No. 24-2249

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATES OF TENNESSEE, ARKANSAS, ALABAMA, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, and WEST VIRGINIA,

Plaintiffs-Appellants,

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Arkansas,
Case No. 2:24-cv-84-DPM

BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Ethics and Public Policy Center (EPPC), is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture, and politics. EPPC works to promote a culture of life in law and policy and to defend the dignity of the human being from conception to natural death. EPPC scholars write and submit public comments on federal agency rulemaking—including the EEOC's Pregnant Workers Fairness Act regulations—and urge the executive branch to follow the law and protect human fetal life.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is about whether states have standing to sue federal agencies that issue unlawful regulations that directly bind them. They do. *See* States Br. at 2-5, 23-45.

Here, the Equal Employment Opportunity Commission (EEOC) used regulations implementing the Pregnant Workers Fairness Act

[1] All parties received timely notice and consented to the filing of this brief. No party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

(PWFA) to unlawfully force Plaintiff States to facilitate abortion. The PWFA provides women workplace accommodation protections for "pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000gg-1(1). It does not mention abortion once. Nevertheless, three EEOC Commissioners commandeered the bipartisan Act to advance a pro-abortion agenda.

According to these unelected officials, the PWFA imposes an abortion-accommodation mandate *sub silentio* on Plaintiff States and employers across the country. Under this mandate, the States are forced to facilitate their employees' abortions with limitation—including eugenic abortions, late-term abortions, and abortions unlawful under state law. Congress did not and would not authorize such a controversial mandate. As another federal court recently held, Congress could not "reasonably be understood to have granted the EEOC the authority to interpret the scope of the PWFA in a way that imposes a nationwide mandate on both public and private employers—irrespective of … *Dobbs*—to provide workplace accommodation for the elective abortions of employees." *Louisiana v. EEOC,* --- F. Supp. 3d ----, 2024 WL 3034006, at *9 (W.D. La. June 17, 2024).

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade* and returned the issue of abortion "to the people and their elected representatives." 597 U.S. 215, 259 (2022). Now, "the States may regulate abortion for legitimate reasons," *id*. at 300, which is exactly what Plaintiff States have done.

But contrary to the Supreme Court's direction in *Dobbs*, the executive branch has sought to unilaterally expand abortion access and preempt state abortion laws. After *Dobbs*, federal agencies and unelected officials began reinterpreting federal laws to promote abortion. Never-before-found authority was conveniently discovered post-*Dobbs* in federal law that federal officials now claim allows the federal government to impose abortion mandates and preempt state laws protecting fetal life. These novel applications of federal authority, documented below, violate federal law and subvert states' sovereign interests in furthering legislatively enacted pro-life policies. The PWFA Rule, for example, directly regulates the States by requiring them to accommodate their employees' abortions in contravention of the States' laws and employment policies.

As the States explained, "much federal law comes not through Congress, but via regulations adopted by unelected agencies." States Br. at 1; *see also West Virginia v. EPA*, 597 U.S. 697, 752-53 (2022) (Gorsuch, J., concurring) ("those in the Executive Branch" increasingly seek "to use pen-and-phone regulations as substitutes for laws passed by the people's representatives"). "Bypassing democratic legislation often leaves regulated parties with little choice but to protect their interests through litigation." States Br. at 1.

But under the district court's reasoning, states would not have standing to challenge unlawful agency actions that directly bind them, effectively and improperly insulating the EEOC and other agencies from legal challenge. The district court's reasoning is even more concerning where, as here, a federal agency unlawfully impinges on states' sovereign interest in protecting fetal life—"a matter of great 'political significance,'" *West Virginia*, 597 U.S. at 743 (quoting *NFIB v. OSHA*, 595 U.S. 109, 117 (2022)), and "great social significance and moral substance," *Dobbs*, 597 U.S. at 300.

This Court should reject the district court's reasoning and hold that the States have standing to challenge the PWFA Rule and other agency

actions that directly regulate them and unlawfully infringe on their sovereign interest in protecting fetal life. This Court should reverse.

Executive branch actions, like the PWFA Rule, weaponize federal law to unlawfully promote abortion and interfere with states' sovereign interest in protecting fetal life.

The executive branch is weaponizing federal law on "a matter of great 'political significance.'" *West Virginia v. EPA*, 597 U.S. at 743 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 595 U.S. at 117). Federal agencies and unelected government officials are sidestepping the Supreme Court's direction in *Dobbs* to promote an abortion-all-costs agenda without "the people and their elected representatives." *Dobbs*, 597 U.S. at 259. As documented below, since *Dobbs*, the executive branch, including the Equal Employment Opportunity Commission (EEOC), have ignored federal limits on its authority and disregarded states' sovereign interest in protecting fetal life. But under the district court's reasoning, states will not have standing to challenge these unlawful agency actions that directly regulate them and preempt state law. This Court should reverse the district court's dismissal for lack of standing.

A. Turning Workplace Pregnancy Accommodations into an Abortion Mandate.

As detailed more fully in the States' brief, Congress passed the Pregnant Workers Fairness Act (PWFA) with broad bipartisan support after *Dobbs* in December 2022.[2] The "pro-mother, pro-baby" Act[3] filled a gap in employment law by requiring employers, including states, 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-sponsors Bob Casey and Bill Cassidy rejected the notion that the PWFA required abortion accommodations.[4]

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

[3] 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Cassidy).

[4] *Id.* (statement of Sen. 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."); *id.* (statement of Sen. Cassidy) ("I reject the characterization that this would do anything to promote abortion.").

Democrat Senator Patty Murray said, "I can't think of a more commonsense, less controversial bill."[5]

Yet, under the EEOC's PWFA Rule, 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.[6] The Rule is 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. *See* States Br. at 46-51; *Louisiana*, 2024 WL 3034006, at *9-10.

B. Turning Title X into an Abortion Counseling and Referral Mandate

Not only is the EEOC turning pregnancy accommodation protections into an abortion accommodation mandate, but another federal agency is turning family planning services into an abortion and counseling referral mandate.

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[5] *Id* at S7049 (statement of Sen. Murray).

[6] EEOC, Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096 (Apr. 19, 2024).

Title X is a federal program that funds state and private health care organizations offering voluntary family planning services. Congress explicitly prohibited 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. But less than a week after *Dobbs*, the Department of Health and Human Services (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."[7]

A White House Fact Sheet on the 51st Anniversary of *Roe v. Wade* identified the $263 million HHS awarded to Title X clinics in 2022 as an action taken by the Biden-Harris administration since *Dobbs* "to defend reproductive rights."[8] This funding went to clinics, like Planned Parenthood, that provide abortion, counsel in favor of abortion, refer for

[7] Press Release, HHS, HHS Announces New Grants to Bolster Family Planner Provider Training (June 30, 2022), https://perma.cc/5MKN-W77R.
[8] 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.

abortion, and fail to physically and financially separate their abortion services from federally funded family planning services.[9]

A January 2023 Report detailing HHS's "efforts to protect reproductive health care since *Dobbs*" identified the additional Title X funding as one aspect of the Department's "six core priorities" to "protect and expand access" to "reproductive care" post-*Dobbs*.[10] In the Report, HHS also touted that, since *Dobbs*, the Department "has worked to protect and expand access to reproductive care amidst unprecedented efforts by Republican officials at the national and state level to restrict access to abortion and contraception."[11]

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[9] Off. of Population Affs., Off. of the Assistant Sec'y for Health, HHS, Title X Family Plan. 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 Plan. Servs., 86 Fed. Reg. 56,144, 56,145 (Oct. 7, 2021) (removing physical and financial separation requirement for abortion and federally funded family planning services).

[10] Report, HHS, Marking the 50th Anniversary of Roe: Biden-Harris Admin. Efforts to Protect Reprod. Health Care (Jan. 19, 2023), https://perma.cc/8EB4-P7US.

[11] *Id.*

In December 2022, HHS indicated to Tennessee's Department of Health that it had a "list of states," with Oklahoma and Tennessee at the top, that HHS was looking at regarding Title X program abortion counseling. Decl. of Tobi Amosun ¶21, *Tennessee v. Becerra*, No. 23-384 (E.D. Tenn. Oct. 24, 2023). HHS then cut off Oklahoma's and Tennessee's Title X funding mid-grant solely because the states will not counsel or refer for abortion illegal under state law.[12] Particularly egregious, the termination came shortly after HHS determined that Tennessee's Health Department was "the only agency in the state capable of administering Title X funds with integrity." Tenn. Br. at 14-15, *Tennessee v. Becerra*, No. 24-5220 (6th Cir. Apr. 5, 2024) (cleaned up), argued July 18, 2024; HHS then reallocated both states' Title X funding to *out of state* pro-abortion groups, including Planned Parenthood. *See id.* at 15; *Oklahoma*

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[12] Letter from Jessica Marcella, Deputy Assistant Sec'y for Population Affs., Off. of Population Affs., Off. of the Assistant Sec'y for Health, HHS, et al., to Yoshie Darnall, Program Dir., Tenn. Dep't of Health, et al., on Decision Not to Fund Continuation Award (March 20, 2023), https://perma.cc/UV9A-E39K; Pl.'s Mot. for Prelim. Inj. & Opening Br. in Supp. at 1, *Oklahoma v. HHS*, No. 23-1052 (W.D. Okla. Jan. 26, 2024)) (suing HHS for terminating Oklahoma's Title X funding "solely because Oklahoma will not provide counseling or referrals for abortion").

v. HHS, No. 24-6063, at 9 (10th Cir. July 15, 2024) (Federico, J., dissenting).

In April 2023, HHS issued a 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.[13]

HHS's actions ignore Title X's limits, violate the Constitution and the Administrative Procedure Act (APA), and ignore the Department'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."[14] *See Oklahoma*, No. 24-6063 (10th Cir. July 15, 2024) (Federico, J., dissenting) (concluding termination of Oklahoma's Title X grant under HHS's interpretation of the Title X rule violated the Weldon Amendment); *but see id.* (majority op.) (holding Oklahoma did not show likelihood of success on claims involving violations of Spending

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[13] 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.

[14] Weldon Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 507(d), 136 Stat. 4459, 4908.

Clause, Weldon Amendment, and APA). Ironically, HHS is tasked with enforcing violations of the Weldon Amendment (as well as other health care conscience protection laws).[15]

C. Turning Taxpayer Dollars into Abortion Funds

In addition to imposing unlawful spending conditions on the Title X program, the executive branch 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."[16] The executive branch 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.

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[15] *See* Off. for Civ. Rts., HHS, *Conscience and Religious Nondiscrimination* (last reviewed Jan. 10, 2023), https://perma.cc/Y94J-KHDG.

[16] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 506(a)-(b), 136 Stat. 4459, 4908.

In September 2022, the Department of Justice Office of Legal Counsel (DOJ OLC) issued a post-*Dobbs* opinion approving of HHS's novel legal interpretation that the Hyde Amendment does not bar HHS from providing and funding transportation for abortion.[17]

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.[18] 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.[19]

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[17] 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.

[18] OPM, Availability of Sick Leave for Travel to Access Med. Care (June 27, 2022), https://perma.cc/J4U8-MHDD; *see also* Letter from Marco Rubio, U.S. Sen., to Kiran Ahuja, Dir., 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).

[19] 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.

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 doctors could obtain a license to perform abortions.[20] 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"[21]—explained that facilitating elective abortions for DOD personnel is a "foundational, sacred obligation" of U.S. military leaders.[22]

Medicaid. In August 2022, HHS Secretary Becerra sent a letter to state governors "in light of the Supreme Court's decision in *Dobbs*," inviting them to apply for Medicaid 1115 waivers to use federal funding

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[20] Mem. from Lloyd Austin, Sec'y of Def., DOD, to Senior Pentagon Leadership, Commanders of the Combatant Commands, Def. Agency and DOD Field Activity Dirs., on Ensuring Access to Reprod. Health Care (Oct. 20, 2022), https://perma.cc/R4PY-R2AS.

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

[22] White House, Press Briefing by Press Sec'y Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby (July 17, 2023), https://perma.cc/9ANX-XC5P.

to "expand access" to abortion.[23] Becerra explained HHS "welcome[d] the opportunity" to work with states because "[t]his is a priority for HHS," notwithstanding federal statutory limits on abortion funding.[24]

TANF. The executive branch 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.[25] 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

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[23] Letter from Xavier Becerra, Sec'y, HHS, and Chiquita Brooks-LaSure, Adm'r, CMS, HHS, to Governors (Aug. 26, 2022), https://perma.cc/9WRA-3DEU.

[24] *Id.*

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

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

D. Turning Hospital Emergency Rooms into Abortion Clinics

The executive branch is seeking to turn hospital emergency rooms across the country into on-demand abortion clinics. Within weeks of the Supreme Court's decision in *Dobbs*, HHS's Centers for Medicare and Medicaid Services (CMS) issued new guidance 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.[26] Secretary Becerra

[26] Mem. 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.

personally sent a letter to healthcare providers reiterating these purported obligations under EMTALA.[27]

The guidance purportedly "does not contain new policy."[28] But as the Fifth Circuit explained, "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." *Texas v. Becerra*, 89 F.4th 529, 541 (5th Cir. 2024).

EMTALA was enacted by Congress in 1986 to ensure patients could receive emergency services even if they were unable to pay.[29] 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. In contrast, EMTALA explicitly acknowledges the

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[27] Letter from Xavier Becerra, Sec'y, HHS, to Health Care Providers (July 11, 2022), https://perma.cc/3DD4-RWVP.

[28] Mem. 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.

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

"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). As the Fifth Circuit held, "EMTALA does not mandate medical treatments, let alone abortion care, nor does it preempt [state] law." *Texas*, 89 F.4th at 546.

Nevertheless, under HHS's novel theory, DOJ sued the State of Idaho, claiming the state's abortion law was preempted by EMTALA. The case is ongoing, and the Supreme Court recently dismissed the case as improvidently granted. *See Moyle v. United States*, 144 S. Ct. 2015 (2024) (per curiam). But taking the opportunity to address the merits, Justice Alito, joined by Justices Thomas and Gorsuch, explained that the government's "preemption theory is plainly unsound"; EMTALA "clearly … does not require hospitals to perform abortions in violation of Idaho law." *Id.* at 2027-28 (Alito, J., dissenting); *see also id.* at 2034-35 ("In sum, the Government's new interpretation of EMTALA is refuted by the statutory text, the context in which the law was enacted, and the rules of interpretation that we apply to Spending Clause legislation.").

E. Turning VA Hospitals into Abortion Clinics

The executive branch has also 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 Department of Veterans Affairs (VA) issued an interim final rule (IFR) that unlawfully determined the VA could provide abortions at VA hospitals and clinics in any state for any reason through all nine months of pregnancy.[30]

Citing the Supreme 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.[31] The IFR claimed that post-*Dobbs* state laws aimed at protecting fetal life created "serious threats" and "urgent risks" to the lives and health of veterans and their beneficiaries.[32] 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

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[30] VA, Reprod. Health Servs., 87 Fed. Reg. 55,287 (Sept. 9, 2022).

[31] *Id*. at 55,295.

[32] *Id*. at 55,288.

life. Because the VA did not have "good cause" to bypass general notice-and-comment requirements, its IFR violated Section 553 of the Administrative Procedure Act. 5 U.S.C. § 533.

The VA's rule also violated other federal laws. The 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.[33] But the 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.[34] 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 that neither the Supreme Court nor any court has endorsed. The Supreme 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

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[33] 87 Fed. Reg. at 55,289 ("but not including under this section infertility services, abortions, or pregnancy care").

[34] *Id.*

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.[35]

The VA's and DOJ'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 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). But in another post-*Dobbs* opinion, DOJ OLC claimed that, state law notwithstanding, this law likewise provides no barrier to VA-provided abortions.[36]

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[35] Intergovernmental Immunity for the Dep't of Veterans Affs. & 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.").

[36] 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.

The VA double-downed on its position when it eventually finalized the rule on March 4, 2024, "without changes."[37] The VA reiterated that state laws—including "additional restrictions" not adopted by the VA, "such as timeframe limitations, evidentiary requirements, or prerequisite procedures (such as mandatory waiting periods or required ultrasounds)"—that "unduly interfere" with the VA's provision of abortion are "preempted."[38]

F. Turning the U.S. Postal Service into a Delivery Service for Abortion Drugs

The executive branch is seeking to unilaterally create an online mail-order abortion economy in all fifty states. In response to *Dobbs*, President Biden directed HHS Secretary Becerra to ensure women have "access" to abortion drugs "no matter where they live"[39] and to make these drugs "as widely accessible as possible," including via telehealth

[37] VA, Reprod. Health Servs., 89 Fed. Reg. 15,451, 15,451 (Mar. 4, 2024).

[38] *Id.* at 15,457, 15,462.

[39] White House, FACT SHEET: President Biden to Sign Memorandum on Ensuring Safe Access to Medication Abortion (Jan. 22, 2023), https://perma.cc/U9Q8-S9QT.

and the mail.[40] Becerra confirmed that he "directed every part of my Department"—which includes the Food and Drug Administration (FDA)—"to do any and everything" to "double down and use every lever we have."[41]

Mailing abortion drugs violates federal law, which 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*," DOJ 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."[42] Federal law, however,

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[40] 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.

[41] 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.

[42] 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.

makes no distinction between lawful and unlawful abortions. *See All. for Hippocratic Med. v. FDA,* 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"); *see also* Br. of EPPC as Amicus Curiae Supporting Resp'ts., *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (explaining OLC's opinion is "poorly supported and unsound").

Following DOJ's post-*Dobbs* novel 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 telehealth without an in-person medical examination, dispensed by retail pharmacies, and shipped nationwide through the mail or common carrier.[43] *See All. for Hippocratic Med. v. FDA.*, 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

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

"doubles down on this violation by permanently eliminating the in-person dispensing requirement"), *rev'd on other grounds and rem'd*, 602 U.S. 367 (2024) (holding, without reaching the merits, that "unregulated parties" plaintiff doctors and medical associations did not have standing). HHS touted the FDA's new REMS in a report marking the 50th Anniversary of *Roe* as one of the actions the Biden-Harris administration took since *Dobbs* to protect access to abortion.[44]

Missouri, Idaho, and Kansas have intervened in a lawsuit challenging the FDA's decision to remove safety standards from mifepristone's REMS, arguing that they have suffered sovereign and quasi-sovereign injuries from FDA's unlawful actions, which "radically interfere with the ability of the States to set policy on ... one of the most 'profound' issues of public policy." *See* States' Br. as Amici Curiae at 3, *FDA*, 602 U.S. 367 (Nos. 23-235, 23-236) (quoting *Dobbs*, 597 U.S. at 223). Specifically, the "FDA's decision to illegally permit mailing of abortion pills nationwide frustrates the ability of States to enforce their laws." *Id.*;

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[44] Report, HHS, Marking the 50th Anniversary of Roe: Biden-Harris Admin. Efforts to Protect Reprod. Health Care (Jan. 19, 2023), https://perma.cc/8EB4-P7US (listing FDA decision-making as one of HHS's six strategic focuses).

cf. FDA, 602 U.S. at 23-24 (leaving the door open for states or others to have standing).

After the district court's decision in the case to suspend the FDA's removal of mifepristone's safety standards, Secretary Becerra told CNN that "everything is on the table."[45] CNN noted that "the secretary would not say whether he believes the FDA should ignore the ruling" and maintained that "the Biden administration is considering all options."[46] *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").

G. Turning Pharmacies into Abortion Drug Dispensaries

In its efforts to make abortion drugs more accessible, the executive branch 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

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[45] 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.

[46] *Id.*

to abortion care, including medication abortion,"[47] HHS responded[48] 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. §8116, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.[49] 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.[50]

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[47] Exec. Ord. No. 14,076, Protecting Access to Reprod. Healthcare Servs., 87 Fed. Reg. 42,053 (July 8, 2022).

[48] 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*).

[49] HHS, Off. for Civ. Rts., Guidance to Nation's Retail Pharmacies: Obligations under Fed. Civ. Rts. L. to Ensure Access to Comprehensive Reprod. Health Care Servs. (July 13, 2022), https://perma.cc/KTQ5-M7FP.

[50] *Id.*

But neither the statute nor 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. Regarding Section 1557 regulations, HHS has represented that they allow pharmacies to refuse to provide abortion drugs for "religious or conscience" reasons, "based on a professional or business judgment about the scope of the services it wishes to offer, or for any other nondiscriminatory reason."[51] HHS also failed to square its pharmacy guidance with the Hyde Amendment, which prohibits HHS funding of most abortions.[52]

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[51] HHS, Section 1557 Final Rule: Frequently Asked Questions, at n.1 (last reviewed May 20, 2024), https://perma.cc/Z6L9-97W8.

[52] Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, §§506–07, 136 Stat. 4459, 4908.

Although HHS claimed the pharmacy guidance does "not have the force and effect of law,"[53] the goal of the guidance, as touted by the Biden administration, was "to protect access to medication abortion."[54] A state and a Catholic pharmacy sued HHS in federal court, arguing the guidance violates 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." *Id.* at *12. Noticeably, the Biden-Harris administration "has, before and since *Dobbs,* openly stated its intention to operate by fiat to find non-legislative workarounds to Supreme Court dictates," which amounts to "a breach of constitutional constraints." *Id.*

[53] HHS, Off. for Civ. Rts., Guidance to Nation's Retail Pharmacies: Obligations under Fed. Civ. Rts. L. to Ensure Access to Comprehensive Reprod. Health Care Servs. (July 13, 2022), https://perma.cc/KTQ5-M7FP.

[54] White House, FACT SHEET: The Biden-Harris Administration's Record on Protecting Access to Medication Abortion (Apr. 12, 2023), https://perma.cc/RBG2-SRTR.

Over a year after it issued its original guidance and almost three months after the district court denied HHS's motion to dismiss, the Department retreated a half step, revising its pharmacy guidance "to clarify that the guidance does not 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."[55]

H. Turning HIPAA's Privacy Protections into a Shield Against Laws Regulating Abortion

HHS is using a federal law that protects the privacy of health information to block states from enforcing abortion laws. Citing "concerns" about *Dobbs* and state pro-life laws, HHS's April 2024 final rule creates 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

[55] HHS, Guidance to Nation's Retail Pharmacies: Obligations under Fed. Civ. Rts. L. to Ensure Nondiscriminatory Access to Health Care at Pharmacies (Sept. 29, 2023), https://perma.cc/S8ZB-WXRD.

protected health information (PHI) tangentially related to "reproductive health care."[56]

HIPAA's basic privacy rule is 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). HHS's new rule leaves this general rule intact, but makes it illegal for a covered entity to comply with such a request—though it is "required by law"—if the covered entity decides that the requested disclosure is "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."[57] "[S]eeking obtaining, providing, or facilitating" is defined maximally to include: "expressing interest in, 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."[58] The rule also defines

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[56] HHS, HIPAA Priv. Rule to Support Reprod. Health Care Priv., 89 Fed. Reg. 32,976 (Apr. 26, 2024)

[57] 89 Fed. Reg. 32,976, 33,063.

[58] *Id.*

"reproductive health care" maximally to include all "health care … that that affects the health of an individual in all matters relating to the reproductive system and its functions and processes."[59]

The repercussions of HHS's rule are profound. Given its broad definitions, HIPAA regulations make it unlawful for a covered entity to readily cooperate with police efforts to track down human traffickers and pimps that are "paying for" and "arranging" abortions, including for minors.[60]

This is not hyperbole. HHS admits that its new rule will "make it more difficult for law enforcement officials to investigate whether reproductive health care was unlawful under the circumstances in which it was provided."[61] The proposed rule was even more transparent, citing 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.[62]

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 33,018.

[62] HHS, HIPAA Priv. Rule to Support Reprod. Health Care Priv., 88 Fed. Reg. 23,506, 23,509 n.11 (Apr. 17, 2023) (citing Laura Huss, Farah

HHS's final rule also rewrites HIPAA to exclude unborn children from the definition of "person."[63] 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."[64] 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.'" Indeed, the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881, 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 U.S.C. §§300gg–4(f), 300gg–53(f); 42 U.S.C. §1395ss(x)(4); 42 U.S.C. §2000ff-8(b).

Diaz-Tello, Colleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings*, If/When/How (Aug. 1, 2022), at 2-3, https://perma.cc/8ZRQ-D8H8).

[63] 89 Fed. Reg. at 32,997.

[64] *Id.*

HHS's final "reproductive health care" rule is yet another attempt by the executive branch 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."[65]

* * *

The Supreme Court's direction in *Dobbs* was clear: the issue of abortion is returned "to the people and their elected representatives." But, as documented above, the executive branch, including the EEOC, is ignoring that direction and weaponizing federal law to promote a broad abortion-access agenda. Federal agencies and unelected government officials are issuing regulations, like the PWFA rule, that directly bind states and interfere with their sovereign interest in protecting fetal life. Under the district court's reasoning, these unlawful agency actions would

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

be improperly insulated from legal challenge. This Court should reverse the district court and find that the States have standing.

CONCLUSION

Amicus urges the Court to grant the relief the States seek.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this brief contains 6,378 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word for Mac Version 16.87 using a proportionally spaced typeface, 14-point Century Schoolbook.

Pursuant to Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

July 25, 2024

s/ Rachel N. Morrison
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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