

117TH CONGRESS
1ST SESSION

S. 401

To amend the Public Health Service Act to prohibit governmental discrimination against health care providers that do not participate in abortion.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24, 2021

Mr. LANKFORD (for himself, Mr. TILLIS, Mr. SCOTT of South Carolina, Mr. PORTMAN, Mr. RISCH, Mr. MORAN, Mr. DAINES, Mrs. FISCHER, Mr. BOOZMAN, Mr. MARSHALL, Mr. CASSIDY, Mr. CRAMER, Mrs. HYDE-SMITH, Mr. BARRASSO, Mr. THUNE, Mr. HOEVEN, Mr. SASSE, Mr. INHOFE, Mrs. BLACKBURN, Mr. ROUNDS, Ms. LUMMIS, Mr. HAWLEY, Mr. SCOTT of Florida, Mr. LEE, and Mr. HAGERTY) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Public Health Service Act to prohibit governmental discrimination against health care providers that do not participate in abortion.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Conscience Protection
5 Act of 2021”.

6 **SEC. 2. FINDINGS.**

7 Congress finds as follows:

1 (1) Thomas Jefferson stated a conviction com-
2 mon to our Nation’s founders when he declared in
3 1809 that “[n]o provision in our Constitution ought
4 to be dearer to man than that which protects the
5 rights of conscience against the enterprises of the
6 civil authority”.

7 (2) In 1973, the Supreme Court concluded that
8 the government must leave the abortion decision “to
9 the medical judgment of the pregnant woman’s at-
10 tending physician”, recognizing that a physician may
11 choose not to participate in abortion. *Roe v. Wade*,
12 410 U.S. 113, 164 (1973). The Court cited with ap-
13 proval a policy that “neither physician, hospital, nor
14 hospital personnel shall be required to perform any
15 act violative of personally-held moral principles”,
16 410 U.S. at 143 n. 38, and cited State laws uphold-
17 ing this principle. *Doe v. Bolton*, 410 U.S. 179,
18 197–8 (1973).

19 (3) Religious diversity adds to the strength of
20 our medical field, and no doctor should have to
21 choose between giving up their faith or moral convic-
22 tions and abandoning a vital medical mission. Con-
23 gress’ enactments to protect this right of conscience
24 in health care include the Church amendments (42
25 U.S.C. 300a–7), the Coats/Snowe amendment (42

1 U.S.C. 238n), and the Weldon amendment approved
2 by Congresses and Presidents of both parties every
3 year since 2004 (including in section 507(d) of divi-
4 sion A of the Further Consolidated Appropriations
5 Act, 2020 (Public Law 116–94; 133 Stat. 2534,
6 2607)).

7 (4) Courts have declined to find that these laws
8 provide a “private right of action” thereby leaving
9 victims of discrimination unable to defend their con-
10 science rights in court, while at the same time ad-
11 ministrative enforcement by the Office for Civil
12 Rights of the Department of Health and Human
13 Services has been inconsistent, at times allowing
14 cases to languish for years without resolution.

15 (5) Defying the Weldon amendment, Califor-
16 nia’s Department of Managed Health Care has man-
17 dated coverage for elective abortions in all health
18 plans under its jurisdiction. Other States such as
19 New York, Illinois, and Washington have taken or
20 considered similar action, and some States may go
21 farther to require all physicians and hospitals to pro-
22 vide or facilitate abortions. On June 21, 2016, the
23 Office for Civil Rights of the Department of Health
24 and Human Services under the Obama Administra-
25 tion concluded a nearly 2-year investigation of this

1 matter by determining that California’s decision to
2 require insurance plans under the California Depart-
3 ment for Managed Health Care authority to cover
4 abortion services did not violate the Weldon amend-
5 ment. At least 28,000 individuals and families sub-
6 sequently lost abortion-free health plans as a result
7 of this mandate.

8 (6) On January 24, 2020, the Office for Civil
9 Rights of the Department of Health and Human
10 Services disavowed its prior findings and issued a
11 notice of violation of the Weldon amendment to Cali-
12 fornia. After the State’s continued noncompliance
13 with the Weldon amendment, the Centers for Medi-
14 care & Medicaid Services, on December 16, 2020,
15 announced the disallowance of \$200,000,000 per
16 quarter in Federal funds to California beginning in
17 the first quarter of 2021. Unless the Biden Adminis-
18 tration provides effective and continuing enforce-
19 ment against California and other States, individuals
20 will continue to be coerced contrary to law into
21 choosing between violating their consciences or for-
22 going health care coverage for themselves, their em-
23 ployees, or their families.

24 (7) On May 21, 2019, the Secretary of Health
25 and Human Services issued a final conscience rule

1 that implements approximately 25 Federal con-
2 science protection provisions and provides mecha-
3 nisms to enforce protections enacted by Congress to
4 ensure that the government and government-funded
5 entities are not unlawfully discriminating against in-
6 dividuals, health care providers, or health care enti-
7 ties. Despite this regulation providing for enforce-
8 ment of laws passed by Congress, a Federal district
9 court vacated the rule. Now, litigation is pending be-
10 fore the United States Court of Appeals for the Sec-
11 ond Circuit where 78 members of Congress have
12 filed a brief in support of the rule, as well as the
13 United States Court of Appeals for the Ninth Cir-
14 cuit. Litigation in both Circuits have been halted be-
15 cause the Biden Administration has indicated its in-
16 tent to revisit the rule.

17 (8) The vast majority of medical professionals
18 do not perform abortions, with up to 86 percent of
19 obstetricians/gynecologists unwilling to provide them
20 (Obstetrics & Gynecology, Sept. 2011) and the great
21 majority of hospitals choosing to do so only in rare
22 cases or not at all.

23 (9) A health care provider's decision not to par-
24 ticipate in an abortion, like Congress' decision not to
25 fund most abortions, erects no barrier to those seek-

1 ing to perform or undergo abortions but leaves each
2 party free to act as he or she wishes.

3 (10) Such protection poses no conflict with
4 other Federal laws, such as the law requiring stabi-
5 lizing treatment for a pregnant woman and her un-
6 born child when either needs emergency care (Emer-
7 gency Medical Treatment and Active Labor Act). As
8 previous Administrations have said, these areas of
9 law have operated side by side for many years and
10 both should be fully enforced (76 Fed. Reg. 9968–
11 77 (2011) at 9973).

12 (11) Reaffirming longstanding Federal policy
13 on conscience rights and providing a right of action
14 in cases where it is violated allows longstanding and
15 widely supported Federal laws to work as intended.

16 **SEC. 3. PROHIBITING DISCRIMINATION AGAINST HEALTH**
17 **CARE PROVIDERS THAT DO NOT PARTICI-**
18 **PATE IN ABORTION.**

19 Title II of the Public Health Service Act (42 U.S.C.
20 202 et seq.) is amended by inserting after section 245 the
21 following:

1 **“SEC. 245A. PROHIBITING DISCRIMINATION AGAINST**
2 **HEALTH CARE PROVIDERS THAT DO NOT**
3 **PARTICIPATE IN ABORTION.**

4 “(a) IN GENERAL.—Notwithstanding any other law,
5 the Federal Government, and any person or entity that
6 receives Federal financial assistance, including any State
7 or local government, may not penalize, retaliate against,
8 or otherwise discriminate against a health care provider
9 on the basis that the provider does not or declines to—

10 “(1) perform, refer for, pay for, or otherwise
11 participate in abortion;

12 “(2) provide or sponsor abortion coverage; or

13 “(3) facilitate or make arrangements for any of
14 the activities specified in this subsection.

15 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-
16 tion shall be construed—

17 “(1) to prevent any health care provider from
18 voluntarily electing to participate in abortions or
19 abortion referrals where not prohibited by any other
20 law;

21 “(2) to prevent any health care provider from
22 voluntarily electing to provide or sponsor abortion
23 coverage or health benefits coverage that includes
24 abortion where not prohibited by any other law;

25 “(3) to prevent an accrediting agency, the Fed-
26 eral Government, or a State or local government

1 from establishing standards of medical competency
2 applicable only to those who have knowingly, volun-
3 tarily, and specifically elected to perform abortions,
4 or from enforcing contractual obligations applicable
5 only to those who, as part of such contract, know-
6 ingly, voluntarily, and specifically elect to provide
7 abortions;

8 “(4) to affect, or be affected by, section 1867
9 of the Social Security Act (42 U.S.C. 1395dd, com-
10 monly referred to as the ‘Emergency Medical Treat-
11 ment and Active Labor Act’); or

12 “(5) to supersede any law enacted by any State
13 for the purpose of regulating insurance, except as
14 specified in subsection (a).

15 “(c) ADMINISTRATION.—The Secretary—

16 “(1) may issue regulations under—

17 “(A) this section;

18 “(B) the Religious Freedom Restoration
19 Act of 1993 (42 U.S.C. 2000bb et seq.), with
20 respect to any program or activity funded, ad-
21 ministered, or conducted by the Department of
22 Health and Human Services;

23 “(C) any of subsections (b) through (e) of
24 section 401 of the Health Programs Extensions
25 Act of 1973 (42 U.S.C. 300a–7) regarding an

1 objection based on a religious belief or moral
2 conviction; and

3 “(D) any other law protecting the exercise
4 of conscience or religious freedom under pro-
5 grams or activities funded, administered, or
6 conducted by the Department of Health and
7 Human Services, including any laws listed
8 under the final rule issued by the Secretary of
9 Health and Human Services titled ‘Protecting
10 Statutory Conscience Rights in Health Care;
11 Delegations of Authority’ (84 Fed. Reg. 23170;
12 May 21, 2019);

13 “(2) shall designate the Director of the Office
14 for Civil Rights of the Department of Health and
15 Human Services—

16 “(A) to receive complaints alleging a viola-
17 tion of any provision of this section or any pro-
18 vision of law referred to or listed under para-
19 graph (1); and

20 “(B) to promptly investigate such com-
21 plaints, issue findings, and require corrective
22 action in cases of such a violation; and

23 “(3) shall, as permitted under law (including
24 the Constitution of the United States), induce com-
25 pliance of a person or entity, including a State or

1 local government, refusing to comply with a provi-
2 sion of this section, or any provision of law referred
3 to or listed under paragraph (1), by terminating, in
4 whole or in part, any Federal financial assistance
5 provided by the Secretary to such person or entity.

6 “(d) DEFINITIONS.—For purposes of this section:

7 “(1) FEDERAL FINANCIAL ASSISTANCE.—The
8 term ‘Federal financial assistance’ means Federal
9 payments to cover the cost of health care services or
10 benefits, or other Federal payments, grants, or loans
11 to promote or otherwise facilitate health-related ac-
12 tivities.

13 “(2) HEALTH CARE PROVIDER.—The term
14 ‘health care provider’ includes—

15 “(A) an individual physician, health care
16 assistant, nurse, pharmacist, health researcher,
17 or other health care personnel;

18 “(B) a hospital, laboratory, pharmacy,
19 health system, or other health care or medical
20 research facility or organization (including a
21 party to a proposed merger or other collabo-
22 rative arrangement relating to health services,
23 and an entity resulting therefrom);

1 “(C) a provider-sponsored organization, an
2 accountable care organization, or a health
3 maintenance organization;

4 “(D) a social services provider that pro-
5 vides or authorizes referrals for health care
6 services;

7 “(E) a program of training or education in
8 the health professions or medical research, a
9 participant in such a program, or any individual
10 applying or otherwise aspiring to participate in
11 such a program;

12 “(F) an issuer of health insurance cov-
13 erage or of a health plan; or

14 “(G) a health care sharing ministry;

15 “(H) a health insurance plan, including
16 group, individual, or student health plans, or a
17 sponsor or administrator thereof; or

18 “(I) any other health care organization,
19 program, facility, or plan.

20 “(3) STATE OR LOCAL GOVERNMENT.—The
21 term ‘State or local government’ includes every
22 agency and other governmental unit and subdivision
23 of a State or local government, if such State or local
24 government, or any agency or governmental unit or

1 subdivision thereof, receives Federal financial assist-
2 ance.

3 **“SEC. 245B. CIVIL ACTION FOR CERTAIN VIOLATIONS.**

4 “(a) IN GENERAL.—A qualified party may, in a civil
5 action, obtain appropriate relief with regard to a des-
6 ignated violation.

7 “(b) DEFINITIONS.—For purposes of this section:

8 “(1) QUALIFIED PARTY.—The term ‘qualified
9 party’ means—

10 “(A) the Attorney General of the United
11 States; or

12 “(B) any person or entity adversely af-
13 fected by the designated violation without re-
14 gard to whether such person or entity is a
15 health care provider.

16 “(2) DESIGNATED VIOLATION.—The term ‘des-
17 ignated violation’ means an actual or threatened vio-
18 lation of section 245A or of any other provision of
19 law referred to or listed under section 245A(c)(1).

20 “(c) ADMINISTRATIVE REMEDIES NOT REQUIRED.—
21 An action under this section may be commenced, and relief
22 may be granted, without regard to whether the party com-
23 mencing the action has sought or exhausted any available
24 administrative remedies.

1 “(d) DEFENDANTS IN ACTIONS UNDER THIS SEC-
2 TION MAY INCLUDE GOVERNMENTAL ENTITIES AS WELL
3 AS OTHERS.—

4 “(1) IN GENERAL.—An action under this sec-
5 tion may be maintained against any person or entity
6 receiving Federal financial assistance, including a
7 State governmental entity. Relief in an action under
8 this section may include money damages even if the
9 defendant is a governmental entity.

10 “(2) DEFINITION.—For the purposes of this
11 subsection, the term ‘State governmental entity’
12 means a State, a local government within a State,
13 and any agency or other governmental unit or sub-
14 division of a State, or of such a local government.

15 “(e) NATURE OF RELIEF.—In an action under this
16 section, the court shall grant—

17 “(1) all appropriate relief, including injunctive
18 relief, declaratory relief, and compensatory damages
19 to prevent the occurrence, continuance, or repetition
20 of the designated violation and to compensate for
21 losses resulting from the designated violation; and

22 “(2) to a prevailing plaintiff, reasonable attor-
23 neys’ fees and litigation costs.”.

○