



**Written Testimony of Rachel N. Morrison, Esq.
Litigation Counsel, Americans United for Life
On N.M. H.B. 51
Submitted to the House Judiciary Committee
February 1, 2019**

Dear Chair Chasey and Members of the Committee:

My name is Rachel N. Morrison, and I serve as Litigation Counsel at Americans United for Life (AUL), the oldest and most active pro-life non-profit advocacy organization. Established in 1971, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death, including the protection of conscience rights in health care and for health care providers.

Thank you for the opportunity to provide legal testimony on New Mexico's H.B. 51, which removes vital protections for health care providers who have a conscience objection to abortion. I am writing to specifically respond to arguments, particularly those made by the ACLU, that both federal and New Mexico state law already protect physicians who choose not to perform abortions based on reasons of conscience, and explain why those laws do not adequately protect all health care providers from being forced to provide or participate in abortions.

If passed, H.B. 51 would remove N.M.S.A. § 30-5-2, the current statutory exception protecting conscience rights in the context of abortion. The exception states in full:

This article [on abortion] does not require a hospital to admit any patient for the purposes of performing an abortion, nor is any hospital required to create a special hospital board. A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital, in which a justified medical termination has been authorized and who objects to the justified medical termination on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of pregnancy, and the refusal of any such person to participate shall not form the basis of any disciplinary or other recriminatory action against such person.

This exception explicitly protects both hospitals and hospital staff with a moral or religious objection from participating in an abortion and from any disciplinary or adverse action for choosing to do so. Removing this exception will remove these vital protections from New Mexico state law.

New Mexico law, absent § 30-5-2, does not adequately protect conscience rights.

The ACLU claims that N.M.S.A. § 24-7A-7(E), “would protect any physician who refuses to perform an abortion based on reasons of conscience.” In full, § 24-7A-7(E) states:

A health-care practitioner may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the health-care institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient.

This provision by itself is inadequate to protect the conscience rights of health care providers in New Mexico. First, this exception does not explicitly apply to abortion, leaving health care providers vulnerable in this context. Second, the exception is narrow and much more limited than the current exception in § 30-5-2. For health care practitioners, it does not protect a practitioner who refuses to participate in an abortion based on reasons of conscience from being coerced by his or her employer to participate in the procedure or from receiving disciplinary or adverse actions as a result of this decision. For health care institutions, they may only decline to comply with an instruction or decision if it is contrary to a policy that is expressly based on reasons of conscience *and* if the policy was timely communicated to the patient. Thus, any health care institution that has a policy not to perform abortions but does not explicitly state that the policy is due to reasons of conscience will not be except under § 24-7A-7(E). In addition, a health care institution may not refuse to perform an abortion if it is unable to timely communicate the policy to a patient. “Timely” is not defined and leaves health care institutions vulnerable to penalties if they choose to forgo performing an abortion in accordance with their policy. Finally, § 24-7A-7(E) is practically unenforceable as it does not contain a right of enforcement or a private right of action. This leaves health care entities and individuals without a way to vindicate even what little conscience rights are protected by § 24-7A-7(E).¹

Federal health care provider conscience protections do not adequately protect conscience rights.

The ACLU also points to conscience protections in federal law, and specifically to the Church Amendments, as a means to “protect individuals and entities that object to performing or assisting in the performance of abortion based on religious beliefs or moral convictions.” The ACLU also directs readers to the U.S. Department of Health and Human Services (HHS) website² for “additional educational resources about federal conscience protections that may be of interest.” HHS identifies and discusses the following federal health care provider conscience protection laws:

- **The Church Amendments**, which protect healthcare providers from discrimination by recipients of HHS funds on the basis of their objection, because of religious belief or moral conviction, to performing or participating in any lawful health service or research activity³;
- **The Public Health Service Act § 245** (also known as the Coats Amendment), which prohibits the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refused to receive training in abortions; require

¹ New Mexico has a state Religious Freedom Restoration Act, N.M.S.A. § 28-22-3, which protects the free exercise of religion, but this law is narrow, does not explicitly apply to abortion, and applies only to action by a government agency. The ACLU did not even attempt to claim that this provision would protect the conscience rights of health care providers.

² <https://www.hhs.gov/conscience/conscience-protections/index.html>.

³ 42 U.S.C. § 300a-7 *et seq.*

or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions⁴;

- **The Weldon Amendment**, which provides that no federal, state, or local government agency or program that receives funds under the Labor, Health and Human Services appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion⁵; and
- **Section 1303 of the Affordable Care Act**, which ensures that no qualified health plan offered through the insurance Exchange discriminates against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.⁶

Notably, these protections are limited and inadequate to protect New Mexico health care providers in several ways. First, the federal health care provider conscience protections only apply to actions by the federal government, or by state or local governments or healthcare institutions that receive certain federal financial assistance. Thus, health care professionals are not protected unless they are employed by a federally-funded entity, and health care entities are only protected if the entity receives government funds or grants.

Second, the federal health care provider conscience protection laws leave health care providers without adequate recourse or proper protection. While federal conscience protections protect the right of health care professionals not to perform an abortion for reasons of conscience *in text*, *in practice* none of these statutes include an implied right of action, which is necessary to allow a health care professional to bring a lawsuit to enforce the provision of the federal conscience rights. Rather, individuals or entities who believe they have been discriminated against, such as through disciplinary or other adverse actions, or were coerced to perform or participate in an abortion procedure in violation of their conscience must file a complaint with the Office for Civil Rights at HHS and are at the mercy of the federal government to intervene, investigate, and enforce their conscience rights. While the HHS has recently renewed its commitment to enforce these protections,⁷ health care professionals in New Mexico should not be left to have their conscience rights contingent on the capacity and policy preferences of the current administration.

In sum, this committee should reject H.B. 51 because it removes vital protections for the conscience rights of health care providers and the remaining state and federal law protections are insufficient to adequately protect health care providers that have a conscience objection to abortion.

Sincerely,



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⁴ 42 U.S.C. § 238n.

⁵ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

⁶ 42 U.S.C § 18113.

⁷ See Press Release, U.S. Dep't of Health & Hum. Servs., HHS Takes Major Actions to Protect Conscience Rights and Life (Jan. 19, 2018), <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>.