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**Unconscionable:
Threats to Religious
Freedom and Rights of
Conscience in the Abortion
Debate**

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The Charlotte Lozier Institute's Special Reports Series involves in-depth looks at legal topics, public opinion surveys and other matters of interest to particular sectors of the life issue community.

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Thomas M. Messner, J.D., *The Women's Health Protection Act of 2013: The Sweeping Impact of S. 1696*, Special Report 1

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Introduction

Those watching the nation’s capital earlier this year witnessed three important events bearing on religious freedom and rights of conscience in the abortion debate.

In a June 21, 2016, letter, the Obama administration made it clear that it would not take action against the California Department of Managed Health Care’s policy requiring all health plans in the state to cover elective abortions.¹ The Weldon Amendment prevents federal agencies and state and local governments receiving funds from the Department of Health and Human Services from discriminating against health care entities opposed to abortion,² but the Obama administration will not seek to apply the law in this case.³

One week later, on June 28, 2016, the Supreme Court denied review in the case *Stormans v. Wiesman*, a dispute regarding the ability of Washington pharmacists with conscientious objections to abortion-inducing drugs to decline to stock such products at their stores.⁴

Then, on July 13, 2016, the U.S. House of Representatives passed the Conscience Protection Act by a vote of 245-182.⁵ The legislation would prevent government from discriminating against health-care providers who object to participating in the practice of abortion.⁶

These events highlight continuing developments in the abortion debate. While society continues to debate whether and when abortion should be permitted, a second question concerns whether to force pro-life individuals and institutions to participate in or facilitate abortions.

Respect for religious liberty and conscience rights has long been a hallmark of the American political tradition. For example, just months after the Supreme Court decided *Roe v. Wade* in 1973, Congress passed the Church Amendment, legislation “which protects abortion-related conscience rights of both individuals and institutions.”⁷ Only two decades ago, a unanimous House and a near-unanimous Senate voted to pass the Religious Freedom Restoration Act, establishing a framework for the protection of religious beliefs from undue government

¹ Richard M. Doerflinger, *A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights*, Public Discourse (July 6, 2016), <http://www.thepublicdiscourse.com/2016/07/17295/>.

² Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H. Sec. 507(d) (Dec. 18, 2015).

³ Doerflinger, *A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights*.

⁴ *Stormans v. Wiesman*, No. 15-862, slip. op. (U.S. June 28, 2016) (Alito, J., dissenting), https://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf.

⁵ *House Votes 245-182 for Conscience Protection Act*, CNSNews.com (July 13, 2016), <http://www.cnsnews.com/news/article/cnsnewscom-staff/house-votes-245-182-conscience-protection-act>.

⁶ Conscience Protection Act of 2016, H.R. 4828, 114th Cong. (2016).

⁷ Brief for Women’s Public Policy Groups and a Coalition of Female State Legislative and Executive Branch Officials as Amici Curiae Supporting Respondents at 8, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), <http://www.becketfund.org/wp-content/uploads/2014/01/13-354-356-bsac-Womens-Policy-Groups-and-Coalition-of-Female-State-Legislative-and-Executive-Branch-Officials.pdf>.

coercion.⁸ Twenty-three years later, however, the question of religious liberty and conscience protection has been transformed into one of the most contentious issues of our day.

This paper presents a survey of challenges reflecting this transition “from culture wars to conscience wars.”⁹ At risk are not only the religious freedom and rights of conscience of pro-life individuals and institutions, but also the goods that a robust understanding and protection of religious liberty and conscience rights provide for society as a whole.

Cases Involving Health Care Workers

One area of conflict involves situations where pro-life individuals or institutions are coerced into participating in or otherwise facilitating abortion or face potential or actual consequences for refusing to do so or for their pro-life beliefs. In some cases the threat comes from government enforcing rules requiring individuals or businesses—pharmacists, for example—to provide services to which they object on moral and religious grounds. Other cases can involve private employers or other nongovernmental entities coercing private citizens—nurses, for example—to participate in abortion procedures or training under threat of losing their jobs or other consequences.

1. *Stormans v. Wiesman*: A group of Washington pharmacists objected to regulations put forward by the Washington State Board of Pharmacy in 2007 that required all pharmacies to stock emergency contraceptives, forbade pharmacies from refusing to deliver a drug on account of religious, moral, or other personal objections, and provided that pharmacies could not refer patients to other providers for moral or ethical reasons.

Greg Stormans operates a pharmacy in Olympia, Washington, that has been in his family for over 70 years.¹⁰ As Christians, the Stormans hold that life begins at conception and that medications that prevent the implantation of a fertilized egg act as abortifacients, ending a human life.¹¹ As such, they do not stock abortifacients like Plan B in their pharmacy, Ralph’s Thriftway.¹² If customers request emergency contraceptives, the Stormans refer the customers to any of the more than 30 other pharmacies within five miles that do stock such products.¹³

⁸ U.S. SENATE, Roll Call Vote No. 331, 103d Cong. (Oct. 27, 1993), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=103&session=1&vote=00331.

⁹ Thomas M. Messner, *From Culture Wars to Conscience Wars: Emerging Threats to Conscience*, Heritage Foundation (April 13, 2011), <http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience>.

¹⁰ Petition for Writ of Certiorari at 5, *Stormans v. Wiesman*, 579 U.S. ____ (2016) (No. 15-862) [hereinafter Petition], <http://www.scotusblog.com/wp-content/uploads/2016/03/Stormans-SCOTUS-Cert-Petition.pdf>.

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Stormans v. Wiesman*, No. 15-862, slip. op. at 2 (U.S. June 28, 2016) (Alito, J., dissenting) [hereinafter *Stormans*], https://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf.

In 2007, the Washington State Board of Pharmacy (Board)—at the insistence of the governor—issued new regulations mandating that pharmacies like Ralph’s Thriftway stock emergency contraceptives.¹⁴ In addition, the Board issued guidance on the regulation that explained, “‘The rule does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription due to moral or ethical objections.’”¹⁵

Pharmacies are allowed to refer patients for other reasons, such as business-related ones, but are explicitly prohibited from referring customers to another pharmacy for religious, moral, or other personal reasons.¹⁶ These requirements made Washington the only state to forbid pharmacists from declining to fill a prescription on religious or moral grounds while also forbidding conscience-based referrals.¹⁷

The Stormans, along with two other pharmacists (Rhonda Mesler and Margo Thelen), challenged these regulations under the U.S. Constitution.¹⁸ A federal district court enjoined the regulations,¹⁹ but was later reversed by the Ninth Circuit on appeal by the state of Washington.²⁰

The Stormans sought review by the U.S. Supreme Court, but the Supreme Court denied review on June 28, 2016, prompting a dissent by Justice Alito, joined by Chief Justice Roberts and Justice Thomas.

Justice Alito noted that 38 national and state pharmacist associations had urged the Court to hear this case. In his dissent Justice Alito wrote that the Ninth Circuit’s decision upheld a regulation that represents “a radical departure from past regulation of the pharmacy industry” that “threatens to reduce patient access to medication by forcing some pharmacies—particularly small, independent ones that often survive by providing specialty services not provided elsewhere—to close.”²¹

In Justice Alito’s words, “Washington would rather have no pharmacy than one that doesn’t toe the line on abortifacient emergency contraceptives.”²²

2. ***Morr-Fitz v. Quinn***: Two pharmacists in Illinois objected to a mandate issued by then-Governor of Illinois Rod Blagojevich that required pharmacists to dispense emergency

¹⁴ Petition, *supra* note 10, at 14.

¹⁵ *Stormans* slip. op. at 4 (Alito, J., dissenting, quoting the Washington State Board of Pharmacy in 1 Supp. Excerpts of Record in Nos. 12–35221, 12–35223 (CA9), at 1248).

¹⁶ Petition, *supra* note 10, at 11.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 15.

¹⁹ *Stormans v. Selecky*, No. C07-5374, slip. op. (W.D. Wash. Feb. 22, 2012), <http://www.becketfund.org/wp-content/uploads/2012/02/Stormans-Opinion-from-Judge-revised.pdf>.

²⁰ *Stormans v. Wiesman*, No. 12-35221, slip. op. (9th Cir. July 23, 2015), <http://www.becketfund.org/wp-content/uploads/2015/07/Stormans-op.pdf>.

²¹ *Stormans*, *supra* note 13, at 5.

²² *Id.* at 13.

contraceptives to customers upon request without delay, preventing pharmacists with objections to such products from referring customers to another provider.

Then-Governor of Illinois Rod Blagojevich issued an emergency executive “Rule” on April 1, 2005, requiring pharmacists to dispense emergency contraceptives to customers upon request and without delay.²³ Existing Illinois law—the Illinois Health Care Right of Conscience Act—protected pharmacists from such coercion, but Governor Blagojevich instituted the “Rule” nonetheless. Governor Blagojevich issued a press release on April 13, 2005, in which he said, “If a pharmacy wants to be in the business of dispensing contraceptives, then it must fill prescriptions without making moral judgments.”²⁴

Luke Vander Bleek and Glenn Kosirog were two Illinois pharmacists with religiously-based objections to emergency contraceptives such as Plan B, which can cause abortion. Under the rule, they faced a bleak situation. They either had to stock and dispense abortifacients or close up their shops.

Americans United for Life filed a lawsuit on behalf of Vander Bleek and Kosirog in June 2005. After a state appellate court ruled in favor of Vander Bleek and Kosirog in 2012,²⁵ the state attorney general declined to appeal further.²⁶

The end result was that Governor Blagojevich’s rule was struck down and the pharmacists were protected from being targeted on account of their beliefs about abortion-inducing drugs.

3. ***Pregnancy Care Center of Rockford v. Rauner***: Recently signed Illinois legislation requires doctors to refer for abortions even if they have conscience-based objections and would require pharmacists to provide abortifacients or refer customers to other pharmacists who will provide abortifacients. Several plaintiffs are challenging the law on religious liberty and free speech grounds.

Recently enacted legislation in Illinois requires doctors to refer for abortions even against their conscience and requires pharmacists who object to providing abortifacients to provide abortifacients or refer customers to other pharmacists who will provide abortifacients.²⁷ The law, known as SB 1564, amends the Health Care Right of Conscience Act. It permits physicians and health care facilities to refuse to participate in or refer for certain health care services because of

²³ *AUL and Illinois Pharmacists Strike a Blow for First Amendment Freedom of Conscience*, Americans United for Life (December 11, 2012), <http://www.aul.org/2012/12/aul-and-illinois-pharmacists-strike-a-blow-for-first-amendment-freedom-of-conscience/>.

²⁴ *Morr-Fitz, Inc. v. Quinn*, No. 4-11-0398, slip. op. at *4 (Ill. App. Ct. Sept. 20, 2012), <http://www.illinoiscourts.gov/opinions/appellatecourt/2012/4thdistrict/4110398.pdf>.

²⁵ *Id.* at *1.

²⁶ Steven Ertelt, *Pharmacists in Illinois Won’t Be Forced to Dispense Plan B Drug*, LifeNews.com (December 11, 2012), <http://www.lifenews.com/2012/12/11/pharmacists-in-illinois-wont-be-forced-to-dispense-plan-b-drug/>.

²⁷ Tim Bradley, *Here Today, Gone Tomorrow: Conscience Protection in Illinois*, Charlotte Lozier Institute (August 2, 2016), <https://lozierinstitute.org/today-gone-tomorrow-conscience-protection-illinois/>.

a conscience-based objection only in limited circumstances. A conscience-based refusal is only permitted if it is accompanied by a written referral for the service(s) in question, provided in a timely fashion.²⁸

The precise language of the legislation provides “that notwithstanding any other law, a health care facility, or any physician or health care personnel working in the facility, may refuse to permit, perform, assist in, counsel about, suggest, recommend, refer for, or participate in health care services because of a conscience-based objection only if the refusal occurs in accordance with written access to care and information protocols designed to ensure that (1) the patient receives material information in a timely fashion; and (2) the refusal will not impair the patient's health by causing delay of or inability to access the refused health care service.”²⁹

On August 5, 2016, several groups, including Pregnancy Care Center of Rockford, Aid for Women, and Anthony Caruso (an OBGYN), challenged the law in Illinois circuit court. Attorneys from Alliance Defending Freedom are among the attorneys representing the plaintiffs.³⁰

The complaint asserts that “SB 1564 requires the Plaintiffs and other medical facilities and physicians to choose between referring for abortions, transferring a patient to an abortion provider, or provide [sic] a patient asking for abortion with a list of providers they reasonably believe may perform the abortion.”³¹ The case is now pending in circuit court in Winnebago County, Illinois.

4. ***Cenzon-DeCarlo v. The Mount Sinai Hospital***: Nurse Cathy Cenzon-DeCarlo was employed at Mount Sinai Hospital in New York City, and had made known to her employer her objections to abortion. DeCarlo was forced to participate in a late-term abortion while working at the hospital, under threat of being charged with insubordination and patient abandonment.

Cathy DeCarlo is a devout Catholic, and upon becoming employed at Mount Sinai Hospital in 2004 she alerted her employer to her faith-based objections to participating in abortions and was promised that she would not be required to violate her conscience.³² However, on May 24, 2009, while preparing for a common procedure for a patient post-miscarriage, DeCarlo learned

²⁸ Health Care Right of Conscience Act, 2016, Illinois Public Act 99-690 (July 29, 2016), <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0690>.

²⁹ *Id.*

³⁰ Complaint, Pregnancy Care Center of Rockford v. Rauner, No. 2016MR741 (17th Ill. Cir. filed Aug. 5, 2016), <https://adlegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/the-pregnancy-care-center-of-rockford-v.-rauner/the-pregnancy-care-center-of-rockford-v-rauner---complaint.pdf?sfvrsn=6>.

³¹ *Id.* at 2.

³² Verified Complaint at 6, Cenzon-DeCarlo v. The Mount Sinai Hospital, No. 09-cv-03120 (E.D.N.Y. Jan. 15, 2010), <https://adlegal.blob.core.windows.net/web-content-dev/documents/cenzon-decarlo-v-the-mount-sinai-hospital---federal-complaint.pdf?sfvrsn=6>.

that the procedure was actually going to be performed on a living 22-week-old child.³³ DeCarlo spoke with a supervisor at the hospital, who claimed that the mother could die if DeCarlo did not assist in the abortion, and that if she refused she would be charged with insubordination and patient abandonment.³⁴

Cathy, in tears, gave in to her supervisor's demand because her family could not afford for her to lose her job and nursing license, but she did so in protest.³⁵ Her supervisor's claim that the life of the mother was in immediate danger turned out to be false.³⁶ DeCarlo was pressured into assisting the doctor in performing a dismemberment abortion on the 22-week-old child, later describing her experience as "like something out of a horror film."³⁷

Two days after the abortion, DeCarlo filed a complaint against her supervisors.³⁸ DeCarlo's attorney with Alliance Defending Freedom also requested an investigation into the matter by the federal Department of Health and Human Services.³⁹ This investigation ultimately led Mt. Sinai to change its policies and procedures to ensure that employees would not be placed in the situation DeCarlo faced.⁴⁰

5. ***Danquah v. University of Medicine and Dentistry of New Jersey***: Twelve nurses employed by the University of Medicine and Dentistry of New Jersey objected to a policy instituted by the university prohibiting its employees from refusing to participate in abortion procedures.

Twelve nurses employed at the University of Medicine and Dentistry of New Jersey (UMDNJ) filed a federal court complaint against their employer on October 31, 2011, alleging that UMDNJ had demanded the nurses assist in abortions or be terminated.⁴¹ At the time the complaint was filed UMDNJ had allegedly already forced some of the plaintiffs to undergo training to assist in abortions and had scheduled the rest of the plaintiffs to undergo such training

³³ *Id.* at 11.

³⁴ *Id.* at 12.

³⁵ *Id.* at 13.

³⁶ *Id.* at 14.

³⁷ *Cenzon-DeCarlo v. The Mount Sinai Hospital*, Alliance Defending Freedom, <https://www.adflegal.org/detailspages/case-details/cenzon-decarlo-v.-the-mount-sinai-hospital>.

³⁸ *Id.*

³⁹ Letter from Matthew S. Bowman, Esq., Legal Counsel, Alliance Defending Freedom, to Michael Carter, Regional Manager, Office for Civil Rights, U.S. Department of Health and Human Service (March 8, 2010), <https://adflegal.blob.core.windows.net/web-content-dev/documents/cenzon-decarlo-v-the-mount-sinai-hospital---adf-letter-to-u-s-dept-of-hhs.pdf?sfvrsn=4>.

⁴⁰ *Mt. Sinai ends forced abortion-participation policy*, Alliance Defending Freedom (Feb. 12, 2013), <https://www.adflegal.org/detailspages/press-release-details/mt--sinai-ends-forced-abortion-participation-policy>.

⁴¹ Verified Complaint at 2, *Danquah v. University of Medicine and Dentistry of New Jersey*, No. 11-cv-06377 (D.N.J. filed Oct. 31, 2011), <http://www.adfmedia.org/files/DanquahComplaint.pdf>.

in the near future.⁴² The nurse plaintiffs argued that UMDNJ was violating federal and state laws by forcing them to participate in abortions in violation of their consciences.⁴³

The complaint filed by Alliance Defending Freedom on behalf of the nurses led to a settlement wherein the hospital agreed not to fire nurses who objected to participating in abortions, and would not require the nurses to attend any training related to abortion procedures.⁴⁴ The settlement established that the nurses “will be required to provide emergency care to TOP [termination of pregnancy] patients should, under a reasonable medical determination, said emergencies occur, and then only until such time as health care personnel who do not have moral or religious objections to TOPs arrive to stabilize and provide care for said patients in need of emergent relief.”⁴⁵

The plaintiff’s attorney noted during the settlement proceedings that his clients “have never taken the position that if they are walking by a room and a woman is in an emergent situation, that they are not going to take the necessary action to protect her.”⁴⁶

6. ***Dust v. Vanderbilt University***: Two students seeking to apply to the Women’s Health track of the nurse residency program at Vanderbilt University filed a complaint objecting to language on the application form requiring applicants to agree to participate in abortions.

While exploring nurse residency programs in January 2011, two students who were interested in applying to Vanderbilt University’s nurse residency Women’s Health track discovered that the application required them to promise to assist in abortions.⁴⁷ An acknowledgement letter included in the application stated, “If you are chosen for the Nurse Residency Program in the Women’s Health track, you will be expected to care for women undergoing termination of pregnancy.”⁴⁸ The letter added, “If you feel you cannot provide care to women during this type of event, we encourage you to apply to a different track of the Nurse Residency Program to explore opportunities that may best fit your skills and career goals.”⁴⁹

Alliance Defending Freedom filed a complaint with the U.S. Department of Health and Human Services on January 11, 2011, on behalf of the two students, who desired to apply to the

⁴² *Id.* at 8.

⁴³ *Id.* at 2.

⁴⁴ Settlement Order, *Danquah v. University of Medicine and Dentistry of New Jersey*, No. 11-cv-06377 (D.N.J. issued Dec. 23, 2011).

⁴⁵ *Id.* at 2.

⁴⁶ Transcript of Proceedings at 6, *Danquah v. University of Medicine and Dentistry of New Jersey*, No. 11-cv-06377 (D.N.J. heard Dec. 22, 2011), <http://www.adfmedia.org/files/DanquahSettlementTranscripts.pdf>.

⁴⁷ *Dust v. Vanderbilt University*, Alliance Defending Freedom, <https://www.adflegal.org/detailspages/case-details/dust-v.-vanderbilt-university>.

⁴⁸ Summer 2011 Application Packet for Vanderbilt University Medical Center Nurse Residency Program at 15, <https://adflegal.blob.core.windows.net/web-content-dev/documents/vanderbilt-nurse-residency-application.pdf?sfvrsn=4>.

⁴⁹ *Id.*

Women’s Health track but could not in good conscience do so.⁵⁰ The complaint argued that federal law prohibits discrimination against students or health care professionals on the basis of their religious or moral convictions—for example, objections to participating in abortions.

The complaint called on HHS to “promptly investigate and compel Vanderbilt to cease its illegal discrimination and/or halt its receipt of relevant tax dollars and cause it to repay wrongfully appropriated funds.”⁵¹ The complaint asserted that Vanderbilt receives “over \$300 million in federal health tax dollars each year.”⁵²

The very next day after that complaint was filed with HHS, Vanderbilt modified the nurse residency application form such that applicants no longer had to agree to participate in abortion procedures.⁵³

7. ***Hellwege v. Tampa Family Health Centers:*** Sara Hellwege sought employment at Tampa Family Health Centers in Florida but was told that she could not apply for the position of certified nurse-midwife because of her religious beliefs and objections to abortion-inducing drugs.

Sara Hellwege was preparing to graduate in the spring of 2014, completing her education in nurse midwifery.⁵⁴ She applied for a job at Tampa Family Health Centers in Florida, and was questioned about her membership in the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) and her religiously-motivated objections to birth control and abortifacients.⁵⁵

Hellwege was informed that she could not proceed in the hiring process on account of these views and this membership.⁵⁶ An email on May 13, 2014, from the person reviewing her resume read in part, “Due to the fact that we are a Title X organization and you are an [sic] member of AAPLOG, we would be unable to move forward in the interviewing process.”⁵⁷

She filed suit against Tampa Health Centers in federal district court, and filed administrative claims with HHS and the Equal Employment Opportunity Commission, alleging that her inability to advance in the hiring process was a result of illegal discrimination against her “based

⁵⁰ Letter from Matthew S. Bowman, Esq., Legal Counsel, Alliance Defending Freedom, to Roosevelt Freeman, Regional Manager, Office for Civil Rights, U.S. Department of Health and Human Services at 3 (Jan. 11, 2011), <https://adflegal.blob.core.windows.net/web-content-dev/documents/bowman-v-vanderbilt-university---adf-complaint-letter.pdf?sfvrsn=10>.

⁵¹ *Id.*

⁵² *Id.* at 1.

⁵³ *Supra* note 47.

⁵⁴ *Hellwege v. Tampa Family Health Centers*, Alliance Defending Freedom, <https://www.adflegal.org/detailspages/case-details/hellwege-v.-tampa-family-health-centers>.

⁵⁵ *Id.*

⁵⁶ Complaint at 5, *Hellwege v. Tampa Family Health Centers*, 103 F. Supp. 3d 1303, (M.D. Fla. 2015) (No. 14-cv-01576).

⁵⁷ *Id.*

on her religious beliefs and moral convictions in opposition to prescribing certain drugs that she believes can cause the death of a human embryo.”⁵⁸

The parties eventually settled the case.⁵⁹

8. ***American Civil Liberties Union v. Trinity Health***: The ACLU filed a lawsuit seeking to force Trinity Health Corporation to perform abortions in certain situations.

Trinity Health is the parent corporation of a Catholic health care system, and operates 86 hospitals in 21 states.⁶⁰ Trinity Health carries out the healthcare mission of Catholic Health Ministries as part of the Catholic Church in the United States, and as such adheres to the teaching that direct abortion is never permitted, as stated in the Ethical and Religious Directives for Catholic Health Care Services published by the United States Conference of Catholic Bishops (USCCB).⁶¹

The American Civil Liberties Union (ACLU) filed a lawsuit against the hospital system on October 1, 2015.⁶² The lawsuit argued that because hospitals within the Trinity Health system do not perform abortions, these hospitals “have repeatedly and systematically failed to provide women suffering pregnancy complications—including at least one of Plaintiff’s members—with the emergency care required by [the Emergency Medical Treatment and Active Labor Act] and the Rehabilitation Act.”⁶³ The lawsuit asked the court, among other things, to enjoin the hospitals from “withholding appropriate stabilizing treatment, including pregnancy termination, from women with pregnancy-related emergency medical conditions within the meaning of EMTALA, where pregnancy termination is the standard of care.”⁶⁴

On April 11, 2016, the U.S. District Court for the Eastern District of Michigan granted Trinity Health’s motion to dismiss the case.⁶⁵ On August 15, 2016, the court denied plaintiffs’

⁵⁸ *Id.* at 1.

⁵⁹ Mediation Report, *Hellwege v. Tampa Family Health Centers*, 103 F. Supp. 3d 1303, (M.D. Fla. 2015) (No. 14-cv-01576).

⁶⁰ Amended Complaint at 5, *American Civil Liberties Union v. Trinity Health Corporation*, No. 15-cv-12611 (E.D. Mich. 2016), <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/american-civil-liberties-union-v.-trinity-health-corporation/american-civil-liberties-union-v-trinity-health-corporation---complaint.pdf?sfvrsn=4>.

⁶¹ *Id.* at 2.

⁶² *Id.* at 1.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 16.

⁶⁵ Opinion and Order Granting Defendants’ Motion to Dismiss at 13, *American Civil Liberties Union v. Trinity Health Corporation*, No. 15-cv-12611 (E.D. Mich. 2016), <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/american-civil-liberties-union-v.-trinity-health-corporation/american-civil-liberties-union-v-trinity-health-corporation---dismissal-order.pdf?sfvrsn=4>.

motion for reconsideration as well as plaintiffs’ motion to amend the complaint.⁶⁶ At the time of publication no appeal had been filed.

Cases Involving Pregnancy Help Centers

Another area of conflict involves pregnancy help centers. These conflicts center around state or local laws that require to pregnancy help centers to communicate certain messages to their clients.

9. *National Institute of Family and Life Advocates v. Harris*: Multiple groups have challenged a California law—the Reproductive FACT Act—that requires licensed covered pregnancy centers to disseminate to all clients a notice stating that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, and to provide a phone number to a county social services office where a client could obtain an abortion covered by Medi-Cal.

On October 9, 2015, California passed a law known as the Reproductive FACT Act.⁶⁷ The Reproductive FACT Act requires licensed covered pregnancy centers to disseminate to all clients a notice stating that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, and to provide a phone number to a county social services office where a client could obtain an abortion covered by Medi-Cal.⁶⁸ The Reproductive FACT Act requires unlicensed covered facilities to disseminate a notice to all clients stating that the facility is not licensed as a medical facility by the State of California.⁶⁹

National Institute of Family and Life Advocates (NIFLA) is a national non-profit organization with 111 affiliates in California. The mission of these pregnancy help centers is to provide resources and help to women in unplanned pregnancies in order to support them in choosing childbirth, not abortion.⁷⁰

NIFLA filed a complaint against the law on October 13, 2015. The complaint explains that the Reproductive FACT Act violates the U.S. Constitution and federal legislation known as the Coats-Snowe Amendment, which protects health care entities from being required to refer for abortions.⁷¹ NIFLA objected to the Reproductive FACT Act on the grounds that it “imposes

⁶⁶ Opinion and Order Denying Plaintiffs’ Motion for Reconsideration and Denying Plaintiff’s Request to Amend the Complaint, *American Civil Liberties Union v. Trinity Health Corporation*, No. 15-cv-12611 (E.D. Mich. 2016), <https://ecf.mied.uscourts.gov/doc1/09718802410>.

⁶⁷ Reproductive FACT Act, 2015, California AB 775 (Oct. 9, 2015), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB775.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Verified Complaint for Declaratory, Injunctive and Other Relief at 2, *National Institute of Family and Life Advocates v. Harris*, No. 15-cv-2277 (S.D. Cal. Oct. 13, 2015), <http://www.adfmedia.org/files/NIFLAComplaint.pdf>.

⁷¹ *Id.* at 3.

government compelled speech upon the Plaintiff pregnancy centers due to their support for pregnant women, and in ways that undermine the centers' messages."⁷²

A federal court denied NIFLA's motion for a preliminary injunction against the law.⁷³ The Ninth circuit upheld the district court's ruling on appeal in an opinion issued October 14, 2016.⁷⁴

10. ***Pregnancy Care Center of New York v. New York City***: Pro-life pregnancy help centers objected to a New York City law that threatened them with heavy fines and possible closure unless they provided printed and oral notices regarding whether or not they provide referrals for abortions and contraception.

New York City Mayor Michael Bloomberg signed Bill 371-A in March 2011. The law required pregnancy help centers to disclose to their clients a number of things, including

- whether or not the pregnancy center has a licensed medical provider on staff;
- whether or not the center provides referrals for abortions;
- whether or not the pregnancy center provides referrals for emergency contraception; and
- that the New York City Department of Health and Mental Hygiene encourages women who are pregnant to consult with a licensed medical provider.⁷⁵

On March 29, 2016, a federal district court judge mediated a final settlement between the parties in favor of pro-life pregnancy resource centers.⁷⁶ The settlement allows such centers to operate according to their religious convictions without being forced to advertise for the city or influence their clients towards seeking an abortion.⁷⁷

11. ***Austin LifeCare v. City of Austin***: A pro-life pregnancy center in Austin, Texas, objected to a city ordinance that required pro-life pregnancy help centers to display signs at their entrances stating whether the center provided medical services, employed a licensed health care practitioner to supervise all services, and was licensed by a state or federal entity to provide medical services.

⁷² *Id.* at 2.

⁷³ Order Denying Plaintiffs' Motion for Preliminary Injunction, National Institute of Family and Life Advocates v. Harris, No. 15-cv-2277 (S.D. Cal. Feb. 9, 2016).

⁷⁴ National Institute of Family and Life Advocates v. Harris, No. 16-55249, slip. op., (9th Cir. Oct. 14, 2016). *See also* Memorandum, Living Well Medical Clinic, Inc. v. Harris, No. 15-17497 (9th Cir. Oct. 14, 2016) (unpublished memorandum disposition citing *NIFLA v. Harris* and affirming denial of preliminary injunction motion brought by parties challenging the FACT Act); Memorandum, A Woman's Friend Pregnancy Resource Clinic v. Harris, No. 15-17517 (9th Cir. Oct. 14, 2016) (same); Mountain Right to Life, Inc., v. Harris, No. 16-56130 (9th Cir. Sept. 6, 2016) (notice of appeal filed August 9, 2016 and proceedings held in abeyance until November 3, 2016).

⁷⁵ Stipulation of Settlement and Discontinuance at 3, Pregnancy Care Center of New York v. City of New York, No. 11-2342 (S.D.N.Y. March 29, 2016), <http://www.adfmedia.org/files/PCCNYsettlement.pdf>.

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 5.

The Austin City Council repealed a 2010 ordinance targeting pro-life pregnancy centers on January 26, 2012, after it was challenged in court, only to replace it with a similar ordinance on the same day.⁷⁸

On January 31, 2012, LifeCare, a pro-life pregnancy help center located in the city, filed a complaint against the new ordinance, claiming that the rule unconstitutionally compelled LifeCare and similar pregnancy centers “under penalty of monetary sanction to post signage ‘affixed to the entrance of the center’ disclaiming to all of its existing or potential clients” whether the center provided medical services, employed a licensed health care practitioner to supervise all services, and was licensed by a state or federal regulatory entity to provide medical services.⁷⁹ LifeCare argued that the city ordinance violated its First Amendment rights by compelling speech.

The city revised the ordinance under pressure of a lawsuit.⁸⁰ However, the city continued to require pro-life centers that do not offer medical services to post signs emphasizing, for example, that they were not licensed to perform ultrasounds, even though there is no such thing as a facility license to perform ultrasounds.⁸¹

On June 23, 2014, a ruling by the U.S. District Court for the Western District of Texas struck down the city ordinance in its entirety.⁸²

12. *Centro Tepeyac v. Montgomery County*: A federal district court struck down the entirety of a Montgomery County, Maryland, law that forced pro-life pregnancy help centers to post signs stating their lack of a licensed medical professional on staff and to encourage clients to consult with licensed health care providers.

The Montgomery County Council in Montgomery County, Maryland, adopted a resolution on February 2, 2010, that required limited service pregnancy help centers without a licensed medical professional on staff to post signage in their buildings stating that the center did not have a licensed medical professional on staff. The signage was also required to state that “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.”⁸³

⁷⁸ *Court strikes down Austin, Texas anti-pregnancy care law*, Alliance Defending Freedom (June 23, 2014), <http://www.adfmedia.org/news/prdetail/5186>.

⁷⁹ Amended Verified Complaint for Declaratory, Injunctive and Other Relief at 3, *Austin LifeCare v. City of Austin*, No. 11-00875 (W.D. Tex. 2014), <http://www.adfmedia.org/files/AustinLifeCareComplaint.pdf>.

⁸⁰ *Supra* note 78.

⁸¹ *Id.*

⁸² *Austin LifeCare v. City of Austin*, No. 11-00875 (W.D. Tex. 2014), <http://www.adfmedia.org/files/AustinLifeCarePermInjFindingsFact.pdf>.

⁸³ *Centro Tepeyac v. Montgomery County*, No. 11-1314 slip. op. at 4 (4th Cir. July 3, 2013), <http://www.ca4.uscourts.gov/opinions/published/111314.p.pdf>.

Centro Tepeyac is a “not-for-profit corporation operating a limited service pregnancy resource center located in the Silver Spring area of Montgomery County.”⁸⁴ Centro Tepeyac objected to the resolution and filed a lawsuit against the county on May 19, 2010, arguing that the resolution violated its freedom of speech under the First Amendment of the U.S. Constitution.

The U.S District Court for the District of Maryland ruled in favor of Centro Tepeyac on March 7, 2014, permanently enjoining the county from enforcing its resolution against the pregnancy center.⁸⁵ Further, the federal district court mediated a settlement on June 18, 2014, wherein the county paid Centro Tepeyac \$375,000 to cover legal fees.⁸⁶

Cases Involving Insurance Coverage

Under the federal Affordable Care Act and the Health and Human Services (HHS) mandate employers are required to provide employee health insurance plans that cover contraception and abortion-inducing drugs. Many people are familiar with the burden these laws place on religious freedom and rights of conscience as well as high-profile cases such as *Burwell v. Hobby Lobby Stores, Inc.* and *Zubik v. Burwell*.⁸⁷

However, similar threats have also emerged under state law. Recent cases in California and New York reveal further violations of religious liberty in the arena of health insurance coverage, where churches and religious organizations are being forced to cover abortion in their employer health insurance plans.

13. ***Foothill Church v. Rouillard***: The California Department of Managed Health Care issued a mandate that health insurance plans in California cover abortions, including voluntary and elective abortions. Several churches have filed lawsuits objecting to the requirement, claiming that their mission and faith prevent them from covering abortion in their employee health plans in good conscience.

The California Department of Managed Health Care (DMHC) is an executive agency of the State of California responsible for enforcing laws regarding health service plans. DMHC sent letters on August 22, 2014, to group health plans that did not cover all legal abortions, requiring that these plans begin offering such coverage, citing the Knox-Keene Act’s provision that health

⁸⁴ *Id.* at 6.

⁸⁵ Order, *Centro Tepeyac v. Montgomery County*, No. 10-1259 (D. Md. 2014), <http://www.adfmedia.org/files/CentroTepeyacPermInjunction.pdf>.

⁸⁶ Notice of Settlement of Remaining Issues, *Centro Tepeyac v. Montgomery County*, No. 10-1259 (D. Md. 2014), <http://www.adfmedia.org/files/CentroTepeyacSettlement.pdf>.

⁸⁷ *HHS Mandate Information Central: Providing the Leading Information on all HHS Mandate Cases Since 2011*, The Becket Fund for Religious Liberty, <http://www.becketfund.org/hhsinformationcentral/>. The Charlotte Lozier Institute filed an amicus brief in *Burwell v. Hobby Lobby Stores, Inc.*, see *supra* note 7, and Charlotte Lozier Institute Associate Scholar Michael J. New, Ph.D., filed an amicus brief in Support of Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016), <https://lozierinstitute.org/wp-content/uploads/2016/01/Amicus-Brief-Zubik-v.-Burwell.pdf>.

plans must cover basic health care services.⁸⁸ The DMHC interprets the term “basic health care services” as including elective abortions (an interpretation that Skyline Wesleyan, the plaintiff in the similar case described below, argues was adopted by the DMHC for the first time in its August 22 letter).⁸⁹ The requirement did not provide exemptions for employee health plans offered by churches and religious employers.

Several churches objected to the law, including Foothill Church, Calvary Chapel Chino Church, and Shepherd of the Hills Church.⁹⁰ The churches filed suit seeking injunctive relief from the mandate, which they argue violates their First and Fourteenth Amendment rights to religious liberty and equal protection.⁹¹ The churches argued that they are required by federal law to offer health insurance to their employees and the new state mandate coerces them to violate their religious beliefs regarding abortion.⁹²

The case was filed on October 16, 2015. On July 11, 2016, a federal district court judge granted the state’s motion to dismiss the cases.⁹³ The plaintiffs filed an amended complaint on August 1, 2016, and the case is ongoing.⁹⁴

14. *Skyline Wesleyan Church v. California Department of Managed Health Care:* The California Department of Managed Health Care issued a mandate that health insurance plans in California cover abortions, including voluntary and elective abortions. Several churches have filed lawsuits objecting to the requirement, claiming that their mission and faith prevent them from covering abortion in their employee health plans in good conscience.

The California Department of Managed Health Care (DMHC) is an executive agency of the State of California responsible for enforcing laws regarding health service plans. DMHC sent letters on August 22, 2014, to group health plans that did not cover all legal abortions, requiring that these plans begin offering such coverage, citing the Knox-Keene Act’s provision that health plans must cover basic health care services.⁹⁵ The DMHC interprets the term “basic health care

⁸⁸ Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss at 2, *Skyline Wesleyan Church v. California Department of Managed Health Care*, No. 16-00501 (S.D. Cal filed June 20, 2016), <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/skyline-wesleyan-church-v.-california-department-of-managed-health-care/dismissal-denial---skyline-wesleyan-church-v.-california-department-of-managed-health-care.pdf?sfvrsn=4>.

⁸⁹ *Id.*

⁹⁰ Complaint for Declaratory and Injunctive Relief at 1, *Foothill Church v. Rouillard* No. 15-02165 (E.D. Cal. filed Oct. 16, 2015), <http://www.adfmedia.org/files/FoothillChurchComplaint.pdf>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Order, *Foothill Church v. Rouillard* No. 15-02165 (E.D. Cal. filed July 11, 2016), <http://www.adfmedia.org/files/FoothillChurchDismissalOrder.pdf>.

⁹⁴ First Amended Complaint for Injunctive and Declaratory Relief, *Foothill Church v. Rouillard* No. 15-02165 (E.D. Cal. filed August 1, 2016), <http://www.adfmedia.org/files/FoothillChurchAmendedComplaint.pdf>.

⁹⁵ Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss at 2, *Skyline Wesleyan Church v. California Department of Managed Health Care*, No. 16-00501 (S.D. Cal filed June 20, 2016),

services” as including elective abortions (an interpretation that Skyline Wesleyan argues was adopted by the DMHC for the first time in its August 22 letter).⁹⁶ The requirement did not provide exemptions for employee health plans offered by churches and religious employers.

Skyline Wesleyan is a Christian church in La Mesa, California, and holds that participating in, facilitating, or paying for elective or voluntary abortion is a grave matter. The church filed a complaint on February 4, 2016, contending that the DMHC regulation violates the U.S. Constitution, as well as the Constitution of the State of California.⁹⁷ The case was moved to federal district court on February 26, and the district court granted DMHC’s motion to dismiss the church’s equal protection claims on June 20, 2016, but denied the motion to dismiss the church’s remaining free exercise claims.⁹⁸ This case is ongoing.

15. ***Diocese of Albany v. Vullo***: Thirteen organizations in New York recently discovered that they had unknowingly been covering elective abortions in their insurance plans under two separate state mandates, and filed suit in state court.

Thirteen organizations discovered recently that they had unknowingly been covering elective (non-therapeutic) abortions in their employer insurance plans under two state abortion mandates and filed suit in state court.⁹⁹ A change in policy had been made without notification to these groups, leading to their covering elective abortions against their consciences and without their knowledge.

The New York State Department of Financial Services (NYSDFS) is responsible for enforcing health insurance regulations, and offers “model language” on what must be included in a health insurance plan.¹⁰⁰ NYSDFS approved model language on April 26, 2016, that states that health insurance plans must cover therapeutic and non-therapeutic abortions. The language includes an exemption for “religious employers” or “any large group” employers, but is said to be narrow enough to disqualify groups like the Catholic Diocese of Albany.¹⁰¹

<https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/skyline-wesleyan-church-v.-california-department-of-managed-health-care/dismissal-denial---skyline-wesleyan-church-v.-california-department-of-managed-health-care.pdf?sfvrsn=4>.

⁹⁶ *Id.*

⁹⁷ Complaint for Declaratory and Injunctive Relief and Nominal Damages, *Skyline Wesleyan Church v. California Department of Managed Health Care*, No. 37-2016-00003936 (Cal. Super. Filed Feb. 4, 2016),

<https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/skyline-wesleyan-church-v.-california-department-of-managed-health-care/complaint---skyline-wesleyan-church-v.-california-department-of-managed-health-care.pdf?sfvrsn=4>.

⁹⁸ *Supra* note 95, at 1.

⁹⁹ Genevieve Plaster, *New York’s Hidden Abortion Mandates Force Churches to Subsidize Abortion*, Charlotte Lozier Institute (May 31, 2016), <https://lozierinstitute.org/new-yorks-hidden-abortion-mandates-force-churches-subsidize-abortion/>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

When groups objected to this language, they were made aware that they had already—unknowingly—been providing coverage for elective abortions under different language regarding “medically necessary” outpatient surgery, in which abortion was included as a medically necessary procedure required to be included in health insurance plans.¹⁰² A lawsuit was filed on behalf of these 13 organizations (including the Diocese of Albany) in New York state court on May 4, 2016.¹⁰³

16. Weldon Amendment: The Weldon Amendment is a rider attached to federal Labor/HHS appropriations bills annually since 2004 that prohibits state governments receiving funds from HHS from discriminating against health care entities on account of their objections to abortion. The Obama administration has declined to act against the California Department of Managed Health Care policy pursuant to the Weldon Amendment in the cases of Foothill Church and Skyline Wesleyan Church described above.

The Weldon amendment has been added to federal appropriations bills annually since 2004, and prevents federal agencies and state and local governments receiving funds from the Department of Health and Human Services from “discriminating against health care entities that decline to provide, refer for, pay for, or provide coverage of abortions.”¹⁰⁴

As explained above, on August 22, 2014, the California Department of Managed Health Care (DMHC) sent letters to group health plans in that state that did not cover all legal abortions, requiring that such plans begin offering such coverage, citing the Knox-Keene Act’s provision that health plans must cover basic health care services.

Several religious entities, including Foothill Church and Skyline Wesleyan Church, filed complaints. They argued that the DMHC’s policy violated the U.S. Constitution and, by discriminating against them because their health plans do not cover elective abortions, the Weldon Amendment.¹⁰⁵

In a June 21, 2016, letter, the Obama administration made it clear that, according to Richard Doerflinger, “the administration has no intention of enforcing the federal law in this case.”¹⁰⁶ The effect of this decision is to force “almost all health plans in the state—including employer plans provided by churches and other religious organizations—to cover elective abortions, including late-term abortions.”¹⁰⁷

¹⁰² *Id.*

¹⁰³ Verified Complaint for Declaratory and Injunctive Relief, *Diocese of Albany v. Vullo* No. 02070-16 (N.Y. Sup. filed May 4, 2016), <http://nylawyer.nylj.com/adgifs/decisions16/051616complaint.pdf>.

¹⁰⁴ Richard M. Doerflinger, *A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights*, Public Discourse (July 6, 2016), <http://www.thepublicdiscourse.com/2016/07/17295/>.

¹⁰⁵ *Supra* note 97 at 9.

¹⁰⁶ Doerflinger, *A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights*, citing Letter from Jocelyn Samuels, Director, Office for Civil Rights, to Catherine W. Short, Esq., Vice President of Legal Affairs, Life Legal Defense Foundation, et al. (June 21, 2016), <http://www.adfmedia.org/files/CDMHCInvestigationClosureLetter.pdf>.

¹⁰⁷ Doerflinger, *A Pledge Betrayed: The Obama Administration Nullifies Conscience Rights*.

The administration’s decision not to enforce this long-standing federal law has aggravated the California cases described above, preventing groups like Skyline Wesleyan and Foothill Church from depending on the federal government’s assistance in their challenges to the DMHC policy.

What Should Be Done

Governments should respect the religious freedom and conscience rights of pro-life individuals and institutions. Private employers and educational institutions should do the same. In particular:

- The federal government should make the Conscience Protection Act law to prevent government from discriminating against health-care providers who object to being complicit in the practice of abortion (approved by the House of Representatives on July 13, 2016).
- The executive branch should enforce the Weldon Amendment and similar legislation designed to prevent entities receiving federal funds from discriminating against health care entities who object to abortion.
- Private employers should accommodate employees’ morally or religiously-based objections to being involved in the practice of abortion by instituting systems to ensure that no such employees will be forced to participate against their will.
- The federal government should provide oversight of all state-sponsored medical schools and residency programs—for both doctors and nurses—and any private programs receiving funds from the Department of Health and Human Services, to ensure that such programs respect the conscience rights of applicants and participants, as protected by the Church and Coats-Snowe Amendments.¹⁰⁸ This will ensure that individuals with pro-life views are not driven out of the medical profession—especially the women’s health fields—further ensuring that patients will continue to have access to pro-life doctors and nurses who share their values and that medical and nursing schools have access to the best-qualified students irrespective of those students’ views on matters of conscience.

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¹⁰⁸ Laws that protect the rights of health service providers who refuse to participate in abortions on conscience grounds.