ETHICS AND PUBLIC POLICY CENTER

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EO 12866 Meeting
VA IFR "Reproductive Health Services"
RIN 2900-AS31

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Thank you for the opportunity to provide comments on OIRA's review of the Department of Veterans Affairs' (VA) interim final rule (IFR) "Reproductive Health Services."[1]

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This IFR under review by OIRA did not have a summary, but it has the same name as the VA's October 2022 IFR[2] and March 2024 Final Rule[3] (which finalized the IFR "without changes"), suggesting that this IFR is related.

The 2022 IFR and 2024 Final Rule amended VA regulations to mandate taxpayer-funded medical benefits coverage of abortion and abortion counseling for veterans and certain beneficiaries.[4] The regulations, currently in effect, functionally allow abortion on demand until birth, not in "limited circumstances," as the VA claimed.

We strongly support rescinding the 2024 Final Rule in this IFR. As we will explain, the Final Rule suffered from many deficiencies, supporting "good cause" for an IFR that rescinds the rule. Such a rescission also aligns with President Trump's priorities and executive actions.

[1] Dep't of Veterans Affs. (VA), Reproductive Health Services, RIN 2900-AS31 (received by OIRA Mar. 5, 2025).

[2] VA, Reproductive Health Services, 87 Fed. Reg. 55287 (Sept. 9, 2022), https://www.federalregister.gov/documents/2022/09/09/2022-19239/reproductive-health-services.

[3] VA, Reproductive Health Services, 89 Fed. Reg. 15451 (Mar. 4, 2024), https://www.federalregister.gov/documents/2024/03/04/2024-04275/reproductive-health-services.

[4] *See generally* Rachel N. Morrison, *Department of Veterans Affairs Rule Doubles Down on Abortion*, FedSoc Blog (Mar. 13, 2024), https://fedsoc.org/commentary/fedsoc-blog/department-of-veterans-affairs-rule-doubles-down-on-abortion (summarizing final rule).

A. There is "Good Cause" to Issue an IFR Rescinding the 2024 Final Rule

As we described in detail in written comments submitted to the VA during the comment period on the IFR[5] and to OIRA during its review of the final rule,[6] the Final Rule suffered from many deficiencies. These deficiencies, individually and combined, support a finding of "good cause" to issue an IFR that rescinds the Final Rule.[7]

Today, I'll briefly flag four major deficiencies with the Final Rule: (1) the VA failed to establish a need for its rulemaking; (2) the Final Rule is contrary to law; (3) the Final Rule violates the major questions doctrine and *Loper Bright*; and (4) the Final Rule had a flawed regulatory impact analysis.

These deficiencies are discussed in depth in our prior comments, and we cite the relevant page numbers below for your reference.

1. The VA failed to establish a need for its rulemaking.[8]

For all rulemaking, agencies must identify a need and how that rule meets that need. The IFR claimed 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."[9] As such, the VA issued the IFR "because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans."[10] This statement of need was reiterated in the Final Rule.[11]

But *Dobbs* and state laws regulating abortion did not create a need for the rulemaking, much less an IFR. No state law prohibits abortion to save a mother's life. Notably, the VA failed to identify a single case of a woman facing "urgent risks" who was unable to obtain an abortion in both its 2022 IFR and 2024 Final Rule.

The rule was a solution in search of a problem. It was issued as part of the Biden-Harris administration's efforts to ignore the Supreme Court's direction in *Dobbs* that the issue of abortion is returned "to the people and their elected representatives" and use federal agencies to unlawfully promote abortion and interfere with states' abortion laws.[12]

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[5] EPPC Scholars Comment Opposing Department of Veterans Affairs' "Reproductive Health Services" Interim Final Rule, RIN 2900–AR57 (Oct. 11, 2022) [hereinafter "EPPC IFR Comment"], https://eppc.org/wp-content/uploads/2022/10/VA-IFR-Ethics-and-Public-Policy-Center.pdf.

[6] EO 12866 Meeting VA "Reproductive Health Services" RIN 2900-AR57 (Feb. 7, 2024) [hereinafter "EPPC OIRA Comment"], https://eppc.org/wp-content/uploads/2024/02/EPPC-Scholars-Comments-for-EO-12866-Meeting-VA-Reproductive-Health-Services.pdf.

[7] As we argued in our public comment on the 2022 IFR, there was no good cause to bypass the advanced notice and public comment for that rule. EPPC IFR Comment at 20-21. This further supports a good cause finding for an IFR that rescinds the 2024 Final Rule that finalized "without changes" the 2022 IFR.

[8] *See* EPPC IFR Comment at 1-5; EPPC OIRA Comment at 1-2.

[9] 87 Fed. Reg. at 55288.

[10] *Id.*

[11] 89 Fed. Reg. at 15472.

[12] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). *Cf.* EPPC Amicus Brief, *Tennessee v. HHS,* No. 24-5220 (6th Cir. Oct. 16, 2024), https://eppc.org/wp-content/uploads/2024/10/EPPC-Amicus_CA6_TN-v.-HHS.pdf (documenting actions federal agencies took post-*Dobbs* to advance the Biden-Harris administration's pro-abortion political agenda and override state pro-life laws).

2. The 2024 Final Rule is contrary to law.[13]

The heart of the Final Rule is that the VA has federal statutory authority to provide medical services that the VA determines are "needed" for veterans[14] and "medically necessary and appropriate" for CHAMPVA beneficiaries[15] and that abortion is "needed" and "medically necessary and appropriate."

But the VA is prohibited from providing abortion benefits under Section 106 of the Veterans Health Care Act of 1992, which provides:

> **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** infertility services, **abortions**, or pregnancy care (including prenatal and delivery care), 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. . . .[16]

The Act is clear: VA benefits cannot include abortion.

Nevertheless, the VA and Department of Justice's Office of Legal Counsel (OLC) dismissed this limitation, claiming that the Veterans' Health Care Eligibility Reform Act of 1996 (which does not mention Section 106 or abortion) "effectively overtook" Section 106 "by establishing a new standard to focus on medical necessity as 'the sole criterion of eligibility for VA hospital care and medical services.'"[17] But "effectively overtook" is a legal standard the Supreme Court has never endorsed and a novel legal theory that the VA (and DOJ) should not adopt.

Further, the Final Rule's argument that even if Section 106 does apply, it is limited to the section is contrary to the text of the Act. The prefatory language in Section 106—"In furnishing hospital care and medical services under chapter 17 of title 38, United States Code"—clearly states that the limitations (including the abortion exclusion) in Section 106 apply to *all* hospital care and medical services provided under chapter 17 of title 38, not just Section 106.

The Final Rule is further undercut by prior VA statements and Congressional action, such as Congress' repeated neutrality when it comes to taxpayer funding of abortion or abortion benefits.[18] And

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[13] *See* EPPC IFR Comment at 6-11; EPPC OIRA Comment at 4-7.

[14] 38 U.S.C. § 1710.

[15] 38 U.S.C. § 1781.

[16] Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 106, 106 Stat. 4943, 4947 (emphasis added).

[17] 89 Fed. Reg. at 15455. *See also 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. at 7-8 (Sept. 21, 2022), https://perma.cc/7TA2-HBES ("In its recent rule, VA also explained that ... section 106 has effectively been overtaken by subsequent legislation.... We agree.").

[18] *See* EPPC IFR Comment at 10-11.

the Final Rule violates other federal laws, like the Anti-Deficiency Act, the Assimilative Crimes Act, and the Comstock Act.[19] These violations were unpersuasively dismissed in the Final Rule.

3. The Final Rule violates the major questions doctrine and *Loper Bright*.[20]

Although commenters pointed out that the Final Rule violates the major questions doctrine,[21] the VA dismissed these concerns, arguing that Congress directed the VA to provide medical services that it determines to be "needed," and that the VA determined abortion is needed.[22] But abortion is a matter of "vast political significan[ce]" that Congress should speak directly to. Here, Congress did not explicitly direct the VA to provide taxpayer-funded abortion benefits, and in fact, explicitly prohibited the VA from providing abortion benefits.

Since the VA issued its Final Rule, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which further constrains any VA discretion to mandate abortion benefits. Even if Section 106 is ambiguous (it is not), *Loper Bright* made clear that the VA is not entitled to deference for its interpretations. Rather, the VA is bound by the best reading of the text, and as explained, the best reading of Section 106 is that the VA is prohibited from providing abortion benefits.

4. The Final Rule's RIA is flawed.[23]

The Final Rule's RIA is fundamentally flawed. It provided general assertions instead of specific evidence, it had conflicting calculations, its baseline for analysis was wrong, it overstated its benefits, and it failed to consider its harms. For example, the Final Rule adopted an incorrect baseline for analysis and wrongly claimed as a benefit abortions needed to save a mother's life and other abortions that are permitted under state law. The Final Rule also failed to account for the following harms:

- Harm to the unborn child, who will be killed.
- Harms of abortion for a woman who receives one.
- Harms to children conceived in rape or incest because the Final Rule stated it was "medically necessary and appropriate" to abort children conceived in such unfortunate circumstances.
- Harms of not fully recognizing the conscience and religious freedom rights of VA employees forced to provide abortion under the Final Rule.

Although we pointed out these flaws in our comments, they were not corrected in the Final Rule.

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[19] The Final Rule cites two post-*Dobbs* OLC opinions in support. *See* Application of the Assimilative Crimes Act to Conduct of Fed. Emps. Authorized by Fed. L., 46 Op. O.L.C. __ (Aug. 12, 2022), https://perma.cc/HR9Q-T5CF; Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. __, slip op. at 1–2 (Dec. 23, 2022), https://perma.cc/9VEU-L96K. But as our EPPC colleague Ed Whelan has persuasively argued, OLC's opinion on the Comstock Act is "poorly supported and unsound." EPPC Amicus Brief at 7-13, *FDA v. All. for Hippocratic Medicine,* 602 U.S. 367 (2024) (No. 23-235), (https://eppc.org/wp-content/uploads/2024/03/23-235-Amicus-Brief-of-Ethics-and-Public-Policy-Center.pdf.

[20] *See* EPPC IFR Comment at 11; EPPC OIRA Comment at 7-8.

[21] *See, e.g.*, Ethics & Public Policy Center, *EPPC Scholars and Others Oppose Department of Veterans Affairs Rule Requiring Taxpayer Funded Abortion Benefits* (Oct. 12, 2022), https://eppc.org/news/eppc-scholars-and-others-oppose-department-of-veterans-affairs-rule-requiring-taxpayer-funded-abortion-benefits (compiling comments by various medical professionals and legal and policy experts).

[22] 89 Fed. Reg. at 15452.

[23] *See* EPPC IFR Comment at 19-20; EPPC OIRA Comment at 3.

B. Rescinding the 2024 Final Rule Aligns with President Trump's Priorities and Executive Orders

The 2024 Final Rule was a political response to the Supreme Court's decision in *Dobbs* and state laws protecting unborn children. Rescinding the Final Rule squarely aligns with President Trump's priorities and the following executive actions.

Campaign Promise. The Final Rule runs counter to President Trump's campaign promise to allow states to regulate abortion and protect unborn human life.[24] The Final Rule raised federalism concerns, including preemption of state abortion laws and whether state health and safety laws would be respected by federal employees.

Executive Order 14182: Enforcing the Hyde Amendment. On January 24, 2025, President Trump signed an executive order "to end the forced use of Federal taxpayer dollars to fund or promote elective abortion."[25] The executive order showed that

> Congress has annually enacted … laws that prevent Federal funding of elective abortion, reflecting a longstanding consensus that American taxpayers should not be forced to pay for that practice. However, the previous administration disregarded this established, commonsense policy by embedding forced taxpayer funding of elective abortions in a wide variety of Federal programs.[26]

Fact Sheet: President Donald J. Trump Enforces Overwhelmingly Popular Demand to Stop Taxpayer Funding of Abortion. A fact sheet on Executive Order 14182 reiterated that Congress' intent via the laws it passes is to "protect taxpayers from being forced to pay for abortion."[27] The fact sheet specifically stated that "the previous administration embedded federal funding of elective abortion in a wide variety of government programs" and emphasized President Trump's desire to return the issue of abortion to the states, which includes addressing the "federal overreach and taxpayer dollars" going to "the Department of Veterans Affairs allow[ing] hospitals to provide abortions."[28]

The fact sheet also stated that the federal government "will no longer force violations of faith and conscience or impede the ability of states to determine life policies through a vote of the people."[29] The VA's final rule was mentioned right after this position.

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[24] *Cf.* Rachel N. Morrison & Eric Kniffin, *Leaving Abortion to the States Requires Federal Action*, Wall St. Journal (Apr. 23, 2024), https://www.wsj.com/articles/leaving-abortion-to-the-states-requires-federal-action-regulation-a97f704e (explaining that rolling back Biden administration actions, including the VA Final Rule, "that have elevated abortion access above states' rights would reduce the power of the administrative state and free states to pursue their own abortion policies" and is required to fulfill President Trump's "law of the state" position).

[25] Executive Order 14182, Enforcing the Hyde Amendment, 90 Fed. Reg. 8751 (Jan. 24, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/enforcing-the-hyde-amendment/.

[26] *Id.* at 8751.

[27] White House, *Fact Sheet: President Donald J. Trump Enforces Overwhelmingly Popular Demand to Stop Taxpayer Funding of Abortion* (Jan. 25, 2025),

https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-enforces-overwhelmingly-popular-demand-to-stop-taxpayer-funding-of-abortion/.

[28] *Id.*

[29] *Id.*

Rescinding the Final Rule supports President Trump's efforts to stop taxpayer funding of abortion and align VA policy with a robust understanding of conscience and religious freedom rights so that no medical professional, hospital, or federal employee is forced to violate their deeply held religious beliefs by ending the life of an unborn human through abortion.

Executive Order 14217: Commencing the Reduction of the Federal Bureaucracy. One of President Trump's priorities stated in this executive order is to "reduc[e] the scope of the Federal bureaucracy" and "minimize Government waste and abuse."[30] "[R]educing government overreach" is one of the considerations mentioned, which aligns with President Trump's desire to stop taxpayer funding of abortion.

Fact Sheet: President Donald J. Trump Continues the Reduction of the Federal Bureaucracy. The fact sheet accompanying EO 14217 stated that "by reducing the Federal footprint, [the administration] is returning power to local communities and state governments."[31] Rescinding the Final Rule is consistent with this policy priority by eliminating federal funds used for abortion and returning the issue of abortion to the states.

Executive Order 14219: Ensuring Lawful Governance And Implementing The President's "Department Of Government Efficiency" Deregulatory Initiative. This executive order stated that it is the policy of the Trump Administration to "focus the executive branch's limited enforcement resources on regulations squarely authorized by constitutional Federal statutes" and that it is a priority of the Administration to restore "the constitutional separation of powers."[32] Rescinding the Final Rule, which is contrary to federal statutes and raises federalism concerns, falls squarely within these policy priorities.

Executive Order 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.[33] In this executive order, President Trump clarified: "It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality."[34] The Final Rule used the term "pregnant individual" 41 times in the 24-page rule.[35] Consistent with the order's recognition that there are only two sexes, this IFR should recognize the biological reality that only females can get pregnant and use terms like "pregnant woman."

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[30] Executive Order 14217, Commencing the Reduction of the Federal Bureaucracy, 90 Fed. Reg. 10577 (Feb. 19, 2025).

[31] White House, *Fact Sheet: President Donald J. Trump Continues the Reduction of the Federal Bureaucracy* (Mar. 14, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-continues-the-reduction-of-the-federal-bureaucracy/.

[32] Executive Order 14219, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10583, 10583 (Feb. 19, 2025).

[33] Executive Order 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 20, 2025).

[34] *Id.* at 8615.

[35] 89 Fed. Reg. at 15461-72.

Conclusion

The IFR should rescind the 2024 Final Rule. The deficiencies in the Final Rule support a "good cause" finding to issue an IFR rescinding the Final Rule. Rescission of the Final Rule is also supported by President Trump's policy priorities and executive actions.