E.O. 12866 Meeting
Reproductive Health Services
Rulemaking RIN 2900-AS31

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Thank you for the opportunity to provide comments on OIRA's review of the rule, Reproductive Health Services (RIN 2900-AS31). The Biden administration's rule with this title (hereinafter, the "Biden abortion rule") allows the U.S. Department of Veterans Affairs to provide taxpayer-funded abortions to retired service members, their spouses, and their dependents. But women and children deserve real healthcare, not abortion. We thus urge the Trump administration to rescind this unlawful rule, which takes limited healthcare resources away from veterans in need.

A. The Need for Federal Regulatory Action

- There was, and still is, no need for the abortion rule that the Biden administration adopted in 2024. Thus, there is a need for this administration to rescind the Biden abortion rule.
    - The Biden administration rulemaking had one goal in mind: to provide abortion on demand across America after *Dobbs*—against state laws and the Supreme Court. The Biden administration categorized state laws restricting elective abortion to protect unborn life as "extreme," and proceeded to contravene those laws by abusing the VA's Congressional authority.[1] As the Biden administration's Office of Legal Counsel noted, "before the VA [. . .] issued its recent rule, the medical benefits package had expressly excluded abortions and abortion counseling."[2] But, after *Dobbs*, to begin providing taxpayer-funded abortions in VA facilities, regardless of contrary state laws, the Biden administration falsely equated beneficiaries' inability to access elective abortion up to birth with an "urgent risk to [beneficiaries'] lives and health."[3]

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[1] Biden-Harris Administration Continues the Fight for Reproductive Freedom, The White House (Mar. 7,2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/03/07/fact-sheet-biden-harris-administration-continues-the-fight-for-reproductive-freedom/.

[2] Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services, 36 Op. O.L.C. (Sep. 21, 2022), https://www.justice.gov/olc/file/1553271/dl?inline.

[3] Reproductive Health Services, 87 Fed. Reg. 55287-01, at 55288 (Sep. 9, 2022); Reproductive Health Services, 89 Fed. Reg. 15451 (Mar. 4, 2024).

- The Biden abortion rule claimed abortion was medically necessary under two circumstances: *first*, when the life or health of the pregnant beneficiary would be endangered if the pregnancy were carried to term, and *second*, when the pregnancy is the result of an act of rape or incest.[4] But no state prohibits the early delivery of an unborn child to preserve the life of the mother, and many states allow exceptions for rape or incest. So the main purpose of the Biden abortion rule was to preempt state law and provide taxpayer-funded abortions in the potentially limitless circumstances when the VA would consider a woman's health (including mental and emotional health) at issue.

B. Alternative Regulatory Approaches.

The Trump administration should consider several alternatives to the Biden abortion rule.

- *Rescind the Biden abortion rule*
  - The administration should choose the option of rescinding the Biden abortion rule, as it was unnecessary and it improperly sought to defy previous federal law, resist a Supreme Court decision, and infringe on state authority.
  - Because state law already allows treating the mother in pregnancies presenting risks to her life, there is no need to keep the Biden rule in place.
- *Rescind the related Office of Legal Counsel Memos*
  - In connection with this rulemaking, the Office of Legal Counsel (OLC) should rescind its memo "Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services."[5] The memo is a politically motivated document rather than a neutral analysis of legal authorities. It should be rescinded promptly, and it does not need to undergo notice and comment before that rescission occurs.
  - A related memo was similarly issued by OLC in the wake of *Dobbs* as a raw exercise of political rationalization instead of neutral legal judgment, and should similarly be rescinded. It is titled "Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized by Federal Law."[6] Its plain purpose was to support the view that because

[4] Reproductive Health Services, 87 Fed. Reg. at 55288.

[5] Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services, 46 Op. O.L.C. (Sep. 21, 2022), http://justice.gov/olc/file/1553271/dl?inline.

[6] Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized

OLC falsely concluded the Biden abortion rule was legal, states could not prosecute VA staff for committing abortions within a state where it is illegal under state law. This is demonstrated by the VA's final rule relying on this memo in response to comments.[7] This OLC memo infringes on state authority and should be rescinded.

C. Identifying and Measuring Costs

The Trump administration should consider the full range of costs and benefits imposed by the Biden abortion rule.

The only costs cognized by the Biden administration were the dollar expense of the abortion procedures and travel to abortion-providing facilities.[8] This narrow analysis ignored a broad array of foreseeable costs including economic costs, harms to women, harms to state interests, and impacts on the VA's ability to provide core services.

- *Microeconomic Costs: Value of Statistical Life Analysis*
  - In general, an agency must account for any changes to fatality risks among impacted populations.[9] Circular A-4 identifies the "value of a statistical life" (VSL) analysis as the preferred method to understand the impact of a regulatory rule involving mortality risk. But neither the interim nor final rule included a VSL analysis.
  - VSL analyses are used by economists, industries, and government agencies to quantify the impact of policy decisions. The analysis is grounded in the observation that a rational person will accept risks to their life when the potential benefit is high enough. To estimate the VSL impact of a regulation, you need two numbers: the statistical value of one life, and the number of lives expected to be gained or lost by the regulation. The product of those numbers multiplied together offers a useful (albeit crude) method of comparing alternative regulatory options.

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by Federal Law, 46 Op. O.L.C. (Aug. 12, 2022), https://www.justice.gov/d9/2022-11/2022-08-12-aca.pdf.

[7] Reproductive Health Services, 89 Fed. Reg. at 15459-60.

[8] Regulatory Impact Analysis for RIN 2900-AR57(F), U.S. Dep't of Veterans Affs., Off. of Regul. Policy & Mgmt., at 3 (Feb. 13, 2024).

[9] Circular No. A-4, Off. of Mgmt & Budget, at 49 (Nov. 9, 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/11/CircularA-4.pdf.

- The OMB Circular also states that "monetary values for children should be at least as large as the values for adults."[10] This calculation should equally include unborn children as a loss of life.
- Under the Biden administration, the VA expected to perform 1,000 abortions each year.[11] Thus, if the Department were to have adopted the same VSL estimate as the Department of Health and Human Services ($11.4 million per person), the total statistical cost of those abortions would have been $11.4 billion per year.[12] Even accounting for maternity leave avoidance, ($26,000 per abortion), the resulting top-line economic cost of this policy would still be a staggering $11.374 billion.[13]
- In 2023, the VA reported that it performed 88 abortions in the first year after implementing this policy (further revealing the imprecision of its regulatory analysis).[14] Even under this lower threshold, the VA rule still would impose a billion-dollar loss on the American people annually due to its extinguishing of unborn life.

- *Macroeconomic Costs due to Lowered Birthrates*
  - An agency has a duty to consider the macroeconomic impacts of birthrate-reducing regulatory actions such as providing elective abortions. Proponents of elective abortion tout increased labor force participation among women as their case in point. But this shortsighted analysis overlooks the long-term cost of reducing the birthrate.[15]

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[10] *Id*. at 50.

[11] Regulatory Impact Analysis for RIN 2900 - AR57(F), U.S. Dep't of Veterans Affs., Off. of Regul. Policy & Mgmt., at 5 (Feb. 13, 2024).

[12] Economic Cost of Abortion, Joint Economic Committee Republicans, at 4 (Jun. 15, 2022), https://www.jec.senate.gov/public/_cache/files/b8807501-210c-4554-9d72-31de4e939578/the-economic-cost-of-abortion.pdf.

[13] *Id*. at 5.

[14] *VA Says It Performed 88 Abortions in the Past Year, But Congress Again Threatens Subpoenas in Pursuit of More Details*, Military.com (Oct. 19, 2023), https://www.military.com/daily-news/2023/10/19/va-says-it-performed-88-abortions-past-year-congress-again-threatens-subpoenas-pursuit-of-more.html.

[15] *The Long-Term Decline in Fertility—and What It Means for State Budgets*, The Pew Charitable Trusts, at 7 (Dec. 5, 2022), https://www.pew.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets.

- Between 2007 and 2020, the United States' total fertility rate dropped to 1.64, well below the requisite 2.1 required to maintain a stable population.[16]
- Increased abortions means fewer births. And since "today's babies are tomorrow's workers and taxpayers," pro-abortion policies place our nation's labor force—and entire economic future—at great risk.[17]
- A Social Security Bulletin from 2010 found that low birth rates were the "dominant factor for the [expected] increased Social Security program cost over the next 75 years."[18] The same analysis discovered that changes in birth rates influenced Social Security solvency more than "real wage growth, productivity, labor force participation, price inflation, unemployment rates, and other economic factors."[19]
- In 2024, the Biden White House released a report recognizing that "[historically low fertility] places upward pressure on the debt-to-GDP ratio," negatively impacting our nation's fiscal health.[20]
- We recommend the VA use all available methods to assess the effect of birthrate changes on economic outcomes, including "aggregate (macro-economic) statistical analyses, microeconomic studies, and simulation modeling" to capture the full macroeconomic impact of its proposed policy.[21]

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[16] Paula Lantz, *The Social Determinants of Declining Birth Rates in the United States*, Milbank Quarterly Opinion, at 1 (Nov. 10, 2021), https://www.milbank.org/quarterly/opinions/the-social-determinants-of-declining-birth-rates-in-the-united-states-implications-for-population-health-and-public-policy/.

[17] Stephanie Murray, *How Low Can America's Birth Rate Go Before It's A Problem?* (Jun. 9, 2021), https://fivethirtyeight.com/features/how-low-can-americas-birth-rate-go-before-its-a-problem.

[18] Stephen Goss, *The Future Financial Status of the Social Security Program*, Social Security Bulletin, Vol. 70, NO. 3, AT 124 (2010), https://www.ssa.gov/policy/docs/ssb/v703/v70n3p111.pdf.

[19] *Id*.

[20] A First-Principles Look at Historically Low U.S. Fertility and its Macroeconomic Implications, The White House, (May 23,2024), https://bidenwhitehouse.archives.gov/cea/written-materials/2024/05/23/issue-brief-a-first-principles-look-at-historically-low-u-s-fertility-and-its-macroeconomic-implications/.

[21] Quamrul Ashraf et al., *The Effect of Fertility Reduction on Economic Growth*, Population and Development Review, 39(1), 97–130 (2013), https://pubmed.ncbi.nlm.nih.gov/25525283.

- *Harms to Women*
  - The Biden abortion rule neglected to consider how the provision of elective abortions would harm women.
  - In the first year since the IFR, two-thirds of the abortions performed by the VA were chemical abortions.[22] The drugs mifepristone and misoprostol are dangerous. The FDA's own label says that roughly 1 in 25 women who take the abortion drug will end up in the ER.[23] The FDA's label also says that up to 7% of women taking abortion drugs will require surgery.[24] Recent real-world data shows that this mifepristone-related ER rate may be as many as 22 times higher.[25]
  - OIRA should consider calculating these harms and the rule should explain how the agency will protect women from these harms.
- *Federalism Harms*
  - The government has an interest in safeguarding unborn human life, a truth even *Roe v. Wade* recognized.[26] *Dobbs* held that Congress and the States have legitimate interests, not just the protection of maternal health and safety, but also "respect for and preservation of prenatal life at all stages of development," as well as "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."[27]

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[22] *VA Says It Performed 88 Abortions in the Past Year, But Congress Again Threatens Subpoenas in Pursuit of More Details*, Military.com (Oct. 19, 2023), https://www.military.com/daily-news/2023/10/19/va-says-it-performed-88-abortions-past-year-congress-again-threatens-subpoenas-pursuit-of-more.html.

[23] FDA label, page 8, table 2 for ER visits, sNDA Approval [Rx ONLY] (COR-SNDA ACTION-05) (fda.gov), https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/020687s022lbl.pdf.

[24] FDA label, page 17, sNDA Approval [Rx ONLY] (COR-SNDAACTION-05) (fda.gov), https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/020687s022lbl.pdf ("About 2 to 7 out of 100 women taking Mifeprix will need a surgical procedure because the pregnancy did not completely pass from the uterus or to stop bleeding.").

[25] Jamie Bryan Hall & Ryan T. Anderson, *The Abortion Pill Harms Women: Insurance Data Reveals One in Ten Patients Experiences a Serious Adverse Event, Ethics and Public Policy Center* (Apr. 28, 2025), https://eppc.org/wp-content/uploads/2025/04/25-04-The-Abortion-Pill-Harms-Women.pdf.

[26] *Roe v. Wade*, 410 U.S. 113, 166 (1973).

[27] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022).

- The Biden abortion rule failed to justify its disregard for these state interests.
- The Biden abortion rule also failed to calculate the costs of precipitating a legal dispute between the state and federal governments over enforcement of state abortion laws where VA staff perform abortions in those states in circumstances where state law disallows those abortions.

- *Harm to the VA's Limited Capacity to Provide Care*
  - The Biden abortion rule also failed to consider its own resource limitations in the policy proposal. The Iraq and Afghanistan Veterans of America submitted a comment on the FR, noting their concern that "providing such non-medically necessary abortion services [. . .] will only exacerbate [health care] access problems."[28]
  - To evaluate the implementation of this rule, the OIG's Office of Healthcare Inspections conducted an on-the-ground study of VA facilities in 2023. Their interviews revealed significant "provider shortages, and challenges with [Veterans Health Administration] staffing and recruitment," particularly in areas "more likely to impact care that requires timely access to specialty providers."[29]
- *Threats to religious liberty*
  - The Biden administration's proposed rule made no mention of the clear threat to religious liberty of staff that can arise when abortion is introduced into a health system. The final rule acknowledged this in responding to comments but made no changes to the rule to ensure protections for religious liberty.[30]
  - As a result, the rule threatens harm to the religious liberty rights of staff, including economic harm if staff are pressured to be involved in or support provision of abortion, even in clerical or administrative ways. It is not adequate for an agency to merely declare, as the VA did, that it will comply with the Religious Freedom Restoration Act (RFRA) and the First Amendment.[31] Where a rule threatens religious liberty protections,

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[28] Nat'l Defense Committee Exec. Order 12866 Meeting on Reproductive Health Services (RIN 2900-AS31) (Mar. 24, 2024), https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=803342.

[29] Off. of Inspector Gen., Off. of Healthcare Inspections, Review of Veterans Health Administration Reproductive Health Services, Nat'l Review: 22-03931-226, at 18 (Sep. 28, 2023), https://www.vaoig.gov/sites/default/files/reports/2024-02/VAOIG-22-03931-226.pdf.

[30] Reproductive Health Services, 89 Fed. Reg. at 15468.

[31] *Id*.

the rule text needs to implement a clear exemption.

- The VA failed to sufficiently explain why the rule text should not include such an exemption. It stated that there is an agency policy for considering a request for a "reasonable accommodation," but it did not say those requests would be granted.[32] The standard under RFRA is not "reasonable accommodation," which is a Title VII standard that is much less protective of employees than the strict scrutiny test under RFRA. The VA's response to these comments was therefore inapposite, making it arbitrary and capricious.
- This omission is even more egregious given the Supreme Court's affirmation failure to consider the Religious Freedom Restoration Act in issuing a rule can violate the Administrative Procedure Act.[33] The fact that the VA may have implemented the rule in consideration of religious liberty issues is not an excuse for the agency failing to consider RFRA in the rulemaking itself.

D. Evidence for the Regulation's Purported Benefits

- *Weak scientific basis*
  - The Biden abortion rule provided a single scientific study to justify the provision of elective abortions. This speculative study, based on "difference in difference methodology [. . .] is hugely susceptible to study design bias."[34] The Biden abortion rule concluded that the rise in maternal mortality rates from 2005 to 2015 was caused by lack of access to elective abortion. The Biden abortion rule includes no basis, however, to conclude that providing elective abortions will reduce maternal mortality. This claim is especially important to defend considering the recent commensurate rise in chemical abortions, their harms, and their effect on maternal mortality.[35]

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[32] *Id*.

[33] *See Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 682 (2020).

[34] Am. Ass'n of Pro-Life Obstetricians & Gynecologists, Comment Letter on Reproductive Health Services Interim Final Rule, at 8 (Oct. 11, 2022), https://eppc.org/wp-content/uploads/2022/10/VA-IFR-American-Academy-of-Pro-Life-Obstetricians-and-Gynecologists.pdf.

[35] *Id*. at 5.

- *Comments requesting scientific data*
    - Multiple commenters requested the VA provide scientific data to defend its central claim that "unless VA removes existing prohibitions on abortion-related care and makes clear that medically necessary and appropriate abortion-related care is authorized, [. . .] beneficiaries will face serious threats to their health."[36]
    - The Department provided no supportive data in the final analysis. In particular, it did not identify how many women seeking an abortion are not otherwise able to obtain one.
    - The VA is obliged to publicly release "the underlying data that are pivotal to the conclusions of the regulatory analysis."[37] So we recommend the Department promptly publish any data on which the prior rule relied –although we suspect that the answer is that the VA relied on no data.

E. Specialized Analytical Requirements

- *Prohibition by Current Law*
    - A key reason to rescind the Biden abortion rule is its patent unlawfulness.
    - Congress established the general boundaries of VA authority when it passed the Veterans Health Care Act (VHCA) of 1992.[38] This statute granted the VA power to provide women with "general reproductive health care services [. . .] but not including under this section infertility services, abortions, or pregnancy care. . . ."[39] This prohibition, codified as a statutory note to 38 U.S.C. §1710, prohibits the VA from providing abortions.
    - Four years later, Congress granted the VA authority to exercise discretion in determining a patient's need for services when it passed the Health Care Eligibility Reform Act (HCERA) of 1996. [40] The HCERA broadened the Secretary's discretion, but did not override the categorical prohibitions established in VHCA Section 106. Congress left Section 106 of the VHCA intact.

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[36] *Id*. at 4.

[37] Circular No. A-4, Off. of Mgmt. & Budget, at 84.

[38] Veteran's Health Care Act of 1992, Pub. L. 102-585, 106 Stat 4943 (codified in 38 U.S.C. §1710 note).

[39] *Id*. §106.

[40] Veterans' Health Care Eligibility Reform Act of 1996, Pub. L. No. 104-262, 110 Stat. 424 (codified at 38 U.S.C. §§ 1710-1720L).

- *The Biden administration's "effectively overtaking" argument is a novel and unsubstantiated legal theory that should be abandoned.*
    - The Biden administration, however, claimed that HCERA effectively overtook and thus repealed the VHCA's statutory prohibition and "[established] a new standard to focus on medical necessity as 'the sole criterion of eligibility for VA hospital care and medical services.'"[41]
    - But HCERA changed how VA clinicians determined care for individual patients; it did not overtake the law determining what care they could provide.
    - These two statutes can be–and should be–read together in harmony. It's a "cardinal rule" of statutory interpretation "that repeals by implication are not favored" and "[w]here there are two acts upon the same subject, effect should be given to both, if possible."[42]
    - Just consider the Act's name: Health Care *Eligibility* Reform Act (emphasis added). The legislation was intended to simplify the complex decision processes determining when and if a particular beneficiary was eligible for a service offered by the VA. Its authors took care to remind that, "although the Act would revise substantially the body of law governing VA health-care eligibility, its impact would be less far-reaching in practice than it appears on its face."[43]
- *"Under this section" does not restrict VHCA Section 106*
    - The Biden administration also attempted to wiggle out from Section 106's abortion prohibition by claiming that the words "under this section" limited its application to activity undertaken under that statute's authority.
    - But the abortion prohibition in Section 106 is within the section entitled "General Authority" and establishes the boundaries of the VA's authority to provide medical services to women.[44] This section is the one and only statutory authority for the VA Secretary to furnish reproductive care to women and it expressly excludes abortion from those services.

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[41] Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services, 46 Op. O.L.C. at 7-8.

[42] *Id*. at 3.

[43] H.R. Rep. No. 104-690, pt. 1 (1995).

[44] Pub. L. No. 102-585, Title I, § 106.

  - At most, "under this section" would clarify that, if Congress expressly allowed the VA to perform abortions in another statute (which it has not), Section 106's prohibitions would be partially constrained.

- *The text of HCERA honored statutory barriers like Section 106*
  - HCERA did not repeal every preexisting statutory care prohibition in the VHCA. We know to the contrary: that the Act's authors saw these prohibitions as remaining in place, absent an express repeal in HCERA, because they explicitly overturned one prohibition (but not others) in the HCERA. Before the Act, the VHCA prohibited the VA from providing nonservice-connected veterans with prosthetics.[45]
- *The VA's practice of offering IVF does not invalidate Section 106*
  - The Biden abortion rule also claimed that the Department's practice of providing in-vitro fertilization justifies the rule. In 2016, Congress passed the Murray Amendment, which explicitly allowed the VA to provide IVF to service members in some cases, which undid the prior specific IVF prohibition in Section 106.[46]
- *Assimilative Crimes Act*
  - As noted above, DOJ's OLC issued a politically biased memo incorrectly concluding that VA staff could commit abortions that are otherwise illegal in the states where VA hospitals sit. This violates the Assimilative Crimes Act, which makes the actions of federal officials illegal if they are illegal under state law where the federal official's activity is not authorized by federal law. As just described, federal law does not authorize abortions at the VA. Therefore, VA staff performing abortions under the Biden abortion rule are violating the Assimilative Crimes Act. This factor needs to be considered in the rescission of the Biden rule.
- *Federalism – Major Questions Doctrine*
  - The Supreme Court has established a basic presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.[47] Abortion is a matter of "staggering" "economic and political significance" and "presents a profound moral question" that has dominated American political debate for half a century.[48] So under the major questions doctrine, the VA must show that an allowance to provide

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[45] H.R. Rep. No. 104-690, pt. 1, at 5 (1995).

[46] Pub. L. No. 114-223, 130 Stat. 897 (2016).

[47] *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

[48] *See Biden v. Nebraska*, 600 U.S. 477, 502 (2023); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

abortions was unmistakably clear in the text of the originating statute at the time of enactment.[49] The Biden abortion rule did not.

- *Federalism – States' Constitutional Authority*
    - *Dobbs* established that the constitutional authority to regulate abortion lies solely with the States. Even if Congress did delegate to the VA authority to allow elective abortions (which it did not), such a grant would violate States' constitutional power to regulate abortion.

[49] *West Virginia v. EPA*, 597 U.S. 697 at 723.