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MEMORANDUM June 4, 2021

To: Hon. Steve Daines
Attention: Andrew Guernsey

From: [redacted] Legislative Attorney, [redacted]

Subject: **Coverage of Abortion Services for Veterans**

This memorandum responds to your request concerning the coverage of abortion services for veterans. Under the Department of Veterans Affairs' (VA) current regulations, such services are excluded from the medical benefits package offered to veterans in the VA health care system.[1] You asked whether the agency's regulations could be amended to permit coverage of abortion services.[2] Because Section 106(a) of the Veterans Health Care Act of 1993 (VHCA) appears to statutorily restrict the VA from covering abortion services, it seems unlikely that a court would uphold regulations that had been revised to allow the VA to make such services available, if challenged.

Section 501(a) of title 38, U.S. Code, authorizes the VA Secretary to promulgate regulations "necessary or appropriate to carry out the laws administered by the Department[.]"[3] The VHCA is among the laws the VA administers.[4] Section 106(a) of the VHCA addresses the coverage of abortion services for female veterans:

> In furnishing hospital care and medical services under chapter 17 of title 38, United States Code, the Secretary of Veterans Affairs may provide to women the following health care services:
>
> (1) Papanicolaou tests (pap smears).
>
> (2) Breast examinations and mammography.
>
> (3) General reproductive health care, including the management of menopause, 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.[5]

[1] *See* 38 C.F.R. § 17.38(c)(1).

[2] In 2016, the Department of Veterans Affairs Advisory Committee on Women Veterans recommended a regulatory change to allow coverage of abortion services, at least in some instances. The agency subsequently declined the recommendation. *See* U.S. Dep't of Veterans Affs., Minutes from Meeting of the Advisory Committee on Women Veterans (Aug. 7-9, 2019), https://www.va.gov/ADVISORY/MINUTES/Minutes-WomVetAug2019.pdf.

[3] 38 U.S.C. § 501(a).

[4] Pub. L. No. 102-585, 106 Stat. 4943 (1992)

[5] *Id.*, § 106(a); 38 U.S.C. § 1710 note.

In 1999, the VA promulgated regulations implementing a national enrollment system for health care delivery and identifying hospital and outpatient services that would be covered in a medical benefits package.[6] The agency's medical benefits package regulation, 38 C.F.R. § 17.38, appears to reflect the abortion restriction included in section 106(a)(3) of the VHCA. The regulation states, in relevant part: "In addition to the care specifically excluded from the 'medical benefits package' under paragraphs (a) and (b) of this section, the 'medical benefits package' does not include . . . Abortions and abortion counseling . . ."[7]

If the VA amended section 17.38 to include abortion services in the medical benefits package, it seems possible that opponents could challenge the revised regulation. The Administrative Procedure Act provides courts authority to review agency actions and "hold unlawful and set aside" such actions for specified reasons.[8] For example, a reviewing court will hold unlawful and set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]"[9] A person adversely affected or aggrieved by any final agency action is generally entitled to judicial review.[10]

If challenged, a court would likely review the revised regulation in accordance with a two-part test established by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[11] First, a reviewing court would consider "whether Congress has directly spoken to the precise question at issue."[12] If Congress's intent is clear, the court "must give effect to the unambiguously expressed intent of Congress," and that is the end of the issue.[13] If, however, Congress has not addressed the question at issue directly, i.e., the statute is silent or ambiguous, the court will attempt to determine if the agency's actions are based on a permissible construction of the statute.[14] If the agency's interpretation is reasonable, the court may not substitute its own construction of the statutory provision.[15] However, deference is not owed to the agency's action if it construes a statute in a way that is contrary to congressional intent or frustrates congressional policy.[16]

In this case, section 106(a)(3) of the VHCA would appear to demonstrate Congress's intent not to provide abortion services to female veterans. Although the section permits coverage of general reproductive health care, abortions are specifically identified as a health care service that the VA may not provide. The VHCA's legislative history provides no additional guidance about restricting abortion coverage for veterans. However, section 106(a)(3) is consistent with other abortion restrictions adopted by Congress. For example, annual appropriations legislation that provides federal funds for the Federal Employees Health Benefits Program (FEHBP) generally prohibits using such funds to pay for an abortion or to pay for administrative expenses related to a health plan in the FEHBP that provides benefits or coverage for

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[6] *See* U.S. Dep't of Veterans Affs., Enrollment - Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54,207 (Oct. 6, 1999) (to be codified at 38 C.F.R. pt. 17).

[7] 38 C.F.R. §17.38(c)(1).

[8] 5 U.S.C. § 706. For additional discussion of agency rulemaking and judicial review, *see* CRS Report R41546, A Brief Overview of Rulemaking and Judicial Review, by Todd Garvey.

[9] 5 U.S.C. § 706(2)(A), (2)(C).

[10] *Id*. § 702.

[11] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[12] *Id*. at 842.

[13] *Id*. at 843.

[14] *Id*.

[15] *Id*. at 844.

[16] *Id*. For additional discussion of *Chevron* deference, *see* CRS Report R44954, *Chevron* Deference: A Primer, by Valerie C. Brannon and Jared P. Cole.

abortions.[17] Section 1093 of title 10, U.S. Code, similarly prohibits the Department of Defense from using appropriated funds to perform abortions, except where the life of the mother would be endangered if a fetus were carried to term or where a pregnancy is the result of an act of rape or incest. Although section 106(a)(3) does not include similar exceptions, it still appears to reflect a general congressional intent to not cover abortion services.

Because section 106(a)(3) clearly seems to restrict the VA from covering abortion services, it appears unlikely that a court would uphold regulations that had been revised to make abortion services available, if challenged.

[17] *See*, *e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 613, div. E, tit. VI.