



Secretariat of Pro-Life Activities

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The Need for the Conscience Protection Act of 2017

Questions and Answers

The Conscience Protection Act was introduced in the House of Representatives by Reps. Diane Black (R-TN) and Jeff Fortenberry (R-NE) on January 24, 2017 (H.R. 644) and in the Senate by Sen. James Lankford (R-OK) on February 3 (S. 301). An identical bill, the Conscience Protection Act of 2016, passed the House on July 13, 2016 on a bi-partisan vote of 245-182 but was not considered by the Senate. Every year since 2013 such language has also been included in the House's proposed Labor/HHS appropriations bill.

The Conscience Protection Act would make more effective and permanent the protections of the Hyde/Weldon conscience amendment, approved by Congress as part of this appropriations act every year since 2004. It would also ensure that victims of discrimination under that policy, and under the Church amendment of 1973, have a right of action to protect their rights in court. Answers to possible questions follow.

1. Is this a solution in search of a problem? Has anyone actually been discriminated against for refusing to do abortions?

There are many such cases of discrimination. Cathy DeCarlo, a nurse at Mt. Sinai Hospital in New York, was forced to take part in the gruesome dismemberment of a 22-week-old unborn child in 2009, and saw no resolution of her complaint to the HHS Office of Civil Rights (HHS/OCR) until 2013. Nurses have been told by Vanderbilt University and by a state-run medical center in New York that they must assist in abortions against their consciences.

On June 21, 2016, the HHS/OCR declared that the State of California may continue forcing all health plans under its jurisdiction to cover elective abortions—in violation of the plain text of the Hyde/Weldon amendment. Violations of Hyde/Weldon are also taking place in other states, such as New York and Washington. And in 2011, a major Catholic organization providing exemplary service for victims of human trafficking was denied a federal grant to continue its work, in large part because it would not pledge to send these victims *only* to health care providers willing to help provide abortions.

2. Why isn't the Hyde/Weldon conscience clause sufficient?

Efforts to invoke this clause to protect conscience rights have uncovered limitations and loopholes that must be addressed. The clause has no “right of action” allowing victims to go to court, leaving their protection entirely in the hands of the Department of Health and Human

Services (HHS)—which, as mentioned previously, has failed to fully enforce Hyde/Weldon, has been the perpetrator of the discrimination, and in other cases has given this issue a low priority. Nurse DeCarlo, for example, had to wait almost four years for a response after being forced to take part in a late-term abortion under threat of losing her job. Moreover, the agency in the California case cited above claims it is not covered by Hyde/Weldon because this particular agency does not directly receive federal funds. And because that amendment is written as a “limitation of funds” rider, its only stated remedy for violations is a cutoff of all federal Labor/HHS/Education funds to an entire federal agency or state government.

Some say such a massive penalty will never be applied in practice, and at least two lawsuits (dismissed at present for lack of a specific controversy) have claimed that it is unconstitutionally overbroad.

3. Why does the legislation’s “right of action” mention the Church amendment of 1973 and the Coats-Snowe amendment of 1996? Doesn’t this make this bill much more expansive than current law?

No, it only states explicitly that victims of discrimination can go to court to defend their rights under these laws. This was assumed to be true until November 2010. Then a federal appeals court found against Cathy DeCarlo, saying that the Church amendment has no such “right of action” because it does not state it outright. See http://blogs.findlaw.com/second_circuit/2010/11/cenzon-decarlo-v-mt-sinai-hosp-no-10-0556-1.html. Absent this clarification, doctors and nurses discriminated against by private hospitals, medical schools, etc. have nowhere to turn except HHS, with the problems noted above. In the Hyde/Weldon, Coats-Snowe, and Church amendments, Congress has *already* prohibited such discrimination. This measure ensures that victims really have a remedy.

4. Shouldn’t there be an exception for “emergencies”? Won’t this provision cause women to die?

No. Since 1973, all federal laws and almost all state laws protecting conscience rights on abortion have had no exceptions. The American Civil Liberties Union (ACLU) in recent years has lobbied for an “emergency” exception (which ACLU would define as any abortion that serves a woman’s physical or emotional “health”), but it has never been able to show that current laws led to any harm to a woman in four decades. Even the Obama administration said that these conscience laws operate side-by-side with the federal Emergency Medical Treatment and Active Labor Act (EMTALA), which rightly requires treatment to stabilize the condition of pregnant women and their babies in emergencies, and the two areas of law have never been in conflict (see 76 *Fed. Reg.*, *supra*, at 9973-4). There is no reported case in which EMTALA was invoked to require an abortion. In 2011, when the Protect Life Act (HR 358) was debated and approved by the House, four experts with many years of experience in high-risk obstetrics and emergency medicine provided testimonials that they have never encountered a case in which an abortion was needed to save the mother’s life (*Cong. Record*, Oct. 13, 2011, H6877-8).

5. Shouldn't the Act be "double-sided"? What if a pro-abortion doctor is discriminated against for his pro-abortion stance?

The Act protects against discrimination by *governmental* entities. Any attempt by government to place an "undue burden" on performance of abortions has long been forbidden by the Supreme Court's abortion decisions. It is the right to *decline* involvement in abortion that now cries out for Congress's protection.

In any case the situations are not parallel. If a doctor is told he may not perform abortions in one government program or on patients whose care is federally funded, his conscience is not violated—he is only inconvenienced, and he can perform such abortions elsewhere. If a doctor is told he *must* perform abortions, he is being ordered to violate his deepest convictions in order to keep practicing medicine—even though the Hippocratic oath that has formed the basis for medical ethics for many centuries rejects abortion. If these medical professionals are forced out of medicine, millions of pro-life Americans will lose their right to receive care from healers who respect and share their moral convictions about the life-affirming purpose of medicine.

9/7/17