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Via Electronic Submission

Office of Public Health and Science
Department of Health and Human Services
Att'n: Brenda Destro, Room 728E
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

**Re: Provider Conscience Regulation: Notice of Proposed Rulemaking
73 Fed. Reg. 50,274 (Aug. 26, 2008)**

Dear Office of Public Health and Science:

On behalf of the Family Research Council ("FRC"), this responds to the above-captioned notice of proposed rulemaking ("NPRM") that the Department of Health & Human Services ("HHS") issued to implement the rights of conscience protected by the Church, Coats, and Weldon Amendments. 42 U.S.C. §§300a-7, 238n; Pub. L. No. 110-161, §508(d), 121 Stat. 1844, 2209 (2008). In addition, as indicated under the signature block below, six additional groups have joined these comments.

I. HHS REGULATION WOULD ENSURE HEALTH CARE ENTITIES' STATUTORY RIGHTS OF CONSCIENCE

FRC and the groups joining these comments strongly support HHS's effort to make not only the communities regulated by the Church, Coats, and Weldon Amendments but also the beneficiaries of those Amendments aware of the protections afforded by those landmark civil rights statutes. The following two sections describe the relevant federal statutory and constitutional protections, then emphasize the need for HHS regulation and ask HHS to confirm that its regulations do not displace any available private remedies.

A. Recent Actions Demonstrate that the Important Federal Statutory Protections Need a Regulatory Action to Protect Beneficiaries

Acting quickly after the U.S. District Court for the District of Montana's decision in *Taylor v. St. Vincent's Hospital*, 369 F.Supp. 948 (D. Mont. 1972) (sterilization), as well as the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973) (abortion), Congress enacted the first Church Amendment to protect the nation's health care providers from courts' or public officials' using the receipt of federal funds to coerce participation in abortion and sterilization procedures that violate providers' religious beliefs and moral convictions, as well as to prohibit employment discrimination based on abortion or sterilization. Pub. L. No. 93-45, §401, 87 Stat. 91, 95 (1973). The following year, the second Church Amendment expanded individuals' anti-discrimination rights, primarily against coerced

participation in any “health service program” against their religious beliefs or moral convictions. Pub. L. No. 93-348, §214, 88 Stat. 342, 353 (1974). Significantly, that amendment defined “health service program” broadly to include “all programs administered by the Secretary except the Social Security Act.” S. REP. NO. 93-381 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3677. Finally, in 1979, the third Church Amendment protected applicants and students in certain HHS-funded health education programs. Pub. L. No. 96-76, §208, 93 Stat. 579, 583 (1979).

In 1996, the Accrediting Council on Graduate Medical Education sought to require training in abortion techniques as a condition for accreditation of hospitals and medical residency programs, and Senator Dan Coats responded with legislation to prohibit discrimination against a “health care entity” for refusal “to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions.” Pub. L. No. 104-134, §515(a)(1), 110 Stat. 1321, 1327-245 (1996); 42 U.S.C. §238n(a)(1). The Coats Amendment defines “health care entities” broadly to “*include[]* an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.” *Id.* §238n(c)(2) (emphasis added).¹ Because the prohibitions of subsection (a)(1) extend beyond the academic setting (*e.g.*, it prohibits requirements to perform or refer for abortions generally as well as requirements to provide or undergo training in abortions), it is significant that the definition of “health care entity” is not exclusive. Unlike the Church Amendments, however, the Coats Amendment does not require institutions or individuals to rely on moral convictions or religious beliefs as their reason to avoid abortion-related activity. *See* 42 U.S.C. §238n(a)(1). Any subjective reason suffices.

Finally, the Weldon Amendment first appeared in the 2005 HHS appropriations bill and has appeared in all subsequent HHS appropriations bills. *See* Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163 (2004); Pub. L. No. 110-161, §508(d), 121 Stat. 1844, 2209 (2008). The Weldon Amendment confirms the broad definition of “health care entities” and prohibits receipt of federal funds by entities that discriminate on the basis of not paying for, referring for, providing, or covering abortions. *Id.* As with the Coats Amendment, the Weldon Amendment’s abortion-related restrictions apply to all abortion-related discrimination, not merely discrimination based on individuals’ or institutions’ religious beliefs or moral convictions. *Id.*

Throughout the history of these related statutes, Congress has responded quickly to instances where courts, public officials, or quasi-public officials have sought to coerce individual and institutional health care providers to engage in activities contrary to religious beliefs or moral convictions. In that context, it is significant that the American College of Obstetrics and

¹ Although not relevant here, the Coats Amendment also deems as accredited for federal, state, and local purposes, any “health care entity” that loses its accreditation based solely on its failure to follow an accrediting board’s abortion-related requirements. 42 U.S.C. §238n(b)(1).

Gynecology (“ACOG”) and the American Board of Obstetrics and Gynecology (“ABOG”) took actions that threatened to put obstetricians and gynecologists (“OB/GYNs”) in the position of either engaging in abortion-related activity against their religious beliefs and moral convictions or risking loss of their certification. Specifically, in its November 2007 bulletin on the maintenance of certification, ABOG listed “violation of ABOG or ACOG rules and/or ethics principles” as a basis for losing ABOG certification. American Board of Obstetrics & Gynecology, *Bulletin for 2008: Maintenance of Certification; Voluntary Recertification Certificate Renewal*, at 10, ¶5.b (Nov. 2007) (Ex. 1). And in January 2008, ACOG issued an ethics opinion that limits the right of refusal in reproductive medicine. American College of Obstetrics & Gynecology, Committee on Ethics, “*Opinion No. 385: The Limits of Conscientious Refusal in Reproductive Medicine*,” at 3-5 (Nov. 2007) (Ex. 2.) Taken together, these two contemporaneous actions threaten conscientious-objector OB/GYNs with losing their ABOG certification for refusing to follow ACOG’s coercion, couched in the form of an ethics opinion.

Because existing laws provide HHS all the authority it needs, both to adopt implementing regulations and to enforce those existing laws, some have argued that regulations are not necessary. To the contrary, however, if HHS had not taken up the cause of the conscientious-objector OB/GYN community, those physicians would face daunting economic pressure to conform their conduct to quasi-official coercion. That the coercion occurred demonstrates the need for regulation not only to educate the regulated community but also the beneficiaries. In addition, the enforcement process that HHS adopts will empower individuals and entities to enforce their rights through HHS, without needing to take on their employers, accreditors, certifying boards, or state and local government.

Comment: HHS regulations are needed both to restrict the illegal actions and inclinations of regulated entities and to protect the civil rights of conscientious objectors.

B. HHS Regulations Should Not Displace Constitutional Protections or Require Administrative Exhaustion

In addition to the federal statutory protections at issue in this rulemaking, conscientious health care providers have rights under the First Amendment, *see, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (religious freedom is a fundamental right), as well as the laws of most states. Maureen Kramlich, *The Abortion Debate Thirty Years Later: from Choice to Coercion*, 31 *FORDHAM URB. L.J.* 783, 802-03 & n.125 (2004) (citing conscience protections under the laws of 46 states) (Ex. 3). Indeed, under 42 U.S.C. §1988(a), conscientious objectors may rely on state-law protections in defending and defining the scope of their civil rights under federal law, provided that the state-law protections are “not inconsistent” with federal law. *Wilson v. Garcia*,

471 U.S. 261, 267 (1985).² Under the Ninth and Tenth Amendments, respectively, a federal enumeration of rights does not “deny or disparage others retained by the people” and powers neither delegated to nor prohibited to the federal government “are reserved to the States... or to the people.” U.S. CONST. amend. IX, X. Finally, in the related area of enforcing the statutory protections of other funding-based federal civil rights laws such as Title IX and Title VI, the availability of an administrative remedy with a federal agency does not preclude a party’s proceeding directly to court to enforce statutory protections, without first exhausting the administrative remedy. *Cannon v. Univ. of Chicago*, 441 U.S. 694, 706-08 (1979). All of these provisions provide important alternate avenues for health care providers to enforce their rights of conscience.

Comment: HHS should clarify that its provider conscience regulations neither preempt whatever rights providers have to enforce their rights of conscience under federal and state law nor require that providers exhaust their administrative remedy with HHS before filing suit.

II. HHS SHOULD DEFINE THE SCOPE OF PROTECTED ACTIVITY

Because the Church, Coats, and Weldon Amendments all refer to abortion, they beg the question of when an abortion (or a pregnancy) takes place. In a widely reported earlier draft of the NPRM, HHS defined pregnancy to begin at fertilization, without regard to implantation. That issue – fertilization vs. implantation as the start of pregnancy – remains the most controversial aspect of the NPRM, and HHS should squarely address it.

A. Pregnancy Begins at Fertilization

To have an abortion (*i.e.*, to end a pregnancy), a woman first must be pregnant. Consistent with the weight of medical and religious authority, HHS should adopt a fertilization-based definition of pregnancy (and thus abortion).

The standard definitions have pregnancy starting at the union of an ovum and spermatozoon, with that union described as both fertilization and conception. *See, e.g.*, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (25th ed. 1974) (pregnancy means “condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon”); DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007) (same); MOSBY’S MEDICAL DICTIONARY (7th ed. 2006) (pregnancy means “gestational process, comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth,” and conception means “beginning of pregnancy, usually taken to be the

² The “Title 24” in §1988(a) includes 28 U.S.C. §1343 and 42 U.S.C. §1983. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972).

instant that a spermatozoon enters an ovum and forms a viable zygote... the act or process of fertilization”). Other medical dictionaries have flirted with an implantation-based definition and returned to the fertilization-based definition. *Compare* STEDMAN’S MEDICAL DICTIONARY (21st ed. 1966) (conception means “act of conceiving, or becoming pregnant; the fecundation of the ovum”) *with* STEDMAN’S MEDICAL DICTIONARY (22nd ed. 1972) (conception means “Successful implantation of the blastocyst in the uterine lining”); *see also* STEDMAN’S MEDICAL DICTIONARY (24th ed. 1982) (conception means “act of conceiving, or becoming pregnant; the fertilization of the oocyte (ovum) by a spermatozoon”); STEDMAN’S MEDICAL DICTIONARY (28th ed. 2006) (conception means “Fertilization of oocyte by a sperm”). At least one medical dictionary appears to have switched from fertilization to an implantation-based definition. *Compare* TABER’S CYCLOPEDIA MEDICAL DICTIONARY (18th ed. 1997) (conception means “union of the male sperm and the ovum of the female; fertilization”) *with* TABER’S CYCLOPEDIA MEDICAL DICTIONARY (19th ed. 2001) (conception means “onset of pregnancy marked by implantation of a fertilized ovum in the uterine wall”). As HHS is aware, no new scientific discoveries explain the changes in definition. Zygotes are as alive today as their predecessors were in the 1970s. While some definitional semantics supports an implantation-based definition, those changes reflect political manipulations,³ not scientific developments, and do not represent the weight of authority or common understanding.

A fertilization-based definition also is consistent with the religious beliefs and moral convictions that the Church, Coats, and Weldon Amendments seek to protect. For example, although Southern Baptists and Catholics do not command the obedience of other faiths, their position on this subject suffices to demonstrate the reasonableness of a fertilization-based definition for religious purposes: “The Bible affirms that the unborn baby is a person bearing the image of God from the moment of conception.” Southern Baptist Convention, RESOLUTION ON THIRTY YEARS OF *ROE V. WADE* (June 2003) (citing Psalm 139:13–16 and *Luke* 1:44) (Ex. 4); *see also* Southern Baptist Convention, RESOLUTION ON HUMAN EMBRYONIC AND STEM CELL RESEARCH (June 1999) (“Bible teaches that... protectable human life begins at fertilization”) (Ex. 5).

In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo’s implantation or to shorten a person’s life.... In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or

³ *See, e.g.,* Robert G. Marshall & Charles A. Donovan, *Blessed Are the Barren: the Social Policy of Planned Parenthood*, 291-302 (1991) (Ex. 6).

indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007) (Ex. 7); *see also* Pontifical Academy for Life, *Statement on the So-Called ‘Morning-After Pill’* (Oct. 31, 2000) (“the proven ‘anti-implantation’ action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*”) (emphasis in original) (Ex. 8). Religious and moral opposition to abortion provides the driving force behind the Church, Coats, and Weldon Amendments and thus should guide HHS in regulating under those laws.⁴

Comment: HHS should adopt the prevailing fertilization-based definition of pregnancy and abortion.

B. Implantation-Based Definitions Are Inapposite

Contrary to a fertilization-based definition of pregnancy (and thus abortion), pro-abortion groups seek to impose a definition that has pregnancy begin at implantation of the fertilized egg in its mother’s uterine wall. To support an implantation-based definition, these groups cite medical dictionaries, federal regulations, and “science.” None of these authorities supports an implantation-based definition of pregnancy.

First, as indicated in the prior section, the weight of medical definitions supports a fertilization-based definition of pregnancy and, thus, abortion. Indeed, even HHS has used fertilization-based definitions, both before and after enactment of the statutes at issue here:

All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep’t of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963); *accord* 45 C.F.R. §457.10 (for SCHIP, “*Child* means an individual under the age of 19 including

⁴ Although the religious views supported here fall squarely within mainstream religious faiths and morality, that is not necessary to trigger our nation’s fundamental First Amendment rights or the rights protected by the Church, Coats, and Weldon Amendments. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion).

the period from conception to birth”); *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define “conception” as “fertilization” in SCHIP because HHS did “not generally believe there is any confusion about the term ‘conception’”). Having itself acknowledged in some contexts that pregnancy begins with fertilization, HHS cannot credibly deny the right of health care providers to have their religious beliefs and moral convictions guide them to that same conclusion.

Second, pro-abortion groups often cite HHS’s definition of pregnancy at 45 C.F.R. §46.202(f) for the proposition that pregnancy begins at implantation, rather than fertilization. That federal regulation simply does not support the weight that pro-abortion groups place on it to define “pregnancy” for all purposes under federal law. At the outset, the regulation expressly applies by its terms only to “this subpart,” namely Subpart B of the HHS regulations at 45 C.F.R. pt. 46. More importantly, HHS’s predecessor did not reject a fertilization-based definition for all purposes and retained the implantation-based definition only “to provide an administerable policy” for a specific purpose (namely, obtaining informed consent for participation in federally funded research) under technology then present:

It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the woman has been surgically rendered incapable of pregnancy.

While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS’s predecessor had “no argument” on the merits against recognizing pregnancy at fertilization, but declined for administrative ease and then-current technology. The resulting “administerable policy” merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research.⁵ In its response

⁵ To the extent that HHS finds that its human-subject protection rules require HHS to use 45 C.F.R. §46.202(f)’s implantation-based definition for the Church, Coats, and Weldon Amendments, HHS must also recognize that the Dickey-Wicker Amendment provides protection from fertilization. *See* Pub. L. No. 110-161, §509(b), 121 Stat. 1844, 2209 (2007) (“For purposes of this section, the term ‘human embryo or embryos’ includes any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells”).

to comments on the final rule, HHS's predecessor acknowledged that another of its pregnancy-related definitions served "interests of both consistency and clarity, although it may vary at times from legal, medical, or common usage." 40 Fed. Reg. 33,526 (1975). A decision to set an arguable floor (based on 1970s technology) for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against *their* religious beliefs or moral convictions. Finally, the enacting Congress expressly indicated that these definitions would not trump religious beliefs and moral convictions under the Church Amendment. S. REP. NO. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655 ("It is the intent of the Committee that guidelines and regulations established by... the Secretary of HEW under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group").

Third, pro-abortion groups often appeal to "science" as supporting their view that pregnancy begins at implantation. In doing so, these groups do not specify what "science" they reference, other than the foregoing definitional semantics, which reflect neither medical science nor medical consensus. The pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation, *see, e.g.*, Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "Embryo-Maternal Signaling Prior to Implantation," 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling... takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "Deciphering the cross-talk of implantation: advances and challenges," SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie & Nagappan Mathialagan, "Maternal Recognition of Pregnancy," 54 BIOLOGY OF REPRODUCTION, 294-302 (1996), as do the embryology texts. *See, e.g.*, Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 15 (8th ed. 2008) ("Human development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual."). Moreover, non-uterine pregnancies such as ectopic pregnancies demonstrate that uterine implantation cannot mark the beginning of pregnancy.

In summary, none of the bases for an implantation-based definition support the claim that the pro-abortion groups' preferred definition has any application in defining the religious beliefs or moral convictions of individuals and institutions who do not share the pro-abortion groups' views. The right to conscience would be a poor thing if limited to the right to believe what someone else tells us.

Comment: Even if it declines to adopt a fertilization-based definition, HHS should clarify that neither 45 CFR §46.202(f) nor any other federal or medical definition justifies the use of an implantation-based definition of "abortion" for the Church, Coats, and Weldon Amendments.

C. HHS Could Allow Rights-Holder's Reasonable Subjective View

Although HHS clearly must adopt the fertilization-based definition of pregnancy if HHS elects to define pregnancy, a formal definition is perhaps unnecessary. People undoubtedly differ on the meaning of life, the timing of life's beginning, and the permissibility of ending life in certain contexts. In other contexts – such as the lawfulness of abortion – government must take sides in the debate on when life begins. In this context, however, HHS need only recognize that the reasonable subjective view of the individual or institution should govern any assessment of that individual's or institution's invocation of religious beliefs or moral convictions.

Because this context does not *require* a definition, HHS could find it appropriate to go no further than to recognize the reasonableness of a subjective belief in a fertilization-based definition:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943); *cf. Harris v. McRae*, 448 U.S. 297, 321 (1980) (free-exercise claim “requires the participation of individual members” because “it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion”) (citations and interior quotations omitted). Under these authorities, HHS might conclude that it need not explicitly define the terms. For the reason set forth in Section II.A, *supra*, a fertilization-based definition unquestionably is reasonable on both religious and medical grounds.

HHS's “SCHIP” rulemaking on the allowable definition of “child” provides precedent for this approach. In defining “child” to allow states to go back to conception, HHS “disagree[d] with [the] contention that there is only one appropriate interpretation of the statutory term at issue, and [HHS] believe[d] the range of comments supports [its] view that States should have the option to include unborn children as eligible targeted low income children.” 67 Fed. Reg. at 61,960. Moreover, when a commenter suggested that the SCHIP's define “conception” to mean “fertilization” because “there are other potentially confusing definitions being used,” HHS responded that it did “not generally believe there is any confusion about the term ‘conception’” but that “[t]o the extent that there is... [HHS] believe[s] States should have flexibility to adopt any reasonable definition of that term.” 67 Fed. Reg. at 61,963-64. Particularly where the issue is conscience and not the onset of SCHIP coverage, individuals and institutions deserve at least that same flexibility.

Comment: If it declines to define abortion or pregnancy in its final rule, HHS nonetheless should make clear that the definition of abortion (and thus the protections afforded by the Church, Coats, and Weldon Amendments) lies in the reasonable subjective religious beliefs or moral convictions of each health care provider.

III. CONSCIENCE PROTECTIONS DO NOT IMPINGE OTHER RIGHTS

Pro-abortion groups claim that the HHS proposal and similar efforts to protect the conscience rights of health care providers violate women's federal constitutional rights of equal protection and privacy. In essence, these claims argue that the U.S. Constitution preempts the proposed regulations. Both claims lack merit.

A. Conscience Protections Do Not Discriminate on the Basis of Gender

Under federal law, discrimination because of pregnancy (or the ability to get pregnant) constitutes discrimination because of sex only in the employment context. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"); 42 U.S.C. §2000e(k) ("For the purposes of [Title VII]... [t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"). Outside the employment context, disparate treatment of a potentially pregnant person because one opposes abortion is not discrimination *because of that person's gender*. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993) (citing cases). "While it is true... that only women can become pregnant, it does not follow that every... classification concerning pregnancy is a sex-based classification." *Bray*, 506 U.S. at 271 (interior quotations omitted, citing *Geduldig v. Aiello*, 417 U.S. 484, 496, n.20 (1974)); accord *Harris v. McRae*, 448 U.S. 297, 322 (1980) (restrictions on abortion funding are not discrimination because of gender); *Poelker v. Doe*, 432 U.S. 519, 520-21 (1977) (no equal-protection violation for city to provide public funding for childbirth but not for elective abortions). Instead, to find the required "[d]iscriminatory purpose" one must find that "the decisionmaker... selected or reaffirmed a particular course of action at least in part *because of*, not merely *in spite of*, its adverse effects upon an identifiable group." *Bray*, 506 U.S. at 271-72 (interior quotations omitted, emphasis added, citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). The refusal to participate in what conscientious objectors consider the unjustified taking of human life has nothing to do with the gender of the victim's consenting mother and everything to do with the conscientious objector's religious beliefs and moral convictions.

Comment: The Equal Protection Clause does not preempt HHS's contemplated rule because no action taken under the rule qualifies as action taken *because of* gender.

B. Conscience Protections Outweigh *Roe* and *Casey*

The rights protected by the Church, Coats, and Weldon Amendments are not preempted by *Roe*, 410 U.S. at 162-64, and *Casey*, 505 U.S. at 855-59, which by their terms do not purport to provide women a right to an abortion performed by whomever a woman chooses. *Poelker*, 432 U.S. at 520-21. As noted in the NPRM's preamble, to the extent that a health care provider's refusal to provide sterilization or abortion services "infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals with religious or moral scruples against sterilizations and abortions." 73 Fed. Reg. at 50,276 (quoting *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (9th Cir. 1975)) (interior quotations omitted). Because nothing in *Roe* or *Casey* outweighs health care providers' religious beliefs and moral convictions, nothing in those decisions preempts HHS's contemplated rules or the Church, Coats, and Weldon Amendments.

Comment: Neither *Roe* nor *Casey* recognize a right to compel any specific individual or institutional health care provider to participate in the provision of abortions, and neither decision preempts HHS's contemplated rule, much less the Church, Coats, and Weldon Amendments.

IV. HHS SHOULD ENFORCE ITS RULE LIKE OTHER FEDERAL ANTI-DISCRIMINATION LAWS

Congress did not enact the funding-based restrictions of the Church, Coats, and Weldon Amendments against a blank slate. Instead, going back to Title VI of the Civil Rights Act of 1964, Congress has required recipients of federal funds to refrain from discriminatory conduct on a variety of bases (*e.g.*, race in Title VI, gender in Title IX of the Education Amendments of 1972, etc.). As the Supreme Court has recognized, Congress would have intended these civil rights statutes to be interpreted in light of each other. *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575 (1984), *abrogated by statute on other grounds*, 20 U.S.C. §1687 ("Regulations authorizing termination of assistance for refusal to execute an Assurance of Compliance with Title VI had been promulgated and upheld long before Title IX was enacted, and Congress no doubt anticipated that similar regulations would be developed to implement Title IX"); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951, 1958-59 (2008) (Congress would have expected similar anti-discrimination statutes to be interpreted similarly); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (same). In general, therefore, it appears that HHS should look to aspects of the enforcement mechanisms for other federal civil rights legislation under the Spending Clause to develop an enforcement regime for the Church, Coats, and Weldon Amendments.

A. HHS Should Adopt the Title VI Enforcement Process

In adopting the implementing regulations for Title IX, HHS's predecessor simply incorporated by reference the enforcement mechanism that it had adopted for Title VI in 1964.

See 45 C.F.R. §86.71 (incorporating 45 C.F.R. §§80-6 through -11 and 45 C.F.R. pt. 81 into 45 C.F.R. pt. 86); 45 C.F.R. §§80-6 through -11; 45 C.F.R. pt. 81.⁶ Given the essentially contemporaneous enactment of the Church Amendments with these other funding-based anti-discrimination statutes, HHS should consider taking the same approach for the enforcement mechanism for the Church, Coats, and Weldon Amendments. The approach would have several advantages for HHS, regulated entities, and beneficiaries alike. First, the enforcement mechanism is time tested and well understood by all concerned. Second, the approach has been very successful in negotiating voluntary compliance with regulated entities and provides a relatively simple complaint process for beneficiaries to utilize without the need to engage counsel. Third, the Title VI enforcement mechanism includes third-party retaliation protections:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [the Act] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

45 C.F.R. §80.7(e). All of these reasons would combine to streamline the process, to ensure expeditious compliance, and to protect the important civil rights at issue here.

Comment: HHS's final rule should follow 45 C.F.R. §86.71 by incorporating by reference Title VI's administrative-enforcement process as HHS's regulatory enforcement mechanism for the Church, Coats, and Weldon Amendments.

B. HHS Should Rely on Existing Civil Rights Educational Methods

HHS should implement its conscience-protection regulations in the same manner as other civil rights regulatory regimes. As suggested in the NPRM, that could include posters to set out applicable requirements. For example, 45 C.F.R. §80.6(d) requires recipients to make information available to beneficiaries regarding Title VI's protections in such a manner as HHS

⁶ FRC and the groups joining these comments agree that HHS should use the proposed certification provisions (proposed §88.5) over Title VI's compliance-assurance provisions (45 C.F.R. §80.4). Thus, if HHS incorporates the Title VI enforcement model as outlined above, HHS should make clear that its incorporation of 45 C.F.R. §80.8(b) substitutes that certification process (§88.5) for Title VI's compliance-assurance process (45 C.F.R. §80.4).

finds necessary to apprise them of the statutory and regulatory protections against discrimination. In addition, 45 C.F.R. §86.3(c)-(d) requires Title IX recipients to prepare a self evaluation within one year to ensure compliance with the Title IX regulations and further requires them to correct anything that does not comply. To the extent that entities already have affirmative-action officers, departments, websites, training, and/or handbooks to implement other civil rights statutes, those same organs should address the civil rights protections afforded by the Church, Coats, and Weldon Amendments and their implementing regulations.

Comment: HHS should roll out its final rule and then follow up its enforcement of that rule in the manner that federal agencies roll out and then maintain other civil rights laws.

V. TITLE X REGULATIONS VIOLATE THE CHURCH AMENDMENTS

The first Church Amendment prohibits both courts and public officials from using receipt of funding under three federal statutes, including the Public Health Service Act, as the basis for requiring an individual or an entity to participate or make its facilities available for sterilization or abortion against the individual's or entity's religious belief or moral convictions. 42 U.S.C. §300a-7(b); *see also* H.R. REP. NO. 93-227 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1464, 1464 (“H.R. 7806 as amended would... deny *any* court, public official, or public authority the right to require individuals or institutions to perform abortions or sterilizations contrary to their religious beliefs or moral convictions because an individual or institution had received assistance under the Public Health Service Act [and two other statutes]”) (emphasis added); *id.*, *reprinted at* 1973 U.S.C.C.A.N. 1464, 1473 (“Subsection (b) of 401 would prohibit a court or a public official, *such as the Secretary of Health, Education, and Welfare*, from using receipt of assistance under the three laws amended by the bill (the Public Health Service Act [and two other statutes]) as a basis for requiring an individual or institution to perform or assist in the performance of sterilization procedures or abortions, if such action would be contrary to religious beliefs or moral conviction”) (emphasis added). Although the Church Amendment's definition of “public official” is in no way limited to state and local government, and the legislative history expressly includes HHS's predecessor, proposed §88.4(e) applies expressly only to state or local governments, without expressly listing HHS and the federal government.

In the third bullet under the NPRM's Section V request for comments, HHS acknowledges “some confusion about whether the receipt of federal funds permitted public officials to require entities to provide abortions or perform sterilizations.” *See* 73 Fed. Reg. at 50,279. Ironically, HHS's own regulations under Title X of the Public Health Service Act require recipients to counsel and refer for abortions. 45 C.F.R. §59.5(a)(5)(i)(C), (ii), (b)(1), (8). These Title X requirements also violate the Coats and Weldon Amendments. 42 U.S.C. §238n(a); Pub. L. No. 110-161, §508(d), 121 Stat. at 2209. Because HHS's own regulations reflect confusion about using federal funding to coerce recipients to provide abortion-related services, the final rule should include HHS and the federal government within the entities subject to §88.4(e).

Comment: HHS should add itself and other federal agencies to the entities subject to §88.4(e) and should acknowledge that the Church, Coats, and Weldon Amendments preempt the abortion-related requirements of HHS's Title X regulations.

VI. HHS SHOULD CLARIFY VARIOUS PROVISIONS OF ITS FINAL RULE

In addition to the foregoing issues, FRC notes the following additional issues that HHS should address in the final regulation:

- **Severability.** HHS should add a severability clause or explain in the preamble that if any portion of the final rule is vacated in litigation, the remainder of the rule is severable.
- **Materiality of Certification.** In its fourth bullet under the NPRM's Section V request for comments, HHS asks whether a written certification of compliance with nondiscrimination provisions should specify that the certification is a material prerequisite to the payment of HHS funds. It should.
- **Consistency with Church Amendments' Education Requirements.** Proposed §88.3 does not refer to §88.4(c)(2), and §88.3(f)(2) makes certain educational institutions subject to §88.4(a)(2). Consistent with 42 U.S.C. §300a-7(e), §88.3(f)(2) should refer instead to §88.4(c)(2). (This appears to be a typographical error.)
- **Consistency with Church Amendments' Regulatory Scope.** Although the Church Amendments use the term "health care personnel," 42 U.S.C. §300a-7(c), proposed §88.4 inconsistently uses both "health care personnel" and "health care professional." *Compare* §88.4(c)(1) *with* §88.4(d)(1). Consistent with the Church Amendments, the final §88.4(c)(1) and §88.4(d)(1) should refer consistently to "health care personnel."
- **Coverage of "Entity" Definitions.** The definitions of "entity" and "health care entity" in proposed §88.2 expressly include physicians, health care professionals, and health care personnel, while the list of "affected entities" in HHS's regulatory impact analysis suggests other types of professionals and personnel (*e.g.*, pharmacies, nursing homes, occupational therapy, public-health workers). *See* 73 Fed. Reg. at 50,280. HHS should confirm that these various phrases (entity, health care professional, health care personnel) include without limitation pharmacists, nurses, occupational therapists, public-health workers, janitors, and technicians, as well as psychiatrists, psychologists, counselors, and other mental health workers.

By addressing these issues in this catch-all section, we do not wish to deemphasize their importance. In particular, the last issue is extremely important to non-physician health care personnel across the nation.

VII. CONCLUSION

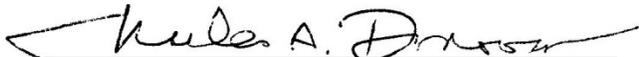
In summary, the Church, Coats, and Weldon Amendments provide important protections that sectors of the health care industry and pro-abortion groups seek to circumvent. The health care industry urgently needs HHS to promulgate its final regulations not only to assist and ensure compliance by regulated entities but also to protect the beneficiaries' fundamental rights of religious belief and moral conviction.

Please contact us with any questions about this matter.

Yours sincerely,



Lawrence J. Joseph



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Enclosures