October 11, 2022

Secretary Denis McDonough
U.S. Department of Veterans Affairs
Attention: Reproductive Health Services Interim Final Rule (RIN 2900–AR57)

Dear Secretary McDonough,

In the interim final rule "Reproductive Health Services" [RIN: 2900–AR57], the Department amends its medical regulations to expand abortion counseling and abortion services for veterans and Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries.

We write in strong opposition to this interim final rule. Unhappy with the results of a court case that returned abortion policy to the American people through their elected representatives, the Department is attempting to circumvent existing state and federal pro-life protections. This is despite the fact that the Department has no authority to adopt such a rule, and the rule violates clearly established limitations on the use of taxpayer dollars for abortions.

The Department does not provide an assessment of the impact unlimited abortion access will have on female veterans or CHAMPVA beneficiaries. Technological advancements in science, sonograms, and in utero studies clearly demonstrate that an abortion is the willful destruction of living, innocent, unborn human life. As this comment will discuss later, abortion also hurts women and hams them emotionally, psychologically, and physically. The Department should rescind the IFR and stop using taxpayer dollars to perpetuate this injustice.

1. VA doesn't have authority to do what it's doing

In *West Virginia v. Environmental Protection Agency*, the Supreme Court finds that federal agencies exceed their authority when they claim novel powers in long extant federal statutes, like the VA's Reproductive Health Services IFR. As such, it appears the VA's new interpretation of section 1710 to permit abortion and abortion counseling oversteps the Department's authority or the longstanding interpretation of this ruling.[1]

The Department claims that paragraphs (1) through (3) of 38 U.S.C. § 1710(a) authorize the VA to provide abortions in its programs. Paragraphs (1) and (2) provide that the VA "shall" provide medical care for specified veterans, primarily those with service-connected disabilities. If Congress had intended for the VA to provide abortions generally, those paragraphs, given their limited scope, would be an unusual place to say so. Paragraph (3) says that the VA "may" provide medical services to those not referenced in the preceding paragraphs but says nothing about abortion. Indeed, *none* of the text of section 1710 says anything about abortion and, as far

[1] West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022); National Federation of Independent Business v. Dept. of Labor, 142 S. Ct. 661 (2022).

as we are aware, that section has never previously been invoked or construed by the VA as authority for the provision of abortion or abortion counseling.[2]

Far from giving the VA authority to *include* abortions in VA programs, Congress has placed significant *limitations* on taxpayer-funded abortions vis-a-vis military personnel and veterans. Thus, the statutes that exist on this subject point in a direction opposite that taken in the interim final rule.

2. Abortion hurts – not helps – women.

Women who undergo an abortion (surgical or chemical) experience high rates of anxiety, depression, substance and alcohol abuse, and thoughts of suicide. For some, this takes the form of Post-Abortion Syndrome (PAS) or After-Abortion Grief. This syndrome refers to the myriad of emotional and psychological challenges women experience following an induced, elective abortion. It is not uncommon for women to experience sustained feelings of regret and loss.

Since abortions cost less and require fewer accommodations than pregnancy, childbirth, and lactation, we are concerned that some may view abortion to be the "cheap and easy" option in high-performance, high-stress environments.

The department's interim final rule has failed to consider the physical, emotional, or mental harm a veteran or CHAMPVA recipient may suffer when faced with an abortion. Since the rule includes abortion as a covered medical condition, the department must provide an analysis of how many pregnant veterans and CHAMPVA recipients will be at risk for these adverse effects under the interim final rule.

3. Disentangling tax dollars from abortion saves lives

Restrictions on public funding for abortions, such as the Hyde Amendment, lead to a decrease in the abortion rate. A Charlotte Lozier Institute study notes that of nearly two dozen studies that have reviewed the impact of funding restrictions on abortion incidence, most find "statistically significant evidence that abortion rates fell after Medicaid funding was reduced."[3] While other factors are certainly at play—including states passing other pro-life laws and more unintended pregnancies being carried to term for other reasons—the Hyde Amendment and similar funding

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[2] Quite the contrary, just last June the VA submitted a statement in support of H.R. 345, a bill, never enacted, directing the VA to provide abortion counseling. Statement of Matthew A. Miller, Department of Veterans Affairs (June 22, 2022) before the House Subcommittee on Health, Committee on Veterans' Affairs, available at https://docs.house.gov/meetings/VR/VR03/20220622/114857/HHRG-117-VR03-Wstate-MillerM-20220622-U1.pdf. The statement says: "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." Id. at 2. This would be a strange concession for the VA to make if it thought that it had the authority all along to provide abortions and abortion counseling under current law.

[3] Michael J. New, "Hyde @ 40: Analyzing the Impact of the Hyde Amendment," Charlotte Lozier Institute, September 2016, https://s27589.pcdn.co/wp-content/uploads/2016/09/OP_hyde_9.28.3.pdf (accessed ____, 2022).

restrictions play an important role in the encouraging long-term trend of declining abortion rates across America.[4]

This decline translates to more than 2.4 million lives since 1976, roughly 60,000 per year.[5] These millions of people are not abstractions—they are real people with families, children of their own, responsibilities, and hopes and dreams. These 2.4 million people are roughly equal to the population of the city of Houston, Texas,[6] or the combined populations of Wyoming and Idaho.[7] They could fill AT&T Stadium, with a seating capacity of 80,000,[8] 30 times.

Failure to disentangle tax dollars from abortion is deeply divisive. There is a well-established, long-standing consensus across the political spectrum: 54 percent of Americans do not support taxpayer funding for abortions domestically, including 29 percent of Democrats and 53 percent of independents.[9]

Beyond the data and public opinion, innocent human lives are more than a statistic. Every single one of these millions of people has immeasurable worth and dignity.

4. "Health" exception is so broad that it swallows the rule

Under the *Roe v. Wade* and *Planned Parenthood v. Casey* standard – and the standard of many pro-abortion states – "health" can mean all kinds of things, including psychological/emotional health. It is in effect an exception that swallows the rule. The IFR follows this same sad pattern. Other policies that disentangle tax dollars from elective abortion, such as the Hyde Amendment, are much more narrowly tailored and clearly defined.

For example, the current Hyde Amendment states that certain federal funds may pay for an abortion "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.''[10] TRICARE includes a similar provision requiring physician certification prior to an abortion in which a mother's life is in danger.[11]

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[4] Michael J. New, "New CDC Data Show Continued Decline in the U.S. Abortion Rate," National Review, December 1, 2020, https://www.nationalreview.com/corner/new-cdc-data-show-continued-decline-in-the-u-s-abortion-rate/ (accessed ____, 2022).
[5] Michael J. New, "Addendum to Hyde @ 40: Analyzing the Impact of the Hyde Amendment," Charlotte Lozier Institute, July 21, 2020, https://lozierinstitute.org/addendum-to-hyde-40-analyzing-the-impact-of-the-hyde-amendment/ (accessed ____, 2022).
[6] U.S. Census Bureau, "Quick Facts: Houston, TX," https://www.census.gov/quickfacts/fact/table/houstoncitytexas/PST045219 (accessed ____, 2022).
[7] U.S. Census Bureau, "Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census," https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table02.pdf (accessed ____, 2022).
[8] Stadiums of Pro Football, "AT&T Stadium," https://www.stadiumsofprofootball.com/stadiums/att-stadium/ (accessed ____, 2022).
[9] Knights of Columbus/Marist poll, January 2022, https://www.kofc.org/en/resources/communications/marist-polling-slide-deck2022.pdf (accessed October 5, 2022)
[10] Consolidated Appropriations Act, 2022, Public Law 117–103, Div. H, secs. 506– 07, 136 Stat. 49.
[11] Covered Services, Abortions, TRICARE, http:// tricare.mil/CoveredServices/IsItCovered/Abortions

The IFR, in contrast, could not be more different. The rule abandons an earlier standard in which a physician certifies that a woman's life is endangered[12] to instead covering abortions if a woman's "health" is endangered.

Specifically, the IFR states that 38 CFR 17.38(c)(1)(i) will permit abortions under this broad health exception. Specifically, assessments of the "conditions, injuries, illness, or diseases" that will qualify for this broad health exception will be made on a "case-by-case" basis "by appropriate healthcare professionals." That give a great deal of subjective leeway to an abortionist.

The Department has no meaningful estimate of how many women might pursue such an assessment. The Department makes no mention of the fact that physicians routinely treat both mothers and their unborn children in a life-affirming manner, even during a serious maternal health complication. In short, abortion is neither the best option nor a necessary option; life-affirming care can be provided to both patients. This includes delivery or caesarean in the event of a medical emergency.[13]

For children who are not yet viable, there is still a profound difference – actually and morally – between inducing delivery and providing palliative care versus tearing the same child apart limb from limb in a dilation and extraction abortion. One scenario affirms the human dignity of the unborn patient; the other does not.

In summary, the Department references vague and undefined health exceptions that are so broad and vague that the exception swallows the rule, amounting to abortion for any reason, however loosely, that can be tied to general health. The Department assumes that even in true medical emergencies, abortion is the only option and ignores the fact that VA beneficiaries might prefer – and be better served by – a life-affirming care model including live birth, perinatal hospice, and/or palliative care.

5. No mention of providing resources to victims of rape/incest

Every child, regardless of the circumstances of their conception, possesses inherent dignity and worth. At The Heritage Foundation we reject the notion that some lives are more important or valuable than others.

In II: Abortions in Limited Circumstances Under 38 U.S.C. 1710 and 1781 Sections C and D, the IFR addresses abortions for veterans or CHAMPVA beneficiaries when the pregnancy is the result of rape or incest. In these two sections, the IFR affirms the pregnant woman's right to an abortion to "promote, preserve, or restore the health of the individual." The emphasis is on providing "medically necessary" care to women who are pregnant due to rape or incest.

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[12] 38 CFR 17.272(a)(64).

[13] Ingrid Skop, M.D., "Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child," Charlotte Lozier Institute, May 2022, https://s27589.pcdn.co/wp-content/uploads/2022/05/Fact-Sheet-Medical-Indications-for-Separating-a-Mother-and-Unborn-Child.pdf (accessed October 5, 2022)

In these sections, the IFR is silent on providing resources to pregnant women who are victims of rape or incest. There is no mention of counseling services, the opportunity to hear about alternative options like adoption, or the opportunity to meet with a qualified individual who can help the woman create a plan for mental, emotional, and physical healing apart from an abortion.

One act of violence, no matter how heinous, should not justify a second act of violence against the innocent, unborn baby. Many women choose to keep their unborn baby, regardless of how traumatic the circumstances surrounding his or her conception. Even if the journey to healing is fraught with difficulty, there are countless stories of children born as the result of rape expressing their gratitude and respect for their mother at being given the chance to live. The IFR fails to provide robust, adequate care for its' veterans and CHAMPVA beneficiaries by remaining silent on this point.

The IFR is silent on providing resources to pregnant women who are victims of rape or incest. In states that allow abortion exceptions in such cases, there is often a gestational limit and policymakers established guidelines to ensure rape and incest victims receive counseling, and perpetrators are prosecuted. If the VA is going to facilitate abortions of children who were conceived due to rape or incest, pregnant mothers should at the very least have the opportunity to first receive proper counseling and medical treatment and report the crime to law enforcement.

In I. Background Sections B and C, abortion counseling is discussed and permitted as part of the abortion care process. Neither rape nor incest is mentioned. Additionally, in III. Abortion Counseling Under 38 U.S.C. 1710 and 1781 section A, the IFR addresses the updated inclusion of abortion counseling. It says, "abortion counseling is a part of pregnant options counseling and is a component of comprehensive, patient-entered, high quality reproductive health care both as a responsibility of the provider and a right of the pregnant veteran. Abortion counseling as 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." It is important to note that neither Section A nor Section B (the only two under III. Abortion Counseling) mention rape or incest.

The IFR addresses abortion counseling as a general part of considering one's options in a pregnancy. Worse still, based on the definition provided by the IFR, the only "counseling" services the IFR pledges to offer are those specifically tailored to abortion. This is based on the assumption that abortion is the de facto option for someone questioning next steps in the case of an unplanned or medically complicated pregnancy. This is not sound or unbiased counseling that allows an individual to consider all their options. Instead, the IFR is only providing counseling regarding why an individual can, should, and will be able to receive an abortion. To avoid anti-discrimination lawsuits, the IFR should include unbiased counseling that focuses on the wellbeing of the mother and the unborn child.

6. No gestational limits

The IFR makes no mention of gestational limits. This means that US taxpayers would pay for abortions through all nine months of pregnancy. Such a policy isn't just extreme, it's barbaric and unnecessary. Even in the event of a medical emergency, health care providers can deliver a

non-viable child and provide comfort care instead of tearing the child apart limb by limb while he or she is still in their mother's womb.

7. No clear conscience protections

When it comes to religious liberty protections for providers who object to participating in abortions, the VA has failed to clearly and explicitly explain what such conscience protections entail.

Does the VA believe that existing legal protections, such as the Title VII religious accommodation requirement, the Religious Freedom Restoration Act, and/or the Coats-Snowe amendment apply in this context? These shouldn't be open questions; they should be clearly laid out within the regulation. The absence of any clear, meaningful references to scope of applicable conscience protections is an egregious omission.

In the context of health care, Congress has rightly protected rights of conscience, based both on religious beliefs and on moral convictions, for over four decades. These protections allow for the expression of a diversity of values in health care while ensuring that individuals and entities are not compelled to participate in practices that violate their sincere moral, ethical, or religious convictions. A strong majority of three quarters of Americans believe that health care professionals should not be required to perform abortions if they have a sincere religious or moral objection to doing so.[14]

A robust respect for the sacred rights of conscience, both in government and among private citizens and institutions, enables Americans to work and live alongside each other despite deep, sincere differences on a number of ethical and moral matters. Conscience protections take nothing away from anyone. Rather, they uphold the traditional American principles of equality, pluralism, and tolerance.[15]

8. Lack of good cause

No state prevents medical treatment to save the life of a pregnant women.[16] The IFR seeks to address a problem that quite simply does not exist. In fact, it's "fake news" – and dangerous, and irresponsible – to perpetuate the lie that women won't be able to receive care in pro-life states in rare life-threatening cases.

The IFR fails to consider that even in cases where an unborn child is diagnosed with a life-limiting anomaly, many parents prefer a perinatal hospice and palliative care model to abortion. As the Charlotte Lozier Institute explains,

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[14] Knights of Columbus/Marist poll, January 2022, https://www.kofc.org/en/resources/communications/marist-polling-slide-deck2022.pdf (accessed October 5, 2022)
[15] Melanie Israel, "What Congress and the Administration Can Do to Protect Conscience Rights," The Heritage Foundation Issue Brief No. 4795, December 7, 2017, https://www.heritage.org/civil-society/report/what-congress-and-the-administration-can-do-protect-conscience-rights (accessed October 5, 2022)
[16] Charlotte Lozier Institute, "Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All States," On Point Issue 86, July 2022 (updated September 2022), https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/ (accessed October 5, 2022)

> The care in perinatal hospice differs in emphasis, but not in type of care from other modes of perinatal care. Its primary focus is on the family — not the fetal diagnosis and attendant anomalies. The family is placed in the center of the care and there is a continuum of support from the diagnosis, through death, and grief.[17]

Families who pursue such hospice care report overwhelmingly positive experiences. In one study involving a military population, 85% of eligible patients chose perinatal hospice care; 75% chose perinatal hospice care in another. Neither involved maternal morbidities or mortalities.[18]

9. Questionable data, no accurate estimate of the number of women affected by the IFR

How many women are of childbearing age who would be affected by this rule? How many of these women would prefer life-affirming care in cases of medical emergency/adverse diagnosis? Again, all states allow for abortions in the event of a life-threatening medical emergency. Many include exceptions for rape and incest. The VA's actions are unjustified because the department has failed to demonstrate the actual number of women who "need" and abortion and are not otherwise able to obtain one under existing state laws. The VA has simply assumed that women will be unable to obtain an abortion, and that they even want one in the first place. In reality, the VA is purporting to have "good cause" to issue this IFR so that the VA can provide abortions women can already get.

Closing

In the words of the late congressman Henry Hyde, a caring and humane society recognizes that innocent, defenseless human life "deserves better than to be flushed down a toilet or burned in an incinerator. The promise of America is that life is not just for the privileged, the planned, or the perfect."[19]

The Supreme Court decision in *Dobbs v. Jackson Mississippi's Women's Health Organization* did not make abortion illegal in the United States. It did, however, return this issue back to the people through their elected representatives. This did not result in a "war on abortion rights" as this VA IFR suggests. Instead, it powered the people of each state to vote and pass laws that reflect their beliefs and interests. This includes those of America's veterans and CHAMPVA beneficiaries.

The Department's IFR is a blatant rejection of the longstanding ruling and is an attempt to use federal power incorrectly to circumvent existing state and federal pro-life protections. Despite the Department's best attempts, they lack the authority to adopt the IFR as it stands unless they make significant reductions to their framing of abortion access.

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[17] Charlotte Lozier Institute, "The Perinatal Hospice: Allowing Parents to be Parents," America Reports Series Issue 1, May 2012, https://s27589.pcdn.co/wp-content/uploads/2012/05/American-Report-Series-PERINATAL-HOSPICE-MAY-20123.pdf (accessed October 5, 2022)

[18] Ibid.

[19] Congressional Record, June 24, 1976, p. 20410, https://archive.org/details/congressionalrec122hunit/page/n1292/mode/1up?view=theater (accessed ____, 2022)

As the IFR currently stands, it's exception for the "life and health" of the mother may be easily interpreted to justify abortion through all nine months of pregnancy. The Hyde Amendment already allows for certain abortions in cases '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." To include an expansion to abortion access that may include emotional, psychological, financial, or other factors as an approved justification shows a blatant disregard for human life and an interest in furthering a pro-abortion ideology at the expense of the lives of unborn babies.

We stand with the lives of unborn babies and veteran mothers and CHAMPVA beneficiaries who have the responsibility, courage, and opportunity to bring new life into the world.

Respectfully submitted,

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