October 11, 2022

Dr. Shereef Elnahal
Under Secretary for Health
Department of Veterans Affairs
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Re: Comments of the American Center for Law and Justice Concerning Docket No. VA–2022–VHA–0021, AR57 – Interim Final Rule – Reproductive Health Services

To the Department of Veterans Affairs:

The American Center for Law and Justice ("ACLJ") submits the following comments, on behalf of itself and over 137,000 of its supporters,[1] in opposition to the Interim Final Rule issued by the U.S. Department of Veterans Affairs (hereafter, the "Department") ("AR57-Interim Final Rule-Reproductive Health Services"), as published in the Federal Register on September 9, 2022 (hereafter, the "Interim Final Rule"). The Interim Final Rule is an improper attempt to override state laws and policies that protect fetal life by restricting abortion.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented expert testimony before State and federal legislative bodies, and have presented oral argument, represented parties, and submitted amicus curiae briefs before the Supreme Court of the United States and numerous State and federal courts in cases involving a variety of issues, including the right to life.[2]

The Interim Final Rule should be repealed because (a) the Rule exceeds the authority that Congress granted to the Department, whereas the previous regulations were in alignment with the restrictions that Congress placed on the ability of the Department to perform or authorize abortions; and (b)

[1] These comments are supported by over 137,000 individuals who have signed our Petition Defend Life, Defeat Abortion in All 50 States, *available at* https://aclj.org/pro-life/defend-life-defeat-abortion-in-all-50-states.

[2] *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Livingwell Med. Clinic, Inc. v. Becerra*, 138 S. Ct. 2701 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).

the process the Department used to implement the Interim Final Rule violated the Administrative Procedure Act (APA).

I. BACKGROUND

In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court restored the State legislatures' constitutional authority to restrict or prohibit abortion. In response, however, President Biden has sought to expand abortion using any means necessary. For example, in July, the President signed an executive order to "protect and expand access to abortion. . . ."[3] That order established an interagency task force with the purpose of "using every federal tool available to protect access to [abortion]."[4] Similarly, in August, President Biden stated during the first meeting of the Interagency Task Force on Reproductive Healthcare Access: "I commit to the American people that we're doing everything in our power to safeguard . . . the right to choose [abortion]. . . ."[5] Since then, various federal agencies have proposed new regulations to further this pro-abortion agenda.

To that end, on September 2, 2022, the Department submitted to the Federal Register the Interim Final Rule to allow the Department to perform abortions. The Rule became effective *immediately* upon its publication in the Federal Register on September 9. Although the normal rule-making process requires a notice and comment period for a proposed rule *before* the publication of a final rule, the APA does contain an exemption "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[6]

The Department justified its decision to deviate from the general rule by stating that "the Secretary has concluded that ordinary notice and comment procedures would be **impracticable and contrary to the public interest** and there is good cause to issue this interim final rule with an

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[3] *Executive Order on Protecting Access to Reproductive Healthcare Services*, The White House (July 8, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/07/08/executive-order-on-protecting-access-to-reproductive-healthcare-services/.

[4] *Remarks by President Biden on Protecting Access to Reproductive Health Care Services*, The White House (July 8, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/.

[5] *Remarks by President Biden and Vice President Harris at the First Meeting of the Interagency Task Force on Reproductive Rights*, The White House (Aug. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/03/remarks-by-president-biden-and-vice-president-harris-at-the-first-meeting-of-the-interagency-task-force-on-reproductive-healthcare-access/.

[6] 5 U.S.C. § 553(b)(B), *available at* https://www.archives.gov/federal-register/laws/administrative-procedure/553.html. The APA also contains exceptions for the time-frame for publication of a rule, typically "not less than 30 days *before* its effective date," when the rule is "a substantive rule which grants or recognizes an exemption or relieves a restriction. . . ." 5 U.S.C. § 553(d)(1).

immediate effective date."[7] It further stated that the 30-day requirement was "inapplicable as this rule is removing restrictions on abortion, in certain, limited circumstances, and on abortion counseling," consistent with 5 U.S.C. § 553(d)(1).[8] As discussed herein, the Interim Final Rule is improper and should be repealed.

II. LEGAL ANALYSIS

The Department announced that it "is taking steps to guarantee Veterans and other VA beneficiaries abortion-related care [sic] *anywhere in the country*. VA employees, when working within the scope of their federal employment, may provide authorized services regardless of state restrictions."[9] According to the Department, the rule is necessary

> because [the Department] has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans. As abortion bans come into force across the country, veterans in many States are no longer assured access to abortion services in their communities, even when those services are needed. VA has determined that an abortion [is] "needed" pursuant to 38 U.S.C. 1710, when sought by a veteran, if determined needed by a health care professional, when the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term or when the pregnancy is the result of an act of rape or incest. Unless VA removes its existing prohibitions on abortion-related care and makes it clear that needed abortion-related care is authorized, these veterans will face serious threats to their life and health.[10]

The Department's Interim Final Rule created an intentional conflict with the law of States that value and protect preborn human life, and also circumvents the limitations placed on the Department by Congress. Moreover, the Rule violates the APA, which requires public comment in matters of agency rule-making. The Rule also improperly intrudes upon State sovereignty on a matter—abortion policymaking—that the Constitution entrusts to the State legislatures.

a. The Interim Final Rule exceeds the authority that the VA has been granted by Congress.

The Veterans Administration, as a federal agency, was created in 1930 "when President Herbert Hoover signed Executive Order 5298 and elevated the Veterans Bureau to a federal

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[7] *Interim Final Rule with Request for Comments*, Dep't of Veterans Affairs, Sec. VIII(B) (Sept. 9, 2022), *available at* https://www.federalregister.gov/documents/2022/09/09/2022-19239/reproductive-health-services.
[8] *Id.*
[9] Press Release, *VA Will Offer Abortion Counseling and – in Certain Cases – Abortions to Pregnant Veterans and VA Beneficiaries*, Office of Public & Intergovernmental Affairs (Sept. 2, 2022, 10:55 AM), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5820.
[10] *Interim Final Rule*, at Sec. I(A).

administration."[11] The Veterans Health Administration is "the largest of the three administrations that comprise VA," and "operates one of the largest health care systems in the world and provides training for a majority of America's medical, nursing and allied health professions."[12]

The Department has never before performed abortions. When the Department was established, abortion was illegal throughout the United States. Abortion remained unlawful (other than to save the mother's life) in 46 States as of the late 1950s, and in 30 States as of 1973 when the Supreme Court created an abortion "right." *Dobbs*, 142 S. Ct. at 2253. During the decades in which abortion was illegal in most States, the Department (correctly) saw no threat to the lives of veterans and other beneficiaries posed by laws restricting abortion.

Additionally, even during the timeframe in which abortion was incorrectly considered to be protected under the federal constitution, Congress chose to prohibit the Department from performing abortions. Title I, Section 106 of the VHCA is entitled "Health Care Services for Women."[13] Within that section, Congress granted general authority to the Secretary of the VA to furnish hospital care and medical services under Chapter 17 of Title 38. These services were to include "[g]eneral reproductive health care," but were *not* to include "infertility services, abortions, or pregnancy care (including prenatal and delivery care). . . ."[14] And, in the thirty years prior to September 2022 that the VHCA restriction on abortion has been in place, the VA correctly never interpreted this provision as allowing any abortions.

In light of President Biden's commitment to using federal agencies to expand abortion, however, the Department has adopted a strained interpretation of the law, claiming that Section 106's restriction of abortion only applies to the VHCA, and not to 38 U.S.C. §§ 1710 or 1712, because of the phrase "*under this section*." Specifically, the VA claims that

> Section 106 did not limit VA's authority to provide care under any other provision of law. The "but not including'" language in section 106 of the VHCA limited only the services provided "under this section," meaning that while section 106 barred the provision of any abortion or infertility service under section 106 of the VHCA, it did not limit VA's authority to provide such services under any other statutory provision such as 38 U.S.C. 1710 or 38 U.S.C. 1712. Public Law 102-585, sec. 106(a).

This argument is flawed. Section 106 of the VHCA grants the Secretary the general authority to provide services *under chapter 17 of title 38 of the United States Code*; "In furnishing hospital care and medical services under chapter 17 of title 38 of the 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. . . ."

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[11] *History – Department of Veterans Affairs (VA)*, U.S. Dep't of Veterans Affairs, https://www.va.gov/HISTORY/VA_History/Overview.asp (last visited Oct. 4, 2022).
[12] *Id.*
[13] Public Law 102-585, sec. 106(a).
[14] *Id.*

The VA's novel reading of the statute renders the whole of Section 106 of the VHCA pointless, as the Department could simply provide whatever services it wanted. "Under this section" does not limit Congress's prohibition on abortions to the four corners of the VHCA; rather, it is referring to Section 106(3)(a), and declares that while the VA has the general authority to provide reproductive health care under Chapter 17, that reproductive care may not include abortion, among other things.

Despite Congress's explicit restriction on abortion services in the VHCA, the Department claims it has the authority to determine that abortion is "needed" "medical care" within the meaning of the VA's general treatment authority, 38 U.S.C. § 1710(a). According to the Department, this means that such care may be provided "if an appropriate health care professional determines that such 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 C.F.R. § 17.38(b)(1)-(3). The Department further claims:

> Congress has ratified VA's interpretation that section 106 of the VHCA does not limit the medical care that the VA may provide pursuant to its authority under 38 U.S.C. 1710. Most recently, when Congress enacted the Deborah Sampson Act of 2020, Public Law 116-315, tit. V (2021), it created a central office to, inter alia, "monitor[ ] and encourag[e] the activities of the Veterans Health Administration with respect to the provision, evaluation, and improvement of health care services provided to women veterans by the Department." 38 U.S.C. 7310(b)(1). Congress defined "health care" for these purposes as "the health care and services included in the medical benefits package provided by the Department as in effect on the day before the date of the enactment of this Act [Jan. 5, 2021]." 38 U.S.C. 7310. Given that VA's medical benefits package as of that date included services that were excluded from the coverage of Section 106 of the VHCA, Congress ratified VA's interpretation that it may provide for these services pursuant to its authority under 38 U.S.C. 1710, notwithstanding section 106. Indeed, the fact that the Deborah Sampson Act of 2020 did not reference section 106 of the VHCA and only referenced VA's medical benefits package shows that Congress did not interpret section 106 of the VHCA as a limitation on VA's authority to provide care to women veterans.[15]

Contrary to the Department's claims, however, even after Congress passed the Veterans' Health Care Eligibility Reform Act of 1996 (P.L. 104-262), which allows the Department Secretary to provide medical services determined to be "needed" under 38 U.S.C. § 1710, a note was added to Section 1710 that referenced Section 106 of the VHCA of 1992 and its list of prohibitions.[16]

The fact that Congress has actively worked at various times to pass legislation to remove restrictions on other categories that are prohibited in Section 106 indicates that Congress still views

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[15] *Interim Final Rule*, at Sec. I(B).

[16] *See* 38 U.S.C. § 1710 note, *available at* https://www.govregs.com/uscode/title38_partII_chapter17_subchapterII_section1710.

Section 106 as being in force. For instance, in 2016, Congress passed "a provision to overturn a 1992 ban on in vitro fertilization (IVF) services for veterans."[17] Thus, the fact that Congress has explicitly acted to overturn some prohibitions in Section 106, but never the prohibition on abortion services, is further evidence that the Interim Final Rule conflicts with federal law.

Last year, Senator Jerry Moran, "the lead Republican on the Senate Veteran's Affairs Committee . . . reaffirmed during a U.S. Senate Appropriations Committee hearing that the Department of Veterans Affairs (VA) is by law prohibited from providing abortion services."[18] Similarly, on August 26, 2022, prior to the VA issuing the Interim Final Rule, Senator James Lankford (OK) sent a letter to Secretary McDonough stating:

> Current federal law and regulation . . . prohibits the VA from providing abortion services. Section 106 of the Veterans Health Care Act of 1992 directs the VA to provide women with "general reproductive health care . . . not . . . abortions." Despite constant attempts by President Biden and his Administration to promote and pay for abortions, I strongly urge you and all VA officials to ensure that any regulatory actions proposed or issued by your agency are consistent with the laws enacted by Congress, including Section 106 of the Veterans Health Care Act of 1992.[19]

The Department cannot override or ignore federal statutes. Indeed, "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citations omitted). Moreover, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). Further, an agency may not act "contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] . . . without observance of procedure required by law." 5 U.S.C. § 706(2).

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[17] Press Release, *Congress Lifts Ban on In Vitro Fertilization Services for Veterans Wounded in the Line of Duty in Annual Spending Bill*, Office of United States Rep. Rick Larsen (Sept. 29, 2016), https://larsen.house.gov/news/documentsingle.aspx?DocumentID=127.

[18] Press Release, *Sen. Moran: VA's Prohibition on Abortion Services is the Law*, Office of United States Senator Jerry Moran (Aug. 4, 2021), https://www.moran.senate.gov/public/index.cfm/news-releases?ID=D888354F-103C-4817-9074-90F5A1C85532.

[19] *Letter from James Lankford, U.S. Senator, to Denis R. McDonough, Secretary of U.S. Dep't of Veterans Affairs* (Aug. 26, 2022), *available at* https://www.lankford.senate.gov/imo/media/doc/2022-08-26%20Letter%20to%20McDonough%20IFR.pdf.

In implementing its Interim Final Rule, the Department has acted outside the scope of—and indeed, in direct contravention of—the authority granted to it by Congress. As Senator Lankford cautioned in his letter to Secretary McDonough:

> Only Congress can change federal law, and Congress has held for the past 30 years that the VA is not permitted to offer abortion services. While activists and even my colleagues in Congress—including some who have written to you to encourage you to promote abortions in states where unborn children's lives are protected, such as Oklahoma—may desire for you to use your authority to usurp Congress to allow the VA to provide, or even pay for abortions through rulemaking, that would be a direct violation of the laws you swore to uphold and follow. Additionally, such action would further erode the integrity of the rulemaking process.[20]

In sum, the Department has no authority to enact the Interim Final Rule.

b. The Interim Final Rule violates the APA.

The Interim Final Rule conflicts with the APA because there was no valid "public interest" justification for bypassing the normal rule-making process,[21] and the Rule is contrary to the law.

The APA was adopted "[t]o improve the administration of justice by prescribing fair administrative procedure."[22] It "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). It requires "reasoned decision making" on the part of the agencies promulgating rules and regulations. *Michigan v. EPA*, 576 U.S. 743, 750 (2015), and a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with the law*."[23]

The Department claimed that following the usual process for rule-making would be "contrary to the public interest," because the health and lives of veterans and other beneficiaries are at risk.[24] The Department stated that because the Supreme Court overturned *Roe v. Wade*, "certain States have begun to enforce existing abortion bans and restrictions on [abortion] and are proposing and enacting new ones, creating urgent risks to the lives and health of pregnant veterans . . . in these States."[25] Despite the allegedly "urgent risks," the Department's publication of its Interim Final Rule occurred four months *after* the Supreme Court's *Dobbs* decision was leaked, and two months after the Supreme Court issued its final opinion in *Dobbs*.

Moreover, the Administration was well aware of the fact that the Court could overturn *Roe v. Wade*, as the Solicitor General presented oral argument before the court in *Dobbs*. Many States

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[20] *Letter from James Lankford*.
[21] *See* 5 U.S.C. § 553(b)(B).
[22] 5 U.S.C. § 701 *et seq.*
[23] 5 U.S.C. § 706(2)(A) (emphasis added).
[24] *Interim Final Rule*, at Sec. I.
[25] *Id.*

had already passed laws anticipating the Court's decision that would promptly take effect after *Roe* was overturned. If there were any actual "need" for the Interim Final Rule—there is none—agency action would have occurred much earlier.

Furthermore, it was well-known that even while abortion was considered a "right" under the federal Constitution, abortion was not readily available in every State or region. Various areas of the country had no abortion providers within a significant distance. Veterans living in these areas prior to the overturning of *Roe* would have faced the same difficulty in accessing abortion as non-veterans, yet the Department (correctly) did not view the significant practical limitations on abortion access in these States as an urgent risk to the health and lives of veterans and beneficiaries.

In addition, despite the Department's assertion that allowing the public to comment on a proposed rule before it takes effect would be "contrary to the public interest," public oversight of federal agency rules and regulations concerning abortion is very much a matter of public interest. Abortion implicates many significant interests—including those of the preborn child who may be killed, the child's parents, the government, and the public—and it also "presents a profound moral issue on which Americans hold sharply conflicting views."[26] As noted in *Dobbs*, policy matters of this nature are entrusted to legislatures to decide, not unelected officials.

Finally, as discussed previously, the Interim Final Rule is in direct conflict with Congressionally enacted law that prevents the Department from performing abortions, and thus the Interim Final Rule violates the APA.

III. CONCLUSION

By imposing a pro-abortion policy upon the Department, the Interim Final Rule creates a disturbing contrast. In the context of armed conflict, veterans are expected to place a high value upon human life and compliance with the law. The law of war (reflected in international conventions and otherwise) permits the taking of human life in only limited circumstances, and provides protections for innocents. Even enemy combatants, prisoners of war, and suspected war criminals have a series of rights that must be respected. Acts of torture are prohibited.

By stark contrast, however, the Interim Final Rule green lights the intentional killing of innocent living human beings, in violation of State laws that make such acts a felony. The Department has declared that gruesome, torturous methods of killing a person that could not be lawfully used against the vilest of war criminals—burning them with chemicals, dismembering them, piercing their skulls and vacuuming their brains out, etc.—are forms of "care" that veterans and their beneficiaries cannot be denied. There is neither statutory nor constitutional authority for the Department to authorize veterans and their beneficiaries to commit heinous, criminal acts against innocent, living human beings.

The ACLJ unequivocally opposes the Department's attempt to subvert the will of Congress and of the States who value and protect innocent human life. The Department's Interim Final Rule, if not repealed, will have profoundly negative impacts on the lives of preborn babies, the women who

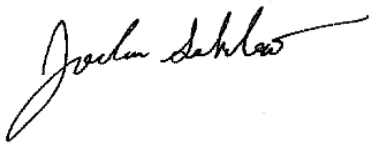
[26] *Dobbs*, 142 S. Ct. at 2240.

carry them, federalism, and the rule of law. It is contrary to law and the Constitution. The ACLJ asks that the Interim Final Rule be repealed completely.

Thank you for the opportunity to provide comment on this critical matter.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE



Jordan Sekulow
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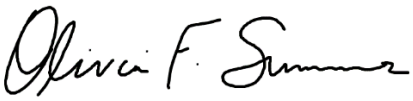

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