October 11, 2022

Dr. Shereef Elnahal
Under Secretary of Health
Department of Veteran Affairs
810 Vermont Avenue NW
Washington, DC 20420

Submitted electronically via regulations.gov

Re: Reproductive Health Services Interim Final Rule, RIN: 2900-AR57

Dear Dr. Elnahal:

We are three law professors who teach and research in constitutional law, health law, and family law. Between us, we have decades of experience writing about abortion law and reproductive health. Most recently, we wrote a paper, *The New Abortion Battleground*, cited by the Supreme Court's dissent in *Dobbs v. Jackson Women's Health Organization* and forthcoming in the Columbia Law Review, which discusses preemption at length. We appreciate the opportunity to comment on the Department of Veterans Affairs' ("Department") Interim Final Rule on Reproductive Health Services, 87 Fed. Reg. 55287 (Sept. 9, 2022).[1]

We commend the Department for providing access to abortions and abortion counseling for veterans and beneficiaries of the Civilian Health and Medical Program of the Department of Veterans Affairs ("CHAMPVA") who are pregnant as a result of rape or incest or whose life or health would be endangered by carrying a pregnancy to term. Our comments below expand on the Department's finding that any attempts by states to criminalize or otherwise prevent the Department and its employees from providing the authorized reproductive health services will be invalid under the Supremacy Clause of the United States Constitution.[2]

There are two different bases for this conclusion under the Supremacy Clause. First, a state law "may conflict with an affirmative command of Congress," in which case the state law is preempted by the federal one. *North Dakota v. United states*, 495 U.S. 423, 434 (1990). And second, "[t]he law may regulate the Government directly or discriminate against it," violating what

[1] This comment letter was prepared with the assistance of Kristen Miller of the Democracy Forward Foundation.

[2] To the extent that any such abortion care is provided on federal property that is an exclusive enclave, state law likely does not apply. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 Colum. L. Rev. at 67-74 (forthcoming 2023). Though the Assimilative Crimes Act incorporates some state criminal laws into federal law for this purpose, the Act has never been applied in the abortion law context and does not apply when the federal government has a policy of protecting the conduct criminalized by the state. *See Lewis v. United States*, 523 U.S. 155, 164 (1998). Here, because the federal government protects abortion services to a limited extent through the FDA's approval of mifepristone for abortion, state criminal laws should not apply on exclusive federal enclaves.

is known as the intergovernmental immunity doctrine. *Id.* As both the Interim Final Rule and the Office of Legal Counsel of the United States Department of Justice recognize, state laws that would prevent the Department from providing the healthcare at issue in this Rule are preempted and otherwise inapplicable to the Department under the Intergovernmental Immunity doctrine. 87 Fed. Reg. at 55,294.[3]

I. The Interim Final Rule preempts state laws that would prevent the Department from providing the authorized healthcare.

State laws banning abortion even in the context of rape, incest, life or the health of the pregnant person (or laws that except rape, incest, life or health of the pregnant person more narrowly than the Department) are unenforceable against the Department because they are preempted by the Interim Final Rule and its underlying statutes.

Preemption under the Supremacy Clause occurs in three circumstances. "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. Third, "state law is pre-empted to the extent that it actually conflicts with federal law." *Id.* The Supreme Court "has found [conflict] pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation omitted).

In every preemption case, "the purpose of Congress is the ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). When that purpose is implemented by rulemaking, "[f]ederal regulations have no less preemptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Thus, "[w]here Congress has directed an administrator to exercise his discretion" and "the administrator promulgates regulations intended to pre-empt state law, the court[] . . . 'should not disturb [the regulation] unless it appears from the statute or legislative history that the [rulemaking] is not one that Congress would have sanctioned.'" *Id.* at 154 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). In other words, "[a] preemptive regulation's force does not depend on express authorization to displace state law." *Id*. "Rather, the question . . . [is] whether the [agency] meant to preempt [state] law and, if so, whether that action is within the scope of the [agency's] delegated authority." *Id.*

Further, while courts normally apply a presumption against preemption when Congress "has legislated . . . in a field which the States have traditionally occupied," *Wyeth*, 555 U.S. at 565, that presumption does not apply where, as here, the "state law [] would control federal operations," *Geo Group, Inc. v. Newsom*, -- F.4th--, No. 20-56172, 2022 WL 4459854, at *11 (9th Cir. Sept. 26, 2022); *cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (declining to apply the presumption against preemption to a state cause of action for fraud against the FDA

[3] *Intergovernmental Immunity for the Department of Veterans Affairs and its Employees When Providing Certain Abortion Services*, 46 Op. O.L.C. --, Slip Op. at 1 (Sept. 21, 2022), https://www.justice.gov/sites/default/files/opinions/attachments/2022/09/22/2022-09-21-va_immunity_for_abortion_services.pdf.

because "the relationship between a federal agency and the entity it regulates is inherently federal in character"). It is incontrovertible that the Department has exclusive control over the medical benefits package for veterans and the CHAMPVA.

Applying these principles here, the plain text of the Interim Final Rule indicates that the Department intends for it to have preemptive effect. As the Rule explains, "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" because such laws pose an obstacle to the Rule's purpose to provide those services. *See* 87 Fed. Reg. at 55,293. This is consistent with preexisting Department regulations related to preemption, which have determined that State and local laws that conflict with the Department's ability to provide "complete health care and hospital services to beneficiaries in all States . . . are without any force or effect[.]" 38 C.F.R. § 17.419(c).

Nor is there any question that the Interim Final Rule "is within the scope of the [Department's] delegated authority." *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 154. With respect to veterans, the Department's general treatment authority mandates that the Department "*shall* furnish" certain veterans—such as those with qualifying service-related disabilities—with "hospital care and medical services which the Secretary determines to be needed[.]" 38 U.S.C. § 1710(a)(1),(2) (emphasis added). With respect to all other veterans, the Department "may . . . furnish hospital care [and] medical services . . . which the Secretary determines to be needed," subject to certain limitations. *Id.* § 1710(a)(3). Here, the Secretary has reasonably determined in the Interim Final Rule that the approved abortion-related services are needed and not subject to statutory limitations. 87 Fed. Reg. at 55,291-93. Providing such services therefore clearly falls within the Department's statutory authority under Section 1710.[4]

Likewise, the Department "is authorized to provide medical care" to CHAMPVA beneficiaries "in the same or similar manner . . . as medical care" provided by the Department of Defense to active-duty family members and others under the TRI-CARE (select) program. *Id.* § 1781(a), (b). Under Department regulations, CHAMPVA services include "medical services and supplies that are medically necessary and appropriate[.]" 38 C.F.R. § 17.270(b). The Interim Final Rule's authorization of the identified abortion-related services for CHAMPVA beneficiaries fits within this authority because the Department has reasonably determined (1) that the identified services are sufficiently similar to those provided under the TRI-CARE program, 87 Fed. Reg. at 55,290-91, and (2) that such services are medically necessary and appropriate, *id.* at 55,291-93.[5]

In sum, because the Department unequivocally intends to displace conflicting state law with the Interim Final rule—which is itself a lawful exercise of the Department's statutory authority—any state laws that would prevent Department health officials from providing the authorized care are preempted. *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-54; *see also Geo Group, Inc.*, --F.4th--, 2022 WL 4459854 at *12 ("interference with the discretion that federal law delegates to federal officials goes to the heart of obstacle preemption") (collecting cases); *cf. United States v. Idaho*, --F.Supp.3d--, 2022 WL 3692618 (D. Idaho Aug. 24, 2022) (issuing a partial preliminary injunction against an Idaho abortion ban that lacked a health exception on the

[4] *See also* OLC Opinion, *supra* note 3, at 5-9.

[5] *Id.* at 8-9.

ground that it was likely preempted by a federal law requiring hospitals to provide medically necessary abortion care more broadly).

II. The Department enjoys intergovernmental immunity from state laws that would prevent the Department from providing the healthcare authorized by this Rule.

Even if the state laws identified above are not preempted, the Supreme Court has repeatedly confirmed that the Supremacy Clause "guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914)). As the seminal case *McCulloch v. Maryland* explains, "[i]t is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." 17 U.S. 316, 427 (1819). States therefore have "no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress[.]" *Id.* at 436.

Most recently, the Court has summarized this doctrine as "prohibiting state laws that *either* 'regulat[e] the United States directly *or* discriminat[e] against the Federal Government or those with whom it deals[.]'" *United States v. Washington*, 142 S. Ct. 1976, 1982 (2022) (quoting *North Dakota v. United States*, 495 U.S. at 435). With respect to state laws that directly regulate the federal government, the Court has found that states may not enforce laws against the government that "seek[] to regulate the federal function itself."[6]

For example, in *Johnson v. Maryland*, the Supreme Court held that a state could not require a federal postal employee to obtain a state driver's license "before performing his official duty in obedience to superior command." 254 U.S. 51, 55 (1920). In so deciding, the Court drew the distinction that "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment." *Id.* at 56. A federal employee could "very well" be subject to "general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets." *Id.* However, the Court was unequivocal that "even the most unquestionable and universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." *Id.* at 56-57. Thus intergovernmental "immunity . . . from state control . . . extends to" laws that "lay[] hold of [federal employees] in their specific attempt to obey orders." *Id.* at 57.

The Court has applied this doctrine in many different contexts. *See, e.g.*, *Mayo v. United States*, 319 U.S. 441, 447-48 (1943) (state could not impose inspection fees on the government's

[6] *See also Immunity of Smithsonian Institution from State Insurance Laws*, 21 Op. O.L.C. 81, 85 (1997) (citing *North Dakota*, 495 U.S. at 436–37 (plurality opinion)); *see also Geo Group, Inc. v. Newsom*, -- F.4th--, No 20-56172, 2022 WL 4459854, *7 (9th Cir. Sept. 26, 2022) (rehearing en banc) (collecting cases and concluding that Court has found state laws unenforceable against the federal government if they "would control its operations").

distribution of fertilizer because such fees functioned "like a tax . . . on the United States itself"); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (holding that a state could not enforce its law regarding the use of oleomargarine against a federal officer who served oleomargarine as part of soldiers' rations because the conduct at issue was the "very matter of administration . . . approved by Federal authority"); *Cunningham v. Neagle*, 135 U.S. 1 (1890) (state could not enforce its murder laws against a U.S. Marshal who killed a man while defending a Supreme Court Justice during the course of duty).

The Department and its employees enjoy immunity from any state law that prohibits the healthcare services authorized by the Interim Final Rule. As the Rule explains at length, Congress has authorized the Department to provide the abortion-related care at issue to both veterans and CHAMPVA beneficiaries. 87 Fed. Reg. at 55,288-90.[7] Accordingly, any state law attempting to prevent the Department from providing those services would "regulate the United States directly," *Washington*, 142 S. Ct. at 1984, by "control[ling] the conduct of [federal employees] acting under and in pursuance of the laws of the United States," *Johnson*, 254 U.S. at 57. The enforcement of such laws against the Department is therefore prohibited by the Supremacy Clause.[8]

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Thank you for considering our submission. If you have any questions or would like to discuss the information in this comment, please contact kmiller@democracyforward.org, counsel for Professors Donley, Cohen, and Rebouché.

Sincerely,

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[7] *See supra,* page 3; *see also* OLC Opinion, *supra* note 3, at 5-9 (analyzing the Department's authority under Title 38 and concluding that "federal law authorizes [the] VA and its employees to provide the abortion and abortion counseling services specified in the rule").

[8] While Congress can waive the immunity provided by the Supremacy Clause—and thus authorize state laws that directly regulate the federal government—courts will only recognize such a waiver "to the extent there is a clear congressional mandate." *Washington*, 142 S.Ct. at 1984 (internal quotation omitted). "In other words, Congress must 'provid[e] clear and unambiguous authorization for' this kind of state regulation." *Id.* (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988)). Here, Congress has not issued such a waiver. *See* OLC Opinion, *supra* note 3, at 9-10.

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