The following is the original full text of an op ed by Anthony Picarello, General Counsel to the United States Conference of Catholic Bishops, submitted to America Magazine. This piece was submitted as a response to the magazine's April 12 editorial. An edited version of this response ran in America's May 17 issue.

I was gratified to see the Editors of *America* acknowledge ("How Compelling?" 4/12/10) that the USCCB opposed the final healthcare reform bill for a range of reasons, including the law's lack of "protection of the conscience of health professionals," its lack of "coverage of undocumented immigrants," and its "possible funding for abortions." I was even more pleased to see them acknowledge: "All [of these concerns] merit further legislative and legal action as health care reform is implemented."

But in the very next paragraph, the Editors claim it was actually the issue of abortion funding at Community Health Centers (CHCs) that represented "[t]he great stumbling block to [the Bishops'] endorsing the bill." Though this is certainly a major problem with the law, it was not the only deal-breaker. The CHC funding issue first entered the debate late in the process, by which time the Bishops had already declared repeatedly—by letters of December 14, December 22, and January 26—that the Senate bill failed to satisfy the Bishops' moral criteria in other ways and should therefore be opposed.

The Editors also claim that the concern over abortion funding at CHCs was based on "[t]enuous legal arguments," "debatable, technical questions of law," and an inconclusive "tissue of hypotheticals"—all of which the Bishops inappropriately elevated to the level of principle. But the legal foundations are far stronger—and far less contested—than the Editors suggest.

As the Editors note, my Office prepared a detailed analysis of the final bill and executive order, explaining the shortcomings of the new law regarding abortion funding—both directly through CHCs *and* indirectly through plans that cover abortion—and regarding conscience protection. That document has now been available to the public for about a month, without a single substantive critique in response.

The Editors raise none themselves. Instead, they base their strongly worded charge against the Bishops exclusively on the claim that "many other legal analysts" take a different view on whether the law will fund abortions at CHCs.

But we have been watching out carefully for any competing analysis and seen almost nothing. To be sure, many have baldly asserted, "I just read the statute differently," but this is not legal analysis, no matter how often it is repeated.

Not only has our final analysis of the bill as passed met no opposition on the legal merits, only one scholar (Prof. Timothy Jost, here and here) and one government agency (HHS, here) were willing to provide any reasoned basis at all for opposing the numerous analyses of the CHC problem that USCCB offered before the bill passed.

(The fact that our pre-passage analysis of the CHC issue was contested at all belies the Editors' claim that "the bishops' reasons for drawing their conclusion were not available for others to

probe during the debate on the bill." The Editors would have avoided this misstatement had they visited our healthcare reform website, www.usccb.org/healthcare—which contains links to pre-passage explanations of our position on CHCs from March 4, March 6, and March 17.)

And neither Jost nor HHS undermine our analysis. CHC services that receive federal funding are defined by a federal statute that uses broad categories, such as "family planning services." For over 30 years, courts have consistently read such broad statutory categories to include abortion, and so to require—not just allow, but require—federal funding for abortion, *unless* Congress passes a statute that expressly excludes abortion from funded services. It is this long line of court cases that created the need for the annual Hyde Amendment, which has since provided that express statutory carve-out for certain federal funds.

But the Hyde Amendment only covers the one large appropriation that Congress makes each year to HHS—Hyde does *not* cover separate appropriations like the healthcare reform statute's multi-year appropriation of billions of additional dollars for CHCs. Thus, the funds that normally flow to CHCs from the annual HHS appropriation *are* covered by Hyde, but the additional funds appropriated separately by the healthcare reform law are *not*. As a result, courts will require those additional funds to be made available for abortions.

Prof. Jost and HHS cite not a single case in support of their contrary position. Instead, Prof. Jost merely dismisses the numerous cases we cite as "irrelevant," because they arise out of the Medicaid context. But this is a distinction without a difference, since the broad statutory language defining the federally-funded services provided by CHCs is very similar—and in the case of "family planning services," identical—to the statutory language defining Medicaid services.

Both Prof. Jost and HHS argue that, because CHCs do not currently provide or fund elective abortions, the additional healthcare reform funds will be similarly restricted. They claim that existing HHS regulations enforcing that restriction will apply with equal force to new funds.

But Prof. Jost and HHS do not even address—least of all rebut—the basic principle of law that existing regulations must have statutory authority behind them to be valid, and the cited regulations rely exclusively on the annual Hyde Amendment for their authority. And because the Hyde Amendment does not apply to the new funds, the regulations do not validly apply to those funds either.

If there were a legally valid way to overcome this statutory problem short of a statutory solution, we would welcome it warmly—but as it is, we see none ourselves and have heard none from others. And once again, abortion funding at CHCs is only one of several major, moral problems with the bill, as the Bishops have articulated consistently and repeatedly throughout the debate.

In short, neither bald assertions (no matter how widely echoed), nor attempts at substantive rebuttal that are so few and so ill-supported, render our reading of the law "tenuous," "debatable," or otherwise as uncertain as the Editors would have it. USCCB's analysis has been careful and sound throughout, and even today, it stands substantially uncontested on the merits. In this context, it would have been an error of principle to reject that analysis, in favor of last-

minute attempts to paper over serious moral problems with the bill. Thankfully, the Bishops followed the principled course.