Filed Electronically

October 11, 2022

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

RE: Interim Final Rule on Reproductive Health Services
RIN: 2900-AR57
DOC: 2022-19239

Dear Sir or Madam:

We submit this correspondence in response to the Department of Veterans Affairs' (VA) interim final rule (IFR) and request for comments published at 87 Fed. Reg. 55287 (Sept. 9, 2022) and relating to abortion in health programs administered by the Department of Veterans Affairs (VA). Our comments are submitted in our individual capacities and any organizational affiliation is included for identification purposes only.

The IFR amends the VA's medical regulations to remove the pre-existing exclusion on abortion counseling and establishes exceptions to the exclusion on abortions in the medical benefits package for veterans who receive care set forth in that package. It likewise removes the exclusion on abortion counseling and expands the exceptions to the exclusion on abortions for Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries. The IFR allows abortion on demand until birth, with no gestational limits whatsoever, and since the IFR's publication, the VA has already boasted of performing the first abortion in its history.[1]

The VA has averred that the IFR is necessary because it has determined that providing access to abortion-related medical services is needed to protect the lives[2] and health[3] of veterans. VA has determined that an abortion is ''needed'' and "medically necessary" whenever a veteran or CHAMPVA beneficiary seeks one.[4]

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[1]Courtney Kube and Minyvonne Burke, VA performs its first abortion weeks after saying it would in certain cases, NBC News online, September 22, 2022, available at: https://www.nbcnews.com/health/health-news/va-performs-first-abortion-weeks-saying-certain-cases-rcna49007.

[2] Every state law restricting access to abortion includes an exception for the life of the mother. See Charlotte Lozier Institute report, infra, n. 19.

[3] Given the broad construction ordinarily given the term "health" in the abortion context, a rule permitting abortion for reasons of health without further qualification or limitation has generally been understood to permit abortion on demand. 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).

[4] For authority supporting these propositions, the VA cites: 38 U.S.C. §1710 et. seq., 38 C.F.R. §§ 17.38(b) and 17.270(b) (defining ''CHAMPVA-covered services and supplies'' as ''those medical services and supplies that are

Such an expansion of abortion benefits, however, is unlawful, as the VA lacks any statutory authority upon which to act. The IFR upon which such expansion is based fails to advance a legitimate justification, as Congress has placed certain conditions on the availability of taxpayer funds and government facilities for the provision of abortion services. The IFR also lacks a good cause basis, sufficient to allow the VA to circumvent the notice-and-comment rulemaking process of the Administrative Procedure Act, and instead permit publication of an interim final rule already in effect with an abbreviated timeline for public comment. Lastly, assuming the IFR can survive the previous fatal defects, the VA's proposition that all contrary state laws are preempted under the IFR fails as a matter of law, as states that have democratically enacted abortion restrictions are properly exercising their plenary police power to regulate medicine and abortion—a right enforced by the Supreme Court's recent holding in *Dobbs v. Jackson Women's Health Organization*.[5] Their sovereign power to enact laws governing their citizens should not be cut off by an executive agency, and particularly not when the power to enact those laws has been recently reinforced by the Supreme Court.

<u>The IFR is Unlawful</u>

Under the aegis of numerous federal statutes – namely, the Veterans' Health Care Eligibility Reform Act of 1996 and the Deborah Sampson Act of 2020 – the VA claims the authority to provide abortions within its hospitals, *even* when a State's law clearly forbids it. Not only does this violate core principles of federalism, but it is an *ultra vires* act. The plain text of the VA's claim to authority, Title 38, Chapter 16, forecloses the provision of abortion.

Most pertinently, Section 106 of the Veterans Health Care Act of 1992 contains a clear restriction on the VA providing abortion as a "medical service." In relevant part, it states that "[i]n furnishing hospital care and medical services under chapter 17 of title 38, United States Code, the Secretary of Veterans Affairs may provide to women… [g]eneral reproductive health care… but not including under this section infertility services, *abortions*, or pregnancy care" (emphasis added).

The Veterans Administration reads this restriction as being relegated only to the general grant of authority under Section 106; this means that they may furnish abortions under an alternative grant of authority, which they claim 38 U.S.C. §1710 provides. But this reading can be doubly refuted: it ignores the text's clear scope of coverage, and it renders superfluous later appropriations amendments to the law.

First, Section 106 itself contains a statement of its scope. "In furnishing hospital care and medical services *under chapter 17 of title* 38" (emphasis added). This prefatory clause suggests that its conditions are applicable to *all* reproductive care rendered under Chapter 16.

Second, this reading would render superfluous the Murray Amendment, Pub. L. 114-223, Div. A, tit. II, § 260, 130 Stat. 897, that provides explicit Sec. 106 carve-outs for certain fertility

medically necessary and appropriate for the treatment of a condition and that are not specifically excluded under [38 CFR 17.272(a)(1)] through (84)''). As relevant here, such ''medical services'' include ''medical examination, treatment,'' ''[s]urgical services,'' and ''[p]reventive health services.'' 38 U.S.C. §1701(6).

[5] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022)

treatments. If Section 106 was already superseded by more expansive provisions, such as 38 U.S.C. §1710, then it is unclear why this carve-out is continually authorized year-after-year.

Section 106 of the Veteran Health Care Act of 1992 prohibits abortions and abortion counseling in no uncertain terms. All authority on which the VA relies, therefore, argues for the VA to immediately cease its implementation of the IFR. The VA is arguing that the 1996 law makes Section 106 null and void, citing the Deborah Sampson Act of 2020. But far from giving the VA the authority to include abortions in VA programs, Congress has placed significant limitations on taxpayer-funded abortions vis-a-vis military personnel and veterans. The statutes that exist on this subject are in direct contravention to the IFR.

Care included in the medical benefits package is ''provided to individuals only if it is determined by appropriate health care professionals that the care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.'' 38 CFR 17.38(b). Some care is specifically excluded from the medical benefits package because the Secretary has determined it is not ''needed'' within the meaning of 38 U.S.C. §1710(a)(1)–(3).[6] Among other services, ''[a]bortions and abortion counseling'' are currently excluded from the medical benefits package, with no exceptions.[7] The fact that the Deborah Sampson Act of 2020 did not reference section 106 of the Veterans Health Care Act and only referenced VA's medical benefits package clearly indicates that Congress did not amend section 106 to include abortion or abortion counseling services when it established the VA's authority to provide care to ''women veterans.''

The IFR Lacks Good Cause.

As the VA rightly notes, "An agency may 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)." But it also claims that "The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. §553(b)(B) to publish this rule without prior opportunity for public comment because it would be impracticable and contrary to the public interest and finds that there is good cause under 5 U.S.C. §553(d)(3) to bypass the 30-day delay requirement. The Secretary also finds that the 30-day delay is inapplicable as this rule removes restrictions on abortion, in certain, limited circumstances, and on abortion counseling. 5 U.S.C. §553(d)(1)."

The Secretary has failed to offer adequate justification for implementing the interim rule without the required opportunity for notice and comment. The notice fails to offer a factual basis supporting the conclusions that "good cause" exists to dispense with notice and comment or that affording such an opportunity would be "impractical."

The Secretary asserts that the interim rule had to take immediate effect to address risks to the life and health of veterans and non-veteran beneficiaries arising from their inability to access abortions. The notice does not explain how the VA interprets "health," but the word is broad and malleable enough to encompass a range of concerns—physical, psychological, etc., that are

[6] 38 CFR 17.38(c); 64 FR 54207, 54210 (Oct. 6, 1999).
[7] 38 CFR 17.38(c)(1).

neither imminent nor life-threatening.[8] Both agencies and courts are constrained to interpret the APA's concept of good cause "narrowly" and to countenance exceptions "only reluctantly."[9] Therefore, the fact that a rule addresses health-related concerns does not exempt the agency from the strictures of notice and comment unless there is something in the nature of those concerns that make them an true "emergency."[10] Thus, the VA's invocation of pregnancy-related health concerns can only serve as good cause to the extent those conditions pose an imminent, serious risk to patients.

But it is not enough for the VA to invoke serious health risks; the required showing of good cause is made only when the agency substantiates the asserted risks with evidence.[11] The VA's legal conclusion that good cause exists receives no deference,[12] and "because notice-and-comment rulemaking is the default, the onus is on the agency to establish that notice and comment should not be given, and any agency faces an uphill battle to meet that burden."[13]

Although the *Dobbs* decision, which the VA cites as the source of the relevant risks, was released over two months ago, the Secretary has failed to identify a single instance since then of a veteran or covered beneficiary being denied a medically necessary abortion. Even a single instance, "while not insubstantial, is a thin reed on which to base a waiver of the APA's important notice and comment requirements."[14] But the VA offers none at all. Left without concrete evidence of a problem, the Secretary instead makes predictions about the immediate effects of state abortion restrictions on the health of veterans and their beneficiaries. Yet the premises underlying the Secretary's prediction of dire consequences are, in several respects, flawed.

Much of the notice evinces an uncritical assumption that abortions are either the sole or the best means of addressing certain pregnancy-related health concerns. For instance, the secretary cites a variety of pregnancy-related health risks including "hypertension," "hemorrhage," "newly diagnosed cancer requiring prompt treatment, and intrauterine infections." But it is not evident from the notice how state restrictions on elective abortions inhibit medical professionals from effectively treating these conditions, which arise and are routinely treated in patients who are not pregnant. For other conditions unique to pregnancy such as "severe preeclampsia," "placenta accreta spectrum, and peripartum hysterectomy," the Secretary gives no indication of whether

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[8] *See* United States Conference of Catholic Bishops, Comment on Interim Final Rule on Reproductive Health Services at 1 (September 21, 2022) https://files.milarch.org/archbishop/comments-opposing-interim-final-rule-21sep2022.pdf. See also, supra, n.3.

[9] *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) ("We have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'").

[10] *Purdue Univ. v. Scalia*, 2020 WL 7340156, at *7 (D.D.C. Dec. 14, 2020) ("[n]otice and comment can only be avoided in truly exceptional emergency situations . . . .").

[11] *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 46 (D.D.C. 2020) ("But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures.").

[12] Review of an "agency's legal conclusion of good cause is *de novo.*" *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

[13] *Purdue Univ.*, 2020 WL 7340156, at *6 (cleaned up).

[14] *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992).

abortions are the sole or even the most effective means of preventing or treating these conditions. Instead, the Secretary is content to speculate that "an abortion *may* be the only treatment available to protect the health of the pregnant [veteran or] CHAMPVA beneficiary." Nothing in the notice's discussion of pregnancy-related health risks evidences why this is so. The Secretary makes no effort to identify situations in which abortion is the *only* treatment available, and to the extent such situations exist, how frequently they arise. Failure to apprise the public of the actual frequency in which dire health issues can only be addressed via abortion prevents meaningful assessment of and comment on the merits of the rule and the Secretary's assertion of good cause.

Absent from the IFR notice is any consideration of how the VA's doctors or medical professionals could adjust their patient-care regimens to account for less reliable access to abortion. The Secretary offers no explanation for why preventative care cannot mitigate the health issues associated with high-risk pregnancies or why the risks, once they have manifested, cannot be managed effectively through existing non-abortion treatments. Also absent from the notice is acknowledgement of the fact that where consensual relations are concerned, pregnancy is plannable or avoidable. An array of readily available contraceptive methods, natural family planning, or simple abstention ensure that in all but the rarest of cases pregnancy is a matter within the control of the potential parents. If pregnancy-related risks are unacceptably high for a given individual, the best means of mitigating those health risks is simply not to get pregnant—a strategy, which among its many advantages, obviates the need for abortions entirely. No consideration of these facts is evident in the Secretary's assessment of the health risks facing veterans and their beneficiaries.

For purposes of the good-cause inquiry, the only question is whether the Secretary's conclusion— that abortion is the *only* means of addressing certain types of serious health risks— has evidentiary support in the VA's record.[15] An agency's "conclusory invocation of its subject-matter expertise . . . does not excuse the agency's failure to cite such examples in support of its claim."[16] And citations to general studies about mortality rates do not address the more nuanced concerns at issue here, namely, whether veterans face imminent, unavoidable, pregnancy-related health risks that only abortions can address. Consequently, the notice provides no evidence to support the Secretary's sweeping conclusion on the medical need for abortions is a form of good cause. If the supposed need for abortion as a medical procedure is doubtful, it is more doubtful still that the need for abortion counseling is sufficiently urgent to make notice and comment impractical.

Similarly unsupported is the putative causal connection the Secretary draws between state laws restricting elective abortions and an imminent risk to the health and lives of veterans. The notice frequently refers to any new or newly revived state laws restricting abortions as "bans," implying (inaccurately) that an abortion is *never* legally permissible in these jurisdictions. Among the supposedly numerous state bans, the Secretary identifies only one Idaho law that criminalizes performing an abortion while providing an affirmative defense where the abortion was

[15] *Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 48–49 ("To be sure, the court did not suggest that impending environmental harm or regulatory evasion could *never* constitute good cause. Rather, the court held, the agency had not provided a record sufficient to warrant invocation of the exception.").
[16] *Id.* at 48.

performed to save the life of the mother. Otherwise, the Secretary supports the contention that states are indiscriminately banning abortion with a citation to a single Washington Post article. A single "newspaper article alone does not provide good cause to bypass notice-and-comment rulemaking procedures," even where that article supports the agency's reasoning.[17] Here, however, the cited article merely confirms that states have restricted access to "elective abortions," which by definition occur in situations where the pregnancy poses no serious or imminent risk to the life of the mother. In reality, no state law prohibits pregnant women from receiving lifesaving care and many have exceptions for rape/incest.

What's more, the notice acknowledges that under CHAMPVA regulations before the interim rule, abortions were already available "when a physician certifies that the abortion was performed because the life of the woman would be endangered if the fetus were carried to term."[18] Taken together, these facts reveal that the dire health concerns forming the basis for "good cause" are imagined, and there is no emergency need for VA to provide abortions, which veterans and non-veterans can already get.[19]

The Secretary, unable to sustain the contention that abortions have been banned, falls back on the hazy notion that either veterans or medical providers are confused about whether abortion remains legal in cases of medical necessity. Apart from the Washington Post article, the Secretary offers scant evidence of the supposed confusion or of its realistic capacity to prevent pregnant women from seeking and receiving life-saving medical care. Rather, this prediction is inherently speculative and depends heavily on an unsupported assumption of general ignorance among medical professionals about what the law allows. To the extent confusion presents an actual problem, there are more direct and less dramatic means of addressing that problem than what the interim rule requires. Uncertainty regarding the availability of abortions could be addressed by public relations and information campaigns aimed at educating both medical professionals and the individuals whom the VA serves.

As such, putative confusion regarding the legality of abortions is an insufficient basis for showing good cause to bypass notice and comment.

While the Secretary maintains that "[t]ime is [] of the essence," the supposed imminence and seriousness of the alleged risks is undercut by the VA's own delay in issuing a responsive rule. The notice points to the Supreme Court's decision in *Dobbs v. Jackson Women's Health* as the cause of the risks the VA seeks to address with its interim rule. The Supreme Court issued its opinion in *Dobbs* on June 24, 2022, and the notice contends that the decision's negative effects on the availability of abortion was "immediate." Nonetheless, the VA's rule requiring abortion access was not forthcoming until September 9, 2022, a delay of over two-and-a-half months.

[17] *Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 46.

[18] *See* 38 CFR 17.272(a)(64).

[19] See, Charlotte Lozier Institute, "Fact Check: State Pro-Life Laws Explicitly Protect Lives of Pregnant Women," July 27, 2022. Available at: https://lozierinstitute.org/fact-check-state-pro-life-laws-explicitly-protect-lives-of-pregnant-women/

The VA's delay in implementing a rule undercuts its ability to invoke a "good cause" or impracticability exception to notice and comment.[20]

The VA's actual delay is longer when one considers the fact that the Court's draft majority opinion in *Dobbs*, holding that the Constitution did not afford a right to abortion, was leaked to the public on May 2, 2022. From that point on, the VA had notice that abortions could soon be restricted in certain states. It is no answer to say that the Court's opinion was not yet final when leaked. If, as the VA now contends, abortion is an indispensable form of healthcare on which lives depend, then the VA's failure to have a contingency plan to respond to the Supreme Court's probable ruling would have put lives at risk and, by the VA's current logic, resulted in unnecessary injury or death.[21] The lack of such a plan and the resulting delay suggests that the VA does not take its own assessment of the health risks at face value and indicates that the agency has no substantial basis for bypassing the notice and comment process.

Finally, it is inappropriate for the VA to use an interim rule to implement an expansive "previously unused authority."[22] Public comment may be less important where the interim rule is "less expansive," but here, the Secretary asserts a previously unused authority to require access to abortions nationwide notwithstanding state laws restricting the availability of elective abortions.[23] The expansive authority asserted here, requiring the availability of a procedure which the VA had until recently excluded and displacing any contrary laws wherever they may be found, is not appropriate for an interim rule that has not benefitted from public input and due consideration. This, in tandem with the lack of an exigent need, militates against finding that the VA had the requisite good cause for bypassing notice and comment or that opportunity for comment would have been impracticable.

The IFR Is Arbitrary and Capricious

Many of the same defects which defeat the VA's showing of good cause also make the rule itself an arbitrary and capricious exercise of decision-making.[24] Again, the VA has not identified a single instance of a covered veteran or beneficiary being denied access to a medically necessary abortion as result of state law. Thus, the Secretary has failed to demonstrate a causal connection between state restrictions on elective abortions and increased risk of severe health complications for veterans and covered beneficiaries. The lack of evidence demonstrating the supposed harm to pregnant women also suggests that procedures and treatment methods other than abortions have thus far proven adequate to address the medical needs of pregnant women seeking medical care through the VA. These evidentiary gaps raise a significant concern about whether the VA has a well-reasoned basis for its action. The VA is not entitled to base its regulation on

[20] *Purdue Univ.*, 2020 WL 7340156, at *7.
[21] See Notice at 55296 ("Each day, pregnant patients in the United States, some of whom are veterans or CHAMPVA beneficiaries, find themselves in need of abortion services . . . . Delaying that care . . . would result in substantial health deterioration and risk the lives of some pregnant veterans and CHAMPVA beneficiaries. Allowing even one preventable death of a veteran or CHAMPVA beneficiary by limiting access to abortions is unacceptable.").
[22] *Tennessee Gas Pipeline Co.*, 969 F.2d at 1144.
[23] *Id.*
[24] *See*, 5 U.S.C. §706(2)(A).

"unsupported speculation," but instead must provide some "factual basis for this belief" that state legislation post-*Dobbs* will prevent veterans and their beneficiaries from receiving medically necessary care.[25]

Finally, the Secretary does little, even in the abstract, to explain the medical necessity of an abortion; that is, to justify why abortions are an indispensable medical response to particularly dire pregnancy-related health risks. "Conclusory statements" about veterans' need for abortions "do not suffice to explain the [VA's] decision."[26] Thus, the notice affords very little basis for concluding that mandating abortion access will alleviate the risks cited, and therefore creates doubt that the rule will address the problem at which it aims. Moreover, the speculative, generalized support the Secretary offers for this rule suggests that the VA is inventing a problem rather than responding to the demonstrated needs of veterans. And a regulation responding to a specific problem is "highly capricious if that problem does not exist."[27]

The VA's Preemption Argument Fails.

In the unlikely event that the VA IFR survives the two previous (fatal) defects—specifically, that the VA has the statutory authority to provide abortions to CHAMPVA beneficiaries or through the medical benefits package (38 U.S.C. § 1710), and that the Administrative Procedure Act could be avoided with an IFR having immediate effect under a showing of "good cause"—the VA's leading preemption argument fails as a matter of law.

The VA represents: "[T]he VA is acting to help to ensure that, **irrespective of what laws or policies States may impose, veterans who receive the care set forth in the medical benefits package will be able to obtain abortions,** if determined needed by a health care professional, 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. Similarly, VA is acting to **ensure CHAMPVA beneficiaries will be able to obtain abortions, if determined medically necessary and appropriate, when the health of the pregnant CHAMPVA beneficiary would be endangered if the pregnancy were carried to term or the pregnancy is the result of an act of rape or incest**. VA is taking this action because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans."[28]

The VA has argued that its IFR is sufficient to preempt "state and local laws, rules, regulations, or requirements that unduly interfere with VA's provision of reproductive health care [and that they therefore] have no force or effect, [and consequently,] there are no actual or possible violations of such laws related to VA programs, operations, facilities, contracts, or information technology systems that would necessitate mandatory reporting by VA employees."[29]

But the VA's unilateral statutory expansion is particularly egregious considering the U.S. Supreme Court's recent reassertion in *Cameron v. EMW Women's Surgical Center, P.S.C.*, that

[25] *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 83 (2d Cir. 2020).
[26] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).
[27] *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).
[28] 87 Fed. Reg. 55287 (Sept. 9, 2022)(emphasis added).
[29] Id., p. 55294.

"[p]aramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law."[30] A state's "opportunity to defend its laws in federal court" and to exercise its sovereign power to enact laws governing its own citizens "should not be lightly cut off."[31] After all, "a State 'clearly has a legitimate interest in the continued enforceability of its own statutes.'"[32] And should the VA's IFR be subject to a future legal challenge, a federal court would likely determine that the VA has vastly exceeded its authority to authorize elective abortions when the statutory exceptions are explicit and unambiguous.[33]

According to data from the Centers for Disease Control and Prevention,[34] the annual number of abortions performed in the United States increased by nearly 80 percent in the five years after *Roe v. Wade*. Despite the decision and the abortion surge, states continued their legislative efforts to protect human beings before birth and cases challenging pro-life laws continued coming before the Supreme Court. In *Planned Parenthood v. Casey,*[35] the Court in 1992 reaffirmed *Roe*'s "central holding" that a woman has a constitutional right "to choose to have an abortion before viability."[36] Three decades later in *Dobbs v. Jackson Women's Health Organization*, a case challenging a Mississippi ban on most abortions after 15 weeks of pregnancy, the Supreme Court overruled both *Roe* and *Casey*, holding that "the Constitution does not confer a right to abortion."[37] The "authority to regulate abortion," Justice Samuel Alito wrote for the majority, "must be returned to the people and their elected representatives."[38] With the Supreme Court's blockade lifted, legislatures are pursuing this goal in both traditional and new ways.

Under the 10th Amendment, states have all powers that are not "delegated to the United States by the Constitution, nor prohibited by it to the States."[39] These state powers include what is often referred as a general "police power" to provide for "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[40] Relevant to the subject of this comment, the states' police power includes both regulating the medical profession by proscribing certain procedures or setting standards for performing them[41] and regulating, restricting, or prohibiting abortion. A

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[30] *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1011 (2022).
[31] *Id.*
[32] *Id.* (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986)).
[33] See, e.g., *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).
[34] Centers for Disease Control and Prevention, Reproductive Health, Morbidity and Mortality Weekly Report, https://www.cdc.gov/reproductivehealth/data_stats/index.htm.
[35] 505 U.S. at 833.
[36] The Supreme Court created the term "viability," defining it to mean when "the fetus [is] potentially able to live outside the mother's womb, albeit with artificial aid." *Roe*, 410 U.S. at 160. Many factors obviously affect whether a particular child is viable, but the current general consensus places viability at approximately 24 weeks of pregnancy.
[37] *Id*. at 2279.
[38] *Id*.
[39] U.S. Constitution, Amendment X.
[40] *Berman v. Parker*, 348 U.S. 26, 32 (1954).
[41] *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

pro-life law, the Supreme Court held in *Dobbs*, is constitutional "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[42] [43]

The Constitution's requirement that federal law preempt conflicting state law is guided by Supreme Court precedents that establish some ground rules:

- First, "Congress has the power to preempt state law"[44] and the "purpose of Congress is the ultimate touchstone" in preemption cases.[45]
- Second, "federal law should not be read to preempt state law 'unless that is the clear and manifest purpose of Congress.'"[46]
- Third, this general presumption against preemption is stronger when the "'historic police powers of the States',"[47] such as regulating the medical profession,[48] are involved.
- Fourth, as a result, "the presumption [is] that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause."[49]
- Fifth, with *Roe v. Wade* overruled, the states may again exercise their traditional police power to restrict or prohibit abortion.[50]

The presumption against preemption in general, and against it in particular when state police powers are involved, counsel against any hypothetical conflict between the VA's IFR and state laws that may restrict abortion. Medical practice laws fall squarely within the states' general

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[42] *Id*. at 2284. In *Roe* and subsequent decisions, the Supreme Court recognized a variety of interests supporting pro-life laws, labeling them valid, legitimate, important, strong, and significant. These interests exist throughout pregnancy. See, e.g. *Roe*, 410 U.S. at 162, 163; *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976); *Beal v. Doe*, 432 U.S. 438, 445-46 (1977); *Maher v. Roe*, 432 U.S. 464, 478 (1977); *Harris v. McRae*, 448 U.S. 297, 313, 324 (1980); *Casey*, 505 U.S. at 846 (1992); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428 (1983).

[43] See *Roe*, 410 U.S. 113, at 153-154: "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."

[44] *Arizona v. United States*, 567 U.S. 387, 399 (2012).

[45] *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963); *Medtronic. Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[46] Jay B. Sykes and Nicole Vanatko, Cong. Rsch. Serv. Report No. R45825, FEDERAL PREEMPTION: A LEGAL PRIMER, July 23, 2019, at 1, 3. See also, *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645,654 (1995) (it is a rebuttable presumption that "Congress does not intend to supplant state law.").

[47] *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 542 (2001), quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). See also *Medtronic*, 518 U.S. at 475; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 7840 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation."); *Arizona v. United States*, 567 U.S. 387, 400 (2012) ("courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'").

[48] See *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

[49] *Hillsborough County, Fla. V. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1986).

[50] In *Dobbs*, the Supreme Court held that these measures will be constitutional ""if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." 142 S.Ct. at 2284.

police powers, including regulating[51] the practice of medicine,[52] that the Supreme Court has repeatedly held federal regulation is presumed not to preempt. In fact, the Supreme Court has explicitly acknowledged that the states' power to regulate the medical profession includes the very kinds of restrictions that states are imposing on abortion today. The "Constitution gives the States broad latitude to decide that particular [medical] functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others."[53] These are the very restrictions that states today are applying to abortion. While the right to abortion created in *Roe* and maintained in *Casey* tilted the balance against the states, *Dobbs* tilted that balance back in their favor by overruling those precedents.

There is no clear or manifest purpose within any of the statutory authority cited by the VA to preempt state laws that regulate abortion.[54] In fact, the statutory authority cited supports precisely the opposite conclusion: that Congress did not envision elective abortions to be procedures covered by the VA, and that states should be free to make their own laws concerning the regulation of abortion. Here, the VA possesses no authority to displace state law in an area historically recognized as the rightful purview of the states. Congress has declined to rewrite CHAMPVA's regulations and 38 U.S.C. §1710 to include elective, on-demand abortion, and abortion counseling. So the VA now seeks to expand its medical coverage benefits through a unilateral IFR, making law where none exists, and masquerading as a process of clarification that elective abortion is a "medical need" and that protecting the "life and health" of its beneficiaries requires provision of abortion-on-demand with taxpayer money.

<u>Even If the VA's Authority Reaches Abortion, It Can't Pre-empt State Criminal Law</u>

Even if the Secretary has the authority to permit abortion as a covered "medical service" and can preempt state law restricting access to those services, it does not have the ancillary power to sweep away any State law that stands in its way. The pre-emptive power that the VA claims in attempting to immunize federal abortionists from State criminal law is plainly without basis.

Here, the VA invokes express pre-emption authority. But there are several reasons to think that this simple calculus does not apply to this unprecedented emergency rule.

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[51] See, Edward P. Richards, The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations, 8 ANNALS HEALTH L. 201, 218 (1999).

[52] The Supreme Court has asserted that the state police power includes overseeing medical practice and includes the prohibition of illegal drugs. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 597 (1977); *Robinson v. California*, 370 U.S. 660, 664 (1962).

[53] *Id*. at 855.

[54] Some precedents have been incorrectly read to suggest that an agency may pre-empt State law simply by (1) having an otherwise valid statutory authority to make the regulation in question, and (2) Intending for its regulation to pre-empt. *See New York v. FERC,* 535 U.S. 1, 18 (2002); *New York v. FCC*, 486 U.S. 57, 65 (1988); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 458 U.S. 141, 154 (1982)). But these cases dealt with court-adjudged conflict and obstacle pre-emption; the agencies were not *unilaterally* making findings of pre-emption. The authority to make express findings of pre-emption require a clear statement of power to do so, not simply a general regulatory mandate. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 768 (2008).

The VA is Entitled to No Deference When There Is No Inherent Conflict.

Keeping in mind that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency,"[55] nothing in the statutory authority, structure, or mandates of the VA gives legitimacy to the sweeping power that they claim. And even in the unlikely scenario that the VA is not fully barred from providing abortions by Sec. 106, it doesn't follow that the VA has the ability to nullify disfavored State laws.Simply because the VA claims the IFR is sufficient to preempt all state law does not make it so. In particular, the authorities the VA invoke and the "nature and scope" of the VA's statutory authority do not support the idea that any of its regulations would affect a State's *criminal* law.

To the contrary, the Court has been careful to note that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court] expect[s] a clear indication that Congress intended that result,"[56] and that this clear-statement rule is "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[57] Indeed, to invoke the outer limits of Congress' power and nullify State laws on the moral acceptability of abortion would require a clear statement of authority to do so.

The Ability to Pre-empt Criminal Law Is Not Apparent from the Cited Law.

Far from having a "clear indication" of authority from Congress, almost nothing about the system established in Chapter 17 gives *any* indication that setting aside State criminal law is within the ambit of the VA's authority to provide medical services. Perhaps if the criminal provision in question pertained to something that *necessarily* speaks to the practice of medicine – such as requirements of medical licensing, standards of care, malpractice liability, etc. – then they could fairly be said to conflict with the VA's *general* regulatory authority. But the laws that the VA seeks to preempt are both medical and moral in nature; both of which have been recognized for decades by the Supreme Court as wholly within the purview of a state's plenary power to legislate and govern its citizens. Because the VA's purposes and powers do not speak to general laws governing morals and criminal liability, they have no authority to invade a State's traditional powers and set them aside in the name of a vague mandate to "provide medical services."

Finally, the VA's purported ability to preempt laws specifically for medical purposes is found in 38 CFR § 17.419, which the VA invokes as a further argument supporting its preemption claim. But subsection (b), which lists enumerated examples of where pre-emption attaches, don't address federal duties in contradiction of *every* State law. Rather, it addresses only "licenses,"

[55] *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986).
[56] *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).
[57] *Id*. at 173. *See also Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

"certifications," and abiding by a "a national standard of practice," none of which have anything to do with a State's general criminal laws.

This further reinforces the idea that the VA's pre-emptive authority is restrained to laws that speak only to the VA's mandate and purposes – i.e., *bona fide* medical regulations. But criminal laws are plainly outside of the VA's statutory authority – as evidenced by the plain letter of law, the Supreme Court's precedents on pre-emption, and CFR § 17.419 – and so the regulation is void as unlawful.

CONCLUSION

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

Sincerely,

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