



## National Developments

### *Health Care: Legislation and Litigation*

In its first major legislative action of the newly convened 112th Congress, the House of Representatives repudiated the ten-month-old Patient Protection and Affordable Care Act (PPACA), an act that abandons long-standing federal prohibitions against the funding of insurance plans that cover abortion.<sup>1</sup> The bipartisan vote to repeal passed by a greater majority than originally enacted the law.<sup>2</sup> Although a subsequent Senate vote to repeal the PPACA failed on a straight party line, constitutional challenges to the health care reform law prevailed in two federal court cases.<sup>3</sup>

On January 31, 2011, U.S. District Judge Roger Vinson of the Northern District of Florida ruled that the PPACA's "individual mandate," which penalizes individuals who do not buy private health insurance, is unconstitutional because it exceeds the authority of Congress under the commerce clause, and therefore the entire PPACA law is invalid. The holding applies to twenty-six states.<sup>4</sup> In response to a delayed

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<sup>1</sup>The Patient Protection and Affordable Care Act, Public Law 111-148, *U.S. Statutes at Large* 124 (2010): 119, has been extensively analyzed in previous columns. See William Saunders' "Washington Insider" in the Summer and Winter 2010 issues of the *NCBQ*, <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=143> and <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=166>, respectively.

<sup>2</sup>The roll call vote is available at <http://clerk.house.gov/evs/2011/roll014.xml>.

<sup>3</sup>The repeal proposal, offered as an amendment (S.A. 13) by Senate minority leader Mitch McConnell (R-KY) to a reauthorization bill (S. 223) for the Federal Aviation Administration, lost on a vote of 47 to 51 on February 2, 2011. The Senate roll call vote can be found at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00009](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00009).

<sup>4</sup>*State of Florida v. United States Department of Health and Human Services*,

motion for “clarification” filed by attorneys for the Obama administration, Judge Vinson issued a stay of his own ruling on March 3, 2011, and he gave the administration seven days to file its appeal.<sup>5</sup> The stay means PPACA implementation efforts can continue throughout the pendency of the appeal. The Department of Justice filed notice of its appeal on March 10, along with a request for an *accelerated* schedule for briefs in the Eleventh Circuit.

Earlier, in a separate case decided on December 13, 2010, U.S. District Judge Henry Hudson of the Eastern District of Virginia agreed with the Commonwealth of Virginia’s claim that the PPACA’s individual mandate unconstitutionally exceeds the commerce clause, but he upheld the rest of the law.<sup>6</sup> On February 8, 2011, Virginia filed a petition for a writ of certiorari before judgment in the Supreme Court, which, if granted, would result in expedited review of the case by the Supreme Court. The federal government responded on March 14, opposing the petition.<sup>7</sup>

On January 7, Oklahoma’s attorney general elect, Scott Pruitt, announced his decision to file suit against the PPACA, based on its incompatibility with an Oklahoma amendment to its state constitution, passed in 2010, that no Oklahoman can be forced to purchase health insurance.<sup>8</sup>

Three federal court cases have upheld the constitutionality of the PPACA’s individual mandate. Appeals are pending in two cases.<sup>9</sup>

Given the split in the circuits and the progression of the cases, it is quite possible that one of the several cases will reach the Supreme Court by the fall 2012 election.

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—F.Supp.2d— (N.D. Fla. 2011), <http://www.scribd.com/doc/47905280/vinsonruling1-31-11>. The states are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. Additional plaintiffs included the National Federation of Independent Business and two individuals, Mary Brown and Kaj Ahlburg.

<sup>5</sup>The stay ruling is available at <http://obamacare411.files.wordpress.com/2011/03/vinson-clarification-030311.pdf>.

<sup>6</sup>*Virginia v. Sibelius*, 728 F.Supp.2d 768 (E.D.Va. 2010), is available at <http://documents.nytimes.com/health-care-law-ruled-unconstitutional?ref=policy>.

<sup>7</sup>The petition is available at [http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/24454%20pdf%20McCullough.pdf](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/24454%20pdf%20McCullough.pdf).

<sup>8</sup>Oklahoma Office of the Attorney General, “Oklahoma Attorney General-elect Will File Lawsuit against Federal Health Care Reform Bill,” news release, January 7, 2011, <http://www.oag.ok.gov/oagweb.nsf/0/8723EA10351AAEE08625781400654082!OpenDocument>.

<sup>9</sup>The three cases are *Thomas More Law Center v. Obama*, case no. 10-cv-1156 (E.D. Mich. October 7, 2010), appeal pending before the Sixth Circuit Court of Appeals; *Liberty University v. Geithner*, case no. 10-cv-00015 (W.D. VA), dismissed November 30, 2010, appeal pending before the Fourth Circuit Court of Appeals; and *Mead v. Holder*, civil action no. 10-cv-00950-GK (DDC February 22, 2011).

Pro-life legislators in the House of Representatives wasted no time in introducing other measures to address the threats to life created by PPACA, short of the act's complete eradication.<sup>10</sup>

On January 20, 2011, Reps. Joe Pitts (R-PA) and Daniel Lipinski (D-IL) introduced H.R. 358, the Protect Life Act.<sup>11</sup> The bipartisan bill addresses serious anti-life provisions in the PPACA. Historically, federal funding of insurance plans that cover abortion has been treated in federal law as equivalent to direct payment for abortion.<sup>12</sup> However, the PPACA provides for taxpayer dollars to be used by insurance plans that cover abortion through the PPACA state insurance exchanges that will be established in 2014. Moreover, other funding streams created through the PPACA lack statutory prohibitions against *direct* abortion funding.<sup>13</sup> The Protect Life Act would amend the PPACA by prohibiting federal funding under the act for abortions or abortion coverage. The bill also contains a conscience protection that would prevent funding from being withheld from institutions that refuse to provide abortions. On February 11, the bill passed through the House Committee on Energy and Commerce. As of March 16, one hundred and forty members, including six Democrats, were cosponsors.

### *Defunding the Abortion Industry*

Pro-Life Caucus cochairs, Reps. Chris Smith (R-NJ) and Dan Lipinski (D-IL), introduced H.R. 3, the No Taxpayer Funding for Abortion Act, on January 20, 2011. The bill would establish a permanent government-wide prohibition on federal

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<sup>10</sup>The anti-life provisions of the PPACA are analyzed in William Saunders' Summer 2010 "Washington Insider," <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=143>. For a recent summary of the anti-life provisions of PPACA, see Mary Harned, "Problems with Health Care Reform," January 5, 2011, Americans United for Life, <http://www.aul.org/2011/01/problems-with-health-care-reform/>.

<sup>11</sup>The predecessor bill introduced in the 111th Congress in 2010 was H.R. 5111. For discussion of H.R. 5111, see William Saunders' Winter 2010 "Washington Insider," <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=166>. The current version of the Protect Life Act, H.R. 358, is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.358>.

<sup>12</sup>Over the last four decades, Congress has passed numerous laws (and administrations have promulgated numerous regulations) prohibiting the use of federal tax dollars for abortions or for the subsidization of insurance plans that cover abortions. The most well known of these laws, the Hyde Amendment, prohibits the use of funds appropriated through the Labor, Health and Human Services (LHHS) appropriations bill for abortions or abortion coverage. The Federal Employee Health Benefits Program (FEHBP) also prohibits the subsidization of insurance plans that cover elective abortions.

<sup>13</sup>The abortion funding stream under PPACA came to light in July 2010, when the Obama administration approved plans by three states to use federal funds directly for elective abortion in their "high-risk" pools under the Pre-existing Condition Insurance Plan (PCIP). Only after pro-life groups complained did the administration enact a rule against abortion funding through these pools. For additional background, see William Saunders' Winter 2010 "Washington Insider," <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=166>.

funding for abortions and abortion coverage, replacing the yearly battles pro-life Congressmen face to enact separately a series of abortion funding restrictions, such as appropriations riders (the Hyde amendment), regulations that may be overturned by new administrations, and executive orders that exist at the will of the president.

H.R. 3 also codifies the Hyde-Weldon conscience protection amendment to protect health care providers, health care institutions, and health insurance providers against discrimination by the government on the basis that they do not provide, pay for, provide coverage of, or refer for abortions.<sup>14</sup> H.R. 3 prevents government discrimination by ensuring that health care entities are not forced to violate their consciences and safeguards those who seek health care providers, hospitals, and insurance plans that do not support abortion.

The bill contains a private right of action for health care providers whose conscience rights have been violated. Reliance upon existing remedies that depend solely upon the government to enforce these rights is insufficient, particularly given the Obama administration's recent weakening of conscience protection regulations (which is described in more detail below). Creating a right to enforce conscience protection in the courts will require congressional action. Supporters of the bill include the USCCB.<sup>15</sup> On March 3, the House Judiciary Committee approved H.R. 3 in a full committee markup meeting on a bipartisan vote of 23 to 14.<sup>16</sup> The bill has been referred to the Energy and Commerce Committee and the Ways and Means Committee.

Earlier in January, Rep. Mike Pence (R-IN) introduced the Title X Abortion Provider Prohibition Act.<sup>17</sup> The bill, H.R. 217, would prohibit the federal government from providing Title X family planning grants to any entity that performs abortions or gives funds to entities that perform abortion. Planned Parenthood, the nation's largest provider of abortion, is also the largest recipient of Title X funding.

On February 19, the House approved a continuing budget resolution to fund the federal government for fiscal year 2011.<sup>18</sup> The resolution, H.R. 1, included several pro-life improvements to the budget. H.R. 1 reinstated a previous ban on federal and

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<sup>14</sup>The Hyde-Weldon amendment has been renewed annually since 2004 as part of the Labor, Health and Human Services appropriations bill.

<sup>15</sup>Among those testifying at the hearing was Richard Doerflinger, associate director of the USCCB's Secretariat of Pro-Life Activities. His testimony is available at <http://www.usccb.org/prolife/HR3-testimony-2011-02-08.pdf>. Mr. Doerflinger is the author of this column in alternating issues of the Journal.

<sup>16</sup>The roll call vote is available at <http://judiciary.house.gov/hearings/pdf/Roll%20Call%20Vote%2014%20H.R.%203.pdf>. Democrat Pedro Pierluisi, resident commissioner of Puerto Rico to Congress, voted for the bill. As a delegate representing a U.S. territory, his vote is included in committee but not in the full House.

<sup>17</sup>The text of bill H.R. 217 is available at <http://www.govtrack.us/congress/bill.xpd?bill=h112-217>.

<sup>18</sup>The text of bill H.R. 1 is available at [http://thomas.loc.gov/home/gpoxmlc112/h1\\_1h.xml](http://thomas.loc.gov/home/gpoxmlc112/h1_1h.xml).

local taxpayer funding of elective abortions in the District of Columbia that Congress overturned in the fiscal year 2010 budget. It restored and made permanent the Mexico City Policy that President Obama overturned his first week in office. (The Mexico City Policy prohibits international aid from going to groups that promote and perform abortions overseas.) The continuing resolution also cut funding for the United Nations Population Fund (UNFPA), a family planning agency that has supported coerced abortions under China's one-child policy.

An amendment to H.R. 1, offered by Rep. Pence and adopted on a bipartisan vote of 240 to 185, revoked *all* federal payments to Planned Parenthood for the fiscal year 2011.<sup>19</sup>

Since February 1, a series of undercover videos filmed by Live Action have revealed what appears to be a widespread pattern of illegal activity by Planned Parenthood employees in various states, such as failure to report sex trafficking of minors and instances of statutory rape, and a willingness to ignore parental-involvement laws.<sup>20</sup>

Further, former Kansas attorney general Phill Kline, the only prosecutor in the United States to have brought charges against Planned Parenthood, testified at a hearing on February 24 that state investigators in Kansas found 166 instances when girls younger than fourteen years got abortions at clinics owned either by late-term abortionist George Tiller or Planned Parenthood of Overland Park.<sup>21</sup> Kline testified that during that same time, Planned Parenthood reported only one case of child rape and Tiller reported only one case of child rape.

Consequently, pro-life groups have called for Congress to take action to hold Planned Parenthood accountable and to end all federal funding of its operation.<sup>22</sup> In 2009, Planned Parenthood received over \$363 million in government contracts and grants.<sup>23</sup> Its involvement in abortion is increasing. In 2009, the most recent year for which figures are available, Planned Parenthood performed 332,278 abortions, up from 324,008 in 2008 and 305,310 in 2007—an increase of 8.8 percent in two years.<sup>24</sup>

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<sup>19</sup>Final vote results are available at <http://clerk.house.gov/evs/2011/roll093.xml>.

<sup>20</sup>The Live Action videos can be viewed at <http://liveaction.org/>.

<sup>21</sup>The Supreme Court of Kansas filed professional ethics charges against Kline, based on his investigation of Planned Parenthood. Kline's trial began February 21, 2011. Kline's testimony concerning underage abortions at Planned Parenthood clinics is reported at <http://www.jillstanek.com/2011/02/breaking-planned-parenthood-abortion-doc-failed-to-report-164-cases-of-child-statutory-rape/>.

<sup>22</sup>Concerned groups have formed a coalition, Expose Planned Parenthood, to urge a Congressional investigation and defunding of Planned Parenthood. See <http://exposeplannedparenthood.net/>.

<sup>23</sup>Planned Parenthood Federation of America, annual report 2008–2009, 29, [http://www.plannedparenthood.org/files/PPFA/PP\\_AR\\_011011\\_vF.pdf](http://www.plannedparenthood.org/files/PPFA/PP_AR_011011_vF.pdf).

<sup>24</sup>The abortion numbers for 2007 are reported in the federation's annual report for 2007–2008, [http://www.plannedparenthood.org/files/AR08\\_vFinal.pdf](http://www.plannedparenthood.org/files/AR08_vFinal.pdf). More recent annual reports do not include abortion numbers. The numbers for 2008 appear in the "Planned

Planned Parenthood recently instituted a policy mandating that within the next two years all affiliates have at least one clinic that performs abortions.<sup>25</sup>

The Senate rejected H.R. 1 on March 9 by a vote of 44 to 56.<sup>26</sup> On March 15, the House passed a new short-term continuing resolution, H.J. Res. 48, which the Senate approved two days later. This short-term continuing resolution that expires on April 8 contains none of the pro-life provisions of H.R. 1. At this writing, it is unclear how much longer this pattern of temporary continuing resolutions will continue. Senate Majority Leader Harry Reid (D-NV) stated that Senate Democrats will not support any continuing resolution that includes provisions that strip Planned Parenthood of funding.<sup>27</sup>

It is expected that pro-life representatives in the House will continue efforts to cut funding of Planned Parenthood and other abortion providers as well as efforts to pass pro-life legislation, such as the Protect Life Act and No Taxpayer Funding of Abortion Act.

### *Conscience Protection*

On January 20, Reps. John Fleming (R-LA), Dan Boren (D-OK), and cosponsors introduced H.R. 361, the Abortion Non-Discrimination Act (ANDA), to protect conscience rights of health care professionals.<sup>28</sup> The act would amend the Public Health Service Act to clarify that the prohibition against discrimination by the federal government, or by any state or local government that receives federal funding, extends to any health care professional, entity, or insurance plan that refuses to perform, provide coverage for, pay for, or refer for an abortion. The bill also establishes remedies to prevent and to redress violations of the act, including a private right of action for health care entities.

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Parenthood Services” fact sheet of September 2010, [http://www.plannedparenthood.org/files/PPFA/fact\\_ppservices\\_2010-09-03.pdf](http://www.plannedparenthood.org/files/PPFA/fact_ppservices_2010-09-03.pdf), and 2009 numbers in the fact sheet of February 2011, [http://www.plannedparenthood.org/files/PPFA/PP\\_Services.pdf](http://www.plannedparenthood.org/files/PPFA/PP_Services.pdf).

<sup>25</sup>This policy change became known when an affiliate in Corpus Christi, Texas, disassociated itself from Planned Parenthood because the affiliate did not provide abortions, citing the availability of other abortion services in its area. See Amanda Carey, “Planned Parenthood Plans to Expand Abortion Services Nationwide,” *Daily Caller*, December 23, 2010, <http://www.dailycaller.com/2010/12/23/planned-parenthood-plans-to-expand-abortion-services-nationwide/>. Confirming stories include Sara Foley, “Local PP Chapter Drops Affiliation,” *Corpus Christi Caller-Times*, December 20, 2010, <http://www.caller.com/news/2010/dec/20/local-planned-parenthood-chapter-drops/>, and Susan K. Livio, “Planned Parenthood May Double the Number of Abortion Clinics while Expanding Nationwide,” January 16, 2011, [http://www.nj.com/news/index.ssf/2011/01/planned\\_parenthood\\_to\\_double\\_t.html](http://www.nj.com/news/index.ssf/2011/01/planned_parenthood_to_double_t.html).

<sup>26</sup>The roll call vote is available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00036](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00036).

<sup>27</sup>Alexander Bolton, “Reid: Rider on Planned Parenthood Won’t Be Included in Budget Deal,” *The Hill*, March 17, 2011, <http://thehill.com/homenews/senate/150629-reid-no-deal-on-abortion-planned-parenthood>.

<sup>28</sup>The text of H.R. 361 can be found at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.361:>.



Section 245 of the Public Health Service Act (“PHS 245”), enacted by Congress in 1996, provides protection for entities that refuse to participate in abortion.<sup>29</sup> It provides that neither the federal government nor any state or local government may discriminate against entities because they refuse to receive, provide, or require abortion training; because they refuse to provide abortions or referrals for abortion or abortion training; or because they attended a training program that did not require abortion training. H.R. 361 would prohibit discrimination in governmental activities beyond “training,” to include conscience protection related to the licensing and practice of physicians and other health care entities.

The wording of S. 165, introduced on January 25 by Senator David Vitter (R-LA) and three cosponsors, is identical to that of H.R. 361.<sup>30</sup> Both bills have been referred to congressional committees.

The need for legislation to protect conscience and provide remedies for health care providers is especially urgent in light of the February 18, 2011, rescission by the Department of Health and Human Services (HHS) of many provisions of the existing conscience protection regulations promulgated by the George W. Bush administration.<sup>31</sup>

The Bush regulations were promulgated to enforce federal conscience protection laws that Congress had enacted previously. In addition to the 1996 Public Health Service Act, these include the 1973 Church amendments and the Hyde-Weldon amendment, which was first added to a funding bill in 2004.<sup>32</sup>

HHS rescinded the definitions contained in §88.2 of the regulation, thus removing any limit on the agency’s discretion in defining and applying these terms. This allows the agency to narrowly interpret the conscience protection statutes. HHS also rescinded the certification requirement, so that potential discriminators are less accountable. (Previously, failure to comply would have resulted in forfeiture of federal funds.)

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<sup>29</sup>The text of PHS 245, contained in 42 U.S.C. §238n, is available at <http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/42usc238n.pdf>.

<sup>30</sup>The text of S.165 can be found at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.165>.

<sup>31</sup>See Department of Health and Human Services, “Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws,” *Federal Register* 76.36 (February 23, 2011): 9968–9977, <http://www.gpo.gov/fdsys/pkg/FR-2011-02-23/pdf/2011-3993.pdf>. The final rule enacted by HHS under the Bush administration on December 19, 2008, can be found at <http://edocket.access.gpo.gov/2008/E8-30134.htm>.

<sup>32</sup>For additional discussion of the Church amendments (42 U.S.C. §300a-7), the Public Health Service Act §245, and the Weldon amendment (most recently passed in Consolidated Appropriations Act 2010, Public Law 111-117, Div. D, Sec. 508 (d), 123 Stat. 3034, 3279-80, (December 16, 2009)), see William L. Saunders and Michael A. Fragoso, “Conscience Protection in Health and Human Services,” *Engage* 10.2 (July 20, 2009), [http://www.fed-soc.org/publications/pubID.1535/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.1535/pub_detail.asp); and William L. Saunders and Michael A. Fragoso, “The Obama Administration Signals Intent to Change Conscience Clause Rule,” *Federalist Society New Federal Initiative Project*, May 4, 2009, [http://www.fed-soc.org/publications/pubID.1356/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.1356/pub_detail.asp).

These concerns are heightened because of several statements HHS made when announcing the rescission, which suggest that the agency may interpret “informed consent” to require referral and may consider conscience regulations as subservient to other laws.<sup>33</sup> The HHS decision to rescind the 2008 regulations ran counter to the overwhelming majority of the three hundred thousand comments it received.

In anticipation of a final rule to rescind the Bush regulations, forty-six members of the House of Representatives sent a letter on February 11 to the Secretary of HHS, Kathleen Sebelius.<sup>34</sup> Among other things, the members asked about the status of the HHS investigation and enforcement of the existing regulations in a particularly egregious situation, the case of Catherina Cenzone-DeCarlo. (Cenzone-DeCarlo, an operating room nurse, was required to participate in an abortion despite conscience objections. A federal court, in a suit brought by Cenzone-DeCarlo, held that individuals whose conscience rights under the federal law were violated *nevertheless* lack the right to sue to enforce those laws.<sup>35</sup> Enforcement, in other words, is left to HHS. Cenzone-DeCarlo is also pursuing a case in state court in New York.<sup>36</sup>)

Ultimately, what is probably more important than the rescission is whether HHS will vigorously enforce whatever conscience-protection regulations exist. The agency’s apparent disinterest in the Cenzone-DeCarlo case suggests that it has little interest in protecting the freedom of conscience of pro-life Americans.

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<sup>33</sup>In their new regulation HHS states, “Many comments expressed concern that the 2008 Final Rule would prevent a patient from being able to give informed consent, because the health care provider might not advise the patient of all health care options. Partial rescission of the 2008 Final Rule should clarify any mistaken belief that it altered the scope of information that must be provided to the patient by their provider in order to fulfill informed consent requirements.” This statement could be interpreted to mean that referrals for abortions are required.

<sup>34</sup>The letter is available at <http://oldsite.alliancedefensefund.org/userdocs/US-CT-HouseLetter.pdf>.

<sup>35</sup>*Cenzone-DeCarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2d Cir. N.Y. 2010), [http://www.ca2.uscourts.gov/decisions/isysquery/73a08e44-e9d5-4eb1-b07b-18dfb1901910/3/doc/10-556\\_op%20\(PC\).pdf](http://www.ca2.uscourts.gov/decisions/isysquery/73a08e44-e9d5-4eb1-b07b-18dfb1901910/3/doc/10-556_op%20(PC).pdf).

<sup>36</sup>In the state case, Cenzone-DeCarlo alleges a violation of her civil rights under the New York State Constitution’s provisions guaranteeing freedom of religion and conscience protection. The complaint is available at <http://oldsite.alliancedefensefund.org/userdocs/Cenzone-DeCarloStateComplaint.pdf>. In the United States as in many other countries, conscience protection is not left solely to national law. In the absence of national law, individual states are free to enact conscience protections. Forty-seven states do have some health care conscience protection laws. Americans United for Life (AUL) and other organizations have developed model laws that can be adopted by state legislatures. Idaho adopted AUL’s comprehensive conscience protection model law last year, although efforts are already underway by anti-life forces to amend it so that health care providers must assist suicide if Idaho legalizes it. AUL’s model legislation is available at <http://www.aul.org/defending-life-model-legislation-healthcare/>.



*“Preventive Care”*

Over the last few months, the Institute of Medicine (IOM) held three public meetings to prepare guidelines for “preventive care for women” under the new health care law. The PPACA requires all insurance plans (not just those participating in the exchanges) to cover “preventive care for women” without cost sharing, meaning that these services must be fully covered without a co-pay.<sup>37</sup> The IOM is tasked with making a recommendation to the Health Resources and Services Administration (HRSA) on what constitutes “preventive services.”<sup>38</sup>

The majority of the groups invited to present at the meetings take a public stance in favor of abortion. The list included Planned Parenthood, the nation’s largest abortion provider, who stands to gain financially if abortion and abortion-inducing drugs are included in this mandate. This conflict of interest was not disclosed at the meeting.

Most presenters urged the IOM to include *all FDA approved contraceptives* in the preventive care mandate. This would include so-called “emergency contraceptives,” including the newly approved drug ella (ulipristal acetate), which can kill an embryo even after implantation.<sup>39</sup> If “contraception” is included in the definition of “preventive care,” Americans will be forced to subsidize these abortion-causing drugs with their insurance premiums.

No groups who oppose abortion were invited, despite the fact that a number of pro-life organizations submitted comments to HHS by September 17, 2010, concerning coverage of preventive services.<sup>40</sup>

In the limited time provided for public comment at each meeting, pro-life groups gave oral comments emphasizing Senator Mikulski’s speech on the Senate floor in which she asserted that abortion is not to be included in preventive services.<sup>41</sup> In addition, if abortion and contraception are declared to be mandatory preventive

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<sup>37</sup>The requirement is part of an amendment added by Senator Barbara Mikulski (D-MD), [http://mikulski.senate.gov/\\_pdfs/BAI09N48.pdf](http://mikulski.senate.gov/_pdfs/BAI09N48.pdf).

<sup>38</sup>“Preventive Services for Women” project, Institute of Medicine Board on Population Health and Public Health Practice, August 1, 2010, National Academies Project Information, <http://www8.nationalacademies.org/cp/projectview.aspx?key=IOM-BPH-10-13>.

<sup>39</sup>“FDA Approves ella Tablets for Prescription Emergency Contraception,” news release, August 13, 2010, <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm>.

<sup>40</sup>The National Catholic Bioethics Center submitted written comments highlighting that (1) pregnancy is not a disease; (2) the interim final rules rightly did not include contraceptives, sterilizations, abortifacients, and abortion as mandated preventive services; (3) numerous health care providers would be unable to comply with such mandates; and (4) the legislative history of the PPACA shows the intent *not* to include drugs or devices that induce the expulsion of a human embryo before or after implantation. The NCBC letter is available at <http://www.dol.gov/ebsa/pdf/1210-AB44-0198.pdf>. AUL’s written comments are available at <http://www.aul.org/wp-content/uploads/2010/09/Americans-United-for-Life-Comment-on-OCIIO.9992.pdf>.

<sup>41</sup>During debate over the amendment on the Senate floor, Senator Mikulski told Senator Robert Casey (D-PA), “This amendment does not cover abortion. Abortion has never been

services, conscience rights will be denied for those who do not wish to participate in any plan that covers those services.

The IOM is expected to give its recommendations to HRSA in August 2011.

### *Stem Cell Treatments*

A milestone was reached on January 13, 2011, with the ten thousandth adult stem cell transplant performed by City of Hope.<sup>42</sup> The patient, afflicted with advanced leukemia, received adult stem cells from an unrelated donor. City of Hope began bone marrow transplantation in the 1970s. Their first successful bone marrow transplant patient, an Indiana college student with acute myeloid leukemia, is still in remission. In 2010, the National Marrow Donor Program recognized City of Hope as the only center to achieve above-average survival rates in unrelated transplants for five consecutive years.<sup>43</sup>

### *Assisted Reproductive Technologies*

*Eggsploitation*, a documentary produced by the Center for Bioethics and Culture, won the “Best Documentary” award at the California Independent Film Festival on January 30. *Eggsploitation* focuses on the unregulated multi-billion-dollar infertility business of selling human eggs. The film presents first-hand accounts of three young women who reveal the tragic health consequences of their experiences as egg donors.<sup>44</sup>

A South Korean court has upheld the conviction of clone scientist Hwang Woo Suk for embezzlement.<sup>45</sup> Hwang was convicted in October 2009 of embezzling

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defined as a preventive service. This amendment is strictly concerned with ensuring that women get the kind of preventive screenings and treatments they may need to prevent diseases particular to women such as breast cancer and cervical cancer. There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.” *Congressional Record* 178 (December 3, 2009): S12274, [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S12274&dbname=2009\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S12274&dbname=2009_record). AUL gave oral comments citing Mikulski’s position, <http://www.aul.org/2010/11/more-abortion-in-health-care-reform/>.

<sup>42</sup>“City of Hope Reaches Historic Treatment Milestone with 10,000th Bone Marrow Transplant,” news release, January 13, 2011, <http://www.businesswire.com/news/home/20110113006638/en/City-of-Hope-Reaches-Historic-Treatment-Milestone-10000th>.

<sup>43</sup>Shawn Lee, “City of Hope Demonstrates Remarkable Outcomes for Unrelated Donor Transplants,” *Hope News* 5.23 (August 2, 2010), <http://www.cityofhope.org/about/publications/hope-news/2010-vol-05-num-23-august-2/Pages/city-of-hope-demonstrates-remarkable-outcomes-for-unrelated-donor-transplants.aspx>.

<sup>44</sup>Center for Bioethics and Culture, “Eggsploitation Named Best Documentary,” news release, January 31, 2011, <http://www.cbc-network.org/2011/01/eggsploitation-named-best-documentary/>.

<sup>45</sup>Hwang Woo Suk’s criminal convictions and phony research studies were reported in an earlier column. See William Saunders’ Summer 2006 “Washington Insider,” <http://www.ncbcenter.org/NetCommunity/Page.aspx?pid=952>.

\$719,000 in research funds and illegally buying human eggs. He was found guilty of faking research results, on which he based a claim that he had created the first cloned human embryos.<sup>46</sup> It is reported that Hwang, out on a suspended prison sentence, has traveled frequently to Libya, where he has secured a \$133 million stem cell research grant from the Libyan government.<sup>47</sup>

A fifty-seven-year-old woman who gave birth to her grandson a few months ago is the oldest surrogate mother in Britain.<sup>48</sup> Doctors implanted two frozen embryos in her womb in December 2009 in their fourth attempt to achieve a sustainable pregnancy.

### International Developments

Abortion proponents' efforts to make abortion a "right" in Europe were hindered when the Grand Chamber of the European Court of Human Rights (ECHR) issued its decision in *A, B, and C v. Ireland* on December 16, 2010.<sup>49</sup> The case involved three unnamed women who claimed that their right to abortion under the European Convention on Human Rights treaty was denied because of the pro-life provisions of the Irish Constitution. The court held there is no right to abortion under the convention, and that matters relating to abortion should be left to the member states' own domestic law.<sup>50</sup> The decision is binding on forty-seven member nations and all lower chambers of the court.

On March 7, 2011, the Supreme Court of India established legal guidelines to allow "passive" euthanasia, the withholding of lifesaving treatment in cases reviewed by medical experts and approved by the high court.<sup>51</sup> The court did not allow euthanasia in the case before it, that of a woman in a vegetative state for nearly forty years. India joins Belgium, Luxembourg, the Netherlands, Switzerland, and the states of Oregon and Washington in allowing some form of euthanasia.

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<sup>46</sup>"Court Upholds Sentence of Disgraced Scientist," *Korea JoongAng Daily*, December 17, 2010, <http://joongangdaily.joins.com/article/view.asp?aid=2929797>.

<sup>47</sup>"Disgraced Clone Scientist Hwang Wins Research Project from Libya," *Korea Herald*, February 27, 2011, <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20110227000366>.

<sup>48</sup>David Wilkes and Lucy Laing, "Woman, 57, Gives Birth to Her Own Grandson," *Daily Mail Online*, February 25, 2011, <http://www.dailymail.co.uk/news/article-1360791/Grandmother-Pamela-Butler-gives-birth-grandson.html>.

<sup>49</sup>The author was a consultant in this case. For further background, see William Saunders' Winter 2009 "Washington Insider," <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=89>. The ECHR judgment, ECHR 2032 (December 16, 2010), is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=878721&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>50</sup>Many pro-life groups filed amicus briefs in the case. See Joint Written Observations of Third Party Interveners, November 14, 2008, *A, B, and C v. Ireland*, 25579/05 Eur. Ct. H.R., <http://www.aul.org/wp-content/uploads/2010/07/joint-observations.pdf>.

<sup>51</sup>*Shanbaug v. Union of India*, Writ Petition (Criminal) No. 115 of 2009 (Supreme Court of India, March 7, 2011), [supremecourtfindia.nic.in/outtoday/wr1152009.pdf](http://supremecourtfindia.nic.in/outtoday/wr1152009.pdf).

On March 11, the United Kingdom's Human Fertilisation and Embryology Authority (HFEA) announced a scientific review of an experimental IVF procedure involving a "three-parent" embryo.<sup>52</sup> The procedure is intended to prevent a woman from passing on medical conditions related to defective mitochondria. It involves removing the two pronuclei (which contain the DNA from the sperm and the egg) from the woman's fertilized egg and thus leaving behind the defective mitochondria. These pronuclei are then placed into a donor's fertilized egg whose pronuclei have already been removed. The resulting embryo thus contains pronuclei from one man and woman and mitochondria from a second woman. The IVF procedure has worked on monkeys. The HFEA will deliver a report in 2012 on whether the United Kingdom should allow this technique in human beings.<sup>53</sup>

### State Developments

Gruesome reports of unsanitary clinic conditions and the January 19, 2011, arrest of a Philadelphia clinic's abortionist on murder charges underscore the need for stringent medical regulations for abortion clinics and effective enforcement of such regulations.<sup>54</sup> Despite state laws requiring facility and personnel standards and inspection of facilities that perform abortions, and despite numerous complaints against the abortionist, Dr. Kermit Gosnell, state health officials had not inspected the clinic since 1993.<sup>55</sup> A grand jury reported that Gosnell regularly performed illegal late-term abortions, frequently delivering babies alive and then killing them by cutting their spinal cords with scissors.

Other unsafe abortion clinics are currently operating across the nation. Some states lack medically appropriate regulations for abortion clinics.<sup>56</sup> In other states, enforcement of existing safety standards by state health officials is inadequate. These

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<sup>52</sup>The agency's announcement is available at <http://www.hfea.gov.uk/6372.html>.

<sup>53</sup>See John Travis, "UK Review Launched for 'Three-Parent' IVF Technique," *ScienceInsider*, March 11, 2011, <http://news.sciencemag.org/scienceinsider/2011/03/uk-review-launched-for-three-par.html>.

<sup>54</sup>Linsey Davis and Seniboye Tienabeso, "Philadelphia Abortion Doctor Accused of Killing Babies with Scissors, Charged with 8 Murders," ABC News, January 19, 2011, <http://abcnews.go.com/Health/philadelphia-abortion-doctor-accused-killing-babies-scissors-charged/story?id=12649868>.

<sup>55</sup>Pennsylvania laws require state health officials to inspect and approve any medical facility in which an abortion is provided (28 Pa. Code § 29.43(a)), and require all abortion facilities to meet state-mandated requirements concerning administration, professional qualifications, patient testing, and physical plant (28 Pa. Code § 29.33, 38).

<sup>56</sup>Americans United for Life provides model legislation for abortion clinic regulation: (a) the Abortion Patient's Enhanced Safety Act, which requires abortion clinics to be licensed as and to meet the same standards as ambulatory surgical centers, <http://aul.org/wp-content/uploads/2009/11/Abortion-Patients-Enhanced-Safety-Act-2010-LG.pdf>; and (b) the "Woman's Health Protection Act," which codifies the abortion industry's own internal standards—standards that have withstood multiple legal challenges over the last decade, available at <http://www.aul.org/wp-content/uploads/2010/12/Abortion-Clinic-Regulations-2011-LG.pdf>.

tasks remain serious challenges, because the Supreme Court has empowered federal courts and attorneys for abortionists to thwart efforts of state health officials to regulate abortion clinics.<sup>57</sup> As a result of the Court's mistaken view in *Roe v. Wade* that abortion has few medical risks, and the Court's prohibitions against state regulation of abortion in the first trimester, subsequent court decisions over the decades have invalidated numerous efforts by state health officials to regulate abortion. In addition, lawyers for abortionists who succeed in getting clinic regulations struck down receive attorneys' fees from state tax funds under the Civil Rights Attorneys Fee Act of 1976, which creates a significant disincentive for state health officials to regulate clinics.

In historic legislation intended to ensure better health and safety standards, the Commonwealth of Virginia General Assembly voted to adopt regulations for abortion clinics that perform five or more first-trimester abortions per month. The measure passed with a tie-breaking vote cast by Virginia's lieutenant governor Bill Bolling (R) on February 24.<sup>58</sup>

Following the Montana Supreme Court's decision in 2009 that effectively legalized assisted suicide, the Montana legislature tabled an attempt in February 2011 to introduce a bill that would have adopted regulations for its practice.<sup>59</sup>

On January 28, a federal court found the Baltimore regulations that forced pregnancy centers to put signs in English and Spanish saying that they did not refer

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<sup>57</sup>For background on how the Supreme Court contributed to making the abortion industry the least regulated in America, see Clarke Forsythe, "The Supreme Court's Back Alley Runs through Philadelphia," *Weekly Standard*, January 24, 2011, [http://www.weeklystandard.com/blogs/supreme-court-s-back-alley-runs-through-philadelphia\\_536984.html?nopager=1](http://www.weeklystandard.com/blogs/supreme-court-s-back-alley-runs-through-philadelphia_536984.html?nopager=1).

<sup>58</sup>*Washington Post* editors, "Va. Passes Abortion Clinic Regulations," *Washington Post*, February 24, 2011, <http://voices.washingtonpost.com/local-breaking-news/virginia/va-passes-abortion-clinic-regu.html>.

<sup>59</sup>*Baxter v Montana*, 2009 MT 449 (Mont. 2009), <http://fnwebl.isd.doa.state.int.us/idmws/docContent.dll?Library=CISDOCSVRO1>. The Montana Supreme Court did not determine whether the Montana constitution guarantees a right to assisted suicide, but it held that nothing in state law or precedent prevents it. For analysis of the court's decision, the first instance of a court, not the legislature, changing law to legalize assisted suicide, see William L. Saunders Jr., "The Montana Supreme Court Legalizes Assisted Suicide," *Engage* 11.2 (August 31, 2010), [http://www.fed-soc.org/publications/pubid.1959/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1959/pub_detail.asp). Americans United for Life filed an amicus brief in the Montana Supreme Court on behalf of a bipartisan coalition of twenty-eight Montana legislators, arguing that the district court failed to give proper weight to the unanimous decisions in other courts' finding there is no right to assisted suicide. AUL argued that the state has a compelling interest in protecting the vulnerable and disabled in the state, and that the state's prohibition of assisted suicide under its homicide statutes serves that interest. AUL's brief is available at <http://www.aul.org/auls-amicus-curiae-brief-baxter-v-montana-2009/>. See also Associated Press, "Montana Lawmakers Put Physician-Assisted Suicide Issue on Hold," *Billings Gazette*, February 20, 2011, [http://billingsgazette.com/news/state-and-regional/montana/article\\_a35791fe-3d00-11e0-bff3-001cc4c002e0.html](http://billingsgazette.com/news/state-and-regional/montana/article_a35791fe-3d00-11e0-bff3-001cc4c002e0.html).

for abortion or birth control to be a violation of the First Amendment.<sup>60</sup> Judge Marvin J. Garbis determined that the pregnancy centers were targeted because of their position on abortion, which is impermissible viewpoint discrimination. On March 15, in a second federal court case in Maryland, Judge Deborah Chasanow upheld a Montgomery County ordinance requiring “limited-service pregnancy centers” to post a sign stating that a licensed medical professional is not on staff, but she enjoined an additional provision that requires the statement, “The Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.” There is no county policy requiring pro-abortion facilities, such as Planned Parenthood, to provide similar notification when women visit and do not receive medical services.<sup>61</sup>

However, in New York City, the City Council passed regulations on March 2 that force pregnancy care centers to post written statements and give oral statements saying that they do not provide abortions or contraception.<sup>62</sup> Approved by a vote of 39 to 9 (with 1 abstention), the law requires pregnancy care centers to post whether or not a medical provider is on site.<sup>63</sup> It also establishes a private right of action for aggrieved persons. This comes at a time when New York City’s municipal offices report that 41 percent of all pregnancies and 60 percent of pregnancies of African-American women in the city end in abortion.<sup>64</sup>

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<sup>60</sup>Mary Gail Hare, “Judge Rules Pregnancy Center Ordinance Unconstitutional,” *Baltimore Sun*, January 29, 2011, [http://articles.baltimoresun.com/2011-01-29/news/bs-md-co-archdiocese-upheld-20110128\\_1\\_pregnancy-centers-ordinance-abortion-or-birth-control](http://articles.baltimoresun.com/2011-01-29/news/bs-md-co-archdiocese-upheld-20110128_1_pregnancy-centers-ordinance-abortion-or-birth-control). The decision in *O’Brien v. City of Baltimore*, 2011 U.S. Dist. LEXIS 17072 (January 28, 2011), is available at <http://www.scribd.com/doc/48045316/O-Brien-v-Baltimore-Opinion>.

<sup>61</sup>*Centro Tepeyac v. Montgomery County*, 2011 U.S. Dist. LEXIS 26532 (March 15, 2011).

<sup>62</sup>New York City Council, Law 2011/017 (Int. 371) (March 16, 2011), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=371>.

<sup>63</sup>Details of the vote are available at <http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=138743&GUID=D637B12C-E3F2-4516-9B92-AA47353FC839&Options=&Search=#>.

<sup>64</sup>New York City Department of Health and Mental Hygiene, *Summary of Vital Statistics: 2009*, December 2010, <http://www.nyc.gov/html/doh/html/vs/vs.shtml>.