Washington Insider

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Conscience Protection Act Stymied Again

For at least fifteen years, a top public policy priority of the United States Conference of Catholic Bishops (USCCB) has been to ensure that no one can be forced to participate in abortion. This seems to be a spectacularly modest proposal—and one that even so-called "pro-choice" advocates would heartily support. Sadly, that is not the case. In fact, pro-*abortion* activists strongly oppose laws protecting the conscience rights of pro-life individuals, referring to such laws as "refusal clauses" or, worse, as discrimination. And they even oppose legislation—such as the Conscience Protection Act (CPA)[1]—that does not propose new conscience rights but rather seeks to provide another remedy for those whose rights are violated under existing federal conscience laws.

Specifically, the CPA

- Codifies the Hyde-Weldon amendment, which prohibits federal, state, and local governments that receive federal funds from discriminating against those who decline to take part in abortion or abortion coverage. Hyde-Weldon has been approved by Congress as part of the Labor/HHS appropriations act every year since 2004.
- Clarifies the types of forbidden governmental discrimination and the victims of discrimination that Hyde-Weldon seeks to protect.
- Provides a right to take legal action to ensure that those who object to abortion can defend their conscience rights under the Hyde-Weldon, Coats-Snowe, and Church amendments in a court of law—a remedy that has long been available to victims of other civil rights violations.

1. See H.R. 644 at https://www.congress.gov/bill/115th-congress/house-bill/644.

These federal laws protecting conscientious objection to abortion have been approved for decades by congresses and presidents of both parties. Yet in recent years, a growing number of states have passed laws forcing all health plans—even those purchased by churches and other religious or pro-life organizations—to cover elective abortions for any reason. Moreover, some hospitals and some residency and training programs have forced, or tried to force, health care providers or trainees to participate in abortions.[2] Such laws and actions are in direct violation of federal conscience laws.

How can states and health care institutions get away with violating federal law? In short, because these laws rely on the federal government to enforce them. The only remedy federal conscience laws provide for those whose rights are violated is to file a complaint with the Office of Civil Rights, part of the Department of Health and Human Services. Sadly, under the Obama administration, enforcement was a low priority or did not happen at all—and worse, HHS itself was a perpetrator of discrimination.[3] This lack of enforcement by the federal government is precisely why the CPA proposes giving victims of government discrimination the ability to defend their rights in a court of law.

Thankfully, the Trump administration has taken significant steps to enforce federal conscience laws.[4] Nonetheless, the need for the CPA remains urgent, given the prospect that the next administration could take a hostile view toward these laws.

The support for conscience protections by the Trump administration and by the party in power in both the House and Senate provided great optimism to pro-life groups, who hoped that the 115th Congress might actually enact the CPA after many failed attempts in recent years. Yet, despite significant efforts by pro-life groups at the national, state, and local levels, the CPA failed to get enacted yet again.

Frankly, the obstacle is the Senate. Its rules allow legislation to be filibustered, and sixty votes are needed to stop a filibuster and advance the bill. While the CPA probably had the support of a majority of senators, it could not muster the sixty votes needed for passage as a stand-alone bill. For this reason, efforts to pass the bill have focused on trying to get it included in must-pass appropriations legislation needed to fund the government.

Ultimately, decisions about what policies get included in the final versions of appropriations bills are made through closed-door negotiations by the majority and minority leaders in the House and Senate along with the White House. Unfortunately, because of strong opposition by some key Democratic House and Senate leaders, negotiators did not include the CPA in the 2018 Consolidated Appropriations Act that was passed by Congress and signed into law by President Donald Trump on March 23.

This is a very disappointing result. Nonetheless, efforts to enact this modest but critically important legislation will continue until success is achieved.

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2. See US Conference of Catholic Bishops (USCCB), "The Conscience Protection Act of 2017 (H.R. 644/S. 301)," fact sheet, November 2, 2017, http://www.usccb.org/.

3. Ibid.

4. Brian Fraga, "Pro-lifers Applaud New HHS 'Conscience and Religious Freedom Division,'" *National Catholic Register*, January 19, 2018, http://www.ncregister.com/.

Separating Abortion from Title X Family Planning Program

On June 1, President Trump proposed new regulations to help ensure that abortion is separated from the federal Title X family planning program.[5] Public comments are being accepted through July 31.

Title X of the Public Health Service Act ("Title Ten") was created in 1970 as a pre-pregnancy federal family planning program to help poor women space their children and limit their family size. It was created in the heat of the population control movement and receives millions of dollars every year, even though its authorization expired in 1985. Embedded in the authorizing law itself is a strict prohibition on abortion;[6] indeed, it was argued that Title X was needed to reduce the abortion rate.

Nevertheless, the guidelines governing the early years of the program soon required abortion referrals and non-directive abortion counseling and allowed abortions to be performed at the same locations, arguably allowing the program to become a direct channel for abortion providers to receive clients as well as federal money. To respond to this abuse, President Ronald Reagan issued formal regulations in 1987 requiring that Title X service sites be physically and financially separated from abortion centers and that they not refer or counsel for abortion. These regulations were challenged in court and were ultimately upheld by the Supreme Court in *Rust v. Sullivan* (1991). However, they were rescinded in January 1993 by President Bill Clinton and were followed by regulations later that year requiring abortion referrals and allowing co-location of Title X clinic sites with abortion sites.

Until now, the Clinton regulations remained largely in place. In the last few months of his presidency, however, Barack Obama added the following provision to the regulations: "No recipient making sub-awards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons unrelated to its ability to provide services effectively."[7]

The stated purpose of this addition was to prevent states from excluding providers like Planned Parenthood from sub-awards on the basis of state criteria, such as a requirement that sub-recipients provide comprehensive primary and preventive care in addition to family planning services. In March 2017, Congress passed a resolution rescinding this Obama regulation.

The Trump administration's proposed regulations, called the Protect Life Rule, are modeled after the Reagan administration regulations and include several important requirements. Specifically, Title X projects

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5. Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25502 (June 1, 2018), https://www.gpo.gov/.

6. Section 1008 of Title X reads, "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." Family Planning Services and Population Research Act, Pub. L. 91-572 (1970), https://www.gpo.gov/.

7. Compliance with Title X Requirements by Project Recipients in Selecting Sub-recipients, 81 Fed. Reg. 61639, 61646 (September 7, 2016), https://www.gpo.gov/.

- May not encourage, promote, or advocate for abortion as a method of family planning.
- Must be physically and financially separate from any abortion activities. In order to meet the separation requirement, a Title X project must have an objective integrity and independence from prohibited abortion activities, including (1) separate accounting records, (2) degree of separation from facilities in which prohibited activities occur, (3) separate personnel, health records, and workstations, and (4) absence of material promoting abortion in Title X sites.
- May not provide, promote, refer for, or support abortion, present it as a method of family planning, or take any other affirmative action to assist a patient to secure such an abortion.
- Must comply with the requirement for *physical* separation from abortion activities within one year and for *financial* separation from abortion activities within sixty days.
- Must comply with state and local laws requiring notification or reporting of child abuse, child molestation, sexual abuse, rape, incest, intimate partner violence, or human trafficking.
- Must encourage parents' involvement in their children's decisions with respect to family planning.

Developments in the Battle against Assisted Suicide

As state legislatures are winding down their 2018 sessions, bills to legalize assisted suicide are now dead in the following states: Alaska, Arizona, Connecticut, Delaware, Indiana, Iowa, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, Oklahoma, Rhode Island, Utah, and Wisconsin. Utah not only defeated a measure to legalize assisted suicide; it enacted a law to prohibit the practice. Bills to legalize assisted suicide are still active in Michigan, New Jersey, Ohio, and Pennsylvania. In Maine, after failing to get a measure to legalize assisted suicide on the November 2018 ballot because of faulty paperwork, a new attempt has begun to place a measure on the 2019 ballot.

Sadly, on Thursday, April 5, 2018, Hawaii became the seventh jurisdiction to legalize assisted suicide, when Governor David Ige signed Hawaii's physician-assisted suicide bill into law. The law goes into effect on January 1, 2019.

In May, a county Superior Court judge in California ruled the state's assisted-suicide law was invalid because the legislature improperly fast-tracked it through a special session dedicated to MediCal funding in a way that violates the requirements of the California Constitution. An appellate court affirmed the lower court's ruling but also ruled that the law could remain in effect while the case moves forward.

Also in May, the American Medical Association's Council on Ethical and Judicial Affairs (CEJA) issued its much-anticipated report recommending no change to the AMA's long-standing opposition to physician-assisted suicide. CEJA had undertaken an extensive two-year review of the AMA policy with the consideration of adopting a neutral position. After announcing the report to its members in advance of the AMA's House of Delegates meeting in June, an overwhelming majority of

AMA member comments in an online forum expressed support for the CEJA recommendation. And at the House of Delegates meeting, a reference committee strongly urged the delegates to vote in favor of the CEJA report after hearing overwhelming testimony in support of the CEJA recommendation.

In spite of these overwhelming expressions of support for the recommendations, the AMA House of Delegates voted 56 to 44 percent against affirming the report. The matter now goes back to CEJA for further review. In the interim, the AMA remains opposed to assisted suicide, absent a vote to actually change the position.

US Supreme Court Rules in Favor of Pro-life Pregnancy Centers

In a June 26 decision, *NIFLA v. Becerra*, the Supreme Court ruled against a California law that forces pro-life pregnancy centers to provide free advertising for the abortion industry.[8]

The California law requires clinics that primarily serve pregnant women to provide their clients with government-crafted notices. *Licensed* centers must give their clients notice that California has public programs that provide free or low-cost abortions and give them a phone number that they can call to see if they qualify. *Unlicensed* centers must give their clients a notice stating that the centers are not licensed to provide medical services and have no licensed medical provider. Both notices must be written in English and any other language identified by state law. The law applies to pro-life pregnancy centers. Most other health facilities are exempt.

A group of pro-life pregnancy centers organized as the National Institute of Family and Life Advocates (NIFLA) sued the state of California, claiming a violation of their right to free speech. The district court found no likelihood of success and denied the centers' request for a preliminary injunction. The Ninth Circuit affirmed, holding that the notice requirement for licensed centers was subject to a lower level of scrutiny because it involved "professional speech" and that the requirement for unlicensed centers satisfied any level of scrutiny.

By a 5–4 vote, the Supreme Court has now reversed the lower court rulings, holding that the notice requirements for both licensed and unlicensed pregnancy centers are likely to violate the free speech clause and that the centers are entitled to a preliminary injunction.

Justice Clarence Thomas wrote the opinion of the Court. He was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito, and Neil Gorsuch. Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, dissented.

Justice Kennedy, joined by the Chief Justice and Justices Alito and Gorsuch, filed a brief concurring opinion with this rather pointed rebuke of the California legislature:

> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." …

8. The *NIFLA v. Becerra* opinion is available at https://www.supremecourt.gov/opinions/17pdf/16-1140_5368.pdf .

> But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." … It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[9]

Cardinal Timothy M. Dolan of New York, chair of the USCCB Committee on Pro-life Activities, issued a statement praising the ruling:

> In an important victory for the free speech rights of pro-life organizations, the Supreme Court today has affirmed that the First Amendment protects the right of all organizations to choose for themselves not only what to say, but what not to say. This includes allowing pro-life pregnancy care centers to continue providing life-affirming support to both mother and child without being forced by governments to provide free advertising for the violent act of abortion in direct violation of the center's pro-life convictions. The decision is an important development in protecting pro-life pregnancy centers from future efforts to compel speech in violation of their deeply held beliefs.[10]

A Pro-abortion Litmus Test for the Supreme Court?

On June 27, Supreme Court Justice Anthony Kennedy announced his retirement, prompting pro-abortion activists and elected officials to wail and gnash their teeth, insisting that *Roe v. Wade* is doomed and any nominee who does not publicly support *Roe* should be rejected. Pro-life groups responded, pointing to how *Roe* is not health care, is bad law, and fails women, and urging US senators to reject any pro-abortion litmus test for judges.

Cardinal Daniel N. DiNardo of Galveston–Houston, president of the USCCB, wrote to the members of the Senate on July 6, expressing "grave concerns about the confirmation process, which is being grossly distorted by efforts to subject judicial nominees to a litmus test in support of *Roe*, as though nominees who oppose the purposeful taking of innocent human life are somehow unfit for judicial office in the United States." The Cardinal continues, "By any measure, support for *Roe* is an impoverished standard for assessing judicial ability. For forty-five years, *Roe* has sparked more informed criticism and public resistance than any other court decision of the late 20th century." [11]

9. Ibid., Kennedy, J., concurring, 2.

10. USCCB, "Chairman of U.S. Bishops' Pro-life Committee Praises Supreme Court's Respect for Free Speech in *NIFLA v. Becerra* Decision," news release, June 26, 2018, http://www.usccb.org/.

11. USCCB, Daniel Cardinal DiNardo to All US Senators, July 6, 2018, http://usccb.org/.

The letter points to decades of polling showing that most Americans oppose *Roe*'s policy of unlimited abortion, to a growing number of state legislatures passing pro-life laws, to mainstream medicine rejecting abortion, and to many pro-abortion legal scholars who have criticized *Roe* for not being grounded in the US Constitution. The Cardinal says, "If a Supreme Court ruling was wrongly decided, is widely rejected as morally flawed and socially harmful, and is seen even by many supporters as having little basis in the Constitution, these are very good reasons not to use it as a litmus test for future judges. Further, nominees' faith should not be used as a proxy for their views on *Roe*. Any religious test for public office is both unjust and unconstitutional."

On July 9, President Trump nominated Judge Brett Kavanaugh from the DC Circuit Court to replace Justice Kennedy, and the fate of *Roe v. Wade* will clearly be front and center throughout his confirmation process. While no one knows with certitude how Judge Kavanaugh would vote if presented with an opportunity to overturn *Roe,* pro-abortion groups have announced multi-million-dollar campaigns to defeat his nomination. Pro-life groups are lining up to support his nomination.

The USCCB, which does not support or oppose the confirmation of presidential nominees, will urge prayer and fasting that this change in the Court will move our nation closer to the day when every human being is protected in law and welcomed in life. To this prayer effort, the bishops will couple an educational effort exposing how *Roe v. Wade* is not health care, is bad law, and fails women.

Finishing Up with Inspiration

On October 25, 2017, the House Appropriations Subcommittee on Labor, Health and Human Services and Education held a hearing titled "Down Syndrome: Update on the State of the Science and Potential for Discoveries across Other Major Diseases." The hearing featured researchers and advocates who are committed to expanding society's knowledge about Down syndrome and related disorders and improving the quality of life for Americans with Down syndrome. One of the panelists, Frank Stephens, provided some particularly poignant remarks:[12]

> Mr. Chairman and members of the committee: Just so there is no confusion, let me say that I am not a research scientist.
>
> However, no one here knows more about life with Down syndrome than I do. Whatever you learn today, please remember this, I am a man with Down syndrome and my life is worth living.
>
> Sadly, across the world, a notion is being sold that maybe we don't need research concerning Down syndrome. Some people say prenatal screens will identify Down syndrome in the womb, and those pregnancies will just be terminated.
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> It's hard for me to sit here and say those words. I completely understand that the people pushing this particular "final solution" are saying that people like me should not exist.

12. Frank Stephens, Opening Statement before the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, October 25, 2017, video, 1:12:25, https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=395058.

That view is deeply prejudiced by an outdated idea of life with Down syndrome. Seriously, I have a great life. I have lectured at universities, acted in an award-winning film and an Emmy-winning TV show, and spoken to thousands of young people about the value of inclusion in making America great. I've been to the White House twice, and I didn't have to jump the fence either time.

Seriously, I don't feel I should have to justify my existence, but to those who question the value of people with Down syndrome, I would make three points.

First, we are a medical gift to society, a blueprint for medical research into cancer, Alzheimer's, and immune system disorders.

Second, we are an unusually powerful source of happiness. A Harvard-based study has discovered that people with Down syndrome, as well as their parents and siblings, are happier than society at large. Truly, happiness is worth something.

Finally, we are the canary in the eugenics coal mine. We are giving the world a chance to think about the ethics of choosing which humans get a chance at life. So we are helping to defeat cancer and Alzheimer's, and we make the world a happier place. Is there really no place for us in the world? Is there really no place for us in the NIH budget? …

Let's be America, not Iceland or Denmark. Let's pursue answers, not "final solutions." Let's be America. Let's make our goal to be Alzheimer's-free, not Down-syndrome-free.