Americans United for Life

Understanding the Mail-order Abortion Rules Within the Federal "Comstock Act"

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Introduction

Since the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[1] there has been renewed attention on pro-life laws and legislation. In *Dobbs*, the Court held there is no federal constitutional right to abortion and returned the abortion issue to the democratic process.[2] Since then, many state-level ballot initiatives and legislative acts have grappled with the abortion issue. Older state abortion laws, which remained unenforceable under *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] have sprung back into effect with the Supreme Court's *Dobbs* decision. Federal laws have come under new scrutiny. Even before *Dobbs*, Congress used its constitutional powers to protect human life from abortion violence.[5] For instance, Congress protected conscience rights,[6] restricted the public funding for abortion,[7] safeguarded infants born alive after a botched abortion,[8] and proscribed gruesome partial-birth abortions.[9] Congress also prohibited mailing or shipping abortifacient matter, which is the focus of this report.[10]

Two statutes—18 U.S.C. §§ 1461–1462—restrict mailing or shipping abortifacient matter. 18 U.S.C. § 1461 traces back to Section 2 of the Comstock Act of 1873.[11] Section 1461 contains a mail-order abortion rule that restricts mailing abortifacient matter through the United States Postal Service ("USPS"). 18 U.S.C. § 1462 comes from a separate law that Congress enacted in 1897.[12] It contains a mail-order abortion rule that prohibits the shipment of abortifacient matter through express companies, common carriers, or interactive computer services. Although 18 U.S.C. §§ 1461–62 originated in nineteenth century statutes, Congress regularly has amended and reaffirmed the laws throughout their statutory history. Congress also has bolstered the laws through 18 U.S.C. § 552, which requires federal officers to comply with the prohibition on mailing abortifacients.

The mail-order abortion rules have captured public and media attention, but confusion remains about what the rules say and how they apply in practice. Two Supreme Court Justices mentioned the rules during oral argument in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, which brought attention to the

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[1] 142 S. Ct. 2228 (2022).
[2] *Id.* at 2242–43.
[3] 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.
[4] 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
[5] Carolyn McDonnell, *Federal Policymakers' Guide to a Post*-Roe America, AMS. UNITED FOR LIFE 4–7 (Nov. 14, 2022), https://aul.org/wp-content/uploads/2022/11/Federal-Policymakers-Guide-to-a-Post-Roe-America.pdf (discussing Congress' powers to limit abortion).
[6] *E.g.*, 42 U.S.C. §§ 238n, 300a-7.
[7] *E.g.*, Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. H, tit. V, §§ 506–507(c), 136 Stat. 4459, 4908 (2022).
[8] 1 U.S.C. § 8.
[9] 18 U.S.C. § 1531.
[10] 18 U.S.C. §§ 1461–1462.
[11] Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599.
[12] Act of Feb. 8, 1897, ch. 172, 29 Stat. 512, 512.

rules.[13] Intervenor-plaintiffs—Missouri, Idaho, and Kansas—in the district court in *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration* have challenged the FDA's approval of mifepristone under these rules, since the FDA allows mifepristone prescriptions by mail even though the rules explicitly forbid this.[14] Members of Congress have filed companion bills in the Senate and House that would repeal the mail-order abortion rules.[15]

This report provides an overview and statutory history of the mail-order abortion rules contained within 18 U.S.C. §§ 1461–1462.[16] It also addresses some misconceptions about these laws. As such, the report does not cover 18 U.S.C. §§ 1461–1462's historical application to contraceptives, which implicates different caselaw[17] and bioethical considerations.[18] Likewise, the report does not analyze the mailing of literature or advertisements, which involves an analysis of the First Amendment.[19] Rather, the report focuses on the (1) Comstock Act of 1873; (2) history and current text of the mail-order abortion rule in 18 U.S.C. § 1461; (3) history and current text of the mail-order abortion rule in 18 U.S.C. § 1462; (4) 18 U.S.C. § 552's federal officers provision; (5) health and safety benefits of the mail-order abortion rules; (6) Office of Legal Counsel's opinion interpreting 18 U.S.C. § 1461; and (7) pervasive myths surrounding these rules.

Act of March 3, 1873

President Ulysses S. Grant signed into law the Act of March 3, 1873, which is now popularly known as the Comstock Act. Congress later amended and codified this

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[13] Justices Thomas and Alito posed questions on these rules during oral argument in *Food and Drug Administration v. Alliance for Hippocratic Medicine*. Transcript of Oral Argument at 26–27, 48–49, 90, 602 U.S. 367 (2024) (No. 23-235). The Supreme Court ultimately decided the case solely on the standing issue and did not address 18 U.S.C. §§ 1461–1462 further. *Food & Drug Admin.*, 602 U.S. 367.

[14] Their argument has two parts. First, "the FDA has failed to restrict the upstream distribution of chemical abortion drugs from manufacturer or importer to abortionists in violation of these federal laws." Intervenors' Complaint at 100, No. 2:22-cv-223-Z (N.D. Tex. Jan. 12, 2024). Second, certain FDA actions "impermissibly removed the in-person dispensing requirement for chemical abortion drugs and, accordingly, authorized the downstream distribution of chemical abortion drugs by mail, express company, and other common carriers." *Id.*

[15] Stop Comstock Act, S. 4619, 118th Cong. (2024); Stop Comstock Act, H.R. 8796, 118th Cong. (2024).

[16] As such, this report does not touch upon the abortifacient-importation restrictions within 19 U.S.C. § 1305.

[17] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022); *see* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[18] As Professor Joseph W. Dellapenna writes:

> Abortion has, and always has had, a different moral and legal quality compared to contraception or others forms of reproductive and sexual privacy, for abortion involves the killing of an embryo or a fetus regardless of how one morally evaluates the status of that being. The drawing of this distinction continues down to today, and continued throughout the time that both abortion and contraception were becoming technologically feasible.

DISPELLING THE MYTHS OF ABORTION HISTORY 377 (rev. ed. 2023); *see also Dobbs*, 142 S. Ct. at 2277.

[19] *See* Miller v. California, 413 U.S. 15, 24–25 (1973) (establishing a three-part obscenity test to determine if the material is unprotected by the First Amendment); *see also* Hamling v. United States, 418 U.S. 87, 102 (1974) (applying the *Miller* test to 18 U.S.C. § 1461).

law in part as 18 U.S.C. § 1461. The law prohibited the sale of "any drug or medicine, or any article whatever . . . for causing unlawful abortion" within the District of Columbia and U.S. territories.[20] The Act of March 3, 1873 directed:

> That no . . . article or thing designed or intended for the . . . procuring of abortion . . . shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, . . . shall take, or cause to be taken, from the mail any such . . . package, shall be deemed guilty of a misdemeanor . . . .[21]

The law further prohibited the importation of abortifacients, except when the drugs are "imported in bulk, and not put up for any of the purposes before mentioned [*i.e.*, abortion]."[22]

There are two important points of historical context. First, abortion historically was dangerous and often lethal for the mother. In *A Law Dictionary* (15th ed. 1883), John Bouvier described in the "abortion" entry:

> The criminal means of producing abortion are of two kinds. *General*, or those which seek to produce the expulsion through the constitution of the mother [such as by ingesting drugs like mercury] . . . ; or *local or mechanical* means [such as through injury to the mother or surgery] . . . . The latter is the more generally resorted to, as being the most effectual. *These local or mechanical means not unfrequently produce the death of the mother, as well as that of the foetus*."[23]

During this period, of the then-thirty-seven states, at least fourteen states explicitly extended their abortion law (or soon did so when they codified the crime of abortion) to the death of the mother (not just the unborn child).[24] For example, New York's 1829 abortion statute for second-degree manslaughter included the element that either the unborn child or mother died.[25] Of course, a prosecutor could always bring a case for the death of the mother under general homicide laws. However, the fact that over a third of the states had a criminal statute for abortion-produced maternal deaths showed that abortion posed grave risks to mothers during this era.

Abortion occurred through dangerous injury, ingestion, or insertion techniques.[26] Consequently, at least through the mid-nineteenth century, women often turned to

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[20] Act of Mar. 3, 1873, ch. 258, § 1, 17 Stat. 598, 598–99. In 1948, Congress repealed, but did not reenact this provision into positive law. Act of June 25, 1948, Pub. L. No. 80–772, 62 Stat. 683, 864.
[21] Act of Mar. 3, 1873, § 2, 17 Stat. at 599.
[22] *Id.* § 3.
[23] *Abortion*, vol. I, at 75 (last emphasis added).
[24] These states were New York, Ohio, Massachusetts, Michigan, Alabama, New Jersey, Wisconsin, Pennsylvania, Oregon, Florida, Minnesota, South Carolina, Kentucky, and Mississippi. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–97 (2022).
[25] *Id.* at 2285 (citing 1829 N.Y. LAWS p. 19).
[26] DELLAPENNA, *supra* note 18, at 29–56 (detailing types of abortion techniques).

infanticide as a safer option than abortion.[27] Professor Dellapenna describes that "[s]omeone who was utterly determined to be rid of an unwanted child but was unwilling or unable to risk a near suicidal abortion could only 'terminate' the child after it was born, rather than 'terminate' the pregnancy before birth."[28] As medicine improved, abortion became "safer" as compared to the near-lethal risks of previous abortion methods. Professor Dellapenna writes:

> "[w]e cannot say precisely when combining improved techniques for doing abortions with analgesics, anesthetics, antibiotics, and antiseptics, made abortion early in pregnancy possibly safer than carrying a child to term. All we can say for certain is that the transition to relative safety for early abortions occurred sometime between the discovery of antiseptics in 1867 and the relegalization of abortion in the USSR in 1955.[29]

Thus, abortion posed lethal risks to women at the time Congress enacted the Comstock Act, and the criminalization of mailing abortifacient matter had a secondary purpose of protecting maternal health and safety (with the primary purpose being to protect unborn children).

Second, Congress passed the Act of March 3, 1873 amidst a legal history and tradition in the United States that protected human life—mothers and unborn children—from abortion. "The common law, in its early centuries, treated abortion as a crime primarily because it involved the killing of an unborn child—an approach that continued with elaboration, but without interruption, until *Roe* changed it."[30] "[N]ineteenth-century American courts were unanimous that post-quickening abortion was a crime, [although] those courts split over whether pre-quickening abortion was a common-law crime."[31] Even the split over quickening "so late in the development of the common law itself suggests that abortion had not been a common practice much before the codification process began," especially because of the danger of early abortion techniques.[32]

During the nineteenth century, states codified their common laws that criminalized abortion. Professor Dellapenna writes, "[t]he inclusion of the abortion prohibitions in the nineteenth-century codifications suggests . . . a lack of controversy when the common law of abortion was clarified and carried forward as part of the general law of crimes with only those changes necessitated by changing medical

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[27] *See generally id.* at 89–124.
[28] *Id.* at 89.
[29] *Id.* at 457.
[30] *Id.* at 135.
[31] *Id.* at 422. Quickening refers to when a pregnant woman begins to feel her unborn child's movements in the uterus. *Quickening*, MERRIAM-WEBSTER'S MEDICAL DICTIONARY 656 (2016). Quickening had emerged in common law as an evidentiary standard "because medicine at the time did not have the technology or 'tools' to *reliably* determine that the unborn child was alive before the mother first felt fetal movement." CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 106 (2013) (emphasis in original).
[32] DELLAPENNA, *supra* note 18, at 422.

technologies."[33] As the Supreme Court described in *Dobbs v. Jackson Women's Health Organization*:

> American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment [in 1868], three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.[34]

Even in 1873, when Congress passed the Comstock Act, all but six of then-existing states had statutes criminalizing abortion.[35] The remaining six states considered abortion a common-law crime (at least after quickening),[36] and five of these states codified their abortion laws within ten years after Congress passed the Comstock Act,[37] while the remaining state codified its law in 1910.[38] Accordingly, "[Anthony] Comstock's activities [to pass the Comstock Act in 1873] did not begin until the legislative battles over abortion were largely concluded" and emerged amidst a legal history and tradition of abortion criminalization.[39]

Current Text and History of the Mail-order Abortion Rule in 18 U.S.C. § 1461

The mail-order abortion rule bars the abortion industry from using the United States Postal Service (USPS) to mail abortion-inducing drugs. The current statute provides:

> Every article or thing designed, adapted, or intended for producing abortion . . . ; and Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion . . . Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 [regarding nonmailable matter] to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be [subject to criminal penalties].[40]

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[33] *Id*. at 302.
[34] 142 S. Ct. 2228, 2248–49 (2022).
[35] *Id*. at 2285–97; DELLAPENNA, *supra* note 18, at 317.
[36] *E.g.*, State v. Slagle, 83 N.C. 630 (1880); Mitchell v. Commonwealth, 78 Ky. 204 (1879).
[37] DELLAPENNA, *supra* note 18, at 317; *Dobbs*, 142 S. Ct. at 2295–96.
[38] DELLAPENNA, *supra* note 18, at 317–18; *Dobbs*, 142 S. Ct. at 2296.
[39] DELLAPENNA, *supra* note 18, at 359 n.349.
[40] 18 U.S.C. § 1461.

A violation of 18 U.S.C. § 1461 carries a fine and/or imprisonment up to five years for the first offense, and a fine and/or imprisonment up to ten years for subsequent offenses.[41]

Congress passed 18 U.S.C. § 1461 pursuant to its Postal Clause power. Under the Postal Clause, "Congress shall have Power . . . To establish Post Offices and Post Roads."[42] "Use of the United States mails, whether to mail a letter across the street or across the nation, historically has been recognized by Congress as use of an exclusively federal instrumentality."[43] The Postal Clause power is broad and has permitted Congress to "establish the United States Postal Service as a monopoly by prohibiting others from carrying letters over postal routes."[44]

The Supreme Court has determined that 18 U.S.C. § 1461 is constitutional in the context of obscenity. In *Roth v. United States*, the Court "h[e]ld that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7 [the Postal Clause]."[45] Likewise, in a post-*Miller*[46] case, the Court reaffirmed "that 18 U.S.C. § 1461, 'applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.'"[47]

18 U.S.C. § 1461 originated in the Act of March 3, 1873, now known as the Comstock Act. Since then, Congress has amended the law ten times, overall increasing the scope of the mail-order abortion rule.[48] This includes the 1909 codification of U.S. penal laws, and the 1948 repeal and recodification of the criminal code, including the mail-order abortion rule at 18 U.S.C. § 1461. Congress last amended and affirmed the mail-order abortion rule in 1994. A full statutory history of 18 U.S.C. § 1461 with excerpted legislative and historical notes appears in Appendix A of this report.

Current Text and History of the Mail-order Abortion Rule in 18 U.S.C. § 1462

The second statute, 18 U.S.C. § 1462, prohibits the abortion industry from shipping abortion-inducing drugs through a common carrier or interactive computer service. The statute provides criminal penalties for:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service . . . for carriage in

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[41] *Id.*
[42] U.S. CONST. art I, § 8, cl. 7.
[43] United States v. Riccardelli, 794 F.2d 829, 831 (2d Cir. 1986).
[44] Regents of Univ. of Cal. v. Pub. Emp. Rel. Bd., 485 U.S. 589, 593 (1988) (citing Private Express Statutes, 18 U.S.C. §§ 1693–99, 39 U.S.C. §§ 601–06).
[45] 354 U.S. 476, 493 (1957).
[46] Miller v. California, 413 U.S. 15 (1973).
[47] Hamling v. United States, 418 U.S. 87, 99 (1974) (citing *Roth*, 354 U.S. at 492) (alteration in original).
[48] *See infra* Appendix A.

> interstate or foreign commerce . . . any drug, medicine, article, or thing designed, adapted, or intended for producing abortion . . . ; or Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service . . . any matter or thing the carriage or importation of which is herein made unlawful.[49]

Like its companion statute, the first offense carries a fine and/or imprisonment up to five years, and subsequent offenses carry a fine and/or imprisonment up to ten years.[50]

Congress passed 18 U.S.C. § 1462 pursuant to its Commerce Clause power. Under the Commerce Clause, Congress may regulate (1) interstate commerce channels, (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities having a substantial relation to interstate commerce."[51] "[T]he first two categories are self-evident, since they are the ingredients of interstate commerce itself."[52] Here, Congress draws its power from the second category by regulating instrumentalities, *i.e.*, "express company or other common carrier or interactive computer services," as well as restricting things, *i.e.*, abortifacients, in interstate commerce.

The Supreme Court upheld the constitutionality of 18 U.S.C. § 1462 in the context of obscenity. In *United States v. Orito*, the Court held:

> Given (a) that obscene material is not protected under the First Amendment, (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce, and (c) that no constitutionally protected privacy is involved, we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter.[53]

Likewise, "Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause."[54]

The statute comes from an 1897 law that Congress passed to restrict certain items transported by express companies or common carriers. Since then, Congress has

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[49] 18 U.S.C. § 1462.
[50] *Id.*
[51] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).
[52] Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (citing Gibbons v. Ogden, 9 Wheat. 1, 189–90 (1824)).
[53] 413 U.S. 139, 143 (1973) (citations omitted).
[54] *Id.* at 143–44.

amended the law nine times.[55] This includes the 1909 codification of the criminal code, and the 1948 repeal and recodification of the criminal code, in which Congress placed the common carrier law at 18 U.S.C. § 1462. Congress last amended and affirmed the mail-order abortion rule in 18 U.S.C. § 1462 in 1996, expanding the rule to apply to interactive computer services. Appendix B contains a full statutory history of 18 U.S.C. § 1462 with excerpted legislative and historical notes.

18 U.S.C. § 552's Federal Officers Provision

Congress has bolstered the mail-order abortion rules by directing federal officers to adhere to the prohibition on mailing abortifacients. 18 U.S.C. § 552 provides criminal penalties for "[w]hoever, being an officer, agent, or employee of the United States, knowingly aids or abets any person engaged in any violation of any of the provisions of law prohibiting importing . . . or sending or receiving by mail . . . means for procuring abortion." The statute carries a sentence of a fine and/or imprisonment up to ten years.[56] The law traces back to the Comstock Act of 1873,[57] but Congress last amended and affirmed this law in 1994.[58]

Health and Safety Benefits of the Mail-order Abortion Rules

The mail-order abortion rules bolster the public policy of safeguarding the health and safety of women and adolescents seeking chemical abortion drugs. In-person visits are necessary for chemical abortions as a matter of basic patient health and safety.

Before a chemical abortion, healthcare providers must confirm a woman is, in their determination, a medically appropriate candidate for chemical abortion. In most states, this consultation is with a physician. In a few states, it can be done by a midlevel provider, such as a nurse practitioner, certified nurse-midwife, or physician assistant.[59] A number of medical conditions make a woman ineligible to take chemical abortion drugs, including having a potentially dangerous ectopic pregnancy (a pregnancy outside of the uterus) or having an intrauterine device (IUD) in place.[60] Chemical abortion cannot terminate an ectopic pregnancy and carries heightened risk to the woman's health later into pregnancy.[61] The FDA label warns medical professionals to "[e]xclude [an ectopic pregnancy] before treatment."[62] Yet, a physician can only diagnose an

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[55] *See infra* Appendix B.
[56] 18 U.S.C. § 552.
[57] Act of Mar. 3, 1873, ch. 258, § 4, 17 Stat. 598, 599.
[58] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, tit. XXXIII, § 330,016(1)(K), 108 Stat. 1796, 2147.
[59] *E.g.*, CAL. BUS. & PROF. CODE § 2253(b) (2022).
[60] *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Sept. 1, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.
[61] *Mifeprex Prescribing Information*, U.S. FOOD & DRUG ADMIN. 1, 4, 17 (Jan. 2023), https://www.accessdata.fda.gov/drugsatfda_docs/label/2023/020687Orig1s025Lbl.pdf.
[62] *Id.* at 1.

ectopic pregnancy by blood tests and an ultrasound, which means a physician cannot determine via telemedicine whether a pregnancy is ectopic.[63]

Determining gestational age usually is done in person by ultrasound. Ultrasound "is the most accurate method to establish or confirm gestational age" in the first trimester.[64] Dating a pregnancy by using a woman's last menstrual period (LMP) is far less accurate. The American College of Obstetricians and Gynecologists (ACOG) indicates only "one half of women accurately recall their LMP."[65] In one study, forty percent of women had more than a five-day discrepancy between their LMP dating and the ultrasound dating.[66] In this regard, LMP dating is not nearly as precise as an ultrasound. The FDA label indicates "pregnancy is dated from the first day of the last menstrual period," but medical professionals should "[a]ssess the pregnancy by ultrasonographic scan if the duration of pregnancy is uncertain or if ectopic pregnancy is suspected."[67] As the American Association of Pro-life Obstetricians and Gynecologists notes, "[a]ccurate confirmation of gestational age reduces the potential for taking medication abortion pills outside of [the] recommended window or giving the patient falsely elevated chances of a successful abortion with this technique."[68] These aspects are an important part of informed consent, "and it would be impossible to tailor counseling about medication abortion to each patient if gestational ages are not confirmed." [69] Accordingly, an accurate measurement of gestational age is required to show that a woman is even a candidate for a chemical abortion.

Without an in-person evaluation, abortion providers also cannot test for Rh negative blood type. During pregnancy, if a woman has Rh negative blood while her fetus is Rh positive, the woman's body may produce antibodies after exposure to fetal red blood cells.[70] Abortion can cause maternal exposure to fetal blood, even in the first trimester.[71] Therefore, if indicated, a healthcare provider must give a woman with Rh negative blood an Rh immuneglobulin injection. Without the injection, antibodies can damage future pregnancies by creating life-threatening anemia in fetal red blood cells.[72] ACOG describes that "Rh testing is recommended in patients with unknown Rh status before medication abortion, and Rh D immunoglobulin should be administered

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[63] *Ectopic Pregnancy*, MAYO CLINIC (Mar. 12, 2022), https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/diagnosis-treatment/drc-20372093.
[64] COMM. ON OBSTETRIC PRAC., AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS ET AL., METHODS FOR ESTIMATING THE DUE DATE, COMM. OP. NO. 700, at 1 (reaffirmed 2022).
[65] *Id*. at 2.
[66] *Id*.
[67] *Mifeprex Prescribing Information*, *supra* note 61, at 2.
[68] RSCH. COMM., AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, DANGERS OF RELAXED RESTRICTIONS ON MIFEPRISTONE, COMM. OP. NO. 9, at 7 (July 2022), https://aaplog.org/wp-content/uploads/2022/07/CO-9-Mifepristone-restrictions-update-Jul-22.pdf.
[69] *Id*.
[70] *Rh Factor Blood Test*, MAYO CLINIC (July 29, 2022), https://www.mayoclinic.org/tests-procedures/rh-factor/about/pac-20394960.
[71] *Id*.
[72] *Id*.

if indicated."[73] Rh negative blood typing is thus a medically necessary test, but it cannot occur during chemical abortion consultations that are done entirely via telemedicine.

A woman seeking an abortion may be facing intimate partner violence (IPV). There are "[h]igh rates of physical, sexual, and emotional IPV . . . among women seeking a[n abortion]."[74] One study found that for women seeking abortion, the prevalence of IPV is nearly three times greater than for women continuing a pregnancy.[75] Post-abortive IPV victims also have a "significant association" with "psychosocial problems including depression . . . , suicidal ideation . . . , stress . . . , and disturbing thoughts."[76]

Medical professionals must perform IPV screening periodically and "at various times . . . because some women do not disclose abuse the first time they are asked."[77] They must "[s]creen for IPV in a private and safe setting with the woman alone and not with her partner, friends, family, or caregiver."[78] Yet, telemedicine cannot ensure that a coercive partner, friend, family member, or caregiver is not in the room with a woman seeking a chemical abortion. In other words, domestic violence screening by telehealth may not allow individuals the privacy they need to disclose abuse.[79] Likewise, "mifepristone must be dispensed directly to the woman seeking an abortion," which "prevents use in reproductive coercion" over the woman's pregnancy choices.[80] Thus, telehealth ineffectively screens a woman seeking chemical abortions for domestic violence or coercion. If she changes her mind, no medical professional is there to help her. She is left alone to care for her physiological and psychological health, as well as her safety if complications or IPV arise. Consequently, by restricting the distribution of chemical abortion drugs through the mail or common carriers, the federal mail-order abortion rules are bolstering the public policy of safeguarding the health and safety of women and adolescents seeking these drugs.

Office of Legal Counsel Opinion's Statutory Interpretation

In December 2022, the Office of Legal Counsel (OLC) issued a memorandum "conclud[ing] that section 1461 does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol where the sender lacks the intent that the recipient of the drugs will use them unlawfully."[81] The U.S. Food and Drug Administration later adopted the OLC memorandum's reasoning in litigation over

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[73] Am. Coll. of Obstetricians & Gynecologists Comm. on Prac. Bulls.—Gynecology & the Soc'y of Fam. Plan., *Medication Abortion Up to 70 Days of Gestation*, 102 CONTRACEPTION 225, 226 (2020).
[74] Megan Hall et al., *Associations Between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis*, PLOS MED., Jan. 7, 2014, at 1, 15.
[75] COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, REPRODUCTIVE AND SEXUAL COERCION, COMM. OP. NO. 554, at 2 (reaffirmed 2022).
[76] Hall, *supra* note 74, at 11.
[77] COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, INTIMATE PARTNER VIOLENCE, COMM. OP. NO. 518, at 3 (reaffirmed 2022).
[78] *Id*.
[79] *See id*. ("Screening for IPV should be done privately.").
[80] RSCH. COMM., AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, DANGERS OF RELAXED RESTRICTIONS ON MIFEPRISTONE, *supra* note 68, at 10.
[81] Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion, 46 Op. O.L.C. ___, slip op. at 1–2 (2022).

chemical abortion drugs.[82] The OLC memorandum argued that (1) 18 U.S.C. § 1461 only applies to unlawful abortions;[83] (2) under the prior construction canon, Congress has adopted the view that 18 U.S.C. § 1461 only applies to unlawful abortions;[84] and (3) "USPS has accepted the settled judicial construction of the Comstock Act—and reported as much to Congress."[85] The OLC memo then lists "many circumstances in which a sender of these drugs typically will lack an intent that they be used unlawfully," which essentially nullified the law.[86] Although the OLC memorandum does not address 18 U.S.C. § 1462 specifically, it noted its analysis extends to that law as well.[87]

There are a few blatant problems with the OLC memorandum's reasoning. First, the statute does not use the phrase "unlawful", let alone "unlawful abortion." 18 U.S.C. § 1461 applies to "[e]very article or thing designed, adapted, or intended for producing abortion." Consequently, the OLC memorandum rewrites the plain language of the statute by inserting "unlawful" into the text.

Second, the OLC memorandum draws the phrase "unlawful" from caselaw but decontextualizes it from the legal history and tradition of abortion criminalization.[88] For example, the OLC memorandum cites the Second Circuit's opinion in *United States v. One Package*, which noted, "[t]he word 'unlawful' would make this clear as to articles for producing abortion, and the courts have read an exemption into the act covering such articles even where the word 'unlawful' is not used."[89] Yet when Congress recodified 18 U.S.C. §§ 1461–62 in 1948, states universally prohibited abortion. A "lawful purpose" referred to medical interventions to save the mother's life or other limited exceptions to abortion criminalization.[90] As Professor Dellapenna writes, historically, "nearly all statutes containing therapeutic exceptions generally applied them only to protect the life of the mother—nothing less would justify killing the child," and only six

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[82] Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 28–29, *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 668 F. Supp. 3d. 507 (N.D. Tex. 2023) (No. 2:22-cv-223-Z); Brief for Federal Appellants at 72–73, *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5th Cir. 2023) (No. 23-10362).
[83] Application of the Comstock Act, *supra* note 81, slip op. at 5–11.
[84] *Id.* at 11–15.
[85] *Id.* at 15–16.
[86] *Id.* at 17–21.
[87] *Id.* at 2 n.3.
[88] *See id.* at 5–11.
[89] *E.g.*, 86 F.2d 737, 739 (2d Cir. 1936); *accord* Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930) ("It would seem reasonable to give the word 'adapted' a more limited meaning . . . as requiring an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes."); United States v. Nicholas, 97 F.2d 510, 512 (2d Cir. 1938) ("We have twice decided that contraconceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed.").
[90] *E.g.*, State v. Moore, 25 Iowa 128, 131 (1868) (affirming a jury instruction that "[t]o attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act"); Gleitman v. Cosgrove, 227 A.2d 689, 694 (N.J. 1967) ("[t]he only justification so far held lawful by our courts is preservation of the mother's life"); *see also* DELLAPENNA, *supra* note 18, at 255 (discussing how "unlawful" under England's abortion law indicated abortions "performed by someone other than a physician, or, if by a physician, without a good faith belief that the abortion was necessary to preserve the mother's life or health.").

states plus the District of Columbia "authorized abortions to protect the mother's health or according to some lesser standard."[91] The OLC memorandum is ignoring this legal history and tradition. In context, and under the legal history and tradition of abortion, an "unlawful abortion" referred to universal state criminalization of abortion, which only had "legal justification" in narrow circumstances, such as medical procedures to save the mother's life.

Third, there is a federalism issue. Fundamentally, the OLC memorandum is arguing that the intent element under 18 U.S.C. § 1461 depends upon each state's criminal law. Or as the OLC memorandum put it, 18 U.S.C. § 1461 does not apply if "the sender lacks the intent that the recipient of the drugs will use them unlawfully." This reasoning permits a state to determine—under its state abortion code—whether a federal statute—*i.e.*, 18 U.S.C. § 1461—applies to certain mailed matter within its jurisdiction. Yet, under the Supremacy Clause, States do not have the power to nullify a federal law that Congress properly exercised under its Postal Clause authority.[92]

Other sources have rejected the OLC memo's reasoning. Instead of repeating their arguments, this report summarizes four of these sources. First, Judge James C. Ho's concurrence to the Fifth Circuit opinion in *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration* provides guidance.[93] Judge Ho determined "'us[ing] the mails for the mailing' of a 'drug . . . for producing abortion' is precisely what the Comstock Act prohibits."[94] The concurrence rejects the FDA's argument to limit the mail-order abortion rules. Judge Ho emphasizes that the 18 U.S.C. § 1462 applies to an "interactive computer service," so the FDA cannot argue these laws do not extend to a private carrier.[95] According to Judge Ho, "the FDA can't invoke the prior-construction canon" because there is no judicial consensus "that the Comstock Act prohibits sending abortifacients only when they are used in violation of state law."[96] Finally, "the post-enactment history of the Comstock Act . . . only reinforces the natural reading of the text" which prohibits the mailing of abortifacients.[97]

A second source is the district court opinion in *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*.[98] The Supreme Court overruled this opinion on standing grounds,[99] but the district court's opinion provides guidance on how to interpret 18 U.S.C. §§ 1461–1462. The district court held, "[h]ere, the plain text of the Comstock Act controls. . . . It is indisputable that chemical abortion drugs are both 'drug[s]' and are 'for producing abortion.' Therefore, federal criminal law declares they

[91] DELLAPENNA, *supra* note 18, at 320.
[92] *See* U.S. CONST. art. VI, cl. 2.
[93] *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 256–72 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part).
[94] *Id.* at 267–68 (citing 18 U.S.C. § 1461) (alterations in original).
[95] *Id.* at 268.
[96] *Id.*
[97] *Id.* at 269–70.
[98] 668 F. Supp. 3d 507 (N.D. Tex. 2023).
[99] *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367 (2024).

are 'nonmailable.'"[100] Likewise, "[t]he statute plainly does *not* require intent on the part of the seller that the drugs be used 'unlawfully.'"[101] The district court noted that "none of the cases cited in the OLC Memo support the view that the Comstock Act bars the mailing of abortion drugs only when the sender has the specific intent that the drugs be used unlawfully."[102]

Third, the Ethics and Public Policy Center (EPPC) filed an *amicus* brief in multiple stages of litigation in *Food and Drug Administration v. Alliance for Hippocratic Medicine* to counter the OLC memo.[103] EPPC's brief describes, "OLC's exception would render section 1461 a virtual nullity, even for mailings to states in which abortion is broadly unlawful."[104] The brief then counters that "[t]here is no meaningful support for OLC's claim that section 1461 does not apply when 'the sender lacks the intent that the recipient of the drugs will use them unlawfully.'"[105] According to EPPC's brief, circuit courts did not have a "consensus interpretation" supporting OLC's position, and "Congress [did not] ratify a 'consensus interpretation' that never existed."[106] Also, the Food and Drug Administration Amendments Act of 2007 never impliedly preempted the mail-order abortion rules.[107]

A fourth source is a Heritage Foundation legal memorandum entitled, *The Justice Department Is Wrong: Federal Law Does Prohibit Mailing Abortion Drugs*.[108] As that memorandum details, "[t]he OLC opinion did not even acknowledge, let alone follow, the well-established process of statutory interpretation . . . ."[109] According to the memorandum, the OLC opinion should have begun with the statute's text—which unambiguously prohibits mailing abortion drugs—consequently, the OLC memo cannot resort to extrinsic evidence.[110] Yet, "the OLC started by searching outside the statute for a preferred meaning to impose *upon* it."[111] The Heritage Foundation memorandum also noted that "[18 U.S.C.] § 1461's legislative development . . . points in the opposite direction" from the OLC's conclusion, and delves into this legislative history.[112] In sum, the OLC memo has presented an atextual argument that 18 U.S.C. § 1461 does not apply to mailing chemical abortion drugs in most circumstances.

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[100] *All. for Hippocratic Med.*, 668 F. Supp. 3d at 540–41 (citations omitted) (last alteration in original).
[101] *Id.* at 541 (emphasis in original).
[102] *Id.* at 542.
[103] *E.g.*, Brief of Ethics and Public Policy Center as Amicus Curiae in Support of Respondents, *Food & Drug Admin.*, 602 U.S. 367 (Feb. 28, 2024) (No. 23-235).
[104] *Id.* at 5.
[105] *Id.* at 7.
[106] *Id* at 7–16.
[107] *Id* at 16–17.
[108] THOMAS JIPPING & SARAH PARSHALL PERRY, LEGAL MEMO. NO. 324 (2023).
[109] *Id.* at 5.
[110] *Id.* at 5–7.
[111] *Id.* at 7 (emphasis in original).
[112] *Id.* at 9.

Addressing Some Myths Surrounding the Mail-order abortion Rules

There has been some confusion regarding the mail-order abortion rules. This report addresses three common issues: whether 1) these laws are obsolete and unenforceable; 2) repealing these laws would be in the interest of public policy; 3) the rules ban mailing or shipping any surgical instrument or drug that could be used to produce an abortion.

Nonuse Has Not Repealed These Laws

Media has described the mail-order abortion rules as a "19th century statute" that has been "long-dormant."[113] Danco Laboratories, the drug manufacturer of mifepristone, echoed this theory during oral argument in *Food and Drug Administration v. Alliance for Hippocratic Medicine*. In response to Justice Clarence Thomas' questioning about the mail-order abortion rules, Danco contended, "[t]his statute has not been enforced for nearly a hundred years."[114] These are desuetude arguments, which contend that a law's nonuse or obsoletion effectively repeals it.

Desuetude is a weak legal argument, and courts overwhelmingly reject it. "Desuetude, the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement, currently enjoys recognition in the courts of West Virginia and nowhere else."[115] Fundamentally, "[a] statute is not repealed by nonuse or desuetude. . . . The bright-line rule is that a statute has effect until it is repealed."[116] As Justice Antonin Scalia and Bryan Garner describe in *Reading Law: The Interpretation of Legal Texts*, "[i]f 10, 20, 100, or even 200 years pass without any known cases applying the statute, no matter: The statute is on the books and continues to be enforceable until its repeal."[117] This canon goes to the fact "that only the legislature has the power both to enact and to disenact statutes."[118]

As a practical matter, the mail-order abortion rules fell into nonuse because *Roe v. Wade* essentially nullified them for half a century. As the Supreme Court described in *Dobbs*, "*Roe* abruptly ended [the abortion] political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State."[119] Likewise, *Roe* removed abortion from the federal democratic process, placing abortion on a constitutional pedestal which superseded federal laws that interfered with the devised right. When the *Dobbs* Court "return[ed]

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[113] *E.g.*, Tierney Sneed, *Supreme Court Abortion Case Brings 19th Century Chastity Law to the Forefront*, CNN (Mar. 29, 2024), https://www.cnn.com/2024/03/29/politics/comstock-act-alito-thomas-abortion/index.html; Matthew Perrone, *What Does 1870s Comstock Act Have to Do with Abortion Pills?*, ASSOCIATED PRESS (Apr. 8, 2023), https://apnews.com/article/comstock-act-abortion-pills-dbf61e25f6f23cd3772c597dd6d4e337.
[114] Transcript of Oral Argument, *supra* note 13, at 49.
[115] *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (citing State v. Donley, 607 S.E.2d 474, 479–80 (W. Va. 2004)).
[116] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 336 (2012).
[117] *Id.*
[118] *Id.* at 339.
[119] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

the issue of abortion to the people's elected representatives," it permitted the mail-order abortion rules to go back into effect.[120]

Finally, calling the mail-order abortion rules a "19th century statute" ignores the rich statutory history of both statutes, which includes amendments in the 1990s during the Clinton Administration. As the report details in Appendix A, after Congress passed the "Comstock Act" in 1873, it amended or (re)codified the law ten times. The 19th century law technically no longer exists since Congress repealed it to codify the criminal code in 1909. When Congress recodified the laws in 1948, Senator Alexander Wiley—then-chairman of the Senate Judiciary Committee—explained that "[o]bsolete and executed provisions are eliminated" within the codification bill that Congress subsequently passed. [121] This legislative history indicates that Congress did not view the mail-order abortion rules as obsolete since the recodified criminal code kept them. Thus, the "Comstock Act" has transformed into 18 U.S.C. § 1461, and Congress last amended it in 1994. This is not an obsolete law.

The mail-order abortion rules also appear in a separate statute, 18 U.S.C. § 1462, which applies to common carriers and interactive computer services. This law did not originate in the Comstock Act. Rather, Congress passed an initial version of it in 1897 in a separate law. Congress subsequently amended or (re)codified the law nine times. Congress notably repealed the 1897 law in 1909 when it first codified federal criminal laws. Consequently, 18 U.S.C. § 1462 dates back to 1948, when Congress recodified the criminal code. Congress most recently amended this law in 1996, during which Congress modernized the law to extend to an "interactive computer service." Accordingly, nonuse has not repealed the abortion-pill rules, and in fact, Congress has reaffirmed them as recently as the 1990s.

Repealing these Laws Would Have Negative Public Policy Implications

Some Members of Congress have discussed repealing these laws,[122] even as some pro-abortion groups have cautioned these Members that the political timing is not right.[123] Recently, Members introduced companion bills in the U.S. Senate and House that would repeal the mail-order abortion rules.[124] As a practical matter, obscenity caselaw—under the *Miller* test—ensures that 18 U.S.C. §§ 1461–1462 do not infringe upon First Amendment rights.[125] But if Congress reevaluates 18 U.S.C. §§ 1461–1462, then it needs to do a careful analysis provision-by-provision, not a hasty repeal of everything. The statutes extend to areas beyond bioethics, such as child pornography

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[120] *See id*. at 2243.
[121] 94 CONG. REC. 8,721 (1948).
[122] Nathaniel Weixel, *Democratic Senator Eyeing Bill to Repeal Comstock Act*, THE HILL (Apr. 2, 2024), https://thehill.com/homenews/senate/4570689-democratic-bill-repeal-comstock-act-abortion/.
[123] Oriana González, *Democrats Say they Have a Winning Hand on Abortion but Outside Groups Won't Let Them Play It*, NOTUS (Apr. 18, 2024), https://www.notus.org/congress/comstock-repeal-planned-parenthood-aclu-democrats.
[124] Stop Comstock Act, S. 4619, 118th Cong. (2024); Stop Comstock Act, H.R. 8796, 118th Cong. (2024).
[125] *See* Miller v. California, 413 U.S. 15 (1973).

and "matter of a character tending to incite arson, murder, or assassination."[126] Thus, a repeal of 18 U.S.C. §§ 1461–1462 in their entirety not only would remove the mail-order abortion rules, but also loosen safeguards against the distribution of child pornography and items used in arson, murder, or assassination.

Some Members of Congress attempted to repeal parts of 18 U.S.C. §§ 1461–1462 through identical bills introduced in both the Senate and House in 1996. Under the bills, 18 U.S.C. § 1461 would have applied only to matter within its first provision, "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[127] The bills would have repealed 18 U.S.C. § 1462(c), including the mail-order abortion rules applying to "any drug, medicine, article, or thing designed, adapted, or intended for producing abortion . . . ."[128]

Notably, the introduction of these bills occurred a month after the Telecommunications Act of 1996 became law.[129] Within the Telecommunications Act, Congress had extended 18 U.S.C. § 1462 to an "interactive computer service."[130] The sponsor of the House bill, Representative Patricia Schroeder, expressed concern over the Telecommunications Act's expansion of the mail-order abortion rules, and described her legislation that would have repealed the abortion-related provisions within 18 U.S.C. §§ 1461–62.[131] Ultimately, neither 1996 bill left committee let alone received a vote.[132]

As discussed above, the mail-order abortion rules support the public policy of women's health and safety by requiring in-person visits and reducing the risk of intimate partner violence. Thus, if Congress considers a partial repeal of these rules, it should also consider the negative impact it will have upon women's health and safety.

These Laws Do Not Prohibit Mailing Surgical Instruments and the Drugs for Other Indicated Uses

Some have claimed these laws could ban the mailing of surgical instruments or drugs for other indicated uses. For example, one article claims that:

> A literal reading of the Comstock Act would criminalize the mailing of materials that can be used to provide abortion care without differentiating or accounting for whether these materials will be—or are intended to be—used to provide abortions. This means that if a medication, article, or

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[126] 18 U.S.C. § 1461; *e.g.*, United States v. Dodds, 347 F.3d 893 (11th Cir. 2003).
[127] Comstock Clean-up Act of 1996, S. 1592, 104th Cong. § 3 (1996); Comstock Cleanup Act of 1996, H.R. 3057, 104th Cong. § 3 (1996).
[128] Comstock Clean-up Act of 1996, S. 1592, § 2; Comstock Cleanup Act of 1996, H.R. 3057, § 2.
[129] *See S.1592—Comstock Clean-up Act of 1996*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/senate-bill/1592/all-actions (last visited July 26, 2024); *H.R.3057—Comstock Cleanup Act of 1996*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/house-bill/3057 (last visited July 26, 2024).
[130] Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, subtit. A, § 507(a), 110 Stat. 56, 137.
[131] 142 CONG. REC. 10,770 (1996).
[132] *See S.1592—Comstock Clean-up Act of 1996*, *supra* note 129; *H.R.3057—Comstock Cleanup Act of 1996*, *supra* note 129.

> material can be used to provide abortion care, mailing it will be illegal regardless of the intent of the sender or the recipient.[133]

Yet, "[t]he intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress."[134]

Surgical instruments and drugs have different uses. The FDA has approved a two-drug regimen of mifepristone and misoprostol for chemical abortions,[135] but these drugs have other indicated uses. As the American Association of Pro-life Obstetricians and Gynecologists describes:

> [T]hese medications have other uses that have nothing to do with elective abortion. Mifepristone is approved for use in Cushing's syndrome and is being evaluated for use in miscarriage. Misoprostol is used for ulcer prevention, labor induction, cervical ripening, control of hemorrhage, treatment of miscarriage, and pre-treatment for cervical dilation for non-abortion D&C.[136]

Accordingly, misoprostol prescribed to treat a miscarriage is not intended to produce an abortion. Likewise, doctors may use the same types of surgical instruments in legitimate medical procedures—such as miscarriage management, or the removal of an ectopic pregnancy—that abortionists use during induced abortion procedures.

The statutes explicitly require an intent for the item to produce abortion. 18 U.S.C. § 1461 provides:

> Every article or thing *designed, adapted, or intended for* producing abortion . . . Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another *to use or apply it for* producing abortion . . . Is declared to be nonmailable matter . . . .[137]

Likewise, the relevant text in 18 U.S.C. § 1462 relies upon intent, applying to "any drug, medicine, article, or thing *designed, adapted, or intended for* producing abortion."[138]

In context, the statutes apply to matter that *is* "designed, adapted, or intended for producing abortion," not matter that *can be* "designed, adapted, or intended for producing abortion." The titles of the statutes show this purpose.[139] 18 U.S.C. § 1461 is

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[133] Mabel Felix et al., *The Comstock Act: Implications for Abortion Care Nationwide*, KFF (Apr. 15, 2024), https://www.kff.org/womens-health-policy/issue-brief/the-comstock-act-implications-for-abortion-care-nationwide/.
[134] Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930).
[135] *Mifeprex Prescribing Information*, *supra* note 61, at 1.
[136] *AAPLOG Statement: Clarification of Abortion Restrictions*, AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (July 14, 2022), https://aaplog.org/aaplog-statement-clarification-of-abortion-restrictions/.
[137] 18 U.S.C. § 1461 (emphasis added).
[138] 18 U.S.C. § 1462(c) (emphasis added).
[139] SCALIA, *supra* note 116, at 221–22 ("The title and headings are permissible indicators of meaning" so long as courts do not "allow[them] to override the plain words of a text.").

entitled, "Mailing obscene or crime-inciting matter" while 18 U.S.C. § 1462 is "Importation or transportation of obscene matters." Thus, the laws are not general bans on mailing surgical instruments and drugs that can produce abortion.

Whether the statute covers a surgical instrument or drug comes down to the intended use of it. Generally, abortion laws "apply only to intentional actions that *begin* the process of terminating a pregnancy, i.e., to physician intervention *intended* to prevent an ongoing pregnancy from continuing and progressing to live birth," which is how this report views the intent element within the mail-order abortion rules. [140] As the Sixth Circuit described in *Davis v. United States*, "intent that the articles described in the circular or shipped in interstate commerce were to be used for condemned purposes is a prerequisite to conviction . . . ."[141] In *Youngs Rubber Corporation v. C.I. Lee Co.*, the Second Circuit noted, "[i]t would seem reasonable to give the word 'adapted' a more limited meaning . . . and to construe the whole phrase 'designed, adapted or intended' as requiring an intent on the part of the sender that the article mailed or shipped by common carrier be used for . . . abortion . . . ."[142] Similarly, the Seventh Circuit in *Bours v. United States* held, "the language of the act, in our judgment, requires that there must be the indication of a positive intent that the act will be done, not merely that it might perhaps be performed."[143] Accordingly, these laws focus on the intended use of the matter.

In sum, these laws are not a general ban upon the distribution of surgical instruments or drugs for other indicated uses. Rather, they only restrict the distribution of items intended to produce abortion.

Conclusion

Congress has amended, recodified, and reaffirmed 18 U.S.C. §§ 1461–62 multiple times since the nineteenth century. In fact, Congress repealed the original 19th century laws, and recodified the laws in 1948, amending them last during the Clinton Administration in the 1990s. Within these laws, the mail-order abortion rules prohibit the mailing and shipping of abortifacient matter. These rules support the public policy of patient health and safety by ensuring in-person dispensing of chemical abortion drugs.

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[140] *See* Maura K. Quinlan & Paul Benjamin Linton, *Medically Necessary Abortions After Dobbs: What, If Anything, Has Changed?*, 39 NOTRE DAME J. L., ETHICS & PUB., at 1, 17–18 (forthcoming 2025). In contrast, the OLC memorandum contends the mail-order abortion rules contain a specific intent element that the mailed matter be used to produce an unlawful abortion. This report addresses the OLC memorandum's interpretation above. *See supra* Section "Office of Legal Counsel Opinion's Statutory Interpretation."
[141] 62 F.2d 473, 475 (6th Cir. 1933).
[142] 45 F.2d 103, 108 (2d Cir. 1930); *see also* United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936) (noting the precursor law to 18 U.S.C. § 1461 "w[as] part of a continuous scheme to suppress immoral articles and obscene literature and should so far as possible be construed together and consistently. If this be done, the articles here in question ought not to be forfeited when not intended for an immoral purpose.").
[143] 229 F. 960, 965 (7th Cir. 1915).

Political debate and litigation will continue over these rules. In the meantime, States should continue to establish health and safety safeguards for women and adolescents seeking chemical abortion drugs. And the pro-life movement must continue to support abortion alternatives to empower women and families with authentic choice to choose life.

Appendix A: History of 18 U.S.C. § 1461

Act of March 3, 1873

In 1873, Congress passed the Act of March 3, 1873 using its Postal Clause power. Both Chambers had considered the bill, amending it to broaden its provisions,[144] revising it based upon a similar English statute,[145] and clarifying that it did not repeal existing law or affect previous indictments.[146] As enacted, the law directed:

> That no . . . article or thing designed or intended for the . . . procuring of abortion . . . shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, . . . and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such . . . package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, [be subject to a fine and/or imprisonment].[147]

In dicta in *Ex Parte Jackson*, the Supreme Court noted, "[a]ll that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished."[148]

1876 Amendment of the Act of March 3, 1873

Congress amended the law in 1876 to read:

> Every . . . article or thing designed or intended for the . . . procuring of abortion . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of

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[144] CONG. GLOBE, 42nd Cong., 3rd Sess. 1525 (1873).
[145] *Id.*
[146] *Id.* at 2005.
[147] Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599.
[148] 96 U.S. 727, 736 (1877).

> the same, shall be deemed guilty of a misdemeanor, [and subject to a fine and/or imprisonment].[149]

1888 Amendment of the Act of March 3, 1873

In 1888, Congress again amended the law:

> Every . . . article or thing designed or intended for the . . . procuring of abortion, . . . whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be [subject to a fine and/or imprisonment].[150]

1908 Amendment of the Act of March 3, 1873

In 1908, Congress amended the law. The amendment did not affect the mail-order abortion rule, but instead added a provision to 18 U.S.C. § 1461's precursor law that: "[a]nd the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination."[151] That provision, as codified and amended, appears in the current text of 18 U.S.C. § 1461.

1909 Repeal of the Act of March 3, 1873, Revision, and Codification of the Mail-order Abortion Rule at 18 U.S.C. § 334

In 1909, Congress first codified the country's federal penal laws. [152] 18 U.S.C. § 334 contained the mail-order abortion rule.[153] This action repealed the prior "Comstock Act."[154] The codification of U.S. penal laws had been in progress at least since 1897, when Congress created the Commission to Revise and Codify the Criminal and Penal Laws of the United States.[155] The final report of the Commission made suggestions to obscenity provisions within the law, such as the recommendation to extend it to "indecent, vile, or filthy" matter after the Supreme Court had interpreted "obscene,"

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[149] Act of July 12, 1876, ch. 186, § 1, 19 Stat. 90, 90.
[150] Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 496.
[151] Act of May 27, 1908, Pub. L. No. 60–147, 35 Stat. 406, 416.
[152] Act of Mar. 4, 1909, Pub. L. No. 60–350, § 211, 35 Stat. 1088, 1129.
[153] Congress repealed this statute in 1948 and recodified it at 18 U.S.C. § 1461.
[154] Act of Mar. 4, 1909, § 341, 35 Stat. at 1153.
[155] COMM'N TO REVISE & CODIFY THE LAWS OF THE U.S., FINAL REPORT vol. I, at 1 (1906).

"lewd," and "lascivious" in a limited manner in *Swearingen v. United States*.[156] It also lists relevant caselaw regarding the Act of March 3, 1873.[157]

The codification bill expanded the mail-order abortion rule. When introducing this section of the bill, Senator Weldon Heyburn—the chairman of the Joint Committee on the Revision of the Laws—noted:

> I would say that that section is merely broadened in its scope as to the description of the articles, and I think no Senator would object to it being made as broad as language could make it. The purpose of the section is so evident that I need not say anything further about it.[158]

The Special Joint Committee on the Revision of the Laws' report echoed this intent, describing that, "[a]side from a transposition of language, the other changes made in this section, which are designed to perfect the law so that its provisions can not be evaded, are indicated by the words italicized."[159]

There was some debate in the Senate about the scope of the law and whether to add language to the first provision that dealt with obscenity. The Senate ultimately extended it to materials that are "vile" or "filthy," but rejected language that would apply the prohibition to "disgusting" material because that language was too broad.[160] These amendments did not affect the mail-order abortion rules.

As codified in 1909, the mail-order abortion rule read:

> Every . . . article or thing designed, adapted, or intended for . . . producing abortion . . . ; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for . . . producing abortion . . . , is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be [subject to a fine and/or imprisonment].[161]

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[156] *Id*. at 107 (citing 161 U.S. 446 (1896)); COMM'N TO REVISE & CODIFY THE LAWS OF THE U.S., FINAL REPORT vol. II, at 1813 (1906).
[157] COMM'N TO REVISE & CODIFY THE LAWS OF THE U.S., FINAL REPORT vol. II, at 1813.
[158] 42 CONG. REC. 979 (1908).
[159] S. REP. NO. 60-10, pt. 1, at 22 (1908).
[160] 42 CONG. REC. 2391–92 (1908).
[161] Act of Mar. 4, 1909, Pub. L. No. 60–350, § 211, 35 Stat. 1088, 1129.

1911 Amendment of 18 U.S.C. § 334

Congress amended the law in 1911. This amendment did not affect the mail-order abortion rule, but instead added a provision at the end of the statute, providing, "[a]nd the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination."[162] Congress had first passed this provision in 1908, but Congress did not include it within the 1909 codification. The 1911 amendment reinserted the "arson, murder, or assassination" provision into the law.

1948 Repeal of 18 U.S.C. § 334, Recodification at 18 U.S.C. § 1461, and Amendment of the Mail-order Abortion Rule

Congress repealed the existing law in 1948, recodifying and amending it at 18 U.S.C. § 1461.[163] The bill's purpose was to enact the U.S. criminal law into positive law.[164] When the House was considering the codification bill, Representative John M. Robsion of the House Judiciary Committee explained:

> The law is restated in simple, clear, and concise language. Many sections of existing statutes are consolidated to facilitate finding the law. The advantages of codes are too well known to require any lengthy exposition on my part at this time. You will find no radical changes in the philosophy of our criminal law in this bill. . . . Nor is this bill a subject of partisanship. . . . Favorable action by the House today will constitute a big step toward an orderly and systematic code of laws and will prove a boon to the bench and bar and the public generally.[165]

When the bill reached the Senate, Senator Alexander Wiley described:

> The bill makes it easy to find the criminal statutes because of the arrangement, numbering, and classification. The original intent of Congress is preserved. A uniform style of statutory expression is adopted. . . . Obsolete and executed provisions are eliminated. Uncertainty will be ended and there will no longer be any need to examine the many volumes of the Statutes at Large as the bill, upon enactment, will itself embody the substantive law which will thus appear in full in the United States Code.[166]

In this regard, Section 1461 was a continuation of Congress' efforts to restrict mailing abortifacients and there were few changes to the statute.

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[162] Act of Mar. 4, 1911, Pub. L. No. 61–481, § 2, 36 Stat. 1327, 1339.
[163] Act of June 25, 1948, Pub. L. No. 80–772, 62 Stat. 683, 768, 863–64.
[164] *Id.*, 62 Stat. at 683 (describing itself as "An Act To revise, codify, and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure'").
[165] 93 CONG. REC. 5,049 (1947).
[166] 94 CONG. REC. 8,721 (1948).

The House Judiciary Committee's report references caselaw discussing the intent element within Section 1461,[167] including the Second Circuit's decisions in *Youngs Rubber Corporation, Inc. v. C.I. Lee & Co., Inc.*[168] and *United States v. Nicholas*,[169] as well as the Sixth Circuit's decision in *Davis v. United States*.[170] The report describes that "[r]eference to persons causing or procuring was omitted as unnecessary in view of [the] definition of 'principal' in section 2 of this title" and that "[m]inor changes of phraseology were made."[171]

As newly codified in 1948, the mail-order abortion rule read:

> Every article or thing designed, adapted, or intended for . . . producing abortion . . . ; and Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for . . . producing abortion . . .—Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be [subject to a fine and/or imprisonment].[172]

1955 Amendment of 18 U.S.C. § 1461

Congress amended 18 U.S.C. § 1461 in 1955, which did not affect the mail-order abortion rule. Specifically, Congress amended the first paragraph of the law to read, "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—."[173] Congress also repealed the fifth paragraph, which had covered "[e]very letter, packet, or package, or other mail matter containing any filthy, vile or indecent thing, device, or substance . . . ."[174]

1958 Amendment of 18 U.S.C. § 1461

In 1958, Congress amended the eighth paragraph of 18 U.S.C. § 1461 to read:

> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails

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[167] H.R. REP. NO. 80-304, at A104–05 (1947).
[168] 45 F.2d 103.
[169] 97 F.2d 510.
[170] 62 F.2d 473.
[171] H.R. REP. NO. 80-304, at A105.
[172] Act of June 25, 1948, Pub. L. No. 80–772, § 1461, 62 Stat. 683, 768.
[173] Act of June 28, 1955, Pub. L. No. 84–95, § 1, 69 Stat. 183, 183.
[174] *Id.* § 2, 69 Stat. at 183.

> for the purpose of circulating or disposition thereof, or of aiding in the circulation or disposition thereof, shall be [subject to a fine and/or imprisonment].[175]

1971 Amendment of 18 U.S.C. § 1461

Congress amended 18 U.S.C. § 1461 in 1971, removing contraceptives from the statute and incorporating 39 U.S.C. § 3001(e), which concerns nonmailable matter.[176] The amendment did not affect the mail-order abortion rule.

1994 Amendment of 18 U.S.C. § 1461

In 1994, Congress amended 18 U.S.C. § 1461 by striking the fine amounts and inserting "under this title" in each place the fine amounts had appeared.[177]

Appendix B: History of 18 U.S.C. § 1462

Act of February 8, 1897

Congress first regulated the shipment of abortifacients through common carriers in 1897 under its Commerce Clause power. The statute read:

> That it shall be unlawful for any person to deposit with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia . . . any article or thing designed or intended for the . . . procuring of abortion . . . ; and any person who shall knowingly deposit, or cause to be deposited, with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or who shall take from such express company or other common carrier with intent to sell, distribute, or circulate any matter or thing herein forbidden to be deposited for carriage, shall for each offense, upon conviction thereof be [subject to a fine and/or imprisonment].[178]

1905 Amendment of the Act of February 8, 1897

Congress extended the law to imports and exports of abortifacients in 1905:

> It shall be unlawful for any person to deposit with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia into any other State or Territory

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[175] Act of Aug. 28, 1958, Pub. L. No. 85–796, § 1, 72 Stat. 962, 962.
[176] Act of Jan. 8, 1971, Pub. L. No. 91–662, §§ 3, 5(b), 6(3), 84 Stat. 1973, 1973–74.
[177] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, tit. XXXIII, § 330,016(1)(K), (L), 108 Stat. 1796, 2147.
[178] Act of Feb. 8, 1897, ch. 172, 29 Stat. 512, 512.

> of the United States or the District of Columbia, or from any place in or subject to the jurisdiction of the United States to a foreign country, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction of the United States, or who shall cause to be brought into any place in or subject to the jurisdiction of the United States from any foreign country, . . . any article or thing designed or intended for the . . . procuring of abortion . . . ; and any person who shall knowingly deposit, or cause to be deposited, with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States, or for carriage from any place in or subject to the jurisdiction of the United States to a foreign country, or from any place in or subject to the jurisdiction of the United States through any foreign country, to any place in or subject to the jurisdiction of the United States, or who shall take from such express company or other common carrier with intent to sell, distribute, or circulate any matter or thing herein forbidden to be deposited for carriage shall for each offense, upon conviction thereof, be [subject to a fine and/or imprisonment].[179]

1909 Repeal of the Act of February 8, 1897, Revision of the Mail-order Abortion Rule, and Codification at 18 U.S.C. § 396

Congress first codified the mail-order abortion rule in 1909, which was part of Congress' first codification of the country's penal laws. This action repealed the 1897 common carrier law and 1905 amendment,[180] and codified these provisions at 18 U.S.C. § 396.[181] As mentioned above, Congress had created the Commission to Revise and Codify the Criminal and Penal Laws of the United States in 1897, which compiled U.S. penal laws into a criminal code. In the Commission's final report, it proposed updated language for the common carrier law, but otherwise did not comment on this provision.[182] Congress altered the law's language in the proposed penal code bill, but as the Special Joint Committee on the Revision of the Laws reported, "[t]his section has been amended so as to conform to the changes made in section 212 [18 U.S.C. § 334, which Congress ultimately passed as section 211], which prohibits the sending of obscene matter, etc., through the mails. Aside from a transposition of language the changes are properly indicated by italics."[183] When Senator Heyburn introduced the provision, he likewise described, "I would call attention to the fact that the section as read is existing law, except that the jurisdiction is enlarged to conform to existing conditions. It takes in 'noncontiguous territory,' that being a class of jurisdiction that at

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[179] Act of Feb. 8, 1905, Pub. L. No. 58–52, 33 Stat. 705, 705.
[180] Act of Mar. 4, 1909, Pub. L. No. 60–350, § 341, 35 Stat. 1088, 1158–59.
[181] Congress repealed this statute in 1948 and recodified it at 18 U.S.C. § 1462.
[182] COMM'N TO REVISE & CODIFY THE LAWS OF THE U.S., FINAL REPORT vol. II, at 1823.
[183] S. REP. NO. 60-10, pt. 1, at 24.

the time of existing law was not included."[184] In this regard, the law was a continuation of previous laws restricting the shipment of abortifacients via common carriers.

As codified, the Common Carrier rule read:

> Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, . . . any drug, medicine, article, or thing designed, adapted, or intended for . . . producing abortion . . . ; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be [subject to a fine and/or imprisonment].[185]

1920 Amendment of 18 U.S.C. § 396

Congress extended the law in 1920 to cover certain "motion-picture film[s]," but this amendment did not affect the mail-order abortion rule.[186]

1948 Repeal of 18 U.S.C. § 396, Recodification at 18 U.S.C. § 1462, and Amendment of the Mail-order Abortion Rule

Congress repealed the existing law in 1948,[187] recodifying and amending it at 18 U.S.C. § 1462. As mentioned above, the bill's purpose was to revise, codify, and reenact U.S. criminal law into positive law. The House Judiciary Committee reported a few notes about the revisions to Section 1462: (1) the "[r]eference to persons causing or procuring was omitted as unnecessary in view of [the] definition of 'principal' in section 2 of this title"; (2) the "[w]ords 'in interstate or foreign commerce' were substituted for ten lines of text without loss of meaning (See definitive section 10 of this title.)"; (3) it directs the reader to the reviser's notes about Section 1461, which had discussed caselaw interpreting the intent element; and (4) it notes "[m]inor changes of phraseology were made."[188]

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[184] 42 CONG. REC. 1,031 (1908).
[185] Act of Mar. 4, 1909, Pub. L. No. 60–350, § 245, 35 Stat. 1088, 1138.
[186] Act of June 5, 1920, Pub. L. No. 66–279, 41 Stat. 1060, 1060–61.
[187] Act of June 25, 1948, Pub. L. No. 80–772, § 1461, 62 Stat. 683, 863–65.
[188] H.R. REP. NO. 80-304, at A105.

As recodified at 18 U.S.C. § 1462, the statute read:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce . . . any drug, medicine, article, or thing designed, adapted, or intended for . . . producing abortion . . . ; or Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—Shall be [subject to a fine and/or imprisonment].[189]

1950 Amendment of 18 U.S.C. § 1462

Congress restructured the statute in 1950 by separating the provisions into subsections, but otherwise retained the text of the 1948 statute. It moved the mail-order abortion rule into 18 U.S.C. § 1462(c).[190] The statute now read:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce— . . .
>
> > (c) any drug, medicine, article, or thing designed, adapted, or intended for . . . producing abortion . . . ; or
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—
>
> Shall be [subject to a fine and/or imprisonment].[191]

1958 Amendment of 18 U.S.C. § 1462

In 1958, Congress altered the first paragraph to read: "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—."[192] The penultimate paragraph changed to "Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—."[193] Congress also increased the penalty for subsequent offenses of the law.[194]

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[189] Act of June 25, 1948, § 1462, 62 Stat. at 768–69.
[190] Act of May 27, 1950, Pub. L. No. 81–531, 64 Stat. 194, 194.
[191] *Id.*
[192] Act of Aug. 28, 1958, Pub. L. No. 85–796, § 2(a), 72 Stat. 962, 962.
[193] *Id.* § 2(b), 72 Stat. at 962.
[194] *Id.* § 2(c), 72 Stat. at 962.

1971 Amendment of 18 U.S.C. § 1462

Congress amended 18 U.S.C. § 1462 in 1971, removing contraceptives from the statute.[195] The amendment did not affect the mail-order abortion rule.

1994 Amendment of 18 U.S.C. § 1462

In 1994, Congress amended 18 U.S.C. § 1462 by striking the fine amounts and inserting "under this title" in each place the fine amounts had appeared.[196]

1996 Amendment of 18 U.S.C. § 1462

Through the Telecommunications Act of 1996, Congress amended 18 U.S.C. § 1462 to extend the statute to knowingly using an "interactive computer service" for the interstate carriage of abortifacients.[197] The amendment added "or receives" after "takes" in the second undesignated paragraph.[198] It expanded the law to taking or receiving an abortifacient from an "interactive computer service."[199] Congress extended the law to the "importation" of abortifacients.[200]

Notably, Members of Congress were aware that the Telecommunications Act of 1996 had expanded the mail-order abortion rule.[201] A month after the Telecommunications Act became law, Members introduced companion bills in the Senate and House that would have removed abortifacients from the scope of 18 U.S.C. §§ 1461–1462.[202] These bills never left their committees, and Congress kept the mail-order abortion rule as federal law.[203]

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[195] Act of Jan. 8, 1971, Pub. L. No. 91–662, § 4, 84 Stat. 1973, 1973.
[196] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, tit. XXXIII, § 330,016(1)(K), (L), 108 Stat. 1796, 2147.
[197] Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, subtit. A, § 507(a)(1), 110 Stat. 56, 137.
[198] *Id.* § 507(a)(2)(A), 110 Stat. at 137.
[199] *Id.* § 507(a)(2)(B), 110 Stat. at 137.
[200] *Id.* § 507(a)(2)(C), 110 Stat. at 137.
[201] *E.g.*, 142 CONG. REC. H10,769–70 (statement of Patricia Schroeder) (discussing how the "Comstock Act [is] still on the books").
[202] Comstock Clean-up Act of 1996, S. 1592, 104th Cong. (1996); Comstock Cleanup Act of 1996, H.R. 3057, 104th Cong. (1996).
[203] *See S.1592—Comstock Clean-up Act of 1996*, *supra* note 129; *H.R.3057—Comstock Cleanup Act of 1996*, *supra* note 129.