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Making Health Care Reform “Abortion Neutral”: What is the Legal Status Quo on Abortion?

Abortion advocacy groups want to use health care reform to advance their agenda. They want Congress or a federal commission to establish abortion as a “basic” or “essential” health benefit, subsidize it with federal taxpayer funds, and guarantee ready “access” to abortion nationwide. They claim that pro-life advocates also want to use this legislation to advance the pro-life cause, rescinding options on abortion coverage that existed before.

What are the facts? What does federal law say about abortion, abortion coverage and funding, and conscience rights? *If health care reform were “abortion neutral,” simply preserving the status quo, what policies would it have to reflect and/or keep intact?*

Status of Abortion

- The U.S. Supreme Court’s abortion decisions treat abortion as a “right” in the negative sense – that is, government may not prohibit or place an “undue burden” on a woman’s decision whether to have an abortion before viability. However, the Court has upheld a federal ban throughout pregnancy of a particular abortion procedure known as “partial-birth abortion.” Likewise, the Court has held that government may regulate abortion throughout pregnancy and may “encourage childbirth over abortion,” by, among other things, prohibiting use of public funds, personnel and facilities for abortion.

Abortion Coverage and Funding

- Beginning with the Hyde amendment in 1976, Congress has barred federal funding of abortion in all major health programs for over three decades. Generally such funding has been forbidden except when the mother’s life is endangered by a physical illness or condition, or in cases of rape or incest; these cases constitute a tiny fraction, perhaps 1%, of abortions. Beyond these exceptions, federal funds may not be used for abortion *or for any health benefits package that includes abortion*. Such funding is banned by riders to various appropriations bills, adopted year after year for decades. The laws governing military hospitals and the Children’s Health Insurance Program have their own permanent bans on abortion funding.

- The Federal Employees Health Benefits Program (FEHBP), often cited as a possible model for health care reform, is unique in helping to pay the premiums for hundreds of different private health plans, so federal employees may choose the plan that best suits their budgets and other needs. *Not one* of the benefits packages offered to federal employees in this program may include abortion beyond the Hyde exceptions.

Conscience Protection

- For decades, Congress has respected the right of health care providers to decline involvement in abortion or abortion referrals, *without exception*. Since 2004 the Weldon amendment, approved annually as part of the Labor/HHS appropriations act, has forbidden any federal agency or program (or state or local government receiving federal funds under the act) to discriminate against individual or institutional health care providers and insurers because they decline to perform, provide, pay for, provide coverage of, or refer for abortion. Programs such as Medicaid and Medicare, which fund the rare “Hyde exception” abortions, respect the conscience rights of providers who decline to provide any abortions at all. Other laws respect conscience rights on sterilization and other procedures to which providers may have a moral or religious objection. For a list of federal conscience laws see www.usccb.org/prolife/issues/abortion/crmay08.pdf.

Provision for State Laws

- Federal law also allows states to establish their own policies on abortion. Most states follow the federal policy against abortion funding; 46 states have laws protecting the conscience rights of individual health care providers on abortion,¹ and 43 also protect conscience rights for institutional providers.²

- Most states significantly regulate abortion. For example, 35 states have informed consent laws, usually accompanied by a waiting period; 43 have passed laws requiring parental involvement when minors seek abortions; 46 regulate abortion providers to protect women’s life and health.³

- Nine states prohibit *private* insurance plans from covering most abortions, unless the purchaser pays a separate premium to include it as an optional rider.⁴ No federal law, and no state, *requires* private health plans to include elective abortions.

Conclusion

Health care reform whose goal is to advance health coverage, not advance an agenda on abortion, will take care to be abortion neutral. It will preserve current policies that bar use of taxpayer funds, respect conscience rights, and generally encourage childbirth over abortion; it will not mandate abortion as part of any “basic” or minimum benefit package.

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¹ All states except AL, NH, VT & WV.

² All states except AL, CT, NH, NY, RI, VT & WV.

³ All states except NH, OR, VT & WV.

⁴ IL, MA, MS, NE, ND, PA, RI, SC & VA.