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Office of Public Health and Science
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Hubert H. Humphrey Building
200 Independence Ave. SW
Room 728E
Washington, DC 20201

Re: Provider Conscience Regulation
73 Fed. Reg. 50274 (Aug. 26, 2008)

Dear Sir or Madam:

The Becket Fund for Religious Liberty (“The Becket Fund”) is pleased to submit the following comments in support of the proposed rule protecting the conscience rights of health care practitioners and institutions. 73 Fed. Reg. 50274 (Aug. 26, 2008).

Interest of The Becket Fund for Religious Liberty

The Becket Fund is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions. It has successfully represented clients from a wide variety of religious traditions—including Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and Zoroastrians—in religious liberty litigation around the world. The Becket Fund takes no position on the morality of any particular medical procedure (whether abortion, sterilization, contraception, euthanasia, or lethal injection), though the morality of such procedures is a profoundly important question. Rather, The Becket Fund focuses on a single issue: the basic human right of every individual to follow his or her conscience. That right has not only been protected in the health care context ever since *Roe v. Wade*, but also has a long and storied place in American history. Because the proposed rule provides crucial safeguards for that right, The Becket Fund strongly supports it.

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Comments of The Becket Fund for Religious Liberty

1. Federal, state, and international laws have long protected medical practitioners' right of conscience.

Judging by opponents' comments on the proposed rule, one would think that protections for the right of conscience in the health care context are a recent innovation. Nothing could be further from the truth. State, federal, and international laws have long protected the right of conscience in the health care context in a variety of ways.

a. Federal protection from government pressure.

Almost before the ink dried on *Roe v. Wade*, Congress in 1973 enacted the first "Church Amendment," providing significant protections for the right of conscience in the health care context. That amendment forbids the government from requiring health care professionals or institutions, as a condition of receiving federal funds, "to perform or assist in the performance of any sterilization procedure or abortion" if such actions "would be contrary to [their] religious beliefs or moral convictions."¹ In other words, the government can't pressure health care professionals to perform a sterilization or abortion against their conscience.

b. Federal protection from private pressure.

Other Church Amendments, also passed in the 1970s, protect conscientious objectors not only from government pressure to violate their conscience, but also from pressure by *private employers*. One amendment, for example, prohibits the recipients of certain federal funds, such as hospitals, from penalizing doctors or other health care workers who conscientiously refuse to perform a sterilization or abortion.² Another amendment prohibits medical schools and other institutions from discriminating against any applicant because of the applicant's conscientious refusal to participate in sterilization or abortion.³

c. Federal protection outside the abortion context.

Federal law also extends the right of conscience beyond the issues of sterilization and abortion. One statute prohibits the recipients of certain federal research funds from taking adverse employment action against any health care practitioner who conscientiously refuses to perform or assist in "*any* lawful health service or research activity."⁴ This would arguably prohibit a research institution, for example, from penalizing one of its employees for refusing to engage in embryonic stem cell research.

¹ Health Programs Extension Act § 401, Pub. L. No. 93-45, 87 Stat. 91, 95 (June 18, 1973), codified at 42 U.S.C. § 300a-7(b)-(c)(1).

² 42 U.S.C. § 300a-7(c)(1).

³ 42 U.S.C. § 300a-7(e).

⁴ 42 U.S.C. § 300a-7(c)(2) (emphasis added).

d. Federal protection for refusing abortion training.

The Public Health Service Act, passed in 1996, protects individuals and institutions that refuse training in the performance of abortions.⁵ Section 245(a) prohibits the government from discriminating against any health care practitioner who refuses to undergo training in abortion; section 245(b) protects physician training programs from having their accreditation stripped for refusing to provide training in abortion.⁶

e. Federal protection for insurance companies and HMOs.

The Weldon Amendment, incorporated in every HHS appropriations act since 2005, protects not only health care practitioners and institutions, but also *HMOs and insurance companies* that object to paying for an abortion. The law strips federal agencies and state and local governments of HHS funds if those agencies or governments discriminate against any entities (including doctors, hospitals, insurance companies, or HMOs) that refuse to provide, pay for, or refer for an abortion.⁷

f. Protection in state law.

Federal protections for conscience, however, pale in comparison to the wide variety of protections provided by state law. A full 47 out of 50 states protect health care practitioners' right of conscience to some degree or another, many providing full exemptions to any health care practitioner who conscientiously refuses to participate in an abortion.⁸ Several states expressly protect pharmacists who conscientiously refuse to provide contraceptives.⁹ Oregon, the only state with legalized physician-assisted suicide, also protects health care practitioners who conscientiously refuse to participate in such a procedure.¹⁰ And many states protect health care

⁵ See 42 U.S.C. § 201 *et seq.*

⁶ 42 U.S.C. § 245.

⁷ Consolidated Appropriations Act, 2008, Public Law No. 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007).

⁸ Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME SEX MARRIAGE AND RELIGIOUS LIBERTY 90-91 (Douglas Laycock *et al.* eds. 2008) (summarizing state conscience protections).

⁹ These include Arkansas, Georgia, Mississippi and South Dakota. ARK. CODE ANN. § 20-16-304 (1973); GA. COMP. R. & REGS. R. 480-5-.03(n) (2001); MISS. CODE ANN. § 41-107-1 (2004); S.D. CODIFIED LAWS § 36-11-70 (1998).

¹⁰ OREGON REVISED STATUTES § 127.885(4) (“No health care provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner.”); *id.* at 127.885(2) (“No professional organization or association, or health care provider, may subject a person to censure, disci-

providers who conscientiously object to performing medical procedures that may be requested in a patient's living will.¹¹

g. Protection in foreign and international law.

Nor are protections for conscientious objectors in the health care context unique to the United States. Many foreign countries provide analogous, and sometimes even greater, protections for conscience. In the United Kingdom, for example, the first statute legalizing abortion in 1967 provided an exemption for conscientious objectors: "no person shall be under any duty, . . . to participate in any treatment authorised by this Act to which he has a conscientious objection."¹² Similar protections are provided in the laws of many other western countries, including Australia,¹³ Austria, Belgium, Cyprus, Denmark, France, Germany, Hungary, Ireland,¹⁴ Italy, New Zealand,¹⁵ Portugal, and Spain.¹⁶

pline, suspension, loss of license, loss of privileges, loss of membership or other penalty for participating or refusing to participate in good faith compliance with [the Oregon Death with Dignity Act].")

¹¹ See, e.g., ARIZONA REVISED STATUTES § 36-3205(C)(1) (protecting health care providers who "fail[] to comply with a [patient's health care] decision or a direction that violates the provider's conscience"); CALIFORNIA PROBATE CODE § 4734 ("A health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience. . . . A health care institution may decline to comply with an individual health care instruction or health care decision if the instruction or decision is contrary to a policy of the 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.")

¹² ABORTION ACT 1967 (c. 87).

¹³ See, e.g., CRIMINAL CODE ACT 1983 (NT), § 174(2) ("No person is under a duty, whether by contract or otherwise, to procure or to assist in procuring the miscarriage of a woman or girl or to dispose of or to assist in disposing of an aborted foetus if he has a conscientious objection thereto.") (*quoted in* Natasha Cica, Law and Bills Digest Group, Parliament of Australia, Parliamentary Library, *Abortion Law in Australia* (Research Paper 1, 1998-99) available at <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp01.htm>).

¹⁴ See THE HEALTH (FAMILY PLANNING) ACT, 1979 (No. 20/1979), § 11 ("Nothing in this Act shall be construed as obliging any person to take part in the provision of a family planning service, the giving of prescriptions or authorisations for [family planning], or the sale, importation into the State, manufacture, advertising or display of contraceptives."), available at <http://acts2.oireachtas.ie/zza20y1979.1.html>; see also REGULATION OF INFORMATION (SERVICES OUTSIDE THE STATE FOR TERMINATION OF PREGNANCIES) ACT, 1995 (No. 5/1995), §§ 2, 13 ("Nothing in this Act shall be construed as obliging any person to give [information required by a woman for the purpose of availing herself of services provided outside the State of Ireland for the termination of pregnancies]"), available at <http://www.irishstatutebook.ie/1995/en/act/pub/0005/index.html>.

¹⁵ See CONTRACEPTION, STERILISATION, AND ABORTION ACT 1977 No. 112 § 46(1) ("Notwithstanding anything in any other enactment, or any rule of law, . . . no medical practitioner, nurse, or other person shall be under any obligation (a) To perform or assist in the performance of an abortion or [sterilization]; [or] (b) To fit or assist in the fitting, or supply or administer or assist in the supply or administering, of any contraceptive, or to offer or give any advice relating to contraception . . . if he objects to doing so on

International law also recognizes the right of conscience, though it does not specifically discuss that right in the health care context. Article 18 of the International Covenant on Civil and Political Rights—to which the United States is a party—provides that “[e]veryone shall have the right to freedom of thought, conscience and religion[,] . . . [including the freedom] to manifest his religion or belief in worship, observance, practice and teaching.” Although this provision does not specifically mention conscientious objection, the UN Human Rights Committee has interpreted it to include such a right: “[T]he Committee believes that such a right [of conscientious objection] can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”¹⁷ The same reasoning would apply in the health care context.¹⁸

h. Recognition in the medical community.

Finally, the right of conscience has long been recognized in the medical community. As just one example, the American Medical Association has repeatedly affirmed that “[n]either physician, hospital, nor hospital personnel shall be required to perform *any act violative of personally held moral principles*. In these circumstances, good medical practice requires only that the physician or other professional withdraw from the case, so long as the withdrawal is consistent with good medical practice.”¹⁹

In sum, protections for the right of conscience in the health care context are not new; they are a well-established feature of federal, state, and international law.

grounds of conscience.”); *see also id.* at § 46(2) (“It shall be unlawful for any employer— (a) To deny to any employee or prospective employee any employment, accommodation, goods, service, right, title, privilege, or benefit merely because that employee or prospective employee objects on grounds of conscience to in subsection (1) of this section [*i.e.*, assisting in an abortion or sterilization or the supply of any contraceptive]; or (b) To make the provision or grant to any employee or prospective employee of any employment, accommodation, goods, service, right, title, privilege, or benefit conditional upon that other person doing or agreeing to do any thing referred to in that subsection.”), available at <http://www.legislation.co.nz/act/public/1977/0112/latest/DLM17680.html>.

¹⁶ *See generally* E.U. Network of Independent Experts on Fundamental Rights, OPINION N° 4-2005: THE RIGHT TO CONSCIENTIOUS OBJECTION AND THE CONCLUSION BY EU MEMBER STATES OF CONCORDATS WITH THE HOLY SEE 9-13 (Dec. 14, 2005) (summarizing laws on conscientious objection in the health care context in Austria, Belgium, Cyprus, Denmark, France, Germany, Hungary, Italy, Portugal, and Spain).

¹⁷ UN Human Rights Committee, General Comment No. 22 (Art. 18).

¹⁸ *See also* UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 18 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”).

¹⁹ AMA House of Delegates Policy 5.995 (Issued 1973; reaffirmed 1986, 1996, 1997, 2000) (emphasis added).

2. Protections for the right of conscience have a long and distinguished history in American law.

a. The long history of conscientious objection

Protections for conscientious objectors are also fully consistent with the American tradition of democracy and respect for the rule of law. Conscientious objection was not invented with the Church Amendment; it has a long and distinguished history.

Conscientious objection predates the Constitution. In the colonial era, local governments often clashed with the Quaker population. The Quaker's beliefs often conflicted with the laws of the colonies, which required compulsory militia service for every able-bodied male and a barrage of loyalty oaths designed to ensure allegiance to the colonial governments (and, later, to the fledgling nation). Quakers, with their refusal to take oaths and their refusal to take up arms, provided some colonies with their first introduction to religious dissent. Some governments reacted badly—Quakers often paid for their refusal with jail time—but the nation gradually came around to the idea that those willing to risk jail for their principles were likely to make better citizens, not worse ones.²⁰ At the command of General Washington, Quakers who refused to bear arms in the Revolutionary War were permitted to return to their families and homes.²¹

When the Constitution was written a few years later, it enshrined the notion of accommodations for conscientious objectors. Although the original constitution was criticized for its lack of a bill of rights guaranteeing (among other things) religious freedom, it actually contained two provisions for conscientious objection: one, in the Presidential oath, allows the President to “swear or affirm” his oath of office.²² The second permits Congress, the judiciary, and other state and federal officers to make the same substitution.²³ The “affirm” language was an accommodation for religious groups such as the Quakers, who refused on religious grounds to swear oaths.²⁴ It was designed to ensure that they could serve both their country and their consciences.

b. Conscientious objection and military service

The tradition of conscientious objection gained significant legal ground during the Civil War. Although Congress did not provide for conscientious objection to military service, Presi-

²⁰ This description is drawn from the longer account in Kevin Seamus Hasson, *THE RIGHT TO BE WRONG* 45-67 (Encounter 2005) (“Hasson”).

²¹ *Id.*; see also Margaret Hope Bacon, *THE QUIET REBELS: THE STORY OF QUAKERS IN AMERICA* 73 (Basic Books 1969).

²² U.S. CONST. art. II, § 1.

²³ U.S. CONST. art. VI.

²⁴ Hasson at 48.

dent Lincoln stepped in and directed his War Department to make accommodations for those with religious objections to bearing arms. President Lincoln, after hearing pleas from Quakers and other peace groups, made special arrangements for those with conscientious objections to service. Rather than take up arms, they were permitted to serve in hospitals or other community service, serving both their consciences and their nation.²⁵

In World War I, Congress enacted the first comprehensive conscientious objection bill, providing alternative service for those who could not, in good conscience, bear arms. Congress followed that enactment with a second in World War II. And during the Vietnam War, the Supreme Court stretched the conscientious objector exemption to include not only religiously-based objections, but all “sincere and meaningful” beliefs that “occup[y] a place . . . parallel to that filled by the orthodox belief in God.”²⁶ Many states have also written conscientious objection into their laws regulating state militias.²⁷

If conscientious objectors have taught us anything, it is that religious objection is not at odds with public service. Hundreds of conscientious objectors have gone on to render aid, tend to the wounded, and otherwise provide valuable service to our nation. Two conscientious objectors have been awarded the Congressional Medal of Honor.²⁸ The history of conscientious objection from military service demonstrates that the nation has the power to reconcile religious objections with the very best in public service.

c. Conscientious objection in other areas

Nor is conscientious objection limited to military service. During World War II, the nation struggled with how to respond to citizens (largely Jehovah’s Witnesses) who refused to pledge allegiance to the United States. School children who refused to salute the flag and recite the Pledge were expelled from school and their parents faced prosecution for violation of truancy laws.²⁹ In 1943, the Supreme Court held that the government could not compel citizens to recite the Pledge over their objections.³⁰ This ruling, coming during some of the hardest days of World War II, underscored the nation’s deep respect for the rights of conscience.

²⁵ J. G. Randall & Richard Nelson Current, *LINCOLN THE PRESIDENT 172-75* (University of Illinois Press 1999).

²⁶ *United States v. Seeger*, 380 U.S. 163, 165-66 (1965); Hasson at 52.

²⁷ See, e.g., COLO. REV. STAT. § 28-4-103.5; OR. CONST. art. X § 2; PA. CONST. art. III § 16.

²⁸ The two recipients were Desmond Doss (WWII) and Thomas Bennett (Vietnam). Both were medics who went onto the field of battle unarmed to rescue injured soldiers. See Larry Smith & Gen. H. Norman Schwarzkopf, *BEYOND GLORY: MEDAL OF HONOR HEROES IN THEIR OWN WORDS 90-107* (W. W. Norton & Company 2003); Ron Owens & Ronald J. Owens, *MEDAL OF HONOR: HISTORICAL FACTS AND FIGURES 149* (Turner Publishing Company 2004).

²⁹ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

³⁰ *Id.*

Other religious minorities also enjoy legal protections for their conscientious objection. The Amish, who believe it is necessary to withdraw from the world at adolescence, cannot be compelled to send their children to public school after the 8th grade.³¹ Orthodox Jews, Seventh-Day Adventists, and others who observe the Sabbath are permitted to receive unemployment compensation if they are unable to find religiously suitable work.³² Twenty-two states have broad religious freedom provisions—broader than the First Amendment—which provide additional protection to those who conscientiously object to a wide variety of laws. Conscientious objection is not a recent development, nor an issue confined to the health care context. It protects majorities and minorities, those on the political right and those on the political left. It is a proud tradition in the American legal experience.

3. HHS’s proposed rule protecting conscientious objectors in the health care context provides crucial safeguards for the long-recognized right of conscience.

In light of the broad protections for the conscience of health care practitioners in state, federal, and international law, as well as the long tradition of protecting conscience in American history, HHS’s proposed rule should be uncontroversial. Unfortunately, it is not. And the vehement, negative reactions of those who oppose the rule demonstrate how necessary the rule is. We address two of the most common objections below.

a. Protections for those who conscientiously object to dispensing contraception are appropriate and are consistent with providing adequate access to health care.

Perhaps the most common objection to the proposed rule is that it will allow health care practitioners to opt out of providing common reproductive care services—such as Plan B emergency contraception—thus limiting women’s access to basic health care.³³ This argument is inadequate for several reasons.

i. Protections for those who conscientiously object to dispensing contraception are just as appropriate as protections for those who conscientiously object to abortion.

First, this argument fails to explain why conscientious objectors should be protected when they object to abortion and sterilization, but not when they object to contraception. Many health care practitioners sincerely believe that certain types of contraception—namely, those that

³¹ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

³² *Sherbert v. Verner*, 374 U.S. 398 (1963).

³³ Some have argued that the proposed rule will *not* apply to common contraceptives; these comments assume for the sake of argument that it will.

result in the destruction of a fertilized egg—are tantamount to abortion.³⁴ For these practitioners, dispensing Plan B contraception violates their conscience just as much as assisting in an abortion. Their refusal to dispense Plan B should therefore be entitled to the same legal protection.

Some opponents counter that those who conscientiously object to abortion should not be protected either. But this position is often plagued by inconsistency as well. Those who oppose conscientious objection in the abortion context often *support* conscientious objection for doctors who refuse to administer a lethal injection, or for individuals who refuse to bear arms. But why support one and not the other? In many cases, opponents of the proposed rule respect conscience only insofar as it agrees with their own personal or political beliefs; but that is no respect for conscience at all.

Other opponents argue that abortion is different because women have a constitutional right to an abortion. But this argument confuses a negative right with a positive one. That is, the constitutional right to an abortion is a right to be *free from government interference* in certain decisions regarding an abortion; it is not (and has never been recognized in the law as) an affirmative right to *command the assistance of others* in receiving an abortion. That is especially true when commanding the assistance of others would violate their sincerely held religious beliefs. In short, there is no principled basis for supporting conscientious objection in the context of capital punishment and military service, while opposing conscientious objection in the context of abortion or contraception.

ii. Protections for those who conscientiously object to dispensing contraception are consistent with providing adequate access to health care.

Another variation of this objection is that allowing conscientious objection in the context of contraception will reduce the availability of contraception, thus harming women’s health. There are three problems with this argument. First, opponents rarely back this argument up with any empirical evidence of the alleged harms that would result from conscientious objection to contraceptives—namely, limited access to health care and detrimental effects on women’s health. Most opponents simply cite purely hypothetical scenarios—such as “a poor teenager living in a rural area that has a lone pharmacy.” As experts in religious liberty—not access to health care—we will leave it to economists and health care experts to debate the available empirical evidence. But at least one expert has argued that conscientious objection to dispensing contraceptives has not adversely affected women’s access to health care:

These refusals [to dispense contraceptives] do not appear to have erected a genuine barrier to women’s access—instead it has been more of a temporary inconvenience. For example, one complaint filed with the Washington Board of Pharmacy indicated that the woman obtained [emergency contraception] less than an hour after the initial refusal. Other women by their own accounts have had to drive 45 minutes to find a pharmacy. The relative ease with which women can

³⁴ See Comments of the United States Conference of Catholic Bishops at 4 (September 12, 2008) (“Catholic moral teaching rejects the deliberate destruction of a member of the human species at any stage after fertilization.”).

find [emergency contraception] is not particularly surprising. Women can get [emergency contraception] at Planned Parenthood’s network of nearly one thousand across the country, many of which are in rural and impoverished areas. A number of online drugstores will also deliver overnight to the patient’s home.³⁵

Second, problems of access to contraception (or other forms of medical care) can be solved by measures far short of forcing health care practitioners to violate their conscience. Illinois, for example, requires pharmacies that do not carry emergency contraception to post a sign directing patients to other pharmacies that do.³⁶ Such information-forcing rules are “much less draconian than forcing all pharmacies to stock EC . . . or forcing all pharmacists to dispense it.”³⁷ Moreover, “[i]mposing such duties on facilities is preferable to mandates on individual pharmacists since it leaves individuals room for conscience.”³⁸

Third, the access argument is based on the subtle assumption that most conscientious objectors are just bluffing. According to critics, conscientious objectors don’t really care about their religious beliefs enough to maintain them in the face of opposition; rather, faced with the choice between dispensing contraceptives and being punished, most health care practitioners will simply cave in and dispense contraceptives.

That, however, is not always the case. Many pharmacists will resign rather than violate their sincerely held religious beliefs; many, in fact, have already been forced to do so.³⁹ Pressuring those pharmacists to violate their consciences, then, will not increase access to health care for anyone; in fact, it will significantly *reduce* access to health care for everyone who is not seeking contraception. We have yet to see an opponent of the proposed rule that takes this significant cost into account.

In sum, the fact that the proposed rule might protect those who conscientiously object to dispensing certain types of contraception is not an adequate basis for opposing the rule.

³⁵ David Hyman & Robin Fretwell Wilson, *Health Care Regulation: The Year in Review* 6 (May 4, 2007).

³⁶ See 68 ILL. ADMIN. CODE 1330.91(k) (2006).

³⁷ David Hyman & Robin Fretwell Wilson, *Health Care Regulation: The Year in Review* 6-7 (May 4, 2007).

³⁸ *Id.*

³⁹ See, e.g., Debbie Elliot, “Alabama Nurses Quit over Morning-After Pill,” All Things Considered, *National Public Radio* July 28, 2004 (describing how 11 Alabama nurses resigned their positions at state health clinics rather than provide emergency contraception against their moral convictions), available at <http://www.npr.org/templates/story/story.php?storyID=3627209>.

b. Conscientious objectors should not be forced to leave their jobs.

Another common (and unfortunate) response to the proposed rule is that conscientious objectors in the health care context should simply find a different job—one that does not conflict with their consciences. This argument, too, fails for several reasons.

First, of course, as explained above, this argument is inconsistent with state and federal law. Federal law has never forced OB/GYNs to choose between their conscience and their job, any more than it forces Quakers to choose between the conscience and their country. The result should be the same with respect to other health care practitioners, such as pharmacists, who hold similar religious or moral beliefs.

Second, this argument would exclude a significant portion of the general population from an occupation solely because of their religious or moral beliefs. Such discrimination would never be acceptable on the basis of race, gender, or national origin; it is no more acceptable on the basis of religion. Of course, if a health care practitioner desires to specialize in an area where he or she objects to the vast majority of the work (not a likely scenario), such a desire need not be accommodated. But that is not the issue here. Just as anesthesiologists can do the vast majority of their work without participating in assisted suicide, OB/GYNs can do the vast majority of their work without participating in abortions, and pharmacists can do the vast majority of their work without dispensing contraceptives. Their conscience-based objection to a small part of their work should not disqualify them from the entire occupation.

Third, the “get another job” argument ignores the fact that many health care practitioners entered their field long before the practices they object to became part of the profession. Many OB/GYNs entered their field when assisting in an abortion was still a criminal act. Most pharmacists entered their field long before Plan B became widely available.⁴⁰ And many medical researchers entered their field long before stem cell research became a reality. It is particularly deplorable to force these individuals out of their profession simply because new practices or technologies arose that conflict with their deeply held religious beliefs.

Finally, the “get another job” argument fundamentally conflicts with the claim that protecting conscientious objectors will restrict access to health care. Opponents of conscientious objection cannot, on the one hand, claim that the sky is falling because of a lack of access to basic health care, while on the other hand argue that everyone who objects to performing an abortion or dispensing contraceptives should be driven from the profession. To the contrary, the best way to *maximize* access to health care is to protect a large swath of the population that would otherwise be excluded from the health care profession because of their religious or moral beliefs. That is precisely what the proposed rule is designed to do.

⁴⁰ As of 2005, one quarter of practicing pharmacists were over the age of 55. David Hyman & Robin Fretwell Wilson, *Health Care Regulation: The Year in Review 6-7* (May 4, 2007) (citing ASHP Task Force on Pharmacy’s Changing Demographics, Preliminary Report).

Conclusion

Protections for conscience are not only older than the Constitution, but have been written directly into the text of the Constitution. And protections for conscience in the health care context are widely guaranteed in state, federal, and international law. HHS's proposed rule falls well within this tradition, and The Becket Fund heartily supports it.

Sincerely,



Kevin J. "Seamus" Hasson
President
The Becket Fund for Religious Liberty