

Congress of the United States
Washington, DC 20515

September 20, 2022

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

Dear Secretary McDonough,

We write to express our concern that the Department of Veterans Affairs (VA) plans to provide abortion and abortion counseling to certain veterans and VA beneficiaries without clear legal authority.

Section 106 of the Veterans Health Care Act of 1992 (Public Law 102-585) (hereinafter referred to as section 106) authorized VA to provide certain health care services to women veterans, but specifically prohibited abortion. While the services that Congress has authorized VA to provide have changed significantly since then, Congress has never acted to repeal or replace the prohibition against abortion in section 106. During a recent Committee on Veterans' Affairs hearing, Under Secretary for Health, Dr. Shereef Elnahal, testified that the Veterans' Health Care Eligibility Reform Act of 1996 (Public Law 104-262) granted VA general treatment authority that supersedes Section 106. However, that is not the case.

Congress also has consistently enacted appropriations laws to prohibit federal funds from being used to provide abortion, with limited exceptions, across the government since the Hyde Amendment was first enacted in 1976.¹ For VA, it has been unnecessary for Congress to impose the Hyde Amendment due to the underlying 1992 statutory prohibition.

Section 106 remains current law and clearly imposes a limitation on VA's ability to provide abortion. Your decision to proceed with rulemaking to add abortion to VA's medical benefits package exceeds VA's statutory authority and is a troubling example of the Biden Administration's growing pattern of Executive overreach.

¹ H.R. 14232 (94th): Depts. of Labor and Health, Education, and Welfare Appropriation Act, Fiscal Year 1977 (enacting the Hyde Amendment); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment).

A recent Supreme Court decision, *West Virginia v. EPA*, clarified the limitations of certain agency action.² Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,³ the Biden Administration has largely relied on Executive action to advance its radical agenda. In his first year, President Biden issued more Executive orders⁴ and approved more major rules⁵ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not Executive branch staff.

Given this Administration’s track record and your recent efforts to provide abortion through the VA health care system via rulemaking, despite a clear legal prohibition against doing so, we are compelled to underscore adherence to *West Virginia v. EPA* and remind you of the limitations of your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.⁶ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and 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.’”⁷ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁸ However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.”⁹ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”¹⁰ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

² *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

³ U.S. Const. art. I, § 1.

⁴ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>.

⁵ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>.

⁶ *West Virginia*, 597 U.S. at 5-6.

⁷ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁸ *West Virginia*, 597 at 4.

⁹ *Id.* at 5.

¹⁰ *Id.* at 5.

Recently, the Court also struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹¹ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹² In *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹³ In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹⁴

We see worrisome parallels between the EPA actions that preceded *West Virginia v. EPA* and your actions to add abortion and abortion counseling to VA’s medical benefits package. The legal rationale in the interim final rule is tenuous at best.¹⁵ Certainly, it does not meet the high bar of the “clear congressional authorization” required for such a politically significant action. This is especially true in light of the contrary, thirty-year-old prohibition against VA providing abortion and longstanding Congressional requirements restricting the use of federal funds for abortion.

As the Committees of jurisdiction overseeing VA and ensuring VA is properly funded to care for veterans and their families, caregivers, and survivors, we assure you that we will exercise the full extent of our investigative, oversight, and legislative powers to enforce our Article I obligations, but also to ensure the Administration does not continue to exceed its legal authority.

Accordingly, to assist in this effort, please provide the following no later than October 4, 2022:

1. A list of all pending rulemakings pertaining to the Department of Veterans Affairs, the specific Congressional authority for each rulemaking, and the estimated budgetary impact for each rulemaking.
2. A list of all expected rulemakings pertaining to the Department of Veterans Affairs, the specific Congressional authority for each expected rulemaking, and the estimated budgetary impact for each expected rulemaking.
3. The specific Congressional authority for the interim final rule (IFR) on reproductive health services that was published on the Federal Register on September 9, 2022, and the estimated budgetary impact of that rulemaking.¹⁶ Additionally, please provide written responses to the following:

¹¹ *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. ___ (2021).

¹² *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

¹³ *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹⁴ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁵ *Reproductive Health Services*, 87 Fed. Reg. 55287-55296 (Sept. 9, 2002) (to be codified at 38 C.F.R. part 17).

¹⁶ *Id.*

- a. Will taxpayer dollars be used to fund late-term birth abortions?
 - b. Will taxpayer dollars be used to fund abortion services and/or counseling to minors through the CHAMPVA program?
 - c. Will taxpayer dollars be used to provide transportation for veterans seeking abortion services across state lines?
 - d. Will taxpayer dollars be used to fund any education or awareness campaigns of the IFR and its policy objective?
4. Any legal analyses by the Administration providing public law citations indicating the repeal or replacement of the prohibition against VA providing abortion in Section 106 of the Veterans Health Care Act of 1992 (Public Law 102-585).
 5. A detailed legal analysis of how the IFR remains consistent with the recent Supreme Court ruling in *West Virginia v. EPA*.¹⁷
 6. A detailed legal analysis of the limits, if VA's Office of General Counsel recognizes any, of VA's general treatment authority.

Thank you for your timely response and commitment to our nation's veterans.

Sincerely,



Mike Bost
Ranking Member
Committee on Veterans' Affairs



Kay Granger
Ranking Member
Committee on Appropriations



Jason Smith
Ranking Member
Committee on the Budget

Cc: The Honorable Mark Takano, Chairman, Committee on Veterans' Affairs
The Honorable Rosa DeLauro, Chair, Committee on Appropriations
The Honorable John Yarmuth, Chairman, Committee on the Budget
The Honorable Shalanda Young, Director, Office of Management and Budget

¹⁷ See *supra* notes 2 and 15.