Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, D.C. 20420

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

Dear Sir or Madam:

The Biden administration announced on Friday, September 2, 2022, an upcoming interim final rule (IFR) for the Department of Veterans Affairs (VA). The IFR, published one week later on Friday, September 9, 2022, violates federal and state laws by expanding abortion on demand and pro-abortion counseling through the VA, making abortion available for hundreds of thousands of veterans and their beneficiaries, effective immediately. The new rule includes a broad, undefined "health" exception that imposes abortion on demand at the VA even in states that have taken legal action to protect unborn children and their mothers. We oppose the IFR on policy grounds, because of its clear violations of federal statute, and we question the IFR on procedural grounds, finding no basis for good cause for this interim final rule.

Since the passage of the Veterans Health Care Act of 1992, the Department of Veterans Affairs has been statutorily prohibited from covering abortions, a statute that was later underscored through federal regulation. In response to testimony last year from Secretary McDonough in which he asserted discretion in this matter, Republican members of the House Committee on Veterans' Affairs reminded the administration that federal law—not only regulations—prohibit the VA from offering abortion or counseling for abortion. Veterans Affairs Secretary Denis McDonough also failed to respond to a letter from U.S. Sen. James Lankford (R-OK) showing the illegality of the proposed rule.

The most egregious policy in Secretary McDonough's IFR is the addition of a broad and undefined health exception for pregnant women through both TRICARE (Select) and CHAMPVA. In *Doe v. Bolton*, decided by the United States Supreme Court (SCOTUS) on the same day as *Roe v. Wade*, SCOTUS defined a health exception for abortion to include virtually any reason: "physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health." A health exception, therefore, essentially allows for abortion on demand, provided the mother can get a medical professional—presumably the abortion provider—to agree that it would be *in any way* "beneficial" for her to have an abortion. There is nothing in the IFR to impose a narrower definition. Therefore, the undefined health exception essentially means the VA is now providing abortion on demand for veterans and their beneficiaries, in violation of federal law. And because there is no gestational limit for this health exception, abortion can be excused under this IFR for essentially any reason, through all nine months of pregnancy.

In the IFR, the VA argues that the Deborah Sampson Act of 2020 permits them to include abortion in their benefits package. However, that Act carefully defined health care as "the health care and services included in the medical benefits package provided by the Department as in effect on the

day before the date of the enactment of this Act."[1] On that day, January 5, 2021, "health care and services" did not include (and had not included) abortion. Contrary to the VA's assertion, then, the Deborah Sampson Act proves that abortion must continue to be excluded.

Because there is no authorizing federal appropriation for abortions under the VA, under the Antideficiency Act,[2] the Agency is not permitted to use federal funds for this purpose.

Though there are limited instances in which a state's laws may be preempted by the VA, there is no instance in which a state's laws may be preempted by the VA asserting a rule that breaks federal law. An illegal federal rule's preemption of state laws is therefore also a violation of state laws.

Furthermore, use of an IFR rather than the typical rulemaking process is not warranted. Where citizens in states have determined through the democratic process the point an unborn child deserves legal protection should never justify truncating public comment on administrative action, especially considering the United States Supreme Court clearly articulated these policies decisions be made by elected representatives. Even if the existence of limits on abortion were sufficient grounds for agency rulemaking, the pace of enacting such protections fails to justify an IFR which limits input of the American people. Additionally, every state with pro-life protections allows for women to receive critical medical care when necessary. We celebrate the lives saved since the decision and will continue to work tirelessly to increase the number of unborn children that are protected.

This interim final rule proves that Secretary McDonough has caved to the demands of President Biden, Vice President Harris, and the radical abortion lobby, to aggressively push abortion access, regardless of how it violates state and federal laws regarding abortion. Abortion is not health care—in fact, it carries serious physical and mental health risks—and expanding abortion on demand into the VA is illegal. This is the latest egregious example of the pro-abortion extremism that has taken over the Democratic Party. President Biden himself used to agree taxpayers should never be forced to fund the destruction of innocent life. Now he is head of the most pro-abortion administration in history.

Since the *Dobbs* decision, more than a dozen states have taken action to protect life, with the potential to save more than 200,000 lives. Every state that has enacted strong pro-life laws allows necessary and timely medical treatment to save the life of a pregnant woman. There are no restrictions on lifesaving care for women.

This IFR violates federal and state laws with no justification or authority to do so. We urge the Department to rescind the IFR in order to comply with longstanding law.

Respectfully submitted,

Marjorie Dannenfelser
President
Susan B. Anthony Pro-Life America

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[1] Pub. L. No. 116-315, tit. V, subtit, A, §5101, 134 Stat. 5026
[2] Pub. L. 97-258, 96 Stat. 923