Introduction

Over the last few decades—and especially the last eight years—the United States has witnessed a “sustained assault on religious liberty and the right of conscience.” A chief aim has been to force health-care providers, no matter their religious beliefs, to perform abortions. For pro-choice advocates, “whatever the value of religious freedom might be, it [can] easily be subjugated to a higher, more progressive, ideal.”

A right-of-conscience law is a statute that protects health-care providers who decline to perform health services that they find morally objectionable. Currently, Alabama does not have a right-of-conscience law. Legislation has been introduced in the Alabama Legislature that would change that.

Background

In 1973, the United States Supreme Court handed down its decision in Roe v. Wade, inventing a constitutional right to abortion. The same year, Congress responded by passing the first right-of-conscience law, popularly known as the “Church Amendment” (named for its sponsor, Senator Frank Church). That law offered two main protections. First, it protected individuals and institutions from being required to “perform or assist in the performance of” abortions or sterilizations “if contrary to [their] religious beliefs or moral convictions.” Second, it protected individuals from being discriminated against if they “refused to perform or assist in the performance of” abortions or sterilizations “because of [their] religious beliefs or moral convictions.”

State legislatures quickly followed suit, passing their own right-of-conscience laws, which often mirrored the protections of the Church Amendment. By the end of 1974, over half of all states had enacted right-of-conscience laws. By the end of 1978, almost all had. In the decades since Roe, state and federal right-of-conscience laws have been added and amended—usually expanding their protections to cover more health-care providers or more health services—in an attempt to ensure “that new developments in medicine, law, regulation, and the economy do not result in erosion of legal protection for the rights of conscience of health-care providers.”

Today, right-of-conscience laws can protect health-care providers including “physicians, pharmacists, institutions, and insurers” and can cover health services including “abortion, contraception, insurance to cover contraception, family-planning services or referrals, sterilization, assisted reproduction, human cloning, fetal experimentation, euthanasia, and termination of life support.”

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* A sterilization is a procedure that makes a person permanently unable to reproduce—as through a female undergoing tubal ligation (or, in common terms, “having her tubes tied”). See Taber’s Cyclopedic Medical Dictionary 557, 2209, 2392 (22nd ed. 2012).
Alabama, however, remains one of only three states without a right-of-conscience law.  

**Proposed Legislation**  
Legislation has been introduced in the Alabama Legislature that would codify a right-of-conscience law in the state. This section describes that legislation—the Health Care Rights of Conscience Act.  

**Health Services Covered**  
The Act would protect health-care providers who decline to perform any of the following four health services: abortion, sterilization, human cloning, and embryonic stem-cell research.  

**EXISTING STATE RIGHT-OF-CONSCIENCE LAWS:** All cover abortions. Many cover sterilizations. Some cover human cloning and embryonic stem-cell research.  

**Health-Care Providers Protected**  
The Act would protect individuals, but not institutions, who “participate in any way” in the four covered health services.  

**EXISTING STATE RIGHT-OF-CONSCIENCE LAWS:** All protect individuals. Most protect individuals other than physicians. But: Nearly all protect institutions.  

**Requirements for Protection**  
The Act would require that individuals object to health services on “religious, moral, or ethical” grounds, and make that objection in writing, in advance, to be protected from performing those health services.  

**EXISTING STATE RIGHT-OF-CONSCIENCE LAWS:** Most require similar grounds for objections. Some require objections be made in writing.  

**Types of Protections**  
The Act would offer three protections to individuals who properly object to performing abortions, sterilizations, human cloning, or stem-cell research:  

1. It would establish their right to decline to perform those health services.  

2. It would protect them from punishment for declining to perform those health services.  

3. It would protect them from discrimination for declining to perform those health services.  

Health-care providers would not be allowed, however, to decline to perform a procedure—even one they found objectionable—if doing so would subject a patient to imminent life-threatening danger.  

**EXISTING STATE RIGHT-OF-CONSCIENCE LAWS:** Most provide similar protections. But: Few contain exceptions for medical emergencies.  

**Types of Remedies**  
The Act would allow health-care providers to bring an action for injunctive relief if they were punished or discriminated against for declining to perform one of the four covered health services. For example, a court could order a hospital to reinstate—and reimburse for back pay and legal costs—a wrongly fired physician.  

**EXISTING STATE RIGHT-OF-CONSCIENCE LAWS:** Most “manifest an appalling absence of attention” to how violations of the right of conscience can be remedied.  

**Analysis**  
The Health Care Rights of Conscience Act would serve as a first step toward protecting the right of conscience of health-care providers in Alabama.  

Far from being extreme—an argument that has been dishonestly made by pro-choice advocates—the Act is, in fact, extremely moderate: it would not protect institutional health-care providers (nearly all state right-of-conscience laws do); and it would contain an exception for medical emergencies (nearly all state right-of-conscience laws do not). Its most radical departure from the typical right-of-conscience law is that it covers human cloning and embryonic stem-cell research, but there is an explanation for why many other states’ right-of-conscience laws would not include these practices: in many other states, these practices are greatly restricted or completely banned (unlike in Alabama), and so it...
would be unnecessary to protect health-care providers from being forced to perform them.

The Act can be legitimately criticized, but from the opposite direction: for covering too few, not too many, health services. As legal experts have observed, with most right-of-conscience laws, “the narrow limitation of the procedures covered is the greatest flaw”:

There is no rational justification for protecting rights of conscience in the context of just one of these morally controversial medical procedures (for example, abortion) but not others. Such restrictive protection is fundamentally inconsistent with the basic principles underlying the extension of any such protection—respect for constraints of individual conscience, care for the conscience rights of minorities, and commitment to the value (and belief in the feasibility) of accommodation.46

Ideally, Alabama would protect the right of conscience of all health-care providers—including both individuals and institutions—for all health services.47

The reality, however, has been that powerful lobbies in Montgomery have steadfastly stood between health-care providers and the right of conscience for two decades.48 The result is the less-protective-than-ideal, but passable, legislation currently being considered.49

**Conclusion**

“No provision in our Constitution ought to be dearer to man,” wrote Thomas Jefferson, “than that which protects the rights of conscience against the enterprises of the civil authority.”50 The same might be said for state law.

Alabama should secure the right of conscience for health-care providers. With the “assault on religious liberty and the right of conscience” showing no signs of ending,51 the state needs a right-of-conscience law—now more than ever.

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10. The Church Amendment was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 92-45, § 401(b)-(c), 87 Stat. 91, 95–96 (1973) (codified as amended at 42 U.S.C. § 300a-7(b)-(c)(1)). Its passage was in response to the decisions in Roe v. Wade, 410 U.S. 113 (1973), where the United States Supreme Court invented a right to abortion, as well as Taylor v. St. Vincent’s Hospital, 523 F.2d 75 (9th Cir. 1975), where the United States Court of Appeals for the Ninth Circuit compelled a Catholic hospital to allow sterilizations, despite the hospital’s beliefs-based policy disallowing sterilizations. See NeJaime & Siegel, supra note 9, at 2535–36. In the years that followed, Congress amended the Church Amendment, extending its protections to more health-care providers, and its coverage to more health services. See generally 42 U.S.C. § 300a-7. All of these provisions—the Church Amendment and its amendments—are collectively known as the “Church Amendments.” See Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (codified at 45 C.F.R. pt. 88).

11. These protections are attached to the receipt of “grant[s], contract[s], loan[s], or loan guarantee[s] under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act.” 42 U.S.C. § 300a-7(b)-(c)(1).

12. Id. § 300a-7(b).

13. Id. § 300a-7(c)(1).
GUIDE TO THE ISSUES

14 Elizabeth B. Deutsch, Note, “Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate,” 124 Yale Law Journal 2470, 2478 (2015). These state right-of-conscience laws were generally similar to, but sometimes quite different from, the federal right-of-conscience law. See NeJaime & Siegel, supra note 9, at 2538 n. 89.

15 NeJaime & Siegel, supra note 9, at 2538 n. 89.


20 Burke & Franzonello, supra note 1, at 374. The two other states are New Hampshire and Vermont. Id.


22 Health Care Rights of Conscience Act § 1.

23 Id. § 3(a). Health-care providers would not be protected, however, from “notifying a member of a health[-]care institution’s management of a patient inquiry about obtaining a health[-]care service that a health[-]care provider believes may violate his or her conscience.” Id.


25 See id.


27 Health Care Rights of Conscience Act § 3(c).

28 “Refusing to Provide Health Services,” supra note 24.

29 See id.

30 See id.

31 Health Care Rights of Conscience Act § 3(1).

32 Id. § 4(a)–(c); see also id. § 3(5).


34 See id. at 198.

35 See Health Care Rights of Conscience Act § 4(a) (providing that “[a] health[-]care provider has the right not to participate, and no health[-]care provider shall be required to participate, in a health[-]care service that violates his or her conscience”).

36 See id. § 4(b) (providing that “no health[-]care provider shall be civilly, criminally, or administratively liable for declining to participate in a health[-]care service that violates his or her conscience”).

37 See id. § 4(c) (providing that “[i]t shall be unlawful for any person, . . . public or private institution, public official, or any board which certifies competency in medical or health[-]care specialties to discriminate against any health[-]care provider in any manner based on his or her declining to participate in a health[-]care service that violates his or her conscience”). The Act would also extend this protection to prospective health-care providers. See id. (providing that “no student shall be required to perform a health[-]care service or be penalized because he or she subscribes to a particular position on health[-]care services”).

38 See id. § 4(d). The Act prescribes the following procedure for such situations: “[i]n a life-threatening situation where no other health[-]care provider is available or capable of providing or participating in a health[-]care service, a health[-]care provider shall provide and participate in diagnosis, medical treatment, medical care, and medical procedures until an alternate health[-]care provider capable of providing or participating in the emergency medical treatment, medical care, or medical procedures is found or otherwise becomes available.” Id.

39 See Wardle, supra note 33, at 190–93.

40 See id. at 194.

41 Health Care Rights of Conscience Act § 5(a).

42 Id. § 5(b).

43 Wardle, supra note 33, at 196.

44 In a blogpost about a version of the Health Care Rights of Conscience Act that was introduced in a previous legislative session, an ACLU attorney wrote: “Yes, you heard that right. Under this law, if you or a loved one is pregnant and go to an emergency room in Alabama because of serious complications, every medical professional in that emergency room could refuse to help you if the care you needed to protect you from serious harm to your health required ending the pregnancy.”


47 See supra note 33, at 181.

48 Two states, Louisiana and Mississippi, have such comprehensive right-of-conscience laws. Burke & Franzonello, supra note 1, at 374.

49 E-mail Interview with A. Eric Johnston, President, Alabama Pro-Life Coalition (Mar. 21, 2017). Right-of-conscience laws have been frequently proposed in the Alabama Legislature over the last twenty years, including at least twenty times in the last ten years alone, according to a search of the LexisNexis database. For the first right-of-conscience law proposed during this period, see S. 175, 1996 Leg., Reg. Sess. (Ala. 1996), available at http://scribd.com/document/342848439/ [http://perma.cc/R89H-79LP], protecting the right of conscience of all health-care providers, including both individuals and institutions.

50 E-mail Interview with A. Eric Johnston, supra note 48. Johnston, an attorney, has helped draft many of the right-of-conscience laws that have been proposed in the Alabama Legislature, including the current legislation. Id.

51 See supra notes 1–3 and accompanying text.