COMMENTS SUBMITTED TO THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES WITH REGARD TO THE PROPOSED RESCISSION OF THE "CONSCIENCE REGULATION" RELATING TO HEALTHCARE WORKERS AND CERTAIN HEALTHCARE SERVICES

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IN RE: Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal (45 C.F.R. 88 - March 10, 2009)

Dear Sir or Madam:

We are a broad and diverse coalition of individuals who believe the government must honor the rights of conscience in the healthcare field, while simultaneously assuring access to lawful healthcare services. While some of us would urge the Department of Health and Human Services (the "Department") to retain the "Regulation" promulgated at the end of last year, 73 Fed.Reg. 78072 (Dec. 19, 2008), and others of us would urge the Department to rescind it, in whole or in part, we agree that the conscience protections for healthcare providers contained in Federal statutory law since 1973 provide appropriate and much-needed protection for institutional and individual healthcare providers who object to performing certain procedures, such as abortion or sterilization. We also agree on the Principles set forth below. Further, should the Administration decide to rescind the Regulation, we urge the Department to take the recommended actions .

PRINCIPLES

I. Congress provided appropriate and necessary conscience protections for healthcare providers with regard to certain specific healthcare procedures.

There is widespread misunderstanding and misinformation about precisely what conscience protections Federal law gives and does not give to healthcare providers. This confusion has surfaced in the debate over whether to rescind the Regulation itself. Confusion exists both in the public and, it seems, within the Federal government. For example, popular reporting on the question of whether to rescind the Regulation often seems to suggest that there are no federal statutory protections in this area, and routinely frames the question as though freedom of conscience for healthcare workers is

incompatible with access to healthcare services, especially reproductive services.[1] Likewise, the U.S. Equal Employment Opportunity Commission voiced strong opposition to the proposed Regulation on the grounds that it "is unnecessary to protect the...freedom of conscience of healthcare workers, because Title VII already serves that purpose."[2]

The Regulation did not create the conscience protections healthcare providers enjoy, Congress did.[3] Congress enacted conscience protections for healthcare providers who are morally or religiously opposed to abortion, sterilization, and other procedures, without any of the balancing of interests that characterizes Title VII.[4] Instead, Congress decided that healthcare providers who are morally or religiously opposed to abortion, sterilization, or other procedures can step aside, without professional penalty, allowing willing providers to offer those procedures. The decision to protect conscience concerns about deeply divisive healthcare procedures was made over a period of decades by the Congress and nothing the Department did or does can rescind that decision. Statutes trump regulations, just as the Constitution trumps statutes.

II. Conscience Protections Need Not Jeopardize Access to Services; It is Not a "Zero Sum Game."

The protection for conscience contained in Federal law need not jeopardize patient access to services, as the extensive network of abortion providers across the United States demonstrates. Conscience protections for healthcare providers opposed to abortion have been a part of Federal law since 1973, the year of the United States Supreme Court's decision in *Roe v. Wade*.[5] Even with these decades-old conscience protection laws in place, an extensive network of healthcare providers willing to provide abortions emerged and endures. Thus, the existence of more than 1700 abortion providers across the United States demonstrates that conscience protections can co-exist

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[1] See, The Christian Science Monitor, http://www.csmonitor.com/2009/0326/p01s03-ussc.html; The New York Times, http://www.nytimes.com/2009/02/28/us/politics/28web-abort.html?_r=1&hp

[2] Letter dated September 25, 2008, to Secretary Michael Leavitt, United States Department of Health and Human Services from Commission Stuart J. Ishimru and Christine M. Griffin, U.S. Equal Employment Opportunity Commission. See section VI. below, where we further note that the EEOC's assertion that Title VII "ensures" the accommodation of employees' religious needs in the workplace is incorrect as well.

[3] 42 U.S.C. §300a-7; 42 U.S.C. §238n; P.L. 110-329 (2008).

[4] The Supreme Court "has long recognized that the government may ... accommodate religious practices ... without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144-145 (1987), and this understanding has been applied to the accommodation for both religious individuals, see *Cutter v. Wilkinson*, 544 U.S. 709 (2005) and religious institutions, see *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Especially given the fact that these federal statutory protections for conscience protect those with moral as well as religious objections, these statutes do not raise the Establishment Clause concerns the U.S. Supreme Court has identified in other accommodation cases. *See, e.g. Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

See below for further discussion of the group's views on these issues.

[5] 410 U.S. 113 (1973).

with patient access to abortions,[6] without forfeiting either access for patients or respect for providers who have a moral or religious objection to participating in certain procedures.

III. Conscience Protections Permit Healthcare Providers to Step Aside, Not to Act as a Roadblock to Patient Access.

Federal conscience protections do not authorize individual or institutional healthcare providers opposed to abortion, sterilization or other procedures to create roadblocks to patient access to lawful services. Instead, they allow healthcare providers to step aside to allow another willing provider to step in. Properly structured, the protection of the conscience of healthcare workers need not prevent the patient from securing the desired service from a willing provider.

Examples of such properly structured arrangements already exist in the field of healthcare itself. For instance, many states facilitate patient access to medical services by providing advance notice of providers' willingness to provide a service. Thus, for example, California law requires that "Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees."[7] Advance notice allows the patient to know when a provider is willing and to seek services accordingly.

A second example can be found in the context of the rules governing pharmacists and their possible conscientious objections to dispensing certain prescriptions. The policy of the American Pharmacists' Association is straightforward:

> APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.[8]

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[6] State Facts About Abortion, Guttmacher Institute, http://www.guttmacher.org/statecenter/sfaa.html (last visited March 30, 2009)(listing the total number of abortion providers as of 2005 at 1787);
Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 53 (2008) (showing that Planned Parenthood alone has over 850 clinics to provide these services across the US).

[7] CAL. HEALTH & SAFETY CODE § 123420(c) (West 2006). *See also* NEB. REV. STAT. § 28-337 (1995) ("No [healthcare] facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the [healthcare] facility shall inform the patient of its policy not to participate in abortion procedures.); OR. REV. STAT. § 435.475 (2007) (providing that no "hospital is liable for its failure or refusal to participate in such termination if the hospital has adopted a policy not to admit patients for the purposes of terminating pregnancies. However, the hospital must notify the person seeking admission to the hospital of its policy.").

[8] JAPhA 38(4): 417. July/August 1998

Many states have adopted legislation or regulations which track this policy approach, obligating pharmacies to ensure timely access to lawful prescriptions, but also allowing the accommodation of the conscience concerns of individual pharmacists.[9]

IV. The Key Difficulty Facing Patients Seeking Controversial Healthcare Services is One of Information, Not Access.

Most difficulties patients experience in getting a controversial healthcare service are not real access issues, as in "No accessible healthcare provider will perform an abortion (or other procedure) for me." Instead, they are information problems - in other words, the patient has no idea how to find the person who is willing to provide the abortion or other procedure for her. Such information problems may more greatly impact lower income women. Many states have responded to precisely this kind of knowledge gap about access to controversial services through formal and informal "information networks." Thus, for example, in Washington and Oregon, where pharmacists, physicians and hospitals opposed to facilitating physician-assisted suicide have an absolute right to refuse to participate and provide such services,[10] patient access is ensured with lists of willing providers on the Internet, through hospice organizations and other information networks that allow access to the desired service. These information networks allow the patient seeking the service to get it without great dislocation, while allowing unwilling providers to live by their convictions.[11]

V. The Value of Conscience Protections Have Been Repeatedly Recognized by the United States Supreme Court.

Since the Supreme Court decision in *Roe,* the question of conscience protections has been addressed by the Court on multiple occasions. In each case, the Court has recognized the appropriateness of conscience protections for healthcare providers in our Constitutional scheme. In *Roe*, the Court cited with approval a resolution by the American Medical Association that no "physician, hospital, nor hospital personnel" shall be required to violate "personally-held moral principles." *Roe v. Wade*, 410 U.S. 113, 143 & n. 38. In *Doe v. Bolton*, the companion case to *Roe*, the Supreme Court struck down Georgia's criminal abortion statute that required, among other things, advance approval of abortions by a mandatory abortion screening committee. Although the committee may have served as a means of protecting the rights of individual physicians

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[9] See, e.g., ILL. ADMIN. CODE tit. 68, § 1330.91 (2009), N.J. STAT. ANN. § 45:14-67.1 (2009), WASH. ADMIN CODE § 246-869-010 (2008).

[10] OR. REV. STAT. §127.885, WASH. REV. CODE §70.245.190.

[11] Many of the women who have experienced difficulty in obtaining emergency contraceptives have encountered 'search costs" that would be eliminated with better information. Thus, the patient in one complaint filed with the Washington State Board of Pharmacy obtained EC less than an hour after the initial refusal took place. Kyung Song, *Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES, August 1, 2006, at A5. With better information, the patient would obtain the service without hardship or inconvenience.

and denominational hospitals, an appropriate goal, the Court noted that it was unnecessary in light of Georgia's existing statutory protections for providers:

> Under [Georgia law] the hospital is free not to admit a patient for an abortion.... Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford *appropriate protection* to the individual and to the denominational hospital.[12]

Later in *Webster v. Reproductive Health Service*,[13] the Supreme Court considered whether a hospital's refusal to provide abortion services infringes upon a woman's constitutional rights. The Court upheld a Missouri statute that prohibited public employees from performing abortions in public hospitals. The Court stated that "Nothing in the Constitution requires states to enter or remain in the business of performing abortions. Nor ... do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions."[14] The Court noted, however, that the case "might ... be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose," or if all medicine were socialized.[15]

Nothing like the Missouri measure is contained in Federal law protecting the conscience rights of healthcare providers. Indeed, the federal conscience protections insulate physicians who *do* want to perform abortions or sterilizations from punishment by a facility that *does not* want to. Thus federal law[16] protects conscience concerns in both directions—favoring abortion and sterilization and opposing abortion and sterilization.

VI. Title VII's Religious Accommodation Provision is Inadequate to Address Healthcare Conscience Issues not Covered by Other Federal Statutes.

In a set of comments filed September 25, 2008, the Equal Employment Opportunity Commission (EEOC) claimed that the protection afforded under the religious accommodation requirement of Title VII[17] is adequate to protect individual healthcare practitioners with conscientious objections.

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[12] *Doe*, 410 U.S. at 197-98.

[13] 492 U.S. 490 (1989).

[14] *Id.* at 510.

[15] *Id.* at 510, n.8.

[16] 42 U.S.C. §300a-7(c)(1)(B)

[17] 42 U.S.C. 2000e(j)

Irrespective of one's views on the current Regulation, that claim is incorrect.

In *TWA v. Hardison*,[18] the Supreme Court interpreted Title VII's religious accommodation requirement narrowly to hold that an employer need not provide such an accommodation to an employee if it would impose more than a *de minimis* burden on the employer. That extremely low standard largely removes an employer's obligation to accommodate its employees' religious needs. Thus, Title VII, as currently applied and interpreted by the courts, is anemic in protecting religious belief and practice, including conscientious objection, whether in a healthcare service setting or in any other workplace.

We are gratified that President Obama, during his election campaign, recognized this weakness in our civil rights law and stated:

> "I believe firmly that employers have an obligation to reasonably accommodate their employees' religious practices. I would support carefully drafted legislation that strengthens Title VII of the Civil Rights Act of 1964 to further protect religious freedom in the workplace." [19]

We note that there is a difference of opinion over whether the federal conscience statutes, as well as the Regulation, afford conscience protections to pharmacists who have objections to dispensing various contraceptive prescriptions, or other healthcare workers in the context of healthcare procedures other than "abortion or sterilization" as specified by the statute. A strengthened Title VII, with its "undue hardship" "reasonable accommodation" balancing approach is, in our view, an excellent means of addressing healthcare conscience issues beyond the scope of the specific statutes upon which the Regulation is premised.

We have seen such strengthening of legal requirements for employers' accommodating their employees' religious needs in the workplace through several state laws.[20] These expansions of religious accommodation requirements, which apply to pharmacy/pharmacist situations, among all others, have not resulted in any measurable interference with access to healthcare services or products.

RECOMMENDATIONS

If the Department opts to rescind the Regulation, we urge the Department to take the following steps.

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[18] 432 U.S. 63 (1977).

[19] http://www.ajc.org/site/c.ijITI2PHKoG/b.3878133/ (Question #9).

[20] MASS. GEN. LAWS 151B §4 (1A); N.J.S.A. 10:5-12(q); N.Y. EXECUTIVE LAW §296.10

I. Provide clarity on what procedures fall, in the Department's view, within the scope of the statutes' conscience protections.

No statutory definition exists of the term "abortion" as it is used in the federal conscience statutes. The Department declined to provide a definition of the term in the Regulation.[21] In so doing, the Department noted that commenters on the proposed Regulation were divided over "whether certain contraceptive methods or services that have the potential to terminate a fertilized egg after conception but before implantation are considered abortion" under the proposed regulation.[22]

As a group, we disagree about whether refusals to dispense Plan B would constitute a refusal to perform or assist in the performance of an "abortion" for purposes of the federal conscience statutes. Nevertheless, we agree that the proper way to identify a conscience claim is from the perspective of the conscientious objector. For providers who believe life begins at conception, whether or not Plan B technically acts as an abortifacient changes little about the need to accommodate the pharmacist with a conscientious objection to dispensing Plan B.[23] As the law does in other contexts, we should rely on the refusing party to decide where his or her conscience concerns begin and end.[24]

We believe pharmacists and pharmacies opposed to Plan B should be permitted to step aside and allow others to provide the desired service. While we disagree about whether existing federal protections presently cover such refusals, we believe that should

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[21] See 73 fed. Reg. at 78077 ("After the full consideration of Comments on this issue, the Department declines to add a definition of abortion to the rule.").

[22] Emergency contraceptives—like "Plan B" and the "morning after pill"—contain progestins that inhibit or delay ovulation and disrupt embryo transplant and implantation, although the precise mechanism by which post-coital oral contraception works is "not well understood." David A. Grimes, et al., *Emergency Contraception Review*, 137 ANNALS INTERN. MED. 180, 181 (2002), *available at* http://www.annals.org/cgi/reprint/137/3/180.pdf.

[23] See Karen Sughrue, *The Debate Over Plan B: Did Religion Play Role In An FDA Decision?*, 60 MINUTES, June. 11, 2007, http://www.cbsnews.com/stories/2005/11/22/60minutes/main1068924_page2.shtml.

[24] See, e.g., *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). In *Thomas*, a Jehovah's Witness resigned from his position at a foundry when he was transferred to a department that fabricated turrets for military tanks. He applied for unemployment compensation benefits, which the state denied. Thomas maintained that his religious beliefs prevented him from participating in the production of war materials, although he previously worked in another department making sheet steel for Industrial use. The Indiana Supreme Court upheld the denial and the U.S. Supreme Court reversed. The Court noted that it is not the role of the Court to "dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* Although the Indiana compensation statute did not compel a violation of conscience, the Court concluded that it nonetheless would offend the constitutional requirement for government neutrality if it "unduly burdens the free exercise of religion." *Id.* at 717. Here, the Court found that Thomas was left with no alternative but to resign. *Id.*

such refusals not be so addressed, coverage under a strengthened Title VII would be appropriate, as explained in III below.

In any case, however, we urge the administration to make it clear where it believes the coverage of the Church, Coats and Weldon amendments begins and ends, and the role other federal statutory provisions, namely Title VII, play in the healthcare field.

II. Outline and undertake specific steps to make clear that the Department is committed to enforcing the statutes and its new regulations to ensure access to healthcare services and the protection of healthcare providers' consciences.

The Department should prepare and disseminate materials that explain these statutes and their requirements. It should also develop education and training courses for institutional healthcare providers, their employees, individual healthcare providers, government officials and others about the terms of these statutes. Such educational outreach efforts are the first step in enforcing any law. Educational initiatives are especially warranted here with respect to federal conscience protections in light of the widespread misinformation and misunderstandings about those protections.

III. The Administration should reaffirm President Obama's commitment to legislation designed to strengthen Title VII's religious accommodation provision and undertake efforts to have such legislation enacted by Congress within the year.

Over the past decade, bipartisan members of congress have introduced workplace religious freedom legislation that would strengthen Title VII's religious accommodation provision. The Workplace Religious Freedom Act[25] would amend the Civil Rights Act to roll back *Hardison*'s evisceration of the "undue hardship" standard, and provide that an employer must reasonably accommodate its employee's religious needs unless doing so would impose a "significant difficulty or expense" on the employer. Proponents of WRFA (who span the faith and political spectrum[26]), have long understood and intended the legislation to ensure that an employee's religious accommodation must not come at the imposition of significant expense upon others – be they other employees, customers or clients of the employer, or the employer itself.[27]

In the healthcare context, particularly with regard to pharmacists should they not be covered by the other underlying statutes, a strengthened Title VII would deliver the

[25] http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01431:

[26] http://www.ou.org/public_affairs/article/organizations_supporting_the_workplace_religious_freedom_act/

[27] http://edlabor.house.gov/testimony/2008-02-12-RichardFoltin.pdf; http://www.bpnews.net/bpnews.asp?ID=22109; http://www.nytimes.com/2005/04/12/opinion/l12kerry.html

appropriate balance between accommodation and access by, functionally, codifying the rule that a pharmacist who does not wish to dispense certain medications would not have to do so long as another pharmacist is on duty and would dispense the medications.

It is important to state that, as a group, we disagree over whether an "undue hardship" balancing test approach as embodied in Title VII ought to replace the current regime of healthcare conscience protections in Church, Coats and Weldon. But such a change, of course, could only be made by legislation passed by Congress and not by regulation alone.

CONCLUSION

Freedom of conscience is a right Americans prize. They also value and expect access to lawful healthcare services. Both values can and should be respected in policymaking and governance. Doing so will foster a greater sense of cooperation and help us to forge practical and mutually beneficial solutions in the health care arena.

Respectfully submitted,

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