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March 26, 2009

Office of Public Health and Science  
Department of Health and Human Services  
Attention: Rescission Proposal Comments  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W., Room 716G  
Washington, D.C. 20201

SUBJECT: Rescission Proposal, 74 FR 10207

As the nation's largest pro-life group with affiliates in all 50 states and over 3,000 local chapters nationwide, the National Right to Life Committee (NRLC) registers its strong opposition to the proposed rescission (74 FR 10207) of the final rule (73 FR 78072) implementing the federal laws protecting the conscience rights of America's doctors and health care providers. In light of the systematic, nationwide campaign by pro-abortion pressure groups to force a broad range of health care providers to participate in abortions, the federal government should not rescind this carefully crafted regulation designed to safeguard against forced violations of conscience in federally funded programs.

For over 35 years, it has been the policy of the federal government that the religious and moral beliefs of health care providers who object to abortion would be respected in federally funded programs. The U.S. Congress has repeatedly reinforced this policy through its enactment of legislation. Congress recognized that for many health care providers, the destruction of innocent human life through the violence of abortion is a violation of their most deeply held religious and moral convictions.

But today's abortion advocacy movement – the supposed proponents of an individual's freedom to choose – are becoming increasingly more aggressive in their efforts to force unwilling providers into becoming abortion providers. The need for an effective regulation implementing the federal conscience protection laws is needed today more than ever.

Bias against those who choose not to participate in abortion on moral grounds has been documented for over a decade. In 1996, a case study published in *Issues in Law & Medicine* revealed that applicants for medical school were being screened for their views on abortion, and bias against applicants' opposition to abortion was expressed during evaluations for admission. In 1982, a case study published in the *Brigham Young University Law Review* revealed that approximately 5% of the nurses thought that their job advancement and assignment opportunities may be limited by their religious and moral beliefs regarding abortion, which the authors extrapolated to equal approximately 50,000 of America's nurses.

More recently, the Christian Medical Association reports that more than 40% of its membership surveyed reported having experienced pressure to violate their convictions, with “physicians . . . losing positions and promotions because of their life-affirming views” and “[r]esidents . . . losing training privileges because they refused to do abortions.” Its report, “Abridging the Freedom to Protect Patients: Threats to Healthcare Professionals’ Conscience Rights,” contains real-life examples of the pressure that is brought to bear upon health care professionals for declining to participate in abortion.

Perhaps one of the most alarming developments in the increasing effort to force health care providers to participate in abortion against their convictions came in 2007. In November of that year, the American College of Obstetricians and Gynecologists’ Committee on Ethics issued an opinion declaring that obstetrician-gynecologists who are conscientiously opposed to abortion nevertheless have a duty to refer for abortion, and in certain circumstances, to perform abortions. This opinion was particularly dangerous because of its possible repercussions for pro-life doctors, as the Catholic Medical Association explained at the time: “If physicians refuse to go along with these demands they risk having an ethics complaint filed against them, and this could cause them to lose their certification through the American Board of Obstetrics and Gynecology. Because hospitals use board certification to grant hospital privileges, pro-life physicians could lose their ability to admit patients to hospitals.”

Public outrage immediately followed. It was inconceivable to many Americans that men and women who have studied for years to become obstetrician-gynecologists in order to bring human life into the world would now be told that, despite their moral opposition to abortion, they have to perform and refer for abortion. Thankfully, President George W. Bush’s Secretary of Health and Human Services, Secretary Leavitt, wrote to the groups involved in certification – the American Board of Obstetrics and Gynecology and the American College of Obstetricians and Gynecologists – raising concerns that the ethics opinion might be relied upon as a means for denying board certification to physicians. The Secretary reminded them of the federal conscience protection laws and expressed concern that compliance of HHS-funded State and local governments, and other institutions, could be jeopardized if these entities were to penalize a physician because of the Board’s denial of certification on grounds of failure to perform or refer for abortion.

No one should be forced to participate in the taking of a human life against their moral convictions, especially not by a federally funded entity. Physicians must be able to turn to the federal government for redress if they are discriminated against because of their moral opposition to abortion. Although many states also have conscience protection laws, the federal government carries a big stick in the form of federal funding, and it should use this stick to prevent health care providers from being forced out of the industry rather than violate their conscience. A reduction in health care providers would be detrimental to both America’s overall health care, and to America’s women who would have increasingly limited access to physicians, particularly obstetrician-gynecologists, who share their values regarding health care.

An equally alarming development is the increasing hostility towards institutional health care providers, such as religious hospitals, who object to participating in abortion. A 2002 report by the American Civil Liberties Union's Reproductive Freedom Project titled "Religious Refusals and Reproductive Rights" asserts that when "religiously affiliated organizations move into secular pursuits – such as providing medical care or social services to the public . . . they should no longer be insulated from secular laws. In the public world, they should play by public rules. . . . [T]hey depend on government funds. . . . These institutions ought to abide by the same . . . reproductive health mandates as apply to other health care institutions."

The increasing national effort on the part of certain groups to employ the coercive powers of state and local government agencies and courts to force health-care providers, including religiously affiliated hospitals, to perform or fund abortions is wide-ranging. For example, in Alaska the state supreme court ruled that a community hospital must perform late abortions against the wishes of the hospital's board of directors. Catholic hospitals and HMOs have been pressured by authorities in New Jersey and New York for refusal to provide abortions or abortion-related services. In Connecticut, a certificate of need was denied to a proposed outpatient surgical center because it declined to perform abortions, after abortion activists intervened in the proceedings. A hospital merger in New Hampshire was undone when pro-abortion activists intervened with the state attorney general. The city council of St. Petersburg, Florida, forced a private hospital to leave a non-profit consortium because the consortium followed a pro-life policy.

On December 19, 2008, the U.S. Department of Health and Human Services (HHS) issued a regulation ("final rule") to implement the federal conscience protection laws that Congress has enacted over the last 35 years. After a lengthy process that began on August 26, 2008, the Department concluded that a regulation was necessary in order to educate the public and health care providers about the laws, ensure compliance with the laws, and promote a more tolerant environment within the health care field. In reaching this conclusion, HHS received and reviewed a "large volume" of comments, both pro and con.

A key component of the final rule is its requirement that recipients of certain HHS funding must certify their compliance with the federal conscience protection laws. Such a requirement is nothing new. Currently, many recipients of HHS monies certify their compliance with other nondiscrimination statutes. When it proposed this additional certification requirement, HHS gave by way of example Form PHS-5161-1, which HHS said was "required as part of Public Health Service grant applications" and which "requires applicants to certify compliance with all federal nondiscrimination laws, including laws prohibiting discrimination on the basis of race, color, national origin, religion, sex, handicap, age, drug abuse, and alcohol abuse or alcoholism." There is no reason why recipients of HHS funding should not also be required to certify their compliance with the federal conscience protection laws, especially in light of the increasing pressure on health care providers to violate their moral convictions with regards to abortion. Yet, the Obama Administration would eliminate having this mere certification requirement be part of its distribution of billions of federal tax dollars.

The final rule's certification requirement would ensure that recipients of federal HHS funding are aware of the nondiscrimination requirements contained in federal law (the Church Amendments, Public Health Service Act section 245, and the Weldon Amendment), and that they are committed to complying with these laws. HHS received "hundreds" of comments that confirmed a lack of awareness of these federal protections. The rescission proposal's suggestion of an "outreach and education" effort is a poor substitute for this effective and targeted compliance mechanism of certification.

Lastly, it should not go unnoticed that some of the more prominent organizations that are opposing the final rule are the very groups that oppose the underlying Weldon conscience protection law itself. This conscience protection law prevents any level of government from discriminating against a health care provider merely because the provider declines to provide, pay for, provide coverage of, or refer for abortion. NARAL, Planned Parenthood and the National Organization for Women opposed the enactment of the Weldon Amendment.

The underlying federal conscience laws implemented by the final rule do not prohibit any health care provider from voluntarily offering any abortion-related service; they merely ensure that entities receiving certain HHS funding will not discriminate against providers who decline to offer abortion-related services. Repeal of the final rule will be viewed as an act of hostility by the Obama Administration to the principles embodied in these laws, and an indication that the Administration is more interested in gaining plaudits from extreme pro-abortion advocates than in protecting the conscience rights of pro-life Americans.

Sincerely,



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NRLC President