

October 11, 2022

Via Federal eRulemaking Portal

Michael P. Shores
Director, Office of General Counsel
U.S. Department of Veteran Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Re: EPPC Scholars Comment Opposing Department of Veterans Affairs’ “Reproductive Health Services” Interim Final Rule, RIN 2900–AR57

Dear Director Shores:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the interim final rule (IFR) issued by the Department of Veterans Affairs (VA) called “Reproductive Health Services,” RIN 2900–AR57. 87 Fed. Reg. 55287. Rachel N. Morrison is an EPPC Fellow, member of the HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Natalie Dodson is a Legislative and Regulatory Affairs Associate and member of EPPC’s HHS Accountability Project.

Without demonstrating “good cause,” the VA immediately and unlawfully amended its regulations to remove the statutorily required exclusions on abortion and abortion counseling in veterans’ medical benefits packages and for Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries, which include “certain spouses, children, survivors, and caregivers of veterans.” 87 Fed. Reg. 55287; Regulatory Impact Analysis (RIA) 4. Under the IFR, American taxpayers must now pay for abortion and abortion counseling when “the life or the health of the pregnant veteran would be endangered if the pregnancy were carried to term, or the pregnancy is the result of an act of rape or incest.” 87 Fed. Reg. 55288. An undefined health exception functionally allows abortion on demand until birth. The VA’s claim that abortion under the IFR is “needed” and “medically necessary and appropriate” is arbitrary and capricious. Abortion is not healthcare, abortion harms women, and women do not need abortion to succeed. The VA further claims, contrary to law, that the IFR can preempt state laws protecting the innocent lives of unborn children. In short, the IFR is contrary Congressional direction, violates the VA’s statutory authority, and should be rescinded immediately.

1. There is no need for the IFR, and neither *Dobbs* nor state abortion laws create need.

After the Supreme Court held that there is no constitutional right to abortion in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (U.S. Jun. 24, 2022), the Biden administration is seeking

ways to use the federal government and taxpayer dollars to promote and pay for abortions.¹ Tragically (but not unsurprisingly), the IFR is the latest lawless attempt by the Biden administration to promote the killing of innocent children in the womb through abortion.

All agency rulemaking must identify and address a need. *See* EO 12866, § 1(b) (establishing the principles of regulation, including that “[e]ach agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem”). The VA explains that “[a]fter *Dobbs*, certain States have begun to enforce existing abortion bans and restrictions on care, and are proposing and enacting new ones, creating urgent risks to the lives and health of pregnant veterans and CHAMPVA beneficiaries in these States.” 87 Fed. Reg. 55288. As such, the VA is issuing the IFR “because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans.” 87 Fed. Reg. 55288. As explained below, these statements are misleading and unsupported.

Lifesaving care is *not* abortion. Medical interventions to save a pregnant mother’s life *without* the intent to kill the child are not abortions. We know this because an abortion where a child survives is called a failed abortion. Even with the abortion exclusions, the VA provided care to pregnant women in life-threatening situations, including treatment for ectopic pregnancies and miscarriage.² As the VA Secretary explained during a press conference in July 2022, treatment for ectopic pregnancy and miscarriage “is not abortion services. Period.”³ Similarly, no state abortion law prohibits treatment for ectopic pregnancies, miscarriage, and to save the life of a mother (detailed below). Since no state abortion law prohibits abortion if it is necessary to save the mother’s life, the VA’s justification for this rulemaking (and the good cause justification for issuing an IFR) is arbitrary and capricious.

Notably, the VA does not claim that women are unable to receive lifesaving care and merely suggest women “may” not be able to obtain abortions in other circumstances: “After the *Dobbs* decision, however, veterans living in States that ban or restrict abortion services may no longer be able to receive such medical services in their communities, including in States that now restrict access to abortion even in cases of rape or incest or where the health of the pregnant individual is in danger.” 87 Fed. Reg. 55288. The VA goes on to state that it is “essential for the lives and health of our veterans that abortions be made available if determined needed by a health care professional when: (1) the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term; or (2) the pregnancy is the result of an act of rape or incest.” 87 Fed. Reg. 55288. It is arbitrary and capricious for the VA to claim abortion coverage is “essential for the lives” of veterans when it does not claim that states prohibit treatments necessary to save a woman’s life.

Further, the VA claims that absent its rulemaking “veterans will face serious threats to their life and health.” 87 Fed. Reg. 55288 (“CHAMPVA beneficiaries will face serious threats to their health.”). But it fails to deliver on this claim. The VA fails to provide evidence of any “serious threats.” The IFR was published more than two months after the Supreme Court issued its *Dobbs* decision, yet the IFR fails to cite a single veteran or CHAMPVA beneficiary who faced “serious threats” or was harmed during that time, undercutting the purported need and good cause justification for the IFR.

¹ *See generally* Rachel N. Morrison, *The Biden Administration’s Post-Dobbs, Post-Roe Response*, FedSoc Blog (July 13, 2022), <https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response>.

² *See* VA, VHA, Maternity Health Care and Coordination, VHA Directive 1330.03 (Nov. 3, 2020), https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=9095.

³ VA Secretary McDonough, Press Conference, July 20, 2022, 53:00 <https://www.youtube.com/watch?v=UpFKk5NFhF0>.

Similarly, *Dobbs* itself cannot provide the justification for this rulemaking. *Dobbs* made clear that there is no federal constitutional right to abortion and no compelling government interest in promoting abortion. And as the *Dobbs* Court stated, “the ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women.” No. 19-1392, at 11 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U. S. 263, 273–274 (1993) (internal quotation marks omitted)). Thus, “laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.” *Id.*

The VA next cites the possible lack of access to abortion due to uncertainty about the scope of changing laws post-*Dobb* and claims it issued the IFR to “promote clarity.” 87 Fed. Reg. 55293. It does not. Under the IFR, VA employees, women veterans and beneficiaries, and the public are now uncertain about whether to follow state law or the VA’s regulations when they conflict. The VA further states in the RIA that by “[p]roviding such abortions and abortion counseling will also promote clarity and parity across federal agencies by making VA’s policies more consistent with those of other federal providers that currently provide access to certain abortion services.” RIA 2. As explained below, the IFR is inconsistent with other federal laws enforced across different agencies.

No state law prohibits abortion to save a mother’s life.

The following states currently have laws restricting abortion, but all contain an exception for the life of the mother and many also allow abortion in the cases of rape or incest.⁴

- **Arkansas:** “A person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.” Ark. Code § 5-61-304.
- **Florida:** “No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless one of the following conditions is met: Two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman’s life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition.” Fla. House Bill No. 5, Ch. 2022-69.
- **Georgia:** “No abortion is authorized or shall be performed if an unborn child has been determined in accordance with Code Section 31-9B-2 to have a detectable human heartbeat except when: (1) A physician determines, in reasonable medical judgment, that a medical emergency exists; (2) The probable gestational age of the unborn child is 20 weeks or less and the pregnancy is the result of rape or incest in which an official police report has been filed alleging the offense of rape or incest. As used in this paragraph, the term ‘probable gestational age of the unborn child’ has the meaning provided by Code Section 31-9B-1; or (3) A physician determines, in reasonable medical judgment, that the pregnancy is medically futile.” Ga. Code § 16-12-141.
- **Idaho:** “The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and

⁴ See Mary E. Harned & Ingrid Skop, *Pro-Life Laws Protect Mom and Baby: Pregnant Women’s Lives are Protected in All State*, Charlotte Lozier Inst. (July 26 2022), <https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/>.

provided a copy of such report to the physician who is to perform the abortion.” Idaho Code § 18-622.

- **Iowa:** “The pregnancy is the result of a rape which is reported within forty-five days of the incident to a law enforcement agency or to a public or private health agency which may include a family physician.... The pregnancy is the result of incest which is reported within one hundred forty days of the incident to a law enforcement agency or to a public or private health agency which may include a family physician.” Iowa Code § 146C.1. “‘Medical emergency’ means a situation in which an abortion is performed to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy, but not including psychological conditions, emotional conditions, familial conditions, or the woman's age; or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman.” Iowa Code § 146A.1.
- **Kentucky:** “The following shall not be a violation ...: (a) For a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.” Ky. Rev. Stat. § 311.772.
- **Louisiana:** “It shall not be a violation ... for a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.” La. Rev Stat § 40:1061.
- **Mississippi:** “No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother’s life or where the pregnancy was caused by rape.” Miss. Code § 41-41-45.
- **Missouri:** “[N]o abortion shall be performed or induced upon a woman, except in cases of medical emergency” with “medical emergency” defined as “to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.” Mo. Rev. Stat. § 188.015 *et seq.*
- **North Dakota:** “The following are affirmative defenses under this section: a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female. b. That the abortion was to terminate a pregnancy that resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest.” N.D. Cent. Code § 12.1-31-12.
- **Oklahoma:** “Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage[4] of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.” Okla. Stat. tit. 21, § 861.
- **South Carolina:** “A physician may perform, induce, or attempt to perform or induce an abortion on a pregnant woman after a fetal heartbeat has been detected ... only if: (1) the pregnancy is the result of rape, and the probable post-fertilization age of the fetus is fewer than twenty weeks; (2) the pregnancy is the result of incest, and the probable post-fertilization age of the fetus is fewer

than twenty weeks; (3) the physician is acting in accordance with Section 44-41-690 [medical emergency]; or (4) there exists a fetal anomaly, as defined in Section 44-41-430.” “Section 44-41-680 does not apply to a physician who performs a medical procedure that, by any reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman.” S.C. Code Ann. § 44-41-650 *et seq.*

- **South Dakota:** “Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.” S.D. Codified Laws § 22-17-5.1.
- **Tennessee:** “It is an affirmative defense to prosecution ... that: (1) The abortion was performed or attempted by a licensed physician; (2) The physician determined, in the physician’s good faith medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman.” Tenn. Code Ann. § 39-15-213.
- **Texas:** Exclusions under the law: “(1) the person performing, inducing, or attempting the abortion is a licensed physician; (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: (A) a greater risk of the pregnant female’s death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female.” Tex. Health & Safety Code §§ 170A.001-7.
- **West Virginia:** “No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.” W.Va. Code § 61-2-8.
- **Wisconsin:** “This section does not apply to a therapeutic abortion which: (a) Is performed by a physician; and (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and (c) Unless an emergency prevents, is performed in a licensed maternity hospital.” Wis. Stat. § 940.04.

2. The IFR functionally allows abortion on demand until birth, not in “limited circumstances.”

The VA states the abortion is necessary and needed to “protect the health” of the mother. “Health” is not defined in the IFR, but health has historically been defined broadly. In *Doe v. Bolton* (the companion case to the now overturned *Roe v. Wade*), the Supreme Court defined health as including “all factors—physical, emotional, psychological, familial, and the woman’s age-relevant to the wellbeing of the patient.” 410 U.S. 192 (1972), *abrogated on other grounds, Dobbs*, 142 S. Ct. 2228.

The IFR does not impose any gestational or limits on access to abortion for the health of the woman, effectively allowing abortion on demand until birth. Indeed, nothing in the IFR would limit abortion coverage for mental or emotional, or even social, familial, or economic “health” reasons so long as “an appropriate health care professional determines” abortion or abortion counseling is “needed to promote, preserve, or restore the health of the individual” when “health of the pregnant veteran would be endangered.” 87 Fed. Reg. 55291 (first and second quotation quoting 38 CFR 17.38(b)).

Allowing abortions for undefined and unlimited health reasons, reveals the VA’s true intent to functionally permit all abortions under the guise of “necessity.” This also makes the VA’s claim that it is offering abortion benefits in “limited circumstances” under 38 U.S.C. §§ 1710 and 1781 arbitrary and capricious. 87 Fed. Reg. 55291.

Under the IFR, late term abortions—including when a child could survive outside the womb with appropriate medical care—would be permitted. The VA should clarify that in such cases, there is a duty to preserve the child’s life even if taking steps to end the pregnancy. The Born Alive Infants Protection Act of 2002 affirms legal protection to an infant born alive after a failed attempt to induce abortion. 1 U.S.C. § 8. The VA fails to explain that how it will respect this federal law if a child survives an abortion provided by the VA. Likewise, it is unclear whether the VA is equipped to care for any such children born alive.

Conspicuously missing from the IFR and the RIA is any discussion of the unborn child or the irreparable harm of the loss of life for those children as a result of abortion authorized and funded by the VA. The VA must account for these costs in the RIA.

Further, the IFR places no limits on abortion counseling, such as that it must be nondirective—a longstanding requirement in the federal Title X program context. The IFR states, “Abortion counseling has three purposes: (1) to aid a pregnant individual in making a decision about an unwanted pregnancy, (2) to help the pregnant individual implement the decision, and (3) to assist the pregnant individual in controlling their future fertility.” 87 Fed. Reg. 55292. This is nondirective and pro-abortion counseling. If the final rule allows abortion counseling (which it shouldn’t), the counseling should be nondirective.

3. IFR is unlaw because it exceeds the VA’s statutory authority and violates Section 106.

The VA’s authority identified in the IFR.

To support its removal of the existing regulations’ exclusions for abortion counseling and abortion services, the VA points to the VA Secretary’s general treatment authority to furnish “needed” hospital care or medical services under 38 U.S.C. § 1710 and 38 CFR 17.38. In the IFR, the VA determined that abortions and abortion counseling are “needed” services when approved as such by a health care professional approves such services as (a) “needed to promote, preserve, or restore the health of the individual,” and (b) “in accord with generally accepted standards of medical practice.” 87 Fed. Reg. 55288 (citing 38 CFR 17.38(b)(1)-(3)).

Pursuant to 38 U.S.C. § 1710, the VA “shall” provide medical services for certain veterans, specifically (and primarily) those with service-connected disabilities, and “may” provide medical services for others not already identified in the statute. Notably, the term “abortion” does not appear once in the statute, and despite the statute’s enactment in 1996, the VA has never before relied on § 1710 to permit or require coverage of abortion or abortion counseling. Prior to the IFR, VA regulations provide that “the ‘medical benefits package’ does not include ... abortions and abortion counseling.” 38 CFR § 17.38(c)(1).

The IFR also points to its authority under 38 U.S.C. § 1781(a) to provide health benefits to CHAMPVA beneficiaries. 87 Fed. Reg. 55290. Under CHAMPVA, the VA is required to provide “medically necessary and appropriate” care to certain spouses, children, survivors, and caregivers of veterans who meet specific eligibility criteria. 38 U.S.C. § 1781(a); 38 CFR 17.270(b). Such care must be “in the same or similar manner and subject to the same or similar limitations as medical care” provided by the Department of Defense under its TRICARE (Select) program, 38 U.S.C. § 1781(b), and not excluded under CHAMPVA regulations. Prior to the IFR, CHAMPVA regulations specifically excluded abortion, except to preserve the woman’s life. 38 CFR 17.272.

Section 106 prohibits abortion.

Despite these general authorities, the Veterans Health Care Act of 1992, Public Law 102-585, 106 Stat. 4943 (“Section 106”) provides an unequivocal and explicit abortion exclusion. Section 106 states:

In furnishing hospital care and medical services *under chapter 17 of title 38*, United States Code, the Secretary of Veterans Affairs may provide to women the following health care services:

...

(3) General reproductive health care, including the management of menopause, but not including under this section ... abortions ... except for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition.... (emphasis added).

Until this IFR, VA regulations recognized the statutorily required abortion exclusion.

The VA wrongly claims Section 106 does not apply.

The VA states Section 106’s abortion exclusion does not apply, claiming (i) it is limited only to services provided under Section 106, and (ii) it was “effectively overt[aken]” by the later enacted Veterans’ Health Care Eligibility Reform Act (VHCERA), which includes 38 U.S.C. § 1710. 87 Fed. Reg. 55289. Both claims fail.

First, the VA falsely concludes that “Section 106 did not limit VA’s authority to provide care under any other provision of law,” including 38 U.S.C. §§ 1710 and § 1781. 87 Fed. Reg. 55289. It points to the phrase “but not including under this section” preceding Section 106’s abortion exclusion. But preceding that phrase in the same section is the phrase (conveniently omitted in the IFR): “In furnishing hospital care and medical services *under chapter 17 of title 38*.” Thus, Section 106’s abortion exclusion applies to that section which covers all hospital care and medical services provided to women under chapter 17 of title 38, including 38 U.S.C. § 1710 (veterans) and 38 U.S.C. § 1781 (CHAMPVA beneficiaries)—the Department purported authority for the IFR. The VA’s deliberate omission of the phrase referencing chapter 17 and its obfuscation of the scope of Section 106 makes the IFR arbitrary and capricious and a blatant violation of law.

To the extent that the two statutes “conflict” (they do not), the rules of statutory construction would require that the specific (Section 106) controls the general (38 U.S.C. § 1710).

Second, while the VA acknowledges Section 106, it states multiple times that the VHCERA “effectively overtook” Section 106. *See* 87 Fed. Reg. 55289 (“The Veterans’ Health Care Eligibility Reform Act effectively overtook section 106 of the VHCA.”); *id.* 55289 n.6 (“The subsequent 1996 amendments to 38 U.S.C. 1710 and the 1999 rulemaking establishing the medical benefits package overtook VA’s need to rely on section 106 to provide certain women’s health care to women veterans.”)

But “effectively overt[aking]” or no longer having a “need to rely on section 106” is not the same thing as Congress repealing or exempting Section 106. If Congress intended to repeal Section 106 or exempt §§ 1710 or 1781 from its application, it could say so explicitly. The VA’s reliance or lack thereof on Section 106 is inapposite to the proper statutory interpretation of the VA’s authority granted by Congress. As the Supreme Court has repeatedly reiterated as a “cardinal rule,” “repeals by implication are not favored.” *Posadas v. National City Bank*, 296 U.S. 497 (1936) (“Were there are two acts upon the same subject, effect should be given to both, if possible.”). The fact the IFR (and DOJ’s OLC opinion) uses the phrase “overtook” and does not claim that Section 106 was repealed explicitly is telling.

The IFR states that the VA “for decades ... has offered general pregnancy care and certain infertility services under 38 U.S.C. 1710” and that the VA “no longer relies on section 106 of the VHCA to provide such services or any other services.” 87 Fed. Reg. 55289. But to the extent that coverage of general pregnancy care and certain infertility services are included in VA medical benefits packages contrary to Section 106, those services (a) should not be provided contrary to law and (b) do not justify the VA further exceeding its statutory authority and continuing to violate Section 106 here.

Next, the VA points to the Deborah Sampson Act of 2020 as justification for Congresses’ intent that Section 106 does not apply. 87 Fed. Reg. 55289. But this argument falls flat. While the Act created a central office for health care services to women veterans, the Act defined “health care” as “the health care and services included in the medical benefits package provided by the Department as in effect on the day before the date of the enactment of this Act [Jan. 5, 2021].” 38 U.S.C. § 7310 note (alteration in original). Neither abortion services nor abortion counseling were included in the medical benefits package provided by the VA on January 4, 2021. Whether or not other services were included (either in compliance or violation of Section 106) is irrelevant; abortion and abortion counseling were not. Rather than supporting the IFR’s interpretation, the Act supports Congress’ approval of the recognized abortion exclusion.

The IFR’s CHAMPVA benefits are not similar to TRICARE.

In addition to violating Section 106, the proposed extension of CHAMPVA benefits to abortion and abortion counseling for “health” reasons is contrary to law and arbitrary and capricious. Even though TRICARE offers no such coverage, the VA claims that allowing abortions and abortion counseling for a woman’s *health* will be “sufficiently ‘similar’” to TRICARE and in accord with its statutory requirement to offer care “in the same of similar manner and subject to the same or similar limitations” as provided under TRICARE. 87 Fed. Reg. 55290-91 (quoting 38 U.S.C. § 1781). This is absurd.

Allowing abortion for health reasons is essentially allowing elective abortion on demand until birth (as explained above). In contrast, TRICARE only allows abortion and abortion counseling in limited circumstances where the life of the woman is in danger and in cases of rape and incest. Abortion in the cases of rape or incest account for less than 1% of abortions nationally.⁵ While the VA is correct that “similar” does not mean “identical,” 87 Fed. Reg. 55291, what the VA is proposing is *not* the same or similar or even close to similar as coverage under TRICARE. It is fundamentally different in kind. Elective abortion on demand until birth for broad and undefined “health” reasons is *not* the same as the narrow exceptions sometimes recognized in federal and state laws, such as the Hyde Amendment.

Neither abortion advocates, nor those who are pro-life would view abortion access under TRICARE and CHAMPVA under the IFR as similar. Likewise, no one thinks that abortion laws in Idaho are similar to Maryland and Delaware. *Compare* Idaho Code § 18-622, *with* Md. H.B. 937 *and* 24 Del.

⁵ See Tessa Longbons, *Fact Sheet: Reasons for Abortion*, Charlotte Lozier Inst. (Aug. 17, 2022), <https://lozierinstitute.org/fact-sheet-reasons-for-abortion/> (finding rape and incest accounted for only 0.3% of abortions).

Code § 1790. Not even the federal government, which is suing Idaho for allegedly violating the Emergency Medical Treatment and Labor Act (EMTALA), thinks the abortion laws are similar. *See United States v. Idaho*, No. 22-cv-329 (D. Idaho).⁶

To the extent the IFR identified examples where the VA has provided similar, but not identical coverage under CHAMPVA (especially to the extent the coverage is not, in fact, similar, and in excess of the VA's authority), those examples are inapposite and do not justify providing non-similar abortion coverage here.

The VA's position is undercut by prior VA statements and Congressional action.

The VA's prior statements and actions belie the Department's current statutory interpretation. For example, in June 2022, the VA issued a statement in support of a congressional bill (never enacted) that would direct the VA to provide abortion counseling: "To be clear, this bill would not authorize VA to provide abortions; it would only allow VA to provide patient education to ensure Veterans can make their choices regarding their care."⁷ This statement oddly failed to acknowledge any existing authority the VA thought it had to offer abortion counsel or abortion services.

Further, in 2019, the VA acknowledged that Congress had not provide it authority to provide abortion. In explaining why it declined a recommendation by the advisory Committee on Women Veterans to provide abortion and abortion counseling in the health benefits package regulations, the VA stated Congress never gave it a "legal mandate" to provide abortion and the "VA believes that Congress, as the representatives of the will of the American people, must take the lead on this sensitive and divisive issue."⁸ Indeed, just last year, 130 Members of Congress wrote to the VA to confirm Section 106 and the abortion exclusion is still in effect.⁹

In support of the IFR, some point to the conference report language from Section 106 that states: "The inclusion of the phrase 'under this section' underscores the intent of the Committees not to limit such authority as the Secretary may have to provide any infertility services under chapter 17. The use of that phrase does not, however, signal an intent to expand such authority."¹⁰ But the same conference report explains just before: "Section 106 would authorize the Secretary, *in furnishing hospital care and medical services under Chapter 17 of title 38, United States Code, to provide certain health care services to women veterans*. These services are 'pap smears,' breast exams and mammography, and general reproductive health care. The measure expressly provides that the phrase 'general reproductive health care' includes the management of menopause, but does not include under this section infertility services, abortions, or pregnancy care (including prenatal and delivery care)."¹¹ Thus, in context, it clear that this

⁶ See Press Release, Office of Public Affairs, Dep't of Justice, Justice Department Sues Idaho to Protect Reproductive Rights: Complaint Alleges Idaho Law Violates the Emergency Medical Treatment and Labor Act (Aug. 2, 2022), <https://www.justice.gov/opa/pr/justice-department-sues-idaho-protect-reproductive-rights>.

⁷ Statement of Matthew A. Miller, Department of Veterans Affairs, before the House Subcommittee on Health, Committee on Veterans' Affairs (June 22, 2022), available at <https://docs.house.gov/meetings/VR/VR03/20220622/114857/HHRG-117-VR03-Wstate-MillerM-20220622-U1.pdf>.

⁸ Department of Veterans Affairs, Meeting of the Advisory Committee on Women Veterans (2019), available at <https://www.va.gov/ADVISORY/MINUTES/Minutes-WomVetAug2019.pdf>.

⁹ Letter from Members of Congress to Secretary McDonough (June 15, 2021) available at https://republicans-veterans.house.gov/uploadedfiles/2021_6_15_pro-life_letter_to_va_secretary.pdf; see also Letter from Sen. Lankford to Secretary McDonough (Aug. 26, 2022) available at <https://www.lankford.senate.gov/imo/media/doc/2022-08-26%20Letter%20to%20McDonough%20IFR.pdf>.

¹⁰ Joint Explanatory Statement on H.R. 5193, 1992 U.S.C.C.A.N. 4186, 4189-90.

¹¹ *Id.* (emphasis added).

section is referring to authorization of providing health care services to *women* veterans under the entirety of Chapter 17 of title 38. This reading is supported by the fact that the VA, can and has prior to enactment of Section 106, provide infertility services *to men* under its general authority to decide the scope of benefits in chapter 17, but that Section 106, which expanded services *to women* veterans, was aimed at limiting infertility services that are specific to women, specifically IVF. Even Democratic Senator Patty Murray has admitted that Section 106 had that effect, leading to the genesis of the 2017 MilCon-VA rider: “But, because of a ban Congress passed in 1992, VA has been prohibited from covering the costs of certain fertility services, and while Senator Murray has successfully added a provision to annual spending bills the past few years to make fertility treatments and adoption options available to military families, Senator Murray is committed to repealing the ban once and for all and taking away any question that this service will be available in the long-term.”¹²

Further in debates during 1993-1994, Congress considered legislation to repeal the VA’s abortion ban explicitly shortly after the 1992 law’s enactment.¹³ To claim that a Republican-controlled Congress intentionally or unintentionally repealed the VA’s 1992 abortion ban in the 1996 law, after it was such a topic of contention, is absurd.

Section 106 reflects Congress’ repeated neutrality on abortion.

Section 106’s abortion exclusion is consistent with Congress’ repeated decision to remain neutral on abortion and prohibit taxpayer dollars from funding abortion or abortion benefits. While Congress sometimes permits federal funding of abortion in limited circumstances, it does not always and has never permitted a broad “health” exception.

For example, in a related context, the Department of Defense (DOD) is prohibited from using any funds or facilities to perform an abortion except in cases where the mother’s life is endangered or in cases of rape or incest. 10 U.S.C. § 1093. It is absurd to think Congress would permit veterans *more* access to abortion under VA benefits than those currently serving under the DOD. Notable other abortion exclusions include:

- ***Healthcare programs and activities:*** The Hyde Amendment (included in appropriation legislation for over forty years) states no federal funds “shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion,” with narrow exceptions for life, rape, and incest. P.L. 117-103. Div. H, §§ 506-507.
- ***Health insurance:*** Section 1303 of the Affordable Care Act (ACA) states nothing in the ACA “shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions.” 42 U.S.C. § 18023(c)(1).
- ***Employee health insurance benefits:*** Title VII “shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.” 42 U.S.C. § 2000e(k).

¹² Senator Murray Reintroduces Comprehensive Legislation to Repeal VA’s Outdated Ban on IVF for Veterans with Service-Connected Injuries (Feb. 4, 2019), <http://web.archive.org/web/20190815031007/https://www.murray.senate.gov/public/index.cfm/newsreleases?ID=1B977A82-C813-4117-82A8-0FA4BFC89F2D>.

¹³ Proposed Veterans Health Legislation, Hearing Before the Subcommittee on Hospitals and Health Care of the Committee on Veterans’ Affairs, House of Representatives, 103rd Cong. (Sept. 22, 1993).

- **Family planning grants:** No Title X funds “shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6.
- **Education programs and activities:** Nothing in Title IX “shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.” 20 U.S.C. § 1688.
- **Foreign financial assistance:** The Helms Act states that “no foreign assistance funds may be used to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions.” Sec. 305 of Pub. L. No. 100-459.

According to the IFR, the “VA believes it is important to provide at least the same reproductive health care services that other Federal agencies provide their beneficiaries.” 87 Fed. Reg. 55293. But as demonstrated above, the VA is proposing abortion services *greater than* other federal agencies and programs. More importantly, however, it doesn’t matter what the VA “believes,” it matters what authority Congress provides the VA. And Congress explicitly excluded abortion.

The IFR violates other federal laws.

The IFR’s novel (and unlawful) interpretation of its authority under §§ 1710 and 1781, and the inapplicability of Section 106’s abortion exclusion raises serious questions under the major questions doctrine. *See West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).

Further, the IFR violates the Antideficiency Act, which bars federal agencies from making expenditures for which there is no authorizing congressional appropriation. 31 U.S.C. § 1341. Indeed, the VA estimates that the IFR would incur expenses in excess of \$25 million over the next decade to pay for more than 10,000 abortions! RIA 3. Because Congress explicitly prohibited the VA from providing health benefits for abortion services or counseling, the VA and any VA employee providing or counseling for abortion is acting outside authorized Congressional appropriations and subject to administrative and criminal penalties.

To the extent that the VA is providing drugs for chemical abortion, VA employees must comply, under threat of criminal penalties, with federal law that prohibits interstate carriage and mailing of abortion drugs, and other equipment, devices, and other commodities for producing abortions. 18 U.S.C. §§ 1461, 1462. Further, 18 U.S.C. § 552 states that for “an officer, agent, or employee of the United States”—which includes the VA—to “knowingly aid[] or abet[] any person engaged in any violation of” these laws is also a crime. *Cf. Texas v. Becerra*, 5:22-CV-185-H, 54 n.21 (N.D. Tex. Aug. 23, 2022) (The federal government’s reading of EMTALA “may conflict with the federal law barring the importation or delivery of any device or medicine designed to produce an abortion. How the defendants’ view of EMTALA and that criminal statute would interact is not before the Court, but their fraught coexistence further counsels against the defendants’ interpretation, especially in light of the strong presumption against implied repeal of another statute.” (citing 18 U.S.C. § 1461)).

4. Abortion is not healthcare and not “needed” or “medically necessary and appropriate.”

The VA determined that “an abortion is ‘needed’ pursuant to 38 U.S.C. 1710, when sought by a veteran, if determined needed by a health care professional, when the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term or when the pregnancy is the result of an act of rape or incest.” 87 Fed. Reg. 55288. The IFR also states that extending CHAMPVA abortion and abortion counseling benefits “better promote[s] the long-term health of CHAMPVA beneficiaries” and is “both medically necessary and appropriate to promote the long-term health of CHAMPVA

beneficiaries.” 87 Fed. Reg. 55290-91. The IFR describes abortion as a benefit to women, but conveniently ignores that every abortion ends the life of an innocent child and in fact often harms the very women, abortion aims to “benefit.” As explained below, abortion is not medically necessary and appropriate. Abortion is not healthcare, it ends the life of an innocent child, and it harms women.

From VA’s perspective, “[a]llowing even one preventable death of a veteran or CHAMPVA beneficiary by limiting access to abortions is unacceptable.” 87 Fed. Reg. 55296. While the VA should ensure every preventable death is prevented, this rulemaking is not needed to do so. As explained above, the VA offers lifesaving care when necessary and no state prohibits abortion in the case where a woman’s life is in danger, meaning there is no need for the VA’s rulemaking to allow lifesaving care that is already permissible.

Further, the VA (rightly) seeks to prevent just one death of a woman but condones the deaths of thousands of unborn children for abortions that are *not* necessary to save the life of the child’s mother. To justify its rule, the VA points to “maternal morbidities and mortality” and “the human costs involved.” RIA 2-3. Yet the VA fails to acknowledge, much less consider, the morbidity and mortality of innocent unborn human beings and the human costs involved with abortion for those children. This one-sided calculus makes the VA’s rationale arbitrary and capricious.

The VA relies on general claims of pregnancy harms yet fails to address abortion harms.

The IFR claims that “abundant evidence supports VA’s determination.” 87 Fed. Reg. 55291. Yet, the IFR spends little room elaborating on the so-called “abundant evidence.” 87 Fed. Reg. 55291. The VA asserts, “research has shown that while most pregnancies progress without incident, pregnancy and childbirth in the United States can result in physical harm and even death for certain pregnant individuals.” 87 Fed. Reg. 55291. For example, “[s]ome pregnant veterans may be at heightened risk for other pregnancy complications including hemorrhage, placenta accreta spectrum, and peripartum hysterectomy, among others.” 87 Fed. Reg. 55291. Thus, according to the IFR, abortion “may be needed” to save the life or preserve the health of the veteran. 87 Fed. Reg. 55291. In addition, the IFR claims “veterans of reproductive age, in particular, have high rates of chronic medical and mental health conditions that may increase the risks associated with pregnancy.” 87 Fed. Reg. 55295. The IFR further speculates that “individuals at risk of pregnancy complications who do not have access to contraception or abortion may experience conditions resulting from pregnancies that can leave them at risk for loss of future fertility, significant morbidity, or death.” 87 Fed. Reg. 55291.

First, as explained above, lifesaving medical treatments, such as for ectopic pregnancy, are not abortion and are not prohibit by prior VA regulations or state law (even if called abortion). As Secretary McDonough clarified during a July 2022 press conference, treatments for ectopic pregnancy and miscarriage are *not* abortion and the VA already provides any necessary lifesaving treatments. As such, the VA’s rationale that this rulemaking is needed to save lives is arbitrary and capricious.

Second, the VA lacks proper evidence and statistics to make claims about maternal mortality rates. As the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) points out, the “abortion industry as it protects its product by reassuring that abortion is safe, an assertion based on deliberately deceitful and inadequate data” and “biased academic physicians have led the discussion on maternal mortality.”¹⁴ Further, the IFR does not address maternal mortality for VA beneficiaries specifically, a necessary calculation to support its rulemaking.

¹⁴ Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *Induced Abortion & the Increased Risk of Maternal Mortality* (Aug. 13, 2019), <https://aaplog.org/wp-content/uploads/2020/01/FINAL-CO-6-Induced-Abortion-Increased-Risks-of-Maternal-Mortality.pdf>.

Third, the VA points to physical harm, yet its rule allows abortion for “health” reasons which are not limited to “physical harm.” To the extent the VA is concerned about physical health, it should clarify. To the extent the VA means non-physical health, it must provide sufficient reasons for why abortions for those reasons are needed.

Fourth, the IFR touts the alleged “risk of pregnancy” and childbirth, yet it does not address the serious risks associated with abortion, some of which are similar. The physical risks of abortion that the VA must take into account include: hemorrhage, retained tissue, infection, uterine perforation, cervical laceration, and immediate psychiatric morbidity.¹⁵ In addition to the immediate physical risks associated with abortion, long term mental health conditions can present or worsen during and after an abortion.¹⁶ The American Association of Pro-Life Obstetricians and Gynecologists (APPROG) identifies that abortion “significantly increases risk for ... depression, anxiety, substance abuse, suicide ideation and behavior.”¹⁷ Additionally, “abortion is associated with a higher risk for negative psychological outcomes when compared to other forms of perinatal loss and with unintended pregnancy carried to term.”¹⁸ “There is consensus among most social and medical science scholars that a minimum of 20 to 30% of women who abort suffer from serious, prolonged negative psychological consequences,^{65,66} yielding at least 260,000 new cases of mental health problems each year.”¹⁹ The VA should not perpetuate these poor mental outcomes by its IFR.

Ironically, while pointing to certain studies that show “individuals have limited knowledge about the safety and risks of abortion,” the VA itself fails to address abortion risks in its own analysis. 87 Fed. Reg. 55292. Perhaps the VA wrongly thinks there are none. Regardless, failure to acknowledge the risks associated with abortion make the VA’s analysis regarding need and medical necessity arbitrary and capricious.

Fifth, the VA fails to analyze whether there are alternative treatment options apart from abortion to solve problems associated with high-risk pregnancy. Instead, the VA assumes abortion is the immediate fix for complex medical situations and emergencies. It is not and creates its own risks and harms.

Instead of promoting abortion, which kills an innocent child in the womb, the VA should focus its efforts on supporting mothers throughout their pregnancies, at childbirth, and after. Pregnant women who are experiencing health issues or at risk for pregnancy complications, should be monitored treated for those conditions, not offered abortion.

Sixth, The IFR fails to provide any statistics for how many women covered by the VA’s benefits are in a high-risk category and do not have access to contraception (and issue this rule does not remedy) and seek abortion as a means of birth control.

Finally, the VA fails to take into consideration that every abortion causes the death of an innocent human person. It cannot seriously talk about harms of pregnancy without addressing the harms of abortion.

¹⁵ See Angela Lanfranchi, Ian Gentles, & Elizabeth Ring-Cassidy, *Complications: Abortion’s Impact on Women* 96 (2013).

¹⁶ See Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *Abortion and Mental Health* (Dec. 30, 2019), <https://aaplog.org/wp-content/uploads/2019/12/FINAL-Abortion-Mental-Health-PB7.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Abortion disadvantages women and women don't need abortion to succeed.

Although today's abortion advocates, including the Biden administration, claim that unlimited access to abortion is the *sine qua non* of women's equality and women's rights, this view is contradicted by a growing mountain of evidence that easy access to abortion is in many ways disadvantageous to women's equality. It is also contradicted by the views of the earliest women's rights advocates in our country. The suffragists understood that the full advancement of women would only be possible when the dignity of children, born and unborn, is protected.

Robust evidence suggests that relatively easy access to abortion has changed society in several ways disadvantageous to women. First, by acting as a kind of secondary insurance against child-bearing to the primary (but fallible) insurance of contraception, easy access to abortion tends to change sexual behavior in favor of greater sexual risk-taking, which disincentivizes contraceptive use and leads to more uncommitted sexual relations.²⁰ Over time, increases in risk-taking, coupled with contraceptive failure, misuse, or nonuse leads to more nonmarital pregnancies, single parenthood and abortion, all of which disproportionately impact women.²¹ The easy availability of abortion tends to establish nonmarital sex as the price of a romantic relationship, even as women continue to report that this new causal sex ethic is undesirable to them.²²

According to now-Treasury Secretary Janet Yellen and her co-authors, Nobel laureate George Akerlof, and David Katz, legal abortion also drives out “shotgun marriage.”²³ Since nonmarital births have become more common and more socially accepted, the father, along with the wider society, can now reason that the availability of abortion means that single parenthood is always the woman's “free choice.” While sex and potential motherhood remain unshakably connected a half-century after *Roe*, the connection between sex and potential fatherhood—that connection irresponsible men have always sought to avoid—has grown far more tenuous, contributing to the feminization of poverty we see today.²⁴ In a country benighted for the last half century by unlimited access to abortion, the risks of sex—and the responsibilities of having children—have been assumed disproportionately by women. For far too many men, children are no longer part of the sexual bargain.²⁵

²⁰ Phillip Levine, *Sex and Consequences: Abortion, Public Policy, and the Economics of Fertility* 3-4 (2007) (“[I]f this form of insurance [abortion] is available at a very low cost, it may lead to changes in behavior that increase the likelihood of its being needed [altering] decisions regarding sexual activity and contraception that would affect the likelihood of becoming pregnant Since using contraception or abstaining from sexual activity may be viewed as costly, women/couples may choose to do so less frequently, in essence substituting abortion for contraception, as abortion becomes even more accessible.”).

²¹ Richard Posner, *Sex and Reason* 143 (1994) (“[I]f abortion is cheap, [] intercourse will be more frequent and . . . may generate more unwanted pregnancies, not all of which will be aborted. This should help us to understand the combination of cheap contraceptives, frequent abortions, and yet a high rate of unwanted births in our society.”).

²² Lisa Wade, *American Hook Up* (2017)

²³ George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. Econ. 277, 281 (1996) (“By making the birth of the child the physical choice of the mother, the sexual revolution has made marriage and child support a social choice of the father.”); *see also* Helen Alvaré, *Abortion, Sexual Markets and the Law in Persons, Moral Worth & Embryos* 261 (Steven Napier ed., 2011).

²⁴ Single motherhood accounts for “virtually all the increase in child poverty since the 1970s,” according to Brookings Institution scholar Isabel Sawhill.

²⁵ People changed their sexual behavior as a result of a change in the laws. As University of Pennsylvania economist Jonathan Klick summarized the econometric studies on abortion policy and sexual behavior: “Individuals, even young individuals whose sexual behavior is often considered to be driven more by emotion than by calculation, are sensitive to the costs of the sexual activity. When those costs increase, ... individuals engage in less risky sex.”

Second, the widespread availability of abortion and “abortion as equality” arguments also confirm public and private actors’ inclinations to avoid expensive accommodations for women with children in educational and work settings. Ironically, under the guise of women’s rights, equality arguments for abortion suggest that females are intrinsically blighted by their reproductive capacity to bear children. These arguments tend, unwittingly perhaps, to promote the male childless norm in educational and employment settings.²⁶

While explicit sex discrimination is increasingly a thing of the past thanks to the cultural and legal advances over the past half century, pregnancy discrimination and discrimination against mothers perdures.²⁷ If abortion is what enables women to participate in the workplace—as we’re constantly told—then, employers often reason, costly accommodations, flexible work schedules, and part-time-pay equity are not so necessary. In fact, corporate consultants now tout abortion coverage—or paying for their employee’s abortions—as yielding “high-impact benefit with low-cost investment.”²⁸

Since the Supreme Court decided *Dobbs*, a litany of voices—including the dissenting opinion in *Dobbs*—have argued that the decision rendered women “second-class citizens.” 597 S. Ct. at 15. In fact, it was seven men in *Roe v Wade* who took from women the right to vote their conscience and make their voices heard on the issue of abortion. And even before women could vote—and while they were agitating for the vote in the late 19th and early 20th centuries, they made their opposition known on abortion in all sorts of public settings. From newspapers they published, to speeches they gave, the earliest women’s rights advocates were categorically opposed to abortion. That women felt the need to seek out then illegal abortions revealed to these women’s rights advocates just how deeply society was failing women.

So, for instance, Victoria Woodhull, the first woman to run for president on the Equal Rights Party platform, the first woman to testify before Congress, and an ardent and radical advocate of constitutional equality for women. Woodhull recognized that mothers were “directly charged with the care of embryonic life,” for children’s rights, she said, “begin while yet they remain the fetus.”²⁹ In 1870, just two years after the 14th amendment was ratified, Woodhull wrote: “Many women who would be shocked at the very thought of killing their children after birth, deliberately destroy them previously. If there is any difference in the actual crime we should be glad to have those who practice the latter, point it out. The truth of the matter is that it is just as much a murder to destroy life in its embryonic condition, as it is to destroy it after the fully developed form is attained, for it is the self-same life that is taken.”³⁰

Or take, as another example, OBGYN Alice Stockham (the fifth woman licensed to practice medicine in the U.S.) in her popular 1889 book, *Toxology*: “Many women have been taught to think that the child is not viable until after quickening, and that there is no harm in arresting pregnancy previous to the feeling of motion; others believe that this is no life until birth, and the cry of the child is heard.... Life must be present from the very moment of conception.... By what false reasoning does [the mother] convince herself that another life, still more dependent upon her for its existence, with equal rights and possibilities has no claim upon her for protection?” Dr. Elizabeth Blackwell, the first woman licensed to practice medicine, agreed: “The gross perversion and destruction of motherhood by the abortionist filled me with indignation, and awakened active antagonism.”

²⁶ See Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 Harv. J.L. Pub. Pol’y 889 (2011)

²⁷ See Sigrid Luhr, *Signaling Parenthood: Managing the Motherhood Penalty and Fatherhood Premium in the U.S. Service Sector*, 259 Gender & Soc’y 263-64 (Apr. 2020)

²⁸ Rhia Ventures, “Hidden Value: The Business Case for Reproductive Health” (2020).

²⁹ Victoria Woodhull, “Children—Their Rights, Privileges and True Relation to Society,” *Woodhull & Claflin’s Weekly* (1871).

³⁰ Victoria Woodhull, “When Is It Not Murder to Take a Life?,” *Woodhull & Claflin’s Weekly* (1870).

The 19th century women’s rights advocates courageously agitated for their rights—to education and entry into the professions, within marriage and in civil and political life—in part, so that they could fulfill, with men, their responsibilities to their families and beyond. They knew that for women to participate more fully in the economic and social life of the nation, the nation would need to become far more hospitable to children and the women who bear them.

The VA should not perpetuate the disadvantages associated with abortion to women by providing taxpayer-funded abortion and abortion counseling.

The VA doesn’t have a compelling interest in the intentional taking of an innocent human life in the womb.

The debate over abortion in this country has generally involved an analysis of the competing goods at stake. On the one side, there is the unborn child, whose interests primarily consist of being protected from the lethal private violence of abortion. On the other is the pregnant woman whose interests include being free from the bodily, psychic, and economic burdens of an unwanted pregnancy and the obligations of parenting once the child is born. Arguments in favor of abortion rights rest on the proposition that because these burdens are so significant and uniquely affect the pregnant woman, she alone should have the authority to terminate or continue the pregnancy. Arguments for restricting or prohibiting abortion rest on the proposition that absent narrow and compelling justifications (such as threats to the life of the mother), it is unjust to intentionally take the life of the child in utero, who though immature, small, and profoundly dependent, is indisputably an individual, living member of the species *homo sapiens*, separate and distinct from her mother.³¹ By way of response, those arguing for abortion rights sometimes make the case that the unborn child, though a human being in the biological sense, does not merit legal protection because she is not a “person” in the moral sense. (The VA fails to acknowledge the unborn child at all.) Proponents of this point of view argue that only those human beings that meet preferred criteria (such as the capacity for conceptual thought) should enjoy the protections of the law against intentional killing of innocents. Advocates for legal protection of the unborn child respond that such line-drawing constitutes radical discrimination against the weak and vulnerable based on standards that are specifically designed by the strong to withhold the protection of the law for their own benefit. Moreover, they object that when applied neutrally, the criteria for “personhood” often exclude from the moral and legal community not just the unborn, but newborns, children, the cognitively disabled, and the elderly, which reveals such criteria to be ethically monstrous. They argue that all human beings possess intrinsic, equal, and matchless worth, regardless of age, size, state of dependency, or others’ perceptions.

To be clear, this is an argument that depends on two propositions, neither of which is “theological” in the sense of depending on the propositions of any revealed religious tradition. The right to life argument proceeds from the indisputable biological identity of the unborn child as a living organism of the species *homo sapiens* and the normative proposition that all living human beings are entitled to moral concern and the equal protection of the law, without discrimination. This ethical, political, and legal argument for and against abortion has continued for many decades, made by thoughtful philosophers, legal scholars, and others of good will. The form of this argument is well understood and a fixture of American public bioethics.

The VA’s framing of the singular interest at stake fails to recognize this well-established account of the competing goods at stake. Presented with the VA’s position as the only window into the ethical, legal, and policy debate over abortion, one could be forgiven for not understanding why there is a dispute at all. It only mentions one side of the calculus of important goods—the “health” burdens on the mother

³¹ For an extended discussion of the legal, policy, and philosophical debate over abortion, see O. Carter Snead, *What It Means to be Human* 106-85 (2020). The arguments that follow draw heavily upon this work.

of unwanted pregnancy—and entirely ignores the interests of the innocent, unborn human being whose life is intentionally terminated by the abortion. The VA never explains why the undefined and amorphous “health” interests of the mother are sufficient to justify the intentional taking of an innocent human life in the womb. This is arbitrary and capricious. The irreparable harm of the loss of life to the unborn must be taken into consideration in the regulatory impact analysis.

Indeed, the VA does not attempt to explain why abortion is a justified harm. The Department appears to simply assume without explanation that it is not meaningfully harmful in the first instance.

As the Supreme Court made clear in *Dobbs* there is no federal constitutional right to abortion. Further, the Court enumerated a list of “legitimate state interests” that could serve as justifications for regulations on abortion. Specifically, the Court noted such state interests as “respect for and preservation of prenatal life at all stages of development...; protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.” 142 S. Ct. at 2284. As such, there is no compelling government interest in abortion generally, and the VA has failed to show there is a compelling interest in taxpayer funded abortion services for veterans in contradiction of “legitimate state interests.”

The VA’s argument rests on the premise that the fundamental unit of human reality is the individual, defined by her will and capacity to choose, and whose flourishing consists in pursuing the projects of the will, even when it requires the use of violence against the weakest and most vulnerable members of one’s own family. This nonnative framework dissolves the parent-child relationship, atomizes and isolates mother and child, and reconfigures their relationship as a zero-sum vital clash of interests between strangers—a person and nonperson (who is not even recognized).

This narrative of conflict bears little relation to the lived reality of human procreation and pregnancy, in which the dramatis personae include a woman and her biological offspring literally joined in body, one inside the other and utterly dependent on the other, the two lives integrated and intertwined to a degree found in no other human relationship. They are, biologically speaking, mother and child. They are not host and parasite, homeowner and intruder, or violinist and unwilling conjoined kidney donor (to borrow a famous analogy from philosopher Judith Jarvis Thomson).³² This is not a dispute over private property. Moreover, there is no mere “unplugging” to undo this relationship; modern methods of abortion involve the direct killing and removal of the fetus through highly invasive and violent means. The VA’s narrative of this conflict is simplistic, alien, and forgetful of lived embodied reality.

The VA offers no serious discussion of the meaning of pregnancy’s singular bodily integration and intertwining of mother and child. There is no exploration of the significance of the bonds of kinship. There is no reflection on the fact that every new human life comes into being already embedded in a relationship with mother, father, and family. They do not consider that the womb is the first place of belonging for every child who has ever lived. There is no wrestling with the complexity and risks of dividing the world of living human organisms into “persons” who bear rights and “nonpersons” who live at the sufferance of others, according to their interests and desires.

The Department’s argument does not grapple with the alternative possibility that we are not merely solitary and isolated individuals seeking to impose our wills on the world and one another. That we are perhaps better understood as vulnerable, mutually dependent, embodied beings in time who exist

³² See Snead, *supra* note 31, at 126-31 (discussing Judith Jarvis Thomson, A Defense of Abortion, in *Rights and Wrongs of Abortion: A Philosophy and Public Affairs Reader* 3, 4-5 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1974)).

in a web of relationships that bring with them both unchosen obligations and unearned privileges regarding one another's care and concern. In these human networks of uncalculated giving and graceful receiving that are required to protect and promote the flourishing of a community of embodied beings, the vulnerability and dependence of a woman facing an unplanned pregnancy constitutes a summons for aid that must be answered by all of us who are able to render it. By contrast, the VA's argument presupposes only a world of strife in which atomized strangers are isolated in their vulnerability, with only the "freedom" to resort to force against others to protect their interests. It is a world without unchosen obligations that inhere in particular natural or communal relationships. It is a world in which parents and children are strangers to one another, owe nothing to each other, and are not entitled to mutual love, care, concern, and protection.

The VA is wrong to embed its radically individualistic anthropology in regulation as the necessary but implicit normative foundation for a right to abortion that Congress did not grant and the Constitution does not recognize.

Killing innocent children conceived in an act of rape or incest is not "needed" or "medically necessary and appropriate."

The IFR states that abortions are "needed" and "medically necessary and appropriate" when the pregnancy is the result of an act of rape or incest. 87 Fed. Reg. 55292. But another way of saying this is that it is "needed" and "medically necessary and appropriate" to kill innocent children conceived in an act of rape or incest. This is disgusting and insulting to those still living who were conceived in such a way. That child's life is worth no less than another child's based on his or her parentage or the act in which the child was conceived. As a society, we have rightly moved away from viewing children conceived out of wedlock as inferior to those conceived by married parents. Likewise, we should not view children conceived in an act of rape or incest as inferior to those not so conceived. Neither should we heap upon the children the punishment for the sin of a parent.

The VA asserts "veterans are also more likely to have preexisting mental health conditions that would be compounded by the mental health consequences of being forced to carry a pregnancy to term if that pregnancy is the result of rape or incest." 87 Fed. Reg. 55292 ("[M]ental health consequences will have a "unique impact on veterans, who report higher rates of sexual trauma compared to their civilian peers.>"). The VA claims abortion is good for the mother because otherwise she will experience "constant exposure to the violation committed against the individual which can cause serious traumatic stress and a risk of long-lasting psychological conditions such as anxiety and depression." 87 Fed. Reg. 55292.

But the answer to violence is not more violence. Abortion is not a neutral. Those who are suffering mental health issues should receive counseling and support, not abortion. To the extent that veterans experience sexual trauma, the federal government should take steps to identify why this is happening and stop the sexual trauma *before* it happens, rather than trying to gloss it over with abortion as a solution. For those women veterans, the VA should not add the trauma of abortion to any sexual trauma they experienced.

While Congress sometimes, but not always, permits federal funding for abortions of pregnancies in the case of rape or incest, it explicitly chose not to do so here with Section 106's abortion exclusion.

5. The VA's baseline for analysis is wrong.

The VA provides general assertions, not specific evidence.

The RIA claims the IFR is needed due to “urgent health risks” as a result of *Dobbs* and state laws. RIA 6. But the IFR was not in effect for over two months after *Dobbs* was issued in June 2022, and the VA fails to cite *a single woman* who faced such urgent health risks and was unable to receive medically necessary care. Indeed, despite several interim months of state abortion laws prohibiting certain abortions post-*Dobbs*, the VA fails to cite to one instance where a pregnant veteran could not obtain access to life-saving treatments. In short, this is a rule in search of an “urgent” problem. Policy or personal preferences for tax-payor funded abortion contrary to state law is not an urgent problem necessitating rulemaking, much less good cause for an IFR.

The VA points to state laws post-*Dobbs* as creating a need for this rulemaking. “It is critical that this rule be published and be made effective immediately to ensure pregnant veterans and CHAMPVA beneficiaries have access to this important care. Indeed, delaying the issuance of this rule would increase the risk to their health and lives and put care out of reach for some pregnant veterans and CHAMPVA beneficiaries entirely. Time is also of the essence because, after the *Dobbs* decision, many State laws have prompted providers to cease offering abortion services altogether; thus, many veterans and CHAMPVA beneficiaries would face delays (including travel and wait times) if they were required to obtain, outside the VA, the treatment permitted under this rule.” 87 Fed. Reg. 55296.

“Some” and “many” must be quantified. To determine the specific number of pregnant veterans and CHAMPVA beneficiaries that would benefit from the IFR, the VA must determine how many are affected by lack of abortion access due to state laws post-*Dobbs*. To reach this number the VA must:

- a. Take the number of covered female veterans and beneficiaries of childbearing age.
- b. Subtract the number of women in states that permit abortion.
- c. Identify how many women would seek abortion based on life, health, rape, or incest.
- d. For these women, subtract any abortions sought that were prohibited pre-*Dobbs* (such as when the fetus can feel pain).
- e. Subtract any abortions sought that are permitted under state law (such as prior to detection of a fetal heartbeat or when the fetus can feel pain).
- f. Subtract any abortions sought that are necessary to save a mother's life (since all states permit abortion in such circumstances).
- g. Subtract any abortions sought in cases of rape or incest where such abortions are permitted in states otherwise prohibiting abortion.

This number is significantly smaller than the broad claims of need and urgency made by the VA.

The IFR provides conflicting calculations.

The VA's estimates do not add up, making them arbitrary and capricious. For example, on September 21, 2022, VA Secretary McDonough when speaking at the Senate Veterans' Affairs Committee stated the VA “provide[s] healthcare to 300,000 women veterans of childbearing age.”³³ The RIA assumes, based off data from the Department of Defense, that “0.005 percent of active-duty servicemembers of reproductive age” will seek abortion when the pregnancy is the result of rape or incest.

³³ U.S. Senate Committee on Veterans' Affairs, Ensuring Veterans' Timely Access to Care in VA and the Community, <https://www.veterans.senate.gov/2022/9/ensuring-veterans-timely-access-to-care-in-va-and-the-community/63b521ff-d308-449a-b3a3-918f4badb805>.

RIA 4. The VA “assumed the same frequency of these abortions for veteran enrollees and CHAMPVA beneficiaries.” RIA 4. This assumption fails to address the ongoing epidemic of sexual assaults related to active duty servicemembers.³⁴

The analysis goes on to assume “that VA will provide or cover 1000 abortions annually” for both veterans and CHAMPVA beneficiaries for life, health, rape, and incest reasons. But 0.005 percent (not including health reasons) of 300,000 veterans (not including any CHAMPVA beneficiaries) is 1,500, not 1,000—significantly more than the VA’s estimates. This calculation error has implications for the projected costs of the rule and capacity of VA to provide such services.

According to the National Partnership for Women & Families, it is estimated that up to 53 percent of veterans of reproductive age may be living in States that have already banned or are likely to soon ban abortion following the *Dobbs* decision. 87 Fed. Reg. 55295. The VA estimates that over 155,000 veterans ages 18 through 49 are potentially capable of pregnancy, enrolled in VA health care, and live in States that have enacted abortion bans or restrictions. 87 Fed. Reg. 55295. Again, these numbers do not add up 53 percent of 300,000 is 159,000 not 155,000.

6. The VA doesn’t have “good cause” to issue an IFR.

IFRs short circuit the democratic public notice and comment rulemaking process required by the Administrative Procedures Act (APA). IFRs are not commonly issued, and exceptions to the normal rulemaking process should not be used lightly. The APA permits an agency to forgo notice if the agency for “good cause” finds that compliance would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). Here, the VA found that the normal rulemaking process would be “impracticable and contrary to the public interest.” 87 Fed. Reg. 55295. However, the VA’s rationale falls far short of the good cause threshold to issue an IFR.

The determination for good cause is inexorably linked with the purported “need” for the rulemaking and the false claims about abortion being needed, medically necessary, and appropriate. As explained above, there is no need for the rulemaking, and thus there is no good cause.

The VA has failed to demonstrate good cause. The VA claims general harms to women associated with pregnancy absent abortion access, and that delaying implementation “would result in substantial health deterioration and risk the lives of some pregnant veterans and CHAMPVA beneficiaries.” 87 Fed. Reg. 55296. But as explained above, the Department fails to identify one woman who was harmed in the several months between the *Dobbs* decision and issuing the IFR, indicating that waiting several more months to go through the normal rulemaking process would not be “impracticable.” Also, as explained above, the IFR’s baseline for analysis is wrong, significantly minimizing the claimed harm or need. General claims about the lack of assurances abortion access in the community are insufficient to establish “impracticability.”

Further, mere policy disagreement with the Supreme Court’s decision in *Dobbs* or state laws protecting life of the unborn is not “contrary to the public interest” or “good cause.” Likewise, disagreeing with Congress’ statutory direction based on political preferences of the prevailing party is not “contrary to public interest” or “good cause.” Indeed, if there is good cause for this IFR, it is hard to see how there would not be good cause for any other proposed rulemaking the administration seeks to impose.

³⁴ See Melinda Moyer, ‘A Poison in the System’: The Epidemic of Military Sexual Assault, New York Times (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html>.

To reiterate, there is *no* good cause for issuing an IFR. At a minimum, the VA should withdraw the IFR and reissue a proposed rule with public notice and comment period, only after which the Department should issue a final rule.

7. The IFR does not preempt state abortion laws.

The IFR amounts to nothing more than the VA’s political disagreement with Congressional limitations and state abortion laws and policy. Such disagreement is insufficient to preempt state law by administrative fiat. The IFR states: “This rulemaking serves as notice that all VA employees, including health care professionals who provide care and VA employees who facilitate that health care, such as VA employees in administrative positions that schedule abortion procedures and VA employees who provide transportation to the veteran or CHAMPVA beneficiary to the VA facility for reproductive health care, may not be held liable under State or local law or regulation for reasonably performing their Federal duties.” 87 Fed. Reg. 55294. DOJ’s OLC opinion likewise concludes: “States may not impose criminal or civil liability on VA employees—including doctors, nurses, and administrative staff—who provide or facilitate abortions or related services in a manner authorized by federal law, including VA’s rule.”³⁵ The OLC opinion rubber stamped the VA’s unlawful actions under a fig leaf of legal analysis and falsely claims that the abortion exclusions “are not compelled by statute.”³⁶ The VA’s and DOJ’s mere assertions cannot guarantee legal protections or immunization to its employees who it will ask to provide abortions contrary to state law.

Preempting state abortion laws violates federal law.

One of the stated purposes of the IFR is to “ensure” that veterans can obtain abortions “irrespective of what laws or policies States may impose.” 87 Fed. Reg. 55288. This is contrary to federal law, making the IFR unlawful. Pursuant to the Assimilative Crimes Act, abortion is a crime on federal property if it is a crime in the state where the property is located. The only exception is when there is a federal statute that *already* makes the conduct a crime. 18 U.S.C. § 13. Apart from the Partial Birth Abortion Ban, federal law does not criminalize abortion. Neither the IFR nor the DOJ OLC opinion on the VA IFR mention the Assimilative Crimes Act. However, a prior OLC opinion on the application of the Assimilative Crimes Act on federal enclaves, which “may include” VA hospitals, explains that application of the act on a particular location “requires a case-by-case analysis.”³⁷ Even if the OLC opinions were correct, abortion is excluded from VA medical benefits under *federal law*, namely Section 106. Further, current VA regulations governing its facilities across the U.S. provides that “State or local laws and regulations [are] applicable to the area in which the [VA] property is situated.” 38 C.F.R. § 1.218(c)(3). The IFR fails to explain how its preemption claim squares with this regulation.

The IFR is unclear which state abortion laws it preempts.

The IFR states, “Under VA’s regulations, State and local laws, rules, regulations, or other requirements are preempted only to the extent they unduly interfere with the ability of VA employees to furnish reproductive health care while acting within the scope of their VA authority and employment.” 87 Fed. Reg. 55294. As explained above, the IFR does not impose any limits on the types of abortion procedures permitted. It is unclear what abortion regulations (outside a prohibition) would purportedly “unduly interfere.” Additionally, the VA fails to state which state health and safety abortion regulations

³⁵ *Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services*, Dep’t of Justice, Office of Legal Counsel, 46 Op. O.L.C. ___, slip op. 1 (Sept. 21, 2022).

³⁶ *Id.* at 6.

³⁷ *Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized by Federal Law*, Dep’t of Justice, Office of Legal Counsel 46 Op. O.L.C. ___, slip op. 1 (Aug. 12, 2022).

will be recognized and which will be preempted. Common state abortion regulations include informed consent, parental notification, reflection periods, ultrasounds, in-person evaluations, and the abortion provider's medical training, qualifications, and certification. These health and safety regulations should be explicitly recognized by the VA.

8. The VA must respect conscience and religious rights of VA employees.

Assuming the VA moves forward with the IFR (even though it is unlawful as explained above), the VA must respect the religious and conscience rights of its employees who object to perform, providing, participating in, assisting with, counseling on, promoting, or referring for abortions or abortion counseling. We ask the Department to explain how its rule will comply with the following constitutional and statutory religious and conscience protections and how VA employees will be able to avail themselves of these legal protections.

- **First Amendment.** The First Amendment protects the rights to free exercise and free speech (among others). The IFR would require VA employees to provide abortions and abortion counseling. This requirement conflicts with the religious exercise and free speech rights of many VA employees. As the Supreme Court has made clear: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v Burns*, 427 U.S. 347, 373 (1976). The VA should explain in any final rule how it will honor its employees’ First Amendment rights.
- **Religious Freedom Restoration Act (RFRA).** RFRA, which the Supreme Court has described as a “super statute,” “prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (citing 42 U.S.C. § 2000bb-1 *et seq.*). Here, as explained above, there is no compelling government interest to require taxpayer-funded abortion and abortion counseling contrary to law, Congressional direction, and states’ interest of the highest order to prevent the killing of innocent human beings. The Department should provide a meaningful mechanism for VA employees to assert their rights under RFRA.
- **Title VII of the Civil Rights Act of 1964.** Title VII prohibits discrimination on the basis of religion in employment. 42 U.S.C. § 2000e-2. It defines “religion” to include “all aspects of religious observance and practice, as well as belief” and requires employers to “reasonably accommodate” employees’ religious observances and practices when such accommodations do not impose “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). The VA should ensure that its employees know about their rights under Title VII and the process for requesting a religious accommodation, which must be evaluated on a case-by-case basis. Many VA employees will likely seek religious accommodations under Title VII for any abortion-related job duties.
- **Coates-Snowe Amendment.** The Coates-Snowe amendment prohibits the federal government, including the VA, from discriminating against any “health care entity” (which “includes an individual physician”) on the basis that “(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; or (2) the entity refuses to make arrangements for any of [such] activities.” 42 U.S.C. § 238n. This law protects more than just religious objections and applies to any conscience objection—religious or otherwise. We ask that the VA acknowledge in any final rule that a VA employee with a moral, medical, conscience, or

religious objection will not be forced to perform or assist in VA-provided abortions or abortion counseling.

Without such guarantees, the VA will likely lose qualified health care staff and leave gaps in health care for veterans—costs the VA must account for in its regulatory impact analysis. The VA cites minimal health care costs benefits, it projects from its rule. RIA 3. But it fails to consider the increase in health care costs and worse health outcomes that will result from VA employees leaving the professional to avoid violating their consciences or religious beliefs when it comes to abortion. These costs must be considered in the RIA.

Conclusion

The VA should immediately rescind and abandon the unlawful IFR and restore the prior regulations recognizing statutorily required exclusions for abortion services and counseling in VA health benefits and the CHAMPVA program.

Sincerely,

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