RESPONSE OF CAROL TOBIAS,
PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE

August 4, 2014

QUESTION FROM SENATOR GRAHAM: *In your testimony to the Committee, both verbal and written, you asserted that S. 1696 would result in invalidation of federal and state laws that protect individual doctors, nurses, and other health-care providers, and usually private institutions as well, from being penalized for declining to participate in the providing of abortions. These are often referred to as "conscience protection laws," although some of the critics of such laws call them "refusal clauses." During the question period at the hearing, when I suggested to Nancy Northup, president and CEO of the Center for Reproductive Rights, that the bill would result in invalidation of the conscience laws, she said, "I don't agree. This legislation doesn't address the issue of conscience objection." However, she did not explain how these laws could survive scrutiny under the tests imposed by the bill, and she was evasive when I asked her if she would endorse an amendment to S. 1696 exempting these laws from the scope of the bill. Do you have any comment on Ms. Northup's claim that the bill "does not address" the issue of conscience protection laws, and could you please explain the process of judicial analysis that you believe would result in invalidation of these laws under S. 1696?*

S. 1696 "doesn't address" conscience protection laws only in the sense that they are not explicitly mentioned, but of course this is completely irrelevant, since they clearly fall within the general prohibitions in the bill, which render presumptively invalid any laws that either treat abortion differently from other "medically comparable procedures" *or* that directly or indirectly reduce "access" to abortion services.

I will use as examples the two conscience protection laws in effect in South Carolina. South Carolina Code Ann. § 44-41-50 states in part:

> (a) No physician, nurse, technician or other employee of a hospital, clinic or physician shall be required to recommend, perform or assist in the performance of an abortion if he advises the hospital, clinic or employing physician in writing that he objects to performing, assisting or otherwise participating in such procedures. Such notice will suffice without specification of the reason therefor.
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> (b) No physician, nurse, technician or other person who refuses to perform or assist in the performance of an abortion shall be liable to any person for damages allegedly arising from such refusal.
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> (c) No physician, nurse, technician or other person who refuses to perform or assist

> in the performance of an abortion shall because of that refusal be dismissed, suspended, demoted, or otherwise disciplined or discriminated against by the hospital or clinic with which he is affiliated or by which he is employed. A civil action for damages or reinstatement of employment, or both, may be prosecuted by any person whose employment or affiliation with a hospital or clinic has been altered or terminated in violation of this chapter.

South Carolina Code Ann. § 44-41-40 states:

> "No private or nongovernmental hospital or clinic shall be required to admit any patient for the purpose of terminating a pregnancy, nor shall such institutions be required to permit their facilities to be utilized for the performance of abortions. No cause of action shall arise against any such hospital or clinic for refusal to perform or to allow the performance of an abortion if the institution has adopted a policy not to admit patients for the purpose of terminating pregnancies; provided, that no hospital or clinic shall refuse an emergency admittance."

These statutes clearly provide certain specified immunities, with respect to refusal to participate in abortion, that do not apply to other "medically comparable procedures." Therefore, under S. 1696, anyone challenging such a law would easily establish a *prima facie* case that the laws are invalid. The laws would then be nullified unless the state can convince a federal judge, by clear and convincing evidence, that these laws significantly increase the safety of abortion practice or otherwise advance women's health, and that there is no "less restrictive" way to accomplish those purposes. But of course, these laws were enacted for the purpose of protecting conscience rights. It will avail the state nothing to show that they do no harm to women's health – they will be invalidated.

Nor would it change the situation if the state legislature were to enact new laws that would apply to a broader range of medical procedures. Any conscience law that could be invoked by a health care provider to avoid participation in providing abortions would be subject to attack under the alternate prohibition in S. 1696, which is the prohibition on laws that directly or indirectly reduce "access" to abortion – whether or not they single out abortion. It would be easy for those attacking the new law to show that it was being used or would be likely to be used by health care providers who object to participating in abortion. It is self evident that the effect "is reasonably likely to result in a decrease in the availability of abortion services in the State," at which point the law is presumptively invalid under S. 1696.