



Via Federal Express
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c/o Centralized Case Management Operations
U.S. Department of Health and Human Services
Office for Civil Rights
Headquarters
200 Independence Avenue, SW
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Washington, D.C. 20201

Celeste Davis, Regional Manager
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Office for Civil Rights
Midwest Region
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Re: ACLU Administrative Complaint (October 25, 2016) against Ascension Health

Dear Ms. Samuels:

By way of introduction, Alliance Defending Freedom is a national and international legal organization which litigates cases implicating religious freedom, the sanctity of life, marriage and the family, and the right to conscience more broadly.

It has come to our attention that the ACLU Foundation and the ACLU of Michigan recently filed an administrative complaint¹ with your office alleging that Ascension Health—the nation’s largest nonprofit health system and the world’s

¹ See Administrative Complaint against Ascension Health and Genesys Health (hereinafter “Administrative Complaint”), dated October 25, 2016.

largest Catholic health system—is in violation of Section 1557 of the Patient Protection and Affordable Care Act (hereinafter “ACA”), because in adherence to the Ethical and Religious Directives for Catholic Health Care promulgated by the United States Conference of Catholic Bishops, it declines to perform sterilization procedures in its facilities. We write to inform you that it is our position that the various and sundry claims asserted by the ACLU are specious and fail as a matter of law. As such we urge your office to summarily dismiss the Administrative Complaint in its entirety. Any other course of action would fail to respect the federally protected conscience rights of Ascension Health and Genesys Health.

I. Federal Law Protects Healthcare Providers Such as Ascension Health From Being Compelled to Act in Violation of Their Consciences.

Complainants—the ACLU and Mrs. Jessica Mann—allege that Ascension Health, and its subsidiary Genesys Health, have discriminated against Mrs. Mann because Genesys Regional Medical Center declined to perform a sterilization procedure that she requested in connection with her most recent pregnancy. The medical center’s policy, however, which is predicated upon its sincerely held religious beliefs, is not only not discriminatory but protected by federal law.

The Church Amendment provides that no “court or any public official or other public authority [may] require” a healthcare entity to “make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions.”² The amendment further provides that a healthcare entity need not “provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.”³

As a Catholic health system Ascension Health—and by extension its subsidiary Genesys Health—adheres to the Ethical and Religious Directives for Catholic Health Care Services promulgated by the United States Conference of Catholic Bishops. Those Directives prohibit the “[d]irect sterilization of either men or women, whether permanent or temporary,” precisely because it is the considered judgment and belief

² 42 U.S.C. § 300a-7(b).

³ *Id.*

of the Catholic Church that such procedures are “intrinsicly immoral.”⁴ Abiding by these imperatives ensures that the “religious mission of the institution” is respected, and its “commitment to human dignity and the common good” advanced.⁵

Notwithstanding the longstanding teaching of the Catholic Church on these matters, and the clarity of federal protections for the right of conscience with respect to sterilization and other medical procedures,⁶ the ACLU seeks to compel Ascension Health to act against its conscience. This is both inconsistent with the solicitude this nation has shown for the right to conscience throughout history, and improper as a

⁴ United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* at ¶¶ 53, 70, available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

⁵ *Id.* at ¶9.

⁶ In addition to the Church Amendment detailed above, myriad federal statutes protect the right to medical conscience. *See, e.g.*, Overview of Statutory Health Care Provider Conscience Protections, available at <http://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html> (outlining extant conscience protections for health care providers, and noting that even the Patient Protection and Affordable Care Act “includes new health care provider conscience protections”); Coats-Snowe Amendment (42 U.S.C.A. § 238n) (protecting any health care entity or individual physician from being forced to perform, refer for, or even make arrangements to refer for an abortion); Weldon Amendment (Div. G, § 508(d) of the Consolidated and Further Continuing Appropriations Act 2015, Pub. L. 113-235, 128 Stat 2130, 2515 (Dec. 16, 2014)) (prohibiting federal agencies and programs, and state and local governments receiving certain federal funding, from discriminating against any healthcare entity, professional, or insurance plan, because of their decision not to provide, pay for, provide coverage for, or refer for abortions); Danforth Amendment (20 U.S.C.A. § 1688) (ensuring that Title IX of the Education Amendments Act of 1972 cannot be construed to “require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion”). States laws also provide protections for medical conscience. *See* Mich. Comp. Laws Serv. § 333.20181-20184 (protecting individual medical practitioners and institutions from having to participate in abortions, and providing that the refusal to be so implicated “shall be with immunity from any civil or criminal liability or penalty”); Mo. Rev. Stat. § 197.032 (providing that under Missouri law a medical practitioner or hospital—public or private—can refuse, based on “moral, ethical or religious beliefs,” “to treat or admit for . . . abortion”).

matter of extant federal law.⁷ Perhaps most telling, the ACLU's complaint runs afoul of the ACA itself—the law upon which the ACLU ostensibly and exclusively relies. The ACA quite conspicuously provides that “[n]othing in [it] shall be construed to have any effect on Federal laws regarding . . . conscience protection.”⁸ Moreover, Executive Order 13535 explicating the ACA confirms that “longstanding Federal laws to protect conscience (such as the Church Amendment)] . . . remain intact.”⁹ Thus it should be beyond cavil that the Administrative Complaint filed by the ACLU fails on its face as a matter of law. Section 1557 does not require Ascension Health or Genesys Health to perform sterilization procedures, and it was not an act of discrimination against Mrs. Mann for these Catholic institutions to abide by their religious principles in declining to do so. To the contrary, the ACA—by its very terms, and by executive pronouncement—actually protects Ascension Health and Genesys Health from being compelled to provide services not in keeping with their

⁷ See, e.g., Lynn D. Wardle, “Conscience Exemptions,” 14 Engage: J. Federalist Soc’y Prac. Groups 77, 78-79 (2013) (explaining that protecting “conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights”); Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 30-35 (2011) (discussing the flurry of conscience protections, both state and federal, that were passed in the wake of the Supreme Court’s decision in *Roe v. Wade*, which declared a right to elective abortion); Francis J. Manion, *Protecting Conscience*, 24 Regent U. L. Rev. at 370–71 (“One of the effects of the Supreme Court’s decisions in *Roe v. Wade* and *Doe v. Bolton* was the creation within the American health care system of a potential class of conscientious objectors of a kind and on a scale previously unknown.”)

⁸ 42 U.S.C. § 18023(c)(2)(A)(i). An additional and independent reason to deny relief to the ACLU is the Religious Freedom Restoration Act (RFRA), which provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” except when it can show that such burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C.A. § 2000bb-1. That most demanding of constitutional standards cannot be met here, given the historically paramount nature of the right to conscience, and given the fact that Mrs. Mann was able to find an alternative healthcare provider to perform her requested tubal ligation.

⁹ Executive Order 13535, *Patient Protection and Affordable Care Act’s Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion*, available at <https://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>.

religious beliefs or conscientious principles. Thus the inquiry is at an end. No investigation is necessary and no remedial action is warranted.

II. Conscience Protections Should Be Respected and Protected Because They Redound the Benefit of Patients, the Medical Profession, and Society as a Whole.

The ACLU treats the right to conscience as disposable so long as the requested procedure can be deemed “the medical standard of care.”¹⁰ But it should go without saying that a right that can be so easily eliminated is no right at all but rather a chimera. The truth is that the right to conscience exists over and apart from whether a particular medical procedure is deemed by the patient, an advocacy group, another healthcare institution, or another group of physicians to be “the medical standard of care.” Indeed, in this case Ascension Health and Genesys Health obviously do not believe that direct sterilization is to be considered part and parcel of the “medical standard of care.” The ACLU reductively and dismissively characterizes these institutions’ sincerely held religious beliefs as the mere “imposition of religious health care restrictions.”¹¹ But it is simply not the case that all legally permitted care must be delivered without question—indeed, a right to request or undergo a particular medical procedure does not entail a concomitant right to demand that treatment from a particular healthcare institution or medical practitioner. It is not an act of discrimination to decline, for conscience reasons, to perform a medical procedure—indeed, if that were the case conscience protections would not exist. But conscience protections do exist—in great number, and for good reason. Indeed, patients, the medical profession, and society as a whole benefit when medical institutions and practitioners practice medicine with their consciences intact and preserved inviolate.¹² That is because “[m]edicine is at heart a moral enterprise[,] and those who practice it are de facto members of a moral community.”¹³ And history teaches us that when we

¹⁰ Administrative Complaint at 3, ¶ 4.

¹¹ Administrative Complaint at 5.

¹² See, e.g., Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 Ind. L.J. 703, 730–31 (2014) (noting that “[a] number of scholars identify ‘professional conscience’ informed by moral precepts internal to medicine as essential to medical practice,” and concluding that “[t]o navigate ethically complex medical questions, physicians need ethical virtues as much as they need clinical skills”).

¹³ Edmund D. Pellegrino, *The Medical Profession as a Moral Community*, 66 Bull. N.Y. Acad. Med. 221 (1990); Elizabeth Sepper, *Not Only the Doctor’s Dilemma: The Complexity of Conscience in Medicine*, 4 Faulkner L. Rev. 385, 391 (2013) (arguing that “ethical

encourage those in the medical community to abandon their consciences, patients invariably suffer the consequences.¹⁴

In this case the ACLU encourages this Office to ignore the conscience rights of Ascension Health and Genesys Health. But it does so without paying heed to the consequences of such abandonment. These institutions serve the community with dedication and help to meet the ever-increasing demand for healthcare in a time of great upheaval and general lack of availability in the provision of such care. If they are forced to act against their consciences to suit the ACLU's unsupported reading of the ACA, such compulsion would threaten their very existence, thereby threatening harm to the poorest of the poor. Catholic institutions like Ascension Health and Genesys Health are motivated by the "ministry of healing and compassion" that is part and parcel of Catholic teaching,¹⁵ which helps to explain the Catholic preference for serving "those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination."¹⁶ If this Office were to destroy the roots of this compassion, it is not difficult to predict that its fruits will soon disappear as well.

III. Conclusion

Mrs. Mann's requested treatment constitutes a morally impermissible act to the Genesys Regional Medical Center. Under these circumstances, the hospital was under no obligation to sterilize Mrs. Mann. Ascension Health and Genesys Health exhibited fealty to their religious beliefs and conducted their health care mission in accordance

reasoning is in fact deeply embedded in the practice of medicine" and concluding that "[a]s a profession that is largely self-regulated, medicine demands conscientiousness").

¹⁴ See, e.g., Benjamin Mason Meier, *International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal*, 30 Am. J.L. & Med. 419, 419–20 (2004) (arguing that that "[s]ociety benefits from physicians who seek truth and healing for the good of humanity," but concluding that "[d]espite ethical admonishments to 'do no harm,' . . . physicians have caused some of the most appalling human rights abuses of the twentieth century"); Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine* at 5, *International Journal of Family Medicine*, Volume 2013 (Article ID 587541), available at <https://www.hindawi.com/journals/ijfm/2013/587541/> (arguing that "widespread dismissal of conscience socializes physicians to be muted participants in atrocities and suboptimal care rather than advocates of health and humanity").

¹⁵ *Ethical Directives* at 7.

¹⁶ *Ethical Directives* at ¶ 3.

with their consciences, which they are permitted to do by federal law and by the tradition of the medical profession itself.¹⁷ Under no reasonable interpretation of the ACA can such fealty be considered tantamount to discrimination. The ACLU's Administrative Complaint should therefore be summarily dismissed.

Sincerely,



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¹⁷ See supra at p. 1-4 (detailing the dictates of the Church Amendment and the ACA itself); see also Edmund D. Pellegrino, *Toward a Reconstruction of Medical Morality*, *The American Journal of Bioethics*, 6(2): 65-71, 2006 (arguing that “the patient cannot ask the physician to override his values. To respect the patient’s moral agency does not mean submitting to whatever he wishes if it violates the physician’s moral beliefs.”); Azgad Gold, *Physicians’ “Right of Conscience”—Beyond Politics*, 38 *J.L. Med. & Ethics* 134, 139 (2010) (recognizing that “[f]rom an ethical perspective, exactly as it is wrong to ignore the patient’s right to autonomy by expecting him to conform to the physician’s perspective, in the same way, it would be unfair to treat physicians with a different standard”); C. Everett Koop, *Introduction*, 35 *Duq. L. Rev.* 1, 2 (1996) (“The Hippocratic Oath and the tradition surrounding it served mankind well for several millennia and became the medical ethics and value system that has made western medicine the art that it is. . . . The Hippocratic Oath has kept physicians on the right course for more than two thousand years.”).