

Congress of the United States

Washington, DC 20515

January 25, 2023

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Attorney General Garland:

On January 3, 2023, the Department of Justice (DOJ) Office of Legal Counsel (OLC) released a memorandum regarding the application of longstanding federal criminal law prohibiting the mailing of chemical abortion drugs in interstate or foreign commerce by the U.S. Postal Service (USPS) as well as common carriers and express companies. These criminal prohibitions regarding the distribution of abortion drugs are enforceable. Nevertheless, OLC's memo claims that these federal mail-order abortion laws do not prohibit the mailing of the abortion drugs mifepristone or misoprostol "where the sender lacks the intent that the recipient of the drugs will use them unlawfully." The memo further claims that a lawful use for abortion drugs can be presumed even when these drugs are mailed into states that prohibit most abortions. However, neither Congress nor the courts have articulated such an interpretation of the law that radically departs from the plain text and clear meaning of the law.

It is disappointing, yet not surprising, that the Biden administration's DOJ has not only abdicated its Constitutional responsibility to enforce the law, but also has once again twisted the plain meaning of the law in an effort to promote the taking of unborn life. The OLC memo should be immediately rescinded or, at minimum, redrafted to articulate an accurate application of the law.

Section 1461 of title 18 of the U.S. Code, amended as recently as 1994,¹ imposes criminal penalties on mailing abortion drugs or abortion-related paraphernalia through USPS:

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, ... ;

—
Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. ...

¹ *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. 103-322, title XXXIII, § 330016(1)(K), (L), Sept. 13, 1994, 108 Stat. 2147.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section ... to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof shall be fined [up to \$250,000] under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined [up to \$250,000] under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

Similarly, section 1462 of title 18 of the U.S. Code, amended as recently as 1996,² likewise imposes criminal penalties on the importation of abortion drugs or abortion-related paraphernalia or their carriage in interstate or foreign commerce, either by using a common carrier like FedEx and UPS, or an online website:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934), for carriage in interstate or foreign commerce—

...

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, ... ; ... or

Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful—

Shall be fined [up to \$250,000] under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined [up to \$250,000] under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

While OLC relies on carefully selected excerpts of a few circuit court opinions from the early 20th century to attempt to justify its memo, its conclusions are baseless. Several of the cases focused on the now-repealed portions of the law that dealt with the mailing of contraceptives. However, the memo cites only one case that actually has to do with the statute's prohibition on mailing material related to abortion, *Bours v. United States*.³ Yet, OLC neglects to reference the court's assessment in that case that the law "indicates a national policy of discountenancing abortion as inimical to the national life." Instead of limiting violations to instances "where the sender lacks the intent that the recipient of the

² *Telecommunications Act of 1996*, § 507(a), February 8, 1996, Pub. L. 104-104, 110 Stat. 137.

³ *Bours v. United States*, 229 F. 960 (7th Cir. 1915)

drugs will use them unlawfully,” the court actually said that definitions of abortion under State law were irrelevant.⁴

Beyond the flawed interpretation and application of circuit court opinions, and the memo’s claim that Congress “settled upon an understanding of the reach of section 1461... that is narrower than a literal reading might suggest,” the actual text of the law cannot and should not be ignored. Despite numerous amendments to the statute, Congress has never repealed these criminal statutes that prohibit the mailing of dangerous chemical abortion drugs nor modified them in a way that restricted them based on the sender’s intent or the recipient’s plans. As such, these longstanding Federal mail-order abortion laws continue to be “the supreme law of the land.”⁵

In fact, at least one Federal court has recently acknowledged that these laws are currently in effect.⁶ And as you know, the Food and Drug Administration (FDA) is currently facing additional litigation⁷ that challenges FDA’s approval of chemical abortion drugs and the agency’s reckless Risk Evaluation and Mitigation Strategy (REMS), in which these laws are invoked. Both FDA’s approval of mifepristone and REMS must comply with these Federal laws prohibiting the mailing or shipping of abortion drugs.⁸

The memo claims its stipulations are actually part of a “consensus interpretation” of the law that Congress has ratified for decades. But history contradicts that claim. For instance, in 1978, Congress considered, but did not adopt, a limitation to the law that would prohibit mailing of items “intended by the offender ... to be used to produce an illegal abortion.”

A House subcommittee report accompanying the proposed bill stated that “under current law, the offender commits an offense whenever he ‘knowingly’ mails any of the designated abortion materials. [The proposed modification] requires proof that the offender specifically intended that the mailed materials be used to produce an illegal abortion. An abortion is ‘illegal’ if it is contrary to the laws of the state in which it is performed.”⁹ Hence, it is clear that Congress never understood the law on mailing abortion drugs to mean anything other than what it says.

⁴ *Id.* “It is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded.”

⁵ See *Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953) (“The failure of the executive branch to enforce a law does not result in its modification or repeal.”).

⁶ See *Texas v. Becerra*, No. 5:22-CV-185-H, slip op. at 55 n.21, 2022 WL 3639525, *26 n.21 (N.D. Tex. Aug. 23, 2022). In addition, Mississippi Attorney General Lynn Fitch raised the Federal mail-order abortion laws in litigation regarding Federal pre-emption of State laws on abortion drugs (*GenBioPro Inc. v. Dobbs*, S.D. Miss., No. 3:20-cv-00652). <https://storage.courtlistener.com/recap/gov.uscourts.mssd.109735/gov.uscourts.mssd.109735.44.0.pdf>. After this filing was made, GenBioPro sought to have the case voluntarily dismissed.

⁷ See *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*, No. 2:22-CV-00223-Z (N.D. Tex.)

⁸ In the preamble to a final rule limiting the mailing of e-cigarettes promulgated last year, USPS observed, as equally applies here, that “FDA authorization . . . for introduction or delivery into interstate commerce does not absolve an actor from other Federal requirements . . . : Rather, all overlapping requirements must be complied with in order to offer the product in interstate commerce.” <https://www.federalregister.gov/documents/2021/10/21/2021-22787/treatment-of-e-cigarettes-in-the-mail>

⁹ U.S. House. Committee on the Judiciary. Recodification of Federal Criminal Law, H.R. 13959. (H. Rpt. 95-29, at 42). Washington: Government Printing Office, 1979.

Despite the great lengths OLC went to in order to try to turn these laws into a dead letter, it is nevertheless your Constitutional duty to enforce these Federal criminal laws contained in sections 1461 and 1462 of title 18 of the U.S. Code according to their plain text as enacted by Congress. That necessarily includes prosecuting those in the abortion industry who are responsible for the dangerous and, sadly, pervasive mailing and interstate or international carriage of abortion drugs.

While the use of chemical abortion drugs may be legal in some States, and Federal law does not currently explicitly prohibit the use of such drugs, Federal law does prohibit the mailing or shipping of such items. Despite attempts to downplay this action, the “mere mailing” of these items is expressly what the law has prohibited for nearly 150 years.

Beyond the legal flaws in the memo, it is of great concern that OLC makes no effort to adequately or appropriately emphasize that this opinion has no official or binding legal effect on Federal courts or future administrations, and that these laws, which include criminal penalties, are subject to a 5-year statute of limitations. An OLC memo cannot rewrite the law, and the plain words of the law are clear. OLC has chosen to promote abortion rather than the law, and is dangerously misleading those who would rely on this memo into committing what the Federal law clearly proscribes as criminal activity. It is your Constitutional and moral responsibility to rescind the memo.

As you are aware, violations of the Federal mail-order abortion laws constitute predicate offenses under both the Racketeer Influenced and Corrupt Organizations Act (RICO) and Federal criminal money laundering statutes. RICO provides for enhanced criminal penalties and civil causes of action against anyone who, in connection with an enterprise, engages in a pattern of violating the Federal mail-order abortion laws.¹⁰ In addition, the Federal money laundering statutes outlaw certain international and domestic financial transactions involving proceeds from violations of the Federal mail-order abortion laws.¹¹

The OLC memo only serves to further the deeply troubling proliferation of illegal mail-order abortion drug trafficking operations that operate both openly and covertly and endanger the lives of pregnant moms and their preborn babies.

The reckless distribution of abortion drugs by mail or other carriers to pregnant mothers who have not been examined in-person by a physician is not only dangerous and unsafe, it is criminal. We demand that you act swiftly and in accordance with the law, shut down all mail-order

¹⁰ 18 U.S.C. § 1961(1)(B), as added by the *Comprehensive Crime Control Act of 1984*, § 1020, October 12, 1984, Pub. L. 98-473, 98 Stat. 2143. RICO violations entail criminal penalties of, for each offense, up to 20 years imprisonment, fines of up to \$250,000, and forfeiture of any property interest in the criminal enterprise. Civil remedies under RICO provide for awards of three times the amount of damages caused and the cost of the suit.

¹¹ A violation of the Federal mail-order abortion laws is a predicate offense under 18 U.S.C. §§ 1956, 1957. A violation of 18 U.S.C. §§ 1956, 1957 by reason of the Federal mail-order abortion laws is also a predicate offense under the Travel Act, 18 U.S.C. § 1952.

abortion operations, and hold abortionists, pharmacists, international traffickers, and online purveyors, who break the Federal mail-order abortion laws, accountable. We also demand that, in light of these laws, you cease efforts to prevent States from regulating or prohibiting abortion drugs. Instead, we expect that you put the law and your obligation to enforce it above the abortion industry's dangerous and deadly political agenda.

We look forward to your reply and demand that you promptly rescind the OLC memo.

Sincerely,



James Lankford
United States Senator



Jim Jordan
Member of Congress



Cindy Hyde-Smith
United States Senator



Steve Daines
United States Senator



James E. Risch
United States Senator



Marsha Blackburn
United States Senator



Mike Crapo
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Ted Cruz
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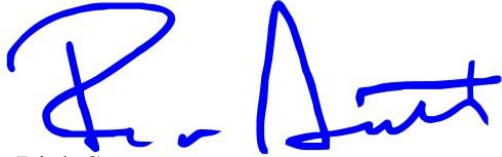
Mike Braun
United States Senator



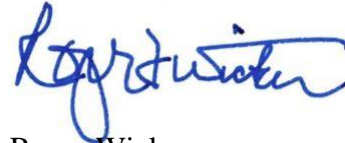
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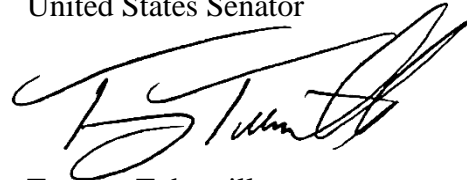
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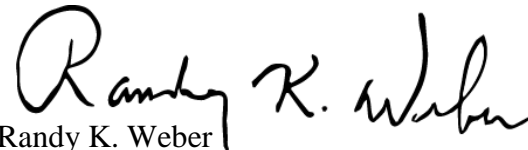
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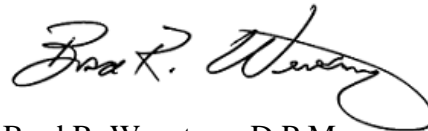
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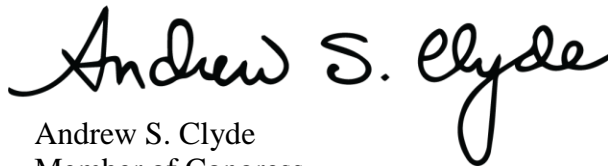
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