, FIKAYO WALTER-JOHNSON, DANA SUSSMAN & LYNN M. PALTROW, PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 43 (2023), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf [https://perma.cc/JH3B-NYBV].

121. *See, e.g.*, *Substance Use During Pregnancy*, GUTTMACHER INST. (Aug. 31, 2023), https://web.archive.org/web/20231004041533/https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy [https://perma.cc/H896-EBDB] (noting, as of August 2023, that "25 states and the District of Columbia consider substance use during pregnancy to be child abuse under civil child-welfare statutes, and 5 consider it grounds for civil commitment," "26 states and the District of Columbia require health care professionals to report suspected prenatal drug use, and 8 states require them to test for prenatal drug exposure if they suspect drug use"); Editorial, *Criminalizing Expectant Mothers*, N.Y. TIMES (Apr. 16, 2014), https://www.nytimes.com/2014/04/17/opinion/criminalizing-expectant-mothers.html [https://perma.cc/UK2P-7R64] (criticizing proposed legislation in Tennessee that would allow "the filing of assault charges . . . when a fetus or newborn is deemed to be harmed by illegal narcotics").

122. *See* Shoshana Walter, *They Followed Doctors' Orders. Then Their Children Were Taken Away*, N.Y. TIMES MAG., https://www.nytimes.com/2023/06/29/magazine/pregnant-women-medication-suboxonbabies.html [https://perma.cc/V4A3-68AE] (July 1, 2023) (reporting that "public-records requests to every state and the District of Columbia" revealed "thousands [of women] who have been referred to child-welfare authorities" for using medications prescribed by their physicians, including opioids prescribed to treat opioid addiction).

123. Beety & Oliva, *supra* note 119, at 32; *see also* Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison*, THE MARSHALL PROJECT (Sept. 1, 2022, 10:30 AM), https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison [https://perma.cc/9LL4-MMJA] (contending that "[w]hile the repercussions of *Dobbs* are still unfolding, it gives states leeway to expand child endangerment and homicide laws to punish people for what happens during their pregnancies").

124. Caroline Bologna, *Without* Roe v. Wade, *Pregnant Women May Face Arrest for All Kinds of Behaviors*, HUFFPOST (June 17, 2022), https://www.huffpost.com/entry/roe-v-wadepregnancy-criminalization-arrest_l_629f6619e4b0c184bdd5b0df [https://perma.cc/Q2FG-ACAP].

125. *See, e.g.*, Jolynn Dellinger & Stephanie K. Pell, *The Criminalization of Abortion and Surveillance of Women in a Post-*Dobbs *World*, BROOKINGS INST. (Apr. 18, 2024),

the fact that much of the sensitive reproductive health care information that law enforcement and other state officials seek to enforce their abortion and gender-affirming care bans and bolster their pregnancy surveillance regimes, such as the use of controlled substances or "drugs of concern" during pregnancy, is already collected by state PDMPs.[126] Worse yet, many states permit their PDMP agencies to easily expand the scope of the sensitive prescribing information they collect by engaging in relatively simple regulatory maneuvers, such as enacting a rule that adds new prescription drug targets, like abortion medications, to their list of surveilled "drugs of concern."[127]

These same regulatory processes could be invoked by states to surveil individuals who take hormone therapies or other gender-affirming care prescription drugs. For example, individuals who take testosterone as part of such a treatment regime[128] are already subject to surveillance by all fifty-four state PDMPs because testosterone is a Schedule III controlled substance.[129] The thirteen states that have not yet granted their PDMP agencies the authority to surveil drugs of concern,[130] of course, can easily reverse course by simply amending their respective PDMP statutes.

Moreover, and as explained above, all states authorize law enforcement access to state PDMP data[131] and exchange their PDMP information with other states.[132] As such, PDMPs pose potent threats to health care privacy and access that must be taken seriously in a politically polarized, post-*Dobbs* America. This is not an idle or imaginary threat. One state, Louisiana, recently became the first state in the nation to enact legislation that reclassified the two drugs commonly utilized in medication abortion health

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https://www.brookings.edu/articles/the-criminalization-of-abortion-and-surveillance-of-women-in-a-post-dobbs-world/ [https://perma.cc/4BQ6-29FS]; *see also supra* notes 123–24 and accompanying text.

126. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 26, at 3–4; *see also supra* notes 31–41 and accompanying text (discussing the collection of data related to the use of controlled substances and "drugs of concern").

127. *See* PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., *supra* note 31, at 4 (explaining that "[d]esignating a drug of concern is typically accomplished through the promulgation of administrative rules"); *see also supra* note 42 and accompanying text.

128. *See* Skyler Rosellini & Abigail Coursolle, *Increasing Access to Testosterone to Improve the Lives of Transmasculine People*, NAT'L HEALTH L. PROGRAM (Nov. 29, 2021), https://healthlaw.org/increasing-access-to-testosterone-to-improve-the-lives-of-transmasculine-people/ [https://perma.cc/6Y9D-7369] (noting that some gender-affirming care involves the use of testosterone).

129. *FDA Approves New Changes to Testosterone Labeling Regarding the Risks Associated with Abuse and Dependence of Testosterone and Other Anabolic Androgenic Steroids (AAS)*, FDA (Oct. 25, 2016), https://www.fda.gov/drugs/drug-safety-and-availability/fda-approves-new-changes-testosterone-labeling-regarding-risks-associated-abuse-and-dependence [https://perma.cc/3FDH-J2JV] (explaining that testosterone is an anabolic androgenic steroid and, as such, was placed on Schedule III of the CSA by the Anabolic Steroids Control Act of 1990).

130. *See supra* note 31 and accompanying text.

131. *See supra* note 52 and accompanying text.

132. *See supra* note 60 and accompanying text.

care as controlled substances subject to PDMP surveillance.[133] In addition, in July 2024, Genspect, an international organization that describes itself as "critical of the gender-affirmative approach" and opposed to medical interventions to treat gender dysphoria,[134] advocated for the use of existing PDMPs to monitor gender-affirming treatment hormones.[135] It is, therefore, critical that jurisdictions that purport to protect the right to reproductive and gender-affirming health care reform PDMP data collection and exchange to avoid assisting out-of-state enforcement of reproductive and gender-affirming health care surveillance and criminalization schemes.

A. Proposed Federal Reforms and Limitations

As discussed in the previous section, HHS recently issued a final rule that amends the HIPAA Privacy Rule to prohibit "covered entities" from disclosing PHI that is sought (presumably by law enforcement or other state officials) to identify or investigate individuals, health care providers, or others who seek, obtain, provide, or facilitate lawful reproductive health care.[136] The new rule certainly bolsters HIPAA's protection of reproductive health information. Unfortunately, it is insufficient to protect the reproductive health data collected by PDMPs from dissemination to in-state and out-of-state law enforcement personnel and other authorized PDMP users for several reasons.

First, the HIPAA Privacy Rule only regulates the use and disclosure of PHI by "covered entities" and their "business associates."[137] As the privacy rule makes clear, covered entities are limited to health care plans, health care clearinghouses, and health care providers who share electronic health information in connection with certain transactions,[138] whereas business associates include entities who provide limited support services to covered entities.[139] The rule permits those covered entities and business associates to share PHI among themselves for the purposes of treatment, payment, and

133. *See* Caitlin Yilek, *Louisiana Governor Signs Bill to Classify Abortion Pills as Controlled Substances into Law*, CBS NEWS (May 25, 2024, 8:18 AM), https://www.cbsnews.com/news/louisiana-abortion-pill-law/ [https://perma.cc/MND8-XYLZ] (reporting that the drugs were reclassified as Schedule IV drugs, "put[ting them] in the same category as opioids, depressants and other drugs that can be addictive"); *PDMP Policies and Capabilities*, *supra* note 31 ("Substances Monitored" tab, noting that Louisiana's PDMP surveils all Schedule II through V controlled substances).

134. *Our Position – FAQs*, GENSPECT, https://genspect.org/our-position-faqs/ [https://perma.cc/8KB9-KF5V] (last visited Oct. 12, 2024).

135. *See* CARRIE MENDOZA, GENSPECT, HORMONE PRESCRIPTION DRUG MONITORING PROGRAM (PDMP): USING THE EXISTING PDMP SYSTEM TO IMPROVE SAFETY 1–2 (2024), https://genspect.org/wp-content/uploads/2024/07/Hormone-Prescription-Drug-Monitoring-Policy.pdf [https://perma.cc/6ALM-EQ5K].

136. *See supra* notes 106–08, 115–16 and accompanying text.

137. 45 C.F.R. § 164.500(a), (c) (2024).

138. *Id.* § 160.103.

139. *See id.* (listing the various types of services that parties may provide to covered entities that make them business associates).

health care operations with few restrictions and without patient authorization.[140]

The privacy rule also authorizes covered entities to use and disclose PHI to numerous noncovered entities without patient notice or authorization under certain circumstances pursuant to twelve public policy exceptions.[141] Such exceptions include, among others, uses and disclosures of PHI (1) "required by law,"[142] (2) "for public health activities,"[143] (3) "for health oversight activities,"[144] (4) "for judicial and administrative proceedings,"[145] and (5) "for law enforcement purposes."[146] States frequently invoke these broad public policy exceptions as the lawful basis for their statutory mandates that require covered entities to submit PHI to PDMPs without patient notice or authorization.[147] The VA has likewise invoked the HIPAA exception "for public health matters" to justify its rule that permits VA prescribers to report veteran patient PHI to state PDMPs.[148]

Even ignoring these exceptions, state PDMP agencies are not covered entities, and, therefore, are not subject to *any* HIPAA Privacy Rule regulation.[149] As the HHS National Committee on Vital and Health Statistics has acknowledged, PDMP "databases collectively contain large amounts [of] personally identifiable health information not regulated by HIPAA because no covered entity maintains the data."[150] This means that, once a covered entity, such as a pharmacy, uploads prescribing and dispensing data to a state PDMP database, that sensitive health care information is no longer protected by HIPAA. Instead, the use and dissemination of that data is regulated exclusively by state law.[151] Moreover, and as emphasized previously, all states permit federal and state law enforcement to access PDMP data[152] and

140. *See id.* § 164.506. Covered entities are only required to obtain patient authorization to use or disclose psychotherapy notes and to use or disclose PHI for marketing and sale purposes. *Id.* § 164.508(a)(2)–(4).

141. *See id.* § 164.512 (outlining uses and disclosures of PHI for which patient authorization is not required).

142. *Id.* § 164.512(a).

143. *Id.* § 164.512(b).

144. *Id.* § 164.512(d).

145. *Id.* § 164.512(e).

146. *Id.* § 164.512(f).

147. *See* AMANDA K. SARATA, CONG. RSCH. SERV., IF11042, PRIVATE HEALTH INFORMATION AND PRESCRIPTION DRUG MONITORING PROGRAMS (PDMPS) 1–2 (2021), https://crsreports.congress.gov/product/pdf/IF/IF11042 [https://perma.cc/KS7M-WHCH].

148. Disclosures To Participate in State Prescription Drug Monitoring Programs, 78 Fed. Reg. 9589, 9590 (Feb. 11, 2013) (codified at 38 C.F.R. §§ 1.483, 1.515) (citing to 45 C.F.R. § 164.512(b) as authority to disclose veteran PHI to state PDMPs).

149. *See* SARATA, *supra* note 147, at 2.

150. NAT'L COMM. ON VITAL & HEALTH STATS., HEALTH INFORMATION PRIVACY BEYOND HIPAA: A 2018 ENVIRONMENTAL SCAN OF MAJOR TRENDS AND CHALLENGES 26 (2017), https://www.ncvhs.hhs.gov/wp-content/uploads/2018/02/NCVHS-Beyond-HIPAA_Report-Final-02-08-18.pdf [https://perma.cc/S43W-26X2].

151. *See* SARATA, *supra* note 147, at 2.

152. *See supra* note 52 and accompanying text.

many send unsolicited "suspicious" behavior reports to law enforcement personnel.[153]

The new HIPAA Privacy Rule also may fail to constrain covered entities from reporting reproductive health information to PDMPs. As detailed above, the new rule prohibits covered entities from disclosing reproductive health information *that is sought to identify or investigate* individuals, health care providers, or others who seek, obtain, provide, or facilitate lawful reproductive health care.[154] PDMPs certainly collect prescribing data to facilitate criminal and regulatory investigations,[155] but both the federal government and state agencies have gone to extraordinary lengths to argue that PDMPs serve many other laudable purposes.

The federal Substance Abuse and Mental Health Services Administration (SAMHSA), for example, has characterized PDMPs as clinical diagnostic support tools that "prescribers and pharmacists can use to improve the care and safety of individual patients."[156] According to the federal Office of National Drug Control Policy, "PDMPs serve multiple functions," including acting as a "patient care tool; drug epidemic early warning system; and drug diversion and insurance fraud investigative tool."[157] The BJA has similarly explained that

> [e]very PDMP has the same overarching goals: ensure access to controlled substance medications for legitimate medical purposes, support education efforts on appropriate prescribing and dispensing of these medications, support public health initiatives, use of the PDMP data to inform early intervention and substance use disorder efforts, and support investigations of controlled substance diversion and violations of the medical and pharmacy practice statutes.[158]

State PDMP statutes and websites also characterize PDMPs as multipurpose tools that, among other things, promote public health and improved patient care.[159] It seems plausible, therefore, that either the federal

153. *See supra* note 58 and accompanying text.

154. *See supra* notes 106–08, 115–16 and accompanying text.

155. *See supra* notes 66–67 and accompanying text.

156. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 26, at 1.

157. OFF. NAT'L DRUG CONTROL POL'Y, PRESCRIPTION DRUG MONITORING PROGRAMS 1 (2011), https://www.ojp.gov/pdffiles1/ondcp/pdmp.pdf [https://perma.cc/5WNK-PXZV].

158. *Prescription Drug Monitoring Programs Overview*, BUR. OF JUST. ASSISTANCE, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM (Nov. 9, 2022), https://www.cossup.org/Content/Documents/Podcasts/Podcast_Transcript_PDMPs_Overview.pdf?f=true&f=true [https://perma.cc/5QJL-B3MC] (transcript available online).

159. *See, e.g.*, *Prescription Monitoring Program (PMP)*, WASH. STATE DEP'T OF HEALTH, https://doh.wa.gov/public-health-provider-resources/healthcare-professions-and-facilities/prescription-monitoring-program-pmp [https://perma.cc/QUR5-VLSH] (last visited Oct. 12, 2024) (explaining that the PDMP "was created to improve patient care and to stop prescription drug misuse by collecting dispensing records for Schedule II, III, IV and V drugs, and by making the information available to medical providers and pharmacists as a patient care tool"); *NC Controlled Substances Reporting System*, N.C. DEP'T OF HEALTH & HUMAN SERVS., https://www.ncdhhs.gov/divisions/mental-health-developmental-disabilities-and-substance-use-services/north-carolina-drug-control-unit/nc-controlled-substances-reporting-system [https://perma.cc/P5LT-2FSZ] (last visited Oct. 12, 2024) (providing that the PDMP "is used

government or certain states (or both) might take the position that, because the articulated purposes of PDMP data collection go well beyond identifying and investigating individuals seeking lawful reproductive health care, covered entity reports to PDMPs are not subject to the HIPAA Privacy Rule. They also might point out that PDMP investigatory functions are aimed at identifying and investigating drug misuse and diversion and not the provision of reproductive health care. At a minimum, a covered entity is likely to argue that the PDMP prescribing information of pregnant patients that pertains to nonreproductive health care treatment falls outside the new rule. The counterargument here, of course, is that *all* treatment during pregnancy aimed at improving maternal health is "reproductive health care" because maternal health and fetal well-being are inextricably intertwined.[160]

The best way to mitigate these concerns would be for the federal government to amend the new HIPAA Privacy Rule. That new rule should eliminate (or considerably narrow) the public policy exceptions that permit covered entities to easily disseminate PHI,[161] which often reveals criminalized, surveilled, and stigmatized patient health care conditions ranging from substance use disorder (SUD), medication abortion, and gender affirming care to PDMP agencies, law enforcement, and other federal and state officials.[162] Several congressional Democrats presented a similar proposal to the Biden administration before the new HIPAA rule was finalized, but that proposal was rejected.[163]

With that history in mind, it is imperative that the federal government repeal the rules that permit VA and IHS providers to report federal PHI to state PDMPs.[164] If the federal government is serious about protecting reproductive health privacy, it also should immediately reconsider its aggressive advocacy for—and funding to support—interstate data sharing.[165] Such cross-border collaboration between jurisdictions with wildly varying laws regarding abortion, gender-affirming care, and SUD, among other conditions, is a threat to patients who seek access to safe, evidence-based health care for those conditions.

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as a clinical tool to improve patient care and safety while avoiding potential drug interactions and identifying individuals that may be in need of referral to substance use disorder services").

160. The new HIPAA Privacy Rule strongly supports such an interpretation. HHS clarified in the final rule that "reproductive health care" is "to be interpreted broadly and [is] inclusive of all types of health care related to an individual's reproductive system," and that "this additional language clarifies that the definition encompasses the full range of health care related to an individual's reproductive health." HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33005 (Apr. 26, 2024) (codified at 45 C.F.R. pts. 160, 164). HHS further explained that "reproductive health care" includes "the provision of medications and devices, whether prescription or over-the-counter." *Id.*

161. *See supra* notes 141–46 and accompanying text.

162. *See supra* notes 38, 147 and accompanying text.

163. *See supra* notes 110, 115–16 and accompanying text.

164. *See supra* notes 64–65 and accompanying text.

165. *See supra* note 59 and accompanying text.

B. Proposed State Reforms

Given that the enactment of robust health data privacy protections at the federal level is the preferred but least likely immediate course of action, there are several things that states that wish to protect the right to reproductive and gender-affirming health care ("health care sanctuary states") can do to better safeguard sensitive PHI from PDMP collection and dissemination. Such states should also be wary of collecting and sharing sensitive prescribing information with federal law enforcement and other officials because the federal government's position on the legality of treating various stigmatized health care conditions is subject to change every two to four years.

First, states should refuse to subject *all prescription drugs* to PDMP surveillance. Such broad data collection would necessarily include prescription drugs that treat health conditions that are criminalized in certain states, including drugs prescribed to provide abortion and gender-affirming health care. States should also consider exempting Schedule III testosterone data from PDMP collection and interstate exchange due to the key role that the drug plays in gender-affirming health care.[166]

Second, health care sanctuary states should eliminate the ability of state administrative officials to easily subject any drug to state PDMP surveillance by simply adding it to the state's "drug of concern" category (potentially without meaningful scientific justification).[167] Given the implications of such surveillance, health care sanctuary states should either (1) eliminate the "drugs of concern" category from PDMP data collection, (2) reserve the power to add substances to the "drugs of concern" category to the legislature, or (3) place demanding and evidence-based prerequisites on the ability of a PDMP administrative agency to subject a noncontrolled drug to PDMP surveillance.

Third, and in addition to eliminating the collection of sensitive prescription PHI, health care sanctuary states should stop sharing PDMP information with states that criminalize health care. As noted above, the sharing of prescription drug data about a patient in today's world can identify the patient's stigmatizing health care condition.[168] PDMP prescribing data also identifies the patient's prescriber and, therefore, their practice specialty.[169] As such, PDMP prescriber identifiers often suggest that the patient is being treated for a specific, stigmatized health care condition. North Carolina, for example, should refuse to share PDMP prescribing data collected from in-state practitioners who, in addition to other services, provide abortion health care services or gender-affirming care to out-of-state residents, with states like Florida.[170]

Fourth and finally, health care sanctuary states should enact prescription drug monitoring legal reforms that are responsive to the heightened

166. *See supra* notes 128–29 and accompanying text.
167. *See supra* note 42 and accompanying text.
168. *See supra* note 38 and accompanying text.
169. *See supra* note 46 and accompanying text.
170. *See supra* note 91 and accompanying text.

surveillance and policing of pregnant people post-*Dobbs*. Imagine that a pregnant resident of an abortion criminalization state is vacationing in a sanctuary state and, while so doing, seeks health care treatment from an in-state provider that involves the prescription of a PDMP-monitored drug. Further, imagine that the pregnant person returns home, suffers a miscarriage, and is charged with fetal harm, fetal endangerment, or even feticide based on the patient's PDMP record obtained by the abortion criminalization state through data exchange with the sanctuary state. Such a potential outcome should motivate sanctuary states to reconsider the collection of pregnant people's prescribing information. As mentioned above, any health care treatment sought and obtained during pregnancy ought to be viewed as highly sensitive reproductive health care due to the considerable impact that maternal health has on fetal well-being. In this connection, New Jersey state legislators recently introduced a bill that protects reproductive health care prescription data from state PDMP collection.[171]

CONCLUSION

The federal government propped up state implementation and enhancement of PDMPs to ensure the heightened surveillance of drugs associated with a stigmatized and often criminalized health care condition: substance use disorder. As is virtually always the case with sophisticated law enforcement surveillance tools, PDMPs have continuously expanded and enhanced their drug monitoring capabilities and missions. They increasingly monitor noncontrolled substances that have little-to-no risk of misuse and now have the capacity to surveil all prescribed drugs, including medications prescribed to pregnant people, medication abortion drugs, and substances used to provide gender-affirming care. Consequently, PDMPs pose potent threats to patients who seek health care for various stigmatized conditions in post-*Dobbs* America. It is therefore critical that reproductive and gender affirming health care-protective jurisdictions reform their PDMP data collection, dissemination, and exchange practices to protect their most vulnerable patients.

171. *See* Assemb. B. 4314, 221st Leg., 2024–25 Reg. Sess. § 3 (N.J. 2024). This bill was introduced in response to the author's presentation of this Essay at the Symposium entitled *Drug Law for the 21st Century: Learning from 50 Years of DEA-Led Public Health Policy* hosted at Fordham Law School on February 16, 2024, and co-organized by the *Fordham Law Review* and the Project on Psychedelics Law and Regulation (POPLAR) at the Petrie-Flom Center at Harvard Law School. Email from William Lim, Deputy Couns., Office of Legis. Servs., N.J. State Legis. to author (June 27, 2024, 10:20 AM) (on file with author).