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Abstract

As the regulation of abortion availability returned to the States, many have grappled with so-called trigger laws: dormant laws that were set to take effect to restrict or ensure access to abortion should constitutional protection be revoked. While the federal government has no true trigger law, it does have long-unenforced laws prohibiting the mailing of "[e]very article or thing designed, adapted, or intended for producing abortion." 18 U.S.C. § 1461 is an old law, and it has not been enforced for at least fifty years.

But the law's potential effect on the growing practice of mail-distribution of chemical abortion pills has not been fully explored. While the law's application has already begun influencing litigation, this Article is the first scholarly article to explore the textual meaning of § 1461. This Article examines the history of the statute before applying textualist tools of statutory interpretation to conclude that the clear meaning of § 1461 prohibits the mailing of modern abortifacients. It also explores, but ultimately rejects, the primary alternative interpretation and the potential obstacle posed by the statute's age and nonenforcement.

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I. INTRODUCTION

Chemical drug-induced abortion faced upheaval following *Dobbs v. Jackson Women's Health Organization*, which held that there is no constitutional right to abortion.[1] Before *Dobbs*, the Food & Drug Administration approved the usage of chemical abortion drugs and made them accessible by mail.[2] Perhaps because the caselaw then still affirmed a constitutional abortion right, the FDA apparently never considered that the distribution of chemical abortion drugs by mail might violate longstanding federal statutes. But it does. Under 18 U.S.C. § 1461, "[e]very article or thing designed, adapted, or intended for producing abortion, . . . is declared to be nonmailable matter."[3]

18 U.S.C. § 1461 is old, with roots in the civil war era, and has gone unenforced for decades. While chemical abortion drugs remain available through the mail as of this writing, their future is uncertain due to the conflict posed by § 1461. The conflict has prompted a federal lawsuit, legal commentary, and an opinion from the Office of Legal Counsel.[4]

This Article seeks to shed light on the textual meaning of § 1461. When interpreting statutes, courts have increasingly sought to decipher the text's "ordinary meaning."[5] So does this Article. It considers late-nineteenth-century understandings of the term "abortion" and intertextual usage of the terms "unlawful abortion," "knowingly," and "nonmailable." These factors show that the statute encompasses a broad prohibition on mailing any item "designed, adapted or intended" to produce *any* abortion, regardless of the

1. 597 U.S. 215, 229–31 (2022); Rachel M. Cohen, *The Coming Legal Battles of Post-Roe America*, VOX (Jun. 27, 2022) (https://www.vox.com/2022/6/27/23183835/roe-wade-abortion-pregnant-criminalize) (last accessed Dec. 13, 2023) ("With the rise of the internet, telehealth appointments, mail-order pharmacies, and drugs like mifepristone and misoprostol that people can acquire in advance of being pregnant, the questions around what it means to both provide and obtain an abortion have evolved considerably since the pre-*Roe* days.").

2. *See infra* Part II.C.

3. 18 U.S.C. § 1461.

4. *See* Plaintiffs' Brief in Support of Their Motion for Preliminary Injunction, All. for Hippocratic Med. v. FDA, Case No. 2:22-cv-00223-Z at *20–21 (N.D. Tex. Apr. 7, 2023); *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion*, OFFICE OF LEGAL COUNSEL, Slip Op., at 1 (Dec. 23, 2022), https://www.justice.gov/olc/opinion/file/1560596/download [hereinafter "OLC Opinion"]. As Part II.C explores, this federal lawsuit has prompted ongoing debates about the meaning of § 1461 and, in turn, has spurred tensions between local and state governments over efforts to enforce § 1461. *See* discussion *infra* notes 51–56. The lawsuit went up on appeal to the Fifth Circuit, *see* All. for Hippocratic Med. V. FDA, 78 F.4th 210 (5th Cir. 2023), and the Supreme Court recently granted a petition for certiorari. *See* All. for Hippocratic Med. v. FDA, No. 23-235 (U.S. Dec. 13, 2023).

5. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 60 (2d ed. 2013) ("[T]extualism has had an extraordinary influence on how federal courts approach questions of statutory interpretation. When the Court finds the text to be clear in context, it now routinely enforces the statute as written."); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–38 (Amy Gutmann ed., 1997).

sender's intent. So long as the sender, carrier, or recipient knows that the item mailed is an abortifacient, the statute imposes criminal penalties.[6]

Part I discusses statutory history, including § 1461's enactment, amendments, and current role in ongoing debates. Part II extracts a clear meaning from the statute's text and context. Part III briefly shows that the statute's age and nonenforcement pose no obstacle to its application today.

II. THE LEGAL HISTORY OF 18 U.S.C. § 1461

Before determining § 1461's ordinary meaning, it is worth examining its legal history—how the law acquired its present form. And there is a lot of legal history to unearth. Section 1461 has been amended, recodified, or reenacted multiple times since its inception in 1873.[7] This Part explores that history.

A. The Comstock Act's Motivation and Passage

Section 1461 can trace its statutory lineage to the Civil War. Its currently contested provisions on the mailing of abortifacients grew out of bans on obscene literature. Congress first banned obscene books and publications in 1865 out of concern "about obscene materials being sent to Union troops."[8] In that incarnation, the statute "merely legitimated the Postmaster General's removal of materials considered obscene from mail addressed to soldiers during the Civil War."[9] It covered only printed materials, not abortifacients, contraceptives, or other articles.

In the late 1800s, a collective of anti-vice crusaders and organizations began an aggressive campaign against "obscene materials."[10] Leading the group was the zealous anti-vice activist, Anthony Comstock—a "Congregationalist who inspired the foundation of the New York Society for the Suppression of Vice in 1873 and the Watch and Ward Society of Boston in 1876 and who inspired George Bernard Shaw to use the opprobrious word 'comstockery.'"[11] Fearing that society had become inundated by "salacious" and immoral

6. *See infra* Part II.C.

7. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 70 n.19 (1983).

8. Margaret 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, 746 (1992) (citing Post Office Act, ch. 89, § 16, 13 Stat. 504, 507 (1865)).

9. *Id.* This pre-existing power is distinct from the criminal enforcement of the statute, and its exercise and enforcement are entirely within the discretion of the Postmaster General, separate from the charging decision of a prosecutor. James Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 UCLA L. REV. 44, 46 (1961).

10. Blanchard, *supra* note 7, at 745–47.

11. Poe v. Ullman, 367 U.S. 497, 520 n.10 (1961); *see also id.* at 745.

appetites, Comstock, with the New York state government's approval, formed the Committee for the Suppression of Vice.[12]

Under pressure, Congress substantially re-wrote the anti-vice law, passing "An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," soon also known as the Comstock Act.[13] This re-write vastly widened the law's scope. It now also banned the mailing of "any article or thing designed or intended for the prevention of conception or procuring of abortion."[14] Section 1 prohibited selling, publishing, exhibiting, giving away, or even *possessing* these articles.[15] Under § 2, none of the listed items could "be carried in the mail, and any person who shall knowingly [mail obscene] articles or things . . . shall be deemed guilty of a misdemeanor."[16] Sections 1 and 2 differed, however, in that § 1 applied to "any drug or medicine, or any article whatever, for the prevention of conception, or for causing *unlawful* abortion."[17] Section 2 omitted the word "unlawful." Both sections provided for criminal penalties including hefty fines, prison, and hard labor for up to ten years.[18] In less than a year, the new law had resulted in fifty-five arrests and twenty convictions, with no signs of slowing down.[19]

B. Recodification and Amendments

"The original prohibition was recodified and reenacted on a number of occasions, but its thrust remained the same–'to prevent the mails from being used to corrupt the public morals.'"[20] As early as 1876, the statute was restructured to eliminate a loophole that held materials related to abortion and contraceptives to a different standard than written obscenities.[21] The new

12. DONNA DENNIS, LICENTIOUS GOTHAM 238 (1st ed., 2009); Blanchard, *supra* note 7, at 745.

13. Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598, 599 (1873). "The driving force behind [the Act] was Anthony Comstock, who in his diary referred to the 1873 Act as 'his law.'" *Bolger*, 463 U.S. at 70 n.19 (citing Paul, *supra* note 9, at 57).

14. DENNIS, *supra* note 11, at 266 ("One of the most significant changes from prior federal law was the introduction of a new prohibition on mailing articles 'for the prevention of conception or procuring of abortion.'").

15. Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598, 599 (1873).

16. *Id.*

17. *Id.* (emphasis added).

18. *Id.*

19. Blanchard, *supra* note 7, at 746; DENNIS, *supra* note 11, at 275 ("By 1900 the New York Society for the Suppression of Vice could proudly report the conviction and sentencing of hundreds of individuals for obscenity-related crimes.").

20. *Bolger*, 463 U.S. at 70 n.19; S. Rep. No. 113, 84th Cong., 1st Sess., 1 (1955).

21. Blanchard, *supra* note 7, at 746.

language grouped together "[e]very obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion."[22] It also listed "[e]very 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 the prevention of conception or producing abortion, or for any indecent or immoral purpose."[23] All of these were "declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."[24]

This law remained with only minor changes until the 1940s, when it was incorporated into its modern place in the United States Code—Title 18, § 1461.[25] Its statutory neighbor, 18 U.S.C. § 1462, applied penalties similar to those under § 1461 for those who "knowingly used any express company or other common carrier" to ship "in interstate or foreign commerce . . . any drug, medicine, article, or thing designed, adapted, or intended for producing abortion."[26] But not all of the Comstock Act made it into Title 18. Section 1 of the former law, which prohibited possession and distribution of "any drug or medicine, or any article whatever, for the prevention of conception, or for causing *unlawful* abortion," was never incorporated.[27]

In 1945, during the overhaul and recodification of the United States Criminal Code, a House committee included in the statutory record a "Historical and Revision Note" (the "Note"). Historical and Revision Notes generally are included "only in positive law titles and specify the laws that formed the basis of sections that were included in the title when the title was first enacted into positive law."[28] They are often used interchangeably with Editorial Notes, which "are prepared by the Code editors to assist users of the Code. They provide information about the section's source, derivation, history, references, translations, effectiveness and applicability, codification, defined terms, prospective amendments, and related matters."[29] The Note following § 1461 "invited" Congress's attention to circuit court opinions in cases like *Youngs*

22. *See* Act of July 12, 1876, an Amendment to the Comstock Act, ch. 186, § 1, 19 Stat. 90 (1876).
23. *Id.*
24. *Id.*
25. Act of June 25, 1948, ch. 645, 62 Stat. 683, 768 (codified as 18 U.S.C. § 1461).
26. 18 U.S.C. § 1462.
27. Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598, 599 (1873) (emphasis added).
28. *Notes Generally*, *Detailed Guide to the United States Code Content and Features*, IV, OFFICE OF THE LAW REVISION COUNSEL, https://uscode.house.gov/detailed_guide.xhtml#notes_generally (last accessed Dec. 13, 2023).
29. *Id.* The commentative function of the Note in this case is more akin to that of an Editorial Note.

Rubber Corporation, Inc. v. C. I. Lee & Co., Inc., and *United States v. Nicholas*, observing that the word "adapted" had not been construed "literally."[30] According to the Note, the "literal" language "would seem to forbid the transportation by mail or common carrier of anything 'adapted,' in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose, 'even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately.'"[31]

In 1978, Congress considered and rejected an amendment to the statute that would have declared every "drug medicine, article, or thing intended by

30. *See* 18 U.S.C. § 1461 (Historical and Revision Note). The Note reads in full:

> The attention of Congress is invited to the following decisions of the Federal courts construing this section and section 1462 of this title.
> In *Youngs Rubber Corporation, Inc. v. C. I. Lee & Co., Inc.*, 45 F. 2d 103 (2d Cir. 1930) it was said that the word "adapted" as used in this section and in section 1462 of this title, the latter relating to importation and transportation of obscene matter, is not to be construed literally, the more reasonable interpretation being 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 illegal contraception or abortion or for indecent or immoral purposes." The court pointed out that, taken literally, the language of these sections would seem to forbid the transportation by mail or common carrier of anything "adapted," in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose, "even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately. Such a construction would prevent mailing to or by a physician of any drug or mechanical device 'adapted' for contraceptive or abortifacient uses, although the physician desired to use or to prescribe it for proper medical purposes. The 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. Section 334 [this section] forbids also the mailing of obscene books and writings; yet it has never been thought to bar from the mails medical writings sent to or by physicians for proper purposes, though of a character which would render them highly indecent if sent broadcast to all classes of persons." In *United States v. Nicholas*, 97 F. 2d 510 (2d Cir. 1938), ruling directly on this point, it was held that the importation or sending through the mails of contraceptive articles or publications is not forbidden absolutely, but only when such articles or publications are unlawfully employed. The same rule was followed in *Davis v. United States*, 62 F. 2d 473 (6th Cir. 1933), quoting the obiter opinion from *Youngs Rubber Corporation v. C. I. Lee & Co.*, *supra*, and holding that the intent of the person mailing a circular conveying information for preventing conception that the article described therein should be used for condemned purposes was necessary for a conviction; also that this section must be given a reasonable construction. (See also *United States v. One Package*, 86 F. 2d 737 (3d Cir. 1938)).

Id. (parentheses in original).

31. *Id.* (citing *Youngs Rubber*, 45 F.2d at 403).

the offender under subsection (b) of this section used to produce an *illegal* abortion" unmailable.[32] Summarizing the proposed changes, the Subcommittee on Criminal Justice noted that "under current law, the offender commits an offense whenever he 'knowingly' mails any of the designated abortion materials. [The proposed amendment] requires proof that the offender specifically intended that the mailed materials be used to produce an illegal abortion."[33] The Subcommittee also remarked that "[i]t is the subcommittee's intent that in order to be convicted under this provision a defendant must have knowledge of both the content of the material and its intended purpose."[34] The proposed amendment would have made an identical change to § 1462.[35] But Congress did not adopt H.R. 13959, and § 1461 remained unchanged in its application to "abortion" rather than "illegal abortion."

Just a few years earlier, Congress had amended the statute to strike out a different category of unmailable material—contraceptives.[36] Where the statute once provided a blanket ban on items "intended for preventing conception," it no longer mentioned contraceptives.[37] This amendment came after the Supreme Court in *Griswold v. Connecticut* found a constitutional right to use contraceptives.[38] Indeed, Congress's 1971 revision to the Comstock Act was part of a larger effort that amended many statutes restricting access to contraceptives.[39]

But Congress never loosened the statute's restrictions on mailing abortion-producing materials—not even after *Roe* or *Casey*—and rejected both an amendment limiting the restriction to unlawful abortifacients, and an amendment removing abortifacients from the statute entirely.[40] True, *Roe* likely rendered the abortion-related provisions unenforceable, which is probably why no one has tried to enforce them since *Roe* was decided in 1973, but while Congress chose to remove contraceptives from the Act's coverage, it did the opposite with abortifacients.

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32. REP. OF THE SUBCOMM. ON CRIM. JUST., 95TH CONG., REP. ON RECODIFICATION OF FED. CRIM. LAW 40, H.R. REP. No. 95–29, pt. 3, at 42 (Comm. Print 1978) (emphasis added).

33. *Id.*

34. *Id.* at 39.

35. *Id.* at 42 ("Thus, revised title 18 changes current law by requiring proof that the relevant material or object to be used to produce an illegal abortion and that the offender specifically intended the material or object to be so used. As in the two previous sections, an abortion is 'illegal' if it is contrary to the law of the state in which the abortion is performed.").

36. *See* Pub. L. 91–662, 62 Stat. 768 (1971).

37. *Id.*

38. 381 U.S. 479 (1965) (upholding the right of married persons to obtain contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (same, for unmarried persons).

39. *See* Pub. L. 91–662, 62 Stat. 768 (1971).

40. *See* REP. OF THE SUBCOMM. ON CRIM. JUST., 95TH CONG., *supra* note 31, at 42.

C. Current Statute and Controversy

The provision applicable to abortion—worth quoting in full—now reads as follows:

> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; 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, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and
>
> Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—
>
> 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 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 fined under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.[41]

While the law's history matters—and reinforces this author's view of the statute's meaning—it is the current version that motivates this Article's analysis. Treatment of § 1461 in academic literature has been sorely lacking. The statute may have sat dormant for decades, thanks to *Roe* and *Casey*,[42] but *Dobbs* has made it relevant again.[43] There has been no criminal enforcement of the statute yet.[44] However, the possibility that the statute bars distribution of Mifepristone and other drugs prescribed to produce abortions now hangs in the air.

Over the last twenty years, the Food & Drug Administration has progressively loosened restrictions on chemical abortion drugs. While such drugs were, as recently as three years ago, described as "one of the FDA's most restricted drugs,"[45] current FDA guidelines have relaxed to the point that abortion pills can be acquired without even leaving one's home. In 2021, during the COVID-19 pandemic, the FDA issued letters to the distributors of the chemical abortion drug Mifeprex and its generic equivalent Mifepristone, stating that it intended to "exercise enforcement discretion" and allow "dispensing of mifepristone through the mail . . . or through a mail-order pharmacy when such dispensing is done under the supervision of a certified prescriber."[46] In January 2023, the FDA made mail-order abortifacients

41. 18 U.S.C. § 1461.

42. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

43. One of the first public discussions of § 1461's renewed relevance post-*Dobbs* was a brief article written by Ed Whelan. *See* Ed Whelan, *Federal Laws Bar Mailing and Interstate Carriage of Abortion Drugs*, NAT'L REV. (June 27, 2022).

44. A collective of State Attorneys General have threatened to enforce the statute against multiple pharmacies. *See* Andrew Bailey, Letter from State Att'ys Gen. to CVS, regarding Distribution of Abortion Drugs, Off. of the Att'y Gen. of Mo. (Feb. 1, 2023); Andrew Bailey, Letter from State Att'ys Gen. to Walgreens regarding Distribution of Abortion Drugs, Off. of the Att'y Gen. of Mo. (Feb. 1, 2023). But so far, there have been no indictments, charges, or other formal enforcement under § 1461.

45. *The abortion pill is one of the FDA's most restricted drugs*, USA TODAY (July 10, 2020), https://www.usatoday.com/videos/news/health/2020/07/10/abortion-pill-one-fdas-most-restricted-drugs/5415602002/ (last accessed Dec. 13, 2023).

46. Letter from FDA to Am. Coll. of Obstetricians & Gynecologists and Soc'y for Maternal-Fetal Med. about Mifepristone REMS 2 (Apr. 12, 2021); Supplemental Approval Letter from FDA to Danco Lab'ys (May 14, 2021).

permanently available.[47]

This wrought a monumental change in the drug's availability. Under 21 U.S.C. § 355-1, the FDA is required to develop and enforce Risk Evaluation and Mitigation Strategies ("REMS") to "ensure that the benefits of the drug outweigh the risks of the drug."[48] Until 2021, the REMS controlling Mifepristone had restricted its distribution to "certain health care settings, specifically clinics, medical offices, and hospitals . . . by or under the supervision of a specifically certified prescriber."[49] By the end of 2022, barely one year after those restrictions were removed, more than fifty percent of abortions were performed using chemical abortion drugs.[50]

In November 2022, a lawsuit challenging the FDA's approval and distribution scheme for these drugs cited § 1461.[51] The suit argued that "[t]The FDA's approved distribution system for mifepristone neither acknowledged nor attempted to comply with the federal laws that prohibit the upstream distribution of these drugs—from the manufacturer to the abortionists—by mail, express company, or common carrier."[52] In December 2022, the Office of Legal Counsel issued an advisory opinion to the Postmaster General urging a far narrower interpretation of the statute.[53] The FDA cited that opinion in its response to the lawsuit, but the court agreed with the plaintiff, quoting from § 1461 to show why distribution of Mifepristone could not be approved.[54] In the court's view, it was "indisputable that chemical abortion drugs are both 'drug[s]' and are 'for producing abortion.' Therefore, federal criminal law declares they are 'nonmailable.'"[55] The judge stayed the drug's approval and distribution, but the Supreme Court issued a stay of the district court's stay

47. FDA, *Risk Evaluation and Mitigation Strategy (Rems) Single Shared System for Mifepristone 200 Mg* (Jan. 3, 2023).

48. *See also Approval with restrictions to assure safe use*, 21 C.F.R. § 314.520. ("(a) If FDA concludes that a drug product shown to be effective can be safely used only if distribution or use is restricted, FDA will require such postmarketing restrictions as are needed to assure safe use of the drug product, such as: (1) Distribution restricted to certain facilities or physicians with special training or experience. . . .").

49. *NDA 20-687 MIFEPREX (mifepristone) Tablets, 200 mg REMS*, FDA (June 8, 2011) (FDA also required that "MIFEPREX will not be distributed to or dispensed through retail pharmacies."). The REMS controlling the distribution of Mifeprex also required that it only be provided by certified healthcare providers and dispensed to patients with documentation of safe use conditions.

50. Rachel Jones, et al., *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INSTITUTE (Dec. 1, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions (last accessed Dec. 13, 2023).

51. Plaintiffs' Brief in Support of Their Motion for Preliminary Injunction, All. for Hippocratic Med. v. FDA, 2:22-cv-223-Z (N.D. Tex. Apr. 7, 2023).

52. *Id.* at *9.

53. *See* OLC Opinion at 1–2, 14.

54. All. for Hippocratic Med. v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *17 (N.D. Tex. Apr. 7, 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

55. *See id.* at *17.

during the pendency of the appeal. On appeal, the Fifth Circuit did not reach the issue of whether § 1461 prohibited mailing of mifepristone, but Judge Ho wrote in his concurrence that "[t]he FDA's 2021 revisions also violate the Comstock Act."[56] That litigation continues as of this writing, with § 1461 as a central issue. Meanwhile, in New Mexico, attempts to pass local ordinances enforcing § 1461 have been met with statewide legislation and litigation.[57] These and other ongoing disputes demonstrate the need for a ground-up interpretation of § 1461, untrammeled by concerns over standing and civil procedure that might restrict a court from ruling on the issue.

III. TEXTUAL ANALYSIS

This Part examines the textual and contextual evidence of § 1461's ordinary meaning as it applies to the mailing of chemical abortion drugs. "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'"[58] Here, all evidence, including terms, definitions, contextual usage, and comparison to other statutes, supports a broad reading that would prohibit mailing chemical abortion drugs regardless of the legality of the intended abortion. This Part also examines the Biden administration's proposed alternative interpretation, under which the statute prohibits mailing abortifacients only when the sender intends that they will be used illegally. As this Part concludes, there is no adequate support for that reading, which contradicts the text's plain meaning.[59]

A. Historical Linguistic Meaning

The ordinary meaning of statutory terms is crucial. "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[60] A good starting point for a term's ordinary meaning

56. All. for Hippocratic Med. v. FDA, 78 F.4th 210, 257 (5th Cir. 2023) (Ho, J., concurring).

57. Blake Ovard, *Governor, AG sued over abortion ordinances*, NEWS-SUN (Apr. 19, 2022), https://www.hobbsnews.com/2023/04/19/gov-ag-sued-over-abortion-ordinances/#:~:text=The%20lawsuit%20centers%20around%20House,Hobbs%2C%20Eunice%20and%20Lea%20County (last accessed Dec. 13, 2023); New Mexico v. Bd. of Cnty. Comm. for Lea Cnty., No. S-1-SC-39742 (N. Mex. 2023).

58. Lawson v. FMR LLC, 571 U.S. 429, 440 (2014) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

59. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L. J. 788, 793 (2018) ("[M]ost judges begin their interpretive inquiry with the words of a statute – and even end there if they find the meaning of those words to be 'plain.'").

60. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56–58 (2012).

is its definition.[61] "Abortion," as it appears in § 1461, was a well-defined term at the time of enactment. Dictionaries covering the years from the statute's enactment to its most recent amendments agree that "abortion" was an inclusive term, referring to any "miscarriage of birth"[62] and pre-viability termination of the fetus.[63] Some dictionaries explicitly include both the criminal act and the delivery of the miscarriage in the same sense of the word, rather than as separate definitions, reinforcing the term's breadth.[64] And the second edition of Black's Law Dictionary, published in 1910, notes that the term "abortion" is "sometimes loosely used for the offense of procuring a premature delivery; but strictly, the early delivering is the abortion."[65] The meaning of abortion also remained consistent while Congress amended and recodified § 1461—the definition was unchanged in dictionaries published around the time of its most recent substantive amendments.[66] While slight variations and the limitations of dictionary usage prevent a precise and conclusive definition of the term in context, a "general sense of the word"[67] emerges: as far as

61. Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1442 (1994). The debate over the exact weight to be afforded to dictionaries is far larger than this Article can address. *See* John Manning, *The New Purposivism*, 4 SUP. CT. REV. 113, 177–78 (2011) ("Even the casual student of interpretation, for example, knows that dictionaries have their limits. However, as many scholars note, dictionary usage is on the rise in courts along with an emphasis on textualism."); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress*: *The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L REV 77, 86 (2010). For now, a brief survey of dictionary definitions remains a good place to start.

62. *Abortion,* OXFORD ENGLISH DICTIONARY (1911) ("Miscarriage of Birth" or "the procuring of this"); *Abortion*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("The expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life. The unlawful destruction, or the bringing forth prematurely, of the human fetus before natural time of birth.").

63. *Abortion*, BOUVIER'S LAW DICTIONARY (1st ed. 1883) ("The expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life."); *Abortion*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("The miscarriage or premature delivery of a women who is quick with child. When this is brought about with a malicious design, or for an unlawful purpose, it is a crime in law. . . Sometimes loosely used for the offense of procuring a premature delivery; but strictly, the early delivering is the abortion; causing or procuring the abortion is the full name of the offense.").

64. *Abortion,* BLACK'S LAW DICTIONARY (3d ed. 1933) ("The expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life. The unlawful destruction, or the bringing forth prematurely, of the human fetus before natural time of birth.").

65. *Abortion,* BLACK'S LAW DICTIONARY (2d ed. 1910).

66. *Abortion,* BLACK'S LAW DICTIONARY (4th ed. 1968) ("The expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life. The unlawful destruction, or the bringing forth prematurely, of the human fetus before natural time of birth."); *Abortion*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The act of giving untimely birth to offspring, premature delivery, miscarriage; the procuring of premature delivery so as to destroy offspring. (In Med. abortion is limited to a delivery so premature that the offspring cannot live, i.e. in the case of the human fœtus before the sixth month.)").

67. Lawrence Solum, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 55 (1993).

dictionaries can show, "abortion" generally denotes the early termination of a pregnancy.

The historical context of § 1461 confirms this conclusion.[68] State and federal law at the time of the Comstock Act's passage, and for decades afterward, reflected a broad understanding of the term "abortion." From 1850 until at least 1919, every state to join the Union criminalized abortion at all stages of pregnancy, and "[b]y the end of the 1950s, . . . statutes in all but four States and the District of Columbia criminalized abortion '*however and whenever performed*, unless done to save or preserve the life of the mother.'"[69] Many of these states also passed laws similar to the federal Comstock Act.[70] This backdrop caused the Seventh Circuit, in the 1915 case *Bours v. United States*, to remark that "the word 'abortion' in the national statute must be taken in its general medical sense. Its inclusion in the statute governing the use of the mails indicates a national policy of discountenancing abortion as inimical to the national life."[71]

Looking elsewhere in the United States Code, we find more evidence that "[e]very article or thing designed, adapted, or intended for producing abortion" should be read according to its literal terms. As noted above, the originally enacted Comstock Act contained two provisions affecting abortion. One specified only "unlawful" abortion, but the surviving provision did not. In fact, there are multiple comparators to the Comstock Act in this regard. At the time of the Comstock Act's codification in 1948, multiple state prohibitions on abortion specified that they applied only to "unlawful" abortions.[72] And the Tariff Act of 1930 (enacted more than a decade before § 1461's codification) prohibits "importing into the United States from any foreign country . . . any drug or medicine or any article whatever for causing unlawful

68. Note, *Looking It Up: Dictionaries and Statutory Interpretation, supra* note 59, at 1452 (proper interpretation requires "employing dictionaries to identify the general outlines of word meanings and then relying on contextual arguments from text, structure, history, or policy to determine which meaning is appropriate").

69. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252–53 (2022) (emphasis added) (quoting Roe v. Wade, 410 U.S. 113, 139 (1973). For a discussion of the states which did not criminalize abortions totally, and how they effect the interpretation of § 1461, see *infra* note 78 and accompanying text.

70. *See* Margaret Blanchard, *supra* note 7, at 751 n.53 (1992) (discussing a New York state Comstock Law); Lamb v. State, 10 A. 208 (Md. 1887) (discussing a Maryland state Comstock Law); Poe v. Ullman, 367 U.S. 497, 520 n.10 (1961) (discussing a Connecticut state Comstock law).

71. 229 F. 960, 964 (7th Cir. 1915). That case rejected an indictment under the Comstock Act's prohibition on written materials giving information "where or by whom any act or operation of any kind, for the procuring or producing of abortion will be done or performed." *Id.* The indictment was deemed insufficient because it did not contain sufficient evidence that the letter ensured an "abortion will be done or performed." *Id.*

72. Those states were Massachusetts, New Jersey, and Pennsylvania. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 n.35 (2022) (quoting Roe v. Wade, 410 U.S. 113, 139 (1973)).

abortion."[73] "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[74] Given the multiple examples of Congress choosing either to include or eliminate language regarding "unlawful" abortions, courts should treat § 1461's omission as intentional.[75]

The statute has a well-defined mens rea requirement. It prohibits "knowingly" mailing "every article or thing designed, adapted, or intended for producing abortion."[76] "'Knowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness."[77] "Knowingly" appears three times in the statute:

> 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 for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof. . .[78]

Each of the three instances criminalizes a different interaction with nonmailable materials—"whoever knowingly uses . . . knowing causes . . . or knowingly takes . . . ." So the most logical interpretation is that "knowingly" modifies both the interaction and the criteria for nonmailable matter laid out in the provision's first half. A fair, if awkward, restatement would be: "whoever, with awareness that what he is mailing is any article or thing designed, adapted or intended for producing abortion, uses the mails . . . ."

The language "designed, adapted or intended" clarifies exactly which materials are prohibited by the statute. There is no serious dispute that Mifepristone is an "article or thing designed, adapted or intended for producing

73. 19 U.S.C. § 1305(a) (emphasis added).

74. Bittner v. United States, 598 U.S. 85, 95 (2023).

75. *See, e.g.*, Rotkiske v. Klemm, 140 S. Ct. 355, 361 (2019) ("A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision."); Kimbrough v. United States, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms.").

76. 18 U.S.C. § 1461.

77. Arthur Anderson LLP v. United States, 544 U.S. 696, 705 (2005) (citing BLACK'S LAW DICTIONARY 888 (8th ed. 2004); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252-1253 (1993); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 725 (1981)).

78. 18 U.S.C. § 1461.

abortion." Danco advertises the drug as an "option for ending early pregnancy."[79] And its distribution was approved by the FDA for that exact purpose.[80] While a given shipment of pills might be susceptible of, or even intended for, non-abortive uses, that does not change what the items themselves were "designed" for.[81] The statute's use of the disjunctive "or" means that the mailed material, to be covered, need only meet one of the descriptors "designed, adapted, or intended."[82]

But the language also limits the statute's reach: each of these descriptors are past participles. An item is not prohibited by the statute merely because it is adapt-*able* to produce an abortion. The adaption, design, or intention at issue necessarily occurs before shipment. This phrasing also sweeps in items that were not originally designed for producing abortions but have since been adapted or intended to produce abortion. For example, Misoprostol, a drug that has multiple uses, but is also commonly prescribed alongside Mifepristone to produce an abortion, may not have been designed by its manufacturer for producing an abortion. But if a shipment of Misoprostol is adapted or intended to produce an abortion (perhaps by being shipped alongside a prescription of Mifepristone), it is prohibited. The statute's phrasing does not cover just any item that could hypothetically be adapted to produce an abortion, but as applied to Mifepristone, the combined meanings of "abortion" and "knowingly" and the "designed" language are incontrovertible.[83] The statute's ordinary meaning, understood in context, covers all mail distribution of chemical abortion drugs like Mifepristone.

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79. Mifeprex, DANCO (https://www.earlyoptionpill.com/) (last accessed Dec. 13, 2023); *see* Rachel Zimmerman, *Ads for Controversial Abortion Pill Set to Appear in National Magazines*, WALL STREET JOURNAL (May 23, 2001).

80. Letter to American College of Obstetricians & Gynecologists and Society for Maternal-Fetal Medicine about Mifepristone REMS 2, *supra* note 45; Supplemental Approval Letter to Danco Laborties, FDA (May 14, 2021).

81. No category of nonmailable matter prohibited by the Postal Service excepts nonmailable matter intended for purposes other than the nonmailable item's usual purpose. *See* USPS DOMESTIC MAIL MANUAL, § 136; *Prohibited, Restricted, and Non-Mailable Items*, UNITED STATES POSTAL INSPECTION SERVICE (July 27, 2022), https://www.uspis.gov/news/scam-article/prohibited-restricted-and-non-mailable-items.

82. Loughrin v. United States, 573 U.S. 351, 357 (2014) ("As we have recognized, ['or's'] 'ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.'" (quoting United States v. Woods, 571 U.S. 31, 45–46 (2013))); Garcia v. United States, 469 U.S. 70, 73 (1984) ("The three classes of property protected by § 2114 are each separated by the conjunction 'or.' Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."); Reiter v. Sonoton Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.").

83. This analysis would also apply to common medical implements such as scalpels and curettes, which can be used to produce abortion, but would not be prohibited by this statute in most cases, unless they were intended or modified in some way to produce an abortion.

In fact, chemical abortion drugs may be unmailable under multiple provisions of § 1461. The paragraph following the "designed, adapted or intended" language covers "[e]very 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."[84] Even if it was not already clear that "designed, adapted or intended" covers chemical abortion drugs capable of other legitimate uses, this second paragraph clearly does. Mifeprex, the generic version of Mifepristone, is advertised as "the early option pill," and "[a] safe and effective option for ending early pregnancy."[85] This is obviously an "advertise[ment] or descri[ption] . . . calculated to lead another to use or apply it for producing abortion."[86] Therefore, under either the "designed, adapted or intended" standard or the "advertised or described" standard, chemical abortion drugs like Mifepristone must be considered nonmailable matter.

B. Narrower Alternative Interpretation

A narrower, alternative interpretation was outlined by the Justice Department's Office of Legal Counsel ("OLC").[87] On December 23, 2022, OLC issued a memorandum opinion to the Postmaster General concerning § 1461's effect on the mailing of chemical abortion drugs.[88] OLC opined that the statute "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."[89] This interpretation relies on the theory that Congress knew of, *and adopted as authoritative*, a consensus of narrow constructions for § 1461 when it re-enacted the statute.[90] OLC bases its "adopted consensus" argument on two pieces of evidence: the U.S. Post

84. 18 U.S.C. § 1461.

85. Mifeprex, DANCO, https://www.earlyoptionpill.com/ (last accessed Dec. 13, 2023).

86. 18 U.S.C. § 1461.

87. OLC Opinion at 1.

88. *Id.* OLC issued its opinion in response to the Postmaster General consistent with its practice of providing "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 JUST. (https://www.justice.gov/olc) (last visited Oct. 21, 2023); Memorandum for Christopher Schroeder, Assistant Att'y Gen., Off. of Legal Couns., from Thomas J. Marshall, Gen. Couns.l, U.S. Postal Serv., Re: Request for an Interpretation of 18 U.S.C. § 1461, OFFICE OF LEGAL COUNSEL at 1 (July 1, 2022).

89. OLC Opinion at 1–2.

90. *Id.* at 5–16 ("Over the course of the last century, the Judiciary, Congress, and USPS have all settled upon an understanding of the reach of section 1461 and the related provisions of the Comstock Act that is narrower than a literal reading might suggest."); *see also* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Office's acceptance of the narrow interpretation, and the Historical and Revision Note appended to § 1461 when it was re-codified in 1948.[91] These show, supposedly, that Congress was aware of, and ratified, the interpretation put forward in *Bours* and *Youngs Rubber*. OLC therefore "conclude[d] that Congress's repeated actions, 'taken against this background understanding in the legal and regulatory system,' ratified the judiciary's settled narrowing construction."[92] The "prior-construction canon" that OLC applies was articulated by Justice Scalia as follows: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction."[93] But nearly every step of analysis in OLC's contention is seriously flawed.

Evidence supporting Congress's adoption of the putative consensus is insubstantial. For a start, Post Office acceptance cannot controvert the statute's plain meaning.[94] In 1970, the Postmaster General opined in a letter to Congress that "the delivery by mail of contraceptive information or materials has by court decisions . . . been considered proper in cases where a lawful and permissive purpose is present."[95] That letter was contained in a report from the House of Representatives on the post-*Griswold* bill that would strike out the prohibition on contraceptives. But the report itself acknowledged that "[e]xisting statutes completely prohibit the importation, interstate transportation, and mailing of contraceptive materials."[96] OLC admits that the Post Office's proposed reading was "in tension with the text of the contraception provisions."[97] Yet OLC concluded that Congress somehow ratified this atextual interpretation. That conclusion defies the long-established principle of statutory construction that "when the meaning of the statute's terms is plain, our job is at an end."[98]

Furthermore, the Post Office's position, and any purported congressional ratification, did not reach abortion. When the Post Office stated its

91. OLC Opinion at 11–16 (citing 18 U.S.C. § 1461 (Historical and Revision Note)).

92. *Id.* at 11 (internal citation omitted) (quoting Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 536 (2015)).

93. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012).

94. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary [statutory] language must ordinarily be regarded as conclusive."); WILLIAM ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 35 (2016).

95. H.R. REP. NO. 91-1105, at 3–4 (1970).

96. *Id.* at 2.

97. OLC Opinion at 14 n.17.

98. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." (citation omitted)).

questionable interpretation of the Comstock Act*, Griswold* had been decided. But *Roe* had not. There is no evidence that the Post Office meant its construction to apply equally to abortion and contraception. In the years following *Roe*, there was no commentary or clarification from the Post Office on its interpretation. Much like how Congress's responses to those two decisions were different vis-à-vis amending § 1461,[99] the Post Office overtly changed its policies in reaction to *Griswold*, but not to *Roe*.[100]

The OLC's reliance on the Historical and Revision Note is likewise problematic, for three reasons. First, the Note is not law. It is non-binding legislative history, written by the compilers of the United States Code. Second, the cases cited by the Note are insufficient to establish the consensus necessary for Congressional adoption. Third, even if the Note had legal weight, it doesn't say what the OLC says it does. Indeed, a careful examination of the Note's contents reveals that the premise OLC draws is a reversal of the Note's only possible purpose.

The first of these weaknesses should be familiar to scholars of statutory interpretation. The persuasive value of legislative records and commentary is minimal. Legislative history is often unreliable and ill-suited for statutory interpretation, as it tends to show limited and often contradictory congressional intent.[101] And the § 1461 Note does not even reflect the intent of a member of Congress, a committee, or any other entity that shares in the vested legislative power of Article I. Rather, the § 1461 Note was "written by a staff of experts hired by Congress to revise the U.S. Code in the 1940s."[102] *At best*, it reflects the intent of non-congressional actors.[103] And even if that meant something for interpretive purposes, it is obviously overcome by the fact that

99. *See supra* notes 43–46 and accompanying text.

100. OLC suggests that the Food and Drug Administration Amendments Act of 2007, an overhaul of REMS system, was "consistent with the understanding that the Comstock Act does not categorically prohibit the covered modes of conveying abortion-inducing drugs." OLC Opinion at 14. This, even though the law makes no mention of § 1461, or any interpretation of any related statute. The claim that such an indirect, implied recognition, separated from the Post Office's interpretation by a thirty-seven-year gap and the relevant case law by almost eighty years, is a far-reaching stretch. That stretch will not suffice for "clearly expressed legislative intention" to accept an interpretation that is contradictory to the language of a statute. *See Consumer Product Safety Comm'n*, 447 U.S. at 108.

101. *See, e.g.*, John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000) (arguing that courts generally should not consult legislative history); SCALIA & GARNER, supra note 89, at 56 (rejecting "extrinsic sources such as legislative history or an assumption about the legal drafter's desires").

102. OLC Opinion at 12 n.14.

103. *See Notes Generally*, *Detailed Guide to the United States Code Content and Features*, IV, OFFICE OF THE LAW REVISION COUNSEL, https://uscode.house.gov/detailed_guide.xhtml#notes_generally (last accessed Dec. 13, 2023) ("For most titles, the Historical and Revision notes are the reviser's notes that were contained in the congressional committee report accompanying the codification bill that enacted the title.").

Congress itself considered an amendment to § 1461 that would have implemented this exact interpretation, but rejected it.[104] The Subcommittee's report for the proposed bill expressly acknowledged that the specific intent requirement was not "current law."[105] The Supreme Court has specifically acknowledged that "Revision Notes are not conclusive evidence of congressional intent,"[106] and has rejected the relevance of many Historical and Revision Notes, including a Note produced by the very Act that produced the § 1461 Note.[107] If there is any persuasive value to a historical note, it must be evaluated on a case-by-case basis, and not presumed to be controlling. Here, such an evaluation shows that the § 1461 Note has little persuasive value.

In fact, the § 1461 Note does not even purport to interpret the statute; it just summarizes caselaw. Many Historical and Revision Notes expressly defend a particular interpretation or denote its intended adoption.[108] But the § 1461 Note does not. It does not state that the law was meant to incorporate the cited decisions, nor that those decisions propose the statute's most natural reading. Instead, it "invited" the "attention of Congress" to the holdings.[109] This silence speaks volumes. While the Note's invitation might suffice to show that Congress was aware of the cases cited, it "does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress."[110] This Note's context provides no reason to think Congress approved of the interpretation it laid out.[111]

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104. REP. OF THE SUBCOMM. ON CRIM. JUST., 95TH CONG., REP. ON RECODIFICATION OF FED. CRIM. LAW 40 (Comm. Print 1978); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (rejecting an agency's interpretation of a statute that "Congress considered and rejected."); *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting) ("In the face of the unsuccessful legislative efforts . . . judges may not rewrite the law simply because of their own policy views.").

105. REP. OF THE SUBCOMM. ON CRIM. JUST., *supra* note 104, at 40 ("[U]nder current law, the offender commits an offense whenever he 'knowingly' mails any of the designated abortion materials. [The proposed amendment] requires proof that the offender specifically intended that the mailed materials be used to produce an illegal abortion.").

106. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831 n.4 (1989).

107. United States v. Wells, 519 U.S. 482, 497 (1997); 18 U.S.C. § 1014 (Historical and Revision Note); Act of June 25, 1948, ch. 645, 62 Stat. 683, 752 (codified as 18 U.S.C. § 1014). Furthermore, many instances of judicial reliance on such notes only arise when the meaning of the statute is already clear, or when there is other evidence of the statute's meaning. *See* Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 697–98 (2003); *Alfonzo-Larrain*, 490 U.S. at 832; Field v. Napolitano, 663 F.3d 505, 511 (1st Cir. 2011).

108. *See, e.g.*, 18 U.S.C. § 1404 (Historical and Revision Note) ("[T]he consolidation was without change of substance except as above indicated."); 28 U.S.C. § 1653 (Historical and Revision Note) ("Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship."); 28 U.S.C. § 1441 (Historical and Revision Note) ("The amendment made by this section shall apply with respect to claims in civil actions commenced in State courts on or after the date of the enactment of this section.").

109. 18 U.S.C. § 1461 (Historical and Revision Note).

110. *Wells*, 519 U.S. at 496–97.

111. SCALIA & GARNER, *supra* note 89, at 326.

Second, while the Note discusses a series of cases interpreting the Comstock Act, they are insufficient in number and scope to establish a "broad consensus" that Congress could have been aware of. The canon cited by OLC applies only "[w]hen administrative and judicial interpretations have *settled* the meaning of an existing statutory provision."[112] But to "settle" the meaning of a statute requires uniformity among a plurality of courts.[113] The § 1461 Note and OLC Opinion together cite cases from only four of ten existing circuits. A minority of circuits can hardly be enough to "settle" a statute's meaning.[114] This is especially true where, as here, the cases are not on point. Each of the cases dealt with the statute's now-defunct prohibition on contraceptives and addressed abortion only in dicta. In other words, the interpretation repeated by the Historical Note represents "neither a settled judicial construction nor one which we would be justified in presuming Congress, by its silence, impliedly approved."[115]

The third weakness of treating the Historical Note as an adopted consensus is that the cases it cites do not actually support the position it takes. The primary case relied on is *Youngs Rubber*, from the Second Circuit, where the holder of the "Trojan" trademark for contraceptives was alleged to be engaged in illegal distribution under the Comstock Act.[116] In dicta, the court mused that if one took the statute "literally," its "language would seem to forbid the transportation by mail or common carriage of anything 'adapted' in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose."[117] This, "even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately."[118] The court thought it "reasonable 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 illegal contraception or abortion."[119] The court pointed to nothing in the text to explain *why* this "more limited meaning" should be imputed to the broadly

112. Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (emphasis added).

113. Justice Scalia speculated that "perhaps" seven courts of first impression would be enough to settle a statute. SCALIA & GARNER, *supra* note 93, at 325.

114. *Id.*

115. United States v. Powell, 379 U.S. 48, 55 & n.13 (1964) (citation omitted).

116. 45 F.2d 103 (2d Cir. 1930).

117. *Id.* at 108.

118. *Id.*

119. *Id.* The equivalent state law at the time, Section 1142 of the New York Penal Law, criminalized the sale of "any article, drug or medicine for the prevention of conception, or for causing *unlawful* abortion, but section 1145 provides that 'the supplying of such articles to such [lawfully practicing] physicians or by their direction or prescription, is not an offense under this article.'" *Id.* (emphasis added). Perhaps this is what led the court to consider its interpretation "reasonable."

phrased "designed, adapted or intended."[120] The court did, however, cite *Bours v. United States* for support.[121]

Although *Bours* itself is not mentioned in the Historical Note, OLC relies on *Bours* for its consensus. A strange choice, because *Bours* is a terrible case for the OLC's position. As discussed above, the Seventh Circuit in *Bours* opined that the Comstock Act constituted a "national policy of discountenancing abortion as inimical to the national life."[122] In fact, *Bours* directly rejected a position parallel to the one OLC cites it for. That case dealt with a letter sent by a doctor to a pregnant mother, providing details regarding a consultation for a possible abortion.[123] The doctor's defense was that "to be unmailable, the letter must contain an express or implied obligation that the illegal operation will actually be performed."[124] The doctor's interpretation was effectively the one the OLC adopts: that a sender must "inten[d] that the recipient of the drugs will use them unlawfully."[125] But *Bours* swiftly rejected that position as inconsistent with the statute.[126] It also rejected the notion that differing standards for legal and illegal abortion across the nation required an intent standard. It held that "the word 'abortion' in the national statute must be taken in its general medical sense," and that it is "immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded."[127]

The other cases referenced by the Note, *Davis v. United States, United States v. One Package*, and *United States v. Nicholas*, recite the language from *Youngs Rubber*, despite its hollow foundation and non-binding status as dicta.[128] But these cases do not squarely support OLC's narrow interpretation, either. Each applied the statute's clause dealing with contraceptives. *One Package* and *Nicholas* dealt with importing contraceptive articles, which fell under the Tariff Act and New York's state equivalent, rather than the Comstock Act.[129] As noted above, both that state law's and the Tariff Act's prohibitions included the critical "unlawful" modifier, which does not appear in the Comstock Act.[130] And *One Package* was forthright about its departure from

120. *Id.*
121. *Id.*
122. *Bours*, 229 F. at 964 (7th Cir. 1915).
123. *Id.* at 962.
124. *Id.* at 964.
125. OLC Opinion at 1–2.
126. *Bours*, 229 F. at 964.
127. *Id.*
128. Davis v. United States, 62 F.2d 473 (6th Cir. 1933); United States v. One Package, 86 F.2d 737 (2d Cir. 1936); United States v. Nicholas, 97 F.2d 510 (2d Cir. 1938).
129. *One Package*, 86 F.2d at 738; United States v. Nicholas, 97 F.2d 510 (2d Cir. 1938).
130. *See supra* notes 79, 121, and accompanying text.

the statute's text.[131] There is no justification for reading nonexistent words into a statute when Congress has proven itself willing to include them elsewhere.[132]

Furthermore, *Davis* and *One Package* both dealt with *literature* pertaining to contraceptives.[133] As in *Bours*, if the sender lacked intent to provide contraceptives, the letter would not contain "information where and how things designed, adapted and intended . . . for preventing conception can be obtained," and would thus fall outside the statute's coverage.[134] But chemical abortion drugs do not require this extra step. Even if used for perfectly legal abortions, they would still be an "article or thing designed, adapted, or intended for producing abortion."[135] The § 1461 Note and OLC cannot account for these statutory differences. None of the cases cited held that § 1461, as codified in 1948 and applied to mailed chemical abortion drugs, requires intent as to illegal usage. That reading of the Note is "simply wrong."[136]

If anything, the Note supports the plain interpretation—not OLC's narrow interpretation. What purpose could the Note's "invitation" serve if the statute's language was plainly understood to bear the meaning discussed in *Youngs Rubber*? There would be no reason to include the Note if the statute naturally supported a narrow interpretation. Indeed, the Note would serve a purpose *only* if the text *was not* understood by Congress or the public to mean what *Youngs Rubber* considered it might mean.

The statutory meaning is plain, and Congress's recodification did not change that fact. All tools of statutory interpretation point towards a broad meaning for § 1461. The definitions and usage of the terms within the statute make clear that the law prohibits mailing drugs like Mifepristone and applies criminal penalties so long as the sender, recipient, or carrier knows that the drug is designed, intended, or adapted to produce an abortion of any kind.

IV. POST-*DOBBS* ENFORCEMENT AND DESUETUDE

Does the statute's long period of non-enforcement change anything?

131. *One Package*, 86 F.2d at 739 ("The word 'unlawful' would make this clear as to articles for producing abortion.")

132. Rotkiske v. Klemm, 140 S. Ct. 355, 361 (2019) ("A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

133. *Davis*, 62 F.2d at 473; *One Package*, 86 F.2d at 737.

134. *See Davis*, 62 F.2d at 475.

135. 18 U.S.C. § 1461. Nor would this effect whether they were a "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." *Id.*

136. United States v. Wells, 519 U.S. 482, 497 (1997) (rejecting reliance on a Historical and Revision Note).

Many have raised concerns[137] akin to those reflected in the common law doctrine of desuetude.[138] An old English doctrine meant to set aside dead-letter statutes, "[t]he rationale of [desuetude] is that unenforced laws lack support in public convictions, and they may not be brought to bear, in what will inevitably be an unpredictable and essentially arbitrary way, against private citizens."[139] This Part considers § 1461 in light of these concerns, but concludes that the theory of desuetude is antithetical to our federal separation of powers, and that § 1461 does not present the harms that desuetude seeks to avoid.

Some scholars suggest that the sudden application of long-unenforced criminal statutes may deny people fair notice, and thus due process of law, under the Fifth Amendment.[140] Professor Cass Sunstein argues that desuete statutes reflect outmoded values, so defendants would lack notice that their covered conduct is criminal.[141] In one forthcoming Note, Ebba Brunnstrom contends that the desuete nature of § 1461 specifically presents a Fifth Amendment due process concern because the lack of recent enforcement renders the statute unconstitutionally vague.[142] According to Brunnstrom, "nonenforcement is a policy decision," and the nonenforcement of § 1461, without congressional objection, should be taken as congressional rejection of a statute.[143]

These arguments, as acknowledged by their proponents, are quite

137. *See, e.g.*, Joshua Zeitz, *Can the 19th Century Law that Banned Walt Whitman Also Ban Abortion by Mail?*, POLITICO (Apr. 14, 2023), https://www.politico.com/news/magazine/2023/04/14/19th-century-comstock-laws-abortion-00091964 ("2023 is not 1873. . . . There is little chance the public will support [the Comstock Act] today."); Letter from State Atty's Gen. to CVS regarding distribution of abortion drugs, Off. of the Att'y Gen. of Mo. (Feb. 1, 2023) ("First, many people are not aware that federal law expressly prohibits using the mail to send or receive any drug that will 'be used or applied for producing abortion.' 18 U.S.C. § 1461. Although many people are unfamiliar with this statute because it has not been amended in a few decades . . . .").

138. *See generally Desuetude*, 119 HARV. L. REV. 2209 (2006).

139. Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage,* 2003 SUP. CT. REV. 27, 50.

140. *Id.* at 29–30; John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014).

141. *See* Sunstein, *supra* note 139, at 59–60 (arguing that the criminal sodomy law at issue in *Lawrence v. Texas*, 539 U.S. 559 (2003), became deseute because its "infrequent enforcement stemmed from the particular fact that the moral claim that underlay it could no longer claim public support, which led to a "lack of fair notice" that raised due process issues).

142. Ebba Brunnstrom, Note, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs*, 51 COLUM. HUM. RIGHTS L. REV. *37–48 (forthcoming), available at https://ssrn.com/abstract=4384327. That argument incorrectly assumes that in order to enforce § 1461, there must be a discernible definition of "illegal abortion." But the plain text of the statute has no such requirement. Therefore, this Part deals only with the due process concerns presented by arbitrary enforcement.

143. According to this analysis, § 1461 has not been applied in a criminal prosecution over abortifacients in over 100 years. *Id.* at *37 n.146.

theoretical[144]—desuetude has never been accepted in the overwhelming majority of American courts.[145] And for good reason. Desuetude is repugnant to our system of separated legislative and judicial powers. However old or seldom enforced a federal statute may be, it remains a "Law[ ] of the United States" and thus "the supreme law of the land."[146] The only entity empowered to modify validly enacted statutes under our Constitution is Congress.[147] "[T]he legislature alone has the power to make criminal laws, and it is for that same legislature to decide whether to repeal a statute that has come to be viewed as obsolete."[148]

Because amendment and revocation of statutes is a power lodged firmly with the legislature, judges should refrain from treating old laws as nullified or unenforceable based on prior non-enforcement. Similarly, courts should not treat statutes as nullified because they were presumed non-enforceable under now-overturned precedent. To hold otherwise would be a commission of what Jonathan Mitchell has called the "writ-of-erasure fallacy."[149]

> When judges or elected officials fail to recognize that a statute continues to exist as law even after a court declares it unconstitutional or enjoins its enforcement, they fall victim to what I call the "writ-of-erasure fallacy": The assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court's ruling is in fact more limited in scope and leaves room for the statute to continue to operate.[150]

This fallacy equates the judicial power with the legislative power in a way that impermissibly blurs the separation of powers.[151] "Because the judicial

144. *Id.* ("The Supreme Court should further expand the void for vagueness doctrine . . . by developing the normative basis of the vagueness doctrine to include concerns such as the lack of notice facing potential defendants that provide for the normative bases of the doctrine of desuetude."); Sunstein, *supra* note 139, at 50 ("Most American courts do not accept that idea in express terms.").

145. *Desuetude*, *supra* note 138, at 2209 ("Desuetude . . . currently enjoys recognition in the courts of West Virginia and nowhere else.").

146. U.S. CONST., Art. VI.

147. *See* U.S. CONST., Art. III.

148. *Desuetude*, *supra* note 135, at 2213.

149. Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) ("The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute—though only while the court's injunction remains in effect.").

150. *Id.* at 937.

151. Paul Larkin, *Finding Room in the Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTARIES 1 (2014).

branch is not the legislative branch, courts cannot abrogate an unambiguous statute on grounds of obsolescence."[152] Simply put, judicial abrogation of dead-letter statutes "is absolutely violative and destructive of our three-fold scheme of government."[153] And treating a failure by the executive branch to enforce a dead-letter statute as abrogation or elimination of a statute is similarly antithetical to the separation of powers.

It has never been within courts' power to revoke or amend statutes,[154] as courts and scholars alike have long recognized.[155] Congress, too, has treated court opinions as having no statutory effect. When *Griswold* affirmed a constitutional right to use contraceptives, *Congress* soon amended statutes, including § 1461, to remove barriers to contraceptives.[156] This would have been unnecessary if the Court's disapproval were enough to permanently strike a law. Likewise, *Roe* and *Casey*'s rejection of certain abortion regulations cannot erase any law. In short, "[t]he federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute."[157] So the desuetude theory fails.

Even as a practical matter, § 1461 does not present the harms of arbitrariness and notice identified by Sunstein. Section 1461 has seldom been enforced. But unenforced does not mean unknown or unprecedented. In 1996, Congress considered, and declined, amending § 1461 to remove any prohibition on mailing abortion drugs.[158] As recently as five years ago, chemical abortion drugs were "one of the FDA's most restricted drugs."[159] Before 2021, chemical abortion drugs could not be dispensed through the mail.[160] Abortion providers, manufacturers, and distributors of chemical abortion pills

152. *Desuetude*, *supra* note 135, at 2213.

153. *Id.* (quoting *Enforcement of Obsolete Laws*, 67 CENT. L.J. 141, 141–42 (1908)) (alteration in original).

154. Mitchell, *supra* note 146, at 935–36 ("The belief that federal courts 'strike down' unconstitutional statutes is widely held throughout our legal and political culture. But that is an imprecise and misleading description of the power of judicial review.").

155. *See* Steffel v. Thompson, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (quoting Perez v. Ledesma, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part))); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) ("No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.").

156. *See* Pub. L. 91-662, 62 Stat. 768 (1971).

157. Mitchell, *supra* note 146, at 936.

158. H.R. REP. No. 95-29, pt. 3, at 42 (Comm. Print 1978); Comstock Cleanup Act of 1996, H.R. 3057, 104th Cong. (1996).

159. *The abortion pill is one of the FDA's most restricted drugs*, USA TODAY (July 10, 2020) https://www.usatoday.com/videos/news/health/2020/07/10/abortion-pill-one-fdas-most-restricted-drugs/5415602002/.

160. Letter from FDA to Am. Coll. of Obstetricians & Gynecologists and Soc'y for Maternal-Fetal Medicine about Mifepristone REMS (Apr. 12, 2021).

are accustomed to having to carefully comply with governmental oversight. Some already faced the possibility of criminal charges in states where abortion was criminalized after viability. Presumably, most have already been made aware of the possible conflict with § 1461 by pending litigation.[161] Against this backdrop, enforcement would not "inevitably" occur in "unpredictable and essentially arbitrary way[s]."[162] Providers, distributors and manufacturers cannot have grown so accustomed to the 2021 regulations that enforcement of § 1461 would blindside them now.

V. CONCLUSION

As it is written, there is little question that chemical abortion drugs are nonmailable under § 1461. The statute's requirement that the drugs be mailed "knowingly" limits the statute's breadth, but not by much. Neither OLC's unsupported interpretation nor the statute's age should prevent its enforcement. Faithful adherence to congressional enactments requires that this prohibition be enforceable. The statutory interpretation in this Article gives courts, litigants, and advocates a foundation on which to build.

161. *See* Memorandum from FDA on Review of Supplemental Drug Applications Proposing Modifications to the Mifepristone REMS Program (Dec. 23, 2022).

162. Sunstein, *supra* note 139, at 50.