**TO:** **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

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**RE:** **RESCISSION PROPOSAL - PROVIDER CONSCIENCE REGULATION**

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# COMMENTS OF THE AMERICAN CENTER FOR LAW & JUSTICE ON THE PROVIDER CONSCIENCE REGULATION RESCISSION PROPOSAL

The American Center for Law and Justice (ACLJ) hereby respectfully provides the following comments on the Rescission Proposal regarding the December 19, 2008 final rule entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" ("Provider Conscience Regulation") currently under consideration by the Department of Health and Human Services ("Department").

Overview:

As an organization committed to preserving the conscience rights of Americans, the ACLJ views the Rescission Proposal as a backward step in the effort to provide full protection for the conscience rights of American healthcare workers and entities. The ACLJ has litigated, and continues to litigate, cases related to protecting the conscience rights of health professionals in both state and federal courts. Moreover, the ACLJ has helped to resolve numerous employment related situations involving conscience rights without the necessity of litigation.

The Provider Conscience Regulation simply—but importantly—facilitates the enforcement of existing statutes. The Regulation helps to ensure that funds designated by the Department are not used to engage in coercive and/or discriminatory practices as prohibited by the Church Amendments (42 U.S.C. § 300a-7); the Public Health Service Act § 245 (PHSA) (42 U.S.C. § 238n); and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209). While these statutory provisions expressly protect the conscience rights of healthcare entities and personnel, it is apparent that such provisions are increasingly disregarded either by health service providers themselves or by government entities. The conscience rights of healthcare personnel are increasingly at risk of being subordinated to the desires and opinions of others. Importantly, the Provider Conscience Regulation does not create new substantive law. Rather, by requiring compliance with existing law, it merely provides a mechanism by which the anti-discrimination provisions of the Church Amendments, the PHSA, and the Weldon Amendment can be effectively enforced, thus ensuring the full protection of conscience rights in the medical arena.

## I. The Provider Conscience Regulation Protects Americans' First Amendment Conscience Rights

The First Amendment to the United States Constitution provides protection for the right to espouse any particular belief and also safeguards conduct in accordance with one's religious beliefs. Preserving the conscience rights of Americans is thus of paramount *constitutional* concern. The Provider Conscience Regulation helps to ensure that such rights are properly protected. The Supreme Court has noted that the "full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, *is conceded to all*." *Watson v. Jones*, 80 U.S. 679, 728 (1871) (emphasis added). The Court has also explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The First Amendment's Free Speech Clause also operates to secure the cherished freedom of belief and thought. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Court noted in both *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), and *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), freedom of thought necessarily requires freedom from coercive government indoctrination. Freedom from coercive or discriminatory policies and practices such as those prohibited by the Church Amendments, the PHSA, and the Weldon Amendment fits squarely into this cherished right.

For many, the act of engaging in a medical procedure that ends in the termination of a developing human life (or that otherwise touches on "sanctity of life" issues) is not morally neutral. The "abortion debate" is consequently highly controversial and politically-charged. Individuals simply cannot be forced onto one side of that debate, much less forced to participate in the very practices being debated. *Effective* conscience protection in the health services field is therefore vital. Unfortunately, many healthcare professionals have been placed in situations where they are forced

to choose between their conscience and their job, or more troubling, between their conscience and the law.[1]

The ACLJ has undertaken representation in a number of real-life cases which demonstrate that these concerns are not speculative:

- In *Moncivaiz v. Dekalb*, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. Mar. 12, 2004), a bilingual part-time secretary working in DeKalb's Women Infants and Children (WIC) program was denied a promotion to full-time secretary because of her moral and religious objections to doing translation work that might facilitate abortion. *Id*. at *3.

- In *Adamson v. Superior Ambulance Service*, Civil Action No. 04C-3247 (N.D. Ill., filed May 7, 2004), an Emergency Medical Technician was fired when she informed her employer that, because of her religious objection to abortion, she would not assist in the performance of a non-emergency, elective abortion by transporting the patient to an abortion clinic.

- In *Baretela v. Unity Health System*, Case No. 08cv6110L (W.D.N.Y., filed March 10, 2008), Michelle Baretela, a social worker in New York, was fired for her refusal, on conscience grounds, to make referrals for abortions. Despite the fact that providing information to patients on any type of medical or surgical procedure was beyond the scope of both Baretela's training and practice as an out-patient social worker, her employment was terminated solely on the basis of her conscientious objection to participating in abortion referrals.

- In *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. July 31, 2007), a pharmacist was placed on an unpaid leave of absence after a Planned Parenthood nurse complained about his conscientious objection to dispensing potentially abortifacient drugs.

- In 2001, ACLJ filed suit in federal district court on behalf of Karen Brauer, a K-Mart pharmacist, after she was fired for her conscientious refusal to dispense abortifacients or sign a statement indicating her agreement to dispense all prescriptions in the future regardless of her religious or conscientious objection to such activities.

- In *Menges v. Blagojevich*, a group of Illinois pharmacists sued then-Governor Rod Blagojevich and other state officials after implementation of a state administrative regulation requiring pharmacies to dispense potential abortifacients "without delay." The statute provided no exceptions for religious or conscientious objections to such services.

[1] *See e.g.* Americans United for Life, Healthcare Rights of Conscience, http://www.aul.org/Rights_of_Conscience (last visited Sept. 18, 2008); Teresa Stanton Collett, *Protecting the Health Care Provider's Right of Conscience*, April 27, 2004, CBHD.org, http://www.cbhd.org/resources/healthcare/collett_2004-04-27.htm; *St. Agnes Hosp., Inc. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

- In *Nead v. Eastern Illinois University*, a nurse who had been employed by the university for over four years sued after she was denied a promotion to a full-time position. Despite the Director of Nursing's familiarity with Andrea Nead's nursing skills and her clear qualification for the new position, Nead was denied the promotion after she indicated in her interview, on the basis of her religious conviction, that she would not be able to dispense certain potentially abortifacient chemicals.

- In a Tennessee case, the ACLJ represented Deborah S., a nurse employed by the state health department. Deborah informed her employer that she would not dispense a potential abortifacient because of her conscientious religious objection. Several other nurses who worked with Deborah expressed their willingness to cover for her on those rare occasions when the issue should arise. The state, however, responded by informing Deborah that she would either have to dispense the drugs despite her objections or be transferred to a different unit sixty miles away from her current work location.

- The ACLJ represented Paula Koch, a Kansas pharmacist employed by the federal government, after she was threatened with termination over her conscientious refusal to dispense a potential abortifacient.

- In *State of Illinois v. Bonnie Brown*, an Illinois pharmacist was prosecuted for "unprofessional conduct" after she told a nurse her store was "out of stock" of a possible abortifacient, despite the fact that her supervisor had told her this would be an acceptable way to handle her conscientious objection to dispensing the drug.

- In May 2002 ACLJ attorneys tried the case of *Diaz v. Riverside Health Services*. Michelle Diaz was a nurse in California who was fired from her job at a public hospital because she refused, on conscience grounds, to participate in abortions or to dispense a potential abortifacient.

- In a series of current cases, the ACLJ is pursuing EEOC claims on behalf of pharmacists fired for their refusal to dispense potentially abortion-inducing drugs.

- The ACLJ is also currently representing pharmacists in state court in Illinois whose employment with Walgreens was terminated when they requested accommodation of their conscientious objections to dispensing potential abortifacients.

Had the various employers been required to *certify* compliance with the Church Amendments, as the Provider Conscience Regulation provides, these issues might have been resolved, with protection for conscience rights, without any need for legal intervention to vindicate those rights. Even more importantly, without the enforcement mechanism of the Provider Conscience Regulation, it is uncertain how the prohibitions set forth in the Church Amendments are to be enforced, as courts have been reluctant to recognize a private cause of action under the statute. *See, e.g.*, *Moncivaiz*, 2004 U.S. Dist. LEXIS 3997; *Nead v. Eastern Illinois Univ.*, 2006 U.S. Dist. LEXIS 36897 (C.D. Ill. June 6, 2006).

Like teachers and students in the public school setting, healthcare professionals simply should not be forced to check their religious or conscience beliefs at the clinic, hospital or research lab door. The conscience protections afforded by the Church Amendments, the PHSA, and the Weldon Amendment afford valuable protection for the First Amendment conscience rights of these individuals. While additional education and outreach on the issue of conscience protection may be beneficial, and certainly should be undertaken, those means alone are not as likely to ensure proper enforcement of these federal laws. The Provider Conscience Regulation is therefore an important regulatory enforcement mechanism for these statutory protections.

## II. There is National Precedent for Right-of-Conscience Protection Legislation

Based undoubtedly on the foundational constitutional principles that guarantee conscience rights to Americans, this Nation possesses a decades-long history of explicit and affirmative right-of-conscience protection. In the healthcare arena, right-of-conscience legislation is widespread. In fact, out of all fifty states, only three fail to provide some express form of conscience protection to health professionals.[2] In the forty-seven states that do provide such protection, however, there are varying levels of protection. For instance, in some states, healthcare personnel may raise a valid conscientious objection to engaging in abortion-related medical practices only if they provide proof or the reasons for objecting in writing.[3] Various states simply require a conscientious objector, whether an individual or a healthcare entity, to provide prior notice to patients.[4] Importantly, nineteen states enforce outright prohibitions against requiring health professionals – including both entities and employees – to engage in medical procedures resulting in abortion.[5]

Conscience protection exists outside the healthcare context as well. In 1965, the Supreme Court held that selective service draftees may raise conscientious objections to mandatory military service. *United States v. Seeger*, 380 U.S. 163 (1965). Acknowledging that such objections are oftentimes based on an ethical or moral belief, as opposed to a religious belief, the Court defined a conscientious objection as "[a] sincere and meaningful belief which occupies in the life of its

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[2] Alabama, New Hampshire and Vermont do not currently provide right-of-conscience protection to health care personnel. *See* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, app. at 299 (Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson eds., Rowman and Littlefield 2008).

[3] ARIZ. REV. STAT. ANN. § 36-2151 (2003); CAL. HEALTH & SAFETY CODE § 123420(a) (West 2006); COLO. REV. STAT. ANN. § 18-6-104 (West 2004); GA. CODE ANN. § 16-12-142 (2007); IDAHO CODE ANN. § 18-612 (2004); 720 ILL. COMP. STAT. ANN. 510/13 (West 2003); KY. REV. STAT. ANN. § 311.800 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West 2003); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); 43 PA. CONS. STAT. ANN. § 955.2 (West 1991); VA. CODE ANN. § 18.2-75 (2004) (as quoted in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 2, at app. at 299-301).

[4] CAL. HEALTH & SAFETY CODE § 123420(c) (West 2006); NEB. REV. STAT. § 28-337 (1995); OR. REV. STAT. § 435.475 (2007) (as quoted in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 2, at app. at 301).

[5] ARK. CODE ANN. § 20-16-601(a) (2005); CONN. AGENCIES REGS. § 19-13-D54(f) (2005); DEL. CODE ANN. tit. 24, § 1791 (2005); FLA. STAT. ANN. § 390.0111(8) (West 2007); HAW. REV. STAT. ANN. § 453-16(d) (LexisNexis 2005); IND. CODE ANN. § 16-34-1-4 (LexisNexis 1993); IOWA CODE ANN. § 146.1 (West 2005); KAN. STAT. ANN. § 65-443 (2002); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (2004); MICH. COMP. LAWS ANN. § 333.20181 (West 2001); MINN. STAT. ANN. § 145.414 (West 2005); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2003); N.C. GEN. STAT. § 14-45.1(e), (f) (LexisNexis 2007); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (LexisNexis 2004); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000); S.D. CODIFIED LAWS § 34-23A-12 (2004); TENN. CODE ANN. § 39-15-204 (2006); WYO. STAT. ANN. § 35-6-106 (LexisNexis 2007) (as quoted SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 2, at app. at 302-05).

possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . ." *Id.* at 176. The Court explained that permitting a conscientious objection under this standard "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition [] is grounded in their religious tenets." *Id.* In 1970, *Welsh v. United States* clarified the *Seeger* test simply to ensure that non-religious moral convictions could still qualify as conscientious objections. 398 U.S. 333 (1970). Both *Seeger* and *Welsh* now serve as the benchmark for conscience clause legislation. Demonstrating the legal effect of *Seeger* and *Welsh*, the Department of Defense currently permits members of the military to raise conscientious objections to being drafted into military service or to engaging in sustained military enlistment.[6]

Against this backdrop of conscience protection in both the medical and military fields, the Provider Conscience Regulation is a welcome, though certainly not surprising or arbitrary, step toward the full protection of the conscience rights of American healthcare workers. Importantly, it adds a crucial measure of enforceability and accountability that has often been lacking under federal law. As previously stated, although the matter has yet to be definitively decided, courts have been hesitant to find a private cause of action under the Church Amendments, *see e.g.*, *Moncivaiz*, 2004 U.S. Dist. LEXIS 3997. In the absence of such a private right cause of action, certification of compliance with federal law, and the oversight it would provide, is more than appropriate to help safeguard the protections afforded by these laws. Indeed, it is the very job of executive agencies to enact regulations implementing legislation passed by Congress. As the Supreme Court has recognized, Congress often leaves statutory "gaps" to be filled by administering agencies. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). While the specific regulations adopted are certainly within the discretion of the agency, the important point is that there be *some* regulation to fill these gaps. The Rescission Proposal, however, runs counter to this essential purpose by suggesting wholesale deletion of an important enforcement mechanism that gives much-needed vitality to the statutory schemes created by Congress in the Church Amendments, the PHSA, and the Weldon Amendment.

## III. The Provider Conscience Regulation Does Not Create New Substantive Law, But Merely Serves as a Means of Enforcing Pre-Existing Law

Cries of alarm from groups like the American Civil Liberties Union and Planned Parenthood Federation of America regarding the Provider Conscience Regulation are exaggerated and unwarranted. The regulation does not create new substantive law. Rather, it simply defines key terms and requires that healthcare entities certify that they are in compliance with existing law. Thus, these and similar groups in reality take issue not so much with the Provider Conscience Regulation as with the federal laws that the regulation seeks to enforce. By requiring recipients of Department funds to certify compliance with federal law, the Provider Conscience Regulation merely—but importantly—ensures greater accountability for those who might otherwise be tempted to coerce healthcare professionals to violate their consciences. In the face of numerous statutes seeking to protect moral and religious conscience in the health services field (*i.e.*, the Church Amendments, the PHSA, and the Weldon Amendment), it cannot be realistically argued that concerns regarding such coercion in the workplace and elsewhere are not valid. Certifying

[6] *See* Department of Defense Directive 1300.6 (May 31, 2007), *available at* http://www.thesimpleway.org/practical/mil_PDF/Department%20of%20Defense%20Directive%201300.6.pdf.

compliance with federal law on these matters is simply a logical and essential measure to ensure that these laws are understood, implemented, and followed.

Similar to a request for a federal grant in which a proposed grantee must certify that it is in compliance with, and will remain in compliance with, all federal and state Equal Opportunity laws and regulations, the Provider Conscience Regulation is a simple device for enhancing recipient compliance with federal law. The same arguments made here against the Regulation could also be made in the Equal Opportunity situation and would equally lack merit. If a grant recipient is unwilling to certify that it is in compliance with the law and will remain so, chances are the recipient is already looking for ways to get around the law.

Furthermore, the federal laws protecting conscience rights and the Provider Conscience Regulation allow for healthcare personnel to step out of the way, not in the way, of access to legal healthcare services. Because the Provider Conscience Regulation merely provides a means of enforcing the substantive protections afforded by current federal law, nothing in the regulation could reasonably be construed as hindering anyone's access to lawful healthcare services. In fact, the realization of such concerns is much more likely to occur if the Department adopts the Rescission Proposal as a final rule. This is because the lack of enforceability of conscience rights, through a means such as the Provider Conscience Regulation, may well lead to a decrease in the number of individuals and entities who are willing to enter or remain in the medical service field, particularly those currently serving low-income areas. Rather than elevating the conscience rights of healthcare providers over the right of patients' access to healthcare services, the Provider Conscience Regulation actually *enhances* access, both by welcoming providers with conscientious scruples who might not otherwise enter the field, and by ensuring that those patients who *want* a pro-life physician or pharmacist, for example, will not be precluded from finding one. As the Department noted in response to comments on the Provider Conscience Regulation at the proposal stage, "[b]ecause federal health care conscience protection laws have been in place for many years, we fully expect health care entities to take the necessary steps to protect conscience rights *while meeting the needs of their patients*." 73 Fed. Reg. 78084.

If federal conscience laws are to have full force, the Department should retain the Provider Conscience Regulation as finalized. Moreover, while the ACLJ finds no ambiguity or confusion resulting from the Provider Conscience Regulation, to the extent the Department identifies any such problems, the Rescission Proposal, which suggests wholesale repeal of the regulation, is surely not the best means of correction. Instead, the Department should clarify any ambiguities while maintaining the necessary enforcement mechanism provided by the Provider Conscience Regulation.

## IV. Conclusion

The Provider Conscience Regulation ensures that the conscience protection currently afforded by federal statute to healthcare professionals is properly enforced. The Provider Conscience Regulation does not create new law, but simply serves to prevent Department funds from being used to support coercive or discriminatory practices that violate current federal law, including the Church Amendments, the PHSA, and the Weldon Amendment. The ACLJ strongly opposes the Rescission Proposal, which would repeal, in its entirety, the important enforcement mechanism

provided by the Provider Conscience Regulation and send a very mixed message to grant recipients, who may read the rescission as a signal that federal conscience protections are not going to be taken seriously or enforced with vigor. The Department should refrain from taking any action, including rescinding the Provider Conscience Regulation, that casts doubt on the obligation going forward to protect the conscience rights of those employees currently protected by the Regulation.