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March 23, 2009

Office of Public Health and Science
Department of Health and Human Services
Attention: Rescission Proposal Comments
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 716E
Washington, DC 20201

Re: Rescission Proposal Comments

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("Conference" or "USCCB"), we offer the following comments on the Department's proposal to rescind a regulation that HHS published last year. 74 Fed. Reg. 10207 (March 10, 2009) ("Rescission Proposal"). The regulation was issued by the Bush Administration to enforce three Acts of Congress that protect the conscience rights of health care professionals and institutions. 73 Fed. Reg. 78072 (Dec. 19, 2008) (hereinafter "Conscience Regulation").

Interest of the United States Conference of Catholic Bishops

The Conference is a nonprofit corporation organized under the laws of the District of Columbia. All active Catholic bishops in the United States are members of the Conference. The Catholic Church, the largest religious denomination in the United States, has over 67 million adherents in over 18,000 parishes throughout the country. The Conference advocates and promotes the pastoral teaching of the bishops in such diverse areas as education, family, health care, social welfare, immigration, civil rights, the economy, and respect for human life at its most vulnerable stages. The Conference participates in rulemaking proceedings of importance to the Catholic Church and its people and institutions in the United States.

Religious freedom and the right of conscience are among the values the Catholic Church seeks to promote and protect. As the Pontifical Council for Justice and Peace has said: "Unjust laws pose dramatic problems of conscience for morally upright people: *when they are called to cooperate in morally evil acts they must refuse*. Besides being a moral duty, such a refusal is also a basic human right which, precisely as such, civil law itself is obliged to recognize and protect. 'Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative

effects on the legal, disciplinary, financial and professional plane.'"[1] Protection of this basic right of conscience takes on even greater urgency when members of the healing professions are subjected to pressure, or risk being pressured, to participate in the taking of innocent human life, conduct which is directly inimical to the role and function of medicine. Individuals and institutions committed to healing should not be required to take the very human life that they are dedicated to protecting.

In light of these important considerations, we offer the following comments.

Comments

I. THE POLICY OF THE EXECUTIVE BRANCH SHOULD BE TO SATISFY ITS CONSTITUTIONAL OBLIGATION TO FAITHFULLY EXECUTE THE LAWS

The first stated purpose of the Rescission Proposal is to afford HHS "an opportunity to review this regulation to ensure its consistency with current Administration policy." 74 Fed. Reg. at 10207. We respectfully submit that the Administration's principal policy objective—and constraint—should be to fulfill the Constitutional duty of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. CONST. Art. II, § 3, cls. 4.

More specifically, that means giving full force and effect to the policy judgments already made by Congress, as reflected in its enactment of a series of statutes over a period of many years, to protect the conscience rights of health care providers, both individual and institutional. It also means giving full force and effect to the Constitution, which has never been construed by the Supreme Court to impose on any entity, public or private, a duty to provide abortions, to fund them, or otherwise to help others obtain them. Instead, the Constitution commends—and sometimes commands—legal accommodation for those whose deepest moral and religious convictions forbid them to participate in abortion.

To the extent that the foregoing Constitutional duties of the Administration allow any discretion for policymaking through regulation, that discretion should be exercised in a manner that is consistent not only with the intent of Congress, but also with the Administration's previously stated policy commitments. Therefore, because the Administration purports to favor "choice" in matters of abortion,[2] its regulatory actions

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[1] *Compendium of the Social Doctrine of the Church* (2005), no. 399, citing Pope John Paul II, *Evangelium vitae* (1995), no. 73. Cf. *Catechism of the Catholic Church* (2d ed., 2000), no. 2242.

[2] Obviously, the Conference does not favor the choice to have an abortion, as that choice extinguishes human life in the womb. We are merely tracing out the implications of the Administration's own stated policy favoring such choice.

should give full respect to the choice of health care providers not to be involved in abortions. And if, as the Administration has stated, it will pursue a policy of reducing the abortion rate, it should not rescind the Conscience Regulation in an attempt to serve the opposite policy of increasing access to abortion.

A. Congress Has Long Ago Determined by Statute the Policy That This Administration Must Follow, Which Is to Respect the Consciences of Medical Professionals and Institutions

We respectfully submit that the most relevant and important question regarding the Conscience Regulation is how well it carries out the intent of Congress in enacting the underlying statutes. It is Congress that established the relevant policy by enacting, over a 36-year period, three separate statutory protections: the Church Amendment (42 U.S.C. § 300a-7), the Coats-Snowe Amendment (42 U.S.C. § 238n), and the Weldon Amendment (an annual rider to the HHS/Labor appropriations bill, recently re-enacted as part of the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, Div. F, § 508(d) (March 11, 2009)). Just as it is within the authority and institutional competence of the Legislative Branch to enact such laws, it is the obligation of the Executive Branch to enforce them fully.

Thus, the question is not whether the policy to be pursued is the strong protection of conscience in health care—Congress has already decided that question repeatedly and decisively by a series of statutes—but how best to enforce the policy of conscience protection already expressed in those statutes.

B. The Administration Has No Constitutional Obligation to Rescind the Conscience Regulation, Which Instead Assures Compliance with the First Amendment

From the very outset, the Supreme Court has acknowledged the right of physicians, hospitals, and other health care providers not to be forced to perform or facilitate abortions in violation of their consciences. *Roe v. Wade*, 410 U.S. 113, 143 & n.38 (1973) (citing with approval an AMA resolution that no "physician, hospital, nor hospital personnel" shall be required to violate "personally-held moral principles"). Although the argument was rejected by the Supreme Court long ago, some continue to urge the theory that the Constitution compels taxpayers to support abortions through government funding. *Maher v. Roe*, 432 U.S. 464 (1977); *see Harris v. McRae*, 448 U.S. 297, 311-27 (1980). Indeed, the Court has long held that the Constitution allows the government not only to decline to support abortion, but also to favor and encourage childbirth over abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 872-73 (1992); *Webster v. Reproductive Health Services*, 492 U.S. 490, 511 (1989); *Poelker v. Doe*, 432 U.S. 519, 521 (1977). Accordingly, there is no credible basis for concluding that the Constitution compels the rescission of the existing Conscience Regulation.

In fact, the existing regulation serves and reinforces the First Amendment principle of religious liberty. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court reaffirmed not only the permissibility, but the high value, of providing legislative accommodations allowing conscientious objection. *Id.* at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well"). Indeed, in the absence of these statutory protections—or similarly, in the absence of any meaningful regulatory enforcement of them—one can reasonably expect religious individuals and institutions to resort to Free Exercise litigation to protect their rights of conscience.[3] Rather than display such a "callous indifference" to the religious life of its citizens, Congress has chosen instead to "follow[] the best of our traditions" by passing the underlying conscience protection statutes. *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).[4] This Administration should follow suit by providing meaningful enforcement of those laws, beginning with the preservation of the existing Conscience Regulation.

In sum, the Administration's duty to assure compliance with the Constitution would not be served, but undermined, by rescission of the Conscience Regulation.

C. The Administration Should Avoid Inconsistencies in Its Policy Regarding the Protection of Conscience

As discussed above, the Administration's constitutional duty to faithfully execute the law means that the Administration must faithfully execute the statutes that Congress has already passed to protect conscience in health care. Correspondingly, the

[3] Free Exercise plaintiffs would experience varying degrees of success, depending on the facts of the case. For example, if the Weldon Amendment were repealed or inadequately enforced, states receiving federal funds would have broader freedom to pass laws that could force religious individuals (or institutions) to choose between the observance of their faith and their government health care job (or health care program participation, respectively). And particularly where government allows those individual or institutional providers to opt out of participating in any of a number of medical procedures, for any of a number of reasons, the government's unwillingness to accommodate a request to opt out for religious reasons would very likely violate the Free Exercise Clause. *See Fraternal Order of Police v. Newark,* 170 F.3d 359 (3d Cir. 1999) (Alito, J.).

[4] In the event that a commenter might suggest that the existing Conscience Regulation (or the underlying statutes) would violate the Establishment Clause, we note that this is a radical theory with virtually no chance of success in court. The Supreme Court has repeatedly and consistently rejected Establishment Clause challenges to laws, like the ones at issue here, that have the purpose and effect of reducing regulatory interference with religious exercise. *See, e.g., Cutter v. Wilkinson,* 544 U.S. 709 (2005) (rejecting Establishment Clause challenge to statute providing heightened protection for religious exercise of prisoners); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (rejecting Establishment Clause challenge to statutory exemption for religious institutions to prohibition against religious discrimination); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting Establishment Clause challenge to religious exemption from military draft); *Zorach v. Clauson*, 343 U.S. 306 (1952) (rejecting Establishment Clause challenge to law allowing students to leave school premises to attend religious instruction); *Arver v. United States*, 245 U.S. 366 (1918) (rejecting Establishment Clause challenge to military draft exemptions for clergy and theology students). Even a statute that limits the government's own involvement in abortion does not violate the Establishment Clause. *See Harris v. McRae*, 448 U.S. 297 (1980) (rejecting Establishment Clause challenge to law prohibiting taxpayer funding of abortion).

Administration may not adopt policies that contradict or undercut the policies reflected in the statutes it is bound to enforce, or otherwise create logical inconsistencies.

1. To the extent the policy of the Administration purports to be "pro-choice," it should not adopt policies that would tend to force unwilling medical professionals or institutions to assist in abortion

Because the Administration holds itself out as one committed to a policy of "choice" regarding abortion, the Administration cannot, consistent with that policy, remove the choice of nurses, doctors, clinics, or hospitals not to provide or facilitate abortions. There is absolutely nothing "pro-choice" about forcing unwilling health care providers to participate in abortion. To be sure, some groups—including groups virtually certain to comment on this proposal—hold themselves out as "pro-choice" and yet will urge exactly this form of compulsion on health care providers. We urge the Administration, in the strongest possible terms, to reject such blatant inconsistency in exercising whatever policy discretion it may have in this area.

In any event, respecting the choices of health care providers is the policy that the underlying statutes command. Indeed, the Church Amendment protects both those who choose to participate in abortion and sterilization and those who choose not to do so. The Coats-Snowe Amendment, though not double-edged in the same fashion, was adopted in the face of a threatened action by the Accreditation Council for Graduate Medical Education ("ACGME") that would have made abortion training mandatory—that is, the action would have deprived training programs and medical residents of the choice not to participate in abortion. The Coats-Snowe Amendment addressed that problem by requiring protection of the choice not to participate in abortion. Similarly, the Weldon Amendment was enacted against the background of various threats to the rights of conscience of those who choose not to participate in abortion.

To reiterate, if the Administration's policy is one of "choice," it cannot, consistent with that policy, refuse to accommodate a health care provider's choice not to participate in abortion.[5] Otherwise, the policy is simply one of unmasked coercion.

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[5] The claim is sometimes made that Title VII already provides a religious accommodation requirement for individual employees of covered employers. But these protections only cover individuals—not religious institutions—as against employers, and are notoriously weak even where they do apply. *See TWA v. Hardison*, 432 U.S. 63 (1977). Moreover, recent legislative attempts to strengthen Title VII's protections have been scuttled precisely by (among others) those who believe that conscience should yield to access to potentially objectionable "services." In any event, Title VII is an entirely different statutory scheme that HHS has no responsibility for enforcing.

2. *To the extent the policy of the Administration purports to be that of reducing the rate of abortion, it should not take a regulatory action designed to increase access to abortion*

Both during the presidential campaign and after his inauguration, the President stated his commitment to reducing the abortion rate. The newly created Advisory Council on Faith-Based and Neighborhood Partnerships, for example, has been tasked with providing advice on how best to achieve the goal of reducing the Nation's abortion rate.

As explained further below, rescinding the Conscience Regulation or otherwise weakening conscience protection will have uncertain effects on access to abortion, but is certain to reduce access to health care more broadly. But even if forcing unwilling health care providers to facilitate abortions did increase abortion access, the Administration should still keep the Conscience Regulation. That is because the Administration's stated policy of reducing the number of abortions cannot be reconciled with a policy of increasing access to abortions. The Administration cannot have it both ways: either it is for increasing access to abortion, or it is for reducing the rate of abortion. Increasing abortion access increases abortion rates.[6] The Administration cannot coherently—or in good faith—claim to stand for both policies at the same time.

II. IN THE PRESENT ENVIRONMENT, THERE IS A CRITICAL NEED FOR REGULATORY ENFORCEMENT OF THE CONSCIENCE PROTECTION STATUTES ENACTED BY CONGRESS

The Rescission Proposal requests "[i]nformation, including specific examples where feasible, addressing the scope and nature of the problems giving rise to the need for federal rulemaking and how the current rule would resolve those problems." 74 Fed. Reg. at 10210.

Negative public reaction to an earlier leaked version of the Conscience Regulation by pro-abortion groups and some editorial writers attests to their need. The adverse reaction demonstrates, at best, a deplorable lack of understanding about the federal legislative rights of conscience on which the regulation is based, at worst outright hostility to those statutory rights. Judging from much of the public commentary, one would think that rights of conscience in health care were a recent invention, and that the three statutes implemented through this rule simply did not exist. Regulatory

[6] *See* R. Brown and R. Jewell, "The Impact of Provider Availability on Abortion Demand," 14 *Contemporary Economic Policy* 95-106 (2007) (concluding that "residents in counties with longer travel distances to the nearest abortion provider have lower abortion rates and lower pregnancy rates"); R. Jones, *et al.*, "Abortion in the United States: Incidence and Access to Services, 2005," 40 *Perspectives on Sexual and Reproductive Health* 6-16 (2008), at 14 ("The number of abortions and the abortion rate are, in part, dependent on the accessibility of services").

enforcement is therefore all the more critical to ensure that Congress's intent will be carried out.

The need for regulatory enforcement is also demonstrated by growing hostility on the part of some professional organizations and advocacy groups to rights of conscience in health care. The following examples are illustrative:

- In November 2007, the American College of Obstetricians and Gynecologists issued an opinion (Ethics Committee Opinion No. 385) asserting that it is unethical for obstetricians-gynecologists to decline to provide or refer for abortion or sterilization. When it became apparent that this discriminatory policy might affect board certification of ob-gyns (serving in both private and public hospitals) through the incorporation of ACOG ethics standards into requirements set by the American Board of Obstetrics and Gynecology, this necessitated letters of concern from the Secretary of HHS pointing out the contradiction between the ACOG opinion and the federal statutes at issue here. Letter of March 14, 2008, from HHS Secretary Michael O. Leavitt to Norman F. Gant, M.D., Executive Director of the American Board of Obstetrics and Gynecology.[7]

- The American Civil Liberties Union has developed a report and advocacy kit aimed at requiring all hospitals, including those with a conscientious objection, to provide abortions. The report argues that the "law should not permit an institution's religious strictures to interfere with the public's access to reproductive health care."[8] Entire organizations with names like "Merger Watch" have been established to influence local governments and public opinion to block mergers and joint ventures involving hospitals, including Catholic hospitals, that have ethical policies against performing abortions and sterilizations.[9]

- NARAL Pro-Choice America claims that conscience clauses, which it and other advocacy groups pejoratively label "refusal clauses," are "dangerous for women's health."[10]

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[7] Secretary Leavitt's letter is available at www.hhs.gov/news/press/2008pres/03/20080314a.html (visited March 16, 2009).

[8] American Civil Liberties Union Reproductive Freedom Project, "Religious Refusals and Reproductive Rights," 9 (2002), available at www.aclu.org/reproductiverights/religion/12679pub20020122.html (visited March 16, 2009). *See* Maureen Kramlich, "The Abortion Debate Thirty Years Later: From Choice to Coercion," 31 FORDHAM URBAN L. J. 783, 787 (March 2004) (discussing the ACLU report and related threats to conscience rights with regard to abortion).

[9] *See, e.g.*, www.mergerwatch.org (visited March 16, 2009).

[10] NARAL Pro-Choice America, "Refusal Clauses: Dangerous for Women's Health", stating (p. 6) that failure to provide abortions, sterilizations, and other procedures, "even for religious reasons," is "wrong and may jeopardize

- Physicians for Reproductive Choice and Health claims that "the right of the patient to timely and comprehensive reproductive healthcare must *always* prevail" over a health care provider's rights of conscience, and that "[s]everal other leading national medical and public health associations hold similar beliefs."[11]

Hostility to conscience rights is not confined to professional organizations and advocacy groups. State and local governments have exerted pressure on health care professionals and institutions to provide abortions and other procedures despite their conscientious objections. In recent litigation on the Weldon Amendment, ultimately dismissed on procedural grounds, the Attorney General of California claimed that hospitals in some circumstances have a duty under state law to provide abortions. *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840 (N.D. Cal. March 18, 2008). In 2003, two bills were introduced in the New York legislature (A. 4945 & S. 4031) to allow the state health commissioner in licensing decisions to discriminate against hospitals that do not participate in abortions. In 1999, a bill was introduced and received considerable support in the California legislature (AB 525) to strip hospitals that decline to participate in abortion from receiving public financing or state-funded health care contracts. In 2000, the California Medical Association presented a resolution at the House of Delegates meeting of the American Medical Association in Chicago urging the enactment of similar laws throughout the country.[12]

In the face of such undisguised hostility to conscience rights, there is a need to retain regulatory enforcement of the Church, Coats-Snowe, and Weldon Amendments. Indeed, many of those attacking conscience rights in the examples cited above seemed unaware that the implementation of their proposals by state or local governments would violate one or more federal statutes.[13]

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patient health." *See* http://www.prochoiceamerica.org/issues/abortion/access-to-abortion/refusal-clauses-and-counseling-bans/dangers-of-refusal-clauses.html (visited March 20, 2009).

[11] Physicians for Reproductive Choice: "Church and Medicine: Medical and Public Health Associations on Refusal Clauses" (emphasis added), available at http://www.prch.org/content/index.php?pid=129 (visited March 16, 2009), with links to similar statements by other organizations.

[12] The "reproductive health" resolution was ultimately amended to remove its coercive features. *See* testimony by Francis Cardinal George, Catholic Archbishop of Chicago, at the AMA House of Delegates meeting, available at http://www.usccb.org/prolife/AMAstatement_6-12-2000.pdf (visited March 18, 2009).

[13] Others, by contrast, are well aware that their opposition to the Conscience Regulation is simply another manifestation of their hostility to the policy reflected in the underlying statutes. Some critics have actually used the same arguments against both the regulation and the statute. *See* ACLU Letter to the House Urging Opposition to the Weldon Amendment (July 14, 2004), available at www.aclu.org/reproductiverights/abortion/12725leg20040714.html (visited March 16, 2009).

III. CONSIDERATIONS OF ACCESS TO HEALTH CARE SERVICES, PARTICULARLY FOR THE POOR, MILITATE IN FAVOR OF KEEPING THE CONSCIENCE REGULATION, NOT RESCINDING IT

The Rescission Proposal requests "[i]nformation, including specific examples where feasible, supporting or refuting allegations that the December 19, 2008 final rule reduces access to information and health care services, particularly by low-income women." 74 Fed. Reg. at 10210.

This question seems to assume that the Administration may choose to weaken conscience protection if such protection may diminish access to abortion or sterilization. But that policy choice is foreclosed by the conscience statutes themselves. In any event, rescinding the Conscience Regulation would have uncertain effects on access to those "services." Rescission, however, would certainly reduce access to life-affirming health care services, especially for poor and underserved populations.

A. The Conscience Statutes Foreclose Administrative Action That Would Prioritize Access to Abortion or Sterilization Over Conscience Protection

Congress's enactment of the Church Amendment was, in substantial part, a reaction to a federal district court decision holding that a Catholic hospital, the "only hospital" in the plaintiffs' area capable of performing tubal ligations (sterilizations), was required to provide such procedures by virtue of its receipt of Hill-Burton funds. *See Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975). In that case, the defendant-hospital was "the only maternity department in Billings, Montana, where the plaintiff could secure a tubal ligation" at the time of a cesarean delivery. *Id.* at 77. Presented with this scenario, Congress determined that access to tubal ligations nonetheless had to yield to the conscientious objections of a private hospital. Following passage of the Church Amendment, the lower court vacated its injunction and entered judgment in favor of the hospital, a decision that the Ninth Circuit affirmed. *Id.* at 78.

If there is a policy debate between "access" and "conscience," it is a debate that Congress has already taken up and resolved when, in partial response to *Taylor*, it passed the Church Amendment. And the answer Congress gave was this: presented with a conflict between conscience and access to procedures such as abortion and sterilization, conscience prevails. Therefore, it is particularly inappropriate that the Rescission Proposal appears to contemplate giving weight to public comments tending to show that the Conscience Regulation would limit "access to [these] services" especially for those "in rural areas or otherwise underserved." 74 Fed. Reg. at 10209. Comments to this

effect would simply reiterate the argument of the district court in *Taylor* that Congress specifically considered and rejected by passing the statutes to be enforced.[14]

B. Weakening Conscience Protections Will Have Uncertain Effect on Access to Abortion, but is Certain to Reduce Access to Life-Saving Health Care for All, and Especially for the Poor

Even if Congress had not taken up and resolved this question—that is, if the Administration were free to treat reduction in access to abortion or sterilization as a basis for weakening conscience protection—the Administration should recognize that, although weakening conscience protection may or may not meaningfully increase access to abortion and sterilization, it will reduce access to health care overall, particularly for the poor and other underserved populations, when our Nation can ill afford it.

If conscientiously-opposed individuals and institutions are forced to make a choice between performing abortions and facing punishment, they will still not perform abortions but instead will face the punishment—whether this means loss of a job, loss of participation in a government program, or even civil or criminal penalties. Rescinding the Conscience Regulation will chiefly increase the number of Catholics and others being punished for heeding the voice of conscience.

Recognition of the prospect of these punishments will also have broader, systemic effects. Many if not most of the providers who would face these penalties will either cease practicing medicine altogether, or choose an area of practice that avoids the conflict. Already there is anecdotal evidence of physicians opting not to choose an ob-gyn specialty because of pressures to perform or refer for abortions. Driving physicians out of a specialty because they cannot, in good conscience, provide or refer for one particular procedure obviously does not expand the pool of available physicians. Quite the opposite, it shrinks the pool of available physicians and reduces access to all health care. And what is true of physicians is equally true of other health care professionals and institutions. Thus, weakening conscience protection will decrease access to health care services that actually preserve the life and well-being of women and children.

Indeed, the poorest and neediest patients will suffer the most from such reduction in access to life-affirming health care. Those who allege a conflict between conscience and "access" neglect to ask why rural and other underserved areas are so frequently served only by a Catholic or other faith-based provider. This occurs because for-profit providers see no profit margin in serving poor or sparsely populated areas, while

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[14]*See, e.g.*, Cong. Rec. S9595 (March 27, 1973) (statement of Senator Church); Cong. Rec. S9596 (March 27, 1973) (statement of Sen. Stevenson); Cong. Rec. S9601 (March 27, 1973) (colloquy between Senators Nelson and Church); Cong. Rec. H17453 (May 31, 1973) (statement of Congressman Froehlich).

religiously-affiliated providers serve these patients—whether in rural areas or the inner city—because they see those patients as having inherent human dignity and human rights, including a right to the assistance and compassion of the healing professions. If these providers were barred from acting in accord with the moral and religious convictions that motivated them to provide life-affirming health care in the first place, the result will not be more comprehensive health care for these areas but, in some cases, none at all.

Finally, we note that driving conscientious objectors out of the medical profession also reduces religious diversity in the profession, which is both an end in itself and a benefit to patients in our religiously diverse society. Many patients want access to physicians and other health care providers who do not see the taking of human life as part of a profession devoted to healing. Those patients will find no like-minded physicians to serve them, if those physicians are driven out of their chosen specialty or even out of medical practice altogether. This will not mean greater diversity in health care. It will mean less diversity, and less access to the kind of care patients want and need.

IV. THE EXISTING REGULATION ONLY REDUCES AMBIGUITY AND CONFUSION REGARDING EXISTING STATUTORY PROTECTIONS OF CONSCIENCE

The Rescission Proposal asks "whether the December 19, 2008 final rule provides sufficient clarity to minimize the potential for harm resulting from any ambiguity and confusion that may exist because of the rule." 74 Fed. Reg. at 10210.

The Conscience Regulation enhances clarity and reduces ambiguity and confusion, rather than the opposite, as the question suggests. In this way, the regulation faithfully implements the terms of the statutes, and the Administration should therefore retain it. Two points warrant particular emphasis.

First, those opposed to the Conscience Regulation have complained that it goes beyond protecting conscientious objections to abortion. In fact, the underlying statutes themselves explicitly go beyond abortion. The Church Amendment protects conscientious objections to sterilization as well as abortion. 42 U.S.C. § 300a-7(b), (c)(1) & (e). It protects conscientious objection to "any lawful health service or research activity" in the case of any entity that has received a specified grant or contract for biomedical or behavioral research. 42 U.S.C. § 300a-7(c)(2). It protects conscientious objections to any "health service program or research activity" funded in whole or in part under an HHS-administered program. 42 U.S.C. § 300a-7(d).

The statutes also go beyond merely protecting conscientious objection to performing an abortion. The Church Amendment protects conscientious objection to "assist[ing]" in the procedure. 42 U.S.C. § 300a-7(b), (c) & (e). It protects the conscientious decision not to "counsel, suggest, recommend, assist, or in any way

participate" when the objector is an applicant for an internship, residency, or other program of health care training or study. 42 U.S.C. § 300a-7(e). The Coats-Snowe Amendment protects health care entities that decline to provide abortion or training for abortion, or referrals for abortion or abortion training. 42 U.S.C. § 238n. The Weldon Amendment protects the conscientious decision not to provide, pay for, provide coverage of, or refer for abortions. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, Div. F, § 508(d) (March 11, 2009).

Thus, claims that the Conscience Regulation goes beyond the provision of abortion are at bottom a policy disagreement with the underlying statutes—statutes which this Administration is charged with enforcing.

Second, the regulation provides a reasonable and well-grounded interpretation of statutory terms that are undefined in the statutes themselves. It is precisely the function of a regulation to fill in the interstices of a statute where the statute itself does not define its terms, so as to ensure that the statute's purpose is fully implemented. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). The Conscience Regulation does that. Here we cite just three examples of such responsible and helpful clarification:

- The Church Amendment protects conscientious objection in the case of a provider called upon not only to perform but to "assist in the performance of" abortion, sterilization, or (for entities that have received a specified grant or contract) any lawful health service or research activity. The Church Amendment does not define "assist in the performance of." Plainly the phrase must mean something other than the actual performance of an abortion, else it would be rendered superfluous. Quite reasonably, the regulation defines the phrase to mean any activity with a "reasonable connection" to the objectionable procedure, including "counseling, referral, training, and other arrangements" for the procedure.

- The Coats-Snowe Amendment states that "the term 'health care entity' ... includes" training programs and the like. The regulation reasonably interprets the phrase "including" as creating not a definition but a non-exhaustive list; otherwise Congress would have used the word "means" instead of "includes." *See, e.g., P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 n.7 (1979) (words in a federal statute that follow the term "including" denote some, but not all, of the items within the meaning of the broader term). The regulation's approach here is in full accord with the stated intent of key Congressional sponsors and supporters of the Amendment. S. Rep. 105-220, Health Professions Education Partnerships Act of 1998, at 65 (stating that the term "health care entity" as used in the Coats-Snowe Amendment "was intended to be read in the straightforward manner of 'including' not only the specific entities mentioned,

but also those which are routinely seen as health care entities in common usage and other Federal laws, such as a hospital, provider sponsored entity, health maintenance organization, health plan, or any other type of health care entity. By the word 'includes' [C]ongress intended to add to, not subtract from, the range of entities generally seen as 'health care entities' under Federal law.").

- The text of the Coats-Snowe Amendment explicitly protects health care entities from government discrimination when they decline to provide abortions as well as when they decline to provide abortion training. The section heading in the U.S. Code, however, refers explicitly only to training, because that was the controversy that provided the initial impetus for Congressional enactment of the statute. The regulation, consistent with the usual canons of statutory interpretation, follows the actual statutory text rather than its heading.

V. THE ADMINISTRATION SHOULD CONSIDER OUTREACH THAT IS DESIGNED TO DISPEL COMMON MISCONCEPTIONS ABOUT THE EXISTING CONSTITUTIONAL, STATUTORY, AND REGULATORY LAW IN THIS AREA, AND SHOULD CERTAINLY AVOID FEEDING THOSE MISCONCEPTIONS ITSELF

The Rescission Proposal asks "whether the objectives of the December 19, 2008 final rule might also be accomplished through non-regulatory means, such as outreach and education." 74 Fed. Reg. at 10210.

We note at the outset that any outreach and education should be in addition to, rather than in lieu of, vigorous regulatory implementation of the existing conscience statutes. We believe that such supplemental activities could help to advance the cause of protecting conscience in health care. But under no circumstances should mere outreach and education be considered an adequate substitute for the existing Conscience Regulation, which, like the statutes it implements, bears the force of law.

In particular, there has been rampant mischaracterization of the Conscience Regulation in the popular press and in commentary. Often the regulation has been attacked without reference to, and with no apparent knowledge of, the statutes it enforces. These caricatures point to the need for both regulatory enforcement and further outreach and education, to dispel misconceptions about the state of the law on conscience protection in the context of abortion and sterilization and—with respect to entities that have received a specified grant or contract—other procedures that may violate conscience.

Put another way, public misperception about the Conscience Regulation and the statutes they enforce is, in and of itself, a testament to the need for regulatory enforcement and other guidance from HHS.

Conclusion

It is the Administration's constitutional duty to enforce the laws enacted by Congress, including the conscience protection statutes at issue here. Congress has made its policy choice—a choice that respects and advances this Nation's founding principles of religious liberty and diversity, and that tends to increase patients' ready access to basic health care, regardless of their location or socio-economic status. The Administration's regulatory actions should faithfully enforce that existing policy choice.

Thank you for the opportunity to comment.

Sincerely,

Anthony R. Picarello, Jr.
General Counsel

Michael F. Moses
Associate General Counsel