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Office of Public Health and Science
United States Department
of Health and Human Services
Attention: Rescission Proposal Comments
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 716G
Washington, DC 20201

Re: Comment on Conscience Rescission Proposal: *Proposed Rule 45 C.F.R. Part 88
Rescission of the Regulation Entitled "Ensuring That Department of Health and Human
Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in
Violation of Federal Law"*

Dear Office of Public Health and Science:

I write on behalf of the Alliance Defense Fund, a non-profit legal alliance devoted to protecting the sanctity of human life, religious freedom, marriage and the family. ADF fully opposes the rescission of regulations that protect health care providers' rights of conscience. The current regulations do nothing but implement various conscience-protecting laws that Congress has enacted multiple times in the last 35 years, but which have not been sufficiently enforced even in the face of immense new threats. The current implementing regulations are reasonable and necessary and should in no way be rescinded.

Despite the allegations of fringe pro-abortion groups, broadly applying conscience protection to include objection to the abortion of embryos before implantation is legally sound. Such a scope is supported by the language and context of the conscience-protecting statutes as well as the relevant medical science and history.

Congress enacted conscience protections less than five months after *Roe v. Wade* invented a constitutional "right" to abortion. The first of several amendments named after Senator Frank Church became law on June 18, 1973, protecting health care providers from being forced to kill preborn children. Under the Church Amendment, recipients of certain federal funds may not discriminate against a health care employee:

because he refused to perform or assist in the performance of [legal sterilization] or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral

convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.¹

Several statutes followed, expanding conscience protection on several grounds including similar references to those who oppose abortion.² These statutes represent an unbroken tradition in our country of protecting health care providers against mandatory participation in child-killing.

Even though the laws do not define “abortion,” their reference to abortion protects those who object to killing any child inside his mother. Pro-abortion extremists are insisting that HHS draw an arbitrary line within the category of abortion so that opposition to some kinds of child killing is not protected. They reject the current implementing regulations mainly because those rules do not establish the pro-abortion movement’s own random landmarks in prenatal development such as implantation, before which they seek to mandate embryocide. But such a capricious distinction is found nowhere in the statutes. The language and context of the Church Amendment show that it and subsequent laws protect opposition to killing any child inside his mother, regardless of its stage of development.

The first step in interpreting a statute is to look at the plain meaning of the text, by reference to its language, specific context, and statutory structure.³ Agencies must issue regulations in accord with the clear meaning of the statutes passed by Congress, and Courts will defer to an agency’s reasonable statutory interpretation.⁴ Of particular importance is the meaning of conscientious opposition to abortion as understood in 1973 when the first Church Amendment was enacted.⁵ The common understanding of these terms should be considered, along with their applicable medical definitions.⁶

The text of the Church Amendment explicitly covers activities prior to abortion, by protecting conscientious objection to both abortion and “sterilization.” Abortion advocates are therefore demanding an incongruous situation in which conscience protection exists for sterilization (which occurs before the sexual act) and then is taken away for killings of early embryos (after the sexual act but before implantation), and then is reinstated again for later abortions, or rather, might be reinstated to cover whatever they *decide* qualifies as “abortion” at according to their present political agenda. Since the implementing regulations do not use this

¹ 42 U.S.C. § 300a-7(c)(1); Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91 (1973).

² See 42 U.S.C. § 300a-7(b); 42 U.S.C. § 300a-7(c)(2); 42 U.S.C. § 300a-7(d); 42 U.S.C. § 300a-7(e); 42 U.S.C. § 238n; Pub. L. No. 108-447, § 4, 118 Stat. 2809, 2867 (2004); Pub. L. No. 109-149, § 508(d) 119 Stat. 2833, 2879–80 (2005); Pub. L. No. 110-5, § 2, 121 Stat. 8, 9 (2007); Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2008).

³ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)

⁴ *Federal Exp. Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

⁵ *Perrin v. United States*, 444 U.S. 37, 42–43 (1979) (“we look to the ordinary meaning of the term [] at the time Congress enacted the statute”).

⁶ See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.19 (1976) (statutes use ordinary meaning unless Congress clearly adopts technical definition); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (using dictionaries in analysis of statutory meaning).

nonsensical line-drawing schema, abortion advocates demand that they be rescinded altogether. This would leave the field open for them to change their definitions in perpetuity, for example to exclude RU-486 or methotrexate from the definition of “abortion,” or not to cover abortions that they claim will benefit a woman in some way. Eventually no abortion will count as an “abortion” that doctors may choose not to participate in.

In contrast, the meaning of “abortion” in 1973 and today confirms that abortion does indeed include killing any preborn child inside a woman regardless of the child’s age or development. The 1974 edition of Dorland’s Medical Dictionary (25th ed.), defines abortion as “the premature expulsion from the uterus of the products of conception—of the embryo, or of a nonviable fetus.”⁷ It defines “conception” as “the fecundation of the ovum,” and “pregnancy” as “the condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon.”⁸ Blakiston’s Gould Medical Dictionary from 1972 concurs. It defines abortion as “the artificially induced expulsion of an embryo or fetus before it is viable; the prematurely expelled products of conception,” and it defines “conception” as “the fertilization of the ovum by the spermatozoon.”⁹ Stedman’s Medical Dictionary from 1966 defines abortion as “the giving birth to an embryo or fetus prior to the stage of viability at about 20 weeks of gestation.”¹⁰ It defines “embryo” as “an organism . . . from conception until approximately the end of the second month,” and it defines “conception” as “the act of conceiving, or becoming pregnant; the fecundation of the ovum.”¹¹ All three define “abortifacient” as an agent that causes abortion. There is simply no question that killing an embryo at any stage counted as “abortion” in both common and medical parlance.

So too do policy interests show that “abortion” cannot exclude some preborn killings. The killing aspect of abortion is *the sole reason* that abortion is controversial. Without it there would be no laws or court cases on abortion, and in particular we wouldn’t have the underlying statutes that protect conscientious objection. The entire reason for Congress to protect objection to abortion was because some people believe that abortion kills children, and health providers should not be forced to participate in killing people. It makes no sense to object to the implementing regulations on the grounds that they encompass too many prenatal killings.

Abortion advocates hope to confuse the issue by utilizing pseudo-science to claim that embryos are not human beings before implantation. Of course, it makes no sense to allow abortion enthusiasts, who oppose all conscience protection, to dictate to pro-life doctors the definition of when life begins. More importantly, the medical consensus documented above proves that “abortion” in 1973 was still defined as expelling a human being from a woman at any point after fertilization, even before implantation.

⁷ DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 4 (25th ed. 1974).

⁸ *Id.* at 348, 1250.

⁹ BLAKISTON’S GOULD MEDICAL DICTIONARY 5, 345 (3d ed. 1972).

¹⁰ STEDMAN’S MEDICAL DICTIONARY 4 (21st ed. 1966)).

¹¹ *Id.* at 352, 515.

Abortion advocates are not only wrong about what abortion means, their approach is flawed. No medical definition can be forced onto the statute like a square peg into a round hole, and that's especially true of politically-motivated definitions. For example, there are aspects of the medical definitions that are clearly not dispositive to the statutory meaning of "abortion." Medically, "abortion" can be read as a catch-all that includes miscarriage or induced healthy labor, and it can also be defined as only applying before viability. But it would be irrational to say that the conscience protection statutes do not protect a doctor from being forced to perform a 36-week abortion because it occurs after viability. Instead, the common meaning of "abortion" in laws like this covers intentional preborn child-killing in a woman anytime before birth.¹² For the same reason, abortion advocates are wrong to try to impose their artificial distinction between pre- and post-implantation abortion. Congress protected conscience without that distinction, and it is not even consistent with the medical consensus in 1973. Opposition to abortion is protected whenever an objector reasonably perceives a preborn victim inside his mother to be threatened by a killing action, regardless of what the abortion movement says.

Abortion is sometimes defined today merely as "the termination of a pregnancy,"¹³ but this definition is too generic to interpret the statutes in an exclusive manner. Healthy birth "terminates a pregnancy," too, making most of us a product of "pregnancy termination." But we weren't born during "abortions" from the perspective of these statutes. Likewise, abortion is increasingly used to kill a triplet or twin while leaving the overall "pregnancy" unterminated. Yet such killings could not be called non-abortions so that the Church Amendment doesn't apply. Defining abortion as mere termination of pregnancy is often a euphemistic approach to hide what abortion actually does. But in considering "abortion" under these statutes, the term centrally refers to a death-dealing action on a preborn human being in a woman.

Yet even if abortion is defined as the termination of a pregnancy, abortion would include killing embryos before and after implantation. Abortion advocates wish to claim that pregnancy doesn't begin until implantation, but they are wrong. "Pregnant" suite simply means "with child." Dorland's 1974 dictionary defines "pregnant" as "with child" and "pregnancy" as "the condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon."¹⁴ Blakiston's 1972 dictionary similarly defines pregnancy as "the state of a woman from conception to childbirth," and defines conception from fertilization.¹⁵ Stedman's 1966 dictionary defines pregnancy as "the state of a female after conception until the birth of a

¹² *United States v. Zazove*, 334 U.S. 602, 611 (1948) ("unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports")

¹³ Office of the Secretary of the Department of Health and Human Services, "Draft Memo on Proposed Rule, 45 C.F.R. Part __," at 16, *available at* <http://www.rhrealitycheck.org/emailphotos/pdf/HHS-45-CFR.pdf> (last viewed on Mar. 24, 2009); *see also* "abortion," U.S. National Library of Medicine and the National Institutes of Health, "Medicine Plus Medical Dictionary" provided by Merriam-Webster, *available at* <http://www2.merriam-webster.com/cgi-bin/mwmednml?book=Medical&va=abortion> (last visited Mar. 24, 2009) ("the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus").

¹⁴ DORLAND'S 1974 at 1250-51.

¹⁵ BLAKISTON'S GOULD MEDICAL DICTIONARY 345, 1238 (3d ed. 1972).

child” and defines conception from fertilization.¹⁶ Today’s medical dictionaries concur.¹⁷ Even the pro-abortion lobby’s verbal gymnastics illustrate this point. Realizing that pregnancy inescapably means “with child,” they have been forced to use a distinct phrase, “established pregnancy,” to claim that implantation-preventing drugs do not cause abortions (because they do not terminate an “established pregnancy”).¹⁸ Yet the modifier “established” betrays the fact that pregnancy *qua* pregnancy exists once a child is present, which is at fertilization, even before he is “established” in his mother’s uterine wall. Therefore implantation drugs do terminate a pregnancy, which exists as soon as an embryo exists in a woman. To “terminate a pregnancy” is to terminate the presence of a human being in his mother’s body, *at any time* after fertilization. Drugs that cause an embryo’s demise by preventing the child’s implantation are “abortions.”

The pro-abortion effort to insist that embryo-killing is not abortion proves to be blatantly political rather than scientific. As illustrated above, the medical baseline prior to and at the time of the Church Amendment comported with the simple truth that human beings begin at conception by fertilization, that a woman is pregnant if she has a child inside her no matter what age the child is, and that abortion is the expulsion and destruction of such child. This truth was inconvenient for abortion advocates because birth control drugs were known to be not purely “contraceptive,” but also designed to kill early embryos.¹⁹ Thus in 1959, the Population Council teamed with Planned Parenthood to study reproduction so they could control population by the use of chemicals.²⁰ One expert was shockingly candid about the political attempt to redefine conception and abortion to implantation. He pointed out that implantation itself is not a precise moment, but is a “continuity of mechanisms.” Then, waxing philosophical (as scientists playing God are wont to do), he supposed that perhaps the elusive beginning of a human life is similarly imprecise—neither at fertilization nor at implantation. He even admitted that the abortion movement’s semantic conjectures over “implantation” were “[s]cientifically poor.” And yet he recommended that to achieve the “social advantage” of swaying public opinion in favor of “control of implantation,” it would be a “prudent habit of speech” if abortifacient agents were “being considered to prevent conception rather than to destroy an established pregnancy.”²¹

¹⁶ STEDMAN’S MEDICAL DICTIONARY 352, 1291 (21st ed. 1966).

¹⁷ Draft Memo, *supra* note 13, at 16–17 (citing STEDMAN’S MEDICAL DICTIONARY 4 (28th ed. 2006)).

¹⁸ American Medical Association Medical Student Section Resolution 443, “FDA Rejection of Over-The-Counter Status for Emergency Contraception Pills,” at 1 line 7, *available at* http://www.ama-assn.org/ama1/pub/upload/mm/15/res_hod443_a04.doc (last visited Mar. 24, 2009); James Trussell and Elizabeth G. Raymond, “Emergency Contraception: A Cost-Effective Approach to Preventing Unintended Pregnancy,” at n.68 and accompanying text (Princeton University: April 2007) (same), *available at* <http://ec.princeton.edu/questions/ec-review.pdf> (last visited Mar. 24, 2009).

¹⁹ *See, e.g.*, Danforth, David N., ed., TEXTBOOK OF OBSTETRICS AND GYNECOLOGY 820 (2d ed., Harper & Row 1971); Walker, James, et al., eds., COMBINED TEXTBOOK OF OBSTETRICS AND GYNAECOLOGY 805 (9th ed., Churchill Livingstone 1976).

²⁰ Hartman, Carl G., ed., MECHANISMS CONCERNED WITH CONCEPTION: PROCEEDINGS OF A SYMPOSIUM PREPARED UNDER THE AUSPICES OF THE POPULATION COUNCIL AND THE PLANNED PARENTHOOD FEDERATION OF AMERICA Preface at v (Pergamon Press 1963) (discussing population control and anti-fertility purpose of exploring science of reproduction).

²¹ *Id.*

Planned Parenthood could not pass up this opportunity to redefine language for political purposes. In 1965, abortion advocates succeeded in convincing the American College of Obstetricians and Gynecologists to engage in such unscientific verbal gymnastics by redefining “conception” from fertilization to implantation, with no scientific basis whatsoever for the change.²² The occurrence of implantation was not a new discovery—it had been known decades before this change, and no new evidence had arisen indicating that embryos before implantation are not individual beings. But the goal of abortion enthusiasts and population controllers was, as shown above, to make people believe that the embryonic victims of birth control were not human beings prior to implantation. On the contrary, evidence continues to mount proving that each human life begins at fertilization rather than any other point including implantation.²³

This semantic change slowly seeped into medical dictionaries, but not in time to change what “abortion” means under the conscience protecting statutes. The 1972 edition of Stedman’s changes conception to refer to implantation,²⁴ yet notably this remained the minority view through the time of the Church Amendment, and the change was not even internally consistent.²⁵ Stedman’s did not change its definition of abortion or pregnancy in its 1972 edition, so that abortion still meant expelling a human being all the way back to the point of conception.²⁶ The definition of “implantation” had not changed either (nor had the science behind it), and the definition of “impregnate” continued to refer both “to fecundate” and “to cause to conceive.”²⁷ Thus, nearly 15 years after Planned Parenthood’s Orwellian strategy was launched at the 1959 Population Council, the medical dictionaries still overwhelmingly referred to abortion as embryo killing from the moment of fertilization. Later pro-abortion attempts at verbal engineering became more pathetic and spawned such discredited terms as “pre-embryo”²⁸—all in the attempt to justify embryo destruction prior to implantation.

Applying the abortion movement’s politics-over-science semantic exercise to the conscience protection statutes is utterly contrary to their meaning. History shows it to be a bald attempt to alter society and fill Planned Parenthood’s coffers by convincing people that birth control drugs don’t really kill human beings. In contrast, the conscience protection statutes on their face are written to protect people who believe that preborn human beings should not be killed. Pro-abortion activists and government officials who are clamoring to rescind the implementing regulations are the same people trying to make sure that they can continue to actually violate the conscience-protecting federal statutes by discriminatory state laws and

²² American College of Obstetricians and Gynecologists, *Terminology Bulletin*, “Terms Used in Reference to the Fetus” (Chicago: ACOG, September 1965).

²³ See George, Robert P., & Christopher Tollefsen, *EMBRYO: A DEFENSE OF HUMAN LIFE* (Doubleday 2008).

²⁴ *STEDMAN’S MEDICAL DICTIONARY* 276 (22nd ed. 1972).

²⁵ See *MCI Telecommunications Corp.*, 512 U.S. at 226–27 (a statute is not made ambiguous by citation to a technical, minority, and inconsistent variant among several definitions).

²⁶ *Id.* at 3, 1013.

²⁷ *Id.* at “implantation,” “impregnate”.

²⁸ Shea, John P., “The ‘Pre-Embryo’ Question” (Oct. 30, 2004), *available at*

http://www.lifeissues.net/writers/she/she_26pre_embryoquestion.html (last viewed Mar. 24, 2009).

organization policies.²⁹ It would be absurd to reject the current implementing regulation on the grounds that it fails to comply with the abortion movement's political effort to safeguard their own conscience violations. Congress in no way adopted the pro-abortion reengineering of language that abortion activists are demanding.

Finally, although the full scope of "abortion" in the statutes is clear and therefore conclusive, it is worth noting that the legislative history of the Church Amendment also confirms that it was intended to protect objection to the earliest abortions. Senator Adlai Stevenson III, Democratic Senator from Illinois, testified in favor of the amendment on the floor of the Senate in 1973. While expressing his own support of some abortion, he passionately declared:

[W]hether it is life, or the potentiality of life, our moral convictions as well as our religious beliefs, warrant protection from this intrusion by the Government. . . . I believe the Government in all its branches should move with the greatest reluctance to diminish the value of human life on all questions—whether it be the termination of life, or its potentiality in the womb, or the imposition of capital punishment."³⁰

These determinations about the very beginnings of human life are made in the conscience of each citizen and health care provider, and are precisely the decisions that abortion activists wish to trump by their ideologically-driven linguistic games.

The text, context, and background of the Church Amendment and its progeny all point to one conclusion: the conscience of health care providers must be protected when they object to "abortion" at any stage of embryonic development from fertilization onward. The Department should not rescind the implementing regulations, which do nothing but enforce laws that have sought to protect conscience for over three decades. The Department should ignore the rhetoric of abortion extremists who themselves oppose rights of conscience. Therefore it should reject the rescission of 45 C.F.R. Part 88, and leave the current implementing regulations in place.

Respectfully submitted,



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²⁹ See, e.g., *State of Connecticut, et al. v. United States, et al.*, 3:09-cv-054, Complaint (filed Jan. 15, 2009); *NFPRHA, et al., v. Leavitt*, 3:09-cv-055, Complaint (filed Jan. 15, 2009); *Planned Parenthood, et al., v. Leavitt*, 3:09-cv-057, Complaint (filed Jan. 15, 2009).

³⁰ 119 Cong. Rec. 9595–96 (daily ed. March 27, 1973) (statements of Sen. Stevenson).