



SECRETARY OF DEFENSE  
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JUL 18 2023

The Honorable Jack Reed  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I appreciate the opportunity to provide the Committee on Armed Services of the Senate with additional information on the policies directed in my October 20, 2022 memorandum, "Ensuring Access to Reproductive Health."

The U.S. military is the strongest fighting force on Earth, in large part, because we can draw on an unmatched strategic resource: the talents of the American people. Nearly one in five U.S. troops today are women, who make up a majority of the U.S. population and are the fastest-growing subpopulation in the military.

Last year, in the wake of the Supreme Court's landmark ruling in *Dobbs v. Jackson Women's Health Organization*, the Department heard concerns over continued access to reproductive health care from Service members from all grades, ranks, and components. An independent study by the RAND Corporation estimated that 40 percent of active-duty Service women would have no access to abortion services or severely restricted access to those services at the duty stations where they have been ordered to serve.<sup>1</sup>

Moreover, a study published in 2017 found that 39 percent of the U.S. population has no access or limited nearby access to Assisted Reproductive Technology services, such as in vitro fertilization (IVF).<sup>2</sup> A 2022 RAND survey estimated that the infertility rate among Service women was 22 percent, which is higher than the 19 percent infertility rate estimated by the Centers for Disease Control and Prevention (CDC) among civilian women.<sup>3</sup> The CDC also estimates that some 2.3 percent of babies born in the United States are conceived through IVF and other assisted reproductive technology. In 2021 alone, according to the CDC, IVF treatment helped in the birth of more than 97,000 infants in the United States.<sup>4</sup>

To work through these issues, I convened the Department's senior leadership, including the Secretaries of the Military Departments, the Joint Chiefs of Staff, and the Senior Enlisted leaders of the Military Services, along with leading health care and legal experts from the Department. Together, we recognized that our Service members and their families are ordered to travel or move to meet the U.S. military's operational requirements, and they often do not choose where they are stationed. We agreed that our troops should not be disadvantaged in accessing health care due to their patriotic service. We noted that failing to address this issue would harm

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<sup>1</sup> Hunter, K.M, Meadows, S.O, et al. "How the *Dobbs* Decision Could Affect U.S. National Security," RAND Corporation, September 2022.

<sup>2</sup> Harris JA, Menke MN, Haefner JK, Moniz MH, Perumalswami CR. Geographic Access to Assisted Reproductive Technology Health Care in the United States: A Population-based Cross-Sectional Study. *Fertil Steril*. 2017 Apr;107(4):1023-1027.

<sup>3</sup> Meadows, S.O., Collins, R.L., et. al. "The Women's Reproductive Health Survey (WRHS) of Active-Duty Service Members," RAND Corporation, September 2022.

<sup>4</sup> Centers for Disease Control and Prevention, "Assisted Reproductive Technology (ART) Success Rates," <https://www.cdc.gov/art/artdata/index.html>.

retention. We also agreed that ensuring access to high-quality health care, including non-covered reproductive health care (health care that cannot be performed or paid for by the Department), is key to protecting the health and well-being of our people and to maintaining our military readiness. Finally, we agreed that protecting our troops' access to such health care required moving with urgency.

The feedback from the Force and discussions with senior leaders led us to develop new policies to protect the privacy of reproductive-health information and ensure that Service members and their families have access to non-covered reproductive health care wherever they are ordered to serve. These policies included:

- 1) The *Command Notification of Pregnancy policy*, which established a standard timeline of no later than 20 weeks for Service members to notify their commanders of a pregnancy. That will help ensure that Service members have the time and flexibility to make private and deeply personal health care decisions, while ensuring that their commanders can continue to meet all operational requirements.
- 2) The *Administrative Absence for Non-Covered Reproductive Health Care policy*, which allows Service members an administrative absence, with approval by their commander, to access non-covered reproductive health care, without losing pay or having to use regular leave.
- 3) The *Travel for Non-Covered Reproductive Health Care Services policy*, which authorizes travel allowances, such as transportation and lodging, to help our Service members access non-covered reproductive health care in a different location when timely access to such care is unavailable near their duty station.

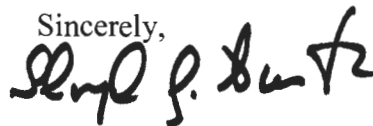
These policies are all fully consistent with applicable Federal law.

Nothing in our new policies changes the circumstances in which the Department might pay for medical care, including abortion services. As has been the case for many years, the Department is authorized to perform abortions only in rare and tragic circumstances, either when the life of the mother would be endangered if the pregnancy were carried to term or in cases in which the pregnancy is the result of an act of rape or incest. Under our new policies, non-covered reproductive health care procedures — whether an abortion, a course of IVF, or the use of other assisted reproductive technology, such as egg retrieval and other medical procedures to build families — remain at the expense of the patient.

The enclosed paper provides additional detail, as requested in subtitle I of title V of the Committee Report accompanying S. 2226 of the 118th Congress.

I look forward to our continued partnership to do right by all our extraordinary women and men in uniform and their families.

Sincerely,



Enclosure:  
As stated

cc:  
The Honorable Roger F. Wicker  
Ranking Member

## Department of Defense Policies on Non-Covered Reproductive Health Care

### Overview

On October 20, 2022, the Secretary of Defense signed a memorandum directing the Department of Defense (DoD) to take a series of actions to ensure Service members and their families are able to access reproductive health care. On February 16, 2023, DoD released policies on command notification of pregnancy, administrative absence for non-covered<sup>1</sup> reproductive health care, and travel and transportation allowances for non-covered reproductive health care. These policies reinforce the Secretary of Defense's commitment to taking care of our people, protecting their health and well-being, and ensuring the Force remains ready and resilient.

Timely access to lawfully available reproductive health care is a readiness, retention, and recruitment issue. As the Secretary explained in his October 20, 2022 memorandum, Service members and their families are often required to travel or move to meet our staffing, operational, and training requirements. We have heard concerns from Service members and their families about the complexity and the uncertainty that they currently face in accessing reproductive health care where they are stationed. In the Secretary's judgment, such effects qualify as unusual, extraordinary, hardship, or emergency circumstances for Service members and their dependents and will interfere with our ability to recruit, retain, and maintain the readiness of a highly qualified force. These policies are designed to ensure that Service members and their families are afforded time and flexibility to make private health care decisions consistent with the responsibility of the DoD to meet operational requirements and protect the health and safety of those in our care.

The following information is provided in response to the request in subtitle I of title V of the Committee Report accompanying S. 2226 of the 118<sup>th</sup> Congress. While the Department is actively engaged with the Defense Advisory Committee on Women in the Services (DACOWITS) on reproductive health care issues, given its status as a discretionary federal advisory committee, DACOWITS declined to formally coordinate on this response. DoD consulted with the Department of Justice on the section of this response entitled "Legality of DoD Policies."

### Background

Women, who make up more than half of the U.S. population, make up nearly one-fifth of our Force. As of October 2022, there were 392,997 women in service, accounting for 19.1% of the Force. The Under Secretary of Defense for Personnel and Readiness noted in his testimony to the House Armed Services Committee Subcommittee on Military Personnel on July 29, 2022, that for Service members living and working in states with the full range of non-covered reproductive health care available to them, being required to move to a state that severely restricts access to this care might deter them from remaining in military service because of the risks it may pose to their privacy and health care choices.<sup>2</sup> A 2018 report by RAND, "*Addressing Barriers to Female Officer Retention in the Air Force*," found that "[i]ssues related to pregnancy that could affect female officers' decisions whether to stay in or leave the Air Force arose in 85 percent of their focus groups."<sup>3</sup>

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<sup>1</sup> "Non-covered" reproductive health care in the context of these policies consists of lawfully available assisted reproductive therapies and abortions that cannot be paid for or performed by the Department.

<sup>2</sup> *Service Members' Reproductive Health and Readiness: Hearing Before the H. Armed Services Comm., Subcomm. on Military Personnel*, 117th Cong. (July 29, 2022), Available at: <https://www.youtube.com/watch?v=tIrKFJgriU4>

<sup>3</sup> Kirsten M. Keller et al., "Addressing Barriers to Female Officer Retention in the Air Force," 17, (2018)

On February 16, 2023, DoD released a policy on command notification of pregnancy, administrative absence for non-covered reproductive health care, and travel and transportation allowances for non-covered reproductive health care. The policies are summarized as follows:

*Command Notification of Pregnancy* policy, which standardizes and extends the timeframe for Service members to inform their commanders about a pregnancy, allowing Service members to delay pregnancy notification to appropriate command authorities until 20 weeks of gestation, with limited exceptions;

*Administrative Absence for Non-Covered Reproductive Health Care* policy, which provides eligible Service members the ability to request an administrative absence for a period of up to 21 days to receive, or accompany a dual-military spouse or dependent who receives, non-covered reproductive health care without taking leave; and

*Travel and Transportation Allowances for Non-Covered Reproductive Health Care* policy, which provides eligible Service members and dependents travel and transportation allowances to receive non-covered reproductive health care services when timely access to non-covered reproductive health care services is not available within the local area of the member's permanent duty station, temporary duty location, or the last location the dependent was transported to on authorized government orders.

For purposes of the administrative absence and travel and transportation allowances for non-covered reproductive health care, non-covered reproductive health care includes non-covered abortion and Assisted Reproductive Technology (ART), which includes, but is not limited to, in vitro fertilization, intrauterine insemination, and egg retrieval. All non-covered reproductive health care is at the patient's expense.

Pursuant to section 1093 of title 10, United States Code, funds available to the DoD may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, or in a case in which the pregnancy is the result of an act of rape or incest. Consistent with section 1093, DoD provides or otherwise pays for abortions for Service members and eligible dependents where the life of the mother would be endangered if the fetus were carried to term, or in a case in which the pregnancy is the result of an act of rape or incest. Such abortion cases are referred to as "covered." For the reasons discussed below, none of the policies at issue are precluded by section 1093 or implicate DoD's actions and authorities under that provision.

## **Legality of DoD Policies**

On October 3, 2022, the Department of Justice's Office of Legal Counsel (OLC) provided a written opinion entitled, "Authority of the Department of Defense to Use Appropriations for Travel by Service Members and Dependents to Obtain Abortions." This opinion, which is publicly available and enclosed for your reference,<sup>4</sup> advised that DoD "may lawfully expend funds to pay for [S]ervice members and their dependents to travel to obtain abortions that DoD cannot itself perform due to statutory restrictions"<sup>5</sup> and that "DoD may lawfully expend funds to pay for such travel pursuant to both its express statutory authorities and, independently, under the necessary expense doctrine."<sup>6</sup> OLC also concluded that the

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<sup>4</sup> *Authority of the Department of Defense to Use Appropriations for Travel by Service Members and Dependents to Obtain Abortions*, 46 Op. O.L.C. \_\_ (Oct. 3, 2022), Available at: <https://www.justice.gov/d9/2022-11/2022-10-03-dod-abortion-transportation.pdf>

<sup>5</sup> *Id.* at 1.

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

language in title 10, United States Code, section 1093 “does not prohibit the use of funds to pay expenses, such as a per diem or travel expenses, that are incidental to the abortion.”<sup>7</sup>

Specifically, the October 3, 2022, OLC opinion affirmed that, under title 37, United States Code, section 452(a), the Secretary of Defense has “broad authority to provide payment for expenses in connection with authorized travel,”<sup>8</sup> and that this authority would extend to “travel for service members and their dependents to obtain abortions”<sup>9</sup> should the Secretary so authorize it. In addition, the OLC opinion affirmed that under title 37, United States Code, sections 452(b)(11) and 453(d), travel and transportation allowances may be authorized by the Secretary for “unusual, extraordinary, hardship, or emergency circumstances.”<sup>10</sup> As OLC noted, the Secretary of Defense could reasonably conclude that being stationed in a location without access to non-covered abortion services “may impose significant costs on a Service member’s physical and mental health and well-being”<sup>11</sup> and that “[S]ervice members who are required to serve in an area without access to essential reproductive health care face unusual, extraordinary, hardship, or emergency circumstances.”<sup>12</sup> Accordingly, OLC determined that these statutory provisions “confer express authority” for expenditures to pay for travel to obtain non-covered abortions.<sup>13</sup>

In addition to the Secretary’s explicit authority to authorize travel under title 37, United States Code, sections 452(a), 452(b)(11) and 453(d), OLC concluded that the necessary expense doctrine provides an alternative basis on which DoD may pay for travel for Service members and dependents to obtain non-covered abortions.

The necessary expense doctrine, as described by OLC, “permits an agency to expend funds from a general appropriation ‘[if] the agency believes that [a]n expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency’s mission’ where no ‘specific provision limits the amount that may be expended on a particular object or activity within [the] general appropriation.’”<sup>14</sup>

As the Secretary stated in his October 20, 2022 memorandum, “Ensuring Access to Reproductive Health Care,” changes in state laws pertaining to reproductive health care “qualify as unusual, extraordinary, hardship, or emergency circumstances for Service members and their dependents and will interfere with our ability to recruit, retain, and maintain the readiness of a highly qualified force.”

The challenges, risks, and physical and mental costs applicable to Service members would also apply to their family members. It is frequently said that DoD recruits the Service member and retains the family. Although family members are not members of the Armed Forces, their experiences affect Service members’ readiness and willingness to serve. DoD recognizes the importance of military family readiness and has instituted programs to “address the needs resulting from the unique challenges associated with military lifestyle.”<sup>15</sup> A Service member’s concern for loved ones may impose mental health costs and impede full performance on duty. Worries about the impact of military assignments on family members’ reproductive health care options could deter individuals from volunteering for military service or convince a Service member to leave the military. Mitigating these harms by paying for family members to

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<sup>7</sup> *Id.* (internal quotations and citations omitted).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.* at 10 (internal quotations and citations omitted).

<sup>12</sup> *Id.* at 7 (internal quotations and citations omitted).

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 8 (internal citations omitted).

<sup>15</sup> DoD Instruction (DoDI) 1342.22, “Military Family Readiness,” August 5, 2021 para. 1.2.b

travel to obtain non-covered reproductive health care in appropriate circumstances, including both non-covered abortions and ART, would directly contribute to the DoD’s mission.

The authorization of these policies is also consistent with Departmental practices. The DoD frequently provides accommodations to Service members and their families to relieve the burdens imposed by military service, such as mitigating the impact of certain assignment locations. Examples of other allowances, benefits, and entitlements that Service members are authorized to receive based on duty station or assignment location include the Remote and Austere Conditions Assignment Incentive Pay,<sup>16</sup> authorization of assignment or special duty pay,<sup>17</sup> continuous overseas tour travel entitlement,<sup>18</sup> environmental morale leave,<sup>19</sup> basic housing allowances,<sup>20</sup> cost of living allowances,<sup>21</sup> and dependent student travel.<sup>22</sup> These policies are intended to increase the emotional and physical well-being of all Service members and their families. It is also worth noting that many leading private sector employers provide fertility benefits and pay for their employees to travel to obtain abortions in states where such abortions are lawful. Providing these allowances ensures the DoD keeps pace as a top employer in the United States.

Regarding the Committee’s request for information related to the Department of Health and Human Services rule on “Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services,” that rule concerns programs authorized under the Public Health Service Act and is not applicable to the Department of Defense or the legality of DoD policies.

As noted above, the DoD’s travel policy is consistent with and independent from section 1093 of title 10, United States Code. OLC concluded that section 1093 “does not prohibit the use of funds for expenses that are indirect or ancillary to the performance of abortion”<sup>23</sup> and “does not bar DoD from using appropriated funds to pay for Service members and their dependents to travel to obtain abortions that DoD cannot fund directly.”<sup>24</sup> This interpretation is consistent with longstanding OLC precedent regarding similar statutory language.

## **Implementation and Oversight**

### *Command Notification of Pregnancy*

As the DoD reviewed policies on reproductive health care access, it became apparent that the lack of standardization of requirements for command notification of pregnancy created inequity across the Force. Some Service members were afforded more time and privacy to make family planning decisions than others upon confirmation of their pregnancy. The decision to standardize the pregnancy notification requirement removed this inequity, affording Service members the choice to delay notification of pregnancy to their commanders up to 20 weeks gestation, with certain exceptions.

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<sup>16</sup> “Remote and Austere Conditions Assignment Incentive Pay (RAC-AIP) for Assignments to Alaska,” Memorandum, Office of the Deputy Chief of Staff, G-1, 28 February 2020

<sup>17</sup> DoDI 1340.26, “Assignment and Special Duty Pays,” September 25, 2017, as amended, Section 4.1-4.10 and title 37, United States Code, section 352

<sup>18</sup> DoDI 1315.18, “Procedures for Military Personnel Assignments,” October 28, 2015, as amended, Enclosure 4, paragraph 8

<sup>19</sup> DoDI 1327.06, “Leave and Liberty Policy and Procedures,” June 16, 2009, as amended, Enclosure 2, paragraph 1.j.(8)

<sup>20</sup> Title 37, United States Code, section 403

<sup>21</sup> Title 37, United States Code, section 403b

<sup>22</sup> Joint Travel Regulation, paragraph 050816

<sup>23</sup> *Authority of the Department of Defense to Use Appropriations for Travel by Service Members and Dependents to Obtain Abortions*, 46 Op. O.L.C. \_\_, 4 (Oct. 3, 2022)

<sup>24</sup> *Id.*

This policy does not change the DoD's encouragement that pregnant Service members immediately access prenatal care to support their health and well-being. As soon as a pregnancy is confirmed by a DoD medical provider, the pregnant Service member will be placed in a limited duty status, without disclosure of, or reference to, the pregnancy, unless certain exceptions apply based on individual circumstances, such as a potential upcoming deployment or unit hazards.

This policy does not provide a direct cost or benefit to Service members and operates independent of the policies concerning administrative absence and travel and transportation allowances for non-covered reproductive health care, as described below. Standardization of the command notification agreement eliminates an inconsistency and inequity that existed across the joint force.

#### *Implementation of the Administrative Absence and Travel and Transportation Allowances for Non-Covered Reproductive Health Care Policies*

The administrative absence and travel and transportation allowances for non-covered reproductive health care will help Service members access, or accompany a dependent to access, lawfully available non-covered reproductive health care, regardless of where they are stationed. Travel allowances are available for Service members and eligible dependents as set forth in the Joint Travel Regulations (JTR).

Service members are responsible for the cost of non-covered reproductive health care and compliance with applicable state requirements. Service members and their dependents may consult their health care provider to understand the reproductive health care available to them, as well as Military OneSource and chaplain resources, for information regarding additional services and support.

Due to the time-sensitive nature of many non-covered reproductive health care services, and to make sure Service members have the time and flexibility to make private health care decisions, these policies require that requests for an administrative absence or travel and transportation allowances for non-covered reproductive health care should be given all due consideration and should be granted to the greatest extent practicable, unless, in the commanding officer's judgment, the Service member's absence would impair proper execution of the military mission. Eligible Service members may need to disclose a minimum amount of health care information necessary for commanders or approval authorities to authorize the absence or travel and transportation allowances.

#### *Commanders' Responsibilities and Oversight Functions*

The DoD expects Commanders to display objectivity, compassion, and discretion when addressing all health care matters, including reproductive health care matters, and Commanders have a duty to enforce existing policies against discrimination and retaliation. Commanders must protect the privacy of protected health information, and all information is restricted to personnel with a specific need to know. Should a Commander be uncomfortable approving requests for non-covered reproductive health care, they may consult with their chain of command as to whether such requests may be referred to a higher echelon of command for approval. Department of Defense Instruction 1300.17 "Religious Liberty in the Military Services," September 1, 2020 and Military Department and Service level policies should be consulted when applicable, if executing the responsibilities associated with these or any DoD policies substantially burdens the Commander's exercise of a sincerely held religious belief.

JTR paragraph 010104 and DoD Financial Management Regulations volume 5, chapter 25 contain procedures for handling false, fictitious, or fraudulent claims. As always under the



JTR, the approving organization and Authorizing Official are responsible for monitoring and preventing abuse during the travel order and travel voucher approval process to ensure compliance with the JTR. If there is reasonable suspicion of falsified expenses, the applicable per diem or actual expense allowance will be denied. Commanders who suspect a Service member of abusing a benefit may employ a wide range of investigatory procedures, such as Commander Directed Investigations, Inspector General investigations, and disciplinary actions, such as non-judicial punishment or court martial.

## **Usage to Date**

While tracking mechanisms are still being finalized, DoD is monitoring the execution of the administrative absence and transportation allowances policies while providing direction to the Military Departments and other DoD Components on tracking usage and cost.

## **Assessment of Senate Bill 822, “Modification to Department of Defense Travel Authorities for Abortion-Related Expenses Act of 2023”**

The DoD strongly opposes Senate Bill 822. Access to reproductive health care is an important issue for Service members and their families and critical to the DoD’s ability to recruit, retain, and maintain the readiness of a highly qualified force. Nearly 20 percent of those serving today are women. The Secretary of Defense’s October 2022 memorandum and the subsequent policies were developed in a thoughtful and deliberate manner to ensure Service members and their families have access to non-covered reproductive health care. Prohibiting the use of appropriated funds to implement these policies will be detrimental to the Joint Force, affecting recruitment, retention, and readiness. Service members must be focused on combat readiness and mission accomplishment. Repeal of these policies could result in Service members being distracted by where and whether they can receive non-covered reproductive health care instead of focusing on their military duties. Senate Bill 822 would infringe on the Secretary of Defense’s authorities to promote a ready and resilient military.

Senate Bill 822 would also impose restrictions on medical convalescent leave. Convalescent leave does not relate to authorization for travel for a health care procedure; rather, it is provided as a result of health care provider recommendations for recovery from a procedure. Legislating a strict prohibition on the use of convalescent leave for a non-covered health care procedure may adversely impact the individual medical readiness of Service members by limiting necessary recovery times, potentially resulting in unnecessary medical complications. Health care providers must be able to recommend convalescent leave consistent with individual medical circumstances and health care standards of practice.

In summary, Senate Bill 822 does not return the DoD to a standard prior to the issuance of the three policies published by the Under Secretary of Defense for Personnel and Readiness on February 16, 2023. It instead imposes new restrictions on the Secretary of Defense’s lawful authority.

## **Conclusion**

DoD must stay focused on efforts that ensure our Service members remain healthy and ready to defend the Nation. These policies reinforce the Secretary of Defense’s commitment to taking care of people, protecting their health and well-being, and ensuring the Force remains ready and resilient. Timely access to lawfully available reproductive health care is a readiness, retention, and recruitment issue. Efforts taken by the Department to protect the privacy of, and access to, reproductive health care ensures Service members and their families are afforded time and flexibility to make private health care decisions in a manner consistent with the responsibility of the Department to meet operational requirements and protect the health and



safety of those in our care. The DoD's policies on non-covered reproductive health care directly contribute to our ability to recruit, achieve, and maintain a ready force.

(Slip Opinion)

## **Authority of the Department of Defense to Use Appropriations for Travel by Service Members and Dependents to Obtain Abortions**

The Department of Defense may lawfully expend funds to pay for service members and their dependents to travel to obtain abortions that DoD cannot itself perform due to statutory restrictions. DoD may lawfully expend funds to pay for such travel pursuant to both its express statutory authorities and, independently, the necessary expense doctrine.

October 3, 2022

### MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE

You have asked whether the Department of Defense (“DoD”) may lawfully expend funds to pay for service members and their dependents to travel to obtain abortions that DoD itself cannot perform due to statutory restrictions. We conclude that DoD may lawfully expend funds for this purpose under its express statutory authorities and, independently, under the necessary expense doctrine.

#### I.

By statute, “[f]unds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest,” 10 U.S.C. § 1093(a), and “[n]o medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest,” *id.* § 1093(b). By its express terms, 10 U.S.C. § 1093(a) applies only to funds used to “perform abortions.” As we have previously concluded in assessing identical language restricting the Peace Corps’ use of its appropriations, the plain text is dispositive here. *See Peace Corps Employment Policies for Pregnant Volunteers*, 5 Op. O.L.C. 350, 357 (1981). This language “does not prohibit the use of funds to pay expenses, such as a per diem or travel expenses, that are incidental to the abortion.” *Id.*

This conclusion is confirmed by section 1093’s legislative history. When Congress originally enacted the provision in 1984, it prohibited DoD only from using funds “to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.” Pub. L. No. 98-525, § 1401(e)(5), 98 Stat. 2492, 2617–18 (1984). DoD subsequently adopted a policy of prohibiting non-covered abortions from being performed at any DoD facility even when privately funded—a policy that President Clinton then directed DoD to reverse, stating that it went “beyond . . . the requirements of the statute.” *Memorandum on Abortions in Military Hospitals*, 1 Pub. Papers of Pres. William J. Clinton 11, 11 (Jan. 22, 1993). In 1996, Congress responded to President Clinton’s directive by amending 10 U.S.C. § 1093 to make clear that, in addition to the prohibition on using funds to “perform abortions,” “[n]o medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.” 10 U.S.C. § 1093(b). It is notable that the amendment was targeted narrowly to address the specific issue of DoD’s use of its medical treatment facilities, rather than reaching the same result via a broader prohibition on expenditures indirectly related to the provision of abortions.

The limited scope of the 1996 amendment is especially significant because when Congress has wanted to restrict abortion-related expenditures beyond those for the procedure itself, Congress has done so. For example, in 1988—prior to amending 10 U.S.C. § 1093—Congress had attached a restriction to Department of Justice (“DOJ”) funds prohibiting the use of those funds “to require any person to perform, *or facilitate in any way the performance of*, any abortion.” Pub. L. No. 100-459, tit. II, § 206, 102 Stat. 2186, 2201 (1988) (emphasis added); *see also, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, § 726(d), 136 Stat. 49, 131 (“CAA 2022”) (referring to funding for “abortion *or abortion-related services*” (emphasis added)). This DOJ restriction is also in the current appropriation. *See* CAA 2022, div. B, § 203. That Congress chose not to include such capacious language in the 1996 amendment confirms that it did not intend for the prohibition to sweep so widely.

Other DOJ appropriation restrictions provide further evidence that Congress did not intend DoD’s prohibition on the use of funds to perform abortions to reach ancillary expenses, such as travel costs. In addition to

the provision noted above, section 202 of the current appropriation contains a general prohibition against using the appropriated funds “to pay for an abortion.” *Id.*, div. B, § 202. Section 204 then contains a clarification that the prohibition on requiring any person to perform or facilitate an abortion does not “remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate” to obtain an abortion “outside the Federal facility.” *Id.*, div. B, § 204. Importantly, this language in section 204 does not also create an exception to the general funding restriction in section 202, but rather only clarifies that nothing in section 203 “remove[s] the obligation” of the agency to provide transportation services. *Id.* Section 204 therefore is premised on an understanding that section 202’s general prohibition on “pay[ing] for an abortion” does not affect the agency’s ability to provide such escort services, showing that when Congress prohibits funds from being used “to pay for an abortion,” it does not intend that prohibition to reach transportation expenses.

Comparing 10 U.S.C. § 1093 to the text and history of the longstanding funding restriction known as the Hyde Amendment is similarly instructive. The Hyde Amendment restricts expenditures by the Departments of Labor, Health and Human Services, and Education by providing that no covered funds “shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion,” except “if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.” CAA 2022, div. H, §§ 506–507. In previous advice, we concluded that the Hyde Amendment would not bar the use of appropriated funds to provide transportation for women seeking abortions. *See* Memorandum for Samuel Bagenstos, General Counsel, Department of Health and Human Services, from Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022). In reaching that conclusion, we noted, among other considerations, that earlier versions of the Hyde Amendment only applied to funds “for any abortion,” and that in 1997 Congress added language to reach funds “for

health benefits coverage that includes coverage of abortion.”<sup>1</sup> Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, § 509(a)–(b), 111 Stat. 1467, 1516 (1997); see *Application of the Hyde Amendment to Federal Student-Aid Programs*, 45 Op. O.L.C. \_\_, at \*3 (Jan. 16, 2021); H.R. Rep. No. 105-390, at 119 (1997) (Conf. Rep.); see also 143 Cong. Rec. 17,448 (1997) (statement of Sen. Ashcroft). In the context of health insurance, the funds are paid to reimburse the provider or the insured for, and thus effectively pay for, the abortion procedure itself. As a result, payment for health insurance that covers abortions is more closely connected to the actual provision of abortion than transportation to and from the procedure. Thus, the fact that Congress revised the Hyde Amendment to specify that it applies to payments for health benefits coverage supports the view that the prohibition on expending funds “for any abortion” is limited to the direct provision of abortions and would not apply to transportation.<sup>2</sup> More generally, the amendment suggests that when Congress has wanted to clearly encompass certain expenditures beyond the direct provision of the procedure, Congress has amended abortion-related funding restrictions to do so.

For these reasons, 10 U.S.C. § 1093 does not prohibit the use of funds for expenses that are indirect or ancillary to the performance of abortion. We therefore conclude that 10 U.S.C. § 1093 does not bar DoD from using appropriated funds to pay for service members and their dependents to travel to obtain abortions that DoD cannot fund directly.

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<sup>1</sup> Although the various appropriation restrictions use somewhat different language, compare 10 U.S.C. § 1093(a) (prohibiting “perform[ing] abortions”) with CAA 2022, div. H, § 506(a) (prohibiting “expend[ing]” funds “for any abortion”) and *id.*, div. B, § 202 (prohibiting “pay[ing] for an abortion”), we have concluded that in this context the differences in phrasing do not reflect differences in substance. See *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* at \*3.

<sup>2</sup> To be sure, some of the legislative history suggests that this amendment simply “clarif[ied]” what the Hyde Amendment already prohibited. 143 Cong. Rec. 18,493 (1997) (statement of Rep. Hyde). Regardless, the debate—and Congress’s subsequent action—indicate that the prohibition on funds being “expended for any abortion” did not sweep beyond the direct provision of abortions to an extent that would reach transportation for abortion.

## II.

The Constitution mandates that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. The Purpose Act, reflecting this constitutional principle, provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a). Consistent with the Purpose Act, the Supreme Court has long recognized that “[t]he established rule” is that “the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Accordingly, in the absence of a statute prohibiting the expenditures DoD is contemplating, the availability of the proposed expenditures depends on whether authority exists for DoD to expend its appropriations for this purpose. You have concluded that DoD has authority for the contemplated expenditures under both express statutory authorities and the necessary expense doctrine. We agree.

### A.

You have concluded that “the Secretary of Defense has broad statutory authority to pay for the travel and transportation expenses of Service members and other authorized travelers.” Memorandum from Department of Defense, *Re: Legal Availability of DoD Appropriations to Pay Transportation Costs to Obtain Abortions Outside the Scope of 10 U.S.C. § 1093* at 3 (Aug. 22, 2022) (“*DoD Memo*”). You have noted three sources of statutory authority that you believe permit the Secretary of Defense to authorize the contemplated expenditures: 37 U.S.C. § 452(a), 37 U.S.C. § 452(b)(11), and 37 U.S.C. § 453(d). We agree that these provisions confer express authority for such expenditures.

### 1.

By its express terms, 37 U.S.C. § 452(a) provides broad authority for the Secretary to provide “actual and necessary expenses of travel and transportation, for, or in connection with,” any “travel as authorized or ordered by the administering Secretary,” *id.* § 451(b)(1), with no enumerated limitations.

The broad scope of 37 U.S.C. § 452(a)'s grant of authority to the Secretary to provide travel expenses is confirmed by a list of examples of covered travel expenses in 37 U.S.C. § 452(b)(1)–(20). This list is explicitly illustrative, not exclusive. *See id.* § 452(b) (noting that “[t]he authority under subsection (a) includes travel under or in connection with, but not limited to, the following circumstances”). Of particular note, 37 U.S.C. §§ 452(b)(18) and 452(b)(19) authorize expenses for travel by dependent children of a service member to the continental United States to attend school if the service member is assigned to a permanent duty location outside the continental United States. These provisions demonstrate that, consistent with the broad terms of the statutory definition, Congress understood “official travel” to include travel for purely personal purposes necessitated by the fact that service members and their families “generally do not choose where they and their families will be stationed,” but are assigned to locations “based on the needs of the Military Service and the ability of Service members to meet those requirements.” *DoD Memo* at 7.

Relevant legislative history further confirms that Congress intended the delegation of authority to the Secretary in 37 U.S.C. § 452(a) to be construed broadly. One of the purposes of the travel and transportation authorities for the uniformed services, including both 37 U.S.C. §§ 452 and 453, was to provide the Secretary with flexibility to authorize travel expenses in the face of changing needs. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 631(a), 125 Stat. 1298, 1452 (2011).

As such, both the text of 37 U.S.C. § 452 and its purpose indicate that 37 U.S.C. § 452(a) provides the Secretary with broad authority to provide payment for expenses in connection with authorized travel. Should the Secretary authorize travel for service members and their dependents to obtain abortions, 37 U.S.C. § 452(a) would expressly permit the provision of travel expenses.

## 2.

In addition, 37 U.S.C. § 452(b)(11) provides that the authority under 37 U.S.C. § 452(a) specifically “includes travel under or in connection with[] . . . [u]nusual, extraordinary, hardship, or emergency circumstances.” A separate statute, 37 U.S.C. § 453(d), similarly provides that authorized travelers, including both service members and their dependents, *see*



*id.* § 451(a)(2), “may be provided travel and transportation allowances under this section for unusual, extraordinary, hardship, or emergency circumstances, including circumstances warranting evacuation from a permanent duty assignment location,” *id.* § 453(d).<sup>3</sup> Neither provision specifies what constitutes “[u]nusual, extraordinary, hardship, or emergency circumstances.” *Id.* § 452(b)(11); *see also id.* § 453(d).

Consistent with your representations, discussed further below, that being stationed in a location without access to abortion “may impose significant costs on a Service member’s physical and mental health and well-being,” *DoD Memo* at 7, you have concluded that “the Secretary of Defense or an authorized delegate could reasonably determine that Service members who are required to serve in an area without access to essential reproductive health care face unusual, extraordinary, hardship, or emergency circumstances,” *id.* at 4 (quotation marks and alteration omitted) (citing 37 U.S.C. § 453(d) and 37 U.S.C. § 452(b)(11)). We agree.

There is precedent for the armed forces recognizing that service members and their families may experience hardship circumstances by virtue of being stationed in locations without access to specialized reproductive health care. A current Army policy provides several accommodations for service members when they or their spouses “are undergoing fertility treatment,” including potential eligibility for compassionate reassignment to installations where fertility treatment is available. Christine E. Wormuth, Secretary of the Army, *Army Directive 2022-06 (Parenthood, Pregnancy, and Postpartum)* at 7–8 (Apr. 19, 2022) (“*Army Directive 2022-06*”). The policy also allows service members to remain in the same geographic location for up to 365 days from the date of the first fertility appointment, with an additional 365-day extension from the date the service member is granted a fertility profile for assisted reproductive technology procedures. *Id.* The policy references a DoD Instruction providing that “[m]ilitary personnel assignment decisions will not be

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<sup>3</sup> You have explained that 37 U.S.C. §§ 452(b)(11) and 453(d) differ in that funding authorized under 37 U.S.C. § 452 would typically apply across all the uniformed services and be implemented through an amendment to the Joint Travel Regulations in consultation with the Secretaries of Homeland Security, Commerce, and Health and Human Services, *see* 37 U.S.C. § 464, while 37 U.S.C. § 453(d) authorizes the Secretaries of Defense, Homeland Security, Commerce, and Health and Human Services to provide supplemental travel and transportation allowances for their respective uniformed services, *see id.* § 453; *DoD Memo* at 3–4.

influenced by the . . . health of a Service member’s family member,” except “[w]hen necessary to,” among other things, “relieve the personal hardship of a Service member or family member because a family member needs access to specialized medical treatment.” DoD Instruction 1315.18, *Procedures for Military Personnel Assignments* para. 3.b.1 (Oct. 28, 2015). In like vein, here DoD would be determining that service members and their families may experience hardship circumstances by virtue of being stationed in locations without access to specialized reproductive health care. The two contexts are especially similar because DoD does not provide or pay for either type of health care. *See* 32 C.F.R. § 199.4(e)(2) (excluding from DoD’s medical insurance program payment for non-covered abortions); *id.* § 199.4(e)(3)(i)(B)(3) (excluding many assisted reproductive technologies, including artificial insemination and in vitro fertilization).

In light of the above, we conclude that the Secretary or an authorized delegate, taking into account all relevant considerations, could reasonably determine that requiring service members and their families to live in a location without access to abortion creates an unusual, extraordinary, hardship, or emergency circumstance. If the Secretary or an authorized delegate should make such a determination, 37 U.S.C. § 452(b)(11) and 37 U.S.C. § 453(d) would expressly authorize the provision of travel expenses for a service member or dependent to obtain that care.

## B.

Apart from relying on express statutory authority, an agency may expend funds from a general appropriation under the necessary expense doctrine. The necessary expense doctrine permits an agency to expend funds from a general appropriation “[i]f the agency believes that [an] expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency’s mission,” where no “specific provision limits the amount that may be expended on a particular object or activity within [the] general appropriation.” *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 153–54, 156 (1997) (“*Employee Business Cards*”) (quoting *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. 6, 8 (1986)). Agencies “have considerable discretion in determining whether expenditures further the agency’s

authorized purposes and therefore constitute proper use of general or lump-sum appropriations.” *Id.* at 153; see *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). It is for “[t]he agency itself” to “‘make the required determination,’ since [the agency] is ‘in the best position to determine whether’ an expenditure of funds is necessary to carry out the agency’s mission effectively.” *Religious Seasonal Decorations in Federal Government Buildings*, 45 Op. O.L.C. \_\_\_, at \*6 (Jan. 15, 2021) (quoting *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 90 (2012)).

You have explained that the contemplated expenditure for travel expenses to help service members and their dependents access non-covered abortions “would rely on an operation and maintenance (O&M) appropriation, which is available for ‘expenses, not otherwise provided for, necessary for the operation and maintenance’ of the Department, ‘as authorized by law.’” *DoD Memo* at 4 (quoting CAA 2022, div. C). “This appropriation is a general or lump-sum appropriation ‘covering a wide range of activities without specifying precisely the objects to which the appropriation may be applied.’” *Id.* (quoting *Funding for the Critical Technologies Institute*, 16 Op. O.L.C. 77, 80 (1992)). You have concluded that “the necessary expense doctrine permits DoD to use its . . . appropriations to pay for Service members and dependents to travel to obtain non-covered abortions if a responsible senior official determines that the expenditures would make a direct contribution to the objectives of achieving and maintaining a ready force and/or recruiting and retaining a highly qualified force.” *Id.* at 10. We agree.

DoD plainly has an interest in the readiness of its force, which it defines as the “ability of military forces to fight and meet the demands of assigned missions.” *Id.* at 6 (quoting Office of the Chairman of the Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms* at 179 (May 2022)). You have identified both individual medical readiness and morale as aspects of force readiness that could be furthered by the contemplated expenditure.

DoD defines medical readiness as “[a] Service member’s medical, dental, and mental/behavioral health status necessary to perform their assigned missions.” DoD Instruction 6025.19, *Individual Medical Readiness Program* at 24 (July 13, 2022) (“DoDI 6025.19, *Individual Medical Readiness Program*”). You have identified several reasons why “[f]unding

a Service member’s transportation to and from a non-covered abortion procedure could contribute meaningfully to readiness, such that the expenditure helps accomplish ‘broader [DoD] objectives’ covered by the O&M appropriations.” *DoD Memo* at 7.

First, as the Under Secretary of Defense for Personnel and Readiness and the Acting Assistant Secretary of Defense for Health Affairs recently testified before the House Armed Services Subcommittee on Personnel, “[r]egardless of whether and where abortion is legal, and under what circumstances, we know from established research that individuals will continue to seek” abortion care, including within “the Military Community.” *Women’s Reproductive Health Issues: Hearing Before the Subcomm. on Personnel of the H. Armed Services Comm.* at 4 (July 29, 2022) (statement of Gilbert R. Cisneros, Under Secretary of Defense for Personnel and Readiness, and Seileen Mullen, Acting Assistant Secretary of Defense for Health Affairs) (“*Cisneros Testimony*”). To obtain a non-covered abortion, service members or their family members who are stationed in states without local access from licensed providers would need to travel to another jurisdiction where the procedure is available, despite potentially burdensome or prohibitive costs of travel and lodging. *See id.* “Such expenses would add financial burden and stress to what is already likely to be a challenging situation,” *DoD Memo* at 7, which could further exacerbate negative impacts on service members’ physical and mental health.

Moreover, service members who are unable to afford the added expense “might instead obtain abortions from unlicensed local providers or even resort to self-help, which could put Service members’ health at risk and expose them to potential liability or jeopardy under state law.” *Id.* Others “may be forced to carry unwanted pregnancies to term, ‘transform[ing] what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.’” *Id.* (alteration in original) (quoting *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting)). That would also render service members temporarily non-deployable. *See DoDI 6025.19, Individual Medical Readiness Program* at para. 3.1.a.3 (classifying pregnancy and postpartum as “deployment-limiting medical condition[s]” that render service members “[n]ot [m]edically [r]eady” to deploy). All these circumstances “may impose significant costs on a Service member’s physical and mental health and well-being,” *DoD Memo* at 7, which could negatively impact

their ability “to perform their assigned missions,” DoDI 6025.19, *Individual Medical Readiness Program* at 24.

To be sure, many women who reside in states enforcing newly stringent abortion restrictions after the Supreme Court’s decision in *Dobbs* will face similar obstacles in accessing abortions. Service members, however, have far less ability than civilians to choose the state where they and their families live. Service members must go where the Department of Defense stations them. *See DoD Memo* at 7 (“Service members generally do not choose where they and their families will be stationed.”). As a result, it is possible that the “costs on a Service member’s physical and mental health and well-being . . . could be exacerbated in some cases by a Service member’s perception that military service has limited her reproductive health care options and that the military is unable or unwilling to support her.” *Id.* Where DoD stations a service member in an area with no or limited access to reproductive health care options, the service member may well view DoD itself as the major obstacle to the service member’s or their family member’s ability to receive care. *Cf. Harris v. McRae*, 448 U.S. 297, 315 (1980) (distinguishing between obstacles that a woman generally faces in accessing abortion and obstacles that the government itself places in her path). Such a perception may be further exacerbated by the fact that DoD does, in other contexts, offer accommodations to mitigate burdens on health care access caused by service members’ assignment locations. *See DoD Instruction 1315.19, The Exceptional Family Member Program (EFMP)* para. 1.2 (Apr. 19, 2017) (authorizing accommodations for service members whose families include a member with special needs, including by establishing protocol “to ensure their family members’ special needs are considered during the assignment process” and by allowing for possible stabilization of assignment location “for a minimum of 4 years”); *Army Directive 2022-06* at 7–8 (establishing accommodations within the Army for service members undergoing fertility treatment, as discussed above). This perception may affect not only service members’ individual medical readiness, but also morale, which is an independent component of force readiness. *See DoD Instruction 1015.10, Military Morale, Welfare, and Recreation (MWR) Programs* para. 4 (July 6, 2009) (noting that morale, recreation, and welfare programs are intended to “maintain individual, family, and mission readiness during peacetime and in time of declared war and other contingencies”).

For the above reasons, and in light of the discretion accorded to agencies to determine whether expenditures further the agency’s authorized purposes, *see Employee Business Cards*, 21 Op. O.L.C. at 153, we agree that a DoD senior official could reasonably conclude that “paying for Service members to travel to obtain non-covered abortions would directly contribute to the objective of achieving and maintaining a ready force” by contributing to service members’ physical and mental health and morale, *DoD Memo* at 7.

In addition, you noted that DoD’s interest in military recruitment and retention could provide an alternative, independent ground for the contemplated expenditures from DoD’s O&M appropriation. You have represented that “DoD also has an important interest in recruiting and maintaining the most qualified Service members.” *DoD Memo* at 8. The Under Secretary of Defense for Personnel and Readiness and the Acting Assistant Secretary of Defense for Health Affairs recently testified that “women . . . volunteer at lower rates than men,” and that “some potential recruits [could] feel deterred from joining the military for fear of being stationed at an installation or base” in states that severely restrict their options for reproductive health care. *Cisneros Testimony* at 3. Moreover, existing service members who are presently “living and working in states with the full range of reproductive health care available to them” may be “deter[red] . . . from remaining in . . . military service” because of the possibility of “being required to move to a state that severely restrict access to reproductive health care” and the attendant threat to their “privacy and health care choices.” *Id.* You noted that DoD’s interest in funding travel to pay for non-covered abortions would be especially strong if private sector employers adopt such policies, given that it may put DoD “at a distinct competitive disadvantage” if it cannot offer accommodations similar to those in the private sector, particularly given that service members, unlike civilians, “have little control” over where they live. *DoD Memo* at 8.

For these reasons, we agree with your conclusion that DoD would have discretion under the necessary expense doctrine to pay for travel for service members and dependents to obtain non-covered abortions if DoD were to “determine [that] . . . paying for Service members to travel to obtain non-covered abortions would directly contribute to the objective of recruiting and retaining a highly qualified force.” *Id.*

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We therefore conclude that, pursuant to both express statutory authorities and the necessary expense doctrine, DoD can lawfully expend funds to pay for service members and their dependents to travel to obtain abortions that DoD itself cannot perform.

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