

# Religious Hospitals, Mergers & Refusal Clauses

## Hospitals

- One in six patients in the United States is cared for in a Catholic hospital,<sup>1</sup> and eight of the twenty-five largest health systems in the country are religiously-owned.<sup>2</sup>
- Religious hospitals represent nearly one fifth of the health care system in the U.S.<sup>3</sup> Research conducted in 2010 shows that one fifth of physicians who practice in religious hospitals have faced a “clinical ethical conflict” because hospital policies conflict with their medical judgment.<sup>4</sup>
- The majority of religious hospitals are Roman Catholic-sponsored,<sup>5</sup> making the Catholic healthcare system the largest non-profit provider of health care in the nation.<sup>6</sup> As of 2010, there were 56 Catholic healthcare systems and 629 Catholic hospitals.<sup>7</sup>
  - Under the Religious and Ethical Directives for Catholic Health Care Services, Catholic hospitals cannot provide contraception, sterilization, most infertility treatments, abortion services, or abortion and emergency contraception counseling for victims of sexual assault.<sup>8</sup> Directive 48 prohibits therapeutic abortion as treatment for ectopic pregnancy,<sup>9</sup> even if the pregnancy must be removed to save the mother’s life.<sup>10</sup>
  - This means that some Catholic hospitals will not dispense emergency contraception, even as treatment for rape.<sup>11</sup> Since emergency contraception is most effective in the twenty-four hours following intercourse,<sup>12</sup> religious hospitals’ refusal to provide comprehensive treatment can further traumatize rape victims. The patient is forced to search for another provider; meanwhile, she must manage the additional anxiety of not knowing whether the delay will result in pregnancy. The inconvenience and psychological distress experienced by these women is heightened in rural areas, where religiously sponsored hospitals can be the only health care facility within 35 miles.<sup>13</sup> In 95% of such counties, Roman Catholics make up only a minority of the population.<sup>14</sup>
  - Medicare and Medicaid provide religiously-affiliated hospitals with one half of their funding.<sup>15</sup> Religious hospitals also enjoy certain benefits like tax exempt status, low-cost financing through government bond programs, and, in some areas, use of municipal buildings. <sup>16</sup> Thus, while reliant on funds from a diverse population of taxpayers and serving a diverse population of patients, religious hospitals use a specific institutional doctrine to dictate patients’ medical options. Such choices can be contrary their patient’s health needs and personal beliefs.
- In November 2009, St. Joseph’s Hospital and Medical Center, a Catholic hospital in Phoenix, Arizona, performed an abortion for a 27 year-old woman who was eleven weeks pregnant with her fifth child and severely ill.<sup>17</sup>
  - The hospital’s decision was based on Directive 47, which allows abortion in some circumstances to save the life of the mother.<sup>18</sup> The woman’s physicians stated that she had life threatening pulmonary hypertension and her risk of mortality was almost 100% if she continued the pregnancy.<sup>19</sup>
  - Sister Margaret McBride, the hospital administrator who approved the abortion and who also served as the hospital liaison to the diocese, was automatically excommunicated from the church in May 2010.<sup>20</sup> The medical ethics director of the Diocese of Phoenix was quoted saying, “She consented in the murder of an unborn child. There are some situations where the mother may in fact die along with her child . . . . [Y]ou can’t do evil to bring about good. The end does not justify the means.”<sup>21</sup>In December 2010, the ACLU, responding to the St. Joseph’s incident, wrote to federal health officials at the Centers for Medicare and Medicaid Services.<sup>22</sup> It asked the Centers to investigate Catholic hospitals that violate federal law by

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- refusing to provide emergency reproductive care; however, no investigation proceeded.<sup>23</sup>
- While Sister Margaret McBride was restored to good standing within the Catholic Church by December 2010, the Church withdrew its 116-year affiliation from St. Joseph's Hospital after the hospital refused to promise not provide abortions to patients whose lives were in danger.<sup>24</sup>

### Hospital Mergers and Sales

- Between 1990 and 2001, there were 171 mergers between Catholic and secular hospitals.<sup>25</sup> MergerWatch, a advocacy group seeking to protect the availability of reproductive services, has aided in blocking or reversing 37 mergers and compromise in 22 more over the past 15 years.<sup>26</sup>
- Usually, when Catholic and secular hospitals merge, even if the new entity has no particular religious affiliation, it is forced to follow the Religious and Ethical Directives for Catholic Health Care Services.<sup>27</sup> Consequently, local women's access to reproductive health care is reduced or eliminated.<sup>28</sup>

The women most affected by restricted services at religious hospitals are low-income women, particularly in rural areas.<sup>29</sup> They are the least able to bear the burden of finding another provider, with the attendant costs, delays, and health risks.<sup>30</sup> In some cases, religious hospitals are the only health care option available in the region.<sup>31</sup> Furthermore, there are no abortion providers in 87% of counties,<sup>32</sup> so women who can only access religious hospitals in these areas have even fewer reproductive options.

### Federal Refusal Clauses

Refusal clauses allow healthcare providers and institutions to refuse to provide reproductive health services on religious grounds.<sup>33</sup> Here is a brief history of refusal clauses:

- In 1973, in response to the Supreme Court's decision in *Roe v. Wade*,<sup>34</sup> Congress passed the Church Amendment, which allows healthcare providers to refuse to provide abortions or sterilizations on religious grounds.<sup>35</sup> Both individual providers and healthcare facilities may refuse to even refer and or give information on abortions and birth control, meaning if a woman when refused by one pharmacist, the larger pharmacy has no obligation to serve her either.<sup>36</sup> Nothing in the language of the Church Amendment specifies that providers refusing to offer such services have an obligation to help women secure them elsewhere.
- The Hyde-Weldon Conscience Protection Amendment<sup>37</sup> is a 104-word rider that Representative Dave Weldon (R-FL) tacked onto a 3,500-page, \$388 billion omnibus spending bill in 2004.<sup>38</sup> The Amendment is nearly identical to the Abortion Non-Discrimination Act of 2003,<sup>39</sup> which Congress did not pass. The Weldon Amendment denies funds to government agencies and programs if they do not allow anti-choice health care providers to refuse to pay for, provide, or refer patients for abortion.<sup>40</sup> Some of the effects of the Amendment include:
  - States cannot require that Title X- and Medicare-funded clinics and hospitals make abortion referrals, when they cannot provide care due to religious restrictions.<sup>41</sup>
  - States cannot enforce provisions that provide poor women with Medicaid-funded abortions, even in cases of rape, incest, or when the woman's life is in danger.<sup>42</sup>
  - State and local governments can be punished with loss of federal funding if they insist that merging hospitals find a way to preserve patients' access to abortion services, or even that the hospitals provide patients with referrals to alternative

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providers.<sup>43</sup> Such actions can be termed “discrimination” against the merging hospitals.<sup>44</sup>

The Amendment contains no exceptions to protect a woman’s life or health.<sup>45</sup> The Amendment has been added to the Department of Health and Human Services Appropriations Act every year since 1994.<sup>46</sup>

- A refusal clause was built into the Balanced Budget Act of 1997, which created uniform standards for Medicare managed care.<sup>47</sup> For the first time, insurance plans and institutions were able to opt out of providing, reimbursing, or referring Medicaid patients for any services that contradicted the organization's religious or moral beliefs.<sup>48</sup>
- Despite the opposition of the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Hospital Association,<sup>49</sup> on December 19, 2008, the Bush administration published a new Health and Human Services regulation.<sup>50</sup> While purporting to merely provide education and information about currently existing refusal laws, the language of the HHS rule actually expanded the law in four ways:
  - It left open the possibility that providers could define contraception as abortion and therefore refuse to prescribe or dispense birth control.<sup>51</sup>
  - It expanded the types of individuals and organizations that are afforded refusal rights.<sup>52</sup>
  - It allowed individuals to refuse to provide information or referrals to patients seeking care the individual refuses to provide.<sup>53</sup>
  - It failed to consider laws that protect patients’ rights to information and services.<sup>54</sup>

In February, 2011, the Obama Administration rescinded most of the rule. The 2010 Affordable Care Act, however, still allows newly formed health exchanges to exercise refusal rights. Beginning August 2012, the contraceptive mandate proposed by the Affordable Care Act would secure full and comprehensive access to no-cost preventative healthcare for all women. Services would include contraceptive methods and counseling, prenatal care, screening for gestational diabetes, HPV testing, counseling and screening for STDs and HIV and domestic violence, and breastfeeding support and counseling, and screening and counseling for domestic violence. The Obama Administration compromised with the Catholic bishops by requiring religiously affiliated nonprofits and institutions that serve and employ the general public to provide contraception, but exempting the employees of the church itself, such as priests and nuns. The Supreme Court upheld the Affordable Care Act as a constitutional tax on June 28, 2012.

### State Refusal Clauses

- Almost every state has some sort of refusal clause that allows individual health providers to refuse to provide abortion services.<sup>55</sup>
  - Forty-six states allow health care institutions to refuse to provide abortion services.<sup>56</sup> Fourteen states allow only private institutions to deny abortion services,<sup>57</sup> and one state allows only religious institutions to deny services.<sup>58</sup>
  - Fourteen states allow some health care providers to refuse to provide contraception services.<sup>59</sup>
  - Eighteen states allow some health care providers to refuse to provide sterilization services.<sup>60</sup>
  - Twenty-one states have “gag rules” that prevent organizations that receive state funds from counseling women about or referring women to abortion services.<sup>61</sup>
- Refusal clauses can apply to both medical and non-medical individuals and institutions, including physicians, pharmacists, nurses, pharmacies, hospitals, clinics, universities, and insurance companies.<sup>62</sup>

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- Refusal clauses in several states, such as Illinois and Texas, cover not just services like abortion and contraception, but any service to which the provider or payer has a moral objection.<sup>63</sup>
- According to professional organizations, refusal clauses based in religious beliefs may be acceptable if they provide an adequate plan for referral.<sup>64</sup>
- Bills expanding state refusal clauses are being enacted or introduced at a furious pace. For example, in May 2012, Kansas enacted a law expanding the state's refusal clause so that in addition to refusing to perform or participate in abortion services, individuals are now also allowed to refuse to even make a referral they "reasonably believe" would lead to an ended pregnancy.<sup>65</sup> In March, 2011, Utah passed a measure that widened the state's refusal clause, allowing employees at non-religious facilities to refuse to perform or participate in abortions.<sup>66</sup> Anti-choice advocates wish to additionally extend refusal clauses to employees of hospitals tasked with filling out insurance forms or cleaning surgical instruments, or ambulance drivers tasked with moving patients between facilities.<sup>67</sup>

<sup>1</sup> CATHOLIC HEALTH ASS'N OF THE U.S. (CHA), CATHOLIC HEALTH CARE IN THE UNITED STATES 1 (Jan. 2012), available at [http://www.chausa.org/Pages/Newsroom/Fast\\_Facts](http://www.chausa.org/Pages/Newsroom/Fast_Facts) (click on "Catholic Health Care Statistics in 2012").

<sup>2</sup> See *Ranking the Nation's 25 Largest Healthcare Systems by Employees*, DARK DAILY, (Aug. 25, 2010), <http://www.darkdaily.com/ranking-the-nations-25-largest-healthcare-systems-by-employees-825> (ranking religiously-owned and operated healthcare systems as the 3<sup>rd</sup>, 6<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 20<sup>th</sup>, and 23<sup>rd</sup> largest).

<sup>3</sup> Jennifer Harper, *Doctors Face Religious Conflicts at Hospitals*, WASH. TIMES, April 14, 2010, available at <http://www.washingtontimes.com/news/2010/apr/14/doctors-report-religious-conflicts-at-hospitals>.

<sup>4</sup> *Id.*

<sup>5</sup> LOIS UTTLEY & RONNIE PAWELKO, MERGERWATCH PROJECT, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY-SPONSORED HOSPITALS IN THE U.S. 4 (2002), available at [http://www.mergerwatch.org/storage/pdf-files/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/storage/pdf-files/bp_no_strings.pdf).

<sup>6</sup> Jerry Filteau, *Catholic Hospitals Serve One in Six Patients in the United States*, NAT'L CATHOLIC REPORTER, Oct. 20, 2010, <http://ncronline.org/news/catholic-hospitals-serve-one-six-patients-united-states>.

<sup>7</sup> CHA, *supra* note 1, at 2.

<sup>8</sup> See U.S. CONF. OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH SERVICES 21-22 (Directive 36), 25-26 (Directives 38-43 and 45), 27 (Directives 52 and 53) (5<sup>th</sup> ed., 2009), 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>.

<sup>9</sup> *Id.* at 27 (Directive 48).

<sup>10</sup> *Ectopic Pregnancy*, PUBMED HEALTH (Feb. 26, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001897>

<sup>11</sup> UTTLEY & PAWELKO, *supra* note 5, at 27-28.

<sup>12</sup> *Emergency Contraception*, FEMINIST WOMEN'S HEALTH CTR. (June 8, 2011) <http://www.fwhc.org/birth-control/ecinfo.htm>

<sup>13</sup> UTTLEY & PAWELKO, *supra* note 5, at 11.

<sup>14</sup> RELIGIOUS COAL. FOR REPROD. CHOICE, HOSPITAL MERGERS: THE HIDDEN CRISIS, 1, available at [http://www.rcrc.org/pdf/Hospital\\_Mergers.pdf](http://www.rcrc.org/pdf/Hospital_Mergers.pdf) (last visited June 24, 2012).

<sup>15</sup> Antoinette Bonsignore, *Putting Women at Risk: The Rise of Catholic-Secular Hospital Mergers*, NARAL PRO-CHOICE WASH. (April 8, 2011), <http://prochoicewashington.wordpress.com/2011/04/08/putting-women-at-risk-the-rise-of-catholic-secular-hospital-mergers>.

<sup>16</sup> UTTLEY & PAWELKO, *supra* note 5 at 4-5.

<sup>17</sup> Barbara Bradley Hagerty, *Nun Excommunicated for Allowing Abortion*, NPR, May 19, 2010, <http://www.npr.org/templates/story/story.php?storyId=126985072>.

<sup>18</sup> U.S. CONF. OF CATHOLIC BISHOPS 26 (Directive 47), *supra* note 8. ("Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.")

<sup>19</sup> Barbara Bradley Hagerty, *supra* at note 17.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Rob Stein, *Abortion Fight at Catholic Hospital Pushes ACLU to Seek Federal Help*, WASH. POST, Dec. 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206219.html?>

<sup>23</sup> *Id.*

<sup>24</sup> *Mercy nun at hospital that allowed abortion 'no longer excommunicated'*, CATHOLIC NEWS SERVICE, Dec. 9, 2011, <http://www.catholicnews.com/data/briefs/cns/20111209.htm#head13>.

<sup>25</sup> Rachel Benson Gold, *Hierarchy Crackdown Clouds Future of Sterilization, EC Provision at Catholic Hospitals*, THE GUTTMACHER REPORT ON PUBLIC POLICY, May 2002, at 11, available at <http://www.guttmacher.org/pubs/tgr/05/2/gr050211.pdf>.

<sup>26</sup> *Women's Health Care at Risk*, N.Y. TIMES, Feb. 28, 2012, available at <http://www.nytimes.com/2012/02/29/opinion/womens-health-care-at-risk.html>.

<sup>27</sup> Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 731 (2004).

<sup>28</sup> RELIGIOUS COAL. FOR REPROD. CHOICE, *supra* note 14.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Fogel & Rivera, *supra* note 27, at 733.

<sup>32</sup> Rachel Weiner, *No-Choice: 87% of Counties Have No Access to Abortion Clinic*, HUFFINGTON POST (July 3, 2009, 5:12 AM), [http://www.huffingtonpost.com/2009/06/02/no-choice-87-of-us-counti\\_n\\_210194.html](http://www.huffingtonpost.com/2009/06/02/no-choice-87-of-us-counti_n_210194.html).

<sup>33</sup> GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1 (July 1, 2012), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf).

<sup>34</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>35</sup> Church Amendment, 87 Stat. 91 (1973) (current version at 42 U.S.C. § 300a-7(c) (2006)).

<sup>36</sup> NARAL PRO-CHOICE AM., CURRENT REFUSAL LAWS 2 (Jan. 2012), available at <http://www.naral.org/media/fact-sheets/abortion-refusal-clauses-current-law.pdf>.

<sup>37</sup> Hyde-Weldon Conscience Protection Amendment, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. F, tit. V, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004).

<sup>38</sup> Cynthia L. Cooper, *U.S. Gag Rule Included in Emergency Spending Bill*, WOMEN'S ENEWS (Dec. 6, 2004), <http://www.womensenews.org/article.cfm/dyn/aid/2098/context/archive>.

<sup>39</sup> Abortion Non-Discrimination Act of 2003, H.R. 3664, 108th Cong. § 2 (2003).

<sup>40</sup> NARAL PRO-CHOICE AM., CURRENT REFUSAL LAWS *supra* note 36 at 2

<sup>41</sup> Letter from Laura W. Murphy, Dir., ACLU, to Senator Barbara Boxer, Opposing the Weldon Amendment to the FY 2005 Omnibus Appropriations Bill (Nov. 19, 2004) (on file with ACLU), available at <http://www.aclu.org/reproductive-freedom/aclu-letter-senator-boxer-opposing-weldon-amendment-fy-2005-omnibus-appropriati>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Hyde/Weldon Conscience Protection Amendment, *supra* note 37.

<sup>46</sup> See Jane Walker, *The Bush Administration's Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUS. L. REV. 939, 951 (2009) (noting the Amendment has been added to the HHS Appropriations Act from 2004 through 2009). An Obama Administration rescission of the parts of the Bush 2008 refusal law nonetheless kept the Weldon Amendment in place. See *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, 76 Fed. Reg. 9968, 9968 (Feb. 23, 2011).

<sup>47</sup> Medicaid Managed Care Balanced Budget Act of 1997, 42 U.S.C. 1396u-2(b)(3)(B) (1997).

<sup>48</sup> NARAL PRO-CHOICE AM., note 40.

<sup>49</sup> See Karina, *New Bush Administration Rule is an Assault on Women's Health Care*, THE GAVEL (Dec. 18, 2008), <http://www.democraticleader.gov/blog/?p=1620> (quoting Speaker Nancy Pelosi).

<sup>50</sup> Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (effective Jan. 20, 2009).

<sup>51</sup> NARAL PRO-CHOICE AM. FOUND., FEDERAL REFUSAL RULE 3 (Jan. 1, 2011), available at <http://www.naral.org/media/fact-sheets/abortion-refusal-clauses-federal-1.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> GUTTMACHER INST., *supra* note 33.

<sup>56</sup> The exceptions are Alabama, New Hampshire, West Virginia, and Vermont. *Id.* at 2.

<sup>57</sup> *Id.* (AL, IN, IA, MA, MN, MT, NV, NJ, OR, PA, SC, TX, WY)

<sup>58</sup> *Id.* (CA)

<sup>59</sup> *Id.* (AZ, AR, CO, FL, GA, ID, IL, KS, ME, MA, MS, SD, TN, WA)

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<sup>60</sup> *Id.* (AR, GA, ID, IL, KS, KY, ME, MD, MA, MS, MO, MT, NJ, NM, PA, WA, WV, WI)

<sup>61</sup> *Counseling Bans and Gag Rules*, NARAL PRO-CHOICE AM., [http://www.prochoiceamerica.org/what-is-choice/fast-facts/gag\\_rules.html](http://www.prochoiceamerica.org/what-is-choice/fast-facts/gag_rules.html) (last visited July 11, 2012) (AL, AR, AZ, IL, IN, KS, KY, LA, MI, MN, MS, MO, NE, NE, OH, OK, PA, SC, TX, VA, WI).

<sup>62</sup> PLANNED PARENTHOOD FED'N OF AM., INC., *REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS* 3 (Dec. 2004), available at [http://www.plannedparenthood.org/files/PPFA/refusalclauses\\_12-04.pdf](http://www.plannedparenthood.org/files/PPFA/refusalclauses_12-04.pdf).

<sup>63</sup> Jacob M. Appel, *Conscience vs. Care: How Refusal Clauses are Reshaping the Rights Revolution*, 88 *MED. AND HEALTH R.I.* 279, 280 (Aug. 2005), available at <http://www.rimed.org/medhealthri/archived/mo5Augmhri.pdf>.

<sup>64</sup> PLANNED PARENTHOOD FED'N OF AM., INC., *supra* note 62, at 3.

<sup>65</sup> *Monthly State Update: Major Developments in 2012*, GUTTMACHER INST., (July 1, 2012)

<http://www.guttmacher.org/statecenter/updates/index.html>. For a state-by-state guide to reproduction-related laws, including refusal clauses, see *State Data Center*, GUTTMACHER INST.,

<http://www.guttmacher.org/datacenter/profile.jsp> (last visited June 26, 2012).

<sup>66</sup> *Monthly State Update: Major Developments in 2012*, GUTTMACHER INST., (June 1, 2011)

<http://www.guttmacher.org/statecenter/updates/2011/june.html>.

<sup>67</sup> Adam Sonfield, *Provider Refusal and Access to Reproductive Health Services: Approaching a New Balance*, 11 *GUTTMACHER POLICY REVIEW* (Spring 2008), <http://www.guttmacher.org/pubs/gpr/11/2/gpr110202.pdf>.