



October 11, 2022

**Submitted Electronically via Federal Rulemaking Portal**

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

**Re: Reproductive Health Services (RIN 2900-AR57)**

Dear Secretary McDonough:

On behalf of Americans United for Life (“AUL”), I am writing in opposition to the Interim Final Rule (“IFR”), “Reproductive Health Services,” 87 Fed. Reg. 55,287. AUL is the oldest and most active pro-life nonprofit advocacy organization in the country. Founded in 1971, before the Supreme Court’s decision in *Roe v. Wade*,<sup>1</sup> AUL has dedicated over fifty years to advocating for comprehensive legal protections for human life from conception until natural death. AUL attorneys are legal experts on constitutional law and bioethics, and regularly testify before state legislatures and Congress on abortion issues.<sup>2</sup> Supreme Court abortion opinions have cited AUL briefs and scholarship in *Akron v. Akron Center for Reproductive Health*,<sup>3</sup> *Webster v. Reproductive Health Services*,<sup>4</sup> *June Medical Services L.L.C. v. Russo*,<sup>5</sup> and *Dobbs v. Jackson Women’s Health Organization*.<sup>6</sup>

AUL attorneys have comprehensively analyzed and prepared legal white papers and scholarship on the decision in *Dobbs v. Jackson Women’s Health*

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> See, e.g., *Revoking Your Rights: The Ongoing Crisis in Abortion Care Access Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life); *What’s Next: The Threat to Individual Freedoms in a Post-Roe World Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life).

<sup>3</sup> 462 U.S. 416, 426 n.9 (1983).

<sup>4</sup> 492 U.S. 490, 530 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>5</sup> 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting).

<sup>6</sup> 142 S. Ct. 2228, 2266 (2022) (citing Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 127, 141 (2012)).

*Organization*<sup>7</sup> and abortion litigation in a post-*Roe* world.<sup>8</sup> AUL publishes pro-life model legislation and policy guides,<sup>9</sup> tracks state bioethics legislation,<sup>10</sup> and regularly consults on pro-life legislation in Congress and the states.

The IFR would permit abortion counseling and abortions in the medical benefits package and Civilian Health and Medical Program of the Department of Veterans Affairs (“CHAMPVA”) for the life or health of the mother, or in cases of rape or incest.<sup>11</sup> This would enable abortion on demand, as the VA has not constrained the definition of “health.” As the Supreme Court discussed in *Doe v. Bolton*, a health exception enables a physician’s “medical judgment [to] be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.”<sup>12</sup> For “health” purposes, virtually any situation could fit the medical exception and create abortion on demand up until the baby’s birthday.

We urge the VA not to alter the medical benefits package nor CHAMPVA to permit abortion on demand. Below, I elaborate how (I) Congress never repealed Section 106 of the Veterans Health Care Act of 1992, which prohibits the VA from providing, funding, or counseling for elective abortions;<sup>13</sup> (II) under the major questions doctrine, the VA does not have the power to set a radical abortion policy; and (III) the VA did not promulgate the IFR with “good cause,” because it subverts Congress’ pro-life policy stance and disregards competing governmental interests, including the legitimate interest in safeguarding the unborn child.

Permitting abortion on demand in the IFR is arbitrary and capricious, is without a legal basis, disregards Congress’ explicit exclusion of elective abortion from the VA’s delegated power, is antithetical to federal pro-life policy, and condones abortion violence against women, children, and families across America. Americans United for Life urges the VA to abandon the IFR.

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<sup>7</sup> Carolyn McDonnell, *Dobbs v. Jackson Women’s Health Organization: The Overturn of Roe v. Wade*, AMS. UNITED FOR LIFE (July 5, 2022), <https://aul.org/wp-content/uploads/2022/07/Dobbs-v.-Jackson-Womens-Health-Organization-The-Overturn-of-Roe-v.-Wade.pdf>.

<sup>8</sup> Carolyn McDonnell, *The Attorney General’s Playbook for a Post-Roe World*, AMS. UNITED FOR LIFE (June 28, 2022), <https://aul.org/wp-content/uploads/2022/06/AG-Playbook-for-a-Post-Roe-World.pdf>; Carolyn McDonnell, *Post-Dobbs Abortion Litigation Under Federal and State Constitutional Law*, 5 SOC’Y ST. SEBASTIAN (2022), <https://www.societyofstsebastian.org/summer2022-post-dobbs-laws-mcdonnell>.

<sup>9</sup> *Pro-Life Model Legislation and Guides*, AMS. UNITED FOR LIFE (last visited Oct. 11, 2022), <https://aul.org/law-and-policy/>.

<sup>10</sup> *Defending Life: State Legislation Tracker*, AMS. UNITED FOR LIFE (last visited Oct. 11, 2022), <https://aul.org/law-and-policy/state-legislation-tracker/>.

<sup>11</sup> *Reproductive Health Services*, 87 Fed. Reg. 55,287, 55,294 (issued Sept. 9, 2022).

<sup>12</sup> 410 U.S. 179, 192 (1973).

<sup>13</sup> Veterans Health Care Act of 1992, Pub. Law. No. 102-585, § 106, 106 Stat. 4943, 4947 (1992).

I. Congress Never Repealed Section 106, Which Prohibits the VA from Providing, Funding, or Counseling for Elective Abortions.

The VA has no authority to disregard Section 106 of the Veterans Health Care Act of 1992 (“VHCA”) on the basis that it believes it to be non-binding. Under Section 106, “the Secretary of Veterans Affairs may provide to women the following health care services . . . General reproductive health care . . . 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.”<sup>14</sup> Nevertheless, IFR contends that when Congress enacted the Veterans Health Care Eligibility Reform Act of 1996,<sup>15</sup> it “effectively overtook section 106 of the VCHA.”<sup>16</sup> However, the Veterans Health Care Eligibility Reform Act of 1996 gives a general grant of power and does not mention abortion, whereas Section 106 specifically prohibits abortion. As the Supreme Court recognizes in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, “it is a commonplace of statutory construction that the specific governs the general.”<sup>17</sup> “The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”<sup>18</sup> Here, Section 106’s abortion prohibition acts as the “exception” to the Veterans Health Care Eligibility Reform Act’s general grant of power.

Section 106 of the VHCA explicitly prohibits providing abortion in VA health programming.<sup>19</sup> If any confusion is still lingering as to whether Congress intended abortion to be excluded, Members of Congress have reiterated that the abortion exclusion is effective.<sup>20</sup> The IFR argues that Congress has repealed Section 106 of the Veterans’ Health Care Eligibility Reform Act. However, the Veterans’ Health Care Eligibility Reform Act never mentions abortion. Congress has passed amendments since then, which have not repealed but bolstered Section 106. For example, the Murray amendment allowed for veterans to receive infertility treatments under the

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<sup>14</sup> *Id.*

<sup>15</sup> Pub. L. No. 104-262, 110 Stat. 3177 (1996).

<sup>16</sup> 87 Fed. Reg. 55,289.

<sup>17</sup> *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

<sup>18</sup> *Id.*

<sup>19</sup> Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 106, 106 Stat. 4947.

<sup>20</sup> Letter from Members of Congress to Denis R. McDonough, Secretary, U.S. Dep’t of Veterans Affs. (June 15, 2021), *available at* [https://republicans-veterans.house.gov/uploadedfiles/2021\\_6\\_15\\_pro-life\\_letter\\_to\\_va\\_secretary.pdf](https://republicans-veterans.house.gov/uploadedfiles/2021_6_15_pro-life_letter_to_va_secretary.pdf); Letter from James Lankford, Senator, U.S. Cong. to Denis R. McDonough, Secretary, U.S. Dep’t of Veterans Affs. (Aug. 26, 2022), *available at* <https://www.lankford.senate.gov/imo/media/doc/2022-08-26%20Letter%20to%20McDonough%20IFR.pdf>.

VHCA if infertility is caused by a service injury.<sup>21</sup> However, no amendments have been made to repeal the abortion provision.

The IFR alternatively attempts to argue that Section 106 only applies to “services provided ‘under this section’” and “did not limit the VA’s authority to provide care under any other provision of law.”<sup>22</sup> This reasoning is either an oversight of the provision’s application or a gross misinterpretation. Section 106 explicitly applies to “hospital care and medical services [furnished] under chapter 17 of title 38.”<sup>23</sup> Accordingly, the VA must comply with Section 106’s abortion prohibition.

The VA also attempts to rely on the Deborah Sampson Act of 2020 to argue that Section 106 does not limit the medical care the VA can provide.<sup>24</sup> The Deborah Sampson Act of 2020 provides that references to “health care and services” refers to health care and services provided under the VA medical benefits, rather than under Section 106. However, the Deborah Sampson Act of 2020 provides that “health care” is defined by services provided on the day before enactment, which excluded abortion and abortion counseling just as Section 106 does.<sup>25</sup>

The fact that the VA relies alternatively on 38 U.S.C. 1710(a) paragraphs (1)–(3) does not automatically mean that Section 106 is no longer operative.<sup>26</sup> On the contrary, the VA cannot rely on Section 106 for authority because the provision *is* operative and explicitly prohibits abortion services. 38 U.S.C. 1710(a) paragraphs (1) and (2) state that the VA shall provide medical care for veterans. Paragraph (3) allows that the VA may provide medical services not referenced in paragraphs (1) and (2). There is no explicit language on abortion, yet the VA has determined that abortion is “needed to protect the lives of veterans” under the statute. The VA is creating the authority to provide abortions against the explicit authority of Section 106 and inappropriately interpreting the language of 38 U.S.C. 1710(a). The Supreme Court has held that “absent a clearly established congressional intention, repeals by implication are not favored.”<sup>27</sup> Thus, the VA must show a clear congressional intent to repeal, which is not present.

## II. Under the Major Questions Doctrine, the IFR Does Not Have the Power to Set a Radical Abortion Policy.

The VA recognizes that in *Dobbs*, the Supreme Court overruled its egregiously wrong decisions in *Roe v. Wade*<sup>28</sup> and *Planned Parenthood of Southeastern*

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<sup>21</sup> Pub. L. 114-223, div. A, tit. II, § 260, 130 Stat. 897.

<sup>22</sup> 87 Fed. Reg. 55,289.

<sup>23</sup> Veterans Health Care Act of 1992, Pub. Law. No. 102-585, § 106, 106 Stat. 4947.

<sup>24</sup> 87 Fed. Reg. 55,289.

<sup>25</sup> Pub. L. No. 116-315, tit. V, subtit. A, § 5101, 134 Stat. 5021, 5026 (2021).

<sup>26</sup> 87 Fed. Reg. 55,288.

<sup>27</sup> *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion).

<sup>28</sup> 110 U.S. 113 (1973).

*Pennsylvania v. Casey*,<sup>29</sup> and properly returned the abortion issue to the democratic process.<sup>30</sup> The Supreme Court relinquished its position as the national “*ex officio* medical board” on abortion, and Congress and the state legislatures again have the power to set an abortion policy.<sup>31</sup> The VA has no authority to assume the mantle of “*ex officio* medical board,” and usurp the abortion issue from the legislatures.

*Dobbs* restored the legislatures’ authority to create abortion policy, and now the VA *must* have *explicit* authority from Congress to regulate abortion under the major questions doctrine. The doctrine “refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”<sup>32</sup> As the Court recognized, “there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”<sup>33</sup>

Just as the Court “f[oun]d it ‘highly unlikely that Congress would leave’ to ‘agency discretion’ the decision of how much coal-based generation there should be over the coming decades” in *West Virginia v. Environmental Protection Agency*,<sup>34</sup> it is equally unlikely that the Congress authorizes the VA to set a national abortion policy through the medical benefits package or CHAMPVA. Abortion is a highly contentious issue.<sup>35</sup> These statutes say nothing about permitting abortion on demand. Since the abortion issue has returned to the democratic process, Congress holds the federal power to legislate on the abortion issue. The VA must show that Congress has delegated that authority, but it cannot.

The VA contends the IFR preempts state laws that “unduly interfere” with abortion.<sup>36</sup> Under this flawed reasoning, “a State or local civil or criminal law that restricts, limits, or otherwise impedes a VA professional’s provision of care permitted by this regulation would be preempted.”<sup>37</sup> Notably, the undue interference test is reminiscent of *Casey*’s undue burden standard, which was a “shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial

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<sup>29</sup> 505 U.S. 833 (1992).

<sup>30</sup> 87 Fed. Reg. 55,295.

<sup>31</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part); *see also* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting); *Webster*, 492 U.S. at 519 (Rehnquist, J.) (plurality opinion) (citation omitted); *City of Akron*, 462 U.S. at 456 (O’Connor, J., dissenting) (citation omitted)).

<sup>32</sup> *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

<sup>33</sup> *Id.* at 2605 (citation omitted) (alteration in original).

<sup>34</sup> *Id.* at 2596.

<sup>35</sup> *Dobbs*, 142 S. Ct. at 2243 (“And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”)

<sup>36</sup> 87 Fed. Reg. 55,293–55,294.

<sup>37</sup> *Id.* at 55,294.

obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>38</sup> As the Supreme Court recognized in *Dobbs*, *Casey*’s undue burden standard was unworkable.<sup>39</sup> “Problems begin with the very concept of an ‘undue burden.’”<sup>40</sup> The test is subjective in the abortion context, creating circuit splits and permitting judges to act as legislators. The test does not account for legitimate governmental interests in the abortion issue, discussed *infra* Section III(B), such as the protection of unborn human life.<sup>41</sup> The VA’s undue interference standard will create havoc in interpreting which pro-life laws are preempted because they “unduly interfere” with the IFR.

Although the IFR discusses pro-life laws that abolish abortion at a certain gestational age, the IFR does not recognize its impact upon other state laws protecting women, unborn children, and families from the harms of abortion violence.<sup>42</sup> AUL asks the VA to consider and explain the IFR’s impact upon the following provisions in state laws:

- Abolition of eugenics-based abortions, including:
  - Sex-selective abortions<sup>43</sup>
  - Race-selective abortions<sup>44</sup>
  - Disability-selective abortions<sup>45</sup>
- Prevention of coercive abuse, including:
  - Notice to the mother that it is unlawful to coerce an abortion<sup>46</sup>
  - Retention of forensic evidence<sup>47</sup>
- Born-alive infant protections<sup>48</sup>
- Health and safety, including:

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<sup>38</sup> *Casey*, 505 U.S. at 877.

<sup>39</sup> *Dobbs*, 142 S. Ct. at 2272 (“*Casey*’s ‘undue burden’ test has scored poorly on the workability scale.”)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2284 (“States may regulate abortion for legitimate reasons . . . [which] include[s] respect for and preservation of prenatal life at all stages of development.”).

<sup>42</sup> 87 Fed. Reg. 55,295.

<sup>43</sup> *See, e.g.*, ARIZ. REV. STAT. § 13-3603.02(A)(1) (2021) (“Except in a medical emergency, a person who knowingly does any of the following is guilty of a class 6 felony . . . Performs an abortion knowing that the abortion is sought based on the sex . . . of the child.”).

<sup>44</sup> *See, e.g., id.* (“Except in a medical emergency, a person who knowingly does any of the following is guilty of a class 6 felony . . . Performs an abortion knowing that the abortion is sought based on the . . . race of the child or the race of a parent of that child.”).

<sup>45</sup> *See, e.g., id.* § 13-3603.02(A)(2) (“Except in a medical emergency, a person who knowingly does any of the following is guilty of a class 6 felony . . . Performs an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child.”).

<sup>46</sup> *See, e.g.*, ARK. CODE § 20-16-1705 (2015) (requiring abortion facilities to post signage that states “It is against the law for anyone, regardless of his or her relationship to you, to force you to have an abortion” among other provisions).

<sup>47</sup> *See, e.g.*, ARK. CODE § 12-18-108 (2017) (requiring physicians to submit fetal tissue to the State Crime Laboratory if the abortion was performed on a child under seventeen years of age).

<sup>48</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123435 (1996) (“The rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously.”)

- State licensure requirements and professional discipline<sup>49</sup>
- Admitting privileges<sup>50</sup>
- Clinic inspections<sup>51</sup>
- Minimum health and safety standards for facilities<sup>52</sup>
- Informed consent, including:
  - Reflection periods<sup>53</sup>
  - Ultrasound requirements<sup>54</sup>
  - Informational disclosures on procedural risks<sup>55</sup>
  - Notice of availability of perinatal hospice resources<sup>56</sup>
- Chemical abortion, including:
  - Telemedicine prohibitions<sup>57</sup>
  - Required follow-up visit<sup>58</sup>
  - Informational disclosure on the possibility of reversing the chemical abortion<sup>59</sup>
- Reporting, including:
  - Gestational age of the unborn child<sup>60</sup>

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<sup>49</sup> See, e.g., 18 PA. CONS. STAT. § 3204 (1989) (permitting only physicians to perform abortions and subjecting a physician to professional discipline if she does not act in accordance with the statute).

<sup>50</sup> See, e.g., IND. CODE § 16-34-2-4.5 (2022) (requiring physicians to have admitting privileges in writing at a hospital in the county or in a continuous county, or, alternatively, have an emergency transfer agreement with a physician that meets the admitting privileges requirements).

<sup>51</sup> See, e.g., KAN. STAT. ANN. § 65-4a05 (2011) (requiring state officials to inspect abortion facilities at least twice yearly).

<sup>52</sup> See, e.g., MO. REV. STAT. §§ 197.200 to 197.240 (2017) (providing health and safety standards for abortion facilities).

<sup>53</sup> See, e.g., IOWA CODE § 146A.1(1) (2020) (providing for a 24-hour reflection period between informed consent disclosures and the abortion procedure).

<sup>54</sup> See, e.g., *id.* (“A physician performing an abortion shall obtain written certification from the pregnant woman . . . That the woman has undergone an ultrasound imaging . . . the woman was given the opportunity to see the unborn child by viewing the ultrasound image . . . the woman was given the option of hearing a description of the unborn child based on the ultrasound image and hearing the heartbeat of the unborn child.”).

<sup>55</sup> See, e.g., *id.* § 146A.1(d) (requiring disclosures of the woman’s pregnancy options, and risk factors of abortion in light of the woman’s medical history and medical condition).

<sup>56</sup> See, e.g., NEB. REV. STAT. § 71-5001 to 71-5004 (2017) (requiring disclosures that perinatal hospice services are available and providing state resources).

<sup>57</sup> See, e.g., KY. REV. STAT. ANN. § 311.728 (2019) (“A physician performing or inducing an abortion shall be present in person and in the same room with the patient. The use of telehealth [permitted elsewhere in state law] shall not be allowed in the performance of an abortion.”).

<sup>58</sup> See, e.g., WIS. STAT. § 253.10(3)(c)(1)(hm) (2016) (“If the abortion is induced by an abortion-inducing drug, [the doctor must disclose] that the woman must return to the abortion facility for a follow-up visit 12 to 18 days after the use of an abortion-inducing drug to confirm the termination of the pregnancy and evaluate the woman’s medical condition.”).

<sup>59</sup> See, e.g., KY. REV. STAT. ANN. § 311.774(2) (2022) (providing that prescriptions for abortion-inducing drugs must have the disclosure that it may be possible for a woman to reverse the drug, as well as include contact information for assistance).

<sup>60</sup> See, e.g., WYO. STAT. ANN. § 35-6-107(a)(v) (2019) (requiring reporting of “[t]he length and weight of the aborted fetus or embryo, when measurable or the gestational age of the aborted fetus or embryo in completed weeks at the time of abortion”).

- Demographic information of the woman<sup>61</sup>
- Type of abortion procedure<sup>62</sup>
- Medical complications<sup>63</sup>
- Availability of information for the public<sup>64</sup>
- Submission of abortion statistics to the U.S. Centers for Disease Control and Prevention<sup>65</sup>
- Parental involvement, including:
  - Parental consent laws<sup>66</sup>
  - Parental notification laws<sup>67</sup>
  - Judicial bypass limits<sup>68</sup>
  - Mandatory reporting of abuse<sup>69</sup>
- Conscience protections, including protections for:
  - Doctors and other medical professionals<sup>70</sup>
  - Pharmacists<sup>71</sup>
- Fetal remains, including:
  - Dignified disposition of fetal remains<sup>72</sup>
  - Bans on fetal experimentation<sup>73</sup>

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<sup>61</sup> See, e.g., *id.* § 35-6-107(a)(i), (iv) (requiring reporting of “[t]he age of the pregnant woman” and “[a] summary of the pregnant woman’s obstetrical history regarding previous pregnancies, abortions and live births”).

<sup>62</sup> See, e.g., *id.* § 35-6-107(a)(ii) (requiring reporting of “[t]he type of procedure performed or prescribed”).

<sup>63</sup> See, e.g., *id.* § 35-6-107(a)(iii) (requiring reporting of medical complications).

<sup>64</sup> See, e.g., WYO. STAT. ANN. § 35-6-108(c) (2019) (requiring the state office of vital records to issue a public report providing summary statistics of abortion performed the previous year based upon the reporting).

<sup>65</sup> See, e.g., *id.* (requiring the yearly report that summarizes abortion statistics to be sent to the U.S. Centers for Disease Control and Prevention).

<sup>66</sup> See, e.g., IDAHO CODE § 18-609A(1) (2015) (requiring parental consent before performing an abortion on a pregnant unemancipated minor).

<sup>67</sup> See, e.g., DEL. CODE ANN. tit. 24 § 1780 to 1789B (1995) (requiring parental notice before performing an abortion on a pregnant unemancipated minor).

<sup>68</sup> See, e.g., IDAHO CODE § 18-609A (providing a judicial bypass procedure to the state’s parental consent requirements).

<sup>69</sup> See, e.g., FLA. STAT. § 390.01114(6)(d) (“If the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court shall report the evidence of child abuse or sexual abuse of the petitioner.”).

<sup>70</sup> See, e.g., S.C. CODE ANN. § 44-139-10(D) (2022) (“As the right of conscience is fundamental, no medical practitioner . . . should be compelled to participate in . . . any medical procedure or prescribe . . . any medication to which the practitioner or entity objects on the basis of conscience, whether such conscience is informed by religious, moral, or ethical beliefs or principles.”).

<sup>71</sup> See, e.g., *id.* § 44-139-20(7) (2022) (clarifying that “medical practitioner” includes pharmacists and pharmacy technicians under statutory conscience protections).

<sup>72</sup> See, e.g., ALA. CODE § 26-23F-4 (2016) (providing that parents may request the release of the fetal remains so that the unborn baby can have a “dignified final disposition by burial, interment, or cremation”).

<sup>73</sup> See, e.g., *id.* § 26-23F-5(c) (2016) (“No person shall use an unborn infant, living or deceased, in research or experimentation.”).



- Prohibition on sale or transfer of fetal remains<sup>74</sup>
- Fetal homicide<sup>75</sup>
- Wrongful death<sup>76</sup>

In sum, under the major questions doctrine, Congress has not given the VA the power to manufacture a national abortion policy. The IFR also has not considered its impact on other pro-life provisions in state laws and will wreak havoc over which pro-life laws “unduly interfere” with VA abortions.

### III. There is No Good Cause for an IFR That Subverts Congress’ Pro-life Policy Stance and Does Not Recognize the Government’s Legitimate Interest in the Unborn Child.

The VA contends it has “good cause” to issue the rule without following the 30-day delay before the rules become effective.<sup>77</sup> Good cause means “that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>78</sup> The IFR cites an interest in maternal health and safety as its “good cause.”<sup>79</sup> Yet, the IFR does not have good cause because its rule goes against the public interest. The IFR is contrary to Congress’ pro-life policy stance and has not recognized other important governmental interests present in the abortion issue, such as the protection of unborn human life.

#### A. The IFR Undermines Congress’ Pro-life Policy Stance.

Federal policy is pro-life policy. Following *Dobbs*, there is no federal right or interest in promoting, providing, or paying for elective abortion. Rather, there is a plethora of statutes protecting women, unborn children, families, and medical professionals from the harms of abortion violence. Congress maintains a pro-life policy, and the VA is openly flaunting that policy by manufacturing abortion on demand. Accordingly, the IFR does not have “good cause” because it is contrary to federal pro-life policy.

Congress has passed a multitude of pro-life laws. The Born-Alive Infants Protection Act recognizes that children born alive after attempted abortion are legal persons under federal law and cannot be left to die without medical care.<sup>80</sup> The Partial Birth Abortion Ban Act prohibits the horrific abortion method that induces

<sup>74</sup> See, e.g., *id.* § 26-23F-5(a) to (b) (prohibiting the sale or transfer of fetal remains).

<sup>75</sup> See, e.g., MISS. CODE ANN. § 97-3-19 (2017) (“The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases . . . When done with deliberate design to effect the death of an unborn child, shall be first-degree murder.”).

<sup>76</sup> See, e.g., *id.* § 11-7-13 (2018) (providing a wrongful death cause of action for an “unborn quick child”).

<sup>77</sup> 87 Fed. Reg. 55,295.

<sup>78</sup> 5 U.S.C. 553(b)(3)(B).

<sup>79</sup> 87 Fed. Reg. 55,295.

<sup>80</sup> 1 U.S.C. § 8.

labor just to kill the child when she is partially born.<sup>81</sup> Federal law bars the use of the United States postal service or private carriers from mailing abortion-inducing drugs, including the chemical abortion regimen of mifepristone and misoprostol.<sup>82</sup>

Over the past half century, Congress has enacted numerous statutes protecting medical professionals that conscientiously object to taking a human life through abortion, including the Church Amendment,<sup>83</sup> Coats-Snowe Amendment,<sup>84</sup> and Weldon Amendment.<sup>85</sup> There are conscience protections throughout federal law, such as in the Danforth Amendment to Title IX's definition of sex discrimination,<sup>86</sup> amendments regulating managed-care providers in the Medicare and Medicaid programs,<sup>87</sup> and Affordable Care Act provisions regarding insurance.<sup>88</sup>

Congress restricts public funding of elective abortion. The Hyde Amendment has been a cornerstone of every federal health and welfare appropriations bill since Congressman Henry Hyde first proposed it in 1976.<sup>89</sup> The present version of the Hyde Amendment restricts abortion funding except for medical emergencies and cases of rape or incest.<sup>90</sup> Congress also restricts abortion in other areas. The Dornan Amendment prohibits the District of Columbia from expending public funds for abortion except if the mother's life is at risk or in cases of rape or incest.<sup>91</sup> Federal programs often include explicit abortion funding prohibitions, such as in Title X, which restricts recipients from using public funds "in programs where abortion is a method of family planning."<sup>92</sup>

These statutes show that federal policy opposes abortion violence. Moreover, Congress has repeatedly rebuffed anti-life bills that would concoct legal protections

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<sup>81</sup> 18 U.S.C. § 1531.

<sup>82</sup> 18 U.S.C. § 1461; 18 U.S.C. § 1462.

<sup>83</sup> 42 U.S.C. § 300a-7.

<sup>84</sup> 42 U.S.C. § 238n.

<sup>85</sup> See, e.g., Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, div. H, tit. V § 507(d)(1), 134 Stat. 1182, 1622 (2020). Since 2004, every HHS appropriations bill has readopted the Weldon Amendment. Office for Civil Rights, *Conscience Protections for Health Care Providers*, U.S. Dep't of Health & Hum. Servs. (last reviewed Sept. 14, 2021), <https://www.hhs.gov/conscience/conscience-protections/index.html>.

<sup>86</sup> 20 U.S.C. § 1688.

<sup>87</sup> Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 31–32 (2010); see 42 U.S.C. § 1395w-22(j)(3)(B) (protecting conscience rights in Medicare program) and 42 U.S.C. § 1396u-2(b)(3)(B) (codifying conscience protections in Medicaid program).

<sup>88</sup> 42 U.S.C. § 18023(b)(4) ("No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.")

<sup>89</sup> See Pub. L. No. 94-439 tit. II, § 209, 90 Stat. 1418, 1434 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.")

<sup>90</sup> Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H., tit. V, §§ 506–507, 136 Stat. 49, 496 (2022).

<sup>91</sup> *Id.* div. G, tit. VIII, § 810, 136 Stat. 309.

<sup>92</sup> 42 U.S.C. § 300a-6.

for abortion.<sup>93</sup> Again, there is no federal right or interest in elective abortion following the *Dobbs* decision. Rather, federal abortion policy protects infants born-alive after a botched abortion, prohibits gruesome partial-birth abortions, bans the mailing of abortion-inducing drugs, safeguards conscientious objections towards abortion, and restricts the public funding of abortion. Accordingly, federal policy is pro-life policy. The IFR lacks good cause because it allows abortion on demand within the medical benefits package and CHAMPVA, thus, subverting Congress’ anti-abortion policy stance.

B. The IFR Does Not Recognize the Government’s Legitimate Interest in the Unborn Child, and Moreover, Does Not Have the Power to Weigh Those Interests in the Abortion Issue.

Since pro-life States are abolishing abortion in the wake of *Dobbs*, the “VA is therefore taking this action [*i.e.*, promulgating the IFR] to avert imminent and future harm to the veterans and CHAMPVA beneficiaries whose interests Congress entrusted VA to serve.”<sup>94</sup> Yet, the IFR does not recognize other legitimate governmental interests, including the interest in safeguarding preborn human life, that arise when legislatures consider abortion legislation.<sup>95</sup> Accordingly, the IFR lacks good cause because it does not acknowledge the complex governmental interests present in the abortion issue, nor does the VA have the power to weigh those interests.

According to the Supreme Court in *Dobbs*, “[o]rdered liberty sets limits and defines the boundary between competing interests.”<sup>96</sup> *Roe* and *Casey* had arbitrarily drawn a line between the interests of a woman seeking an abortion and the interests in prenatal human life. Legislatures may seek to draw different lines between these interests. Accordingly, *Dobbs* returned the abortion issue to the democratic process, but particularly noted that *Congress and the States* have legitimate interests, including:

respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.<sup>97</sup>

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<sup>93</sup> See, e.g., Women’s Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021) (seeking to extend legal protection to abortion but failing to pass the Senate); Women’s Health Protect Act of 2019, H.R. 2975, 116th Cong. (2019) (seeking to extend legal protection to abortion but failing to pass the House).

<sup>94</sup> 87 Fed. Reg. 55,288.

<sup>95</sup> 87 Fed. Reg. 55,288–55,296.

<sup>96</sup> *Dobbs*, 142 S. Ct. at 2257.

<sup>97</sup> *Id.* at 2284.

Although the VA recognizes that abortion implicates maternal health and safety, the IFR lacks good cause because it does not acknowledge other governmental interests that are critical to the abortion issue. Nevertheless, the IFR claims “that State and local laws and regulations that would prevent VA health care professionals from providing needed abortion-related care, as permitted by this rule, are preempted.”<sup>98</sup> In other words, the VA is asserting preemption without considering the complex interaction of governmental interests present in the abortion issue. Accordingly, the IFR lacks good cause because it blatantly disregards these important governmental interests.

The IFR further lacks good cause because the VA has not weighed the complex interaction between these interests. Nor could it. The power to weigh these competing interests clearly belongs to Congress and the States, not for any federal agency to arrogate without explicit authorization. Congress has not delegated the power to weigh interests in prenatal human life, elimination of gruesome medical procedures, preservation of the integrity of the medical profession, mitigation of fetal pain, nor prevention of eugenics-based abortions.

#### IV. Conclusion

For the foregoing reasons, the VA does not have the legal authority to include abortion on demand within the medical benefits package and CHAMPVA. Americans United for Life urges the VA to abandon the IFR as the agency has no legal authority to impose a radical abortion policy upon the nation.

Sincerely,

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Litigation Counsel  
AMERICANS UNITED FOR LIFE

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<sup>98</sup> 87 Fed. Reg. 55,293.