Alliance for Conscience Rights

Point-by-Point Rebuttal to the Statement of Administration Policy Opposing the Conscience Protection Act of 2016 (S. 304)

"If the President were presented with this legislation, his senior advisors would recommend he veto the bill."

The Administration strongly opposes the House Amendment to S. 304, the Conscience Protection Act of 2016, because it would have the consequence of limiting women's health care choices and because the Administration believes that protections in current Federal law already provide appropriate protection for the rights of conscience. Longstanding Federal policy already prohibits the use of Federal funds for abortions, except in cases of rape or incest, or when the life of the woman would be endangered. Additionally, the Administration has instituted health care policies that appropriately accommodate religious objections.

The Administration's statement, "*protections in current Federal law already provide appropriate protection for the rights of conscience*" has been completely undermined by its own Department of Justice (DOJ). The DOJ recently informed the federal agency tasked with upholding federal civil rights conscience statutes, HHS's Office for Civil Rights (OCR), that the enforcement mechanism in the Weldon Civil Rights Amendment – the rescission of a state's annual federal health, education and labor discretionary funds – is unconstitutional federal coercion under the Supreme Court's *NFIB v. Sebelius* ruling. The OCR cited the DOJ's determination as a major reason for not upholding Weldon against the State of California's August 2014 health plan abortion mandate. Thus, the OCR and DOJ have basically admitted that the executive branch will **never** enforce Weldon. This development is enabling California, New York, Illinois and other states to flout federal law and Congress's clear intent to protect conscience rights. Federal protections that exist, but are not enforced, cease to provide **any** protection, let alone adequate and appropriate protection for federally protected conscience rights. The Administration's conclusion that "appropriate protection(s) exist under current law is manifestly untrue. Moreover, it would not tolerate this situation in its enforcement of any other federal civil rights law.

This bill would unduly limit women's health care choices by allowing a broadly-defined set of health providers (including secular sponsors of employer-based health coverage) to decline to provide abortion coverage based on any objections.

There is no evidence that providing adequate accommodations for those who object, as a matter of conscience, to providing, paying for, providing coverage of, or referring for abortions has or will unduly limit health care choices for women. A similar claim was made by the ACLU to the

governor in Washington State in 2013 as a result of the expansion of Catholic health care in the state. In response, the State of Washington's Healthcare Research Group, Forecast and Research Division initiated a study to determine the validity of the ACLU's claims. In December 2013, the State issued its finding that the services assessed "do not appear to suggest that communities predominately served by religious hospitals are experiencing barriers to care. Tubal ligation sterilization rates within communities served by religious hospitals are, for instance, the same as – or higher than – the rates within communities served by secular hospitals … Few abortions are performed among inpatients, and no differences associated with hospitals' religious or secular status were detected in a community's abortion rates." Finally, and notwithstanding claims to the contrary, Catholic moral principles do not preclude Catholic hospitals from providing emergency contraception when treating rape victims. For example, in California 11 Catholic-affiliated hospitals are state-designated rape trauma centers and/or Sexual Assault Response Team (SART) sites.

The legislation would also permanently authorize alternative methods of enforcing these provisions that would inevitably lead to confusion.

Given that the Office for Civil Rights recently stated that the Department of Justice believes the current Weldon Amendment remedy to be unconstitutional, an alternate method of enforcement is, by the Administration's own admission, not only appropriate, but necessary under the premise that adequate protections for conscience rights already exist in Federal law. A private right of action, as included in the Conscience Protection Act, would provide an alternative to rescinding a state's federal health, education and other funds — the action the Administration believes to be coercive—in a venue, a Federal Court, that is not part of any presidential administration with a political viewpoint either aligned with or against conscience protection laws. Moreover, every federal civil rights law includes a private right of action, including the Administration's new health care non-discrimination rule. The Administration would never make a similar claim of "confusion" about a private right of action because a victim of, say, unlawful employment discrimination filed a complaint with the Equal Employment Opportunity Commission (EEOC) ***and***, utilizing a private right of action, also filed a case in federal court. In point of fact, the Administration would label it a travesty if any one attempted to remove the private right of action from federal employment civil rights laws solely because victims of employment discrimination have access to the EEOC for discrimination based on race, gender, ethnicity and other protected classes. It is no less a travesty to deny a private right of action to those who conscientiously oppose covering, paying for or providing abortion. As a matter of fundamental fairness, all those claiming a violation of their federal civil rights should have access to the same remedies.

The Administration is continuing its efforts to protect the rights of conscience, reduce unintended pregnancies, expand access to contraception, support maternal and child health, and minimize the need for abortion. At the same time, the Administration is committed to the protection of women's health and reproductive freedom and to supporting women and families in the choices that they make, which—as the Supreme Court just reaffirmed—are protected by the Constitution.

Faith-based hospitals operate in one of the most highly regulated sectors of the economy, and do not compromise the protection of women's health. For example, since 1973, California's Health & Safety Code has required hospitals to provide patients with emergency medical treatment, and the federal government enacted a similar law in 1986, the Emergency Medical Treatment and Active Labor Act (EMTALA). Under these laws, if a hospital cannot treat an emergency patient, the hospital is required to stabilize the patient and transfer her to a facility that can, a requirement that would not change under the Conscience Protection Act. During the more than 40 years these statutes have been in existence, neither state nor federal governments have identified one instance in which a pregnant woman received inappropriate emergency treatment at a Catholic hospital. Moreover, the Administration has itself affirmed that there is no conflict between EMTALA and conscience laws such as the Weldon Amendment: "The conscience laws and the other federal statues have operated side by side often for many decades. As … laws are meant to be read in harmony, the Department fully intends to continue to enforce all the laws it has been charged with administering…. [E]ntities must continue to comply with their… EMTALA… obligations, *as well as the federal health care provider conscience protection statutes.*" (Department of Health and Human Services, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws," 76 Fed. Reg. 9968-77 (Feb. 23, 2011), at 9973, 9974 (emphasis added).) Finally, Catholic moral principles in the area of abortion are internally consistent and far more nuanced than generally understood. For example, they require physicians to provide all reasonable information about the essential nature of proposed treatments, their risks, side effects, consequences and cost, including no treatment at all. They also provide for medical interventions that address serious pathological conditions that cannot be postponed, even if they result in the foreseen but unintended death of a fetus.

'[M]y underlying position has always been consistent, which is I'm a believer in conscience clauses.'

President Barack Obama, in a July 2, 2009 press interview (CNA).