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Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Subj: Interim Final Rule on Reproductive Health Services
RIN 2900-AR57

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops and the Archdiocese for the Military Services, USA, we respectfully submit the following comments on an interim final rule, published at 87 Fed. Reg. 55287 (Sept. 9, 2022), relating to abortion in health programs administered by the Department of Veterans Affairs (VA).[1]

The interim final rule allows abortions, including elective abortions, in VA programs through nine months of pregnancy. That abortion is permitted through *all nine months* of pregnancy can be inferred from the rule's failure to place any gestational limit on the availability of abortion in VA programs. That the rule allows *elective* abortions can be inferred from the allowance of abortion when "the life *or the health*" of the pregnant woman "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. at 55296 (emphasis added). Given the broad construction ordinarily given the term "health" in the abortion context,[2] a rule permitting abortion for reasons of health without further qualification or limitation has generally been understood to permit abortion on demand.

In our view, there are at least three problems with the interim final rule. First, the Department

[1] By "health programs," we refer both to the medical benefits package available to veterans and to health care made available to dependents, spouses, and caregivers of veterans through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA).

[2] *See Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("health" includes "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"), *abrogated on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

has no statutory authority to adopt it. Second, the rule represents a violation of conditions Congress has placed on the availability of taxpayer funds and government facilities for abortions. Third, the rule will facilitate the taxpayer-funded destruction of innocent human lives and harm the women it is intended to benefit.

1. Lack of authority

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 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.[3]

Recent Supreme Court decisions hold that federal agencies exceed their authority when they purport to find novel powers in long extant federal statutes.[4] In our view, the VA's novel reading of section 1710 to permit abortion and abortion counseling is unsupported by either the text or past VA interpretations of that section.

2. Contrary authority

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.

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[3] 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.

Similarly, just three years ago the VA rejected a recommendation to provide abortion because there was no legislation authorizing it. "VA has declined the … recommendation [of the Advisory Committee on Women Veterans] and will not change the medical benefits package regulations to remove the exclusion of abortions and abortion counseling services. VA believes that Congress, as the representatives of the will of the American people, must take the lead on this sensitive and divisive issue. VA will take no further action on the matter without a legal mandate…." Department of Veterans Affairs, Meeting of the Advisory Committee on Women Veterans (2019), available at https://www.va.gov/ADVISORY/MINUTES/Minutes-WomVetAug2019.pdf.

[4] *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).

First, section 106 of the Veterans Health Care Act of 1992 (VHCA), Pub. L. 102-585, prohibits abortion in VA health programs except in rare cases involving pregnancy complicated by a service-related condition.[5] Last year, 130 Members of Congress wrote to the Secretary of the VA to underscore that this prohibition, notwithstanding testimony from the Secretary suggesting discretion on the part of the Department, is still in effect.[6]

In the preamble to the interim final rule, the Department argues (87 Fed. Reg. at 55290) that section 106 "is no longer operative" owing to the subsequent enactment of the Veterans' Health Care Eligibility Reform Act (VHCE). But the VHCE, like section 1710, says nothing about abortion. Congress could easily have repealed section 106's limitations on abortion, but it did not do so either in the VHCE or elsewhere. Under traditional rules of statutory construction, the more specific and targeted treatment of abortion in section 106 governs over the more general treatment of health care in the VHCE. *See*, *e.g.*, *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (when two statutes conflict, the more specific of the two governs over the more general). Section 106 therefore remains in effect.

That the VHCA continues to be operative is also evident from the enactment of the Murray amendment. The VHCA bars funding for "infertility services" for veterans, including in-vitro fertilization (IVF). Therefore, it took a special amendment—the Murray amendment—to carve out an exception for such services for veterans who are rendered infertile by service-connected injuries. The Murray amendment was enacted for FY2017 by Public Law 114-223 (Sept. 29, 2016) and has been renewed for every fiscal year since. Pub. L. 114-223, Div. A, tit. II, § 260, 130 Stat. 897. Of course, there would be no need to enact the Murray amendment year after year if the VHCA were, in the VA's words, "no longer operative."

The VA also argues (87 Fed. Reg. at 55289) that in the Deborah Sampson Act of 2020, Congress ratified the Department's view that section 106 "does not limit the medical care that the VA may provide pursuant to its authority under 38 U.S.C. 1710." But the Deborah Sampson 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* [i.e., the day before January 5, 2021]." Pub. L. No. 116-315, tit. V, subtit. A, § 5101, 134 Stat. 5026 (emphasis added). On January 4, 2021, "the health care and services included in the medical benefits package provided by the Department" (*id.*) did *not* include abortion or abortion counseling. Therefore, any inference drawn from the Deborah Sampson Act with respect to abortion must be that Congress approved of the *exclusion* of abortion and abortion counseling.

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[5] Section 106 states that "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.]

[6] Letter of June 15, 2021, to Secretary McDonough, available at Pro-Life Letter to VA Secretary Scanned.pdf (house.gov). *See also* Letter of Aug. 26, 2022, from Sen. Lankford to Secretary McDonough, available at 2022-08-26 Letter to McDonough IFR.pdf (senate.gov),

The VA also argues (87 Fed. Reg. at 55289) that the phrase "under this section" in section 106 limits its application to section 106 itself, suggesting that the VA can provide abortion and abortion counseling under other sections. But section 106, by its own terms, applies to the "furnishing [of] … medical services *under chapter 17 of title 38*" (emphasis added), and therefore applies to the entire title, not just section 106.

Second, under the Assimilative Crimes Act, 18 U.S.C. § 13, 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. For example, if a doctor performs a partial-birth abortion in a VA hospital, he or she is subject to prosecution under the *federal* statute that makes such an abortion a crime. 18 U.S.C. § 1531. Likewise, if a *state* prohibits post-viability elective abortions, any post-viability abortion performed in that state, in the absence of a federal law prohibiting such abortions, is unlawful under section 13 if performed on *federal* property and unlawful under state law if performed on *private* property.[7]

Third, 10 U.S.C. § 1093 forbids the use of any Department of Defense funds or facilities to perform an abortion except in cases where the mother's life is endangered or in cases of rape or incest. It is hard to imagine that Congress intended for former members of the armed services and their dependents to have access to abortion under VA programs when current members plainly do not have such access under DOD programs.

In short, the only federal statutes that address the issue of abortion in relation to military personnel and veterans significantly limit its availability.

Finally, the Antideficiency Act, Pub. L. 97-258, 96 Stat. 923, bars federal agencies from making expenditures for which there is no authorizing congressional appropriation. Under that Act, the VA is barred from providing or paying for abortion or abortion counseling because there is no congressional appropriation for it. Any Federal employee who violates the Act is subject to administrative penalties (including suspension without pay and removal from office) and criminal penalties.

3. Harm to women and unborn children

The preamble to the interim final rule describes abortion as a benefit to women. In fact, abortion not only takes an innocent human life, but often harms those women who undergo the procedure, factors that the Department has failed to take into account.

Complications from abortion can be serious. Immediate complications include hemorrhage, retained tissue, infection, uterine perforation, cervical laceration, and immediate psychiatric

[7] The U.S. Department of Justice recently issued an opinion in which it concluded that federal employees performing their duties in a manner authorized by federal law while on a federal enclave would not violate the Assimilative Crimes Act in a state the criminalizes such conduct. Department of Justice, Office of Legal Counsel, *Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized by Federal Law* (Aug. 12, 2022), available at 2022-08-12-aca.pdf (justice.gov). Even if the opinion is correct, it does not apply here because federal law, as discussed in this letter, places significant limitations on abortions in VA programs.

morbidity. Angela Lanfranchi, Ian Gentles, & Elizabeth Ring-Cassidy, *Complications: Abortion's Impact on Women* 96 (2013). It is estimated that, in the United States, "at least 45,000 women a year experience physical complications" from abortion. *Id*. at 97. There are also long-term complications, such as placenta previa and pre-term delivery in subsequent pregnancies. John J. Thorpe, Jr., M.D., et al., *Long Term Physical and Psychological Consequences of Induced Abortion: Review of the Evidence*, 58 Obstetrical & Gynecological Survey 67, 70-72, 75 (2002); *see also* Brent Rooney & Byron C. Calhoun, M.D., *Induced Abortion and Risk of Later Premature Births*, 8 J. Am. Physicians & Surgeons 46 (2003) (identifying 49 studies that have demonstrated a statistically significant increase in premature births or low birth weight in subsequent pregnancies in women with prior induced abortion).

Congress has not authorized elective abortion in VA programs. But even if it had, such a practice would be poor public policy because it involves the intentional killing of unborn children and harm to women who undergo the abortion procedure.

Conclusion

We urge the Department to rescind the interim final rule and to reinstate the prior rule prohibiting abortion and abortion counseling in VA programs.

Respectfully submitted,

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