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S. 4612

To protect a person’s ability to access contraceptives and to engage in contraception, and to protect a health care provider’s ability to provide contraceptives, contraception, and information related to contraception.

IN THE SENATE OF THE UNITED STATES

JULY 26, 2022

Mr. MARKEY (for himself, Ms. HIRONO, Ms. DUCKWORTH, Mr. MERKLEY, Mr. BLUMENTHAL, Mr. WARNER, Mr. BENNET, Ms. KLOBUCHAR, Mr. DURBIN, Ms. WARREN, Mr. SCHATZ, Mr. MURPHY, Mr. WHITEHOUSE, Mrs. MURRAY, Ms. BALDWIN, Mr. REED, Mrs. FEINSTEIN, Mr. HICKENLOOPER, Ms. CORTEZ MASTO, Mr. WARNOCK, Ms. CANTWELL, and Mr. OSSOFF) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect a person’s ability to access contraceptives and to engage in contraception, and to protect a health care provider’s ability to provide contraceptives, contraception, and information related to contraception.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Right to Contraception
5 Act”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) CONTRACEPTION.—The term “contracep-
4 tion” means an action taken to prevent pregnancy,
5 including the use of contraceptives or fertility-aware-
6 ness based methods, and sterilization procedures.

7 (2) CONTRACEPTIVE.—The term “contracep-
8 tive” means any drug, device, or biological product
9 intended for use in the prevention of pregnancy,
10 whether specifically intended to prevent pregnancy
11 or for other health needs, that is legally marketed
12 under the Federal Food, Drug, and Cosmetic Act,
13 such as oral contraceptives, long-acting reversible
14 contraceptives, emergency contraceptives, internal
15 and external condoms, injectables, vaginal barrier
16 methods, transdermal patches, and vaginal rings, or
17 other contraceptives.

18 (3) GOVERNMENT.—The term “government”
19 includes each branch, department, agency, instru-
20 mentality, and official of the United States or a
21 State.

22 (4) HEALTH CARE PROVIDER.—The term
23 “health care provider” means, with respect to a
24 State, any entity or individual (including any physi-
25 cian, certified nurse-midwife, nurse, nurse practi-
26 tioner, physician assistant, and pharmacist) that is

1 licensed or otherwise authorized by the State to pro-
2 vide health care services.

3 (5) STATE.—The term “State” includes each of
4 the 50 States, the District of Columbia, the Com-
5 monwealth of Puerto Rico, and each territory and
6 possession of the United States, and any subdivision
7 of any of the foregoing, including any unit of local
8 government, such as a county, city, town, village, or
9 other general purpose political subdivision of a
10 State.

11 **SEC. 3. FINDINGS.**

12 Congress finds the following:

13 (1) The right to contraception is a fundamental
14 right, central to a person’s privacy, health, well-
15 being, dignity, liberty, equality, and ability to par-
16 ticipate in the social and economic life of the Nation.

17 (2) The Supreme Court has repeatedly recog-
18 nized the constitutional right to contraception.

19 (3) In *Griswold v. Connecticut* (381 U.S. 479
20 (1965)), the Supreme Court first recognized the con-
21 stitutional right for married people to use contracep-
22 tives.

23 (4) In *Eisenstadt v. Baird* (405 U.S. 438
24 (1972)), the Supreme Court confirmed the constitu-

1 tional right of all people to legally access contracep-
2 tives regardless of marital status.

3 (5) In *Carey v. Population Services Inter-*
4 *national* (431 U.S. 678 (1977)), the Supreme Court
5 affirmed the constitutional right to contraceptives
6 for minors.

7 (6) The right to contraception has been repeat-
8 edly recognized internationally as a human right.
9 The United Nations Population Fund has published
10 several reports outlining family planning as a basic
11 human right that advances women's health, eco-
12 nomic empowerment, and equality.

13 (7) Access to contraceptives is internationally
14 recognized by the World Health Organization as ad-
15 vancing other human rights such as the right to life,
16 liberty, expression, health, work, and education.

17 (8) Contraception is safe, essential health care,
18 and access to contraceptive products and services is
19 central to people's ability to participate equally in
20 economic and social life in the United States and
21 globally. Contraception allows people to make deci-
22 sions about their families and their lives.

23 (9) Contraception is key to sexual and repro-
24 ductive health. Contraception is critical to pre-
25 venting unintended pregnancy, and many contracep-

1 tives are highly effective in preventing and treating
2 a wide array of often severe medical conditions and
3 decrease the risk of certain cancers.

4 (10) Family planning improves health outcomes
5 for women, their families, and their communities
6 and reduces rates of maternal and infant mortality
7 and morbidity.

8 (11) The United States has a long history of
9 reproductive coercion, including the childbearing
10 forced upon enslaved women, as well as the forced
11 sterilization of Black women, Puerto Rican women,
12 indigenous women, immigrant women, and disabled
13 women, and reproductive coercion continues to
14 occur.

15 (12) The right to make personal decisions about
16 contraceptive use is important for all Americans,
17 and is especially critical for historically marginalized
18 groups, including Black, indigenous, and other peo-
19 ple of color; immigrants; LGBTQ people; people with
20 disabilities; people with low incomes; and people liv-
21 ing in rural and underserved areas. Many people
22 who are part of these marginalized groups already
23 face barriers—exacerbated by social, political, eco-
24 nomic, and environmental inequities—to comprehen-
25 sive health care, including reproductive health care,

1 that reduce their ability to make decisions about
2 their health, families, and lives.

3 (13) State and Federal policies governing phar-
4 maceutical and insurance policies affect the accessi-
5 bility of contraceptives, and the settings in which
6 contraception services are delivered.

7 (14) People engage in interstate commerce to
8 access contraception services.

9 (15) To provide contraception services, health
10 care providers employ and obtain commercial serv-
11 ices from doctors, nurses, and other personnel who
12 engage in interstate commerce and travel across
13 State lines.

14 (16) Congress has the authority to enact this
15 Act to protect access to contraception pursuant to—

16 (A) its powers under the Commerce Clause
17 of section 8 of article I of the Constitution of
18 the United States;

19 (B) its powers under section 5 of the Four-
20 teenth Amendment to the Constitution of the
21 United States to enforce the provisions of sec-
22 tion 1 of the Fourteenth Amendment; and

23 (C) its powers under the necessary and
24 proper clause of section 8 of article I of the
25 Constitution of the United States.

1 (17) Congress has used its authority in the past
2 to protect and expand access to contraception infor-
3 mation, products, and services.

4 (18) In 1970, Congress established the family
5 planning program under title X of the Public Health
6 Service Act (42 U.S.C. 300 et seq.), the only Fed-
7 eral grant program dedicated to family planning and
8 related services, providing access to information,
9 products, and services for contraception.

10 (19) In 1972, Congress required the Medicaid
11 program to cover family planning services and sup-
12 plies, and the Medicaid program currently accounts
13 for 75 percent of Federal funds spent on family
14 planning.

15 (20) In 2010, Congress enacted the Patient
16 Protection and Affordable Care Act (Public Law
17 111–148) (referred to in this section as the “ACA”).
18 Among other provisions, the ACA included provi-
19 sions to expand the affordability and accessibility of
20 contraception by requiring health insurance plans to
21 provide coverage for preventive services with no pa-
22 tient cost-sharing.

23 (21) Despite the clearly established constitu-
24 tional right to contraception, access to contracep-
25 tives, including emergency contraceptives and long-

1 acting reversible contraceptives, has been obstructed
2 across the United States in various ways.

3 (22) As of 2022, at least 4 States tried to ban
4 access to some or all contraceptives by restricting
5 access to public funding for these products and serv-
6 ices. Furthermore, Arkansas, Mississippi, Missouri,
7 and Texas have infringed on people’s ability to ac-
8 cess their contraceptive care by violating the free
9 choice of provider requirement under the Medicaid
10 program.

11 (23) Providers’ refusals to offer contraceptives
12 and information related to contraception based on
13 their own personal beliefs impede patients from ob-
14 taining their preferred method, with laws in 12
15 States as of the date of introduction of this Act spe-
16 cifically allowing health care providers to refuse to
17 provide services related to contraception.

18 (24) States have attempted to define abortion
19 expansively so as to include contraceptives in State
20 bans on abortion and have also restricted access to
21 emergency contraception.

22 (25) In June 2022, Justice Thomas, in his con-
23 curring opinion in *Dobbs v. Jackson Women’s*
24 *Health Organization* (597 U.S. ____ (2022)), stated
25 that the Supreme Court “should reconsider all of

1 this Court’s substantive due process precedents, in-
2 cluding *Griswold*, *Lawrence*, and *Obergefell*” and
3 that the Court has “a duty to correct the error es-
4 tablished in those precedents” by overruling them.

5 (26) In order to further public health and to
6 combat efforts to restrict access to reproductive
7 health care, congressional action is necessary to pro-
8 tect access to contraceptives, contraception, and in-
9 formation related to contraception for everyone, re-
10 gardless of actual or perceived race, ethnicity, sex
11 (including gender identity and sexual orientation),
12 income, disability, national origin, immigration sta-
13 tus, or geography.

14 **SEC. 4. PERMITTED SERVICES.**

15 (a) IN GENERAL.—A person has a statutory right
16 under this Act to obtain contraceptives and to engage in
17 contraception, and a health care provider has a cor-
18 responding right to provide contraceptives, contraception,
19 and information related to contraception.

20 (b) LIMITATIONS OR REQUIREMENTS.—The statu-
21 tory rights specified in subsection (a) shall not be limited
22 or otherwise infringed through any limitation or require-
23 ment that—

24 (1) expressly, effectively, implicitly, or as imple-
25 mented singles out the provision of contraceptives,

1 contraception, or contraception-related information;
2 health care providers who provide contraceptives,
3 contraception, or contraception-related information;
4 or facilities in which contraceptives, contraception,
5 or contraception-related information is provided; and

6 (2) impedes access to contraceptives, contracep-
7 tion, or contraception-related information.

8 (c) EXCEPTION.—To defend against a claim that a
9 limitation or requirement violates a health care provider’s
10 or patient’s statutory rights under subsection (b), a party
11 must establish, by clear and convincing evidence, that—

12 (1) the limitation or requirement significantly
13 advances the safety of contraceptives, contraception,
14 and information related to contraception; and

15 (2) the safety of contraceptives, contraception,
16 and information related to contraception or the
17 health of patients cannot be advanced by a less re-
18 strictive alternative measure or action.

19 (d) RULE OF CONSTRUCTION.—Nothing in this sec-
20 tion shall be construed to limit the authority of the Sec-
21 retary of Health and Human Services, acting through the
22 Commissioner of Food and Drugs, to clear, approve, li-
23 cense, or otherwise engage in the regulation of contracep-
24 tives under the Federal Food, Drug, and Cosmetic Act or
25 the Public Health Service Act, as applicable.

1 **SEC. 5. APPLICABILITY AND PREEMPTION.**

2 (a) **PREEMPTION OF INCONSISTENT STATE AND**
3 **LOCAL LAW.**—No State or political subdivision of a State
4 may administer, implement, or enforce any law, rule, regu-
5 lation, standard, or other provision having the force and
6 effect of law in a manner that—

7 (1) prohibits or restricts the sale, provision, or
8 use of any contraceptives that the Secretary of
9 Health and Human Services, acting through the
10 Commissioner of Food and Drugs, has approved or
11 cleared for contraceptive purposes;

12 (2) prohibits or restricts any person from aiding
13 another person in obtaining any such contraceptives
14 or contraceptive methods; or

15 (3) exempts any such contraceptives or contra-
16 ceptive methods from any other generally applicable
17 law in a way that would make it more difficult to
18 sell, provide, obtain, or use such contraceptives or
19 contraceptive methods.

20 (b) **LIMITATIONS.**—The provisions of this Act shall
21 not supersede or otherwise affect any provision of Federal
22 law relating to coverage under (and shall not be construed
23 as requiring the provision of specific benefits under) group
24 health plans or group or individual health insurance cov-
25 erage or coverage under a Federal health care program
26 (as defined in section 1128B(f) of the Social Security Act

1 (42 U.S.C. 1320a–7b(f)), including coverage provided
2 under section 1905(a)(4)(C) of the Social Security Act (42
3 U.S.C. 1396d(a)(4)(C)) and section 2713 of the Public
4 Health Service Act (42 U.S.C. 300gg–13).

5 (c) DEFENSE.—In any cause of action against an in-
6 dividual or entity who is subject to a limitation or require-
7 ment that violates this Act, in addition to the remedies
8 specified in section 7, this Act shall also apply to, and
9 may be raised as a defense by, such an individual or entity.

10 (d) RELATIONSHIP WITH OTHER LAWS.—Subsection
11 (a) shall apply notwithstanding any other Federal law, in-
12 cluding the Religious Freedom Restoration Act of 1993
13 (42 U.S.C. 2000bb et seq.).

14 (e) EFFECTIVE DATE.—This Act shall take effect im-
15 mediately upon the date of enactment of this Act.

16 **SEC. 6. RULES OF CONSTRUCTION.**

17 (a) IN GENERAL.—In interpreting the provisions of
18 this Act, a court shall liberally construe such provisions
19 to effectuate the purposes of the Act.

20 (b) RULE OF CONSTRUCTION.—Nothing in this Act
21 shall be construed—

22 (1) to authorize any government to interfere
23 with a health care provider’s ability to provide con-
24 traceptives or information related to contraception

1 or a patient's ability to obtain contraceptives or to
2 engage in contraception; or

3 (2) to permit or sanction the conduct of any
4 sterilization procedure without the patient's vol-
5 untary and informed consent.

6 (c) OTHER INDIVIDUALS CONSIDERED AS GOVERN-
7 MENT OFFICIALS.—Any person who, by operation of a
8 provision of Federal or State law, is permitted to imple-
9 ment or enforce a limitation or requirement that violates
10 section 4 shall be considered a government official for pur-
11 poses of this Act.

12 **SEC. 7. ENFORCEMENT.**

13 (a) ATTORNEY GENERAL.—The Attorney General
14 may commence a civil action on behalf of the United
15 States against any State that violates, or against any gov-
16 ernment official (including a person described in section
17 6(c)) that implements or enforces a limitation or require-
18 ment that violates, section 4. The court shall hold unlawful
19 and set aside the limitation or requirement if it is in viola-
20 tion of this Act.

21 (b) PRIVATE RIGHT OF ACTION.—

22 (1) IN GENERAL.—Any individual or entity, in-
23 cluding any health care provider or patient, ad-
24 versely affected by an alleged violation of this Act,
25 may commence a civil action against any State that

1 violates, or against any government official (includ-
2 ing a person described in section 6(c)) that imple-
3 ments or enforces a limitation or requirement that
4 violates, section 4. The court shall hold unlawful and
5 set aside the limitation or requirement if it is in vio-
6 lation of this Act.

7 (2) HEALTH CARE PROVIDER.—A health care
8 provider may commence an action for relief on its
9 own behalf, on behalf of the provider’s staff, and on
10 behalf of the provider’s patients who are or may be
11 adversely affected by an alleged violation of this Act.

12 (c) EQUITABLE RELIEF.—In any action under this
13 section, the court may award appropriate equitable relief,
14 including temporary, preliminary, or permanent injunctive
15 relief.

16 (d) COSTS.—In any action under this section, the
17 court shall award costs of litigation, as well as reasonable
18 attorney’s fees, to any prevailing plaintiff. A plaintiff shall
19 not be liable to a defendant for costs or attorney’s fees
20 in any non-frivolous action under this section.

21 (e) JURISDICTION.—The district courts of the United
22 States shall have jurisdiction over proceedings under this
23 Act and shall exercise the same without regard to whether
24 the party aggrieved shall have exhausted any administra-
25 tive or other remedies that may be provided for by law.

1 (f) ABROGATION OF STATE IMMUNITY.—Neither a
2 State that enforces or maintains, nor a government official
3 (including a person described in section 6(c)) who is per-
4 mitted to implement or enforce any limitation or require-
5 ment that violates section 4 shall be immune under the
6 Tenth Amendment to the Constitution of the United
7 States, the Eleventh Amendment to the Constitution of
8 the United States, or any other source of law, from an
9 action in a Federal or State court of competent jurisdic-
10 tion challenging that limitation or requirement.

11 **SEC. 8. SEVERABILITY.**

12 If any provision of this Act, or the application of such
13 provision to any person, entity, government, or cir-
14 cumstance, is held to be unconstitutional, the remainder
15 of this Act, or the application of such provision to all other
16 persons, entities, governments, or circumstances, shall not
17 be affected thereby.

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