

ISSUE BRIEF

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What Congress and the Administration Can Do to Protect Conscience Rights

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In the context of health care, Congress has rightly protected rights of conscience, based both on religious beliefs and on moral convictions, for over four decades. These protections allow for the expression of a diversity of values in health care while ensuring that individuals and entities are not compelled to participate in practices that violate their sincere moral, ethical, or religious convictions.

Regrettably, conscience-based violations and discrimination continue to occur across the country. From nurses being forced to participate in abortion procedures to states mandating coverage of elective abortion in insurance plans, these violations demonstrate the urgent need for policymakers to stop further assaults on rights of conscience.

A robust respect for the sacred rights of conscience, both in government and among private citizens and institutions, enables Americans to work and live alongside each other despite deep, sincere differences on a number of ethical and moral matters. Conscience protections take nothing away from anyone. Rather, they uphold the traditional American principles of equality, pluralism, and tolerance.

Overview of Health Care Conscience Laws

Laws that protect rights of conscience in the context of health care include the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and Section 1553 of the Affordable Care Act (ACA).

Immediately following the Supreme Court's *Roe v. Wade* decision in 1973, which effectively legalized abortion on demand nationwide, policymakers recognized the need to protect conscience rights in the context of abortion and sterilization procedures.

In 1973, Senator Frank Church (D-ID) offered four amendments that were included in the Public Health Service Act (PHSA). Known collectively as the Church Amendments, they protect moral and religious objectors in the context of health care. Those amendments:

- **Ensure** that entities (such as hospitals) or individuals that receive certain federal funds do not require participation in abortion and sterilization procedures;
- **Prohibit** employment discrimination on the basis of unwillingness (or willingness) to participate in the performance of abortion or sterilization;
- **Provide** a general conscience protection for individual performance or assistance in programs or activities funded by the U.S. Department of Health and Human Services (HHS); and
- **Prohibit** entities receiving federal grants from discriminating against applicants who object to

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participating in the performance of abortion or sterilizations.¹

For more than 40 years, the Church Amendments have offered meaningful protection to moral and religious objectors. Their inclusion in the PHSA was bipartisan; in fact, they passed in the Democrat-controlled Senate and the Democrat-controlled House of Representatives.²

In 1996, Congress added another conscience protection to federal law: the Coats–Snowe Amendment to the PHSA.³ The amendment, which was included in a fiscal year (FY) 1996 appropriations bill, prohibits local, state, and federal governments from subjecting a health care entity to discrimination if the entity will not train, provide, or refer for abortions. Like the Church Amendments, the Coats–Snowe Amendment received bipartisan support in both houses of Congress.⁴

In 2004, Congress enacted yet another conscience protection. The Weldon Amendment, a provision first included in the FY 2005 appropriations bill, stipulates that no funds appropriated under the appropriations bill can go to a federal, state, or local government if it discriminates against a health care entity that will not perform, cover, refer, or pay for abortion. The amendment protects a wide range of entities, including physicians, medical specialists, nurses, hospitals, and health insurance plans.

Unlike the Coats–Snowe and Church Amendments, the Weldon Amendment does not amend the PHSA and is not codified in federal law. Rather, it is a provision that was first included in the FY 2005

Labor–HHS appropriations bill and has been included or referenced annually in subsequent appropriations bills.⁵

The Affordable Care Act, although overall not remotely sufficient⁶ to protect medical conscience and unborn life, also contains a conscience protection provision with regard to assisted suicide, a practice gaining traction in the states. Section 1553 of the ACA prohibits federal, state, or local governments that receive funding under the act from discriminating against individuals or health care entities “on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.” Congress designated the Office for Civil Rights (OCR) at the Department of Health and Human Services to receive and respond to complaints regarding conscience violations and discrimination.⁷

Finally, in 2008, during the waning weeks of the George W. Bush Administration, the Administration put a conscience protection regulation in place. This regulation protected the conscience rights of health care providers by ensuring that HHS funds did not support morally coercive or discriminatory practices or policies in violation of federal law, pursuant to the Church Amendments, the Coats–Snow Amendment, and the Weldon Amendment.⁸ In order to ensure that recipients of HHS funds knew about their legal obligations under these federal health care conscience protection laws, the HHS required written certification that recipients would comply with the terms

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1. 42 U.S.C. §300a-7(b)-(e), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap6A-subchapVIII-sec300a-7.pdf>.
 2. Public Health Service Act Extension, Public Law 93-45 (1973), <https://www.congress.gov/bill/93rd-congress/senate-bill/1136?q=%7B%22search%22%3A%5B%22S.+1136%22%5D%7D&r=1>.
 3. 42 U.S.C. §238n, <https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc238n.pdf>.
 4. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, <https://www.congress.gov/bill/104th-congress/house-bill/3019?q=%7B%22search%22%3A%5B%22H.R.+3019%22%5D%7D&r=1>.
 5. Consolidated Appropriations Act of 2005, Public Law No. 108-447, <https://www.congress.gov/bill/108th-congress/house-bill/4818>.
 6. Chuck Donovan, “Obamacare and the Ethics of Life: Weakening Medical Conscience and the Protection of Life,” Heritage Foundation *WebMemo* No. 3106, January 19, 2011, <http://www.heritage.org/health-care-reform/report/obamacare-and-the-ethics-life-weakening-medical-conscience-and-the>.
 7. Compilation of Patient Protection and Affordable Care Act of 2009, Public Law No: 111-148, <https://www.hhs.gov/sites/default/files/ppacacon.pdf>.
 8. U.S. Department of Health and Human Services, Office of the Secretary, *Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, December 2008, pp. 78071-78101, <https://www.gpo.gov/fdsys/pkg/FR-2008-12-19/html/E8-30134.htm>.
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of the Church, Coats–Snowe, and Weldon Amendments. The rule also defined certain key terms and assigned responsibility for complaint handling and investigation to the HHS’s Office for Civil Rights and program offices.

In March 2009, the Obama Administration announced plans to roll back these conscience protections, in part to ensure the HHS’s “consistency with current Administration policy.”⁹ In February 2011, the Obama Administration issued a final rule that rescinded much of the 2008 rule, including clarifications that would have helped in interpreting and enforcing long-standing federal statutes protecting the conscience rights of health care providers and the requirement that recipients of federal funds certify compliance with those statutes.¹⁰

Ongoing Attacks on Conscience

Despite the existence of numerous conscience protections in federal statutes, violations happen, and existing conscience protections do not provide a private right of action, which would allow victims to seek legal redress in court. Instead, their only recourse lies in an appeal to the Office for Civil Rights (OCR) at HHS. Regrettably, Obama-era occurrences demonstrate the OCR’s poor track record in moving quickly—if at all—on such complaints:

- In 2009, Cathy DeCarlo, a nurse at a New York hospital, was forced to take part in a second-trimester abortion, despite her long-standing religious objections, under threat of losing her job and her license. She filed a complaint¹¹ with the HHS OCR alleging that the hospital had violated the Church Amendments’ protection against compelled participation in assisting abortions. She also filed a lawsuit against the hospital that was dismissed because the Church Amendments do not provide for a private right of action.¹² Almost three years passed before OCR completed its investigation, which led to the hospital agreeing to comply with federal conscience laws, revising its human resources policy, and training staff about obligations to comply with statutory conscience protections.¹³
- In August 2014, the California Department of Managed Health Care mandated that almost every health plan in the state include coverage of elective abortions, including plans purchased by religious schools and organizations and churches. Such a mandate is a clear violation of the Weldon Amendment,¹⁴ but complaints to the HHS about the state’s mandate were dismissed by OCR after nearly two years of investigation.¹⁵ Other states,

9. U.S. Department of Health and Human Services, Office of the Secretary, *Rescission of the Regulation Entitled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law”*; Proposal, March 2009, pp. 10207–10211, <https://www.federalregister.gov/documents/2009/03/10/E9-5067/rescission-of-the-regulation-entitled-ensuring-that-department-of-health-and-human-services-funds-do>.

10. U.S. Department of Health and Human Services, Office of the Secretary, *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, February 2011, pp. 9968–9977, <https://www.gpo.gov/fdsys/pkg/FR-2011-02-23/pdf/2011-3993.pdf>; news release, “USCCB Finds Weakening of Health Care Conscience Rule a ‘Disappointment,’ Affirms Some Positive Elements,” United States Conference of Catholic Bishops, February 18, 2011, <http://www.usccb.org/news/archived.cfm?releaseNumber=11-036>.

11. Alliance Defense Fund (now known as Alliance Defending Freedom), “Report of Discrimination in Violation of 42 U.S.C. § 300a-7,” letter from Matthew S. Bowman to Michael Carter, Regional Manager, Office for Civil Rights, U.S. Department of Health and Human Services, March 8, 2010, <https://adfflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/cenzon-decarlo-v.-the-mount-sinai-hospital/cenzon-decarlo-v-the-mount-sinai-hospital---adf-letter-to-u-s-dept-of-hhs.pdf?sfvrsn=6>.

12. *Cenzon Decarlo v. Mount Sinai Hospital*, U.S. Court of Appeals, 2nd Circuit, November 23, 2010, <http://caselaw.findlaw.com/us-2nd-circuit/1545634.html>.

13. U.S. Department of Health and Human Services, letter from Linda C. Colón to Matthew S. Bowman, Alliance Defending Freedom, and David Reich, MD, Interim President, Mount Sinai Hospital, February 1, 2013, <https://adfflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/cenzon-decarlo-v.-the-mount-sinai-hospital/cenzon-decarlo-v-the-mount-sinai-hospital---results-of-hhs-investigation.pdf?sfvrsn=6>.

14. Life Legal Defense Foundation, “Complaint for Discrimination in Violation of Federal Conscience Protections,” letter from Catherine W. Short to Office for Civil Rights, U.S. Department of Health and Human Services, October 9, 2014.

15. U.S. Department of Health and Human Services, Office for Civil Rights, letter from Jocelyn Samuels, Director, to Catherine W. Short, Life Legal Defense Foundation attorney, June 21, 2016, <https://adfflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/resources/media-resources/cdmhc-investigation-closure-letter.pdf?sfvrsn=4>.

including New York and Oregon, have emulated California's mandate in recent years.¹⁶

- In 2011, the HHS Office of Refugee Resettlement began to give "strong preference" to applicants for a federal antitrafficking grant that would be willing to provide referrals for abortion for trafficking victims.¹⁷ The U.S. Conference of Catholic Bishops, which had been using that federal grant for five years to serve victims of sex slavery and human trafficking, has a long-standing policy of declining to refer victims for contraception or abortion. Yet, despite higher scores for effectiveness than other organizations applying and despite the Church Amendments' prohibition on discrimination against grant applicants on the basis of participation in abortion, the Conference of Catholic Bishops lost the grant competition and was stripped of funding for its important work on behalf of vulnerable women, men, and children.

What Congress and the Administration Should Do Now

- **Ensure a private right of action.** Congress should act to strengthen the rights of victims of conscience violations by ensuring the private right of action. The Conscience Protection Act (H.R. 664/S. 301) would accomplish this goal. In addition to codifying the Weldon Amendment, the Act specifies that the HHS Office for Civil Rights must investigate complaints stemming from allegations of conscience violations and
- **Issue guidance regarding funding discrimination.** To ensure that faith-based groups can continue to partner with the federal government to serve vulnerable populations, the Secretary of HHS should direct all offices offering grants, contracts, and other funding to respect the religious and moral beliefs of those who apply for such funding and ensure that the grant-making process

strengthens the Church, Coats-Snowe, and Weldon Amendments by providing a private right of action if a party such as a health care professional, facility, insurer, or social service provider claims to have been adversely affected by discrimination. Congress should also add a private right of action to the Affordable Health Care Act's assisted suicide conscience protection provision.¹⁸

Giving individuals their day in court is a much better system than the current one, which leaves Americans at the mercy of unelected and often unaccountable bureaucrats who are frequently ideologically opposed to the very conscience protections they are charged with enforcing. A private right of action does not guarantee a certain outcome one way or another, but it would ensure that a person or entity alleging discrimination can, in addition to filing a complaint with the OCR, seek a legal remedy for violations of their rights under the Church, Coats-Snowe, and Weldon Amendments. President Donald Trump has stated that he would do all he can to make sure that the Conscience Protection Act comes to his desk for signature and enactment.¹⁹

16. News release, "Governor Cuomo Announces Decisive Actions to Secure Access to Reproductive Health Services in New York," Executive Office of Governor Andrew Cuomo, January 21, 2017, <https://www.governor.ny.gov/news/governor-cuomo-announces-decisive-actions-secure-access-reproductive-health-services-new-york>; Oregon Health Authority, "Reproductive Health Equity Act," <http://www.oregon.gov/oha/PH/HEALTHYPEOPLEFAMILIES/REPRODUCTIVESEXUALHEALTH/Pages/reproductive-health-equity-act.aspx>.

17. The original grant document is no longer available on the HHS website, but the terms of the grant were widely reported at the time. See Sarah Torre, "Obama Administration Puts Politics Before Trafficking Victims?" *The Daily Signal*, December 1, 2011, <http://dailysignal.com/2011/12/01/obama-administration-puts-politics-before-trafficking-victims/>; Jerry Markon, "Health, Abortion Issues Split Obama Administration and Catholic Groups," *The Washington Post*, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAxV5xZM_story.html?utm_term=.4793456cd278; Mary Ann Walsh, "The ABC Factor at HHS—Anybody But Catholics," *USCCBlog*, October 13, 2011, <http://usccbmedia.blogspot.com/2011/10/abc-factor-at-hhs-anybody-but-catholics.html>; and Florrie Burke and Andrea Powell, "HHS and the Catholic Church: Examining the Politicization of Grants (Minority Day of Hearing)," testimony before the Committee on Oversight and Government Reform, U.S. House of Representatives, December 14, 2011, <https://oversight.house.gov/hearing/hhs-and-the-catholic-church-examining-the-politicization-of-grants-minority-day-of-hearing/>.

18. Conscience Protection Act of 2017, H.R. 644, 115th Cong., 1st Sess., <https://www.congress.gov/bill/115th-congress/house-bill/644>.

19. Letter from Donald J. Trump to Brian Burch, President, CatholicVote.org, October 1, 2016, <https://catholicvote.org/wp-content/uploads/2016/10/Trump-Letter-to-CV.pdf>.

abides by the letter and spirit of federal laws protecting faith-based groups from discrimination.

- **Reinstate the Bush-era regulation.** The Trump Administration should also reinstate the conscience protection regulation put in place during the George W. Bush Administration and include new language to encompass the ACA assisted suicide conscience protection to ensure that recipients of HHS funding are aware of their obligations under federal law.

Conscience Rights Are a Fundamental American Principle

The freedom to live in accordance with one's conscience is a fundamental principle of American life. Americans enjoy the right to act in harmony with their moral and religious beliefs not just in houses of worship or the privacy of the home, but also in the public square, including at work.

Respecting rights of conscience in the context of health care used to be a bipartisan goal, broadly supported by liberals and conservatives alike. Issues like abortion, sterilization, and assisted suicide will undoubtedly remain contentious, but respecting the rights of individuals and entities to dissent on morally sensitive issues can be safeguarded in a free society through robust protections of individual conscience.

Congress and the Trump Administration now have the opportunity to further protect conscience rights through legislation and administrative action. To halt ongoing assaults on America's first freedom and prevent future conscience violations, they should do so without delay.

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