



National Developments

Health Care Reform: Conscience Protection

August 2011 witnessed a highly significant development in the implementation of the health care reform law. This development, unless reversed, heralds a decisive change for many Americans, and in particular Catholic institutions and individuals. Further, it continues the trend by the Obama administration to restrict protection for freedom of conscience.

This far-reaching development came not from Congress or the courts but from a federal agency.

The Patient Protection and Affordable Care Act (PPACA), enacted in March 2010, requires all insurance plans (except those that were “grandfathered” on the date of the law’s enactment) to provide full coverage for “preventive services” for women.¹ However, Congress did not spell out in the statute the items and services that are included in its mandate. Rather, it delegated that determination to the Health Resources Services Administration (HRSA), an agency under the Department of Health and Human Services (HHS).

On July 19, 2010, HHS issued an interim final rule for group health plans and health insurance issuers relating to coverage of preventive services under the PPACA.² The regulation specified that HHS was developing guidelines on “evidence-

¹The Patient Protection and Affordable Care Act, Public Law 111-148, U.S. Statutes at Large 124 (2010): 119.

²“Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act,” *Federal Register* 75.137 (July 19, 2010): 41726, 41731 (codified at 45 C.F.R. 147), <http://www.gpo.gov/fdsys/pkg/FR-2010-07-19/pdf/2010-17242.pdf>.

informed preventive care and screening” for women that would be issued no later than August 1, 2011. The Institute of Medicine (IOM) was subsequently tasked with providing a recommendation on what those guidelines should include.

Following the recommendations issued in July of this year by the IOM—in its report on preventive health care for women—HRSA issued guidelines on “preventive services” for women that must be provided by nearly all insurance plans under the PPACA’s mandate.³ These services must be covered without cost-sharing, meaning that they must be *fully covered*, without requiring a copayment and without being subject to a deductible. Among the IOM’s recommendations are coverage of sterilizations and *all* “Food and Drug Administration (FDA)–approved contraceptives.” That recommendation includes drugs and devices with known life-ending mechanisms of action.

For example, the IOM recommendations, adopted by HRSA in its guidelines, mean that the abortion-inducing drug *ella* is now part of the health care coverage that *every American* will be forced to buy. Despite the fact that *ella*, a drug chemically similar to the FDA-approved “abortion drug” RU-486, can kill a human embryo even after implantation,⁴ the FDA has labeled the drug as emergency contraception. Thus, the “full-range of FDA approved contraceptives” includes *ella*.

Dr. Anthony Lo Sasso, an economist and a member of the IOM panel, dissented from the recommendations. Lo Sasso criticized the process for being subjective and hurried and for failing to undertake any analysis of the cost of its recommendations. He wrote, “The committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee’s composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy.”⁵

Despite this warning, HRSA adopted the IOM recommendations in full.

Subsequently, the Department of Health and Human Services (HHS) issued an amended regulation permitting HRSA to allow an exemption for “religious employers.”⁶ But note that *this exemption is defined so narrowly as to exclude almost*

³The IOM report, *Clinical Preventive Services for Women: Closing the Gaps* (Washington, DC: National Academies Press, 2011) is available at http://www.nap.edu/catalog.php?record_id=13181#toc. The HRSA guidelines are available at <http://www.hrsa.gov/womensguidelines/>.

⁴“The mechanism of action of ulipristal in human ovarian and endometrial tissue is identical to that of its parent compound mifepristone.” D. J. Harrison and J. G. Mitroka, “Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health,” *Annals of Pharmacotherapy* 45.1 (January 2011): 115–119.

⁵Dissenting opinion, *Clinical Preventive Services for Women*, 208, http://books.nap.edu/openbook.php?record_id=13181&page=208.

⁶The amended HHS regulation—“Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act,” *Federal Register* 76.149 (August 3, 2011): 46621–46625—is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-03/pdf/2011-19684.pdf>.

*all Catholic and faith-based health care providers, social service agencies, and educational institutions.*⁷

The exemption is limited to group health plans sponsored by “religious employers” and group health insurance coverage connected with those plans. “Religious employer” is defined in the regulation as follows:

A religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under Internal Revenue Code section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii). 45 C.F.R. §147.130(a)(1)(iv)(B).

First, it should be noted that even if the exception were broadly defined, the promulgation of the HRSA guidelines establishes that drugs and devices with life-ending mechanisms of action—such as *ella*—are *the norm* for “preventive care” for women. Such drugs and devices should never have been included in “preventive care,” which even the bill’s sponsor, Senator Barbara Mikulski (D-Md), acknowledged did not include abortion “in any way.”⁸

Second, the exception protects only insular religious employers and not those who serve people outside their faith. Importantly, it would exclude most Catholic hospitals, undermining the ability of Catholic and other faith-based health care systems to provide care. Further, perhaps unintentionally, it perpetuates the myth that institutional religion, in particular the hierarchy of the Catholic Church, is the sole source of pro-life moral conviction.⁹

⁷See, for example, the letter to HHS by the President of the Catholic University of America, John Garvey, published September 30 in the *Washington Post*, http://www.washingtonpost.com/opinions/hhss-birth-control-rules-intrude-on-catholic-values/2011/09/27/gIQA0j8s9K_story.html. Twenty leaders of national Catholic organizations signed a statement protesting the regulations as threats to religious freedom and access to health care and calling for conscience protections; see <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/open-letter-conscience-protection-11-10-11.pdf>.

⁸During the Senate floor debate, Sen. Mikulski stated, “This amendment does not cover abortion. Abortion has never been defined as a preventative service. . . . 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.

⁹From the beginning of the health care reform debates, pro-abortion proponents have claimed that the pro-life convictions are reducible to the positions of the hierarchy of Catholic Church, despite widespread public support to restrict taxpayer funding of abortion. See William Saunders, “The Pro-life Movement: More Than Just the Catholic Bishops,” *National Review Online*, November 16, 2009, <http://www.nationalreview.com/critical-condition/47876/pro-life-movement-more-just-catholic-bishops/william-saunders>.

HHS claimed its definition is “based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services.”

Such a limited exemption is far narrower than the exemptions of most states with contraceptive “mandates,” however.¹⁰ In addition, some states—such as Arkansas, Missouri, North Carolina, and Texas—exclude emergency contraceptives and/or abortifacients from their contraceptive mandates.

Moreover, the mandated coverage through the HRSA guidelines itself is far more coercive than any state mandate. Where states have mandated contraceptive coverage, employers have other options, although those options often come in the form of a tough choice either to drop prescription coverage or to self-insure. However, since the HRSA guidelines apply to all non-“grandfathered” insurance plans,¹¹ there is no other option.

Finally, the lack of exemption for non-religious employers denies conscience protection for non-religiously affiliated employers who nonetheless have legitimate ethical, moral, or even religious objections.

The HHS amendments to the regulations stated that HHS “will be accepting comments on this definition [of ‘religious employer’] as well as alternative definitions.” Comments were accepted for sixty days after the regulation was issued on August 1.¹²

HHS claimed that other notice and comment requirements of the Administrative Procedure Act (APA)—the act that governs the way federal agencies establish regulations—were either inapplicable or had been waived. Significantly, HHS claimed that its interim final rules of July 19, 2010, which did not include a specific mandate on “contraceptive” coverage, “provided the public with an opportunity to comment on the implementation of the preventive services requirements in this provision, and the amendments made in these interim final rules in fact are based on such public comments.”

¹⁰See National Catholic Bioethics Center, “State Contraceptive Mandates,” August 2010, <http://ncbcenter.org/document.doc?id=198>.

¹¹“Grandfathering” applies to plans in place by the date PPACA was signed, March 24, 2010. However, many changes to such plans can cause them to lose their “grandfathered” status. Bernadette Fernandez, “Grandfathered Health Plans under the Patient Protection and Affordable Care Act,” Congressional Research Service report R41166, June 7, 2010, <http://www.ncsl.org/documents/health/GrandfatheredPlans.pdf>. It is estimated that anywhere from 20 to 51 percent of small employers’ plans will retain their grandfathered status by 2013. Large employers’ plans are projected to retain their grandfathered status at a slightly higher rate: 36 to 66 percent through 2013. “Keeping the Health Plan You Have,” June 14, 2010, <http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html>.

¹²Americans United for Life and the National Catholic Bioethics Center were among many organizations submitting comments opposing the regulations. See <http://www.aul.org/aul-comment-to-hhs-on-preventive-services/> and <http://www.ncbcenter.org/www.ncbcenter.org/document.doc?id=209>; see also <http://www.freedom2care.org/learn/page/laws-obamacare-and-conscience>.

However, HHS mischaracterized the concerns of pro-life organizations that submitted comments to its previous interim final rule. While several pro-life organizations noted concerns about including abortifacients as a “preventive service,” HHS narrowly characterized the concerns, stating that “commenters expressed concerns that HRSA-supported guidelines . . . that included coverage of contraceptive services could impinge upon the religious freedom of certain religious employers.”¹³

The actions of HHS were challenged on substantive and procedural grounds in a letter from twenty-eight senators to HHS Secretary Kathleen Sebelius on October 6.¹⁴ Among other things, the letter states, “Ultimately our concern is with the lack of due consideration given by you and your Department to the adverse impact that IOM’s recommendations would have on our core constitutional value of religious liberty. . . . It is clear that [the ‘religious exemption’ in the regulations] falls far short of securing this constitutional right. . . . To address these concerns, we request that you redraft the [guidelines].” In addition, the senators requested that HHS turn over information, including “any correspondence . . . generated with respect to the decision to include contraceptive services (including abortifacient drugs) as part of preventive services,” any analysis of First Amendment implications that was considered, any correspondence regarding the definition of religious employer, the timeline for more specific guidance from HRSA, and any analysis of cost.

As a result of the HHS/HRSA rule, Congressional action is necessary to restore meaningful protection of rights of conscience.

One solution is offered through the Respect for Rights of Conscience Act, H.R. 1179 and S. 1467. The bill would amend the PPACA to ensure that mandates under the new health law will not undermine rights of conscience. Rep. Jeff Fortenberry (R-NE) introduced H.R. 1179 on March 17, 2011, and as of October 12, there were eighty-one cosponsors.¹⁵ On August 2, 2011, Sen. Roy Blunt (R-MO) introduced the companion bill in the Senate, S. 1467.¹⁶

Other Federal Legislation Related to Health Care

On October 13, the U.S. House of Representatives passed the Protect Life Act (H.R. 358) on a vote of 251 to 172. It would ensure that federal dollars will not be used to fund abortions and would provide clear federal conscience protections for health care providers.¹⁷

¹³HHS amended rule of August 3, 2011.

¹⁴The letter is available at http://johanns.senate.gov/public/?a=Files.Serve&File_id=063f9f8c-2518-49bd-8141-a96caf224639.

¹⁵The text of H.R. 1179 is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1179>.

¹⁶As of October 12, 2011, there were nineteen co-sponsors. The text of S. 1467 is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.1467.IS>.

¹⁷The Protect Life Act replaces the PPACA’s accounting gimmick in the state insurance exchanges (which the PPACA requires be in place by 2014) with the principles of the Hyde amendment. In line with the decades-old restriction of the Hyde amendment—which applies to Medicaid—the Protect Life Act prohibits “funds authorized or appropriated” by

H.R. 452, introduced by Rep. Phil Roe (R-TN) in January 2011, would repeal the Independent Payment Advisory Board (IPAB) authorized by the PPACA (secs. 3403 and 10320).¹⁸ Beginning in 2015, the fifteen-member board will decide what treatments medical providers can offer, even for patients who are willing to pay for other treatments, based on the board's determinations of what is efficient. This means that when PPACA is fully implemented, the IPAB—an unelected entity—will have the power to effectively ration health care through price controls. Doing so could raise pro-life concerns, particularly with end-of-life issues. The bill to eliminate the IPAB board has steadily gained support and has 208 co-sponsors as of October 12, 2011, only twelve shy of a simple majority (since the bill will only need 218 votes to pass in the House).

Other Federal Legislation Related to Life Issues

On September 16, President Obama signed the America Invents Act, H.R. 1249. Significantly, the law now includes a ban on the patenting of human embryos.¹⁹ While the same ban had been in place since 2004 through a pro-life rider to the annual appropriations bill for the Commerce, Justice and State Departments, it was subject to yearly renewal.²⁰ Now, as a part of permanent law, it will take an act of Congress to reverse this pro-life measure.

In June, the Child Interstate Abortion Notification Act (CIANA) was introduced in both the House and the Senate: H.R. 2299 (Rep. Ros-Lehtinen, R-FL; 107 cosponsors) and S. 1241 (Sen. Rubio, R-FL; 30 cosponsors). This act would make it a crime for an adult to transport a minor across state lines to obtain an abortion in contravention of her state's parental involvement laws. CIANA also permits parents of a minor to bring a civil action against an adult who violates this act. The act would create criminal and civil penalties for any physician who knowingly performs an

the PPACA from being used “to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion,” with exceptions for rape, incest, and the life of the mother. The Protect Life Act applies to all of the PPACA's funding, which is important because multiple funding streams created through the PPACA lack statutory restrictions on the use of their funds *directly* for abortion. Such funding streams include the \$9.5 billion appropriated for community health centers (CHCs) and funds appropriated through the “high-risk pools.” By writing the restriction into law, the Protect Life Act safeguards against a court ruling ordering that abortion must be funded, and does not make prohibition of abortion funding depend on administrative rulings and agency interpretations, which are subject to change. The text of H.R. 452 is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.452>.

¹⁸ The text of H.R. 452 is available at <http://thomas.loc.gov/cgi-bin/query/?c112:H.R.452>.

¹⁹ The ban appears in sec. 33 of the act, which is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1249enr/pdf/BILLS-112hr1249enr.pdf>.

²⁰ The Patent and Trademark Office had in place an informal policy against the patenting of human beings since 1987. The Weldon Patent Ban prohibited the Patent and Trademark Office from issuing patents that are “directed to or encompassing a human organism.” This language is now in sec. 33 of the new law.

abortion on a minor in violation of the act, and would require a physician to give notice to parents before performing an abortion on a minor from another state.

Defunding Abortion and Its Providers

The House passed the No Taxpayer Funding of Abortion Act (H.R. 3) on May 4, 2011, which would establish a permanent government-wide prohibition on federal funding for abortion and abortion coverage. Passage of a corresponding Senate bill remains stalled, with prospects of a presidential veto virtually guaranteed. Without passage, pro-life legislators continue to face yearly battles to enact separately a series of abortion funding restrictions through appropriations riders (such as the Hyde amendment), regulations that can be overturned by new administrations and by executive orders that exist at the will of the president.

Although some committees in the House and Senate have produced appropriations bills, it is unlikely that these bills will be passed by Congress. Rather, appropriations for the 2012 fiscal year will probably be handled through a continuing resolution (or series of continuing resolutions) or an omnibus appropriations bill. A continuing resolution would carry forward existing pro-life riders, but with an omnibus, pro-life groups will have to be vigilant to see that existing pro-life riders are maintained.

On July 7, Americans United for Life (AUL) issued an in-depth report documenting the known and alleged abuses by Planned Parenthood affiliates across the nation.²¹ The AUL report provides a substantial basis for Congress to investigate and hold hearings about Planned Parenthood's institutional policies and practices and its use of federal funds. The AUL report outlines specific questions for Congress to ask, aimed at uncovering the depths of Planned Parenthood's abuses. Among the documented abuses are misuse of federal health care and family planning funds, failure to report child sexual abuse, failure to comply with parental involvement laws, an apparent willingness to assist an alleged pimp or sex trafficker, dangerous misuse of the abortion drug RU-486, and misinformation about so-called emergency contraception, including *ella*.

On September 15, the House Energy and Commerce Committee initiated an investigation of Planned Parenthood, requesting documentation including internal audits and details about institutional policies. Rep. Cliff Stearns (R-FL), chairman of the Committee's Subcommittee on Oversight and Investigations, wrote, "The committee has questions about the policies in place and actions undertaken by PPFA and its affiliates relating to its use of federal funding and its compliance with federal restrictions on the funding of abortions."²² Planned Parenthood retained legal counsel and obtained a two-week extension for submission of the requested materials.

²¹ AUL's report, "The Case for Investigating Planned Parenthood: AUL Looks Behind the Closed Doors of the Nation's Largest Abortion Provider," is available at http://www.aul.org/wp-content/uploads/2011/07/PPReport_FULL.pdf.

²² The letter is available at <http://republicans.energycommerce.house.gov/Media/file/Letters/091511%20Stearns%20to%20Planned%20Parenthood.pdf>.

Embryonic Stem Cell Litigation and Legislation

On July 27, Judge Royce Lamberth, though he had initially granted an injunction against regulations from the Obama administration permitting federal funds for research involving the destruction of a human embryo, dismissed *Sherley v. Sebelius*.²³ (Judge Lamberth's ruling followed the April decision by the court of appeals to vacate his ruling granting the injunction.) However, on September 19, the plaintiffs in the case filed an appeal. Unless the court of appeals reverses Judge Lamberth's dismissal of the case (which is highly unlikely), the use of taxpayer dollars for such research will proceed unimpeded, despite the existence of the Dickey-Wicker amendment,²⁴ which bans the use of federal funds for research in which a human embryo is destroyed.

On September 15, Congressmen Dan Lipinski (D-IL) and Randy Forbes (R-VA) introduced the Patients First Act, H.R. 2951.²⁵ The bill prioritizes existing federal funding to support research that shows evidence of providing treatments for patients and is not based on the destruction of a human embryo.

Presidential Commission for the Study of Bioethical Issues

On September 13, the Presidential Commission for the Study of Bioethical Issues released its report on medical experiments surreptitiously performed by American public health doctors on Guatemalan citizens during the 1940s.²⁶ The report traces the history of how, with the permission of local authorities, American doctors deliberately infected hundreds of unknowing Guatemalan prisoners, mental health patients, prostitutes, and soldiers with sexually transmitted diseases in order to observe the course of the illnesses and to test the effectiveness of penicillin in some of the patients. (Some were not treated.) The report found "gross violations of ethics" on the part of the researchers. The commission's next report, due in December 2011, will provide contemporary guidelines to ensure protection of human research participants. Although the commission should do so, it is not likely to suggest protecting embryonic human beings. If that is the case, the commission will miss the essential lesson of the Guatemalan study: all human beings should be treated ethically.

²³For extensive analysis of the *Sherley v. Sebelius* case, see Richard Doerflinger's Spring 2011 "Washington Insider" at <http://www.ncbcenter.org/NetCommunity/Document.Doc?id=173>.

²⁴The Dickey-Wicker amendment, an appropriations rider first enacted in 1996, provides that "(a) none of the funds made available in this Act may be used for—(1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero." Consolidated Appropriations Bill 2010, sec. 509(a)(2), *U.S. Statutes at Large* 123 (December 16, 2010): 3280–3281.

²⁵The text of the bill is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2951:>.

²⁶The commission's report, *Ethically Impossible: STD Research in Guatemala from 1946-1953*, is available at http://www.bioethics.gov/cms/sites/default/files/Ethically-Impossible_PCSBI.pdf.

State Developments

Defunding Planned Parenthood and Other Abortion Providers

Eliminating the direct use of taxpayer funds for abortions and abortion coverage does not prevent taxpayer funds from indirectly subsidizing abortions. Recognizing that all funds are fungible, several state legislatures recently took the bolder step of limiting federal and/or state funds from going to abortion providers.

In May, Indiana became the first state in the nation to prohibit health care contracts with and grants to any entity that performs abortions or operates a facility where abortions are performed.²⁷ The Indiana law affects state funds and federal funds administered by the state, including Medicaid funding for family planning programs. Planned Parenthood, whose affiliates in Indiana receive Medicaid and other pass-through federal funds, filed suit against the State of Indiana, arguing that federal law preempts state determination of “qualified” providers. (The Medicaid law requires that patients have a “free choice” of qualified providers.) In addition to the Planned Parenthood–initiated lawsuit, the Obama administration threatened to withhold all Medicaid funding to the state. In June, U.S. District Judge Tanya Walton Pratt granted the preliminary injunction requested by Planned Parenthood. The State of Indiana filed an appeal in the Seventh Circuit Court of Appeals, seeking to have the injunction overturned while the lawsuit continues.

In late May, Kansas passed legislation to prioritize what types of organizations can receive certain funding, and thus redirected approximately \$330,000 in Title X family planning funding to full-services health clinics and away from Planned Parenthood. Planned Parenthood filed for a temporary injunction, which was granted on August 1, 2011. Judge J. Thomas Marten ordered Kansas to restore funding for Planned Parenthood while the case is being appealed.²⁸

On June 15, the North Carolina legislature overrode the North Carolina governor’s veto of the legislature’s decision to cease funding of abortion businesses. (Federal funds for Medicaid are not affected by the new law.) Planned Parenthood challenged the law in court, and secured a preliminary injunction on August 19.²⁹

The Wisconsin legislature passed a budget on June 16 that redirects \$1 million in state and federal family planning funds away from Planned Parenthood of Wisconsin, the state’s largest abortion provider.³⁰

²⁷The Indiana statute, HEA 1210, provides, “An agency of the state may not: (1) enter into a contract with; or (2) make a grant to; any entity that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state.” The text of the bill is available at <http://www.in.gov/legislative/bills/2011/HE/HE1210.1.html>.

²⁸“Kansas Ordered to Resume Funding Planned Parenthood,” wibw.com, August 30, 2011, http://www.wibw.com/localnews/headlines/Kan_ordered_to_resume_funding_Planned_Parenthood_128709768.html.

²⁹“Judge Blocks Planned Parenthood Cut,” CBS News, August 19, 2011, <http://www.cbsnews.com/stories/2011/08/19/national/main20094874.shtml>

³⁰Christine Roberts, “Wisconsin to Defund Planned Parenthood,” *NY Daily News*, June 22, 2011, http://articles.nydailynews.com/2011-06-22/news/29710723_1_budget-cuts-abortion-provider-health-care.

In New Jersey, on July 11, the state Senate failed to override Governor Chris Christie's line-item veto of the \$7.5 million appropriation for women's health and family planning services, much of which would have gone to Planned Parenthood.³¹ This action followed an earlier failed attempt in May by state Senate Democrats to override the veto.

Following a vote on July 1 by the Executive Council in New Hampshire to cancel a \$1.8 million contract between the state and Planned Parenthood, Planned Parenthood announced it might have to close one or more of the six centers it runs there. However, the Obama administration announced that it will provide the contract directly rather than route the money through the state.³²

In Texas, several amendments were added to the budget to cut an estimated \$64 million from the abortion industry, which represents a 37 percent decline in funding for Planned Parenthood.³³

Attacking Pregnancy Care Centers through Speech Control

An anti-life trend that has been gaining a certain amount of momentum around the country is the passage, by local political bodies, of speech restrictions on pregnancy care centers.³⁴ For instance, on August 2, a bill was introduced before San Francisco's Board of Supervisors to mandate content of pregnancy center ads. In addition, the city attorney wrote a letter to a San Francisco pregnancy center stating that the centers must state that they do not provide or refer for abortions.³⁵

Such tactics have been tried in other jurisdictions and been found wanting under the First Amendment's guarantee of freedom of speech. In Baltimore, for example, an ordinance mandating that pregnancy care centers post signs as to services they do not offer (i.e., abortion and birth control) was held, by the federal district court, to be unconstitutional, and the city has appealed that ruling to the Fourth Circuit.³⁶

³¹<http://www.lifenews.com/2011/07/11/new-jersey-christie-veto-of-planned-parenthood-tax-funds-upheld/>.

³²Karen Langley, "Planned Parenthood Gets Contract," *Concord Monitor*, September 14, 2011, <http://www.cbsnews.com/stories/2011/08/19/national/main20094874.shtml>.

³³Steven Ertelt, "Planned Parenthood Could Lose \$64 Million in Texas De-Funding," *LifeNews.com*, July 22, 2011, <http://www.lifenews.com/2011/07/22/planned-parenthood-could-lose-64-million-in-texas-de-funding/>.

³⁴For more background on the cases, see William Saunders' Summer 2011 "Washington Insider" under "State Developments," <http://www.ncbcenter.org/document.doc?id=187>.

³⁵Jesse McKinley, "Politicians Open Front on Abortion in Bay Area," *New York Times*, August 2, 2011, <http://www.nytimes.com/2011/08/03/us/03abort.html>. The San Francisco municipal department's press release is available at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=865>.

³⁶AUL's amicus brief on behalf of Care Net, Heartbeat International, the National Institute of Family and Life Advocates, and pregnancy care centers in Maryland is available at <http://www.aul.org/wp-content/uploads/2011/06/11-1111-Greater-Baltimore-Center-v-Mayor-and-City-Council-of-Baltimore-PCC-amicus-brief.pdf>. In March 2011, in another Maryland case, a federal court preliminarily enjoined enforcement of part of a similar Montgomery County ordinance, *Centro Tepeyac v. Montgomery County*, no. 10-1259, 1 WL 915348 (D. Md. Mar. 15, 2011).

Two cases challenging a similar (though more onerous) ordinance in New York City were filed—and then consolidated—in the Southern District of New York. On July 13, the district court entered an injunction against the ordinance, and the city subsequently filed a notice of appeal to the Second Circuit.³⁷

Following on the heels of these successful challenges to speech control, local pregnancy care centers filed suit on October 6 against another similar ordinance in Austin, Texas.³⁸

International

In July, the Lower House of the Polish Parliament cast an initial vote, 254 to 151, to ban all abortions.³⁹ Currently Polish law permits some exceptions, including for cases related to rape, incest, fetal abnormality, and maternal health.

A comprehensive ban on abortion would protect Poland from the threat of supra-national tribunals imposing abortion on Poland, one of the most pro-life countries in Europe. On August 31, the legislature rejected the bill by a very narrow margin,⁴⁰ while on the same day, the Lower House overwhelmingly defeated a new bill that would have *expanded* abortion-on-demand. The defeat of the ban was a bit of a surprise, since grassroots pro-life supporters had secured six hundred thousand signatures in two weeks to support the proposed abortion ban. However, it seems likely this issue will play a significant role in the Polish parliamentary elections on October 9.⁴¹

On October 6, the San Jose Articles were publicly released at the United Nations headquarters.⁴² Issued by a team of twenty-nine lawyers and law professors, including the author, it rebuts the argument that there is any requirement under international law to abortion, citing established principles of law and science. As the San Jose Articles make clear, Poland is fully free to ban all abortions. Indeed, given the tendency of international courts and “treaty monitoring bodies” to pressure nations,

³⁷New York City ordinance 2011/017, enacted March 16, 2011, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92>.

³⁸Nick Hadjigeorge, “City Faces Legal Action over Abortion Clinic Signage,” October 11, 2011, <http://www.dailytexanonline.com/news/2011/10/11/city-faces-legal-action-over-abortion-clinic-signage>.

³⁹Thomas Kolasa and Alice Trudelle, “Bill for Total Ban on Abortion Gains Momentum,” *Warsaw Business Journal*, July 6, 2011, <http://www.wbj.pl/article-55241-bill-for-total-abortion-ban-gains-momentum.html>.

⁴⁰Jeremy Kryn, “Historic Polish Ban on All Abortions Fails by a Razor-Thin Margin,” *LifeSiteNews.com*, August 31, 2011, <http://www.lifesitenews.com/news/breaking-historic-polish-ban-on-all-abortions-fails-by-razor-thin-margin/>.

⁴¹Dave Bohon, “Polish Abortion Ban Defeated; Pro-Life Leaders Optimistic,” *New American*, September 13, 2011, <http://thenewamerican.com/world-mainmenu-26/europe-mainmenu-35/8963-polish-abortion-ban-defeated-pro-life-leaders-optimistic/>.

⁴²For more information, see <http://www.sanjosearticles.org>.

such as Ireland, to change their domestic laws restricting abortion, this may be the only sensible course for a pro-life country to take.⁴³

On September 28, the Mexican Supreme Court upheld a provision of the Mexican state of Baja California's constitution that says that life begins at conception.⁴⁴ After the Federal District (the political subdivision surrounding the capital city) legalized abortion in 2007, many Mexican states began amending their state constitutions to protect life, expressly recognizing protection from the moment of conception.⁴⁵ There is a case involving a similar pro-life amendment in the state of San Luis Potosi. However, it is unlikely that the court will reach a different decision in that case. There are currently eighteen Mexican states with similar pro-life protections in their constitutions.

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⁴³For background on how international courts pressure nations to change their abortion laws, see discussion of the *ABC v. Ireland* case in the Winter 2009 "Washington Insider," 651–652, <http://www.nbccenter.org/document.doc?id=89>. See also Stephen Ertelt, "UN Committee Against Torture Blasts Ireland's Pro-life Laws," LifeNews.com, September 23, 2011, <http://www.lifenews.com/2011/09/23/un-committee-against-torture-blasts-irelands-pro-life-laws/>.

⁴⁴Ken Ellingwood, "Mexico: Court Upholds Provision Saying Life Begins at Conception," *Los Angeles Times*, September 28, 2011, http://latimesblogs.latimes.com/world_now/2011/09/mexico-legalize-abortion-supreme-court-baja-california-state-constitution.html. It should be noted that the pro-life provision was upheld because eight votes were needed to overturn it. The vote to overturn it was 7 to 4; thus, the provision was sustained by one vote.

⁴⁵This is explained in great detail in the Mexican country report in *Defending the Human Right to Life in Latin America*, a comprehensive analysis of the pro-life laws throughout Central and South America, which will be published by Americans United for Life in December 2011.