



Matthew S. Bowman, Esq.
Legal Counsel

Email: info@telladf.org

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Secretary Michael O. Leavitt
United States Department
of Health and Human Services
c/o Office of Public Health and Science
Attention: Brenda Destro
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 728E
Washington, DC, 20201

Re: Comment on Provider Conscience Regulation: *Proposed Rule 45 C.F.R. Part 88
Broadly Protecting Health Care Providers' Rights of Conscience*

Dear Mr. Secretary:

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 supports regulations to protect health care providers' rights of conscience, including the right to refuse to kill embryos with abortifacient drugs. Such regulations are reasonable and necessary in order to implement various 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.

After the media reported last month on an earlier draft of a proposed HHS rule, radical special interest groups attacked the proposal because it protected doctors who oppose the abortion of very young embryos.¹ Although the final draft of the regulations does not contain the abortion definition, it still applies conscience protection "broadly" and requires fund recipients to

¹ See Office of the Secretary of the Department of Health and Human Services, "Draft Memo on Proposed Rule, 45 C.F.R. Part __," available at <http://www.rhrealitycheck.org/emailphotos/pdf/HHS-45-CFR.pdf> (last viewed on Aug. 22, 2008); Pear, Robert, "Abortion Proposal Sets Condition on Aid," *N.Y. Times* (July 15, 2008), available at http://www.nytimes.com/2008/07/15/washington/15rule.html?_r=1&adxnnl=1&oref=slogin&partner=rssuserland&mc=rss&pagewanted=all&adxnnlx=1219418998-+BAzvir7ibRfoEteMJM68g (last viewed on Aug. 22, 2008).

certify that they “will not require involvement in procedures that violate an individual’s conscience as part of any part of any health service program.”² Despite the allegations of fringe pro-abortion groups, broadly applying the conscience protection to include objection to the abortion of embryos before implantation is legally unassailable. Such a scope is supported by the language and context of the statutes as well as 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.³

Several statutes followed, expanding conscience protection by similar reference to those who oppose abortion.⁴ 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. Abortion extremists are insisting that HHS draw an arbitrary line within the category of abortion, by declaring that opposition to some kinds of child killing is not protected. They demand that HHS establish random landmarks in prenatal development, such as implantation, so that killing embryos before implantation is unprotected. Such a capricious distinction is found nowhere in the statutes. The language and context of the Church Amendment show that the amendment 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.⁵ Agencies must issue regulations in accord with the clear meaning of the statutes passed by Congress, and Courts will

² Office of the Secretary of the Department of Health and Human Services, “Proposed Rule, 45 C.F.R. Part 88,” at 13, 15–16, 39, 41. *available at* <http://hhs.gov/news/press/2008pres/08/20080821reg.pdf> (last viewed on Aug. 22, 2008).

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

⁴ *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).

⁵ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)

defer to an agency's reasonable statutory interpretation.⁶ Of particular importance is the meaning of conscientious opposition to abortion as understood in 1973 when the first Church Amendment was enacted.⁷ Both the common understanding of these terms and the applicable medical definitions should be considered.⁸

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 suggesting an incongruous situation in which protection exists before the sexual act, and then is taken away for killings of early embryos, and then is reinstated again for whatever they happen to consider "abortion" at the present moment (perhaps they will change the definition again to exclude RU-486 or methotrexate).

The meaning of "abortion" in 1973 and today confirms that abortion includes 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."⁹ 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."¹⁰ 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."¹¹ 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."¹² 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."¹³ All three define abortifacient as an agent that causes abortion.

"Abortion" as a public policy matter cannot exclude some preborn killings. The killing component of abortion is the sole reason for laws and court cases concerning abortion, including the statutes at issue protecting conscientious objection. The entire reason for Congress to protect objection to abortion was because of the belief that abortion kills children. Abortion advocates, having no sensible argument to the contrary, hope to confuse the issue by utilizing pseudo-

⁶ *Federal Exp. Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

⁷ *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").

⁸ *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).

⁹ DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 4 (25th ed. 1974).

¹⁰ *Id.* at 348, 1250.

¹¹ BLAKISTON'S GOULD MEDICAL DICTIONARY 5, 345 (3d ed. 1972).

¹² STEDMAN'S MEDICAL DICTIONARY 4 (21st ed. 1966).

¹³ *Id.* at 352, 515.

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 define and limit the definition of when life begins for pro-life doctors. More importantly, the medical consensus described above proves that “abortion” in 1973 was still defined as expelling a human being at any point after fertilization, even before implantation.

Abortion advocates are not only wrong about what abortion means, their approach is flawed. Medical definitions show that abortion cannot be interpreted in the statutes to exclude killing young embryos. The texts also show that no medical definition can be imposed in a heavy-handed manner, as the abortion advocates wish to do with their politically-motivated definitions. Some aspects of medical definitions vary from the clear statutory scope of abortion. For example, abortion can be read as including miscarriage or induced healthy labor, and elsewhere can be read as limiting abortion to expulsions before viability. It would be irrational if HHS decided that a doctor cannot object to performing a 36-week partial-birth abortion because it occurs after viability. Likewise, no distinction between pre- and post-implantation abortion can be forced onto statutes that protect anti-abortion conscience. Congress made no such distinction, and it is not even consistent with the medical consensus in 1973.¹⁴ Opposition to abortion is protected because the objector perceives a preborn victim inside his mother to be a human being, regardless of what abortionists think.

Abortion is sometimes defined today as “the termination of a pregnancy.”¹⁵ This definition is too generic for interpreting the conscience-protection statutes that originated in 1973. Healthy birth as well as intentional killing “terminates” a pregnancy. Everyone reading this letter is therefore the product of a pregnancy termination in one sense. Likewise, abortion is increasingly used to kill a triplet or twin while leaving the “pregnancy” untermiated, but such killings could not be called non-abortions. In the public policy concept of abortion as well as the medical literature, abortion specifically references its expulsion or death-dealing effect on the preborn human being. Defining abortion as mere termination of pregnancy is in fact a euphemistic approach to hide what abortion actually does.

Nevertheless, even if abortion is defined as the termination of a pregnancy, the medical definitions show that conscience protection would include killing embryos before and after implantation. This is quite simply because “pregnant” means nothing more than “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

¹⁴ *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”)

¹⁵ Draft Memo, *supra* note 1, at 16; *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/mwmednlm?book=Medical&va=abortion> (last visited Aug. 22, 2007) (“the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus”).

spermatozoon.”¹⁶ Blakiston’s 1972 dictionary similarly defines pregnancy as “the state of a woman from conception to childbirth,” and defines conception from fertilization.¹⁷ Stedman’s 1966 dictionary defines pregnancy as “the state of a female after conception until the birth of a child” and defines conception from fertilization.¹⁸ Today’s medical dictionaries concur, as the HHS memo points out.¹⁹ Even the pro-abortion lobby’s verbal gymnastics illustrate this point. They have been forced to use a distinct phrase, “established pregnancy,” to deny that implantation-preventing drugs are abortifacient.²⁰ Yet using 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. To “terminate a pregnancy,” therefore, 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 his 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, a woman is pregnant if she has a child inside her no matter what age the child is, and abortion is the expulsion and destruction of that child. This truth was inconvenient for abortion advocates because it was well known that birth control drugs were not purely “contraceptive” but were also designed to kill early embryos.²¹ Thus in 1959, the Population Council teamed with Planned Parenthood to explore the science of reproduction so as to develop methods to control population by the use of chemicals.²² One paper explored effective ways to prevent embryo implantation, and that author concluded by waxing philosophical (as scientists who play God are wont to do). He pointed out that implantation is not even a precise moment, but is a “continuity of mechanisms,” and then he supposed that perhaps the elusive beginning of a human life is similarly imprecise. He noted that these philosophical and semantic conjectures were “[s]cientifically poor,” but he persisted nonetheless.

¹⁶ DORLAND’S 1974 at 1250–51.

¹⁷ BLAKISTON’S GOULD MEDICAL DICTIONARY 345, 1238 (3d ed. 1972).

¹⁸ STEDMAN’S MEDICAL DICTIONARY 352, 1291 (21st ed. 1966).

¹⁹ Draft Memo, *supra* note 1, at 16–17 (citing STEDMAN’S MEDICAL DICTIONARY 4 (28th ed. 2006)).

²⁰ 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://search.ama-assn.org/Search/cs.html?charset=iso-8859-1&url=http%3A/www.ama-assn.org/ama1/pub/upload/mm/15/res_hod443_a04.doc&qt=%22,+it+cannot+terminate+an+established+pregnancy%22&col=public&n=1&la=en (last visited Aug. 22, 2008); James Trussell and Elizabeth G. Raymond, “Emergency Contraception: A Cost-Effective Approach to Preventing Unintended Pregnancy,” at n.58 and accompanying text (Princeton University: April 2007) (same), *available at* <http://ec.princeton.edu/questions/ec-review.pdf> (last visited Aug. 22, 2008).

²¹ *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).

²² 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).

He ended by recommending that to achieve the “social advantage” of more people *accepting* “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.”²³

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.²⁴ Their goal, as shown, was to make people believe that the embryonic victims of birth control were not human beings because their lives supposedly did not begin until implantation. 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. On the contrary, evidence continues to mount proving that each human life begins at fertilization rather than any other point including implantation.²⁵

This semantic change slowly seeped into medical dictionaries, first in the 1972 edition of Stedman’s, where conception is altered to refer to implantation.²⁶ Notably this remained the minority dictionary view through the time of the Church Amendment, and the change was not even internally consistent.²⁷ Stedman’s did not change its definition of abortion or pregnancy in the 1972 edition, so that abortion still meant expelling a human being all the way back to the point of conception.²⁸ The definition (and science behind) its definition of “implantation” had not changed either, and the definition of “impregnate” continued to refer both “to fecundate” and “to cause to conceive.”²⁹ Later pro-abortion attempts at verbal engineering became more pathetic, spawning such discredited terms as “pre-embryo,” all in the attempt to justify embryo destruction prior to implantation.³⁰

Applying this Orwellian exercise to the conscience protection statutes is utterly contrary to their language. History shows it to be a bald attempt to make people believe that embryos are not really human beings before implantation, so they will not be as personally repulsed by drugs and methods which kill embryos. In contrast, the conscience protection statutes on their face are written to protect people who believe that preborn human beings should not be killed. Abortion activists clamoring to restrict the statutes’ application are the same people leading the effort to

²³ *Id.*

²⁴ American College of Obstetricians and Gynecologists, *Terminology Bulletin*, “Terms Used in Reference to the Fetus” (Chicago: ACOG, September 1965).

²⁵ See George, Robert P., & Christopher Tollefsen, *EMBRYO: A DEFENSE OF HUMAN LIFE* (Doubleday 2008).

²⁶ *STEDMAN’S MEDICAL DICTIONARY* 276 (22nd ed. 1972).

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

²⁸ *Id.* at 3, 1013.

²⁹ *Id.* at “implantation,” “impregnate”.

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

http://www.lifeissues.net/writers/she/she_26pre_embryoquestion.html (last viewed Aug. 22, 2008).

pass state laws that violate the Church Amendment, and which make 45 C.F.R. Part 88 so urgently needed. It would be absurd to use a conscience protection statute to impose a pro-abortion definition of the beginning of human life on pro-life medical personnel. Congress in no way adopted the pro-abortion redefinition 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 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 limited 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.”³¹

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

The text, context, and background of the Church Amendment and its progeny point to one conclusion: the conscience of health care providers is protected in objecting to “abortion” at any stage of development from fertilization onward. The Department should ignore the rhetoric of abortion extremists who themselves oppose rights of conscience, and instead adopt proposed regulations protecting conscience in this broad manner.

Respectfully submitted,



Matthew S. Bowman, Esq.
Legal Counsel
Alliance Defense Fund
Washington, D.C.

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