



The American Civil Liberties Union

Statement
For

**The President's Council on Bioethics
Meeting on the Issue of "Conscience."**

Friday, September 12, 2008

Caroline Fredrickson, Director
ACLU Washington Legislative Office

Vania Leveille, Legislative Counsel
ACLU Washington Legislative Office

Louise Melling, Director
ACLU Reproductive Freedom Project

Sondra Goldschein
State Advocacy Director
ACLU Reproductive Freedom Project

On behalf of the American Civil Liberties Union (ACLU), a nationwide, nonpartisan, nonprofit organization of more than 500,000 members dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we are pleased to submit this statement to the President's Council on Bioethics for the public meeting being held today.

As the Council begins to explore issues relating to ethics, medical reform, and religious refusals in the health care context, we ask that special attention be given to understanding the issues raised when religious belief affects decision-making about reproductive health care.

In this statement, we will tell the story that alerted us to the issues raised by the intersection of these two interests, highlight the ACLU's longstanding commitment to reproductive freedom and religious liberty, outline the framework we use for analyzing the appropriateness of religious refusals to provide reproductive health care, and briefly discuss why related regulations proposed by the Department of Health and Human Services (HHS) could be harmful to patients.

A Hospital's Refusal

In 1994, a nineteen-year-old Nebraska woman was admitted to the emergency room at a religiously affiliated hospital with a blood clot in her lung. Tests revealed that she was approximately ten weeks pregnant, and that the clotting problem resulted from a rare and life-threatening condition exacerbated by the pregnancy. The hospital immediately put her on blood-thinners to eliminate the existing blood clot and to help prevent the formation of more clots that result in death.

Her doctors told her that she had two alternatives. She could stay in the hospital on intravenous blood-thinners for the remaining six-and-a-half months of her pregnancy and have an umbrella-like device inserted into one of her veins designed to catch blood clots before they reached a vital organ. Or she could have a first-trimester abortion, switch to oral blood thinners, and be released from the hospital. She decided to have the abortion. She wanted to go home to care for her two-year-old child.

On the morning she was scheduled to have the abortion, the hospital lawyer appeared in the operating room. He announced that the hospital would not permit an abortion on its premises - even though four doctors had certified that an abortion was necessary to save her life. The procedure was canceled and ten days of dangerous delay followed.

She wanted to be transferred to a facility that would perform the abortion, but the transport increased the risk that a blood clot would kill her. And her doctors felt that the procedure should be performed in a hospital because the blood-thinners she was taking made her prone to excessive bleeding. But the hospital refused to reconsider its decision not to allow the abortion on its premises. Notwithstanding the risks to her health, she was ultimately transferred by ambulance to her doctor's office. He performed the abortion and sent her back to the hospital.

This patient was lucky in the end. She survived the risks she faced when this hospital refused to treat her. But the risk itself was unacceptable.

Commitment to Religious Liberty and Reproductive Freedom

The ACLU has a long, proud history of vigorously defending religious liberty. In Congress and in the courts, we have supported legislation providing stronger protection for religious exercise - even against neutral, generally applicable laws. For nearly a decade, the ACLU fought to preserve or restore the highest level of constitutional protection for claims of religious exercise. We were founding members of the coalition that supported the Religious Freedom Restoration Act in 1993, and we were instrumental in urging Congress to enact the Religious Land Use and Institutionalized Persons Act of 2000. We have also represented persons challenging burdens on the exercise of their religious beliefs. For example, we have sued to protect the right of Jewish students to wear a Star of David pendant at school; we have sued to defend the right of conservative Christian activists to broadcast on public access television; we have sued to protect the right of a Christian inmate to preach; and we have filed a brief in support of two women who were fired for refusing to work at a greyhound racetrack on Christmas Day.

We have been equally vigilant in our advocacy of reproductive freedom. The ACLU fought long and hard to persuade Congress to pass the Freedom of Access to Clinic Entrances Act to protect reproductive health clinics, patients, and professionals from deadly violence. We are currently key supporters of the Responsible Education About Life Act, which will ensure that teens receive complete and medically accurate sexuality education vital to protecting their health and lives. We have participated in nearly every critical Supreme Court case protecting reproductive freedom, from *Roe v. Wade* to *Planned Parenthood v. Casey* to *Gonzales v. Carhart*. This history makes the ACLU well-positioned to assist the Council in its consideration of how to address religiously based refusals to provide health care.

Framework for Analysis

The framework we propose for analyzing religiously based refusals to provide health care balances protection of public health, patient autonomy, and gender equality with the protection of individual religious belief and institutional religious worship. We reject the imposition of religious doctrines on those who do not share them, especially at the expense of the public health. At the same time, we seek the maximum possible accommodation of an individual's religious or conscientious objections, so long as patients' rights are not compromised as a result. We also seek to insulate churches, houses of worship, and similarly situated institutions from having to comply with laws that interfere with their religious practices.

The ACLU framework centers around two critical questions. First, we ask whether the refusal places burdens on people who do not share the beliefs that motivate the refusals. The more the burdens falls on such people, the less acceptable any claimed right to refuse. Second, we ask whether the objector is a sectarian institution engaged in religious practices, or is it instead an entity - whether religiously affiliated or not - that provides services to the general public. The more that services are made available to the general public and the less the services relate to an institution's religious mission, the less acceptable an institution's claimed right to refuse.

In the reproductive health context, it is often possible to accommodate individual – as opposed to institutional – refusals to provide certain health care services without imposing inappropriate burdens on others. But there must be adequate safeguards if an individual health care provider refuses to provide a service. Whatever their religious or moral scruples, health care professionals should give complete and accurate information, make appropriate referrals, effectuate informed health care decisions, and provide care in an emergency.

In the reproductive health context, the risk of imposition on those who do not share the objector's beliefs is especially great when an institution – such as an employer, hospital, health plan, pharmacy, or other corporate entity – refuses to provide a reproductive health service. The refusal of such institutions directly affects employees, patients, enrollees, and customers of diverse backgrounds and faiths. The law should not permit an institution's religious strictures to interfere with the public's access to reproductive health care. While entities operating in the public world ought to play by public rules, churches, temples, mosques, and other institutions whose purpose is to practice and teach religion ought generally to be able to refuse to provide services to which they have a religious objection.

Concrete examples may be clearer than general principles: every rape survivor ought to be offered emergency contraception to protect herself from getting pregnant as a result of the assault, no matter where she is treated; an administrative assistant working at a Catholic university should not have to pay out-of-pocket for birth control pills because her employer believes contraception is a sin; but a church should not have to purchase contraceptive coverage for its ministers and other clerics; and a doctor, nurse, or pharmacist who cannot in good conscience participate in abortions or contraceptive services should be allowed to opt out, so long as the patient is ensured safe, timely, and financially feasible alternative access to treatment. The factors we identify for evaluating refusal clauses should lead to these kinds of fair results.

Proposed Religious Refusal Regulations

Based on the framework outlined above, the ACLU is currently opposing a rule proposed by the Department of Health and Human Services. Last month, HHS released proposed regulations to address religious refusals to provide certain health services. Unfortunately, the rule does not strike the appropriate balance between patient access and religious liberty and could seriously undermine women's ability to obtain essential reproductive health services. The rule leaves open the possibility that – based on religious beliefs – health care providers, including hospitals, insurance companies, and pharmacies, could deny women access to birth control. In addition, the rule may permit health care providers to withhold information and counseling about a wide range of health care services, including birth control and abortion.

To the extent that the regulation permits health care providers to withhold basic information and counseling from their patients, the proposed rule essentially abandons patients in the face of a health care provider's refusal. Legal and ethical principles of informed consent require physicians to inform patients about all treatment options, including those to which the physician objects or those which he or she does not provide. Yet the proposed rule seems designed to do away with these essential safeguards. Instead, as a direct result of the proposed rule, patients

may never be able to access the refused health care – or even know about their right or option to do so – due to geographic, economic, or health plan limitations. This proposal suggests that religious refusals should *trump* patients’ basic health care needs; this is not an appropriate balance of religious freedom and reproductive rights.

In conclusion, we recommend that the Council advocate for solutions that appropriately balance patient access to health care with religious liberty.