



November 17, 2022

The Honorable Denis R. McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Re: Interim Final Rule, Reproductive Health Services, 87 Fed. Reg. 55287
(September 9, 2022)

Dear Secretary McDonough:

Several weeks ago the Department of Veterans Affairs adopted an interim final rule that purports to authorize taxpayer-funded abortions and abortion counseling for certain veterans and beneficiaries. *See* Reproductive Health Services, 87 Fed. Reg. 55287 (Sept. 9, 2022). The rule replays what we, the Attorneys General of 15 States, have come to expect from this Administration's lawless and hasty executive actions taken at the behest of its political base. The rule is unlawful. It will not stand in the way of the duly enacted laws of our States or our commitment to enforcing those laws. We will watch closely the VA's use of this rule and we are prepared to act decisively if the VA violates state law, breaks its pledge that the rule operates only in "limited circumstances," *id.* at 55291, 55295, or defies any other legal requirements.

Federal law authorizes the Secretary of Veterans Affairs to "furnish hospital care and medical services which the Secretary determines to be needed" to certain veterans. 38 U.S.C. § 1710(a)(1). The VA implements its general treatment authority for veterans through regulations defining its "medical benefits package." 38 C.F.R. § 17.38. The Secretary may also provide medical care for certain spouses, children, survivors, and caregivers of veterans, known as CHAMPVA beneficiaries. 38 U.S.C. § 1781. Such care must be provided "in the same or similar manner and subject to the same or similar limitations as medical care is furnished" to family

members of active-duty personnel and others under the Department of Defense's TRICARE (Select) program. *Ibid.*

Before the VA adopted the rule at issue, VA regulations expressly excluded “[a]bortions and abortion counseling” from the medical benefits package offered to qualifying veterans. 38 C.F.R. § 17.38(c)(1) (effective until Sept. 9, 2022). These regulations aligned with statutory limitations directing the Secretary to provide veterans with “health care services” that cover “[g]eneral reproductive health care ... but not ... abortions.” Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 106(a)(3), 106 Stat. 4943, 4947 (1992). VA regulations also “specifically excluded” from the medical coverage for CHAMPVA beneficiaries “[a]bortion” (“except when a physician certifies that the life of the mother would be endangered if the fetus were carried to term”) and “[a]bortion counseling.” 38 C.F.R. § 17.272(a)(64), (65) (effective until Sept. 9, 2022). The exclusion for CHAMPVA beneficiaries aligned with federal law governing TRICARE, which bars use of DOD funds or facilities for abortion “except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.” 10 U.S.C. § 1093(a) & (b).

The VA has now changed course. On September 9, 2022, the VA adopted the interim rule, greenlighting taxpayer-funded abortions and abortion counseling for certain veterans and beneficiaries. Reproductive Health Services, 87 Fed. Reg. 55287. The rule amends the longstanding VA regulations described above to provide abortions in purportedly “limited circumstances” “when the life or health of the pregnant veteran [or beneficiary] would be endangered if the pregnancy were carried to term” or “when the pregnancy is the result of an act of rape or incest.” *Id.* at 55291, 55292. The rule also provides for abortion counseling “to aid a pregnant individual in making a decision about an unwanted pregnancy” and “to help the pregnant individual implement the decision.” *Id.* at 55292. The VA claims that the rule preempts any “State or local civil or criminal law that restricts, limits, or otherwise impedes a VA professional’s provision of care permitted by” the rule. *Id.* at 55294.

This rule is deeply flawed. It rests on a claim of legal authority that the VA does not have and it purports to override duly enacted state laws on matters within traditional state authority. We are prepared to respond decisively and to enforce the laws of our States. We emphasize three points.

First, the VA lacks authority to authorize VA-provided abortions. The central law here is the Veterans Health Care Act of 1992. That law seeks to (among other things) “improve health care services for women veterans,” “improve preventive health services for veterans,” and “make other improvements in the delivery and administration of health care by the [VA].” Pub. L. No. 102-585, 106

Stat. 4943. But, consistent with other longstanding federal laws, that Act does not authorize abortions. Section 106(a)(3) of the Act authorizes the VA Secretary to provide “health care services” that cover “[g]eneral reproductive health care ... , *but not including* under this section infertility services, *abortions*, or pregnancy care (including prenatal and delivery care), except for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition.” *Id.* at 4947 (emphases added). Section 106 forecloses the rule here.

The VA claims that Section 106’s “under this section” language means that it “did not limit” the VA’s authority under other laws. 87 Fed. Reg. at 55289. But Section 106 by its terms applies to “hospital care and medical services *under chapter 17 of title 38, United States Code*,” 106 Stat. at 4947 (emphasis added)—which contains the provisions on which the rule relies. Nor is there merit to the VA’s suggestion that the Veterans’ Health Care Eligibility Reform Act of 1996 “effectively overtook” Section 106. 87 Fed. Reg. at 55289. The VA says that that 1996 law “made major changes to eligibility for VA health care” and replaced the existing “patchwork of eligibility criteria” with a “single, streamlined eligibility provision” for VA healthcare benefits. *Ibid.* But the VA does not point to any text actually repealing or replacing Section 106. “[R]epeals by implication are not favored.” *Posadas v. Nat’l City Bank of New York*, 296 U.S. 497, 503 (1936). “[T]he intention of the legislature to repeal must be clear and manifest,” *ibid.*—and the 1996 law shows no such intention. *Cf. Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”).

Second, even if the VA had the authority it claims, the rule would not simply displace the many state laws regulating and restricting abortion. Supreme Court precedent recognizes that “[t]he Constitution’s Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it.” *United States v. Washington*, 142 S. Ct. 1976, 1982 (2022). But the Court takes “a functional approach to claims of governmental immunity, accommodating of the full range of each sovereign’s legislative authority.” *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion). “State tax laws, licensing provisions, contract laws, or even a statute or ordinance regulating the mode of turning at the corner of streets ... regulate federal activity in the sense that they make it more costly for the Government to do its business.” *Id.* at 434 (internal quotation marks omitted). But for decades the Supreme Court has “decisively rejected the argument that any state regulation which indirectly regulates the Federal Government’s activity is unconstitutional.” *Ibid.*; *see also South Carolina v. Baker*, 485 U.S. 505, 520 (1988) (noting that this theory “has been thoroughly repudiated”).

The VA maintains that the rule displaces any state laws that “impede” VA employees who perform functions under the rule. 87 Fed. Reg. at 55294. But neutrally applicable state laws that impose burdens equally “are but normal incidents of the organization within the same territory of two governments.” *Helvering v. Gerhardt*, 304 U.S. 405, 422 (1938); *see also Washington*, 142 S. Ct. at 1984 (Under current doctrine, “a state law is ... no longer unconstitutional just because it indirectly increases costs for the Federal Government, so long as the law imposes those costs in a neutral, nondiscriminatory way.”). State laws generally restricting abortion do not directly regulate the federal government or single it out for unfavorable treatment. Rather, they represent legitimate exercises of traditional state authority to “serve legitimate state interests” in unborn life, women’s health, the medical profession’s integrity, and more. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2284 (2022). States are entitled to adopt and fully enforce such laws.

We note that the rule permits abortions in circumstances in which state laws also permit abortions. State laws restricting abortion ubiquitously include provisions to protect a woman’s life and commonly include exceptions in other circumstances. *See, e.g.*, Miss. Code Ann. § 41-41-45(2) (exception to general abortion prohibition “where the pregnancy was caused by rape”). That state abortion laws already have such provisions underscores the gratuitous nature of this rule. And the fact that States already soundly legislate on this subject tends to confirm that the real motivation behind the rule is to create a mechanism for allowing purely elective abortions that States have appropriately prohibited or to send a political signal to the Administration’s political base—or both. Indeed, the Administration’s political allies have expressed their desire for the rule to create a federal abortion regime in defiance of the democratic lawmaking process. *See Comments on Interim Final Rule from Democrat Attorneys General to Dr. Shereef Elnahal, Under Secretary for Health, U.S. Department of Veterans Affairs* 1, 6 (Oct. 11, 2022) (available at <https://bit.ly/3hjLGU1>) (lauding the rule for “removing barriers” and greenlighting abortions “without contending with administrative or legal obstacles”).

Third, we will be watching closely the VA’s use of this rule and we will be ready to act if the VA defies the law. We will hold the VA to its promise that the rule authorizes abortions only in “limited circumstances.” 87 Fed. Reg. at 55291, 55295. We reiterate that the rule applies only to qualifying veterans and CHAMPVA beneficiaries. *Id.* at 55287. The rule applies only “when the life or health of the pregnant [woman] would be endangered if the pregnancy were carried to term” or “when the pregnancy is the result of an act of rape or incest.” *Id.* at 55291, 55292. The rule applies only in VA facilities. *See id.* at 55294. And we stress that the rule also must be implemented consistently with an individual’s right to

refuse participation in abortion-related services on the grounds of conscience or religious belief. *See, e.g.*, U.S. Const. amend. I; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (prohibiting discrimination against federal employees on the basis of religion); 42 U.S.C. § 238n(a) (prohibiting the federal government, and state and local governments receiving federal funds, from discriminating against healthcare providers that refuse to perform, or provide referrals for, abortions); Miss. Code Ann. § 41-41-215(5) (permitting healthcare providers to decline procedures for reasons of conscience). In the face of its commitments, the VA assumed that its rule would result in about 1,000 “cases” each year. Dep’t of Veterans Affairs, Regulatory Impact Analysis for RIN 2900-AR57(IF), Reproductive Health Services 3 (Sept. 1, 2022) (estimating 10,578 abortion treatment expenditures between 2023 and 2032). The VA also claimed that covered abortions occurring beyond the early stages of pregnancy “will be very infrequent.” *Id.* at 4; *see also id.* at 5 (assuming 99 percent of cases will occur in the first trimester and 1 percent will occur in the second trimester).

We will hold you to the VA’s representations about the rule’s limited application. We will not allow you to use this rule to erect a regime of elective abortions that defy state laws. We stand ready to move decisively against departures from the rule’s terms or its promises. And we will enforce our duly enacted state laws and hold you accountable for violations of federal law. Those who perform abortions based on the interim final rule—and in defiance of state or federal laws—do so at their own risk.

“Abortion presents a profound moral question” that is entrusted to “the people and their elected representatives” to address. *Dobbs*, 142 S. Ct. at 2284. Like many of the Administration’s abortion-related efforts, this new rule is an unlawful attempt to wrest that authority from the people. That attempt will fail.

Respectfully,



Lynn Fitch
Attorney General of Mississippi



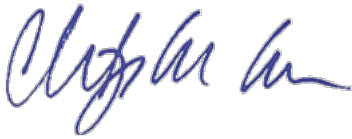
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Attorney General of Arizona



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Attorney General of Arkansas



Ashley Moody
Attorney General of Florida



Christopher M. Carr
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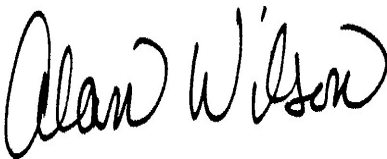
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Attorney General of Nebraska



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Attorney General of North Dakota



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Attorney General of Ohio



Alan Wilson
Attorney General of South Carolina



Jonathan Skrmetti
Attorney General of Tennessee



Ken Paxton
Attorney General of Texas



Sean D. Reyes
Attorney General of Utah

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
Attorney General of West Virginia

cc: Dr. Shereef Elnahal, Under Secretary for Health, Department of Veterans
Affairs