

Issue Brief

June 21, 2022



A SUITE OF POTENTIAL EXECUTIVE ACTIONS FOR A POST-ROE WORLD

On May 2, 2022, news outlet Politico published a [draft](#) of the Supreme Court’s upcoming decision in [Dobbs v. Jackson Women’s Health Organization](#), a case challenging Mississippi’s ban on abortion after 15 weeks. The central argument of the case rests on the constitutionality of abortion, creating an opportunity to reassess the landmark 1973 [Roe v. Wade](#) decision that protected the right to abortion before fetus viability. If issued as written, the draft opinion would completely overturn Roe. It asserts there is no Constitutional right to abortion services, thereby permitting states to more heavily regulate or completely ban the procedure.

A federal law codifying abortion rights would offer protection if Roe falls; however, efforts to legislate a solution continue to fall short of the 60 votes needed to pass a divided Senate. Acknowledging this reality, the Biden administration has [indicated](#) it is considering taking executive action to help alleviate the effects of state limits and bans on abortion post-Roe. Democratic legislators also urged a “whole-of-government response” in a [letter](#) to the President on June 7. The communication highlighted six actions the White House could take, which include:

1. Increasing access to medication abortion;
2. Providing resources for individuals seeking abortion care in other states;
3. Establishing a reproductive health ombudsman at the Department of Health and Humans Services (HHS);
4. Enforcing “Free Choice of Provider” requirements;
5. Clarifying protections for sensitive health and location data; and
6. Using federal property and resources to increase access to abortion.

Each of these potential options is contextualized in the table below.

Table 1: Possible Administrative Actions in Response to SCOTUS Rescinding *Roe v. Wade*

Executive Action & Implementing Agency	Possible Policy Actions	Limitations
Increase access to medication abortion FDA	Remove mifepristone from the REMS list – The medications mifepristone and misoprostol safely and effectively end early pregnancies when taken together. The White House could direct FDA to remove mifepristone from the FDA’s Risk Evaluation and Mitigation Strategy (REMS) list to enable greater access to medication abortion. Removing mifepristone from the REMS list would require the FDA to do away with two restrictions: (1) a requirement that	Any loosening of restrictions by the FDA can be countered by increased regulation at the state level. Nineteen states currently prohibit the use of telemedicine to prescribe medication for abortion, with a number of those states passing laws to ban or restrict

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	<p>patients sign an agreement acknowledging their provider has informed them about the drug; and (2) a requirement that the drug be prescribed by a specially certified health provider.</p> <p>Ensure wide availability of accurate information – The federal government could also support an education and awareness campaign to inform the public about the safety and effectiveness of medication abortion as well as how to access treatment.</p>	<p>access to medication abortion in direct response to the FDA's removal of the "in-person dispensing requirement" for mifepristone in December 2021.</p> <p>Even if the federal government improves communication and awareness about medication abortion, pregnant people in states that have medication abortion restrictions or bans may still lack access.</p>
<p>Provide resources for individuals seeking abortion care in other states</p> <p>HHS</p>	<p>Provide vouchers for travel, childcare services, and other support – HHS could issue grants to community-based organizations (CBOs) to provide services that support access to abortion care in other states.</p>	<p>A bill introduced in Missouri would allow private citizens to sue anyone who performs an abortion or helps a pregnant person obtain one, even if the procedure takes place outside Missouri. The passage of such laws may undermine the ability of CBOs to facilitate abortion access across state lines.</p>
<p>Establish a reproductive health ombudsman at HHS</p> <p>HHS</p>	<p>Gather information about insurers' coverage of reproductive health services – A reproductive health ombudsman could collect and analyze information about the reproductive health services insurers provide, including contraception, and share that information with the public to improve awareness about the services that are available to them and under what conditions.</p> <p>Disseminate information about how to connect with Title X clinics, reproductive health clinics, and abortion funds – A reproductive health ombudsman could also provide the public with information about how to access services available through Title X clinics, reproductive health clinics, and abortion funds. This might include the location of clinics and travel guidance, information about relevant</p>	<p>Individuals may still have difficulty accessing services despite communication and education efforts by HHS. For example, information about insurance coverage for reproductive health services will not be helpful for uninsured individuals.</p> <p>Some states have passed laws that criminalize abortion, including the act of helping to facilitate an abortion. These laws could put pregnant people seeking abortions, as well as entities such as abortion</p>

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	<p>requirements, state laws, or fees, as well as any associated waivers or assistance programs.</p> <p>Provide safety information related to self-managed abortions – A reproductive health ombudsman could communicate safety information to the public about self-managed abortions outside of formal medical settings. Clear guidance on how to safely manage abortions without the help of a medical provider could increase the public’s confidence in this practice as an option, thereby expanding access.</p>	<p>funds, at risk of legal repercussions in certain states.</p> <p>Those seeking to self-manage abortions would still need to acquire the medications necessary to do so. As described above, the FDA currently requires mifepristone to be prescribed by a specially certified health provider and some states have taken steps to further restrict access to the drug.</p>
<p>Enforce “Free Choice of Provider” requirements</p> <p>CMS</p>	<p>More aggressively enforce federal requirements – Medicaid beneficiaries have a legal right to receive family planning services from the provider of their choice. However, some states have passed laws excluding abortion providers from the state’s Medicaid program. The Biden administration could take more aggressive action to enforce this requirement by compelling noncompliant states to reinstate qualified family planning providers into their respective Medicaid programs or risk losing federal funding.</p>	<p>States that have excluded abortion providers from their Medicaid program may be more inclined to accept the loss of federal funding and scale back services instead of working to become compliant. Several of these states previously opted not to secure additional federal support for their Medicaid programs by abstaining from Medicaid expansion under the ACA.</p>
<p>Clarify protections for sensitive health and location data</p> <p>HHS (OCR)</p>	<p>Detail how entities that collect reproductive health information should protect PII and other sensitive data – As states continue to pass laws that criminalize abortion and seek to implement restrictions on seeking reproductive care across state lines, applications that track users’ location and collect sensitive health data could be used to prosecute users who have obtained or are seeking abortions. The HHS Office of Civil Rights (OCR) could establish data sharing</p>	<p>HHS would have to ensure that any regulations promulgated to protect users’ data from being used to enforce states’ abortion rights restrictions are also narrow enough not to compromise the Department’s aims to increase interoperability and data sharing</p>

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	<p>protections for mobile applications, such as those offering menstrual-tracking, to prevent such companies from sharing identifiable data that are currently not covered by HIPAA. OCR could also require entities to meet certain transparency requirements to inform users about the data that is shared with third parties.</p>	<p>between providers, insurers, and patients.</p>
<p>Use federal property and resources to increase access to abortion</p> <p>DOJ, DOD, OPM, and others</p>	<p>Identify reproductive health services that could be provided on federal property – DOJ and other applicable agencies could analyze and identify the reproductive health services that could be provided on federal property, particularly in states where these services are limited by state law or regulation.</p> <p>Facilitate access to reproductive health care for military members and their families – DOD could assess the viability of moving military personnel and their families to ensure access to reproductive health care.</p> <p>Grant federal employees paid time off and reimbursement for abortion expenses – OPM could explore requirements that all federal employees are provided paid time off and reimbursement for expenses necessary to access abortion.</p> <p>Review regulations and policies that limit abortion care and other reproductive health services – All federal agencies could review their regulations and policies to ensure those related to abortion care and other reproductive health services support broad access.</p>	<p>Any steps taken by the federal government to provide abortion services on federal land, in states that have banned abortion, are likely to incur legal challenges.</p> <p>The cost and practicality of moving military members and their families out of states that have banned or limited abortions, many of which are home to major military bases, may make this action too difficult to implement. Alternatively, DOD could explore creating a new benefit that funds travel and related costs for abortion services.</p> <p>Despite the time and financial support provided by the federal government, federal employees who seek or obtain an abortion would still be subject to state law in their respective state, including all potential penalties under the law.</p> <p>Potential regulatory actions that could be taken to expand access to abortion and other reproductive services may be superseded by federal law in certain situations,</p>

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Executive Action & Implementing Agency	Possible Policy Actions	Limitations
		limiting the reach of federal agencies.

Looking Ahead

The court is expected to rule on the case before its term is up in late June or early July. While it is unclear if the draft from February represents the court's final word on the issue, reproductive rights are expected to be drastically scaled back. Once issued, the Court's ruling will immediately take effect, putting pressure on the Biden administration to quickly implement safeguards to protect the rights of pregnant people. The White House should take lawmakers' suggestions seriously and instruct the leaders of each federal agency to submit plans to protect the right to an abortion within 30 days.