Nos. 25A1207 and 25A1208

In the Supreme Court of the United States

DANCO LABORATORIES, LLC, *Applicant*,

v.

STATE OF LOUISIANA, BY & THROUGH ITS ATTORNEY GENERAL, LIZ MURRILL, ET AL.

GENBIOPRO, INC., *Applicant*,

v.

STATE OF LOUISIANA, BY & THROUGH ITS ATTORNEY GENERAL, LIZ MURRILL, ET AL.

BRIEF OF AMICI CURIAE FOR ADVANCING AMERICAN FREEDOM, INC.; ALABAMA POLICY INSTITUTE; ALASKA FAMILY COUNCIL; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN VALUES; AMERICANS UNITED FOR LIFE; AMERICA'S WOMEN; ASSOCIATION OF MATURE AMERICAN CITIZENS ACTION; FRAN BEVAN, PHYLLIS SCHLAFLY'S PENNSYLVANIA EAGLE FORUM; CENTENNIAL INSTITUTE AT COLORADO CHRISTIAN, UNIVERSITY; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); CHRISTIAN LAW ASSOCIATION; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; CONCERNED WOMEN FOR AMERICA; DEMOCRATS FOR LIFE; EAGLE FORUM; FAITH AND FREEDOM COALITION; FAMILY COUNCIL IN ARKANSAS; FAMILY INSTITUTE OF CONNECTICUT ACTION; FRONTLINE POLICY COUNCIL; HUMAN COALITION; ET AL. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that uphold traditional American values, including the constitutional structure that America's Founders designed.[1] Maintaining that structure is critical for limiting government and, therefore, helping to fulfill the very purpose of government, namely, securing inalienable rights. The Declaration of Independence para. 2 (U.S. 1776). A key component of that structure is each state's authority to exercise powers reserved to it, including the enactment and enforcement of criminal laws. Specifically, this case involves the authority of states, following the clarification that "the Constitution does not confer a right to abortion," in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 292 (2022), to regulate abortion. When the Food and Drug Administration, contrary to federal law, authorized obtaining mifepristone, a dangerous drug intended to cause abortion, through the mail, it caused the very assault on this state authority that we see unfolding today. AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes the American experiment depends on ordered liberty and self-government.[3] AAF submits

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of amicus briefs.

[2] Edwin J. Feulner, Jr., Conservatives Stalk the House: The Story of the Republican Study Committee, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

this amicus curiae brief on behalf of its 13,482 members in the Fifth Circuit including 1,860 members in Louisiana.

Amici Alabama Policy Institute; Alaska Family Council; American Association of Senior Citizens; American Values; Americans United for Life; America's Women; Association of Mature American Citizens Action; Fran Bevan, Phyllis Schlafly's Pennsylvania Eagle Forum; Centennial Institute at Colorado Christian University; Center for Urban Renewal and Education (CURE); Christian Law Association; Christian Medical & Dental Associations; Concerned Women for America; Democrats for Life; Eagle Forum; Faith and Freedom Coalition; Family Council in Arkansas; Family Institute of Connecticut Action; Frontline Policy Council; Human Coalition; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; Dr. Alveda King; Louisiana Family Forum; Lutheran Center for Religious Liberty (LCRL); Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; Men for Life; National Religious Broadcasters; National Right to Life; Nebraska Family Alliance; New York State Conservative Party; North Carolina Values Coalition; Orthodox Jewish Chamber of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Priests for Life; Rick Santorum, Former Senator 1995-2007; Dr. Gregory P. Seltz, Executive Director, LCRL, Speaker Emeritus, The Lutheran Hour; 60 Plus Association; Paul Stam, Former Speaker Pro Tem, NC House of Representatives; Delegate Kathy Szeliga, District 7A, Vice Chair of the Maryland Freedom Caucus; Texas Right to Life; The Family Foundation of Virginia; The

Wagner Center; Suzi Voyles, President, Eagle Forum of Georgia; Tradition, Family, Property, Inc.; Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; and Young America's Foundation believe that preserving the authority of states to enact and enforce criminal laws, including those prohibiting abortion, is essential to the protection of the rights and liberties of the American people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Rosalie Markezich did not want an abortion. Yet, because the Food and Drug Administration (FDA) modified its Risk Evaluation and Mitigation Strategy (REMS) for the chemical abortion drug mifepristone removing the in-person doctor visit requirement, Rosalie's former boyfriend was able to obtain abortion drugs through the mail from an abortionist in California.[4] He then coerced Rosalie into taking the imported drugs, killing her baby and leaving her with physical pain, heavy bleeding, and lasting mental health challenges.[5]

Louisiana, where Rosalie lives, outlawed abortion in most circumstances.[6] Yet its authority to protect women and the unborn is undermined when its laws can be so easily circumvented.[7]

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[4] *See* Complaint at 44-46, *Louisiana v. FDA*, No. 25-01491 (W.D. La. Oct. 06, 2025).
[5] *Id.*
[6] *Id.* at 34-35.
[7] *See generally* Carolyn McDonnell, *Mail-Order Abortion Rules: Text, Context, and History of the Comstock Act's Restrictions on Mailing Abortifacient Material*, 1 Ave Maria L. Rev. 101, 105-06 (2025) (showing that the Comstock Act was adopted in part to protect maternal safety).

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. These reserved powers include the authority to enact and enforce criminal laws, which Louisiana first exercised to prohibit abortion 170 years ago.[8] *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 310 (2022) (Appendix A). This Court improperly compromised state authority between 1973, when it invented a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), and 2022, when it overruled *Roe* and held that the Constitution "does not confer a right to abortion." *Dobbs*, 597 U.S. at 292. The Court rightly concluded that "the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* Since then, Louisiana has exercised its authority to classify abortion drugs as controlled substances and to prohibit obtaining them, including through the mail.

The Comstock Act is a federal law prohibiting the U.S. Postal Service from delivering, and anyone from knowingly using the mail to send, any "article or thing designed, adapted, or intended for producing abortion." 18 U.S.C. § 1461. Congress enacted the Comstock Act pursuant to its constitutional authority to "establish post-offices and post-roads," U.S. Const., art. I, § 8, cl. 7, which the Supreme Court has

[8] The laws of states like Louisiana are not preempted by the FDA's approval of mifepristone, *GenBioPro, Inc., v. Raynes*, 144 F.4th 258, 266 (4th Cir. 2025); Brief of Amici Curiae Advancing American Freedom et al., *Raynes*, 144 F.4th 258, available at https://advancingamericanfreedom.com/genbiopro-inc-v-kristina-raynes/, yet, as demonstrated here, those state laws are undermined by the FDA's removal of the in-person requirement for chemical abortion's prescription.

held includes "the right to determine what shall be excluded" from the mail. *Ex parte Jackson*, 96 U.S. 727, 732 (1878). The Comstock Act is thus consistent with Louisiana's effort to prohibit abortion drugs by preventing their importation by mail into the state.

To put a finer point on it, the Comstock Act would be consistent with Louisiana's effort if it were enforced. Instead, the FDA in 2023 abandoned its longstanding requirement that mifepristone,[9] the drug created and used to cause abortion, be obtained only in-person from a certified physician. The FDA thereby authorized what the Comstock Act expressly prohibits, rendering its action "not in accordance with law" and, therefore, unlawful under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). The FDA has directly harmed Louisiana and undermined the exercise of its authority to prohibit abortion drugs.

On May 1, 2026, the Fifth Circuit granted Louisiana's request for a stay of the FDA's 2023 REMS, finding that Louisiana was likely to win on the merits of its Administrative Procedure Act (APA) claim. *Louisiana v. Food and Drug Admin.*, 2026 WL 1194924 at *7 (5th Cir. May 1, 2026). The Court should deny Applicant's request to vacate that stay.

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[9] The FDA's initial approval of Mifepristone was illegal, Brief of Advancing American Freedom et al. at 10-12, *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367 (2024) available at https://advancingamericanfreedom.com/fda-danco-laboratories-v-alliance-for-hippocratic-medicine/, and is dangerous for both women and the unborn. Brief of Amici Curiae Advancing American Freedom et al. at 16-24, *Bryant v. Moore*, No. 24-1576 (4th Cir. Aug. 20, 2024) available at https://advancingamericanfreedom.com/bryant-v-moore/.

ARGUMENT

I. Louisiana has Authority Over Matters Neither Delegated to the Federal Government nor Denied to the States, Including Regulation of Abortion.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. It is one of the "first principles," *United States v. Lopez*, 514 U.S. 549, 552 (1995), of our system of government that Congress "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). *See also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Each state, in turn, may exercise "all the powers reserved" to them. *Chisholm v. Georgia*, 2 U.S. 419, 435 (1793). These reserved state powers include the authority to enact and enforce criminal laws, *see, e.g.*, *Cohens v. Virginia*, 19 U.S. 264, 428 (1821); *Screws v. United States*, 325 U.S. 91, 109 (1945) ("Under our federal system, the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law."); *United States v. Morrison*, 529 U.S. 598, 618 (2000) (the police power is "denied the National Government and reposed on the States"), and a general "police power" to provide for "[p]ublic safety, public health, morality, peace and quiet, [and] law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954). States, therefore, have authority to regulate the medical profession

by, for example, proscribing certain procedures or setting standards for performing them. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

The Supreme Court has described the "unbroken tradition of prohibiting abortion on pain of criminal punishment," *Dobbs*, 597 U.S. at 250, that began under the English common law in the thirteenth century. In America, local legislative bodies began prohibiting abortion long before independence.[10] "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens." *Dobbs*, 597 U.S. at 224. A dozen years before the Fourteenth Amendment was ratified, Louisiana made it a crime for anyone to "administer . . . to any woman pregnant with child, any . . . thing, for the purpose of procuring abortion." *Id*. at 310 (Appendix A).

Three years later, at its May 1859 convention, the American Medical Association unanimously adopted a resolution condemning the "unwarrantable destruction of human life" and the "slaughter of countless children" and calling on state legislatures to strengthen their laws against abortion.[11] The campaign was effective. "By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime. . . Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910." *Dobbs*, 597 U.S. at 248-49.

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[10] *See* Dennis J. Horan, Thomas J. Marzen, *Abortion and Midwifery: A Footnote in Legal History, in New Perspectives on Human Abortion* 200 (1981).
[11] Frederick N. Dyer, The Physicians' Crusade Against Abortion 76 (1999).

While the Constitution had not changed, the Supreme Court in 1973 significantly restricted this longstanding state authority to regulate abortion by holding that its previously created "right of privacy," *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 152. That decision quickly became, and remained, one of the Supreme Court's most controversial,[12] and states, including Louisiana, continued to enact pro-life laws.[13] The Court corrected its error in 2022, overruling *Roe v. Wade* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in their entirety and holding that "the Constitution does not confer a right to abortion . . . and the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 597 U.S. at 292. Louisiana has continued to assert its authority to protect women and the unborn by prohibiting most abortions, whether by surgery or drugs, and by classifying chemical abortion drugs as controlled substances and by prohibiting their prescription via telehealth. *See, e.g.*, La. Rev. Stat. §§ 40:1061, 40:967.

II. The Comstock Act Prohibits Using the U.S. Postal Service to Distribute Mifepristone.

As codified today, the Comstock Act prohibits the U.S. Postal Service from delivering, and anyone from knowingly using the mail to send, any "article or thing

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[12] *See* Thomas Jipping and Sarah Parshall Perry, Dobbs v. Jackson Women's Health Organization*: An Opportunity to Correct a Grave Error*, Heritage Found. Legal Mem. No. 293, Nov. 17, 2021, at 9-11.

[13] In 2006, Louisiana enacted a law banning most abortions that would go into effect when the supreme Court overruled *Roe v. Wade*.

designed, adapted, or intended for producing abortion." 18 U.S.C. § 1461. Interpreting any written document involves "discovering . . . the meaning which the authors…designed it to convey to others."[14] The goal of statutory interpretation, therefore, is to discern the meaning of the statute because, "[t]he text is the law, and it is the text that must be observed."[15]

The Supreme Court has identified principles, or canons, that help keep interpretation focused on that objective. Three related canons are particularly relevant here. First, "[i]n determining the meaning of a statutory provision, courts 'look first to its language, giving the words used their ordinary meaning.'" *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014), quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990). Second, "[a]bsent any textual qualification, [courts] presume the operative language means what it appears to mean." *Id*. at 441. Third, "where…the words of the statute are unambiguous," the "judicial inquiry is complete." *Desert Place, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (internal citations omitted).

Some interpretive exercises require a complex exploration of nuance, opaque language, or vague shades of meaning. This is not one of them. Rather, guided by these canons, properly interpreting the Comstock Act involves two questions. First, is mifepristone a "thing…intended for producing abortion"? Second, does any "textual

[14] Black's Law Dictionary 824 (7th ed. 1999).
[15] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Federal System* 22 (1997).

qualification" prevent the Comstock Act's straightforward application to mifepristone? The answers are obvious.

A. Mifepristone is a "thing…intended for producing abortion."

Producing abortion was the French pharmaceutical company Roussel Uclaf's purpose when it first synthesized mifepristone in 1980.[16] It is why the Population Council, which has sought to expand abortion availability for decades,[17] obtained the right to market that drug in the United States.[18] And it is why everyone from Planned Parenthood[19] and the Population Research Institute[20] to National Public Radio[21] and the Bloomberg School of Public Health at Johns Hopkins University calls mifepristone "the abortion pill."[22] In fact, the FDA itself explains that the agency

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[16] *See* Judith A. Johnson, Cong. Res. Serv., *Abortion: Termination of Early Pregnancy with RU-486* (Mifepristone) at 2 (2001).

[17] Population Council, *Strategic Plan* available at: https://popcouncil.org/strategy/ (last visited Feb. 9, 2026).

[18] *See* Government Accountability Office, Approval and Oversight of the Drug Mifeprex 15 (2008).

[19] *See, e.g.*, Planned Parenthood Direct, *How the Abortion Pill Works* (Sept. 15, 2023) https://www.plannedparenthooddirect.org/article/how-abortion-pill-works.

[20] Population Research Institute, *Everything You Need to Know About the Abortion Pill*, https://www.pop.org/abortion-pill-fact-sheet/ (last visited Feb. 10, 2026).

[21] *See, e.g.*, The Associated Press, *FDA Approves Another Generic Abortion Pill, Prompting Outrage from Conservatives*, National Public Radio (Oct. 22, 2025 11:45 PM) https://www.npr.org/2025/10/02/nx-s1-5561155/fda-generic-abortion-pill.

[22] Morgan Coulson, *What is Mifepristone, aka "The Abortion Pill"?*, Johns Hopkins Bloomberg School of Public Health (Oct. 8, 2025) https://publichealth.jhu.edu/2025/what-is-mifepristone-aka-the-abortion-pill.

approved mifepristone "to end an intrauterine pregnancy.[23] Mifepristone is indeed a "thing…intended for producing abortion."

B. No "textual qualification" prevents the Comstock Act's application to mifepristone.

Because mifepristone is a "thing…intended for producing abortion," the Comstock Act bans its distribution through the mail unless there is a "textual qualification" to the contrary. No such qualification, textual or otherwise, exists. By its plain terms, the Comstock Act excludes a category of objects from the mail based on how those objects could be used, just as the U.S. Postal Service continues to do today. Its website, for example, lists various "items and substances [that] should never enter the mail system,"[24] even though obtaining them in-person would be legal.

Needless to say, abortion advocates today want to avoid the Comstock Act's obvious application to mifepristone. Because they cannot claim that any "textual qualification" neutralizes that application, some try to cast the Comstock Act as not really having any application to abortion at all. The Comstock Act, after all, is best known for its use in suppressing the distribution of obscene or indecent material. Two scholars characterize the Comstock Act as nothing more than "a nineteenth-century

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[23] *See* Food and Drug Administration, *Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation* (Jan. 17, 2025) https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

[24] U.S. Postal Inspection Serv., *Prohibited, Restricted, and Non-Mailable Items* (Jan. 26, 2026) https://bit.ly/3HCU4sY. These include household products that contain aerosol or lithium batteries.

obscenity law."[25] Congress did indeed enact laws in the 19th century to suppress the distribution of certain printed material. The 1865 Post Office Act, for example, prohibited using the "mails of the United States" to deliver publications "of a vulgar and indecent character."[26] When first enacted, however, the Comstock Act prohibited only "materials relating to abortion and contraception from the mails."[27] Only thereafter did Congress expand its reach to also include any written material "of an indecent character."[28]

The general public seems able to see what politically driven academics try to obscure. One online resource titled *US Law Explained*, for example, examined the Comstock Act's dual applications to printed material and abortion. In contrast to subjective language related to the printed material such as "lewd," "indecent," "filthy," or "vile," it explains, the Comstock Act is "far more direct" regarding abortion.[29] "It targets not just drugs or medicines (*mifepristone…would fall squarely in this category*) but also any 'instrument, substance…or thing' designed for abortion."[30]

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[25] Reva B. Seigel and Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L. J. 1068, 1072 (2025).
[26] 13 Stat. 504, 507 (1865). *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 745–46 (1992).
[27] Blanchard, *supra* note 26 at 749.
[28] *Id*.
[29] US Law Explained, *The Comstock Act of 1873: The Ultimate Guide to a 150-Year-Old Law's Modern Resurgence*, https://uslawexplained.com/comstock_act (emphasis added) (last visited Feb. 10, 2026).
[30] *Id.*

The Supreme Court has explained that there is one "cardinal canon:" "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see also Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring) (noting that, when the majority said that a statute was "unambiguous, unequivocal, and unlimited," "discussion of that point is where the remainder of the analysis should have ended."). And so it is here.

C. The Office of Legal Counsel's Attempt to Re-Write the Comstock Act is Deeply Flawed.

In 2021, ostensibly out of concern to limit in-person interactions during the COVID pandemic, the FDA announced it would "exercise enforcement discretion" regarding the in-person dispensing requirement for mifepristone, thereby authorizing use of the internet and U.S. Mail to prescribe and obtain abortion drugs.[31] Discretion is a necessary part of regulatory enforcement simply because resources are finite. By definition, however, that discretion must be exercised among lawful agency options. Since the Comstock Act prohibits using the mail to distribute abortion drugs, it was not a lawful option within the FDA's legitimate discretion.

[31] J. Marc Wheat, Timothy Harper, *Playing Politics with the Abortion Pill: A Quarter Century of Abuse of Power at the FDA*, The Human Life Rev., Spring 2025, at 68.

President Biden took this a step further on the day that the Court overruled *Roe v. Wade*. Dropping the pretense of "enforcement discretion," he ordered the Secretary of Health and Human Services to "ensure that mifepristone is as widely accessible as possible . . . including when prescribed through telehealth and sent by mail."[32] The administration's posture toward the Comstock Act changed from one of avoidance to one of open disregard. The first step in this scheme was for the Justice Department's Office Legal Counsel (OLC) to attempt a wholesale rewrite of the Comstock Act.

One week after *Dobbs*, the Postal Service's general counsel asked the OLC[33] whether the Comstock Act "prohibits the mailing of mifepristone and misoprostol, two prescription drugs that are commonly used to produce abortions."[34] In a written opinion dated December 23, 2022, OLC claimed that the Comstock Act "does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone and

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[32] White House, *FACT SHEET: President Biden Announces Actions In Light of Today's Supreme Court Decision on* Dobbs v. Jackson Women's Health Organization (June 24, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/06/24/fact-sheet-president-biden-announces-actions-in-light-of-todays-supreme-court-decision-on-dobbs-v-jackson-womens-health-organization/.

[33] The Office of Legal Counsel provides "written opinions and other advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and other components of the Department of Justice." Office of Legal Counsel, U.S. Dep't of Jus., https://www.justice.gov/olc (last visited Feb. 10, 2026).

[34] *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion*, O.L.C. Slip Op., at 1 (Dec. 23, 2022), https://www.justice.gov/olc/opinion/file/1560596/download.

misoprostol *where the sender lacks the intent that the recipient of the drugs will use them unlawfully*."[35]

It is easy to see why abortion advocates would prefer this "Comstock Act." The OLC opinion does not even suggest how to identify the particular "sender" or "recipient" of abortion drugs or, more importantly, how to discern the subjective intent of the former or the anticipated use by the latter. Neither the original Comstock Act, nor its present codification say anything about senders, recipients, intentions, or uses. And the OLC opinion concedes that "those sending or delivering mifepristone and misoprostol typically will lack complete knowledge of how the recipients intend to use them and whether that use is unlawful under relevant law."[36] That's another way of saying that the OLC's fictional Comstock Act requires information that does not exist, rendering it unenforceable.

In its effort to comply with President Biden's instruction to broaden access to abortion drugs, the OLC opinion neither mentions its more important obligation to adhere to the statute's plain meaning nor identifies a single principle or canon that should guide interpretation of the statute. Nor did it identify any textual qualification that would alter the straightforward application of that text. The OLC opinion describes a statute that reflects the Biden administration's political objectives, not the statute Congress enacted.

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[35] *Id*. at 1 (emphasis added).
[36] *Id*. at 17.

If Congress wanted to restrict application of the Comstock Act only to situations involving anticipated unlawful use, it would have said so. In fact, it did say so in other statutory provisions. Section 1 of the original Comstock Act, for example, prohibited "any article whatever…for causing *unlawful* abortion" in any place "within the exclusive jurisdiction of the United States." An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, § 1 17 Stat. 598 (1873). That is the very unlawful-use limitation that the OLC wants to be read into Section 2. The Supreme Court, however, has held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See also Riegel v. Medtronic, Inc.*, 522 U.S. 312, 327 (2008) (When assessing two different clauses in the same statute to discern whether the Food, Drug, and Cosmetic Act's wording was intended to pre-empt state law for both drugs and medical devices, the court wrote: "It did not…but instead wrote a pre-emption clause that applies only to medical devices."). In other words, including "unlawful" in § 1 turns its absence from § 2 into an exclusion.

The Supreme Court has held that the same principle applies between separate, but closely related, statutes. *See Sullivan v. Stroop*, 496 U.S. 478 (1990). The Tarriff Act prohibits "importing into the United States from any foreign country . . . any drug or medicine or any article whatever for causing *unlawful* abortion." 19 U.S.C.

§ 1905(a) (emphasis added). Again, the presence of the unlawful-use limitation in this statute combined with its absence from the Comstock Act demonstrates that Congress knows how to include such a limitation and chose not to do so. *See also Alliance for Hippocratic Medicine v. U.S. Food and Drug administration*, 78 F.4th 210, 269-70 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part).

Congress has recodified the federal criminal code since enacting the Comstock Act but has never repealed or even diluted it. In 1948, for example, Congress repealed § 1, which contained the limitation to "unlawful" abortion, but kept § 2, which does not. In addition, Congress has considered, but never adopted, amendments to the Comstock Act that would bring its text in line the Biden OLC's interpretation. In 1978, for example, Congress considered but did not adopt an amendment to the Comstock act that would limit its application to drugs or things "intended by the [sender]…to be used to produce illegal abortion."[37] Even suggesting such a change would make no sense if, as the OLC opinion today claims, the Comstock Act already contained such a limitation.

Finally, the OLC opinion fails even on its own fictional terms. According to the OLC's preferred interpretation of the Comstock Act, whether mailing abortion drugs is permissible depends on whether their intended use is unlawful as defined by state law. In *Bours v. United States*, 229 F. 960, 964 (7th Cir., 1915), which the OLC opinion cites, however, the Seventh Circuit held otherwise. The court held that, in applying

[37] Report of the Subcommittee on Criminal Justice on Recodification of Federal Criminal Law, 95th Cong., 39–42 (Comm. Print 1978).

the Comstock Act "to an alleged offensive use of the mails . . . it is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded. So the word 'abortion' in the national statute must be taken in its general medical sense." *Bours*, 229 F. at 964. The prohibition on using the mail to deliver abortion drugs, therefore, is not conditioned on the intent of the sender, the anticipated use by the recipient, or the legality of abortion in a particular state.

Neither pretending that the Comstock Act does not apply to abortion drugs at all nor adopting fictional statutory constructions that contradict the Comstock Act's plain text can allow a court to avoid its obvious and straightforward application to mifepristone today.

III. The FDA's Action Dropping the In-Person Requirement for Obtaining Mifepristone is Undermining Louisiana's Authority to Enforce its Laws.

The FDA's removal of the in-person dispensing requirement for mifepristone violated the Comstock Act and, therefore, is unlawful under the APA, as "not in accordance with law." 5 U.S.C. § 706(2)(A). It not only authorizes what the Comstock Act prohibits but leads directly, perhaps intentionally, to the increasingly widespread violation of Louisiana law, directly undermining Louisiana's authority to enforce its laws prohibiting abortion.

Ironically, this would still be true even if the Comstock Act said what the OLC opinion pretends it does and prohibited only using the mail to send abortion drugs that the sender knows will be used unlawfully. As noted above, President Biden

expressly called for efforts to make abortion drugs available nationwide and, as Louisiana has documented in its own filings in this case, abortion providers are aggressively responding, even targeting states that they know prohibit abortion drugs.

Further evidence that this is part of a well-organized scheme to undermine and defeat pro-life states' ability to enforce their own laws is the development and use of so-called abortion "shield" laws. These are state laws enacted with the express purpose of protecting abortion activists who intentionally violate the laws of pro-life states from liability or those states' law enforcement efforts. The three law professors who developed the theory underlying these laws write that they "seek to protect abortion providers, helpers, and seekers in states where abortion remains legal from legal attacks taken by antiabortion state actors."[38] This way, from their homebase in a pro-abortion state, abortion activists can use the mail to send abortion drugs into pro-life states. In other words, they violate federal law as a means of violating state law.[39]

When it overruled *Roe v. Wade*, the Supreme Court acknowledged that that decision had been "egregiously wrong from the start." *Dobbs*, 597 U.S. at 231. In

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[38] David S. Cohen et al., *Abortion Shield Laws*, 2 NEJM Evidence (Mar. 28, 2023), https://evidence.nejm.org/doi/full/10.1056/EVIDra2200280.

[39] For more analysis of abortion shield laws, including their constitutional implications and distorting effects on interstate comity and the practice of medicine, *see* Thomas Jipping, *Abortion "Shield" Laws Undermine Interstate Comity and Medical Practice and Raise Constitutional Questions*, Heritage Found. Legal Mem. No. 366, Dec. 30, 2024.

delegating certain powers to the federal government and reserving the rest to the states, the Constitution maintained the states' ability to enforce criminal laws, including those prohibiting abortion. This division of authority, and the states' ability to actually exercise their authority, is one of the most important structural limitations on government power that help protect our liberty. Since 2022, some states have exercised that authority to expressly allow abortion. Nearly half the states, however, seek to exercise their authority differently, to protect human beings in the womb and preserve the sanctity and dignity of human life. The FDA's longstanding requirement that abortion drugs be obtained in-person, therefore, not only protected the health of women but was consistent with efforts by states like Louisiana to keep abortion drugs out. Abandoning that requirement predictably did the opposite, facilitating the violation of state law and undermining states' authority.

CONCLUSION

For the forgoing reasons, this Court should deny the Applicant's request to vacate the Fifth Circuit's stay.

Respectfully submitted,

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