

June 16, 2021

Hon. Dick Durbin, Chair  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Hon. Chuck Grassley, Ranking Member  
Senate Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, DC 20510

Hon. Richard Blumenthal, Chair  
Senate Committee on the Judiciary  
Subcommittee on the Constitution  
224 Dirksen Senate Office Building  
Washington, DC 20510

Hon. Ted Cruz, Ranking Member  
Senate Committee on the Judiciary  
Subcommittee on the Constitution  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senators Durbin, Grassley, Blumenthal and Cruz:

We write to share our views regarding the ways in which the Women’s Health Protection Act of 2021 (“WHPA”) furthers the United States’ human rights treaty obligations, including its obligations under the International Covenant on Civil and Political Rights (ICCPR) as well as other international human rights instruments.

### **The ICCPR Protects Access to Abortion**

U.N. human rights treaty bodies and independent experts have firmly established that reproductive rights are human rights, grounded in the Universal Declaration of Human Rights (UDHR) and the core principles undergirding the human rights treaties. Human rights treaty bodies have consistently recognized and protected reproductive rights as an essential component of the realization of fundamental human rights including the rights to health, sexual and reproductive health, life, equality, information, education, privacy, freedom from discrimination and violence, and freedom from torture and cruel, inhuman and degrading treatment.<sup>1</sup>

International human rights law recognizes and protects access to abortion, in particular, as central to women’s autonomy and reproductive health, and critical to achieving gender equality.<sup>2</sup> International human rights norms require that, where abortion is legal, the nation state must

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<sup>1</sup> Center for Reproductive Rights, *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, at 3 (2019), <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf>.

<sup>2</sup> For example, in 2018, the U.N. Human Rights Council reaffirmed the global consensus that ensuring reproductive health and safety, including access to abortion, is of the utmost importance under international law. Human Rights Council Res. on the Elimination of All Forms of Discrimination against Women and Girls, U.N. Doc. A/HRC/38/L.1/Rev.1, at 3 (July 3, 2018). Although the vast majority of abortions globally are provided to individuals who identify as women or girls, other people (such as trans men/trans masculine and non-binary people) can also experience pregnancy and abortion, and may experience intersectional discrimination.

ensure that it is genuinely safe and accessible.<sup>3</sup> Treaty bodies have condemned procedural barriers to abortion services, including mandatory waiting periods and biased counseling.<sup>4</sup>

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, contains particularly important protections for access to abortion. In 2018, the UN Human Rights Committee, which oversees implementation of the ICCPR, made clear that the right to life enshrined in Article 6 of the Covenant includes the right to access safe and legal abortion without the imposition of restrictions which subject women and girls to physical or mental pain or suffering, discriminate against them, arbitrarily interfere with their privacy, or place them at risk of undertaking unsafe abortions.<sup>5</sup> The Committee stated that the right to life at a minimum requires states parties to provide safe, legal, and effective access to abortion where either the life and the health of the pregnant woman or girl is at risk, or when carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering.<sup>6</sup> Treaty parties should not introduce new barriers to abortion and should remove existing barriers that deny effective access by women and girls to safe and legal abortion.<sup>7</sup> Parties to the Covenant should likewise prevent the stigmatization of women and girls seeking abortion.<sup>8</sup>

Abortion access is currently under attack in the United States. Although the U.S. Supreme Court has repeatedly re-affirmed the constitutional right to abortion established in *Roe v. Wade*,<sup>9</sup> states are enacting increasingly extreme and unconstitutional abortion bans and restrictions in an effort to present the Supreme Court with an opportunity to overturn or decimate *Roe*.<sup>10</sup>

As of March 15, 2021, more than 500 bills restricting abortion had been introduced in state legislatures for the 2021 legislative season, up from the 304 restrictive bills introduced by that time in the 2019 session.<sup>11</sup> In 2020, states enacted twenty-seven new laws restricting abortion

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<sup>3</sup> United Nations (1995). Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), at p. 90. See also Concluding Observations: Colombia (2016), para. 21 (lack of proper training of medical personnel is obstacle to legal abortion).

<sup>4</sup> Center for Reproductive Rights, *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, at 19 (2019), <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf>.

<sup>5</sup> Human Rights Committee, *Gen. Comment 36: on the Right to Life (Art. 6 of the International Covenant on Civil and Political Rights)*, para. 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Roe v. Wade*, 410 U.S. 113 (1973); see, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>10</sup> Center for Reproductive Rights, *What If Roe Fell: 2019*, at 14-17 (2019), <https://reproductiverights.org/what-if-roe-fell> [hereinafter CRR, *What if Roe Fell*]; see also Brief for Petitioner in Support of Certiorari at 9, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (S. Ct. Sept. 2, 2020) (state petitioner arguing that law banning abortion after fifteen weeks presents an "ideal vehicle" for re-evaluating *Roe v. Wade*).

<sup>11</sup> State Abortion Restriction Trend Report (GUTTMACHER INST. 2021), available at [https://www.plannedparenthood.org/uploads/filer\\_public/18/d7/18d7c70a-a4f6-4498-bdfb-fdbeece3fd6/2021\\_state\\_abortion\\_restriction\\_trend\\_report\\_final.pdf](https://www.plannedparenthood.org/uploads/filer_public/18/d7/18d7c70a-a4f6-4498-bdfb-fdbeece3fd6/2021_state_abortion_restriction_trend_report_final.pdf) (last visited March 28, 2021).

access.<sup>12</sup> These include unconstitutional pre-viability bans on abortion,<sup>13</sup> such as laws banning abortion around 6 weeks of pregnancy.<sup>14</sup> In addition, states enacted and expanded regulations that target abortion providers with medically unjustified requirements that subject people seeking abortion to mandatory delays, multiple clinic visits, and medically inaccurate information.<sup>15</sup> While not directly prohibiting abortion, these targeted regulations have the purpose or effect of imposing substantial burdens on people seeking abortion and making it difficult or impossible for clinics to provide care and for people to access that care.

States have also exploited the COVID-19 pandemic to ban abortion. At the onset of the COVID-19 pandemic, elected officials in several states, including Texas, Oklahoma, Alabama, Iowa, and Ohio, attempted to use the COVID-19 crisis to further block access to time-sensitive, essential abortion care. States' actions forced clinics to turn away hundreds of patients, many of whom had no other options, while others traveled hundreds of miles across state lines during a public health emergency. Black and Hispanic people seeking abortion care have been particularly impacted by restrictions, including during the COVID-19 pandemic.<sup>16</sup> These states' obstructive actions are part of an ongoing and long-standing effort to limit, and in many cases prohibit, abortion access in the United States, exacerbating systemic inequities.<sup>17</sup>

These attacks on reproductive care have resulted in wide differences in access to abortion care across the United States, with six states having only one abortion clinic. As detailed in the Abortion Care Network's most recent *Communities Need Clinics* report, abortion clinics are closing at an alarming rate and the number of independent clinics has been reduced by over 32 percent since 2012.<sup>18</sup> As clinics close, patients are forced to travel farther, cross state lines, find overnight lodging, take additional time away from work, and find childcare — increasing both medical and personal out-of-pocket costs.<sup>19</sup> Research demonstrates that maternal mortality rises significantly when states lose clinics, and when they impose abortion restrictions based on

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<sup>12</sup> Elizabeth Nash, et al., *State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other*, GUTTMACHER INST. (Dec. 15, 2020), <https://www.guttmacher.org/article/2020/12/state-policy-trends-2020-reproductive-health-and-rights-year-no-other#>.

<sup>13</sup> See Megan K. Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, GUTTMACHER INST. (Jan. 9, 2020), <https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy>.

<sup>14</sup> These laws are the subject of ongoing litigation. *Id.* Pregnancy is dated from a person's last period. Thus, a 6-week ban prohibits the option of abortion approximately 2 weeks after a missed period, assuming a person has a regular, 4-week period. Such bans operate to prohibit abortion before many people know they are pregnant.

<sup>15</sup> See *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Sept. 1, 2020), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>; see also *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Sept. 1, 2020), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.

<sup>16</sup> Taida Wolfe & Yana Van der Meulen Rodgers, *Abortion During the COVID-19 Pandemic: Racial Disparities and Barriers to Care in the USA*, SEXUALITY RES. AND SOC. POL'Y (Mar. 22, 2021), <https://doi.org/10.1007/s13178-021-00569-8>.

<sup>17</sup> See *Center Lawsuits to Protect Abortion Access During the COVID-19 Pandemic Are Working*, CTR. FOR REPROD. RIGHTS (May 2020) <https://reproductiverights.org/story/center-files-emergency-lawsuit-texas-protect-essential-abortion-access-during-pandemic>.

<sup>18</sup> See *Communities Need Clinics*, ABORTION CARE NETWORK 1, 7-8 (2019), <https://www.abortioncarenetwork.org/communitiesneedclinics>.

<sup>19</sup> Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences For Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPECTIVES ON SEXUAL AND REPROD. HEALTH 95-102 (2017).

gestational age.<sup>20</sup> Restrictions on abortion access particularly harm marginalized communities, including immigrants, low-income people, people of color, LGBTQI+ persons, persons living in rural areas, and persons with disabilities.<sup>21</sup>

### **International Human Rights Experts and the International Community Have Expressed Concern About Barriers to Abortion Access in the United States**

The World Health Organization, the UN body that directs and coordinates global health, has recognized that “[a]ccess to legal, safe and comprehensive abortion care, including post-abortion care, is essential for the attainment of the highest possible level of sexual and reproductive health.”<sup>22</sup> International human rights experts and other official representatives of the international community have repeatedly expressed concern that the barriers to abortion access in the U.S. run counter to this principle and endanger people seeking abortion care.<sup>23</sup> For example:

- In 2016, the UN Working Group on Discrimination Against Women in Law and Practice recommended that the U.S. ensure that women are able to exercise their existing constitutional right under *Roe v. Wade* and combat the stigma attached to reproductive and sexual health care.<sup>24</sup>
- At the conclusion of his 2017 visit to the United States, the UN Special Rapporteur on Extreme Poverty and Human Rights noted concern that low-income women face legal and practical obstacles to exercising their constitutional right to access abortion services, trapping many women in cycles of poverty.<sup>25</sup>
- In May 2020, the UN Working Group on Discrimination against Women and Girls sent a communication to the U.S. government expressing concern that some U.S. state officials

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<sup>20</sup> Amy Addante, et al., *The Association Between State-level Abortion Restrictions and Maternal Mortality in the United States, 1995-2017*, CONTRACEPTION (March 26, 2021), [https://www.contraceptionjournal.org/article/S0010-7824\(21\)00090-1/pdf](https://www.contraceptionjournal.org/article/S0010-7824(21)00090-1/pdf); Summer Sherburne Hawkins et al., *Impact of State-Level Changes on Maternal Mortality: A Population-Based, Quasi-Experimental Study*, 58 AM. J. OF PREVENTATIVE MED. 165-174 (2019), [https://www.ajpmonline.org/article/S0749-3797\(19\)30419-2/pdf](https://www.ajpmonline.org/article/S0749-3797(19)30419-2/pdf). The United States already experiences higher maternal mortality rates than other developed countries, and rates have been rising in the United States in recent years. See Roosa Tikanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

<sup>21</sup> CRR, *What if Roe Fell*, supra note 10, at 18.

<sup>22</sup> [https://www.who.int/health-topics/abortion#tab=tab\\_1](https://www.who.int/health-topics/abortion#tab=tab_1).

<sup>23</sup> The international norm of ensuring access to safe abortion care as essential to protecting human rights and achieving gender equality, coupled with a sound and appropriate comparative law analysis, gives the lie to the claim by some that United States abortion laws are overly permissive as compared to other nations and international norms. For an in-depth discussion of United States abortion law in comparative perspective, see Martha F. Davis and Risa E. Kaufman, *Truth is Truth: U.S. Abortion Law in the Global Context*, AMERICA CONSTITUTION SOCIETY: ISSUE BRIEF (Aug. 2018), <https://www.acslaw.org/wp-content/uploads/2018/08/Davis-Kaufman-Issue-Brief.pdf>.

<sup>24</sup> U.N. Working Group on Discrimination Against Women in Law and Practice, *Report of the Mission to the United States of America*, para. 90(g), 95(h), 95(i), U.N. Doc. A/HRC/32/44/Add.2 (June 7, 2016).

<sup>25</sup> Special Rapporteur on extreme poverty and human rights, *Report of the Mission to the United States of America*, para. 56, U.N. Doc. A/HRC/38/33/Add.1 (May, 4, 2018) (by Philip Alston).

had manipulated the COVID-19 crisis to restrict access to abortion. The experts recognized that “this is the latest example illustrating a pattern of restrictions and retrogressions in access to legal abortion care across the country.” The experts reminded U.S. authorities that abortion care constitutes essential health care that must remain available during and after the pandemic. They noted that abortion access barriers exacerbate systemic inequalities and cause particular harm to marginalized communities, including low-income people, people of color, immigrants, people with disabilities, and LGBTQI people.<sup>26</sup>

The international community reiterated these concerns during the recent Universal Periodic Review (UPR) of the U.S. human rights record, held by the UN Human Rights Council on November 9, 2020. Numerous UN member states urged the United States to improve, protect, and ensure equitable access to comprehensive sexual and reproductive health, rights, services and information, with particular focus on people experiencing multiple and intersecting forms of discrimination. In particular, Norway, the United Kingdom of Great Britain and Northeastern Ireland, Australia, Austria, Canada, Denmark, Finland, Iceland, Luxembourg, Malaysia, Mexico, the Netherlands, and New Zealand, all made specific recommendations to improve access to sexual and reproductive health services and rights both domestically and abroad.<sup>27</sup>

While the prior U.S. Administration “rejected the proposition that abortion was a matter of international human rights,”<sup>28</sup> in its written response to the UPR, submitted on March 4, 2021, the current administration supported each of the UPR recommendations concerning reproductive rights and health services in their entirety. The U.S. statement noted that “[i]t is the policy of the U.S. to support women’s and girls’ sexual and reproductive health and rights in the U.S. as well as globally.”<sup>29</sup> Further, the U.S. response cited President Biden’s actions to expand availability of U.S. foreign aid to support the full range of reproductive services, and to direct review of funding restrictions embedded in the Title X family planning program and other such regulations that impose “undue restrictions on the use of federal funds for women’s access to complete medical information.”<sup>30</sup> The U.S. State Department’s pledge to restore reporting on “a broader range of issues related to reproductive rights” to its annual Country Reports on Human Rights Practices underscores the important place of reproductive rights as a human rights marker.<sup>31</sup>

Indeed, UN Secretary General António Guterres has confirmed the profound global significance of U.S. support for reproductive rights. In January 2021, Secretary General Guterres noted the

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<sup>26</sup> Human Rights Council, *Communication of Special Procedures to the U.S. regarding Information received concerning restrictions taken in the context of the COVID-19 pandemic and which have been interpreted in ways impeding access to abortion services*, Ref. AL USA 11/2020 (May 22, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25279>.

<sup>27</sup> Rep. of the Working Group on the Universal Periodic Review: United States of America, Hum. Rts. Council, Forty-sixth session, Feb. 22 – Mar. 19, 2021, A/HRC/46/15, at paras. 26.299-26.312.

<sup>28</sup> *Id.* at para. 24.

<sup>29</sup> United States of America, Views on Conclusion and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, Rep. of the Working Group on the Universal Periodic Review: United States of America – Addendum, Hum. Rts. Council, forty-sixth session, Feb. 22 – Mar. 19, 2021, A/HRC/46/15/Add.1 at para. 112.

<sup>30</sup> *Id.*

<sup>31</sup> U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, Preface: 2020 Country Reports on Human Rights Practices (March 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/>.

connections between U.S. funding for reproductive health services and the achievement of the Sustainable Development Goals (SDGs). In a statement, Secretary General Guterres praised the U.S. reversal of its prior policy of denying international support to such programs.<sup>32</sup> While the SDGs are not binding on UN Member states, they reflect an urgent call to action to ensure a sustainable future for all nations. Access to comprehensive reproductive health and services, including abortion, are key components of goals 3 (Good Health and Wellbeing) and 6 (Gender Equality).<sup>33</sup>

### **WHPA Helps To Fulfill the United States' Human Rights Commitments, Including Under the ICCPR**

The Women's Health Protection Act (WHPA) protects the right to access abortion care by creating a safeguard against abortion bans and medically unnecessary restrictions on abortion care – restrictions that are not applied to any other similar medical care. These harmful restrictions substantially burden and reduce or eliminate abortion care in large areas of the country and prevent people from making personal decisions about their health, their lives, and their futures.

Specifically, WHPA would protect access to abortion care from, among other things:

- Bans on abortion prior to viability that are a direct violation of constitutional rights confirmed by *Roe v. Wade*;
- Requirements that doctors provide medically inaccurate information to people seeking abortion care;
- Restrictions on the ability to access medication abortion in the earliest weeks of pregnancy;
- Needless state-mandated conditions on the right to abortion, such as forcing pregnant people without medical reason to undergo ultrasounds or other extra tests or procedures and endure waiting periods, shaming them for, and substantially increasing the cost of, obtaining abortion care.

In so doing, WHPA furthers the United States' treaty obligations under the ICCPR to protect the right to access safe and legal abortion without the imposition of restrictions which subject women and girls to physical or mental pain or suffering, discriminate against them, arbitrarily interfere with their privacy, or place them at risk of undertaking unsafe abortions.<sup>34</sup> It furthers the requirement that the government remove barriers that deny effective access to safe and legal abortion, prevent new barriers from being imposed, and otherwise prevent the stigmatization of women and girls seeking abortion.

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<sup>32</sup> United Nations, *Guterres Welcomes US Decision to Restore Funding to the UNFPA*, UN NEWS, (Jan. 29, 2021), <https://news.un.org/en/story/2021/01/1083312> (last visited Mar. 29, 2021). See also Memorandum on Protecting Women's Health at Home and Abroad, 2021 Daily Comp. Pres. Doc. (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/>.

<sup>33</sup> See United Nations Dept. of Econ. and Soc. Affairs: Sustainable Development Goals, <https://sdgs.un.org/goals> (last visited Mar. 30, 2021).

<sup>34</sup> Human Rights Committee, *supra* note 5.

In addition, WHPA responds to international peers' recommendations to support access to reproductive health services as a component of human rights implementation. The U.S. government's support of these recommendations during the UPR process was an important acknowledgement of these national obligations. Enactment of WHPA would take a further, significant step toward protecting the human rights of people seeking abortion care in the U.S.

Sincerely,

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