

# United States Senate

WASHINGTON, DC 20510

February 13, 2023

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. President:

It has been more than six months since the Supreme Court issued its devastating decision in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade* and reversing nearly five decades of settled law. In that time, 18 states have eliminated all or some access to abortion,<sup>1</sup> and with states recently beginning their 2023 legislative sessions,<sup>2</sup> we expect additional states to implement abortion bans this year.<sup>3</sup> These measures endanger millions of Americans – including those living in states where abortion remains legal – and have limited access not only to abortion care, but also to other essential health care services. As the American Medical Association explained, “State-imposed restrictions on abortion care have certainly resulted in diminished access to pregnancy care, reproductive care, and other health care, as well as delays in such care.”<sup>4</sup> In some states, women must travel more than seven hours to find the nearest abortion facility.<sup>5</sup> U.S. maternal mortality rates were already shamefully high even before the Supreme Court’s reckless decision.<sup>6</sup> Now women suffering from miscarriages, ectopic pregnancies, and other complications are facing even more mortal threats as a result of these policies.

We appreciate all of the critical steps that the Biden-Harris Administration has already taken to protect access to reproductive health care services, including removing medically unnecessary in-person dispensing requirements for mifepristone, creating an avenue to grant patients Medicaid waivers to support travel expenses for reproductive care, clarifying that the Comstock Act does not prevent the mailing of medications for the purpose of abortion care, and,

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<sup>1</sup> The New York Times, “Tracking the States Where Abortion is Now Banned,” October 7, 2022, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-vwade.html>.

<sup>2</sup> National Conference of State Legislatures, “2023 Legislative Session Calendar,” updated January 27, 2023, [https://documents.ncsl.org/wwwncsl/About-State-Legislatures/2023\\_session\\_calendar.pdf](https://documents.ncsl.org/wwwncsl/About-State-Legislatures/2023_session_calendar.pdf).

<sup>3</sup> CNN, “Activists preparing for ‘an absolutely crazy year’ in first full statehouse sessions since Supreme Court overturned Roe,” Jessica Schneider and Devan Cole, January 20, 2023, <https://www.cnn.com/2023/01/20/politics/abortion-state-laws-2023-roe-dobbs/index.html>.

<sup>4</sup> Letter from American Medical Association to Senator Warren, September 9, 2022, pp. 1. [On File with the Office of Senator Elizabeth Warren].

<sup>5</sup> The Hill, “Post Roe, travel times to abortion clinics more than tripled: study,” Gianna Melillo, November 1, 2022, <https://thehill.com/changing-america/respect/accessibility/3714486-post-roe-travel-times-to-abortion-clinics-more-than-tripled-study/>.

<sup>6</sup> The Commonwealth Fund, “Maternal Mortality in the United States: A Primer,” Eugene Declercq and Laurie Zephyrin, December 16, 2020, <https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer>.

most recently, proposing to expand access to contraception under the Affordable Care Act.<sup>7</sup> It is critical that you continue to take whatever steps are within your authority to protect reproductive freedom.

After decades of activism by anti-abortion extremists, the *Dobbs* decision emboldened anti-abortion politicians to further their attacks on reproductive rights. In September 2022, Senate Republicans introduced legislation to impose a nationwide ban on abortion.<sup>8</sup> House Republicans made it their first order of business in the new Congress to attack abortion rights and have already passed multiple anti-abortion measures since assuming the majority.<sup>9</sup> Anti-abortion politicians at the state level continue to enact new abortion restrictions and bans that will further threaten the ability of women to make decisions about their own bodies and futures.<sup>10</sup> And anti-abortion extremists have filed numerous lawsuits to strip access even further, including a baseless lawsuit in Texas that seeks to eliminate access to medication abortion nationwide.<sup>11</sup>

As President of the United States, you have a distinct role and responsibility to defend reproductive rights, protect access to reproductive health care, and ensure those values are reflected in domestic and foreign policy. We urge you to continue using the resources of the entire federal government to mount a robust response to this crisis, including by considering the following ideas:

- 1. Clarify the resources and support available to individuals seeking abortion care outside of their home states.** The Administration should build on the work of the Department of Justice (DOJ) and Health and Human Services (HHS) to protect Americans' right to travel and help alleviate the financial strain on those who must cross state lines to access abortion care. Following *Dobbs*, the average travel time to an abortion clinic more than tripled – from about 28 minutes to over 100 minutes<sup>12</sup> – which,

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<sup>7</sup> The White House, “Executive Order on Securing Access to Reproductive and Other Healthcare Services,” press release, August 3, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/08/03/executiveorder-on-securing-access-to-reproductive-and-other-healthcare-services/>; The White House, “FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services,” press release, July 8, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/>; U.S. Department of Justice <https://www.justice.gov/olc/opinion/application-comstock-act-mailing-prescription-drugs-can-be-used-abortions>; Centers for Medicare and Medicaid Services, “Biden-Harris Administration Proposes New Rules to Expand Access to Birth Control Coverage Under the Affordable Care Act,” press release, January 23, 2023, <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable>.

<sup>8</sup> Politico, “Republican Graham introduces bill that would restrict abortions nationwide,” Alice Miranda Ollstein, September 13, 2022, <https://www.politico.com/news/2022/09/13/republicans-graham-bill-restrict-abortions-nationwide-00056404>.

<sup>9</sup> The Washington Post, “House Republicans vote to restrict abortion rights,” John Wagner and Mariana Alfaro, January 11, 2023, <https://www.washingtonpost.com/politics/2023/01/11/house-republicans-mccarthy-abortion-biden/>.

<sup>10</sup> ProPublica, “Here’s What States Are Doing to Abortion Rights in 2023,” Megan Rose, February 8, 2023, <https://www.propublica.org/article/us-abortion-legislation-2023>.

<sup>11</sup> NPR, “A Trump-appointed Texas judge could force a major abortion pill off the market,” Sarah McCammon, February 1, 2023, <https://www.npr.org/2023/02/01/1153593174/mifepristone-abortion-pill-federal-texas-lawsuit-restrict-access-nationwide>.

<sup>12</sup> JAMA, “Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the *Dobbs v Jackson Women’s Health* Decision,” Benjamin Rader, Ushma D. Upadhyay, Neil K. R. Sehgal, et al., November 1,

for many, means potentially crossing state lines. In June 2022, Attorney General Merrick Garland released a statement supporting Americans’ right to travel for abortion care, but further information is necessary to ensure patients can maximize these protections.<sup>13</sup> Specifically, DOJ should issue guidance detailing Americans’ right to travel under the interstate commerce clause, which may be used to inform state shield laws. Federal agencies should also continue exploring additional opportunities to finance travel, child care services, and other forms of support for individuals seeking to access abortion care that is unavailable in their home state, such as providing vouchers.

- 2. Continue efforts to protect the privacy and safety of abortion providers and patients.** The HHS Office for Civil Rights issued guidance detailing how federal laws and regulations, including the Health Insurance Portability and Accountability Act (HIPAA), can be used to protect patients’ privacy. HHS should explore issuing new regulations to strengthen HIPAA to ensure that data cannot be shared with law enforcement and used to criminalize abortion providers or patients, and to ensure robust enforcement of the law.
- 3. Protect access to medication abortion.** We are deeply concerned that a lawsuit in Texas, *Alliance for Hippocratic Medicine v. FDA*, poses significant risks to medication abortion and FDA’s long-standing authority to regulate drugs in the United States.<sup>14</sup> We trust the administration will use every legal and regulatory tool at their disposal to keep this drug – which has a more than 22 year safety record<sup>15</sup> – on the market. This includes any existing authorities, such as enforcement discretion,<sup>16</sup> to allow mifepristone to remain available. FDA has previously used its authority to protect patients’ access to treatment and could do so again.<sup>17</sup>
- 4. Continue to evaluate remaining restrictions on medication abortion.** In January 2023, the FDA permanently removed the medically unnecessary in-person dispensing requirement for mifepristone, as well as authorizing certified pharmacies to dispense the medication.<sup>18</sup> This was an important step and will ensure more Americans can receive medication abortions. We encourage FDA to continue to follow the science to determine

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2022, <https://jamanetwork.com/journals/jama/article-abstract/2798215>.

<sup>13</sup> United States Department of Justice, “Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization*,” June 24, 2022, press release, <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.

<sup>14</sup> The Washington Post, “Fears mount around ‘catastrophic’ abortion pills case as decision nears,” Caroline Kitchener and Perry Stein, February 5, 2023, <https://www.washingtonpost.com/politics/2023/02/05/abortion-pills-texas-lawsuit/>.

<sup>15</sup> Guttmacher Institute, “Medication Abortion,” February 2021, <https://www.guttmacher.org/evidence-you-can-use/medication-abortion>.

<sup>16</sup> U.S. Food & Drug Administration, “Unapproved Drugs,” June 2, 2021, <https://www.fda.gov/drugs/enforcement-activities-fda/unapproved-drugs>.

<sup>17</sup> U.S. Department of Health and Human Services, Federal Register Notice, “Prescription Drug Products; Levothyroxine Sodium,” August 14, 1997, <https://www.govinfo.gov/content/pkg/FR-1997-08-14/pdf/97-21575.pdf>.

<sup>18</sup> U.S. Food & Drug Administration, “Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation,” January 24, 2023, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation>.

if any remaining restrictions on the dispensing of mifepristone, including patient consent forms, are medically unnecessary.<sup>19</sup> If additional evidence is required, FDA could consider working with sponsors and researchers to approve studies that examine how mifepristone can be dispensed without any restrictions.

- 5. Ensure veterans, service members, beneficiaries, and other federal employees can access abortion care.** Veterans Affairs (VA) Secretary McDonough has taken a number of steps to protect access to abortion care for veterans and VA beneficiaries, including issuing an interim final rule allowing VA health care providers to offer abortions and abortion counseling in certain circumstances regardless of state laws.<sup>20</sup> And in October, Defense Secretary Austin issued a memo to protect the rights and privacy of service members who need to take leave or travel to access abortion services, including by providing leave and reimbursement for travel and transportation costs.<sup>21</sup> Additionally, both agencies have taken steps to expand access to contraception: the Department of Defense (DOD) recently waived copayments for certain contraceptives for TRICARE beneficiaries,<sup>22</sup> and the VA has proposed waiving copays for all FDA-authorized contraception for CHAMPVA beneficiaries.<sup>23</sup> The VA and DOD should continue to ensure that their beneficiaries can access reproductive health care without retaliation, and that VA and DOD health care providers who perform covered abortions can act without retaliation. Additionally, DOD should ensure that leaders and commanders have accurate guidance on how to support service members seeking leave, and that military treatment facilities continue to carry contraception. We also appreciate your July 2022 Executive Order ensuring that all federal workers can use paid sick leave to travel for abortion care,<sup>24</sup> and we urge agencies to consider options to reimburse travel costs for federal employees in states that restrict or ban abortion care.

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<sup>19</sup> American Medical Association, “Doctors back continued nationwide access to medication abortion,” Kevin B. O’Reilly, June 28, 2022, <https://www.ama-assn.org/delivering-care/population-care/doctors-back-continued-nationwide-access-medication-abortion>; American Academy of Family Physicians, “FPs Tackle Primary Care Spending, Other Weighty Topics,” Sheri Porter, October 12, 2018, <https://www.aafp.org/news/2018-congress-fmx/20181012cod-advocacy.html>; American Congress of Obstetricians and Gynecologists (ACOG), “ACOG Statement on Medication Abortion,” press release, March 30, 2016, <https://www.acog.org/news/news-releases/2016/03/acog-statement-on-medication-abortion>.

<sup>20</sup> Axios, “VA to offer abortion to pregnant veterans in some cases” Herb Scribner, September 2, 2022, <https://www.axios.com/2022/09/02/veterans-affairs-new-abortion-policy>.

<sup>21</sup> Military Times, “Military to provide leave, travel expenses for troops seeking abortion,” Meghann Myers, October 20, 2022, <https://www.militarytimes.com/news/your-military/2022/10/20/military-to-provide-leave-travel-expenses-for-troops-seeking-abortion/>.

<sup>22</sup> TRICARE, “Frequently Asked Questions about Contraceptive Care,” <https://newsroom.tricare.mil/About-Us/Contraceptive-Care-Beneficiary-FAQs#Q:%20Is%20there%20a%20copayment%20waiver%20for%20contraceptive%20services>.

<sup>23</sup> Federal Register, “CHAMPVA Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA,” October 24, 2022, <https://www.federalregister.gov/documents/2022/10/24/2022-22905/champva-coverage-of-audio-only-telehealth-mental-health-services-and-cost-sharing-for-certain>.

<sup>24</sup> The White House, “FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services,” July 8, 2022, press release, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/>.

6. **Enforce “Free Choice of Provider” requirements.** Federal law guarantees Medicaid beneficiaries the ability to seek family planning services from their provider of choice, including abortion providers. But certain states have openly flouted these requirements.<sup>25</sup> HHS should more aggressively enforce these rules and protect the existing right of people to access care from their provider of choice.<sup>26</sup>
7. **Rescind harmful Executive Orders.** The Biden-Harris Administration has worked to rescind harmful rules from previous administrations, including the Trump-era regulations implementing Section 1557 of the Affordable Care Act (ACA) and the “refusal of care” rule,<sup>27</sup> which we urge the Administration to finalize. In addition, several more remain in place and deserve renewed attention. These executive orders undermine access to abortion, contraception, and other reproductive health care. President Biden should rescind Executive Order 13535, which reinforces the Hyde Amendment and restricted certain federal funds under the ACA from being used for abortion services.<sup>28</sup> The President should also reverse Executive Order 13798, which set the stage for the creation of the HHS Conscience and Religious Freedom Division.<sup>29</sup> This Division has emboldened discrimination and refusals of care under the guise of religious liberty.
8. **Ensure enforcement of the women’s health preventive services benefit under the ACA.** The ACA requires most private health insurers to cover recommended women’s preventive health care, including contraceptives and related services, without cost sharing,<sup>30</sup> but some plans still do not comply with these requirements. HHS, along with the Departments of Labor and the Treasury, have issued guidance to clarify these requirements<sup>31</sup> and recently proposed a rule to help ensure Americans whose employers or schools object to birth control can access it without cost-sharing.<sup>32</sup> These are important steps, and HHS and the Center for Consumer Information and Insurance Oversight

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<sup>25</sup> Government Accountability Office, “MEDICAID: CMS Action Needed to Ensure Compliance with Abortion Coverage Requirements,” January 2019, report, <https://www.gao.gov/assets/gao-19-159.pdf>.

<sup>26</sup> See 42 U.S.C. § 1396a; 42 C.F.R. § 431.51.

<sup>27</sup> Brookings, “Tracking regulatory changes in the Biden era,” December 6, 2022, <https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/>; National Women’s Law Center, “Biden Administration Moves to Largely Rescind Trump’s Refusal of Care Rule,” December 29, 2022, <https://nwl.org/press-release/biden-administration-rescinds-trumps-refusal-of-care-rule/>.

<sup>28</sup> Obama White House Archives, “Executive Order 13535-- Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion,” March 24, 2010, <https://obamawhitehouse.archives.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>.

<sup>29</sup> Repro Blueprint, “First Priorities: Executive and Agency Actions,” September 2020, <https://reproblueprint.org/wp-content/uploads/2020/09/First-Priorities-Executive-Agency-Actions-Incoming-Administration-Blueprint.pdf>.

<sup>30</sup> Kaiser Family Foundation, “Preventive Services Covered by Private Health Plans under the Affordable Care Act,” October 26, 2022, <https://www.kff.org/womens-health-policy/fact-sheet/preventive-services-covered-by-private-health-plans/>.

<sup>31</sup> Department of Health and Human Services, “HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage,” July 28, 2022, press release, <https://www.hhs.gov/about/news/2022/07/28/hhs-dol-treasury-issue-guidance-regarding-birth-control-coverage.html>.

<sup>32</sup> Centers for Medicare & Medicaid Services, “Biden-Harris Administration Proposes New Rules to Expand Access to Birth Control Coverage Under the Affordable Care Act,” January 30, 2023, <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable>.

should continue working to ensure that Americans with private health insurance have affordable access to the birth control of their choice.

- 9. Ensure undocumented individuals can access abortion care without penalty.** Federal agencies should ensure undocumented individuals seeking abortions and other crucial medical care, and those who assist them, can receive those medical services without fear of detention or deportation.
- 10. Ensure those held in federal custody can access abortion care.** All federal agencies, including DOJ and the Department of Homeland Security, should expand and enforce existing protections to safeguard the right to abortion for those who elect to receive these services while being held in federal care or custody.
- 11. Increase critical funding for domestic and global sexual and reproductive health services in the President’s Budget.** Title X is the only federal program dedicated to providing family planning and other sexual health care services,<sup>33</sup> and we encourage you to include strong support for the program and other domestic and global reproductive health programs in the 2024 President’s Budget. We also urge you to again release a Budget Proposal that does not include the Hyde Amendment, and to eliminate all restrictions on abortion coverage and funding, including the Helms Amendment. Both amendments disproportionately harm people of color and low-income communities.<sup>34</sup>

Each day, women’s lives are threatened because they are denied access to essential health care. We commend the Administration’s efforts to protect reproductive freedom and urge you to continue to respond to this crisis with a whole-of-government approach, particularly as extremist judges and anti-abortion politicians across the nation and within Congress intensify their efforts to strip away reproductive rights.

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren  
United States Senator



Mazie K. Hirono  
United States Senator

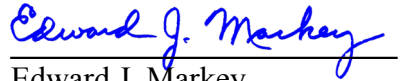
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<sup>33</sup> U.S. Department of Health and Human Services, “Title X Family Planning Annual Report,” <https://opa.hhs.gov/sites/default/files/2022-09/2021-fpar-national-final-508.pdf>. Accessed January 18, 2023.

<sup>34</sup> Ibis Reproductive Health, “U.S. Funding for Abortion: How the Helms and Hyde Amendments harm women and providers,” 2016, [https://www.ibisreproductivehealth.org/sites/default/files/files/publications/Ibis%20Ipas%20Helms%20Hyde%20Fact%20Sheet%202016\\_0.pdf](https://www.ibisreproductivehealth.org/sites/default/files/files/publications/Ibis%20Ipas%20Helms%20Hyde%20Fact%20Sheet%202016_0.pdf).



Tina Smith  
United States Senator



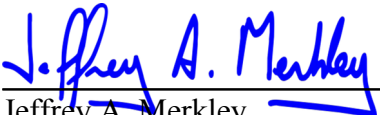
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