



Memorandum

To: Interested Parties
From: Americans United for Life
Date: June 25, 2012
Subject: The Respect for Rights of Conscience Act and its application to the Affordable Care Act

The Affordable Care Act¹ presents an unprecedented threat to the conscience rights of insurers and purchasers of insurance. Though the ACA makes a limited exception for certain religious groups who object to participating in government health programs *generally*,² the law does not allow insurance purchasers, plan sponsors, and others with conscientious objections to decline providing or obtaining coverage for *specific items or services*.

Instead, the ACA marks the first time that the federal government has sought to impose specific coverage or care requirements that infringe on the First Amendment rights of conscience of insurers and purchasers of insurance. For example, the “preventive care for women” mandate (discussed in more detail *infra*) requires nearly all insurance plans to provide full coverage for certain life-ending, abortion-inducing drugs. The limited conscience protection applied by the Department of Health and Human Services (HHS) for what it has defined as “religious employers” is exceedingly narrow and leaves vulnerable many insurers and purchasers of insurance who conscientiously object to providing such coverage.

¹ Pub. L. 111-148 (2010) [hereinafter ACA].

² ACA §1311(d)(4)(H).

The Respect for Rights of Conscience Act, H.R. 1179 and S. 1467, amends the ACA to protect the right to provide, purchase, or enroll in healthcare coverage that is consistent with one’s religious beliefs and moral convictions. It also ensures that no requirement in the ACA creates new pressures to exclude those exercising such rights from health plans.

In the American tradition of protecting freedom of conscience, the Respect for Rights of Conscience Act ensures the provision of healthcare remains guided by conscience, not coerced against it.

A. ACA Threatens Conscience Rights.

The ACA creates a new list of “essential health benefits,”³ mandatory for health plans participating in the insurance Exchanges that begin operation in 2014.⁴ Though the statutory language is broad, listing general categories, such as “ambulatory patient services,” “emergency services,” and “prescription drugs,”⁵ the Secretary of Health and Human Services (HHS) may define specific items and services to be covered in each category.⁶ Although the ACA states that the “essential health benefits” requirement is not to be construed to mandate “abortion” coverage,⁷ Connecticut is already attempting to bypass this supposed safeguard by requiring insurance plans participating in the state Exchange and which are eligible for federal subsidies to include insurance coverage for abortion as an “essential health benefit.” Moreover, there is no statutory language to prohibit the Secretary from mandating coverage for other controversial items and services, including abortion-inducing drugs.

The ACA mandates that nearly all private health insurance plans—not only those plans participating in the insurance Exchanges—cover “preventive care” for women.⁸ However, Congress left the determination of what constitutes “preventive care” to an administrative agency, the Health Resources and Services Administration (HRSA). Because the law does not state that “preventive care”

³ *Id.* §1302(a).

⁴ *Id.* §1301.

⁵ *Id.* §1302(b).

⁶ *Id.*

⁷ *Id.* §1303(b)(1)(A)(i).

⁸ *Id.* §2713(a)(4).

excludes abortion, the agency was permitted to include abortion or abortion-inducing drugs as “preventive care.”

On August 1, 2011, the HRSA adopted an ideologically-driven recommendation from the Institute of Medicine (IOM)⁹ to include the “full-range of FDA-approved contraceptives” in its mandate.¹⁰ That broad definition includes so-called “emergency contraception” including the abortion-inducing drug, Ulipristal Acetate (*ella*).¹¹ Thus, through the “preventive care,” Americans are forced to subsidize these abortion-causing drugs with their insurance premiums.¹²

Moreover, HHS has applied an extraordinarily limited exception to its mandate, exempting only a narrowly defined category of “religious employers.”¹³ However,

⁹ Dissenting from the IOM recommendation, committee member Dr. Anthony Lo Sasso criticized the committee’s lack of transparency and creation of an advocacy-based recommendation: “The committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee’s composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy.” COMMITTEE ON PREVENTIVE SERVICES FOR WOMEN; INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 207 (2011) *available at* http://www.nap.edu/catalog.php?record_id=13181 (*last visited* Jun. 12, 2012).

¹⁰ For more information, see *The Con: HRSA guidelines and the Institute of Medicine*, Americans United for Life, *available at* <http://www.aul.org/the-con-hrsa-guidelines-and-the-institute-of-medicine/> (*last visited* June 12, 2012).

¹¹ Both *ella* and the FDA-approved abortion drug mifepristone (RU-486) are Selective Progesterone Receptor Modulators (SPRMs). Both work by blocking progesterone (a hormone necessary to build and maintain the uterine wall during pregnancy), and can either prevent a developing human embryo from implanting in the uterus or kill an implanted embryo by starving it to death. Harrison & Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 ANNALS PHARMACOTHERAPY 115 (Jan. 2011). (“The mechanism of action of ulipristal in human ovarian and endometrial tissue is identical to that of its parent compound mifepristone.”) Despite this scientific fact, the FDA approved *ella* as a “contraceptive.”

¹² Inclusion of *ella* in the HRSA guidelines is directly contrary to assurances made by Senator Barbara Mikulski (D-MD), the sponsor of the “preventive services” provision, that abortion would not be covered “in any way.” For more information, see *The Con: ACA Preventive Services Stated Intent*, Americans United for Life, *available at* <http://www.aul.org/the-con-aca-preventive-services-stated-intent/> (*last visited* June 12, 2012).

¹³ *Id.* “Religious employer” is defined by the HHS regulation as an employer that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under § 6033 (a)(1) and § 6033(a)(3)(A)(i) or (iii) of the Code.

most religiously affiliated schools, hospitals, and charitable organizations would not be included in the exception's protection. Moreover, non-religiously affiliated institutions – whose pro-life consciences are nonetheless violated by the mandate – are unquestionably left unprotected by the limited conscience protection.

The HHS mandate and narrow exemption extend beyond any coercive measure enacted by the states and compromise duly enacted state laws protecting the consciences of healthcare payers. Even those states that have adopted so-called “contraceptive equity” laws generally only apply their requirements to insurance plans that offer prescription coverage (thereby, allowing an employer the option, albeit a difficult choice, to drop prescription coverage altogether). None of the state mandates apply to self-insured or ERISA plans, thereby providing an employer with additional means to offer insurance in accord with its conscience. Multiple states explicitly exclude certain specific FDA-labeled “contraceptives” from their mandates.¹⁴ Moreover, many states with religious employer exemptions adopt a more expansive definition than that provided for by the HHS regulation.¹⁵

¹⁴ Many states do not require coverage for *all* FDA approved contraceptives and multiple states have explicitly chosen to reject certain so-called “contraceptives” from their mandates. For example, Ark. Stat. Ann. §23-79-1103-1104 (2005) provides that “Nothing contained in this subchapter shall be construed to require any insurance company to provide coverage for an abortion, an abortifacient, or any United States Food and Drug Administration-approved emergency contraception.”; N.C. Gen. Stat. § 58-3-178 (1999) excludes “[t]he prescription drug marketed under the name "Preven" or any "equivalent drug product" as defined in G.S. 90-85.27(1)”; and Tex. Insurance Code Ann. § 1369.104 et seq. (2001) excludes “abortifacients or any other drug or device that terminates a pregnancy.”

Other state laws clarify that their mandates are not to include abortion-inducing drugs. Ga. Code § 33-24-59.6 (1999) (“Likewise, nothing contained in this Code section shall be construed to require any insurance company to provide coverage for abortion.”); Me. Rev. Stat. Ann. Tit. 24 §2332-J (1999) (“may not apply to prescriptions designed to terminate a pregnancy.”); and R.I. Gen. Laws § 27-18-57 (2000) (“Provided, that nothing in this subsection shall be deemed to mandate or require coverage for the prescription drug RU 486.”) Keeping in mind that these laws, explicitly excluding the abortion drug RU-486, pre-date the approval of a substantially similar drug, *ella*, the HRSA/HHS mandated coverage preempts the principles, if not the letter, of these laws.

¹⁵ For example, Nevada law exempts insurers “affiliated with a religious organization,” Nev. Rev. Stat. § 689A.047 (1999), while Missouri exempts *anyone* (not limited to religious employers) with a “moral, ethical, or religious” objection and *any* health carrier “owned,

However, in an Advance Notice for Proposed Rulemaking issued in March 2012, HHS asserted that “[S]tate exemptions will be narrowed to align with the final regulations...” Thus, it is clear that any state protection broader than that proffered by HHS will not be enforceable.

Importantly, the HHS mandate and limited exemption conflict with statutory and constitutional protections in states that have heretofore chosen not to impose contraceptive mandates on their citizens. For example, the mandate stands in direct opposition to the duly enacted law of Mississippi which protects the conscience rights of healthcare payers.¹⁶ Alabama has sought to intervene in the case *Eternal Word Television Network v. Sebelius*¹⁷ asserting that the HHS mandate disrespects Alabama’s long tradition of respecting religious freedom and the freedom of conscience, and prohibits Alabama from continuing to provide such protection to its citizens by making the guarantees of Alabama’s constitution and laws unenforceable.¹⁸

In effect, the HHS mandate is a nation-wide evisceration of state protections for the freedom of conscience.

Additionally, while the ACA, states explicitly that “[n]othing in this Act shall be construed to have any effect on Federal laws regarding – (i) conscience protection...”¹⁹ the mandate and regulation issued through HRSA and HHS violate the principles of long-standing federal laws that provide broad conscience protections.²⁰

Adding to the urgency for Congressional action to address the ideologically driven mandate, HHS opted to waive significant requirements of the Administrative

operated, or controlled ... by an entity that is operated pursuant to moral, ethical or religious tenets...” Mo. Rev. Stat. § 376.1199 (2001).

¹⁶ Miss. Code Ann. § 41-107-9 (2004).

¹⁷ N.D. Ala. 12-00501.

¹⁸ The State of Alabama and Attorney General Luther Strange’s motion to intervene and full complaint *available at* <http://www.ago.state.al.us/Update-193> (*last visited* June 1, 2012).

¹⁹ ACA §1303(c)(2)(A)(i).

²⁰ For more information, see *The Con: Federal Law*, Americans United for Life, *available at* <http://www.aul.org/the-con-federal-law/> (*last visited* June 12, 2012).

Procedure Act (APA) in implementing its preventive care guidelines.²¹ HHS asserted that the comment period required by the APA was “satisfied” in 2010, when HHS issued an earlier interim final rule. The guidelines and regulation were finalized—without change—in February 2012, and the mandate will begin to affect insurance plans as early as August 2012.

The Respect for Rights of Conscience Act addresses the HHS mandate and ensures that the broad mandate authorities in the ACA cannot be used to coerce health plan issuers or healthcare providers to provide coverage for items and services in violation of their conscientious beliefs. The Act prohibits the ACA from mandating that health plans offer coverage for “specific items or services” that are “contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity.”²²

The Act also ensures that the ACA will not be used to coerce healthcare providers to violate their consciences, stating that it may not “be construed to require an individual or institutional health care provider, or authorize a health plan to require a provider, to provide, participate in, or refer for a specific item or service contrary to the provider’s religious beliefs or moral convictions.”²³

By including an individual private right of action, the Respect for Rights of Conscience Act ensures proper enforcement of laws protecting conscience and provides effective remedies when discrimination occurs.

B. Protecting Freedom of Conscience is an American Ideal.

Fr. Richard J. Regan, S.J., once noted, “No culture without some idea of moral conscience has yet been discovered.”²⁴ The Founders of the United States believed protecting the freedom of conscience was paramount.

²¹ See 2011 Preventive Services Regulation, *supra* note 8.

²² H.R. 1179 §3 (a)(6)(A)(i). Or of the “religious beliefs or moral convictions of the purchaser or beneficiary of the coverage” in the case of individual coverage. *Id.* (a)(6)(A)(ii).

²³ *Id.* (a)(6)(B).

²⁴ Richard J. Regan, *Private Conscience and Public Law: The American Experience* 207 (1972).

The nation's first president, George Washington, who presided over the writing of the Constitution to which he was a signatory, wrote passionately about the protection of conscience,

If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and if I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution.²⁵

Thomas Jefferson wrote, “No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority.”²⁶

In the wake of the Supreme Court's 1973 decision in *Roe v. Wade*²⁷ to nullify state laws proscribing abortion, federal and state laws were enacted to protect individual conscience. Today, only three states – Alabama, New Hampshire, and Vermont – do not provide any protection for the civil rights of healthcare providers, institutions, or payers.²⁸ Forty-seven states provide some degree of conscience protection for healthcare providers.²⁹

²⁵ George Washington, Letter to the United Baptist Churches in Virginia (May 10, 1789).

²⁶ Thomas Jefferson to New London Methodists (1809).

²⁷ 410 U.S. 113 (1973).

²⁸ See *Healthcare Freedom of Conscience*, DEFENDING LIFE 2012: BUILDING A CULTURE OF LIFE, DECONSTRUCTING THE ABORTION INDUSTRY, pp 545-570 (Americans United for Life 2012).

²⁹ See *Health Care Rights of Conscience*, DEFENDING LIFE 2011: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA, pp 661-683 (Americans United for Life 2011). Two states protect the civil rights of all healthcare providers, whether individuals, institutions, payers (public or private) who conscientiously object to participating in any healthcare procedure or service: Louisiana and Mississippi. Forty-five states protect the civil rights of only certain healthcare providers and/or institutions from participating in specific procedures (usually abortion only): Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan,

Over the last three decades the list of ethical dilemmas in medicine has continued to grow: embryonic stem-cell research, assisted reproductive technologies, abortion-inducing drugs, end-of-life directives, assisted suicide, euthanasia, etc. Two states – Louisiana and Mississippi – protect the civil rights of all healthcare providers, whether individuals, institutions, payers (public or private) who conscientiously object to participating in any healthcare procedure or service.³⁰

C. Conscience Rights are Under Attack.

While the list of ethical dilemmas increases, so do attacks against laws protecting the conscience of healthcare providers, institutions, and payers.

Some organizations pay lip service to freedom of conscience while misrepresenting the effects of conscience laws, *e.g.*, “While we firmly believe that all people have the right to their own opinions and moral beliefs, it is unethical for healthcare providers to stand in the way of a woman’s access to safe, effective, legal and professional healthcare.”³¹

Ira Glasser, while serving as Executive Director of the American Civil Liberties Union (ACLU), made it clear that the goal of the ACLU and other abortion advocacy groups is to eviscerate conscience protections. He asserted, “Much of the debate focused on strategy, with participants wondering whether it was better to work toward improving and narrowing conscience clauses altogether. ... Although reproductive rights activists should still work to improve conscientious objections, **their ultimate goal should be getting rid of them.**”³²

Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Conversely, three states provide no legal protection for the civil rights of healthcare providers: Alabama, New Hampshire, and Vermont.

³⁰ *Id.*

³¹ PLANNED PARENTHOOD FED’N OF AM., *Refusal Clauses: A Threat to Reproductive Rights* (Dec. 2004), available at http://www.plannedparenthood.org/files/PPFA/refusalclauses_12-04.pdf (last visited Apr. 26, 2011).

³² See "Conscientious Exemptions and Reproductive Rights," Executive Summary, 10 (emphasis added).

However, comprehensive conscience laws do not outlaw any procedure or prescription. Nothing prevents others from providing or paying for the healthcare service to which a conscientious objection has been made. Freedom of conscience laws simply protect healthcare providers, payers, and plan issuers from being coerced to act against their consciences.

Conclusion

The Respect for Rights of Conscience Act guards against the use of the ACA to promote attacks on conscience. It enshrines in statutory language the right to provide insurance coverage in accord with religious and moral values. It preserves that ideal which Thomas Jefferson described as the most “dear” provision of the Constitution, “protect[ing] the rights of conscience against the enterprises of civil authority.”³³

³³ Thomas Jefferson to New London Methodists (1809).