Approved: April 10, 2002
Date

MINUTES OF THE HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairperson Doug Mays at 1:40 p.m. on February 20, 2002 in Room 313-S of the Capitol.

All members were present except: Representative Judy Morrison, Excused
Representative R. J. Wilson, Excused

Committee staff present: Mary Torrence, Revisor of Statutes
Russell Mills, Legislative Research Department
Shelia Pearman, Committee Secretary

Conferees appearing before the committee:
Representative Tony Powell
Mike Farmer, KS Catholic Conference
Terry Leatherman, Kansas Chamber of Commerce and Industry
Michael Moses, Esquire, US Conference of Catholic Bishops
Nikolas Nikas, Americans United for Life
Patrick Herrick, M.D., Ph.D., Associates in Family Care

Others attending: See attached list

Chairman Mays re-opened the hearing on **HB 2711 - Health care providers' rights of conscience act.** Mr. Leatherman expressed concern to the proposed legislation citing limited protection for health care workers as an issue of the employment-at-will doctrine in Kansas. (Attachment #1)

Representative Powell authored this civil rights legislation which will guarantee to every individual, institution, and payer the right to not participate in, or pay for, the limited list of medical procedures. (Attachment #2) With a collaborative effort from various associations and institutions, this bill is a result of revising **HB 2419**. An amendment will remove blood transfusions in Sec. 3(c), included nurse practitioners in Sec. 3(d). He cited California's law and the pending litigation which required employers to provide health insurance which covered abortion and contraceptives. This bill would cover voluntary contract to provide services but will not force institution or insurance companies to cover specific services. He stated it will not deny patient's access to procedures/services included in this legislation. This would be subject to the Kansas Tort Claim Act. Upon questioning, he clarified that the Constitution shall not restrict the free exercise of religion. He stated he expects the practical impact of this legislation will be minor.

Mr. Farmer stated the failure to enact the bill would have a chilling effect on anyone who wishes to participate in the delivery of health services in Kansas yet rejects the practice of abortion, sterilization, cloning, or any of the other morally controversial procedures identified in the bill. (Attachment #3) It also ensures the freedom of health care professionals, institutions and payers not to participate in certain procedures, all of which are morally controversial. He also submitted testimony from Mr. Moses (Attachment #4) who stated out of respect for religious freedom, concern for the ethical integrity of the medical profession, and appreciation for the diversity of our health system and our society, all should agree to help prevent such coercion. Committee questions included Do Not Resuscitate orders and pain-control medication. Mr. Moses testimony included a statement that the intent to provide compassionate care would be permissible.

Mr. Hesse represents the State's largest multi-institutional healthcare system which employs approximately 10,000 employees and referenced the submitted testimony of LeRoy E. Rheault, Via Christi Health System's CEO. (Attachment #5) He stated as a faith-based organization, they support the belief all health care providers should have the civil right to exercise their rights of conscience covered by this act. Also, they believe the bill should be expanded to go outside the walls of hospitals to include physician clinics, senior care facilities, medical and nursing schools. He stated this legislation would prohibit employers from discriminating against professionals who conscientiously object to provide services/procedures listed. He also said healthcare providers and payers should have the individual and organizational right of conscience to decline to participate in or pay for services in the act which they deem morally objectionable without fear of discrimination, termination, government intrusion or other

legal actions. He further stated this legislation also requires reasonable notice of objection so that other healthcare providers are available to provide the necessary treatment. (Attachment #6)

Dr. Herrick cited personalized incidences of healthcare providers who have experienced discrimination. He also stated failure to pass this legislation allows the pressure upon doctors and other practitioners to continue; either ignore their conscience or act against it. (Attachment #7)

Ms. Hargett has been employed for 18 years in an OB-GYN office. Following a conversion of faith, she no longer feels she can administer all medication and services previously done during her employment. Following discussions with her physician employer, he stated he is likely to alter his hiring decisions in the future because of this situation. While she believes this legislation will not benefit her, she stated it is important to the future of healthcare employees. (Attachment #8)

Mr. Nikas voiced his support of **HB 2711**. Their organization, which has been involved in every abortion-related case since *Roe v. Wade*, gives advice to Attorney Generals and State Legislators across America. (Attachment #9) Although he and his colleague, Ms. Bordlee, would not make a policy statement on this bill, he cited this bill is constitutionally-based and nothing in Supreme Court jurist prudence would prevent the State of Kansas from passing this legislation. He cited thirteen states are presently dealing with end-of-life care issues including the freedom to give advance notice of objection of care.

Kansas Human Rights Commission Executive Director and Legal Counsel submitted written testimony stating the prohibitions contained within the proposed legislation concerning discrimination based upon rights of conscience might be seen as inconsistent with such an intent regarding the types of things the act should deal with. KHRC anticipates an increase in discrimination complaints, thus requiring additional resources not currently considered in the FY2003 budget. (Attachment #10)

The meeting recessed at 3:20 with testimony for **HB 2711** to continue on February 21, 2002.

HOUSE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST

DATE 2/20/2002

NAME	REPRESENTING
Carla Mahany	PPKM
Barbara Wade	KCA
Brenda Meyers	NOW / NAWW
Rene Ann Rover	KAHP
Stephanie Sharp	ACS
Natalie Bright	Via Christi
Mary Lou Warren	LWV Great Bend
Priscilla Brandt	LWV Johnson County
Ann Hebberger	Mainstream Coalition
Rich Gilmore	Health Midwest
Kelly Slaughter	KNS
Theodore Rowe	KUVK
Edward Rowe	"
Tom Bell	KHA
Jeff Bottenberg	Univ. Kansas Hospital Authority
Josh Arce	Univ. Kansas
Elmer Feldkamp	Right to Life of Kansas
Keith Haxton	SEAK
Barb Conant	KTRA
Jason Moore	KU School of Pharmacy Student (KPLA)
Jon Josserand	Univ. of Kansas

LEGISLATIVE TESTIMONY

the Kansas Chamber of Commerce and Industry
The Unified Voice of Business

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HB 2711

February 20, 2002

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Federal and State Affairs
by

Terry Leatherman
Vice President – Legislative Affairs
Kansas Chamber of Commerce and Industry

Mr. Chairman and members of the Committee:

My name is Terry Leatherman. I am the Vice President of Legislative Affairs for the Kansas Chamber of Commerce and Industry. Thank you for this opportunity to comment on HB 2711.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The sole reason behind KCCI's testimony today is how this bill will affect the employment-at-will doctrine that has served this state well for years. In short, that doctrine permits an employer or employee to conclude an employment arrangement for any reason, or no reason at all. There are exceptions to employment-at-will in Kansas. The best known exceptions are employment actions for

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discriminatory reasons, such as a dismissal based on someone's race or gender. Section seven of HB 2711 would add a new exception, the right of consci3ence of a health care provider when faced with certain employment requirements.

It is important to recognize the limited construction of the employment-at-will exception in HB 2711. The authors limited the scope of the bill in several ways. The protection is only for health care workers. Further, those workers would have a grievance only when employment action is taken for their refusal to perform a specific list of functions. The bill also provides a procedure where disclosure of the worker's objections are given in advance, avoiding a situation where the right of conscience is expressed when service is about to be rendered.

The bill's careful construction raises a question. If this limited exception to employment-at-will is adopted, where will one draw the line on the next exception to the doctrine? In light of this, especially in cases involving the performance of job duties, KCCI stand next to the doctrine itself. In situations where the questions raised by this bill surface, KCCI respectfully suggests the appropriate resolution should be between the employer and employee, rather than the subject of litigation.

Mr. Chairman, thank you for the opportunity to comment on HB 2711 and the important doctrine of employment-at-will in Kansas. I would be happy to respond to any questions.

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STATE OF KANSAS
HOUSE OF REPRESENTATIVES

TOPEKA

COMMITTEE ASSIGNMENTS
CHAIRMAN: ETHICS AND ELECTIONS
MEMBER: FEDERAL AND STATE AFFAIRS
RULES AND JOURNAL
TAXATION
ALEC STATE CHAIR

TESTIMONY IN SUPPORT OF HB 2711
BY REPRESENTATIVE TONY POWELL
February 20, 2002

Mr. Chairman,

I, along with over 50 of my House colleagues, are proud to be sponsors of HB 2711, the Health Care Providers' Rights of Conscience Act. This landmark piece of legislation will guarantee to every health care provider, institution, and payer, the right to not participate in, or pay for, the limited list of medical procedures and services which they and many Kansans find morally or religiously objectionable. Though you may not know it after hearing from the opponents, it is not an abortion bill. We will have ample opportunities to debate that issue at another time. This bill is about civil rights.

This legislation is the product of major rewriting and work with many in the health care field, such as the Kansas Medical Society and Kansas Hospital Association, and strikes the right balance between patient desires for certain medical procedures and the right of a health care provider to conscientiously object to performing such procedures. After hearing the objections to last year's bill, we took those criticisms to heart. We believe we have answered the legitimate questions and solved them. This bill is greatly narrowed in focus to eliminate unintended consequences, but preserves the core rights necessary to protect health care providers and institutions. Countless hours were spent by me and other supporters refining and clarifying the bill's provisions. I am very proud of the work product represented in HB 2711.

After listening to the opponents testify yesterday, I am convinced more than ever that this bill is desperately needed. Never during my eight years in the legislature have I heard such baseless and overreaching arguments against a piece of legislation. The almost hysterical diatribe against this bill appears to be based on the Orwellian view that any individual health care provider who dares to stand up for his or her own conscience should be drummed out of the medical profession. Such a view is not only bigoted, but goes against the very foundations of our nation's history. Like Alabama Governor George Wallace barring the door to the university to African-Americans, they are saying that people of faith are unfit to serve in health care unless they check their convictions at the door. What an outrage! Our nation was founded on religious freedom and the right to dissent. The opponents of this bill—the abortion industry—want to steal these rights away. Why? Because in the case of abortion, they know there is a stigma associated

with it, and the only way to ensure access to abortions in the future will be to force health care providers to perform and pay for them.

So let me set the record straight—there is nothing in this bill, I repeat, nothing in this bill that will deny patients access to, and the right of health care providers to perform, the medical procedures and services set forth in this bill. Nothing in this bill will prohibit hospitals or medical schools from training or teaching health care professionals about the medical procedures outlined in this bill. To suggest otherwise is to mislead this committee.

What does this bill do? It simply guarantees the right of any health care provider, institution, or payer from being forced against their will to perform or pay for any of the medical procedures outlined in the legislation. Those procedures are limited to only the most controversial: abortion, artificial insemination, assisted reproduction, artificial birth control, human cloning, embryonic stem cell and fetal experimentation, infanticide, assisting suicide and euthanasia, and sterilization for contraceptive purposes. This bill simply gives conscientious objectors the right to not perform procedures that everyone agrees are extremely controversial. Only a tolerant society would protect the right of individuals to refrain from doing something which violates their most deeply held beliefs.

This bill, while protecting important conscience rights, bends over backwards to recognize patient desires and needs. It contains an emergency exception for those extremely rare situations when performing one of the medical procedures outlined in this bill is necessary to protect a patient's life, and requires that health care professionals comply with any ethical duties they may have to patients so long as they are not required to participate in the provision of a health care service subject to this act. With regard to health care payers, they must pay for all services they voluntarily contract for, regardless rest of the bill's provisions. Health care providers, while gaining new civil rights protections under this bill, must give advance notice to their employer in writing of their objection to performing any of the medical procedures or services set forth in this bill. No other civil rights legislation contains this notice requirement.

Another word about the referral issue raised yesterday. It was repeatedly asserted that this bill infringes on patient care rights because it does not contain referral obligations. Well, neither does current law. There is nothing in statute today that requires a doctor, for example, to refer a patient who wants an abortion to an abortionist.

In short, this bill represents the most definitive effort to date to put into practice one of the cardinal principles of our nation—the right to be true to one's own conscience. This bill deserves your support. I would be happy to stand for questions.

Kansas Catholic Conference

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February 20, 2002

Chairman Doug Mays
House Federal and State Affairs Committee

Mr. Chairman and members of the Committee:

Thank you for this opportunity to testify on behalf of HB 2711.

I am Mike Farmer, Executive Director of the Kansas Catholic Conference, the public policy arm of the Catholic Bishops of Kansas. With me today is Michael Moses, Associate General Counsel with the United States Conference of Catholic Bishops, who is here today assisting me and the Kansas Bishops.

I had the opportunity yesterday to listen to the opponents' testimony on this bill. The principal objection to the bill concerned access to some of the procedures identified in the bill. This is a complete red herring. The bill does nothing to interfere with a person's freedom to obtain any procedure or service. On the contrary, this bill ensures the freedom of health care professionals, institutions and payers not to participate in certain procedures, all of which are morally controversial, hence the need for conscience protection.

Stop to consider for a moment the consequences of <u>not</u> passing this bill. Failure to enact the bill would have a chilling effect on anyone who wishes to participate in the delivery of health services in Kansas yet rejects the practice of abortion, sterilization, cloning, or any of the other morally controversial procedures identified in the bill. Absent this bill's protection, one might just as well post signs in front of our medical, nursing and pharmacy schools stating: "Check your conscience at the door." Indeed, one with such conscientious objections need not even apply for admission to such schools because, absent the bill, there is no guarantee that they will not be forced to choose between following their conscience and practicing their chosen profession.

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Is that the message we want to send to the future health care professionals of this State – that they either must perform these procedures in violation of their conscience or else look for another line of work? As a matter of public policy, do we want to say to our children and the children of our fellow citizens that they either must perform these procedures or give up their long cherished dream to enter the health professions? I am firmly convinced, and I believe the members of this committee will share my conviction, that the answer to both questions is no.

I want to address head on the arguments that have been made about so-called emergency contraception for women who are the tragic victims of rape. First, Catholic physicians and health care workers treat such patients with care and compassion. Further, in such cases, if after appropriate testing, there is no evidence that conception has occurred already, the woman may be treated with medications that would prevent ovulation, sperm capacitation or fertilization. It is not morally permissible, however, to initiate or recommend treatments that have as their purpose or direct effect the removal, destruction or interference with the implantation of a fertilized ovum – because it is never morally permissible to take an innocent human life.

Existing Kansas law says that no person shall be required to perform or participate in an abortion or sterilization. Kan. Stat. 65-443, 65-444, 65-446, 65-447. These statutory protections have had a beneficial effect on our health system in ensuring the right of health professionals and institutions to practice medicine consistent with their conscience. We think those protections need to be expanded as this bill would do.

Yesterday an opponent of this bill testified that "one of the greatest freedoms we have is the freedom to choose." If the taking of a human life were a "freedom," which we think it is not, then I would ask that witness and other opponents of this bill: why is it that you are so willing to deny health professionals, institutions, and payers the choice you claim to defend for others, the choice not to take a human life. Can that choice only be exercised one way? If so, what sort of choice is that? Members of this Committee, that is not a choice at all. That is coercion.

The world envisioned by opponents of this bill is not at all a world of choice and diversity, but a world in which choice and diversity are denied, a world in which all must think and act as proponents of abortion, sterilization and other controversial procedures.

Along with my testimony, I am today also submitting the written testimony of the Secretariat of Pro-Life Activities of the United States Conference of Catholic Bishops, which gives a national perspective for the need for conscience protection.

Mike and I would be happy to stand for any questions.

Written Testimony of the

Secretariat for Pro-Life Activities
United States Conference of Catholic Bishops

on the Health Care Providers' Rights of Conscience Act (HB 2711)

Submitted to the Committee on Federal and State Affairs
Kansas House of Representatives

February 20, 2002

Thank you for providing us this opportunity to submit written testimony on the Health Care Providers' Rights of Conscience Act (HB 2711). The United States Conference of Catholic Bishops is a nonprofit corporation organized under the laws of the District of Columbia, whose members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops on diverse issues, including access to health care, concern for the poor and vulnerable, the protection of human rights (including religious freedom and rights of conscience) and the sanctity and dignity of human life. As a national conference we do not take formal positions on state legislation, but we lend advice and assistance to local Bishops and state Catholic conferences at their request. We have been asked by the Kansas Catholic Conference to provide some background on the right of conscience on the federal and state levels and to discuss growing threats to this fundamental right.

The Well-Established Legal Tradition on Rights of Conscience

The basic principle that no one ought to be forced to act in violation of his or her conscience is recognized and protected by a vast body of laws. In federal law, this principle is

recognized in a number of provisions that protect conscientious objection to a range of procedures, including abortion,[1] sterilization,[2] contraception[3] and executions.[4]

This principle is also recognized in the vast majority of states. After the Supreme Court handed down its *Roe v. Wade* decision in 1973, prompting Congress to pass its first legislation protecting the right to refuse to provide abortions, many states passed similar laws. Today Kansas and almost all other states provide some protection for the right of conscientious objection to involvement in abortion. Some states also protect providers who object to other kinds of procedures, including euthanasia, sterilization, artificial insemination, abortifacient drugs and contraception. The State of Illinois has adopted a comprehensive right of conscience law, under which the protection of physicians and other health care personnel extends to *any* procedure "which is contrary to the conscience of such physician or health care personnel." The State of Washington provides comprehensive conscience protection to individual health care providers and to religiously affiliated health care plans and facilities.

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[1] *See* 42 U.S.C. § 300a-7(b) (prohibiting public discrimination against individuals and entities that object to performing abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(c) (prohibiting entities from discriminating against physicians and health care personnel who object to performing abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(e) (prohibiting entities from discriminating against applicants who object to participating in abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 238n (prohibiting discrimination against individuals and entities that refuse to perform abortions or train in their performance); 20 U.S.C. § 1688 (ensuring that federal sex discrimination standards do not require educational institutions to provide or pay for abortions or abortion benefits).

[2] *See* 42 U.S.C. § 300a-7(b) (prohibiting public discrimination against individuals and entities that object to performing sterilizations on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(c) (prohibiting entities from discriminating against physicians and health care personnel who object to performing sterilizations on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(e) (prohibiting entities from discriminating against applicants who object to participating in sterilizations on the basis of religious beliefs or moral convictions).

[3] *See* Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, § 641, 115 Stat. 514, 554-5 (prohibiting health plans participating in the federal employee health benefits program from discriminating against individuals who, for religious or moral reasons, refuse to prescribe or otherwise provide for contraceptives, and protecting the right of health plans that have religious objections to contraceptives to participate in the program).

[4] *See* 18 U.S.C. § 3597(b) (providing that no state correctional employee or federal prosecutor shall be required, as a condition of employment or contractual obligation, to participate in any federal death penalty case or execution if contrary to his or her moral or religious convictions).

Inadequacies in Current Legal Protection

While the principle of protection for conscience rights is widely acknowledged, its implementation has been far from perfect, creating a need for more comprehensive and forward-looking legislation.

Most federal conscience protections apply only to specific federal programs or are tied to the receipt of federal funds.[5] Their scope is limited by this fact, and by the narrow range of procedures covered.

Though the majority of states acknowledge and protects rights of conscience, their laws suffer from similar inadequacies. Most of these laws are limited to abortion. Only a few states protect health care providers from being forced to perform sterilizations. Few existing laws protect the full range of individuals and institutions that may be involved in providing health care in our increasingly complex health care system. Many states do not protect the rights of conscience with respect to newly created technologies such as cloning or embryonic research, or even current misuses of older technology such as "surrogate" motherhood. States have also not addressed the need to protect providers with respect to new threats to human life at the end of life, such as physician-assisted suicide and euthanasia. As noted by one commentator: "As the range of medical technologies continues to expand..., the number of medical services involving potentially serious conflicts of conscience is certain to increase."[6]

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[5] *See* 42 U.S.C. §§ 300a-7(b), 300a-7(c), 300a-7(e) (conscience protections limited to entities that receive and individuals who work in entities that receive federal funds under the Public Health Service Act, Community Mental Health Centers Act, Developmental Disabilities Services and Facilities Construction Act, or Developmental Disabilities Assistance and Bill of Rights Act of 2000); Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, § 641, 115 Stat. 514, 554-5 (protections under only the federal employee health benefits program); 18 U.S.C. § 3597(b) (protects only prosecutors, correctional and other enumerated personnel in the context of federal death penalty cases and executions).

[6] Lynn D. Wardle, "Protecting the Rights of Conscience of Health Care Providers," 14 J. OF LEGAL MED. 177, 181 (1993).

Finally, with new organized threats to conscience on the horizon, it is especially important for states to expand and strengthen their existing protections now. These threats have become especially apparent in recent years in the fields of abortion and contraception, as reviewed below.

Attempts to Force Health Care Providers to Perform Abortions and Other "Reproductive" Services

Existing conscience laws are under increasing attack by abortion rights activists, who want to require all health care personnel and hospitals to provide "the full range of reproductive services," including abortion. Not two years ago, there was a bold and unsuccessful attempt at a meeting of the American Medical Association's House of Delegates to win AMA endorsement for legislation requiring all hospitals to provide a "full range of reproductive services."[7] Fortunately the delegates ultimately defeated this misguided proposal, instead reaffirming AMA policy supporting conscience which states that "neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles."[8]

There have been other attempts to force hospitals to provide abortions and other morally controversial services. In 1997, for example, the Alaska Supreme Court ordered a private non-sectarian hospital that had a policy against abortion to begin performing abortions.[9] And in New Hampshire in 1998, after "reproductive rights"groups learned that a newly merged hospital would no longer perform elective abortions and sterilizations, they approached the New

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[7]AMA House of Delegates, Annual Meeting, 2000, Resolution 218.

[8]*See Proceedings of the 2000 Annual Meeting of the AMA House of Delegates* (American Medical Association, Chicago, IL), June 2000, at 447.

[9]*Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997).

Hampshire attorney general to challenge the merger. The New Hampshire attorney general issued an opinion concluding on several grounds that the merger is subject to the law of charitable trust and must be reviewed in probate court. Under the pressure of the attorney general, the merger dissolved. Subsequently, abortion rights groups made this case a model for one of their strategies to prevent mergers if such procedures will not be performed or to force newly merged hospitals to perform them.[10] The American Civil Liberties Union (ironically named in this context) recently has published a report and advocacy kit aimed at requiring all hospitals, including Catholic hospitals, to perform abortions and other procedures which violate their conscientious convictions.[11]

Contraceptive Mandates and "Emergency Contraception"

Attacks on conscience have not always been as overt as these. A large part of the campaign to undo conscience rights in the abortion context has proceeded subtly and incrementally and has trampled on other conscience rights along the way. For example, to gain momentum for their campaign, abortion rights activists have begun to erode the right of conscience as it relates to paying for and providing contraception. Seventeen states now have adopted, and two more—Massachusetts and New York—are actively considering, mandates that require employers to provide insurance coverage for contraceptives if they provide coverage for other prescription drugs.

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[10] *Hospital Mergers and the Threat to Women's Reproductive Health Services; Using Charitable Assets Laws to Fight Back,* National Women's Law Center, 2001.

[11] ACLU, "Religious Refusals and Reproductive Rights," January 2002.

Advocacy to mandate contraceptive coverage is noteworthy for a number of reasons, not the least of which is the fact that in all but one state, these mandates extend to so-called "emergency contraception." "Contraception" is a misnomer in this case, because this regimen commonly operates not to prevent conception *but rather* to ensure the death of an embryo after conception by interfering with implantation in the womb.[12] It is thought that "this mode of action could explain the majority of cases where pregnancies are prevented by the morning after pill."[13] These efforts to mandate "contraceptive" drug coverage are therefore attempts to obscure or destroy the line between abortion and contraception, and to universalize coverage of abortifacient drugs at the expense of conscience rights. Virtually all the mandates enacted thus far provide either no conscience protection or inadequate protection. Only one mandate safeguards religious and moral beliefs. A dozen of the mandates contain provisions protecting religious employers, but half of these define "religious employer" so restrictively that the vast majority of religious organizations are not covered. In some cases, the statutory language ignores the religious character of organizations such as Catholic Charities and Catholic grade schools, treating them instead as "secular" institutions with no conscience rights whatever.

National groups advancing this campaign have had a federal contraceptive mandate introduced in Congress as well. That bill not only fails to provide any conscience protection (contradicting many federal laws that protect religious beliefs and moral convictions), but would even override all existing conscience protections in state contraceptive mandates, inadequate

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[12] *See* Preven Emergency Contraception Prescribing Information, http://www.preven.com/prodinfo/prescinfo.asp (visited 02/12/02)

[13] F. Grou and I. Rodriguez, "The Morning After Pill, How Long After?" 171 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY 1529-34 (1994).

though many of these already are.[14] This bill, too, would cover abortifacient "emergency contraception." The movement to impose contraceptive coverage is really a movement to mainstream abortion as a medical norm and chip away at the right of conscience.

Mandating "Emergency Contraception" in Hospitals

Conscience rights are also at risk in bills to mandate the administration of "emergency contraception" to rape victims. All Catholic hospitals observe ethical directives which allow provision of emergency contraception to rape victims when its mode of action would be contraceptive, i.e., preventing ovulation or fertilization. Catholic hospitals, however, will not administer this drug as an abortifacient, if conception has already occurred. A handful of states[15] are considering or have considered specific mandates for emergency contraception, which are designed to override the conscience rights of Catholic hospitals and others.

Though only a few state legislatures are considering such measures, an organized national effort—the Abortion Access Project—is operating in twenty-one states[16] to garner support for them. It is quite clear from the project's materials, including fact sheets and resources on the project's website, that it has targeted Catholic hospitals.[17] Mandating these abortifacient drugs is an incremental means to requiring hospitals to perform abortions generally—indeed, the group's

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[14]Equity in Prescription Insurance and Contraceptive Coverage Act of 2001, S. 104, 107th Congress (2001).

[15]Illinois, Florida, Maryland, New York, Wisconsin.

[16]*See* Abortion Access Project, "Hospital Access Collaborative Newsletter" Fall 2001, www.abortionaccess.org/AAP/campaigns/HAC/HAC_news_fall01.htm (visited 02/15/02).

[17]*See* Abortion Access Project web site, www.abortionaccess.org, for Fact Sheets, "Catholic Hospitals and the Charity Myth" and "The Impact of Catholic Hospital Mergers on Women's Reproductive Health Services," and the manual "Designing A Campaign To Increase Hospital-based Abortion Services," especially Section C2, "Catholic Hospitals and Emergency Contraception."

materials on emergency contraception are included in a kit titled: "Designing A Campaign To Increase Hospital-based Abortion Services."[18]

Why Are There Efforts to Undermine Conscience Now?

With conscience laws on the books for nearly thirty years, what accounts for these renewed efforts to undermine rights of conscience? Part of the answer lies in a desperate desire by abortion proponents and others to legitimize procedures that carry a stigma in the medical profession and society at large. Legalizing abortion has not made it respectable, and few doctors want to train in or perform abortions. Half of Americans consider abortion equivalent to murder.[19] If abortion had to be provided in all hospitals, this would lend the impression that it is basic health care. In 1995, when he called for intensified efforts to require abortion training for all medical residents, abortion advocate Dr. David Grimes declared that "making abortion training a routine part of any residency...will put abortion back in the mainstream of medicine."[20]

The procedures covered in the proposed Kansas legislation all have this dynamic in common – that is, none of them is truly established on medical or ethical grounds *as* basic health care, and so organized campaigns are required to *make* them so by requiring everyone to be involved in them. All these procedures are morally problematic or controversial; some of them are illegal in all states (infanticide, euthanasia); some, though quite new, are already illegal in a

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[18]Abortion Access Project, "Designing A Campaign To Increase Hospital-based Abortion Services," available at www.abortionaccess.org/AAP/campaigns/hospital/designing_a_campaign_to_increase.htm#The Need To Increase (visited 02/11/02).

[19]NY Times/CBS Poll, N.Y. TIMES, Jan. 16, 1998, A1.

[20]MED. & HEALTH, Feb. 29, 1995.

number of states (cloning, destructive embryo research); and none of them can claim to treat or cure an illness.

In the case of abortion, renewed threats to conscience can also be explained by the fiercely competitive and commercial nature of the abortion business. To generate the most business, abortion clinics have located in urban areas almost exclusively, where there is a large population base. "Abortion clinics are no different from other speciality services, said Dr. William Ramos, who runs an abortion clinic in Las Vegas. 'In the entire state of Nevada, there is only one Lexus dealer and only one Acura dealer', he said." With abortion, Dr. Ramos continued, "there is less work and more income." But to achieve the income that most abortionists expect, they must remain in cities. "Clinic owners say they have little choice but to cluster in cities—that is the only way they can find enough patients." Additionally, in order to maintain their niche in the market, they often refuse to train other physicians. "One doctor in Detroit....said that when he finished medical school, trained in obstetrics and gynecology, he asked abortion doctors in the area to train him. He was turned away."[21]

The reality is that public sentiment against abortion has grown even stronger in recent years, and fewer women are seeking abortions. Hence clinic owners have become even more protective of the "business" they already have, and less willing to extend their reach to rural areas where few women seek abortion. Rather than "setting up shop" in such areas at a risk to their profit margin, they are advocating that all hospitals be required to perform abortions.

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[21]Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, N.Y. TIMES, Dec. 30, 2000, at A1.

Conclusion

Legislation that will protect conscience by prohibiting discrimination against health care providers is urgently needed to counteract these attempts nationwide to undo existing protections. Respect for conscience has never been, nor should it be, especially controversial. Even Planned Parenthood of Kansas and Mid-Missouri recognizes the right of conscience in theory, saying that it is committed "to ensure an environment which affirms...exercise of the individual conscience."[22] The problem is that Planned Parenthood's respect for conscience is partial and selective, and does not take account of the conscience rights of individuals and institutions that disagree with its own view of "reproductive health."

The proposed bill and other conscience protections recognize a basic principle: no one, least of all a health care provider committed to healing, should be forced to violate his or her conscience by participating in procedures that he or she deems to be harmful or morally wrong. Out of respect for religious freedom, concern for the ethical integrity of the medical profession, and appreciation for the diversity of our health system and our society, all should agree to help prevent such coercion.

[22] www.ppkmo.org (visited 02/12/02).

Via Christi
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LeRoy Rheault
President and
Chief Executive Officer

To: Chairman Doug Mays and Members of the House Committee on Federal and State Affairs

From: LeRoy E. Rheault
Chief Executive Officer
Via Christi Health System, Inc.
Wichita, KS

Re: HB 2711, Health Care Provider's Rights of Conscience Act

Date: February 20, 2002

Chairman Mays and Members of the House Committee on Federal and State Affairs, I appreciate the opportunity to submit written testimony today in support of HB 2711, the Health Care Provider's Rights of Conscience Act. My name is LeRoy Rheault and I am the Chief Executive Officer of Via Christi Health System, Inc. ("Via Christi) in Wichita, Kansas. Via Christi coordinates a Kansas faith-based, multi-institutional healthcare system to promote and provide healthcare services, educational programs, and charitable activities to improve and protect the health and welfare of all persons, addressing their social, spiritual, mental and physical needs. Via Christi's healthcare mission of service extends particularly to the poor and underserved members of society.

Via Christi is the parent corporation to several Kansas not-for-profit hospitals and has an ownership interest in others (Wichita, Manhattan, Pittsburg, Salina). Through Via Christi Senior Services, Inc., Via Christi owns and operates several not-for-profit senior care facilities (Wichita, Manhattan, Concordia) which address issues specific to our senior citizens. Via Christi owns or manages over 25 private physician offices with 90 affiliated physicians throughout the State of Kansas (Preferred Medical Associates clinics in Colby, Winfield, Iola, Colony, Pittsburg, Emporia, Wichita and Mulvane). Also part of Via Christi is Preferred Health Systems (PHS), a for-profit "health care payer" within the meaning of HB 2711 which insures the lives of 155,777 Kansans and an additional 140,000 covered lives through networks, for a total of 295,777 covered lives. Via Christi employs nearly 10,000 employees in Kansas and hundreds out-of state.

Via Christi supports the noble objectives of HB 2711 to declare it public policy of the State of Kansas to respect and protect the fundamental rights of conscience of all healthcare providers of all faiths who provide healthcare services within the State of Kansas. HB 2711 establishes and protects a healthcare provider's civil right to decline to participate in a healthcare service offensive to that provider and frees the provider from government intrusion/entanglement and from threat of termination of employment for exercising such rights. No Kansas healthcare provider (hospitals, physicians, nurses, senior care facilities and others) should be compelled by any institution/employer policies, government agencies, laws and regulations, to participate in, or pay for, a healthcare service which violates an individual's moral principles or an organization's healthcare mission of service. Appropriately, HB 2711 provides sanctions under the Kansas Act Against Discrimination against employers for terminating the employment of, or otherwise discriminating against, healthcare providers for exercising their rights of conscience.

With regard to PHS and its health plan, there are exclusions from coverage and payment for healthcare services listed under HB 2711. To date, neither PHS nor Via Christi has litigated a case over non-payment of healthcare services subject to this Act. HB 2711 will protect faith-based institutions and healthcare payers like Via Christi from objectionable government imposed rules and regulations which run contrary to the mission and values of the organization.

Please accept this written testimony from Via Christi Health System in support of HB 2711 as we believe it should be the law of the State of Kansas to provide all healthcare providers of all faiths the right of conscience to refuse to participate in the provision of, or pay for, a healthcare service subject to this Act.

Respectfully submitted,

LeRoy Rheault

LeRoy E. Rheault
President & CEO
Via Christi Health System, Inc.

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Office of General Counsel

To: Chairman Mays and Members of the House Committee on Federal and State Affairs

Re: HB 2711, Health Care Provider's Rights of Conscience Act

Date: February 20, 2002

Chairman Mays, Members of the House Committee on Federal and State Affairs, and fellow Kansans, greetings from Wichita! I appreciate the opportunity to appear today and submit oral and written testimony in support of HB 2711, the Health Care Provider's Rights of Conscience Act. My name is Matthew (Matt) Hesse and I am Associate General Counsel for the Via Christi Health System ("Via Christi") in Wichita, Kansas. I am one of three lawyers in our office who advise Via Christi organizations and affiliates, their Administrators, Boards of Directors, Officers, Managers and employees on their respective legal matters.

Before I begin, I was instructed by the Chief Executive Officer of the Via Christi Health System, Mr. LeRoy E. Rheault, to submit his written testimony, and that of Via Christi, in support of HB 2711. Mr. Rheault adequately sets forth the position of Via Christi in support of HB 2711, and so, as I distribute his testimony to you, I incorporate his comments by reference into my testimony here today, but wish to address a few other points, if I may.

As you peruse Mr. Rheault's description of Via Christi and its healthcare mission of service throughout the State of Kansas, you will see that Via Christi is a significant player in the healthcare delivery system in Kansas. As such, and with almost 10,000 employees, many of which are covered by the Via Christi Health Plan, we respect the rights of conscience of all healthcare providers within, and outside, Via Christi Health System -- providers of all faiths -- and support their right to decline to participate in a healthcare service they deem morally unacceptable. We believe they should be able to do so without fear of retribution, discrimination, or even termination of employment. From Via Christi's standpoint, as long as the employee indicates in advance and within a reasonable period of time for management to arrange for another provider to render a particular healthcare service, we honor and accommodate such conscientious objections. From the perspective of a healthcare

House Fed. & State Affairs
Date 2/20/02
Attachment No. 6

Robert L. Heath Tel 316-268-5084 Matthew C. Hesse Tel 316-268-5088 Roberta R. Johnson Tel 316-268-5107

provider/employer, Via Christi would not want employees who object to rendering certain healthcare services to be involved in delivery of them, as it could affect employee morale, interfere with the quality of healthcare services delivered in the facility and create significant risk problems for the facility/employer.

Kansas has already recognized the right of persons not to be required to perform or participate in medical procedures which result in the termination of a pregnancy or sterilizations (See, K.S.A. 65-443 and K.S.A. 65-446). These particular statutes apply only to termination of pregnancies or sterilization procedures within hospitals and prevents the hospital and its administrator from imposing sanctions on the conscientious objector because of the person's refusal to perform or participate in the procedure. HB 2711 expands this right beyond the walls of a hospital to physician office clinics, senior care facilities, and medical and nursing schools. In addition, HB 2711 gives providers the right to object to participation in other healthcare services which providers may, and frequently do, find morally objectionable. HB 2711 goes further than the existing law by including protections for those aggrieved by unlawful employment practices resulting from exercising their rights of conscience. The Bill prevents employers from discriminating against providers for having deeply held beliefs about being involved in the delivery of some healthcare services and declining to participate in or perform them. In my opinion, HB 2711 is a logical extension of existing Kansas law.

Via Christi also supports the provisions in HB 2711 which protect healthcare payers as well. The Via Christi Health plan and Via Christi's healthcare payer (Preferred Health Systems, Inc.) should not be subject to government or agency imposed rules or regulations which violate fundamental beliefs or principles of faith held by their sponsoring religious congregations or organizations. In every health plan, there are exclusions from coverage or payment of certain products and healthcare services – every health plan has exclusions. Employees who enroll in these plans have access to summary plan description documents, or the plan itself, to determine what is covered or not covered, to decide whether to enroll in that plan or seek enrollment in another plan, or to seek arrangements with their employers to have certain services which are not covered, covered, if circumstances warrant it. To force faith-based institutions/employers and/or their healthcare plans and healthcare payers to provide healthcare services which violate their core values, mission and principles of faith is government intrusion and entanglement and should not be condoned or allowed. HB 2711 will protect faith-based, healthcare institutions and healthcare payers from such impositions which run contrary to the organization's charitable mission and/or principles of faith. Issues of healthcare service coverage are best left to payers and employers to resolve and/or for employers and employees to resolve. Via Christi's Health Plan and its healthcare payer should have the right not to participate in, arrange for, or pay for a healthcare service subject to the Act and that right should be protected. As Mr. Rheault points out in his testimony, healthcare services listed in the Act are presently excluded from coverage in the

Via Christi Health Plan and under the Preferred Health Systems plan, and to date, with its many covered lives and employees, there has never been a legal dispute over non-payment for such services.

As the dust clears from this serious debate, one principle should emerge inviolate; healthcare providers and healthcare payers should have the individual and organizational right of conscience to decline to participate in or pay for healthcare services (subject to the Act) they deem morally objectionable without fear of discrimination, termination, government intrusion or other legal action.

Lastly, it is not Via Christi's intention to deny others their right to seek healthcare services listed in the Act, but Via Christi seeks to reaffirm that it, its affiliates and employees, and all healthcare providers of different faiths and beliefs, have the right to refuse to provide and/or pay for them as a matter of conscience and as a matter of private contract between the health plan, employer and employee.

Please accept this written testimony in support of HB 2711.

Respectfully submitted,

Matthew C. Hesse
Associate General Christi
Via Christi Health System, Inc.

Health Care Providers' Rights of Conscience Act

Freedom.

This is my idea of freedom: As I would not be the unborn victim of an abortion, so I would not perpetrate that crime upon another. Any state that allows such a crime, to the extent that it allows it, is no free state.[1]

While pro-life sentiment is somewhat popular, I suspect that there is not as widespread an understanding of the interest some have to pursue only natural fertility regulation. My name is Patrick Herrick. I am a family physician. I come before you today, asking you to support the Health Care Providers' Rights of Conscience Act, an interest shared by hundreds of my patients who are your Kansas City area constituents. As a matter of introduction, I offer you the following motivating factors for those who object to artificial fertility regulation.

Contraception and Sterilization – Objections:

- Astute observers have noted, that in cultures where support for contraception is strong, so is support for abortion.
- Artificial contraceptives are, at times, abortifacient in effect.[2]
- Contraceptives propose to render procreation impossible; thus in the occasional (yet certain) failure, users who are indisposed to childrearing will be predisposed to seeking abortion.
- Often used extramaritally, they involve the physician in what amounts to "medicalized fornication"[3].
- This objection is the position of a large Christian denomination, the Catholic Church.[4]
- Increased contraception and sterilization have been associated with an increase in the divorce rate.[5]
- Other arguments, relating to Scriptural passages[6], God's sovereignty in the design of human beings, and marital love as a reflection of God's love.

The following are some true stories of health care professionals whom I know, who have encountered significant organized opposition in following their conscience with these issues.

KK, a registered nurse, provides postpartum care at a large Kansas City hospital. Because she does not administer contraceptive injections, or obtain consent for tubal ligation (recall typical postpartum hospital stays last 2 days), she is routinely "passed over for training and leadership" positions, despite her 20 years of relevant experience. KK states, "It would be worse if I were on Labor and Delivery"; and "I would be in trouble" with physicians, if they knew that sometimes she suggests to patients that they may eventually regret having been permanently sterilized at 23 years of age.

HT is an occupational therapist, a profession which rehabilitates fine motor skills. In her training at an academic Kansas hospital, she was told to counsel preteen psychiatric patients about contraception. When she offered instead to create an abstinence presentation, her

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[1] Line of reasoning and phraseology borrowed from Abraham Lincoln.

[2] FDA labeling for Depo-Provera states that it "results in endometrial thinning. These actions produce its contraceptive effect.". FDA labeling for Ortho Tri-Cyclen states a secondary mechanism of effect is "changes in... the endometrium (which reduce the likelihood of implantation)". (2000 Physicians' Desk Reference, pp. 2435 & 2191). Several journal articles support this contention, e.g. Ling et al., Fertility and Sterility 39:292, 1983 (re "emergency contraception").

[3] Term owing to another physician (LC).

[4] Catechism of the Catholic Church (1994), ¶ 2366-2372; Pastoral Constitution on the Church in the Modern World, Vatican Council II (1965), ¶ 51; The Roman Catechism (under The Sacrament of Matrimony, Marriage as a Natural Contract, The Motives and Ends of Marriage; 1566 A.D.); Summa Theologica (ca. 1265-1274 A.D.), Part II-II, Question 154. Other sources cite the *Didache* of the 1st century as upholding the same position.

[5] From less than 10% to 50%; in contrast, users of natural family planning have less than 5% divorce rate. The Art of Natural Family Planning (Cincinnati: The Couple to Couple League, 1996), pp. 244-5.

[6] Genesis 38:9-10, Psalm 127:3-5, Luke 23:28-9, and passages proscribing *pharmakeia* which has been interpreted as including potions for contraception.

supervisor called HT's academic advisor, calling HT "narrow minded"; and threatened to fail her if she did not provide contraceptive counseling. She did eventually pass, but with a lowered grade for her objection. During the rotation, when making presentations to large groups of (predominantly male) medical students, her supervisor would make dirty jokes, then state in front of the group, "Oh, we forgot this offends HT – she's into 'abstinence awareness'.".

Ten years ago, after simultaneous completion of M.D. and Ph.D. degrees, I entered obstetrics and gynecology residency in Missouri, aiming to become a medical researcher in the field. Things turned sour, when I asked to not perform sterilizations. Senior residents placed intense pressure upon me, telling me to relent, or leave. Simultaneously, the attending physicians no longer allowed me to assist at any surgery. (A resident must perform surgery, in order to learn it.) I did leave, within a month, grateful to find a position in family practice residency. Today, I am no longer involved in medical research.

LC graduated cum laude from a SUNY medical school. She entered family practice residency in a large Kansas institution, and after settling in, began placing Norplants, prescribing oral contraception, and performing other such practices. After one year, however, she experienced a conversion in her faith, and discontinued artificial contraception and no longer referred for abortion. She then rotated through obstetrics, where an attending told her that her refusal to refer for abortion was "substandard care", and that in "his clinic", he had the authority to make her practice the way he wanted. He gave her a very low evaluation. As a result of the obstetrician's communication, she was called into the residency director's office, a process leading to probation. Three months prior to completion of her residency, she was asked to resign, or be terminated. The reason cited for termination was that she had failed to complete 80% of her clinics within a half hour of the expected time. (Think of that, the next time you wait in a doctor's office.) LC states, "If that contraception/sterilization/abortion issue had not generated friction, I would not have been forced to resign.". As a direct result of not finishing residency, LC cannot be board eligible or certified. Most insurance contracts require board eligibility; imagine the difficulty in finding employment, or otherwise obtaining reimbursement, without board eligibility.

Afterwards, LC applied for her Missouri license. When the state board's reply seemed delayed, LC's potential employer contacted the board, to find that LC's former residency director had failed to state whether LC was recommended for licensure. The employer contacted the director, who explained her action by stating that LC was "too Catholic".

These are some of the stories of those have followed conscience rather than yield to significant pressure. Failure to pass this legislation allows the pressure upon doctors and other practitioners to continue; either ignore their conscience or act against it. How many of you would be comfortable, given today's health care market, to be under treatment by a physician who is accustomed to not listening to their conscience?

One hundred and forty years ago, when abortions were commonplace in the United States, it was the action of committed physicians and legislators, acting to "protest against such unwarrantable destruction of human life....in pursuance of...sacred responsibilities"[7], that stemmed the tide, resulting in the passage of state laws prohibiting abortion, except as needed to save the life of the mother.[8] Today again we have a crimson tide that needs to be stopped.

Planned Parenthood and the Kansas Choice Alliance, probably the biggest backers of legalized abortion in this state, would appear to like nothing better than to defeat this bill. In order to continue to pressure medical professionals to abandon our consciences, they now have to persuade you to abandon yours.

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[7] American Medical Association resolution (unanimously accepted), 1859.

[8] Frederick N. Dyer, "Champion of Women and the Unborn: Horation Robinson Storer, MD", Veterans Health System Journal, Dec. 1999, pp. 55-7.

Testimony in favor of HB2711

February 20, 2002

Chairman Doug Mays
House Federal and State Affairs Committee
State Capitol, Rm. 313-S
Topeka, Kansas

Mr. Chairman and Members of the Committee:

My name is Orva Hargett. I have been a nurse for 41 years and involved in women's health for most of that time. Five years ago my husband and I became Catholic and although I touted myself as being Pro-life, there were issues that I never really confronted. I have worked in an OB-Gyn office for 18 years and during that time I handed out oral contraceptives as prescribed by the physician, gave contraceptive injections, counseled patients on the correct use of both of these, obtained surgical consents for tubal ligations, and assisted with the insertion of IUD's. I answered many phone calls regarding the problems patients were encountering with these treatments. The physician I work for is a very caring and compassionate doctor and his patients love and respect him very much. My relationship with him has always been very good and I also respect him very much. Another physician and a nurse practitioner are also in the practice now.

It wasn't until recently that I realized, as a Catholic Christian, I could no longer directly inject the contraceptive medications. I shared this with the two doctors and the nurse practitioner. The new doctor and the nurse were mildly supportive and I was expecting a similar response from the one I had worked for these 18 years. Instead he became very angry. He insinuated that I was being brainwashed and was part of a cult. He then asked me if that meant that I couldn't give out contraceptive pills or handle phone calls regarding problems with contraceptives. He also informed me that my stance would greatly influence any future hiring he would do, not by asking applicants about their religious belief system but whether or not they had problems giving any medications. He also told me that his practice is primarily dealing with women's health issues and a large part of that is prescribing contraceptives and the proper use of these.

Since that conversation I did a lot of soul searching and came to the firm belief that I could not participate in the administration of any contraceptive products, knowing full well that this could result in the loss of my job. There are other tasks that I could do in the office that are not related to the administration of contraception but I don't know if he will give me that option.

I love my job. I have enjoyed it very much and have learned to care deeply for my patients through the years. I have never seen myself as a reactionary or an activist, but this is something I feel very strongly about.

The passage of this bill will probably come too late for me. However, I believe that my recent experience, or one very similar, probably has been and is being repeated many times over with

my nurse-colleagues across this state. This legislation is desperately needed. As health care professionals we shouldn't have to choose between compromising our deeply held convictions or risk losing our jobs.

Section 2 of this bill states that "...people and organizations hold different beliefs about whether certain health care services are morally acceptable." It goes on to say "
It is the public policy of the state of Kansas to respect and protect, as a civil right, the right of conscience of all persons to refuse to participate in the provision of...a health care service subject to this act." This bill would prohibit "...all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons...by reason of their refusal to participate in the provision of..." the health care services described in the act.

Please vote yes for HB 2711 and protect health care professionals in Kansas from being coerced or intimidated into doing things against their conscience.

Thank you Mr. Chairman and I would be happy to stand for any questions.

AMERICANS UNITED FOR LIFE™

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Testimony Presented to the Kansas State Legislature
House Federal and State Affairs Committee

House Bill 2711
Health Care Providers' Rights of Conscience Act

February 20, 2002

Joint Testimony Presented by
Nikolas T. Nikas, General Counsel
Dorinda C. Bordlee, Staff Counsel
Americans United for Life

Mr. Chairman and members of the Committee:

We thank you for allowing us to submit testimony on the constitutionality of HB 2711 addressing Health Care Rights of Conscience. Since last year, AUL has provided legal consultation to over a dozen states seeking to respond to the burgeoning epidemic of discrimination against health care professionals who profoundly respect the dignity of all human life.

HB 2711 merely expands the protection already provided under Kansas law.[1] Modeled on comprehensive legislation that has been in effect for nearly five years in the State of Illinois,[2] Kansas HB 2711 provides much needed protection against discrimination against all health care professionals who wish to exercise the fundamental human right to decline to participate in certain controversial procedures that violate their conscience.

HB 2711 in no way infringes on the rights of patients or the quality of care that they receive. This legislation simply recognizes that a patient's right to choose certain medical procedures does not include a right to force someone to provide it to them.

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[1] Kan. STAT. ANN. §65-443, 65-444, 65-446, 65-447 apply to any person who declines to "perform or participate in medical procedures" which result in abortion or sterilization.

[2] 745 Ill. Comp. Stat. Ann. 70/1 – 70/14 (2000); 720 Ill. Comp. Stat. Ann. 510/13 (2000).

After consulting with medical students, nurses, pharmacists, and physicians who have experienced discrimination at the hands of employers who are intolerant of their beliefs and convictions, our public interest legal organization drafted model legislation in response to the inadequate protection provided by current statutes enacted shortly after *Roe* in 45 states and Congress.[3]

The abortion right announced in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) is the right of a woman to choose whether to terminate a pregnancy. Those cases cannot be read to give any patient the authority to violate another citizen's fundamental freedom of conscience by forcing a health care provider or institution to perform abortion or any other controversial procedure.

The following words of the United States Supreme Court make this clear:

> "**Men and women of good conscience** can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)(emphasis added).
>
> "Whatever one thinks of abortion, it cannot be denied that **there are common and respectable reasons for opposing it,** other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class - as is evident from the fact that men and women are on both sides of the issue. . . ." *Bray v. Alexandria Clinic*, 506 U.S. 263, 271 (1993)(emphasis added).

The Supreme Court has never held that the right declared in *Roe* trumps the fundamental human right of conscience. Nor has it ever held that a physician has a legal duty to perform abortion.

In fact, the Supreme Court has expressly recognized that governments who object to funding abortion cannot be forced to do so. In *Harris v. McRae*, 448 U.S. 297 (1980), the United States Supreme Court ruled that the federal government does not have to fund abortion except to save the life of the mother. Further, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court upheld a state statute that prohibited state-run medical centers from providing abortions except to save the life of the woman.

The response from those who oppose rights of conscience legislation is absolute intolerance. To health care providers who have a profound respect for human life and the convictions of their conscience, their response is "Get out of the profession. You need not apply." Nothing in the American legal tradition supports this radical position. The Kansas Legislature is free, if it so chooses, to provide legal protection from discrimination and intolerance for health care professionals, institutions and payers.

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[3] See attached appendix of current state statutes.

APPENDIX:

Current State Statutes

February 2002

OVERVIEW OF CURRENT RIGHTS OF CONSCIENCE LAWS:

Only **one** state (IL) protects the rights of conscience of **all health care providers**, institutions and payers who refuse to provide **any health care service** based on a religious or moral objection.

Forty-five state laws permit certain health care providers or institutions, or both, to refuse to participate **in abortion or sterilization services only**, on the basis of religious or moral beliefs: AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NE, NV, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WI, WV, WY.

Four states provide **no protection** for the rights of conscience of health care providers.

ALABAMA

MISSISSIPPI

NEW HAMPSHIRE

VERMONT

The United States protects the civil rights of health care providers who conscientiously object to **abortion** and **sterilization** for individuals or institutions that receive federal funds.

UNITED STATES 42 U.S.C.A. § 300A-7 (2000)

CURRENT STATE STATUTES:

The following is a more specific list of current state statutes that provide some protection for the rights of conscience for health care providers, institutions, and payers:

Only **one** state protects the civil rights of **all health care providers**, whether individuals, institutions, or payers, public or private, who conscientiously object to participating in **all health care services**.

ILLINOIS 745 ILL. COMP. STAT. ANN. 70/1 – 70/14 (2000); 720 ILL. COMP. STAT. ANN. 510/13 (2000).

One other state protects the civil rights of health care providers who conscientiously object to participating in **all** health care services but only when the health care providers are **individuals** or **religiously affiliated institutions**.

WASHINGTON Wash. Rev. CODE Ann. §§ 9.02.150, 48.43.065, 70.47.160 (2000).

One state specifically protects the civil rights of **pharmacists** who conscientiously object to dispensing **medication** that will cause **abortion, assisted suicide,** or **euthanasia**

SOUTH DAKOTA S.D. Codified Laws § 36-11-70 (2000).

One state protects the civil rights of all health care providers who conscientiously object to participating in **abortion, sterilization**, and **artificial insemination**.

MARYLAND	Md. Code Ann. Health-Gen. II § 20-214 (1996).

One state protects the civil rights of all health care providers who conscientiously object to participating in **abortion, abortifacients**, and **sterilization**.

PENNSYLVANIA	Pa. Cons. Stat. Ann. TIT. 43, § 955.2 (WEST 1991) AND Pa. Cons. Stat. Ann. TIT. 18, § 3213(D) (WEST SUPP. 1999).

One state protects the civil rights of health care providers and health care institutions who conscientiously object to complying with an individual's health care instructions made in a **living will** or with a health care decision made according to a **durable power of attorney for health care** regarding the withholding or withdrawal of life-sustaining treatment.

CALIFORNIA	Cal. Probate Code §4734 (2000)(enacted by 1999 Cal. Assembly Bill 891).

Four states protect the civil rights of all health care providers who conscientiously object to participating in **abortion** and **sterilization**.

KANSAS	KAN. Stat. Ann. §65-443, 65-444, 65-446, 65-447 (1992).
MASSACHUSETTS	MASS. Ann. Laws CH. 112, § 12I; CH. 272 § 21B (2001).
NEW JERSEY	N.J. Stat. Ann. §§ 2A:65A-1 TO 2A:65A-4 (WEST 1987).
WISCONSIN	Wis. STAT. Ann. § 253.09 (WEST 1999).

Twenty-five states protect the civil rights of all health care providers who conscientiously object to participating in **abortion only**.

ALASKA	Alaska Stat. § 18.16.010(B) (MICHIE 1998)(PERMANENTLY ENJOINED AS APPLIED TO PUBLIC, "QUASI-PUBLIC" NON-SECTARIAN FACILITIES IN *VALLEY HOSP. ASSOC, INC. V. MAT-SU COALITION FOR CHOICE*, 948 P.2D 963 (ALASKA 1997).
ARIZONA	ARIZ. Rev. Stat. Ann. § 36-2151 (WEST 1993).
ARKANSAS	ARK. Code Ann. § 20-16-601 (MICHIE 1991).
COLORADO	Colo. Rev. Stat. Ann. § 18-6-104 (WEST 1999).
CONNECTICUT	Ct. Agencies Regs. § 19-13-D54(f) (Conn. L.J., vol. LVIII, no. 30 (Jan 21, 1997): 8B-9B).
DELAWARE	Del. Code Ann. TIT. 24, § 1791 (1997).
FLORIDA	Fla. Stat. Ann. § 390.0111 (8) (WEST SUPP. 1999).
GEORGIA	Ga. Code Ann. § 16-12-142 (1999).
HAWAII	Haw. Rev. Stat. Ann. § 453-16(D) (MICHIE 1998).
IDAHO	Idaho Code § 18-612 (1997).
KENTUCKY	Ky. Rev. Stat. Ann. § 311.800 (1994).
LOUISIANA	La. Rev. Stat. Ann. §§ 40:1299.31-1299.33 (2000).
MAINE	Me. Rev. Stat. Ann. TIT. 22, §§ 1591-1592 (WEST 1992).

MICHIGAN	Mich. Comp. Laws. Ann. §§ 333.20181 to 333.20184, 333.20199 (WEST 1992).
MINNESOTA	Minn. Stat. Ann. § 145.414 (WEST 1998).
MISSOURI	Mo. Ann. Stat. §§ 188.100, 188.105, 188,110, 188.115, 188.120 (WEST 1996).
NEBRASKA	Neb. Rev. Stat. §§ 28-337 to 28-341 (1995).
NEW MEXICO	N.M. Stat. Ann. § 30-5-2 (MICHIE 1994).
NORTH CAROLINA	N.C. Gen. Stat. §§ 14-45.1(E), 14-45.1(F) (1993).
NORTH DAKOTA	N.D. Cent. Code § 23-16-14 (1991).
OHIO	Ohio Rev. Code Ann. § 4731.91 (ANDERSON 1997).
OREGON	Or. Rev. Stat §§ 435.475, 435.485 (1992).[4]
SOUTH DAKOTA	S.D. Codified Laws §§ 34-23A-11 TO 34-23A-15 (MICHIE 1994); *see also* § 36-11-70 (2001)(Pharmacist Right of Conscience).
TENNESSEE	Tenn. Code Ann. §§ 39-15-204 AND 39-15-205 (1991).
VIRGINIA	Va. Code Ann. § 18.2-75 (MICHIE 1996).

Ten states protect the civil rights of health care providers who object to participating in **abortion only** and **only when** the health care providers are **individuals or private institutions.**

CALIFORNIA	Cal. Health & Safety Code § 123420 (WEST 1996).
INDIANA	Ind. Code. Ann. §§ 16-34-1-3 TO 16-34-1-7 (WEST 1997).
IOWA	Iowa Code Ann. §§ 146.1-146.2 (WEST 1997).
MONTANA	Mont. Code. Ann. § 50-20-111 (1997).
NEVADA	Nev. Rev. Stat. Ann. §§ 449.191, 632.474 (MICHIE 1996).
OKLAHOMA	Okla. Stat. Ann. TIT. 63, § 1-741 (WEST 1997).
SOUTH CAROLINA	S.C. Code Ann. §§ 44-41-40, 44-41-50 (LAW CO-OP. 1985).
TEXAS	Tex. Rev. Civ. Stat. Ann. ART. 4512.7 (WEST SUPP. 1999).
UTAH	Utah Code Ann. § 76-7-306 (WEST SUPP. 1998).
WYOMING	Wyo. Stat. Ann. §§ 35-6-105, 35-6-106 AND 35-6-114 (MICHIE 1997).

[4] Oregon also protects the civil rights of employees of the Adult and Family Services Division who refuse to offer family planning and birth control. Or. Rev. Stat. § 435.225 (1992).

One state protects the civil rights of health care providers who object to participating in **abortion and sterilization only** and **only when** the health care provider is an **individual**.

RHODE ISLAND	R.I. Gen. Laws § 23-17-11 (1996).

Two states protect the civil rights of health care providers who conscientiously object to participating in **abortion only** and **only when** the health care provider is an **individual**.

NEW YORK	N.Y. [Civ. Rights] Law § 79-I (McKinney 1992).
WEST VIRGINIA	W. Va. Code § 16-2F-7 (2000); *SEE ALSO* § 16-2B-4 (2000)("FAMILY PLANNING SERVICES"); § 16-11-1 (2000)(REFUSAL OF A HOSPITAL, MEDICAL FACILITY, OR PERSON TO PARTICIPATE IN OR PERFORM A **STERILIZATION** SHALL NOT BE THE BASIS FOR ANY LEGAL SANCTIONS, RESTRICTIONS, OR CIVIL LIABILITY).

Only **eleven** states protect the civil rights of **medical and nursing students** who conscientiously object.

CALIFORNIA	Cal. Health & Safety Code § 123420 (b) (West 1996).
ILLINOIS	745 Ill. Comp. Stat. Ann. 70/7 (West Supp. 1999).
KENTUCKY	Ky. Rev. Stat. Ann. § 311.800 (5) (1994).
LOUISIANA	La. Rev. Stat. Ann. §§ 1299.31 (West 1992).
MAINE	Me. Rev. Stat. Ann. tit. 22, § 1592 (West 1992).
MASSACHUSETTS	Mass. Ann. Laws ch. 112, § 12I (Law. Co-op. 1991).
MICHIGAN	Mich. Comp. Laws. Ann. §§ 333.20181-33.20184, 333.20199 (West 1992).
MISSOURI	Mo. Ann. Stat. § 188.110 (West 1996).
PENNSYLVANIA	Pa. Cons. Stat. Ann. tit. 43, § 955.2 (b) (3) (West 1991) and Pa. Cons. Stat. Ann. tit. 18, § 3213(d) (West Supp. 1999)
TEXAS	Tex. Rev. Civ. Stat. Ann. art. 4512.7 (West Supp. 1999).
WISCONSIN	Wis. Stat. Ann. § 253.09 (3); § 441.06(6); § 448.03(5) (West 1999).

Only **two** states protect the civil rights of **counselors and social workers** who conscientiously object.

ILLINOIS	745 Ill. Comp. Stat. Ann. 70/5 (West Supp. 1999).
SOUTH DAKOTA	S.D. Codified Laws §§ 34-23A-11 (Michie 1994).

Sixteen states mandate that insurance plans that cover prescription drugs also provide coverage for **contraceptive** drugs or devices. Of the thirteen, **nine** state laws include some form of limited conscience-based exemption for "religious employers" (CA, CT, DE, HI, ME, MD, NV, NC, RI); **seven** state laws have no conscience-based exemption (GA, IA, NH, NM, RI, TX, VT).

TESTIMONY OF KANSAS HUMAN RIGHTS COMMISSION REGARDING H.B. 2711, FEBRUARY 19/20, 2002

ATTENDING HEARING: WILLIAM V. MINNER, EXECUTIVE DIRECTOR, ROBERT M. HOLLAR, ASSISTANT DIRECTOR AND BRANDON L. MYERS, CHIEF LEGAL COUNSEL

It is KHRC's understanding that H.B. 2711 proposes to establish bases upon which to file complaints with KHRC under the Kansas Act Against Discrimination (K.S.A. 44-1001, et seq., hereinafter "KAAD."). The bill prohibits certain actions against health care providers who decline to participate is specified procedures, and allows persons not to contribute health care premiums that would be used to pay for certain procedures.

Usually when a bill proposes to add to an agency's responsibilities and authority, the agency receives a request for input on a fiscal note about the impact on the agency if the bill passes. KHRC has not received such a request as to this bill, but presumes there would be some fiscal impact on the agency that needs to be addressed. At this point we have no firm understanding as to predictions of what number of complaints might be filed with KHRC, so it is very difficult to provide accurate fiscal assessments to the Committee.

It goes without saying that the Commission and its staff would make every effort to efficiently and effectively administer any new duties and authority assigned it through the legislative process. However, the Commission has had some reticence to add to its responsibilities and authority for several years. As the Legislature is aware, in recent years the Commission faced a massive problem of having a large backlog of discrimination complaints on file awaiting investigative processing. This resulted in inordinate delays and a general displeasure with the Commission. The Commission, with the assistance and forebearance of the Legislature, the Governor and the general public, was able to instigate a strategic plan which improved the efficiency and effectiveness of its administration of the Kansas antidiscrimination laws. The Commission is now functioning successfully and satisfactorily.

Over the last decade, several legislative proposals have arisen or been considered that would have increased the authority of the KHRC and increased its jurisdiction. These include proposals to add military status discrimination, discrimination based upon occupation, union membership discrimination, assign the longterm care omsbudsman to the Commission, add multicultural commission responsibilities, etc. These proposals were not adopted to be put under the purview of the Commission. For instance, military status discrimination was statutorily prohibited, but enforcement was by means of a private lawsuit right placed in the statute. Part of the reason such proposals were not assigned as responsiblities of the Commission was because they would have added to the work of this small agency and might have added more cases to a backlog we were diligently trying to reduce. It was thought that the agency simply had enough to do without adding to its work. There were concerns that we would return to the days of a large backlog and untimely processing of complaints. The Committee may wish to

consider adopting a private lawsuit procedure for this bill rather than set up an administrative agency procedure requiring investigation, conciliation, etc.

In 1999 prohibitions against genetic testing/screening were added into the Kansas Act Against Discrimination, but it was anticipated (correctly, as it has turned out) that such additions would portend no significant increase in our caseload or require increased resources to administer.

Any such proposal carries a fiscal cost and requires the Commission to ask for more employees, resources to train the staff on new areas of responsibility, and for funding to expand our information programs. We presume increases in KHRC resources wold be necessary to administer the provisions of this bill in order to avoid the agency returning to the days of backlogged cases and processing delays. We would request appropriate budget enhancements to deal with those costs should this bill be adopted.

The Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act, which are administered by KHRC, traditionally have reflected legislative intent to prohibit discrimination based upon so-called "immutable characteristics, " such as race, sex, national origin, age, etc. The prohibitions contained within the proposed legislation concerning discrimination based upon rights of conscience might be seen as inconsistent with such an intent regarding the types of things the act should deal with, but that is clearly a policy decision for the Legislature. An exception to the "immutable characteristics" approach within KAAD arguably is discrimination on the basis of religion. However, if persons refusing certain tasks in their employment can be asserted as requirements for reasonable accommodation due to their religion, protections already exist within the KAAD. KHRC generally follows the line of cases emanating from Federal antidiscrimination law in this regard (see: TWA, Inc. v. Hardison, 432 U.S. 563 (1977) and Ansonia School Board of Education v.Philbrook, 492 U.S. 60 (1986)). The bill seems to go further and protect actions based upon conscience which might not be also based upon religious beliefs.

There appear to be a number of issues as to how this legislation would operate in practice that we would look to legislative intent to clarify.