

WebMemo



Published by The Heritage Foundation

No. 3106
January 19, 2011

Obamacare and the Ethics of Life: Weakening Medical Conscience and the Protection of Life

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The Patient Protection and Affordable Care Act (PPACA)¹ contains several provisions that weaken longstanding federal policy denying public subsidies for elective abortion and health care plans that provide coverage of elective abortion. In addition, PPACA fails to adequately protect the conscience rights of health care insurers, providers, and personnel who decline to provide, pay for, provide coverage of, or refer for abortions.²

These defects in PPACA not only fail to fix the patchwork of laws that have been passed to bar federal support for elective abortion; they also create new avenues for federal subsidies and promotion of elective abortion.

Summary. PPACA includes at least three problematic provisions with respect to the federal role in funding elective abortion.³

First, Section 1303 facilitates massive federal subsidies for private health care plans that are offered through health insurance exchanges and will cover elective abortions. Under separate law—specifically, the Hyde Amendment to the annual Labor–Health and Human Services (HHS) spending bill—federal funds appropriated to HHS by Congress cannot be spent for health benefits coverage that includes elective abortion. Section 1303 bypasses this limitation.

Second, Section 1101 allows the Secretary of HHS to decide whether certain appropriated funds that are not covered by the Hyde Amendment will be used to subsidize elective abortions through temporary high-risk insurance pools. While HHS has

announced its intention not to allow such subsidies, the decision is subject to reversal unless there is further action by Congress to block it permanently. Moreover, the Obama Administration has explicitly stated that this discretionary limitation should not be regarded as “precedent”⁴ for future executive branch decisions regarding coverage of elective abortion.

Third, Section 10503 directly appropriated \$11 billion over five years to underwrite the operation and construction of community health centers under Section 330 of the Public Health Service Act. Because these funds are not appropriated in the annual Labor–HHS spending bill and are therefore not subject to the Hyde Amendment, their potential use for grants that pay for elective abortions is also a matter of executive branch discretion. President Barack Obama issued Executive Order 13535 in an effort to assure that the Hyde Amendment will be applied to this new community health center funding.⁵ As is the case with federal funds for high-risk insurance pools, unless Congress acts to make the application permanent, this decision is subject to reversal by either executive decision or judicial intervention.

This paper, in its entirety, can be found at:
<http://report.heritage.org/wm3106>

Produced by the Center for Health Policy Studies

Published by The Heritage Foundation
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Washington, DC 20002-4999
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Section 1303 of PPACA also includes language that provides only limited protection for the conscience rights of health care providers and facilities that are unwilling to participate in abortions. Language that was included in the version of the bill adopted by the House of Representatives in November 2009 that would have protected the conscience rights of health care entities and personnel from infringement by government at all levels was omitted from PPACA as finally adopted.

Impact. As a result of these defects in PPACA, longstanding federal policy to provide health care assistance to the poor that favors maternity care over elective abortion has been subverted in several ways, with both short-term and long-term consequences.

Federal Assistance for Elective Abortions. For the first time ever, a federal tax credit will be made available to assist in the purchase of private health plans that cover elective abortion. By 2019, according to the Congressional Research Service,⁶ an estimated 19 million Americans will use these “affordability credits” to buy insurance through the new state health insurance exchanges mandated by the bill. Unless a state has adopted new legislation by that date, taxpayer dollars will flow via these

credits to health insurers who pay for elective abortion procedures.

Limited and Loose Conscience Protections. Even as it expands public subsidies for elective abortion, PPACA provides conscience protections for health care providers and personnel that are both limited in scope and lacking in enforcement guarantees. On July 1, 2010, the American Civil Liberties Union (ACLU) sent a letter⁷ to the Centers for Medicare and Medicaid Services urging investigation of Catholic hospitals that refuse to perform and refer for abortions that the ACLU asserts must be provided under federal law.

One of the laws cited by the ACLU, the Emergency Medical Treatment and Active Labor Act, involves emergency medical services. Section 1303(d) of PPACA references this law and underscores that health care providers are bound by federal and state requirements to provide “emergency services,” potentially including abortions to which religious providers object.

Inadequate Guidance on Conscience Protections. At the same time, existing federal laws that provide limited conscience protections regarding abortion operate with no clear guidance. In December 2008, the Bush Administration published regulations

1. Congress cannot build sound market-based health care reform on the foundation of a flawed health care law. Therefore, the health care law must be repealed in its entirety.

The House of Representatives has taken a major step towards full repeal of the Patient Protection and Affordable Care Act (PPACA—otherwise known as “Obamacare”). Until full repeal occurs, Congress must continue to focus on the core failures and consequences of PPACA and block its implementation to allow time to achieve repeal and lay the groundwork for a new market-based direction for health care reform.

2. Patient Protection and Affordable Care Act of 2010, Public Law 111–148, and Health Care and Education Reconciliation Act of 2010, Public Law 111–152.
3. Chuck Donovan, “Obamacare: Impact on Taxpayer Funding of Abortion,” Heritage Foundation *WebMemo* No. 2872, April 19, 2010, at <http://www.heritage.org/Research/Reports/2010/04/Obamacare-Impact-on-Taxpayer-Funding-of-Abortion>.
4. Ben Adler, “Why Did the Obama Administration Ban Most Abortion Coverage in High-Risk Insurance Pools?” *Newsweek Online*, July 30, 2010, at <http://www.newsweek.com/blogs/the-gaggle/2010/07/30/why-did-the-obama-administration-ban-most-abortion-coverage-in-high-risk-health-insurance-pools.html> (January 12, 2011).
5. Barack Obama, “Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act,” Executive Order 13535, March 24, 2010, at <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000199.pdf> (January 12, 2011).
6. Chris L. Peterson and Thomas Gabe, “Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (PPACA),” Congressional Research Service *Report for Congress*, April 28, 2010, p. 8, at <http://www.ncsl.org/documents/health/HlthInsPremCredits.pdf> (January 12, 2011).
7. Laura W. Murphy *et al.*, American Civil Liberties Union, letter to Marilyn Tavenner, Centers for Medicare and Medicaid Services, July 1, 2010, at http://www.aclu.org/files/assets/Letter_to_CMS_Final_PDF.pdf (January 12, 2011).

permitting the withholding of federal funds from any state or local government or health care entity that refuses to accommodate the moral convictions or religious beliefs of health care insurers, providers, or personnel regarding abortion. The Obama Administration suspended these regulations in March 2009.⁸

Several provisions of PPACA compound the problem. Section 1303(c)(1), for example, omits state conscience protection laws from the categories of abortion law protected from federal preemption.

A New Direction. The new Congress should enact permanent and comprehensive conscience protections and replace the current patchwork of federal statutes and annual abortion riders on spending bills with a permanent, government-wide policy. The No Taxpayer Funding for Abortion Act (H.R. 5939), introduced by Representatives Chris Smith (R–NJ) and Daniel Lipinski (D–IL) in the 111th Congress, would assure that “no funds

authorized or appropriated by federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by federal law, shall be expended for any abortion”⁹ outside the scope of the current Hyde Amendment. By applying conscience protection language to all agencies and programs run by the federal government or by states and localities using federal funds, it would protect both individuals and institutions from any discriminatory act because of their refusal to provide, pay for, provide coverage of, or refer for abortion.

Taking these steps would not only address the abortion funding problems inherent in PPACA but also make longstanding federal policy permanent and avoid debate after debate on this issue in such areas as health care reform, foreign assistance, and defense spending.

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8. Rob Stein, “Health Workers ‘Conscience’ Rule Set to Be Voided,” *The Washington Post*, February 28, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701104.html> (January 12, 2011).
 9. The No Taxpayer Funding for Abortion Act, H.R. 5939, 111th Cong., 2nd Sess., introduced on July 29, 2010, at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5939>. Section 309 makes clear that the bill reflects the language of the current Hyde Amendment and permits federal funding for abortions in cases involving forcible rape, incest with a minor child, and endangerment of the mother’s life by a physical condition “caused by or arising from the pregnancy itself.”