

Religious Hospitals, Mergers & Refusal Clauses

Religious Hospitals

- One in six patients in the United States is cared for in a Catholic hospital,¹ and eight of the twenty-five largest health systems in the country are religiously-owned.²
- Religious hospitals represent nearly one fifth of the health care system in the U.S.³ Research conducted in 2010 shows that one fifth of physicians who practice in religious hospitals have faced a “clinical ethical conflict” because of hospital policies that conflict with their medical judgment.⁴
- The majority of religious hospitals are Roman Catholic-sponsored,⁵ making the Catholic healthcare system the largest non-profit provider of health care in the nation.⁶ As of 2011, there were 59 Catholic healthcare systems and 636 Catholic hospitals.⁷
 - Under the Religious and Ethical Directives for Catholic Health Care Services, Catholic hospitals cannot provide contraception, sterilization, most infertility treatments, abortion or emergency contraception counseling for victims of sexual assault, or abortion services.⁸ Particularly appalling is Directive 48, which prohibits therapeutic abortion as treatment for ectopic pregnancy,⁹ even though, in this situation, the pregnancy must be removed to save the mother’s life.¹⁰
 - Some Catholic hospitals will not dispense emergency contraception, even as treatment for rape.¹¹ Since emergency contraception is most effective in the twenty-four hours following intercourse,¹² religious hospitals’ refusal to provide comprehensive treatment can further traumatize rape victims. The patient is forced to search for another provider; meanwhile, she must manage the additional anxiety of not knowing whether the delay will result in pregnancy.
 - Medicare and Medicaid provide religiously-affiliated hospitals with one half of their funding.¹³ Religious hospitals also enjoy certain benefits like tax exempt status, low-cost financing through government bond programs, and, in some areas, use of municipal buildings.¹⁴
- In November 2009, St. Joseph’s Hospital and Medical Center, a Catholic hospital in Phoenix, Arizona, performed an abortion for a 27 year-old woman who was eleven weeks pregnant with her fifth child and severely ill.¹⁵
 - The hospital’s decision was based on Directive 47, which allows abortion in some circumstances to save the life of the mother.¹⁶ The woman’s physicians stated that she had life threatening pulmonary hypertension and her risk of mortality was almost 100% if she continued the pregnancy.¹⁷
 - Sister Margaret McBride, the hospital administrator who approved the abortion and who also served as the hospital liaison to the diocese, was consequently excommunicated from the church in May 2010.¹⁸ The medical ethics director of the Diocese of Phoenix was quoted saying, “She consented in the murder of an unborn child. There are some situations where the mother may in fact die along with her child. . . . [Y]ou can’t do evil to bring about good. The end does not justify the means.”¹⁹
 - In December 2010, the ACLU, responding to the St. Joseph’s incident, wrote to federal health officials at the Centers for Medicare and Medicaid Services.²⁰ It asked the Centers to investigate Catholic hospitals that violate federal law by refusing to provide emergency reproductive care.²¹

Hospital Mergers and Sales

- Between 1990 and 2001, there were 171 mergers between Catholic and secular hospitals.²²
- Usually, when Catholic and secular hospitals merge, the new entity is forced to follow the Religious and Ethical Directives for Catholic Health Care Services, even if the new entity has

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no particular religious affiliation.²³ The result is that local women's access to reproductive health care is reduced or eliminated.²⁴

The women most affected by restricted services at religious hospitals are low-income women, particularly in rural areas.²⁵ These women are the least able to bear the burden of finding another provider, with the attendant costs, delays, and health risks.²⁶ In some cases, religious hospitals are the only health care option available in the region.²⁷ Furthermore, there are no abortion providers in 87% of counties,²⁸ so women who can only access religious hospitals in these areas have even fewer reproductive options.

Federal Refusal Clauses

Refusal clauses allow healthcare providers and institutions to refuse to provide reproductive health services on religious grounds.²⁹ Here is a brief history of refusal clauses:

- In 1973, in response to the Supreme Court's decision in *Roe v. Wade*³⁰, Congress passed the **Church Amendment**, which allows healthcare providers to refuse to provide abortions or sterilizations on religious grounds.³¹
 - The Church Amendment passed the Senate by a vote of 92-1.³² Even Justice Blackmun, who wrote the majority opinion in *Roe v. Wade*, called refusal clauses an "appropriate protection" of a person's religious belief.³³ The **Hyde/Weldon Conscience Protection Amendment**³⁴ is a 104-word rider that Representative Dave Weldon (R-FL) tacked onto a 3,500-page, \$388 billion omnibus spending bill in 2004.³⁵ The Amendment is nearly identical to the Abortion Non-Discrimination Act of 2003,³⁶ which Congress did not pass. The Weldon Amendment denies funds to government agencies and programs if they discriminate against health care providers that do not pay for, provide, or refer patients for abortion.³⁷ Some of the effects of the Amendment are that:
 - States cannot require that Title X- and Medicare-funded clinics and hospitals make abortion referrals, when they cannot provide care due to religious restrictions.³⁸
 - States cannot enforce provisions that provide poor women with Medicare-funded abortions.³⁹
 - State and local governments can be punished with loss of federal funding if they insist that merging hospitals find a way to preserve patients' access to abortion services, or even that the hospitals provide patients with referrals to alternative providers.⁴⁰ Such actions can be termed "discrimination" against the merging hospitals.⁴¹
- The Amendment contains no exceptions to protect a woman's life or health.⁴² The Amendment has been added to the Department of Health and Human Services Appropriations Act every year since 1994.⁴³
- A refusal clause was built into the **Balanced Budget Act of 1997**, which created uniform standards for Medicare managed care.⁴⁴ For the first time, insurance *plans and institutions* were able to opt out of providing, reimbursing or referring Medicaid patients for any services that contradicted the organization's religious or moral beliefs.⁴⁵
 - Despite the opposition of the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Hospital Association,⁴⁶ on December 19, 2008, the Bush administration published a **new Health and Human Services regulation**.⁴⁷ While purporting to merely educate and inform about currently existing refusal laws, the language of the HHS rule actually expanded the law in four ways:
 - It left open the possibility that providers could define contraception as abortion and therefore refuse to prescribe or dispense birth control.⁴⁸
 - It expanded the types of individuals and organizations that are afforded refusal rights.⁴⁹

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- It allowed individuals to refuse to provide information or referrals to patients seeking care the individual refuses to provide.⁵⁰
- It failed to consider laws that protect patients' rights to information and services.⁵¹
- In February, 2011, the Obama Administration rescinded most of the rule.⁵² The 2010 Affordable Care Act, however, still allows newly formed health exchanges to exercise refusal rights.⁵³

State Refusal Clauses

- Almost every state has some sort of refusal clause that allows individual health providers to refuse to provide abortion services.⁵⁴
 - Forty-five states allow health care institutions to refuse to provide abortion services.⁵⁵ Fourteen states allow only private institutions to deny abortion services, and one state allows only religious institutions to deny services.⁵⁶
 - Fourteen states allow some health care providers to refuse to provide contraception services.⁵⁷
 - Eighteen states allow some health care providers to refuse to provide sterilization services.⁵⁸
 - Twenty-one states have “gag rules” that prevent organizations that receive state funds from counseling women about or referring women to abortion services.⁵⁹
- Refusal clauses can apply to both medical and non-medical individuals and institutions, including physicians, pharmacists, nurses, pharmacies, hospitals, clinics, universities, and insurance companies.⁶⁰
- Refusal clauses in several states, such as Illinois and Texas, cover not just services like abortion and contraception, but any service to which the provider *or payer* has a moral objection.⁶¹
- According to professional organizations, refusal clauses based in religious beliefs may be acceptable if they provide an adequate plan for referral.⁶²
- Bills expanding state refusal clauses are being enacted or introduced at a furious pace. For example, in March, 2011, Utah passed a measure that widened the state's refusal clause, allowing employees at non-religious facilities to refuse to perform or participate in abortions.⁶³

¹ CATHOLIC HEALTH ASS'N OF THE U.S (CHA), CATHOLIC HEALTH CARE IN THE UNITED STATES 2 (Jan. 2011), *available at* http://www.chausa.org/Pages/Newsroom/Fast_Facts (click on “Catholic Health Care in the United States”).

² *See Ranking the Nation's 25 Largest Healthcare Systems by Employees*, DARK DAILY: CLINICAL LAB. AND PATHOLOGY NEWS AND TRENDS, <http://www.darkdaily.com/ranking-the-nations-25-largest-healthcare-systems-by-employees-825> (last updated Aug. 25, 2010) (ranking religiously-owned and operated healthcare systems as the 3rd, 6th, 11th, 12th, 14th, 15th, 20th, and 23rd largest).

³ Jennifer Harper, *Doctors Face Religious Conflicts at Hospitals*, WASH. TIMES, April 14, 2010, *available at* <http://www.washingtontimes.com/news/2010/apr/14/doctors-report-religious-conflicts-at-hospitals>.

⁴ *Id.*

⁵ LOIS UTTLEY & RONNIE PAWELKO, MERGERWATCH PROJECT, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY-SPONSORED HOSPITALS IN THE U.S. 4 (2002), *available at* http://www.mergerwatch.org/storage/pdf-files/bp_no_strings.pdf.

⁶ Jerry Filteau, *Catholic Hospitals Serve One in Six Patients in the United States*, CATHOLIC NEWS REPORTER (Oct. 20, 2010), <http://ncronline.org/news/catholic-hospitals-serve-one-six-patients-united-states>.

⁷ CHA, *supra* note 1, at 2.

⁸ *See* U.S. CONF. OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH SERVICES, Directives 36, 38-43, 45, 52, 53 (4th ed., June 15, 2001), *available at* <http://www.usccb.org/bishops/directives.shtml>.

⁹ *Id.*

¹⁰ *Ectopic Pregnancy*, PUB MED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001897> (last reviewed Feb. 10, 2010).

¹¹ UTTLEY & PAWELKO, *supra* note 5, at 27-28.

¹² *Emergency Contraception*, FEMINIST WOMEN'S HEALTH CTR., <http://www.fwhc.org/birth-control/ecinfo.htm> (last updated June 8, 2011).

¹³ Antoinette Bonsignore, *Putting Women at Risk: The Rise of Catholic-Secular Hospital Mergers*, NARAL PRO-CHOICE WASH. (April 8, 2011), <http://prochoicewashington.wordpress.com/2011/04/08/putting-women-at-risk-the-rise-of-catholic-secular-hospital-mergers>.

¹⁴ UTTLEY & PAWELKO, *supra* note 5, at 4-5.

¹⁵ Barbara Bradley Hagerty, *Nun Excommunicated for Allowing Abortion*, NPR.ORG (May 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=126985072>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Rob Stein, *Abortion Fight at Catholic Hospital Pushes ACLU to Seek Federal Help*, WASH. POST, Dec. 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206219.html?sid=ST2010123003662>.

²¹ *Id.*

²² RACHEL BENSON GOLD, GUTTMACHER INST., HIERARCHY CRACKDOWN CLOUDS FUTURE OF STERILIZATION, EC PROVISION AT CATHOLIC HOSPITALS 11, 11 (May 2002), available at <http://www.guttmacher.org/pubs/tgr/05/2/gro50211.pdf>.

²³ Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 731 (2004).

²⁴ *Hospital Mergers: The Hidden Agenda*, RELIGIOUS COAL. FOR REPROD. CHOICE 1, http://www.rerc.org/pdf/Hospital_Mergers.pdf (last visited June 24, 2011).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Fogel & Rivera, *supra* note 24, at 733.

²⁸ Rachel Weiner, *No-Choice: 87% of Counties Have no Access to Abortion Clinic*, HUFFINGTON POST (July 3, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/06/02/no-choice-87-of-us-counti_n_210194.html.

²⁹ GUTTMACHER INST., GUTTMACHER INSTITUTE STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1 (June 1, 2011), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

³⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

³¹ Church Amendment, 87 Stat. 91 (1973) (current version at 42 U.S.C. § 300a-7(c) (2006)).

³² Rusty Scalpel, *Conscience-Clause Law and Religious Freedom in Health Care*, FREE MKT. PHYSICIAN (Mar. 26, 2009), http://freemarketphysician.blogspot.com/2009/03/conscience-clause-law-and-religious_26.html.

³³ *Id.*

³⁴ Hyde-Weldon Conscience Protection Amendment, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. F, tit. V, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004).

³⁵ Cynthia L. Cooper, *U.S. Gag Rule Included in Emergency Spending Bill*, WOMEN'S ENEWS, Dec. 6, 2004, <http://www.womensenews.org/article.cfm/dyn/aid/2098/context/archive>.

³⁶ Abortion Non-Discrimination Act of 2003, H.R. 3664, 108th Cong. § 2 (2003).

³⁷ U.S. CONF. OF CATHOLIC BISHOPS, BACKGROUND, *supra* note .

³⁸ Letter from Laura W. Murphy, Dir., ACLU, to Senator Barbara Boxer, Opposing the Weldon Amendment to the FY 2005 Omnibus Appropriations Bill (Nov. 19, 2004) (on file with ACLU), available at <http://www.aclu.org/reproductive-freedom/aclu-letter-senator-boxer-opposing-weldon-amendment-fy-2005-omnibus-appropriati>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hyde/Weldon Conscience Protection Amendment, *supra* note 37.

⁴³ See Jane Walker, *The Bush Administration's Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 Hous. L. Rev. 939, 951 (2009) (noting the Amendment has been added to the HHS Appropriations Act from 2004 through 2009). An Obama Administration rescission of the parts of the Bush 2008 refusal law nonetheless kept the Weldon Amendment in place. See Reg. for the Enforcement of Fed. Health Care Provider Conscience Prot. Laws, 76 Fed. Reg. 9968, 9968 (Feb. 23, 2011) (effective Mar. 25, 2011).

⁴⁴ Medicaid Managed Care Balanced Budget Act of 1997, 42 U.S.C. 1396u-2(b)(3)(B) (1997).

⁴⁵ NARAL PRO-CHOICE AM. FOUND., REFUSAL CLAUSES IN CURRENT LAW 2 (JAN. 1, 2011), available at <http://www.naral.org/media/fact-sheets/abortion-refusal-clauses-current-law.pdf>.

⁴⁶ See Karina, *New Bush Administration Rule is an Assault on Women's Health Care*, THE GAVEL (Dec. 18, 2008), <http://www.democraticleader.gov/blog/?p=1620> (quoting Speaker Nancy Pelosi).

⁴⁷ Ensuring That Dep't of Health and Human Servs. Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Fed. Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (effective Jan. 20, 2009).

⁴⁸ NARAL PRO-CHOICE AM. FOUND., THE BUSH ADMINISTRATION'S FEDERAL REFUSAL THREATENS WOMEN'S ACCESS TO REPRODUCTIVE-HEALTH SERVICES 3 (Jan. 1, 2011), <http://www.naral.org/media/fact-sheets/abortion-refusal-clauses-federal-1.pdf>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Reg. for the Enforcement of Fed. Health Care Provider Conscience Prot. Laws, *supra* note 47.

⁵³ NARAL PRO-CHOICE AM. FOUND., THE BUSH ADMINISTRATION'S FEDERAL REFUSAL, *supra* note 52, at 3.

⁵⁴ GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1 (June 1, 2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ NARAL PRO-CHOICE AM. FOUND., COUNSELING BANS AND GAG RULES 1 (Oct. 30, 2010), *available at* <http://www.naral.org/media/fact-sheets/cabortion-refusal-clauses-counseling-bans.pdf>.

⁶⁰ PLANNED PARENTHOOD FED'N OF AM., INC., REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS 3 (Dec. 2004), *available at* http://www.plannedparenthood.org/files/PPFA/refusalclauses_12-04.pdf.

⁶¹ Jacob M. Appel, *Conscience vs. Care: How Refusal Clauses are Reshaping the Rights Revolution*, MED. AND HEALTH R.I. 279, 280 (Aug 2005), *available at* <http://www.rimed.org/medhealthri/archived/m05Augmhri.pdf>.

⁶² PLANNED PARENTHOOD FED'N OF AM., INC., *supra* note 67, at 3.

⁶³ *Monthly State Update: Major Developments in 2011*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/index.html> (last updated June 1, 2011). For a state-by-state guide to reproduction-related laws, including refusal clauses, *see State Data Center*, GUTTMACHER INST., <http://www.guttmacher.org/datacenter/profile.jsp> (last visited June 27, 2011).