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Attacking Religious Freedom and Conscience Rights for Women and Men

The "Protect Women's Health From Corporate Interference Act of 2014" (S. 2578)

Cast as a response to the Supreme Court's narrow decision in *Burwell* v. *Hobby Lobby*, S. 2578 actually ranges far beyond that decision, potentially attacking *all* federal laws protecting conscience rights. Its passage would mark the first time in history that Congress has acted specifically to *reduce* Americans' religious freedom.

- **S. 2578 curtails RFRA, despite claims to the contrary**. Finding #19 says the bill is "intended to be consistent with the Congressional intent in enacting the Religious Freedom and [sic] Restoration Act of 1993 (Public Law 103-141)." Yet its immediate purpose is to impose the HHS mandate on religious believers in ways that the Supreme Court says *violate* the Religious Freedom Restoration Act (RFRA). The text of the bill specifically mandates that its new policy will prevail "notwithstanding" RFRA (Sec. 4 (b)). No such statement would be needed if the two laws were compatible. As regards items the federal government may require in health coverage, S. 2578 nullifies RFRA, which was passed by Congress almost unanimously and signed into law by President Clinton.

- **The new policy overrides other federal conscience protections, not just RFRA**. The bill appears to override "*any* other provision of Federal law" that may protect religious freedom or conscience rights (Sec. 4 (b)). Among the provisions potentially negated are longstanding conscience clauses on abortion such as the Hyde-Weldon amendment, included in every Labor/HHS appropriations bill since 2004.

- **Applies to all present and future coverage mandates, not just contraception**. The bill's rollback of federal conscience protection applies to *any* "specific health care item or service" mandated by "*any* provision of Federal law or the regulations promulgated thereunder" (Sec. 4 (a)). The "contraceptive" mandate already covers some items that can act as abortifacients (e.g., "Ella," a close analogue to the abortion pill RU-486). If the executive branch later chose to add RU-486 itself, or even elective surgical abortion, including late-term abortion, to the list of "preventive services," those who object to providing *or purchasing* such coverage seem to have no recourse from this absolute mandate under RFRA or "any other provision of Federal law." Moreover, Sec. 4 (a) of the bill cites the "preventive services" mandate created by the Affordable Care Act (ACA), codified as Sec. 2713 of the Public Health Service Act (PHSA), as one source for such mandates. This is alarming for two reasons. First, Sec. 2713 is open-ended, giving HHS broad authority to define the list of services without further congressional action. Second, while ACA has a provision saying that the Act cannot require a qualified health plan to include abortion "as part of its essential health benefits" (Sec. 1303 (b)(1)(A)), that provision does not mention the distinct mandate for "preventive services" created under Sec. 2713 of the PHSA. Of course, if Sec. 1303 (b)(1)(A) is also seen as one of the "other provision[s] of Federal law" that must yield to any new coverage mandate under Sec. 4 (b) of the new bill, its protection against mandating abortion as an "essential health benefit" would fall as well.

- **Applies to all employers, not just closely held for-profits**. While the *Hobby Lobby* decision covered only closely held corporations such as family businesses, this bill covers "employers" without limitation—nonprofit or for-profit, publicly held and closely held, even sole proprietors.

- **Covers employees, their minor dependents, individuals purchasing coverage on the health exchanges, and other stakeholders, not just employers**. The bill denies religious freedom rights not only to employers, but also to employees, employee organizations, insurers, individuals and families. No stakeholder in a group *or* individual health plan may opt out of any new mandate created under the PHSA (Sec. 4 (a)). A mother who objects to her health plan's federally mandated coverage of, for example, sterilization or abortion for her minor daughter, would have no recourse in federal law (Sec. 4 (b)). The bill specifically forbids excluding mandated benefits from the coverage of a "covered dependent" such as a minor child. No one's freedom is respected here, except that of the government itself.

- **Retains bad regulations by statute, allowing a change only if it makes them even worse.** The only limits on mandatory coverage that the bill leaves in place are the HHS mandate's own extremely narrow exemption for "houses of worship" and its controversial "accommodation" for religious nonprofits. These apply only to the contraception mandate. And the executive branch may modify them only if the change is "consistent with the purpose and findings of this Act" (Sec. 4 (c)). Since the Purpose (Sec. 2) and Findings (Sec. 3) press for the maximum scope for coverage mandates across all health plans, it seems even these inadequate clauses can only be *restricted*, not expanded, in the future.

- **Encourages employers to drop coverage through draconian penalties**. Reducing religious freedom protection targets employers who now gladly provide generous coverage, but who object in conscience to a "specific health care item or service." These employers are pressured to simply drop coverage and endure the far smaller financial penalty for offering no health coverage at all. S. 2578 specifically codifies all three possible avenues for enforcement and punishment previously identified by the Congressional Research Service for those who do not comply with the HHS mandate, including the notorious fine against employers of $100 a day ($36,500 a year) *per individual affected* (Sec. 4 (d)). The penalty for following one's faith is over *18 times* the fine of $2,000 a year for not offering any employer coverage at all. This Act decides, on employees' behalf, that they are better off with no coverage at all than with excellent coverage that excludes one abortifacient drug, even if they did not want that drug. This bill not only attacks religious freedom, but also shows little interest in maintaining or expanding basic health coverage for employees.

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