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Righting the Course: What Congress and the Biden-Harris Administration Must Do for Abortion Access in the United States

By Megan K. Donovan

The United States is at a crossroads for abortion access, and the next four years are critically important. During the Trump-Pence administration, antiabortion rhetoric and attempts to eviscerate abortion access escalated to new levels, building upon an already dire situation at the state level. And it is no accident that the federal judiciary—reaching all the way up to the U.S. Supreme Court—is primed to decimate abortion rights in the years to come.

This critical juncture comes as the nation continues to grapple with multiple, overlapping crises, from the COVID-19 pandemic and the economic recession triggered by it to state-sanctioned and racially motivated violence, including the 2020 murders of Breonna Taylor, George Floyd, Ahmaud Arbery, Tony McDade and Dion Johnson. These ongoing challenges reflect and exacerbate preexisting inequities and systemic failures, violence and oppression that permeate social structures and systems in the United States, including those that govern if, when and how someone can access abortion care.

The current crises also point clearly to the necessity of holistic, values-based and justice-oriented solutions. For example, when someone decides to have an abortion, they should be able to do so with dignity, on the timeline that meets their needs, and with affordable, equitable access to care. Together, Congress and the Biden-Harris administration have the power, mandate and moral imperative to make this vision a reality.

Abortion Access Today

Despite the fact that the constitutional right to abortion was affirmed nearly 50 years ago, today six in 10 women of reproductive age live in states with policy landscapes intentionally designed to make it difficult to end a pregnancy (see figure).[1] Transgender, nonbinary and gender-expansive people face these same barriers, plus additional obstacles to general health care that can further impede their access to timely, affordable abortion care.[2]

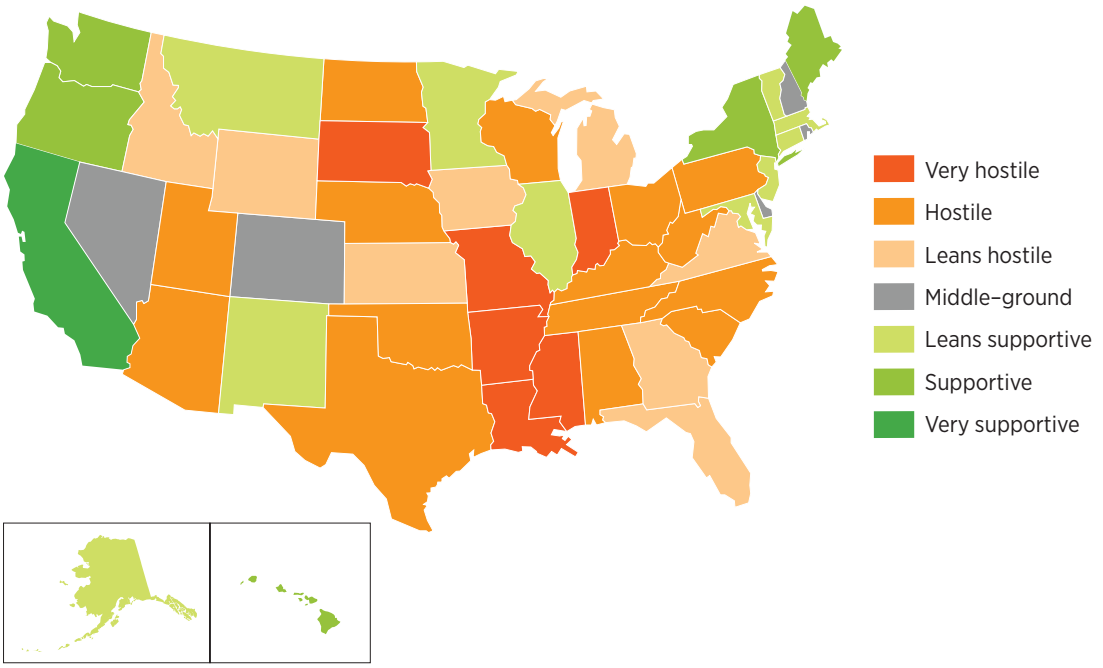
KEY POINTS

- *Six in 10 women of reproductive age live in states with policy landscapes designed to make abortion difficult to access.*
- *It is not enough to protect abortion access as it currently exists—policymakers must build toward a future of expanded, equitable access for all.*
- *Congress and the Biden-Harris administration should prioritize ensuring that people seeking to end a pregnancy can do so with dignity, on the timeline that meets their needs, and with affordable, equitable access to care.*

Across the United States, people seeking abortion care face many barriers and gaps in access, including:

Stigma and lies. The vocal minority opposed to abortion in the United States has long relied on stigma and manufactured outrage as two of its most powerful tools of oppression.[3] This was not lost on the Trump-Pence administration and its allies: The former president frequently used the power of the bully pulpit to deploy extreme rhetoric that relied on shame, hate and outright lies—particularly about abortion later in pregnancy—to rally his base, curry favor with antiabortion activists and embolden antiabortion lawmakers.[4,5]

In 2020, 58% of women aged 13–44 lived in the 29 states with policy landscapes hostile to abortion



Note: Laws in effect as of December 30, 2020.

Harassment and criminalization. Abortion providers reported increases in targeted violence and harassment during the Trump-Pence administration, as antiabortion rhetoric and state-level restrictions emboldened extremists around the country.[6] Moreover, as people increasingly self-manage abortion, the risk of arrest or prosecution is heightened for Black, Indigenous and other people of color, who are disproportionately criminalized because of systemic racism and discrimination.[7]

Affordability. At the federal level, the Hyde Amendment and related bans withhold insurance coverage of abortion from millions of people who obtain their coverage or care through federal programs, including Medicaid and Medicare enrollees, federal employees, military personnel and veterans, federal prisoners and detainees, Native Americans, Peace Corps volunteers and low-income residents of the District of Columbia.[8] Federal and state restrictions also operate to limit the availability of abortion coverage in the private insurance market.[9,10] On average, an abortion at 10 weeks' gestation costs around $550—which could be someone's entire monthly rent payment—and the cost increases for abortions later in pregnancy.[11]

State restrictions on access. State lawmakers hostile to abortion have enacted endless barriers over the years, including restrictions that get between pregnant people and providers (such as waiting periods, parental involvement laws and unnecessary mandatory procedures), onerous and unnecessary rules that aim to close down clinics, and a variety of abortion bans.[12–17] These restrictions layer injustice upon injustice: They make it more difficult to access abortion care in one's own community, result in medically unwarranted and unethical delays and expenses, and chip away at if, when and how someone can get abortion care at all. At the same time, these restrictions both contribute to and make it more difficult to overcome another barrier to access, which is the distance many people have to travel to reach an abortion provider.

Availability of services. In 2014, 35% of abortion patients traveled 25 or more miles to get to a provider.[18] Patients who lived in states with waiting period requirements and young people in states with parental involvement requirements traveled farther than those in states without such restrictions. Longer distances to abortion facilities are associated with increased burdens on patients, including higher out-of-pocket costs

for associated services such as food, lodging and child care; lost wages; increased difficulty getting to a clinic; delayed care; and decreased use of abortion services. Moreover, if the Supreme Court walks back the constitutional right to abortion—triggering bans on abortion to come into effect in some states—patients' average distance to the nearest facility would increase significantly and prevent as many as 140,000 people, most of them from the Midwest and South, from accessing abortion care each year.[19,20]

Limits on medication abortion. Medication abortion accounts for 39% of all abortions in the United States and has transformed how people obtain and experience abortion in this country.[21] Yet, despite its long safety record, the U.S. Food and Drug Administration (FDA) continues to impose restrictions that limit where and how people can get medication abortion. Unlike virtually any other medicine, abortion pills cannot be sold at retail pharmacies and must be dispensed by registered providers that stock the medicine in advance.[22] Moreover, 32 states restrict the type of health care providers that can prescribe abortion pills and 19 have their own restrictions on the use of telemedicine for medication abortion.[23]

Refusals of care. A patchwork of federal and state policies allow individual health care providers and entire institutions to put religious arguments ahead of patient care and turn away people seeking abortion care, referrals or training. The Trump-Pence administration attempted to dramatically expand the reach of these policies.[24] In particular, it relied on an expansive interpretation of the Weldon Amendment to threaten and punish states that seek to ensure abortion coverage and to help justify a range of harmful policies intended to limit access to reproductive health care.[25] The Weldon Amendment is a policy drafted to prohibit "discrimination" against health care providers and institutions that refuse to provide, pay for, provide coverage of or refer for abortion services, without requiring any mechanism for patients to get coverage or care elsewhere.

Repressive policies that harm young people. The United States has an abysmal track record when it comes to supporting and promoting the sexual health and well-being of young people, including when it comes to information and services related to abortion. Too often, young people are denied comprehensive sex education that includes medically accurate information about preventing or ending a pregnancy. In the limited circumstances in which abortion coverage is available, it may be inaccessible to young people if they fear that insurers will inform the policyholder—often, a parent—about the services they access. And while young people seeking abortion care have to navigate the same plethora of restrictions and barriers as adults, 37 states have additional restrictive parental involvement policies that deny young people bodily autonomy.[14,26]

Historic Inequities

The themes of racial, health and economic justice brought to the forefront of the nation's consciousness in 2020 are highly relevant to abortion care and the myriad ways that systemic racism, classism and discrimination affect if, when and how someone can get the care they need.

The labyrinth of obstacles and restrictions that impede access to abortion has cumulative effects on people seeking care and places the greatest burden on communities already struggling to get by and oppressed by structural inequities, including Black, Indigenous and other people of color, immigrants, LGBTQ people and young people. Ultimately, people with historic power and privilege are better positioned to access the care they need, while people denied those resources are forced to grapple with increasing levels of government-sanctioned reproductive coercion and control.

Moreover, as the COVID-19 pandemic continues to transform and, in many cases, devastate the social and economic realities of people's lives, these challenges and barriers to abortion care—and the disproportionate impact they have on marginalized communities—are exacerbated both directly and indirectly. At the outset, policymakers in 11 states immediately used the pandemic as a pretext to try to shut down abortion clinics and push services further out of reach for their residents.[27] As the pandemic continues, job losses, school closures and increased financial hardship make accessing and paying for abortion care that much more difficult.

At the same time, preexisting disparities in access to health care put marginalized communities at high risk for contracting COVID-19 and for receiving substandard care if they do.[28] Research conducted in April and May 2020 revealed that Black and Hispanic women were more likely than White women to want to postpone pregnancy or have fewer children because of the pandemic.[29] They

were also more likely to experience delays in receiving sexual and reproductive health care and to have trouble getting their birth control because of the pandemic.

As policymakers in the Biden-Harris administration and the 117th Congress seek to right the many historic wrongs that claimed attention in 2020, it is imperative they remember that reproductive justice goes hand in hand with racial, economic and health justice—and one major priority for reproductive justice is equitable access to abortion.

Federal Action Required

Federal action is necessary to undo the harms of the Trump-Pence administration, address long-standing barriers to care, and ensure that anyone seeking abortion in the United States can access timely, affordable care—regardless of where they live, how much money they make or their relationship to systemic power and privilege.

To make this vision a reality, Congress and the Biden-Harris administration must act swiftly to shore up and expand access to abortion. The October 2020 confirmation of Justice Amy Coney Barrett cemented an ultraconservative, antiabortion majority on the Supreme Court for the foreseeable future. Far from an aberration, Barrett's confirmation is a highly visible example of a coordinated, multilevel campaign to stack the federal judiciary with antiabortion judges.[30] The ramifications will be both long-lasting and profound: There are more than a dozen abortion-related cases mere steps away from the Court's doors, including challenges to a variety of abortion bans and other restrictions intended to directly test or undermine the legal precedents previously respected by the Supreme Court.[31]

Fortunately, Congress and the Biden-Harris administration can counteract this judicial assault with robust legislative and executive policies. The following priorities for federal action were heavily informed by the Blueprint for Sexual and Reproductive Heath, Rights and Justice—a proactive policy agenda to advance sexual and reproductive health in the United States and around the world endorsed by the Guttmacher Institute and more than 90 other organizations.[32]

Demonstrate visible and vocal support for abortion access. The power of using the bully pulpit to destigmatize and promote access to comprehensive, equitable abortion care cannot be overstated. Congress and the Biden-Harris administration must use their platforms to speak clearly and often about abortion rights and equitable access, condemn antiabortion violence and intimidation, and destigmatize the full range of abortion methods, including self-managed abortion.

Congress can also reinforce these values and make meaningful progress by ensuring that comprehensive access to abortion-related information and services is included in all relevant programs and policies, such as legislation and funding streams to promote comprehensive sex education, telehealth programs and infrastructure, and health care reform.

Create a federal statutory right to abortion care. Congress must act without delay to pass the Women's Health Protection Act, which would establish a federal statutory right for providers to deliver and patients to receive abortion care free from medically unnecessary bans and restrictions.[33] The bill explicitly protects against many of the most common and burdensome restrictions favored by antiabortion lawmakers and would protect the right to abortion nationwide. Establishing these federal statutory rights is especially urgent given the threats to abortion access coming from the judicial branch.

Ensure abortion coverage for all. To promote equitable access to abortion care, Congress must ensure it is affordable to everyone who wants to end a pregnancy. This will require a number of significant steps, including:

- Removing the Hyde Amendment and related coverage bans from annual spending bills.[34]
- Passing the EACH Woman Act to ensure people can obtain insurance coverage of abortion whether they get their coverage or care through Medicaid, Medicare, other public programs or private health plans.[35]
- Passing the HEAL for Immigrant Women and Families Act; among other things, it would enable all lawfully present immigrants to enroll in Medicaid and the Children's Health Insurance Program if they are otherwise eligible.[36]
- Expanding comprehensive health insurance coverage to those who are currently uninsured.[37] Whether this is done through the Biden-Harris plan or a less incremental approach like Medicare for All, Congress

and the administration must ensure that coverage applies to the full range of reproductive health care, including abortion.[38,39]

Protect patients from discrimination. Congress must also prioritize the health needs of patients over the personal beliefs of providers and insurers by eliminating the Weldon Amendment from the annual spending bill that funds the U.S. Department of Health and Human Services (HHS).[25]

At the same time, the Biden-Harris administration can undo some of the harm wrought during the Trump presidency and prevent future encroachments by repealing the May 2019 "refusal of care" rule and eliminating the HHS Office of Conscience and Religious Freedom that was created as cover for the discriminatory refusal policies and actions pursued by the previous administration.[40]

Follow the evidence on medication abortion. As the Biden-Harris administration works to restore scientific integrity to the processes and policies of the executive branch, it is imperative that HHS takes an evidence-based approach to policymaking related to medication abortion.[41] First, the administration must immediately issue guidance confirming that the FDA will not require in-person dispensing of abortion pills for the duration of the COVID-19 pandemic. Next, the FDA should review all the restrictions it currently places on abortion pills in light of the full body of scientific evidence and real-world use and modify or remove them accordingly.

Support self-managed abortion. Medication abortion has changed the way people think about self-managed abortion by offering a method that has proven to be simple, safe and effective. Regardless of the method used, no one should be punished for seeking to end a pregnancy. Congress must do its part to fulfill this basic right by ensuring that the criminal code cannot be used to punish someone for self-managing an abortion.

Similarly, the administration should ensure that the U.S. Department of Justice does not investigate, arrest or prosecute people for actions taken or omitted with respect to their own pregnancy, including self-managing or attempting to self-manage abortion care.[32] Beyond this bare minimum, HHS should also create public health resources to educate pregnant people, medical providers, first responders, social workers and law enforcement officials about self-managed abortion. These resources should be designed to promote accurate information, reduce stigma and encourage supportive responses when people who self-manage an abortion interact with health care providers or other social support systems.

Protect young people's access to abortion. Many of the policy measures necessary to improve access to abortion would benefit adolescents and young adults. At the same time, there are additional actions the federal government must take to address the specific needs and barriers facing this age-group, as well as to prioritize young people's access to confidential and affordable care.[42] The Biden-Harris administration should ensure that HHS issues rules and directives barring insurers from sending explanation of benefits forms and other communications about sexual and reproductive health care to anyone other than the patient and expanding the confidentiality protections for sensitive information under the Health Insurance Portability and Accountability Act.

Congress must also take action to ensure young people have the information and support they need to access affordable and confidential abortion care, including by passing the Real Education for Healthy Youth Act and ensuring that health care reform efforts include coverage and confidentiality protections for young people and abortion care.

Prevent violence and harassment. No one should be subject to the risk of violence or harassment for seeking, providing or supporting abortion care. The Biden-Harris administration must prioritize efforts to monitor, prevent and respond to such attacks.[32] It can do this by developing robust policies and guidelines, investigating and prosecuting people who commit acts of violence or harassment, and coordinating across federal and state agencies to fund and support training and prevention initiatives.

Create a reproductive health care provider service corps. Congress can also increase the availability of abortion care by creating a service corps that would provide incentives and support for clinicians to offer the full range of reproductive health care, including abortion, in underserved areas.[32] This program should support the development of culturally competent care and encourage enrollment of bilingual providers and providers of color to reflect the populations they serve.

A New Tomorrow for Abortion Access?

The start of the Biden-Harris administration and the 117th Congress offered an encouraging reprieve from the Trump-Pence era in many ways, but the administration's failure to immediately affirm and take action on key priorities for abortion access disappointed advocates hoping for more.[43] All the while, dire threats—particularly from antiabortion lawmakers and conservative federal courts—continue to require swift and robust federal action.

When it comes to abortion access, protecting basic rights is just the starting point. Congress and the Biden-Harris administration must prioritize actions and policies that go beyond protecting existing levels of access and instead move the United States toward a bolder, brighter future—one in which everyone can obtain affordable abortion care with dignity and on the timeline that is right for them. ■

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