Americans United for Life

Why State Conscience Laws Matter More Than Ever

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Conscience rights for healthcare professionals are foundational to the practice of medicine. At Americans United for Life, we have assisted lawmakers across the country in enshrining these rights into state law.

As secular employers and government officials increasingly seek to force healthcare professionals to participate, facilitate, and advertise for procedures to which many have deeply-held conscientious objections, it is even more important that conscientious objectors be free from discrimination and never have to choose between violating their conscience and losing their job.

The Biden Administration has made it clear that it will not defend longstanding federal conscience protections—unless you're an abortionist in Texas who wants to violate the Heartbeat Act. For example, its new Title X rule[1] requires all participants to counsel on and refer for abortion without any exemption for projects or individuals, in blatant violation of the Weldon Amendment, and even going beyond the rules implemented by the Obama Administration.

So while 2021 was an outstanding year for enacting life-affirming laws, the record on conscience is mixed at a time when state protections are more vital than ever. New Mexico enacted SB 10, which repealed the state's abortion-specific conscience protections which had been in effect for decades. After several years of heated debate, Connecticut finally enacted SB 835, which penalizes pregnancy resource centers for "deceptive advertising," a descriptor that bureaucrats seem poised to use against PRCs who counsel on or do abortion pill reversal treatment.

It was not all bad news. Arkansas enacted SB 289, which expanded the scope of practitioners covered by state conscience laws, and Indiana enacted HB 1577 to add mental health providers to its existing conscience laws. These are the types of enhancements that other states should consider as federal protections become more difficult to use.

Conscientious Objection is Integral to Freedom.

[1] 86 F.R. 19830 ("A project must: (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options: (A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination.").

Historically we think of conscience rights in the context of a conscientious objector refusing to go to war, or the famous *Barnette*[2] case during World War II, where the Supreme Court recognized the right of Jehovah's Witness children to abstain from saying the pledge of allegiance in public schools.

But increasingly, government involvement and regulation in healthcare has required states and the federal government to pass laws that allow physicians, nurses, and other healthcare professionals to "opt out" of participating in certain procedures that violate their moral, ethical, or religious beliefs.

Conscientious objection in healthcare can arise from RELIGIOUS beliefs—my Christian faith forbids my participation in any act which ends an innocent human life—ETHICAL views—I swore the Hippocratic Oath to "do no harm"—or MORAL principles—taking life is wrong and the science is clear that life begins at fertilization—or some combination of the three.

Problems arise when the government mandates that everyone in an industry do something without creating appropriate carveouts for those who decline to participate. The Affordable Care Act's[3] contraception mandate saying all insurance plans must cover contraception is an example of this.

In an industry like healthcare, the ability of some providers to object gives consumers more options. If every insurance plan in America, without exception, had to cover and include abortion, would an organization like Americans United for Life be able to provider employer-based health insurance?

This was the problem facing faith-based nonprofits in New Hampshire last year when their legislature passed a bill that would have required them to cover abortions if they cover any pregnancy-related health expense.[4] Fortunately, that bill was vetoed because Governor Sununu understood how illogical it would be to force these employers to stop covering *everything* to avoid covering abortion, something everyone in their organizations fundamentally oppose—and may have even signed a faith statement opposing—as part of their employment.

It is obvious to us, as it was to Governor Sununu, that individuals and institutions do not lose their right to exercise their moral and religious beliefs and consciences once they decide to enter the public square or the healthcare profession.

Furthermore, in the age of #MeToo and the uncovering of workplace imbalances, one researcher hypothesized that clearly delineated conscience protections may benefit junior staffers who can use them to speak up where they otherwise lack the institutional power to challenge their superiors.[5]

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[2] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[3] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010)
[4] NH HB 685 (2020) (vetoed).
[5] Birchley, *A Clear Case for Conscience in Healthcare Practice*, 38 J. of Med. Ethics 13 (2011).

America Has a Long Tradition of Protecting Conscience Rights.

History, tradition, and jurisprudence affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs and conscience protections have been affirmed by our Founders, the Supreme Court, and Congress.

The Founders recognized freedom of conscience as a fundamental right.

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion.[6] At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.

The drafters of the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience." Having recently shed blood to throw off a government that dictated and controlled their religion and practices, a government that guaranteed freedom of conscience was of utmost importance.

Thomas Jefferson, the most often quoted Founder and author of the Declaration of Independence, made it clear that freedom of conscience is not to be submitted to the government:

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[7]

Jefferson further maintained that forcing a person to contribute to a cause which he or she abhorred was "tyrannical." This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[8]

Likewise, James Madison, considered the Father of the Bill of Rights, stated: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*."[9]

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations, including rules, statutes, judicial orders, and professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law. Madison considered it

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[6] U.S. Const. amend. I.
[7] Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 235 (8th Am. ed. 1801).
[8] Thomas Jefferson, A Bill for Establishing Religious Freedom (June 18, 1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON, January 1777 to June 1779, 545–53 (Julian P. Boyd ed., Princeton Univ. Press 1950).
[9] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 15 (1785).

"the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[10]

Our first president, George Washington, explained, "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle,"[11] and he advised Americans to "[l]abor to keep alive in your breast that little spark of celestial fire called conscience."[12]

Washington maintained that the government should accommodate religious persons:

> [T]he Conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[13]

Founding Father and President John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[14] And Patriot leader Samuel Adams wrote that the liberty of conscience is an "original right."[15]

Forcing individuals to participate in actions to which they are conscientiously opposed eviscerates the very purpose for which this Nation was founded and formed. This principle of deference to the individual's conscience stayed with our leaders and has been affirmed many times by the Supreme Court in different contexts, like religious liberty, free speech, and conscientious objection to taking up arms.

For decades, the United States Supreme Court has sought to guarantee the freedom of conscience of every American. And "freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence.[16]

For example, the Supreme Court has stated that "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[17] While the "freedom to believe" is absolute, the "freedom to act" is not; but "in every case," regulations on the freedom to act cannot "unduly [] infringe the protected freedom."[18]

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[10] James Madison, Speech in Congress (Dec. 22, 1790).
[11] Michael Novak & Jana Novak, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY 111 (2006).
[12] George Washington, *Rules of Civility* (1745), *in* THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36 (Buckner F, Melton, Jr. ed., 2004).
[13] Letter from George Washington to the Religious Society Called Quakers (Oct. 1789).
[14] John Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*, *in* THE REPORT OF A CONSTITUTION OR FROM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS (1779).
[15] 2 THE WRITINGS OF SAMUEL ADAMS, 1770–1773, 350–59 (Harry Alonzo Cushing ed., 1906).
[16] *See, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("The First Amendment gives freedom of mind the same security as freedom of conscience.").
[17] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).
[18] *Id.*

During the darkest days of World War II, the Supreme Court considered regulations requiring public school students to recite the pledge of allegiance to the American flag, ultimately vindicating the students' freedom of conscience. After initially ruling against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge,[19] the Supreme Court reversed its decision three short years later, explaining:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . [L]ocal authorities [may not] transcend[] constitutional limitations on their power and invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[20]

The Court further explained, "[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order."[21]

Barnette has been affirmed on numerous occasions, including in *Planned Parenthood v. Casey*, in which the Supreme Court stated:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.[22]

Two decades later, the Court recognized the need to protect freedom of conscience for men who were conscientiously opposed to the Vietnam War, even when that belief was deeply unpopular and viewed by many as unpatriotic.

The Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service because of "religious training and belief."[23] In both *United States v. Seeger*[24] (1965) and *Welsh v. United States*[25] (1970), the Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[26]

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[19] *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).
[20] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[21] *Id*.
[22] 505 U.S. 833, 851 (1992) (citing *Barnette*, 319 U.S. 624) (other citations omitted).
[23] 50 U.S.C. § 456(j).
[24] *United States v. Seeger*, 380 U.S. 163 (1965).
[25] *Welsh v. United States*, 398 U.S. 333 (1970).
[26] *Id*.

The Supreme Court cited conscience as part of its reasoning when it sided with high school students exercising their First Amendment free speech rights by protesting the Vietnam War in *Tinker v. Des Moines* (1969).[27]

Likewise, Congress has passed several measures[28] expressing the federal government's commitment to protecting the freedom of conscience, the highest profile instance being the bipartisan and near-unanimous Religious Freedom Restoration Act.[29]

Federal Conscience Protections are Insufficient, Particularly Under a Hostile Administration.

While federal law includes longstanding conscience protections, these laws are insufficient to protect rights of conscience.

There are two big reasons: 1) they only apply to recipients of federal funding, and 2) they are subject to the whim of Members of Congress and federal bureaucrats, many of whom have recently called for the repeal of these necessary protections. Federal protections are applied by appointees of whomever is in the White House, so the level of attention these claims get is subject to the priorities of the HHS Secretary and President in power at the time.

The first big limitation is that federal healthcare 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. In other words, healthcare professionals are not protected unless they are employed by a federally-funded entity, and healthcare entities are only protected if they receive government funds or grants.

Second, the federal protections are at the whim of the controlling administration. On paper, these apolitical laws protect the right of healthcare professionals not to perform an abortion for reasons of conscience, but in practice none of these statutes include an implied right of action. A right of action is necessary to allow a healthcare professional to bring his or her *own* lawsuit to enforce the provision of the federal conscience rights.

Individuals or entities who believe they have been discriminated against, or were coerced to perform or participate in an abortion procedure in violation of their conscience, must file a complaint with the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR). This leaves them at the mercy of the federal government to choose to intervene, investigate, and enforce their conscience rights. Healthcare workers need their own right of action to ensure their conscience protections are meaningful.

OCR is tasked with ensuring federally administered or funded programs comply with civil rights, conscience protections, and religious freedom laws. The Trump administration created a new Conscience and Religious Freedom Division, which focuses specifically on enforcing

[27] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[28] *Conscience Protections for Healthcare Providers*, United States Dep't of Health & Hum. Servs. (last reviewed Sept. 14, 2021) https://www.hhs.gov/conscience/conscience-protections/index.html?language=en.
[29] 42 U. S. C. § 2000bb-1

conscience protections. This includes protecting healthcare providers who cannot perform, accommodate, or assist in certain healthcare procedures, including abortion and assisted suicide, because it would violate their moral or religious beliefs.

According to HHS, "Conscience protections apply to health care providers who refuse to perform, accommodate, or assist with certain health care services on religious or moral grounds."[30]

OCR investigates complaints under the following laws:

The Church Amendments.[31] Congress addressed the issue of conscience protections just weeks after the Supreme Court handed down its decision in *Roe v. Wade* in 1973. The Church Amendments were enacted to protect the conscience rights of those who objected to performing or assisting abortion or sterilization procedures. It also offers protections regarding personnel decisions and prohibits any entity that receives federal funds or contracts under certain statutes from discriminating against any healthcare personnel in employment because the individual either performed or refused to perform an abortion based on the individual's religious beliefs or moral convictions.

The Coats-Snowe Amendment of the Public Health Service Act.[32] In 1995, the Accreditation Council for Graduate Medical Education proposed mandating abortion training in all obstetrics and gynecology residency programs. In response, Congress enacted the Coats-Snowe Amendment, which prohibits the federal government *and* any state or local government receiving federal financial assistance from discriminating against any healthcare entity, which includes individual physicians and students, for refusing to provide or participate in training for abortions, do abortions, or refer for trainings or for abortion procedures. They cannot be penalized for attending a physician training program that did not train on abortions.

The Weldon Amendment.[33] The Weldon Amendment was first passed in 2005, then readopted or incorporated by reference into annual appropriations bills ever since. It echoed the Coats-Snowe language, ensuring that no funding through the Departments of Labor, HHS, or Education is available to a federal agency or program, or a State or local government that discriminates against healthcare entities that do not pay for, provide, cover, or refer for abortions.

The Affordable Care Act.[34] As much bad policy was crammed into the ACA, the bill's authors had to strike a deal with pro-life Members of Congress to get the law passed. For that reason, the ACA includes conscience protections within the health

[30] *Conscience Protections for Healthcare Providers*, United States Dep't of Health & Hum. Servs. (last reviewed Sept. 14, 2021) https://www.hhs.gov/conscience/conscience- protections/index.html?language=en.
[31] 42 USC § 300a-7 et seq.
[32] 42 USC § 238n
[33] Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Division H, § 507(d) (2020).
[34] 42 USC § 18113

insurance Exchange program. Section 1303(b)(4) provides that "No qualified health plan offered through an Exchange may discriminate 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."

President Obama then issued Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act" in 2010 affirming that under the ACA, longstanding federal healthcare provider conscience laws remain intact and new protections prohibit discrimination against healthcare facilities and professionals based on their unwillingness to provide, pay for, provide coverage of, or refer for abortions.[35]

The ACA also included conscience protections around assisted suicide.[36] Financial programs or health plans created by Obamacare cannot discriminate against an individual or institution that refuses to provide services that assist in causing a patient's death.

All of these protections depend on intervention from HHS. No matter how egregious the violation, an individual cannot file a lawsuit under these laws on their own behalf, and instead must file a complaint for HHS to investigate and pursue.[37]

Under this current administration, the new HHS Secretary is Xavier Becerra, California's former Attorney General who was himself investigated by OCR for conscience violations during his term as state Attorney General. New language on the HHS website suggests that these protections are now being used to make sure no one is denied a "lawful abortion."[38] And in response to the new Texas heartbeat law, OCR issued a guidance purporting to "remind" people of their obligation not to discriminate based on performance of abortion.[39]

This is why state protections are so vital. When people are left only to rely on federal protections, they are also forced to rely on federal bureaucrats to defend their rights.

States need to ensure that the rights of conscience of all healthcare professionals, institutions, and payers who object to participating in a healthcare service based on a religious, moral, or ethical objection are protected. For example, pharmacists are often forgotten by these laws, so they may lack the necessary protection for their right to decline to stock or provide emergency contraception, abortion-inducing drugs, or drugs that will be used to end a life.

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[35] Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act" issued in 2010
[36] Section 1553 (42 USC § 18113)
[37] *How to File a Conscience or Religious Freedom Complaint*, United States Dep't of Health & Hum. Servs. (last reviewed Mar. 17, 2020) https://www.hhs.gov/conscience/complaints/filing-a-complaint/index.html.
[38] United States Dep't of Health & Hum. Servs., *Guidance on Nondiscrimination Protections under the Church Amendments* (last reviewed Sept. 17, 2021), https://www.hhs.gov/conscience/conscience-protections/guidance-church-amendments- protections/index.html.
[39] Id.

Two states protect the freedom of conscience all healthcare providers, whether individuals, institutions, or payers (public or private), who conscientiously object to participating in any healthcare procedure or service: Illinois and Mississippi

Forty-five states protect the freedom of conscience of only certain healthcare professionals and/or institutions from participating in specific procedures (usually abortion only).[40]

Just three states provide no protection for the freedom of conscience of healthcare providers, institutions, or payers: New Hampshire, New Mexico, and Vermont.

It's so important to speak up and reach out to your legislators. Encourage them to pass thorough conscience protections for healthcare providers, institutions, and payers. Encourage them to evaluate your existing laws and identify areas that could be strengthened, such as adding more healthcare professionals like home health workers or pharmacists or updating your enforcement provisions.

As Thomas Jefferson said, "we are bound, you, I, and every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. We ought with one heart and one hand to hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into . . . tyranny over religious faith . . . ."[41]

[40] These are AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NE, NV, NJ, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WI, WV, and WY.
[41] Letter from Thomas Jefferson to Edward Dowse (Apr. 19, 1803).