

Nos. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

DANCO LABORATORIES, L.L.C.,
Petitioner,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF DEMOCRATS FOR
LIFE OF AMERICA IN SUPPORT OF
RESPONDENTS**

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INTEREST OF THE *AMICUS CURIAE*¹

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life at all stages is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, health care, and life's other basic necessities.

DFLA supports the Court's decision in *Dobbs v. Jackson Women's Health Organization* to return the issue of abortion "to the people and their elected representatives." 597 U.S. 215, 259 (2022).² DFLA opposes policies that promote abortion, including when pushed by a Democratic administration. To this end, DFLA submitted a public comment opposing a 2023 proposed rule by the Department of Health and Human Services that would remove government funding from pro-life pregnancy centers that support

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made any monetary contribution to fund the brief's preparation or submission.

² See Brief *Amici Curiae* for Democrats for Life of America Five Democratic Legislators From Five Individual State Legislatures On Behalf Of Petitioners, *Dobbs*, 597 U.S. 215 (July 29, 2021), <https://perma.cc/25EN-2QLE>.

women and children.³ DFLA also submitted a public comment in 2023 opposing proposed regulations by the Equal Employment Opportunity Commission that would unlawfully turn workplace accommodation protections for pregnant women and mothers, which DFLA fully supports, into an employer mandate to accommodate abortion.⁴ DFLA is concerned about the Food and Drug Administration’s politicized decision making on mifepristone at issue in this case. These decisions are part of the Biden administration’s pattern and practice, documented in this brief, to promote abortion in violation of federal and state laws, including those that protect unborn human life.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“Everything is on the table.”⁵ Those are the words of Xavier Becerra, Secretary of the U.S. Department of Health and Human Services (HHS), which oversees the Food and Drug Administration (FDA), when CNN asked about the district court’s decision in this case.⁶ Secretary Becerra refused to answer whether ignoring the court’s decision was off the table, explaining that the Biden administration is considering

³ DFLA, Comment Letter in Opposition to HHS’s Proposed Rule “Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program” (RIN 0970-AC99) (Dec. 1, 2023), <https://perma.cc/42H3-ZN6T>.

⁴ DFLA, Comment Letter in Opposition to EEOC’s Proposed “Regulations to Implement the Pregnant Workers Fairness Act” (RIN 3046-AB30) (Oct. 10, 2023), <https://perma.cc/2GGY-UUMV>.

⁵ Jasmine Wright, *HHS Secretary Says ‘Everything Is on the Table’ in Response to Medication Abortion Ruling*, CNN (Apr. 9, 2023, 7:21 PM), <https://perma.cc/GPC9-CVQK>.

⁶ *Ibid.*

“all options.”⁷ See *Danco Labs. v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting from grant of application for stays) (“here, the Government has not dispelled legitimate doubts that it would even obey an unfavorable order in these cases”).

Secretary Becerra’s stance is emblematic of the Biden administration’s pattern and practice to use every lever of the executive branch to resist the Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, which President Joe Biden called “an extreme decision”⁸ by “not a normal Court.”⁹

In *Dobbs*, this Court promised that the issue of abortion is returned “to the people and their elected representatives.” 597 U.S. 215, 259 (2022). Yet since the Court’s decision on June 24, 2022, the Biden administration has done everything in its power to frustrate that promise. The administration is seeking to use federal agencies and unelected government officials to impose a mail-order abortion economy in all fifty states paid for by the American taxpayer.

The day *Dobbs* was issued, President Biden claimed the decision would result in “grave consequences” and announced “actions” his Administration would take in response.¹⁰ “[P]reserving access”

⁷ Ibid.

⁸ White House, Remarks by President Biden Before Meeting with His Task Force on Reproductive Healthcare Access (Jan. 22, 2024), <https://perma.cc/N9KR-TKX9>.

⁹ White House, Remarks by President Biden on the Supreme Court’s Decision on Affirmative Action (June 29, 2023), <https://perma.cc/7XU8-3KL4>.

¹⁰ White House, FACT SHEET: President Biden Announces

to abortion drugs was “one of two key priorities” the President identified.¹¹ He directed Secretary Becerra to “identify all ways to ensure that mifepristone is as widely accessible as possible[,] * * * including when prescribed through telehealth and sent by mail.”¹²

The same day, Secretary Becerra announced HHS’s “commitment to ensure every American has access to * * * medication abortion” and promised, “we will double down and use every lever we have to protect access to abortion.”¹³ FDA decision making, including modifying the Risk Evaluation and Mitigation Strategy (REMS) for mifepristone, was later identified by HHS as one of the Department’s “six core priorities” to “protect and expand access” to abortion post-*Dobbs*.¹⁴ HHS also identified the FDA’s removal of the in-person dispensing requirement from mifepristone’s REMS as an action taken in response to President Biden’s July 8, 2022, executive order directing the HHS Secretary to “protect and

Actions in Light of Today’s Supreme Court Decision on *Dobbs v. Jackson Women’s Health Organization* (June 24, 2022), <https://perma.cc/66T6-BL87>.

¹¹ White House, FACT SHEET: The Biden-Harris Administration’s Record on Protecting Access to Medication Abortion (Apr. 12, 2023), <https://perma.cc/78TT-3J2G>.

¹² White House, FACT SHEET: President Biden Announces Actions in Light of Today’s Supreme Court Decision on *Dobbs v. Jackson Women’s Health Org.* (June 24, 2022), <https://perma.cc/66T6-BL87>.

¹³ Press Release, HHS, HHS Secretary Becerra’s Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization* (June 24, 2022), <https://perma.cc/89AZ-RFL4>.

¹⁴ Press Release, HHS, HHS Releases Report Detailing Biden-Harris Administration Efforts to Protect Reproductive Health Care Since *Dobbs* (Jan. 19, 2023), <https://perma.cc/6CE3-J7DD>.

expand access to abortion care, including medication abortion.”¹⁵

Attorney General Merrick Garland, the nation’s chief law enforcement officer and head of the Department of Justice (DOJ), also issued a statement on *Dobbs*, declaring, “The Justice Department strongly disagrees with the Court’s decision.”¹⁶ He promised DOJ will “work tirelessly to protect and advance” abortion and will “use every tool at our disposal.”¹⁷ Without citing any legal authority, Garland claimed that “States may not ban Mifepristone based on disagreement with the FDA’s expert judgment about its safety and efficacy.”¹⁸ Repeating the AG’s assertion, HHS reported that it is working with DOJ “to help ensure access to care and preserve FDA’s role in determining what is safe and effective for patients.”¹⁹

Rather than wait for Congress to heed his call to codify *Roe v. Wade*, President Biden “committed to doing everything in his power” to “protect access” to

¹⁵ White House, FACT SHEET: The Biden-Harris Administration’s Record on Protecting Access to Medication Abortion (Apr. 12, 2023), <https://perma.cc/78TT-3J2G> (citing Exec. Order No. 14,076, Protecting Access to Reproductive Healthcare Services, 87 Fed. Reg. 42,053 (July 8, 2022), and HHS, Secretary’s Report, Health Care Under Attack: An Action Plan to Protect and Strengthen Reproductive Care (Aug. 2022), <https://perma.cc/WWV5-CSFY>).

¹⁶ Press Release, DOJ, Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization* (June 24, 2022), <https://perma.cc/E6DY-59LK>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ HHS, Secretary’s Report Health Care Under Attack: An Action Plan to Protect and Strengthen Reproductive Care 8 (Aug. 2022), <https://perma.cc/WWV5-CSFY>.

abortion.²⁰ He issued multiple statements and executive orders denouncing *Dobbs* and mandating access to abortion, even though there is no federal constitutional right to abortion and no federal statute contains a mandate to provide abortion.²¹

At the President’s direction, federal agencies, including HHS, and unelected government officials began reinterpreting federal laws to force states and private individuals to perform abortions and use taxpayer dollars to pay for abortion. Never-before-found authority was conveniently discovered in federal law post-*Dobbs* that the administration claims allows the federal government to impose abortion mandates and preempt state laws protecting unborn human life.

Within this context, DOJ urges the Court in this case to defer to unnamed “agency experts” and not “second-guess[] FDA’s expert judgment” on abortion. Br. for Fed. Pet’rs at 12, 42. The FDA’s judgment, however, cannot be viewed in a vacuum unattenuated from the Biden administration’s and HHS’s pattern and practice, documented below, to undermine the promise of *Dobbs* by promoting abortion in violation of federal and state law.

²⁰ White House, FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services (July 8, 2022), <https://perma.cc/F5ZZ-XGL8>.

²¹ *E.g.*, Exec. Order No. 14,076, Protecting Access to Reproductive Healthcare Services, 87 Fed. Reg. 42,053 (July 8, 2022); Exec. Order No. 14,079, Securing Access to Reproductive and Other Healthcare Services, 87 Fed. Reg. 49,505 (Aug. 3, 2022); see also Presidential Memorandum, Further Efforts To Protect Access to Reproductive Healthcare Services, 88 Fed. Reg. 4895 (Jan. 26, 2023) (“My Administration remains committed to supporting safe access to mifepristone * * *”).

ARGUMENT

The Biden administration is weaponizing federal law to promote abortion, preempt state abortion laws, and undermine the promise of *Dobbs*.

The Biden administration is weaponizing federal law and using federal agencies such as HHS to sidestep the Court’s promise in *Dobbs* and promote the administration’s pro-abortion policies without “the people and their elected representatives.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 259 (2022). As documented below, in the Biden administration’s zeal to protect and expand access to abortion, including abortion drugs, the administration ignores federal limits on its authority and disregards state abortion laws.

A. Turning the U.S. Postal Service into a delivery service for abortion drugs.

The Biden administration is seeking to create an online mail-order abortion economy in all fifty states. The day *Dobbs* was issued, President Biden directed HHS Secretary Becerra to ensure women have “access” to abortion drugs “no matter where they live” and to make these drugs “as widely accessible as possible,” including via telehealth and the mail.²² Becerra confirmed that he “directed every part of my Department”—which includes the FDA—“to do any

²² White House, FACT SHEET: President Biden Announces Actions in Light of Today’s Supreme Court Decision on *Dobbs v. Jackson Women’s Health Organization* (June 24, 2022), <https://perma.cc/53SQ-VM42>.

and everything” to “double down and use every lever we have.”²³

Mailing abortion drugs violates federal law. As detailed more fully in the amicus brief of the Ethics and Public Policy Center submitted in this case, federal law broadly prohibits mailing and using any common carrier to transport any drug, medicine, or other article used or intended to produce abortion. 18 U.S.C. 1461, 1462.

Nevertheless, “in the wake of *Dobbs*,” the DOJ Office of Legal Counsel (OLC) issued an unpersuasive opinion in December 2022 advising the U.S. Postal Service that federal law does not actually restrict mailing abortion drugs even when “used to produce abortion” if the sender “lacks the intent that the recipient of the drugs will use them unlawfully.”²⁴ Federal law, however, makes no distinction between lawful and unlawful abortions. See *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725, at *20–21 (5th Cir. Apr. 12, 2023) (per curiam) (observing that HHS and FDA argue that federal law (section 1461 and section 1462) “does not mean what it says it means”).

Following DOJ’s post-*Dobbs* interpretation of federal law, the FDA formally changed the Risk Evaluation and Mitigation Strategy (REMS) for Mifepristone in January 2023 to effectuate its December 2021 decision and allow abortion drugs to be ordered via

²³ Press Release, HHS, HHS Secretary Becerra’s Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization* (June 24, 2022), <https://perma.cc/89AZ-RFL4>.

²⁴ Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. ___, slip op. at 1–2 (Dec. 23, 2022), <https://perma.cc/9VEU-L96K>.

telehealth without an in-person medical examination, dispensed by retail pharmacies, and shipped nationwide through the mail or common carrier.²⁵ See *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 267-68 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part) (“The FDA’s 2021 Mail-Order Decision violates” section 1461 and section 1462, and the 2023 REMS “doubles down on this violation by permanently eliminating the in-person dispensing requirement”). HHS touted the FDA’s new REMS in its report, *Marking the 50th Anniversary of Roe: Biden-Harris Administration Efforts to Protect Reproductive Health Care*, as one of the actions HHS took since *Dobbs* to protect access to abortion.²⁶

B. Turning pharmacies into abortion drug dispensaries.

In its efforts to make abortion drugs more accessible, the Biden administration is also seeking to turn the nation’s pharmacies into abortion drug dispensaries. Three days after President Biden’s July 8, 2022, executive order directing HHS and Secretary Becerra “to protect and expand access to abortion care, including medication abortion,”²⁷ HHS

²⁵ FDA, REMS Single Shared System for Mifepristone 200 mg (Jan. 2023), <https://perma.cc/MJT5-35LF>.

²⁶ HHS, Marking the 50th Anniversary of Roe: Biden-Harris Administration Efforts to Protect Reproductive Health Care (Jan. 19, 2023), <https://perma.cc/8EB4-P7US> (listing FDA decision making as one of HHS’s six strategic focuses and explaining HHS “continue[s] to activate all divisions of the Department in service to [its] commitment to ensuring” access to abortion).

²⁷ Exec. Order No. 14,076, Protecting Access to Reproductive Healthcare Services, 87 Fed. Reg. 42,053 (July 8, 2022).

responded²⁸ by issuing new guidance to “roughly 60,000 U.S. retail pharmacies,” informing them of allegedly “pre-existing statutory requirements” that they must stock and dispense abortion drugs under federal nondiscrimination laws, Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. 18116, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.²⁹ These laws, which do not mention abortion, prohibit sex and disability discrimination. According to the HHS guidance, a pharmacy “may be discriminating” on the basis of sex or disability if it refuses to provide contraception that could act as an abortifacient or fill drugs that can be used for or in conjunction with chemical abortion.³⁰

But neither statute or its regulations state pharmacies are required to stock and dispense abortion drugs. Indeed, the ACA expressly does not preempt state abortion laws. 42 U.S.C. 18023(c). Further, Section 1557 prohibits sex discrimination by incorporating Title IX of the Education Amendments of 1972, which is explicitly neutral on abortion and does not require any entity to provide any service related to abortion. 20 U.S.C. 1688.

²⁸ Press Release, HHS, HHS Issues Guidance to the Nation’s Retail Pharmacies Clarifying Their Obligations to Ensure Access to Comprehensive Reproductive Health Care Services (July 13, 2022), <https://perma.cc/67LZ-JQTS> (announcing the pharmacy guidance was in response to Biden’s executive order and listing actions HHS has taken to ensure access to abortion since *Dobbs*).

²⁹ HHS, Office for Civ. Rts., *Guidance to Nation’s Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services* (July 13, 2022), <https://perma.cc/KTQ5-M7FP>.

³⁰ *Ibid.*

HHS also failed to square its pharmacy guidance with the long-standing appropriations rider known as the Hyde Amendment, which prohibits HHS funding of most abortions.³¹

Although HHS claimed the pharmacy guidance does “not have the force and effect of law,”³² the goal of the guidance, as touted by the Biden administration, was “to protect access to medication abortion.”³³ A state and a Catholic pharmacy sued HHS in federal court, arguing the guidance violated the Administrative Procedure Act. *Texas v. U.S. Dep’t of Health & Human Servs.*, No. 23-CV-00022-DC, 2023 WL 4629168, at *2 (W.D. Tex. July 12, 2023). The district court denied HHS’s motion to dismiss, explaining that HHS is “smurfing[] an executive policy goal into ‘unreviewable’ and ‘unchallengeable’ pieces while reinforcing the whole with an implicit enforcement threat * * * in an effort to avoid legal consequence.” *Id.* at *12. Noticeably, the Biden administration “has, before and since *Dobbs*, openly stated its intention to operate by fiat to find non-legislative workarounds to Supreme Court dictates.” *Ibid.*

Two months later, on September 29, 2023, the Department retreated a half step, revising its pharmacy guidance “to clarify that the guidance does not

³¹ Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H., Tit. V, §§ 506–07 (Dec. 29, 2022), 136 Stat. 4908.

³² HHS, Office for Civ. Rts., *Guidance to Nation’s Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services* (July 13, 2022), <https://perma.cc/KTQ5-M7FP>.

³³ White House, FACT SHEET: The Biden-Harris Administration’s Record on Protecting Access to Medication Abortion (Apr. 12, 2023), <https://perma.cc/RBG2-SRTR>.

require pharmacies to fill prescriptions for medication for the purpose of abortion” and that it does not “suggest or imply an obligation of pharmacies to fill prescriptions for medication in violation of State laws, including those banning or restricting abortion.”³⁴

C. Turning hospital emergency rooms into abortion clinics.

The Biden administration is seeking to turn hospital emergency rooms across the country into on-demand abortion clinics. Within weeks of the Court’s decision in *Dobbs*, HHS’s Centers for Medicare and Medicaid Services (CMS) issued new guidance (which also purportedly “does not contain new policy”³⁵) claiming the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd, could require physicians to perform or complete abortions and could preempt state abortion laws protecting unborn children.³⁶ HHS Secretary Becerra personally

³⁴ HHS, *Guidance to Nation’s Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Nondiscriminatory Access to Health Care at Pharmacies* (Sept. 29, 2023), <https://perma.cc/S8ZB-WXRD>.

³⁵ Memorandum from CMS, HHS, on Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (July 11, 2022) (rev. Aug. 25, 2022), <https://perma.cc/ND68-86SK>. But see *Texas v. Becerra*, 89 F.4th 529, 541 (5th Cir. 2024) (“Put simply, the Guidance sets out HHS’s legal position—for the first time—regarding how EMTALA operates post-*Dobbs*. The Guidance is new policy; it does not ‘merely restate’ EMTALA’s requirements.”).

³⁶ Mem. from Ctrs. for Medicare & Medicaid Servs., HHS, on Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (July 11, 2022) (rev. Aug. 25, 2022), <https://perma.cc/ND68-86SK>.

sent a letter to healthcare providers reiterating these purported obligations under EMTALA.³⁷

EMTALA was enacted by Congress in 1986 to ensure patients could receive emergency services even if they were unable to pay.³⁸ Under EMTALA, Medicare-funded hospitals are required to medically screen, stabilize, and appropriately transfer an individual with an “emergency medical condition.” 42 U.S.C. 1395dd. EMTALA does not mention abortion once, and no prior administration has declared that EMTALA mandates abortions. See *Texas v. Becerra*, 89 F.4th 529, 546 (5th Cir. 2024) (“EMTALA does not mandate medical treatments, let alone abortion care, nor does it preempt [state] law.”). In contrast, EMTALA explicitly acknowledges the “unborn child” four times, imposing a duty on hospitals to stabilize the child as well as the mother. See 42 U.S.C. 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(A)(i), (e)(1)(B)(ii).

Notably, EMTALA is a funding statute that only preempts state law when it “directly conflicts” with its requirements. 42 U.S.C. 1395dd(f). Nevertheless, under HHS’s novel theory, DOJ sued the State of Idaho, claiming the state’s abortion law was preempted by EMTALA. This case is currently pending before the Court which will hear oral argument in April 2024 to answer “whether EMTALA preempts state laws that protect human life and prohibit abortions, such as Idaho’s Defense of Life Act.” See *Moyle*

³⁷ Letter from Xavier Becerra, Secretary, HHS, to Health Care Providers (July 11, 2022), <https://perma.cc/3DD4-RWVP>.

³⁸ CMS, *Emergency Medical Treatment & Labor Act (EMTALA)* (last modified Jan. 5, 2024), <https://perma.cc/CU7C-MLCM>.

v. *United States*, Nos. 23-726, 23-727 (U.S. pet. granted Jan. 5, 2024).

D. Turning VA hospitals into abortion clinics.

The Biden administration has turned government hospitals for veterans and their families into abortion clinics that provide abortions, even when unlawful under state law. On September 9, 2022, a few months after *Dobbs*, the U.S. Department of Veterans Affairs (VA) issued an Interim Final Rule (IFR) that unlawfully determined the VA could provide abortions at VA hospitals in any state for any reason through all nine months of pregnancy.³⁹

Citing the Court’s *Dobbs* decision and state abortion laws, the VA claimed it had “good cause” to issue an IFR and skip advance notice and public comment.⁴⁰ The IFR claimed that post-*Dobbs* state laws aimed at protecting unborn human life created “serious threats” and “urgent risks” to the lives and health of veterans and their beneficiaries.⁴¹ Though the IFR was issued more than two months after *Dobbs*, the VA failed to cite a case of any woman who faced these alleged “serious threats” or “urgent risks,” likely because no state abortion law prohibits saving a mother’s life. Because the VA did not have “good cause” to bypass general notice-and-comment requirements, its IFR violates Section 553 of the Administrative Procedure Act. 5 U.S.C. 533.

The VA’s rule also violates other federal laws. The

³⁹ VA, Reproductive Health Services, 87 Fed. Reg. 55,287 (Sept. 9, 2022).

⁴⁰ Id. at 55,295.

⁴¹ Id. at 55,288.

IFR recognized that Section 106 of the Veterans Health Care Act of 1992, Pub. L. No. 102-585, 106 Stat. 4943 (1992), explicitly bans the VA from providing abortions.⁴² But the VA’s IFR claimed for the first time that Section 106 was “effectively overt[aken]” by the Veterans’ Health Care Eligibility Reform Act of 1996 (VHCERA), which amended the 1992 Act.⁴³ The VA’s claim is utterly implausible. The VHCERA never referenced abortion or claimed to repeal Section 106. Moreover, the VA’s legal standard—“effectively overtook”—is one this Court has never endorsed. This Court “has repeatedly stated that absent a clearly expressed congressional intention to repeal, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.” *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1677 (2020) (cleaned up). Nonetheless, less than two weeks after the VA issued its IFR, DOJ OLC issued an opinion rubberstamping the VA’s theory.⁴⁴

The DOJ’s and VA’s claim that the VA can provide abortions prohibited under state law also violates the Assimilative Crimes Act. This law affirms that state criminal laws (including state laws prohibiting

⁴² 87 Fed. Reg. at 55,289 (“but not including under this section infertility services, abortions, or pregnancy care”).

⁴³ *Ibid.*

⁴⁴ Intergovernmental Immunity for the Dep’t of Veterans Affairs & Its Emps. When Providing Certain Abortion Servs., 46 Op. O.L.C. ___, slip op. at 7–8 (Sept. 21, 2022), <https://perma.cc/7TA2-HBES> (“In its recent rule, VA also explained that * * * section 106 has effectively been overtaken by subsequent legislation. * * * We agree.”).

abortion and regulating the practice of medicine) apply to actions within a federal government building, such as VA hospitals. 18 U.S.C. 13(a). In another post-*Dobbs* opinion, DOJ OLC claimed this law likewise provides no barrier to VA-provided abortions, state law notwithstanding.⁴⁵

E. Turning taxpayer dollars into abortion funds.

In addition to promoting and providing access to abortion, the Biden administration is using taxpayer dollars to fund abortion.

Hyde Amendment. The Hyde Amendment, a yearly appropriations rider since 1976, has ensured that no HHS (and Department of Labor and Department of Education) funds “shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion.”⁴⁶ As then-U.S. Senator Biden told a concerned constituent in 1994, “those of us who are opposed to abortions should not be compelled to pay for them.”⁴⁷ But as President, Biden now claims that despite the Hyde Amendment and other federal restrictions on funding abortion, taxpayer dollars can and should be used to fund abortion, especially abortion travel.

⁴⁵ Application of the Assimilative Crimes Act to Conduct of Fed. Emps. Authorized by Fed. L., 46 Op. O.L.C. ___, slip op. at 1 (Aug. 12, 2022), <https://perma.cc/HR9Q-T5CF>.

⁴⁶ Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H., Tit. V, § 506(a)-(b) (Dec. 29, 2022), 136 Stat. 4908.

⁴⁷ Letter from Joseph R. Biden, Jr., U.S. Senator, to Michael Gregg (April 7, 1994), available at <https://perma.cc/TCB7-Z5PB?type=image>.

In September 2022, DOJ OLC once again issued a post-*Dobbs* opinion, this time approving of the administration's novel legal interpretation that the Hyde Amendment does not bar HHS providing and funding transportation for abortion.⁴⁸

Sick Leave. Three days after *Dobbs*, the Office of Personnel Management (OPM) issued guidance stating that paid sick leave for federal workers covers absences for necessary travel, including longer distances out of state, to obtain medical examinations or treatments.⁴⁹ While the guidance did not mention abortion specifically, its timing and a subsequent White House Fact Sheet confirmed the guidance was intended to authorize the use of taxpayer-funded sick leave for abortion travel.⁵⁰

Military Funds. In October 2022, the Department of Defense (DOD) announced that, despite the statutory prohibition of using military funds for abortion, see 10 U.S.C. 1093, DOD would transport service members to obtain abortions and use funds so its

⁴⁸ Application of the Hyde Amend. to the Provision of Transp. for Women Seeking Abortions, 46 Op. O.L.C. ___ (Sept. 27, 2022), <https://perma.cc/QTQ3-TBT6>.

⁴⁹ OPM, Availability of Sick Leave for Travel to Access Medical Care (June 27, 2022), <https://perma.cc/J4U8-MHDD>; see also Letter from Marco Rubio, U.S. Senator, to Kiran Ahuja, Director, OPM (July 5, 2022), <https://perma.cc/YL64-GXGY> (stating paid sick leave for abortion would violate the Hyde Amendment, and asking for clarification that the policy does not cover travel for abortion).

⁵⁰ White House, FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services (July 8, 2022), <https://perma.cc/NHE6-D5J9>.

doctors could obtain a license to perform abortions.⁵¹ In a July 2023 White House briefing, John Kirby, Coordinator for Strategic Communications of the National Security Council—“the President’s principal forum for considering national security and foreign policy matters”⁵²—explained that facilitating elective abortions for DOD personnel is a “foundational sacred obligation” of U.S. military leaders.⁵³

Title X. Less than a week after *Dobbs*, HHS announced nearly \$3 million in new Title X family planning grants to “increase training and technical assistance to address the challenges that the recent Supreme Court decision may have on their Title X Family planning service delivery.”⁵⁴ Title X is a federal program that funds state and private health care organizations offering voluntary family planning services. Section 1008 of Title X explicitly prohibits Title X funds from being used “in programs where abortion is a method of family planning.” Public Health Services Act, 42 U.S.C. 300a-6.

⁵¹ Memorandum from Lloyd Austin, Secretary of Defense, DOD, to Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DOD Field Activity Directors, on Ensuring Access to Reproductive Health Care (Oct. 20, 2022), <https://perma.cc/R4PY-R2AS>.

⁵² White House, *National Security Council* (last visited Feb. 28, 2024), <https://perma.cc/845K-TYU9>.

⁵³ White House, Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby (July 17, 2023), <https://perma.cc/9ANX-XC5P>.

⁵⁴ Press Release, HHS, HHS Announces New Grants to Bolster Family Planner Provider Training (June 30, 2022), <https://perma.cc/5MKN-W77R>.

Nevertheless, as touted in the White House’s Fact Sheet on the 51st Anniversary of *Roe v. Wade*,⁵⁵ HHS awarded \$253 million in 2022 to Title X clinics that provide abortion, counsel in favor of abortion, refer for abortion, and fail to physically and financially separate their abortion services from federally funded family planning services.⁵⁶ Indeed, in complete disregard of Section 1008 and the Hyde Amendment, HHS issued a rule in 2021 requiring Title X providers to refer and counsel women for abortion, even when abortion is prohibited under state law.⁵⁷

In March 2023, HHS cut off Title X funding to clinics in Oklahoma and Tennessee because they do not provide abortion counseling or referrals.⁵⁸ HHS

⁵⁵ White House, FACT SHEET: White House Task Force on Reproductive Healthcare Access Announces New Actions and Marks the 51st Anniversary of *Roe v. Wade* (Jan. 22, 2024), <https://perma.cc/3KC7-D4PD>.

⁵⁶ Office of Population Affairs, Office of the Assistant Sec’y for Health, HHS, Title X Family Planning Program, <https://perma.cc/K9CD-MAAW>; see also Press Release, HHS, HHS Awards \$256.6 Million to Expand and Restore Access to Equitable and Affordable Title X Family Planning Services Nationwide (Mar. 30, 2022), <https://perma.cc/LM9A-NFPU>; HHS, Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144, 56,145 (Oct. 7, 2021) (removing physical and financial separation requirement for abortion and federally funded family planning services).

⁵⁷ 86 Fed. Reg. at 56,179 (“[E]ach project must * * * [p]rovide for social services related to family planning, including counseling, referral to * * * other social and medical service agencies * * *”).

⁵⁸ Pl.’s Mot. for Prelim. Inj. & Opening Br. in Supp. at 1, *Oklahoma v. U.S. Dep’t Health & Human Servs.*, No. 23-CV-01052-HE (W.D. Okla. Jan. 26, 2024) (suing HHS for terminating Oklahoma’s award of approximately \$4.5 million in Title X funding

ignored not only Title X's limits, but also the agency's obligations under the Weldon Amendment, which prohibits HHS (among others) from discriminating against funding recipients "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."⁵⁹ Ironically, HHS is tasked with enforcing violations of the Weldon Amendment (as well as other health care conscience protection laws).⁶⁰

A few weeks later, the Biden administration announced a new HHS Notice of Funding Opportunity to "establish a safe and secure national hotline" to provide information about abortion to Title X patients—all on the taxpayer's dime.⁶¹

Medicaid. In August 2022, Secretary Becerra sent a letter to state governors "in light of the Supreme Court's decision in *Dobbs*," inviting them to

"solely because Oklahoma will not provide counseling or referrals for abortion"); Letter from Jessica Swafford Marcella, Deputy Assistant Sec'y for Population Affairs, Office of Population Affairs, Office of the Assistant Sec'y for Health, HHS, and Scott Moore, Grants Mgmt. Officer, Grants and Acquisitions Mgmt., Office of the Assistant Sec'y for Health, HHS, to Yoshie Darnall, Program Director, Tenn. Dep't of Health, and Ralph Alvarado, Authorized Official, Tenn. Dep't of Health, on Decision not to Fund Continuation Award (March 20, 2023), <https://perma.cc/UV9A-E39K>.

⁵⁹ Weldon Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H., Tit. V, § 506(d) (Dec. 29, 2022), 136 Stat. 4908.

⁶⁰ See Office for Civil Rights, HHS, *Conscience and Religious Non-discrimination* (last reviewed Jan. 10, 2023), <https://perma.cc/Y94J-KHDG>.

⁶¹ White House, FACT SHEET: Biden-Harris Administration Announces Actions to Protect Patient Privacy at the Third Meeting of the Task Force on Reproductive Healthcare Access (Apr. 12, 2023), <https://perma.cc/3DV5-G8DH>.

apply for Medicaid 1115 waivers to use federal funding to “expand access” to abortion.⁶² Becerra explained HHS “welcome[d] the opportunity” to work with states because “this is a priority for HHS,” notwithstanding federal statutory limits on abortion funding.⁶³

TANF. The Biden administration is not only using federal funds for abortion; it is simultaneously seeking to remove funding from pregnancy centers that support both mothers and their children. For example, HHS’s October 2023 proposed regulations for the Strengthening Temporary Assistance for Needy Families (TANF) program singled out pro-life pregnancy centers as an example of organizations that are ineligible for TANF funding because they likely do not accomplish a TANF purpose.⁶⁴ Pregnancy centers, however, can and do readily accomplish TANF’s four statutorily defined purposes: (i) providing “assistance to needy families so that children may be cared for in their own homes or in the homes of relatives”; (ii) ending “the dependence of needy parents on government benefits by promoting job preparation, work, and marriage”; (iii) preventing and reducing “the incidence of out-of-wedlock pregnancies” and establishing “annual numerical goals for preventing and reducing the incidence of these pregnancies”;

⁶² Letter from Xavier Becerra, Secretary, HHS, and Chiquita Brooks-LaSure, Administrator, CMS, HHS, to Governors (Aug. 26, 2022), <https://perma.cc/9WRA-3DEU>.

⁶³ *Ibid.*

⁶⁴ HHS, Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program, 88 Fed. Reg. 67,697, 67,705 (Oct. 2, 2023).

and (iv) encouraging “the formation and maintenance of two-parent families.” 42 U.S.C. 601(a).

F. Turning HIPAA’s privacy protections into a shield against laws regulating abortion.

HHS is also seeking to use privacy protections for health information to block enforcement of federal and state abortion laws. Citing “concerns” about *Dobbs* and state pro-life laws, HHS issued a proposed rule in April 2023 that would create byzantine new procedures under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), that covered entities must navigate before they can comply with subpoenas, court orders, and other lawful requests for protected health information (PHI) tangentially related to “reproductive health care.”⁶⁵

At present, HIPAA’s privacy regulations are simple: “A covered entity may * * * disclose [PHI] to the extent that such * * * disclosure is required by law and the * * * disclosure complies with and is limited to the relevant requirements of such law.” 45 C.F.R. 164.512(a)(1). But under HHS’s proposed rule, it would be illegal for a covered entity to comply with such a request—though it is “required by law”—if the requested disclosure is believed to be “primarily for the purpose of investigating or imposing liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.”⁶⁶ “[S]eeking obtaining, providing, or facilitating” is defined maximally to include: “expressing interest in,

⁶⁵ HHS, HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23,506, 23,507 (Apr. 17, 2023).

⁶⁶ *Id.* at 23,553.

inducing, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.”⁶⁷ The rule also would define “reproductive health care” maximally to include all “care, services, or supplies related to the reproductive health of the individual.”⁶⁸

The repercussions of HHS’s proposed rule are profound. One of the verbs in HHS’s laundry list, “inducing,” means to “move by persuasion or influence” or to “bring about by influence.”⁶⁹ As such, HHS’s proposed rule would make it illegal for covered entities to comply with a subpoena investigating an alleged coerced abortion, something that is illegal under state law and under the Federal Unborn Victims of Violence Act, 18 U.S.C. 1841.⁷⁰

The proposed rule would also make it unlawful for a covered entity to cooperate with police efforts to track down human traffickers and pimps that are

⁶⁷ Id. at 23,552.

⁶⁸ Ibid.

⁶⁹ *Induce*, Merriam-Webster.com, <https://perma.cc/UC6V-BWES> (last visited Feb. 28, 2024).

⁷⁰ 18 U.S.C. 1841(a) makes it unlawful to cause the death of an unborn child through “conduct that violates any of the provisions of law listed in subsection (b).” Because the provisions listed in section 1841(b) include the federal law prohibiting interstate domestic violence, 18 U.S.C. 2261, the Act “subjects a defendant to federal prosecution if he crosses state lines with the intent to injure or intimidate his spouse or partner and thereby causes the death of that spouse’s or intimate partner’s unborn child.” Michael Holzapfel, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. Contemp. Health L. & Pol’y 431, 442 (2002).

“paying for” and “arranging” abortions, including for minors.

This is not hyperbole. HHS admits it is seeking to thwart law enforcement efforts to “request PHI from regulated entities” to enforce abortion laws.⁷¹ To explain what sorts of uses it has in mind, HHS cites a report from a “reproductive justice” group that laments states are using reports from “designated mandatory reporters” to enforce laws against second and third trimester abortions.⁷²

HHS’s proposed rule would also rewrite HIPAA to exclude unborn children from the definition of “person.”⁷³ The Department cites only one statute in support of its position, 1 U.S.C. 8, which it claims “is consistent” with its proposed definition of “person.”⁷⁴ To the contrary, 1 U.S.C. 8 states, “Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being ‘born alive.’” 1 U.S.C. 8. Indeed, the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881 (2008), which amended HIPAA, repeatedly states that privacy protections for information of an “individual or family member” extend to information of “any embryo” and “any fetus carried by such pregnant woman.” 26 U.S.C. 9802(g); 29 U.S.C. 1182(f); 42

⁷¹ 88 Fed. Reg. at 23,519.

⁷² Id. at 23,519 n.170 (citing Laura Huss, Farah Diaz-Tello, Colleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings, If When How* (Aug. 2022) at 2-3, <https://perma.cc/8ZRQ-D8H8>findings/).

⁷³ 88 Fed. Reg. at 23,552.

⁷⁴ Id. at 23,523. .

U.S.C. 300gg-4(f), 300gg-53(f), 42 U.S.C. 1395ss(x)(4); 42 U.S.C. 2000ff-8(b).

This proposed rule is yet another attempt by the Biden administration to disregard *Dobbs* and undermine state abortion laws protecting unborn children enacted by the people and their elected representatives. Indeed, Secretary Becerra explained that this rule was a response to President Biden’s direction to HHS in the wake of *Dobbs* to “take action to meet this moment,” which HHS “wasted no time in doing.”⁷⁵

G. Turning workplace pregnancy accommodations into an abortion mandate.

After *Dobbs*, the Biden administration not only seeks to enable and fund abortion, it also seeks to convert protections for pregnant women into abortion mandates. In December 2022, Congress passed the Pregnant Workers Fairness Act (PWFA) with broad bipartisan support.⁷⁶ The “pro-mother, pro-baby” Act⁷⁷ filled a gap in employment law by requiring employers to provide their employees “reasonable accommodations” for “the known limitations related to the pregnancy, childbirth, or related medical conditions” unless it poses “an undue hardship” on the employer. 42 U.S.C. 2000gg-1(1).

When abortion concerns were raised on the Senate floor, both Democrat and Republican Senate co-

⁷⁵ Press Release, HHS, HHS Proposes Measures to Bolster Patient-Provider Confidentiality Around Reproductive Health Care (Apr. 12, 2023), <https://perma.cc/V389-7DSJ>.

⁷⁶ Consolidated Appropriations Act, 2023, Pub. L. 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg-2000gg-6).

⁷⁷ 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Cassidy).

sponsors Bob Casey and Bill Cassidy rejected the notion that the PWFA required abortion accommodations.⁷⁸ Democrat Senator Patty Murray said, “I can’t think of a more commonsense, less controversial bill.”⁷⁹

Yet, under the Equal Employment Opportunity Commission’s proposed PWFA regulations, employers—including those who are pro-life—are required to accommodate their employees’ abortions, even when unlawful under state law or against the conscience of the employer. The EEOC’s proposed PWFA regulations are divorced from the intent of Congress and the text of the PWFA; abortion is not mentioned once in the PWFA, and it is not a medical condition, much less a pregnancy- or childbirth-related medical condition.⁸⁰

* * *

This Court’s promise in *Dobbs* was clear: the issue of abortion is returned “to the people and their elected representatives.” But the Biden administration has used federal agencies and unelected government official to undermine that promise. As documented above, the Biden administration and HHS have established a pattern and practice of ignoring

⁷⁸ Ibid. (statement of Sens. Casey) (“I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law.”); *ibid* (statement of Sen. Cassidy) (“I reject the characterization that this would do anything to promote abortion.”).

⁷⁹ Ibid.

⁸⁰ EEOC, Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714 (Aug. 11, 2023).

federal and state laws in their efforts to protect and expand access to abortion, including abortion drugs. The FDA's decision making on mifepristone reflects this pattern of politicized actions to unlawfully promote abortion, not expert judgment entitled to deference by the Court.

CONCLUSION

The Court should affirm the Fifth Circuit's order and remand for further proceedings.

Respectfully submitted.

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