

**BEYOND RELIGIOUS REFUSALS: THE CASE FOR
PROTECTING HEALTH CARE WORKERS’
PROVISION OF ABORTION CARE**

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INTRODUCTION

A physician, and former abortion provider, recently wrote an anonymous article detailing how working at a religiously affiliated medical institution constrains her practice of medicine and specifically her ability to provide reproductive health care, including abortion care, to her patients. She explained:

For now, I'm one of the abortion providers lost to American women because of the preponderance of anti-abortion religious institutions providing health care Nationally, new 'conscience rules' protect people who believe abortions are wrong from having to provide information or medications they think would end a life. But there aren't any conscience rules in place to protect people who, if their home [medical] institution believes otherwise, provide medications or [abortion] procedures they believe would save a life—the mother's.¹

The conflict this anonymous physician articulates—of being barred from providing life-saving abortion care by the religiously affiliated hospital where she is employed—is not merely speculative. Indeed, in November 2009, the medical staff at St. Joseph's Hospital, a Catholic hospital in Phoenix, Arizona, faced this precise circumstance when physicians determined that a pregnant mother of four suffering from pulmonary hypertension would die if she continued her pregnancy.² After reviewing the case, the hospital's ethics committee allowed physicians to perform the abortion to save the woman's life. However, as a consequence of the hospital's failure to adhere to Catholic directives prohibiting the performance of abortion, Catholic nun Sister Margaret Mary McBride, a senior administrator at the hospital who oversaw the ethics committee, was excommunicated and subsequently "left her post" as vice president of the hospital and is "no longer listed as one of the hospital executives on its Web site."³

¹ Dr. X, *A Doctor Tells Why She Performed Abortions—And Still Would*, 29 HEALTH AFF. 1264, 1266–67 (2010), available at <http://content.healthaffairs.org/content/29/6/1264.full.pdf+html>.

² ELIZABETH TENETY, *Arizona hospital no longer 'Catholic' after abortion to save mother's life*, WASH. POST (Dec. 22, 2010, 12:35 PM), http://onfaith.washingtonpost.com/onfaith/undergod/2010/12/st_josephs_hospital_no_longer_catholic_after_abortion_to_save_mothers_life.html; *Arizona Hospital Will Continue To Provide Life-Saving Care And Protect Women's Health Despite Withdrawal Of Support From Catholic Diocese*, ACLU (Dec. 21, 2010), <http://www.aclu.org/reproductive-freedom/arizona-hospital-will-continue-provide-life-saving-care-and-protect-womens-heal>.

³ Nicholas D. Kristof, *Sister Margaret's Choice*, N.Y. TIMES, May 26, 2010, at A35; see also Rob Stein, *Abortion fight at Catholic hospital pushes ACLU to seek federal help*, WASH. POST, Dec. 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206219.html?hpid=moreheadlines>. The hospital was also stripped of its Catholic status. *Id.*

Such prohibitions on the provision of abortion care at religiously affiliated institutions are widespread, particularly with the prevalence of mergers between nonsectarian hospital systems and religiously affiliated hospital systems.⁴ Significantly, many such restrictions apply not only to the provision of abortions in both emergency and nonemergency situations, but also to a broad range of abortion-related care. For example, some religiously affiliated hospitals forbid employees from providing information or counseling about abortion, referring patients to other facilities for abortions, or performing or assisting with abortion procedures at other medical facilities.⁵

Not surprisingly, legal questions regarding religiously based conflicts between employers and employees, particularly with regard to whether and when an employee can provide or refuse to provide reproductive health care, have garnered much attention in recent years.⁶ Most of the attention, however, has been paid to the question of religious *refusals*—that is, whether health care professionals can refuse, based on their religious or moral beliefs, to provide reproductive health care to patients.⁷ Indeed, efforts to en-

⁴ See generally LOIS UTTLEY & RONNIE PAWELKO, MERGERWATCH PROJECT, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY SPONSORED HOSPITALS IN THE UNITED STATES 21–24 (2002), available at http://www.mergerwatch.org/pdfs/bp_no_strings.pdf [hereinafter NO STRINGS ATTACHED] (providing examples of limitations on provision of reproductive health care, including restrictions on the provision of abortion, contraception, and infertility treatment, at religiously affiliated institutions); Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 136–39 (2003) (detailing prevalence of mergers and describing effects on provision of reproductive health care).

⁵ See NO STRINGS ATTACHED, *supra* note 4, at 23 (detailing restrictions on provision of abortion-related care); Andy Fox, *Local doctor under review for abortions*, WAVY.COM (Jan. 4, 2011, 7:21 PM), http://www.wavy.com/dpp/news/local_news/local-doctor-under-review (detailing “review” of doctor associated with Catholic hospital for performing abortions at another facility, a Planned Parenthood). Additionally, some religiously affiliated hospitals, in order to comply with, for example, Catholic Church dictates, bar or restrict a wide range of reproductive health care outside of abortion, including provision of contraception, emergency contraception, assisted reproductive technology, and sterilization procedures. See, e.g., UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, FOURTH EDITION, at Directives 38–54 (June 15, 2001), available at <http://www.nccbuscc.org/bishops/directives.shtml#> [hereinafter DIRECTIVES] (barring Catholic hospitals from providing a wide range of reproductive health care); see also Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe Is Not Enough: When Religion Controls Health-care*, 31 FORDHAM URB. L.J. 725, 732–33 (2004) (detailing bans on reproductive health services, including provision of contraceptive and infertility care, at Catholic hospitals). Throughout this Article, “abortion care” will refer to the range of abortion-related services that a health care professional may provide, including nondirective counseling, referral, the procedure itself, care following the procedure, and the treatment of any related complications.

⁶ See, e.g., Stein, *supra* note 3 (chronicling hospital’s loss of Catholic status for performing life-saving abortion); Rob Stein, *Pharmacists’ Rights at Front of New Debate; Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1 (noting trend of pharmacists refusing to dispense contraception based on their religious or moral beliefs).

⁷ Such commentary and discussion has focused on refusals to provide a wide range of reproductive health services, from pharmacists refusing to dispense contraception and emergency contraception to health professionals and institutions refusing to provide abor-

act “conscience” protections in both state and federal law for those who refuse to provide reproductive health care have been largely successful.⁸ Broadly, such laws permit individuals to refuse to provide certain types of reproductive health care, including abortion care, if doing so is a violation of the individual’s conscience, and prohibit employers from taking adverse employment action against (for example, firing or otherwise penalizing) employees who refuse to provide such care.⁹ Far less attention has been paid, however, to the closely related question of whether health care professionals who seek, also as a matter of conscience, to *affirmatively provide* reproductive health care for their patients have parallel legal protections.¹⁰ This question of whether and to what extent legal protections exist for the conscientious provision of reproductive health care is acutely salient for health care professionals who, like the physician in the opening vignette, desire to provide abortion services to their patients but, because they work in religiously affiliated medical facilities opposed to the provision of abortion care, are prohibited from doing so.

Defining the contours of conscience protections for both groups of health care professionals—those that refuse to perform abortion care and those that provide such care—has been a particularly salient issue recently. At the end of 2008, President George W. Bush’s administration promulgated a federal regulation¹¹ “clarifying” existing federal health care conscience protection statutes known as the Church Amendment,¹² Coats Amendment,¹³

tion services. *See generally* Erin Whitcomb, *A Most Fundamental Freedom of Choice: An International Review of Conscientious Objection to Elective Abortion*, 24 ST. JOHN’S J. LEGAL COMMENT. 771 (2010) (arguing in favor of statutory conscience protections to refuse to perform abortions); Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes Over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41 (2008) (exploring conscience protections for pharmacists who object to dispensing contraception).

⁸ *Refusal to Provide Medical Services*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/fast-facts/refusal-to-provide-medical.html> (last visited Mar. 8, 2011). Forty-seven states and the District of Columbia, as well as the federal government, have passed laws permitting entities and individuals to refuse to provide reproductive health services. Such laws permit individuals and entities to refuse to provide, pay for, or provide information about or referrals for reproductive health services (including abortion services). *Id.*

⁹ *Id.* (“[R]efusal clauses . . . permit a broad range of individuals and institutions—including hospitals, hospital employees, health-care providers, pharmacists, employers, and insurance companies—to refuse to provide, pay for, counsel for, or even refer patients for medical treatment that they oppose.”).

¹⁰ There are a few notable exceptions. *See generally* Eisenstadt, *supra* note 4 (arguing that the Church Amendment includes a private right of action that may offer employment protection to pro-choice health care providers). Indeed, Eisenstadt’s thoughtful article serves as a jumping off point for several contentions in this Article.

¹¹ 73 Fed. Reg. 78,072 (Dec. 19, 2008) (previously codified at 45 C.F.R. pt. 88).

¹² 42 U.S.C. § 300a-7 (2006); *see also infra* Part II (discussing and explaining provisions of the Church Amendment, sometimes also referred to as the “Church Amendments”).

¹³ Public Health Service Act § 245, 42 U.S.C. § 238n (2006) (prohibiting the federal government and any state or local government receiving federal financial assistance from “discriminating” against any physician, residency training program, or participant in a

and Weldon Amendment.¹⁴ These laws protect the rights of health care professionals and institutions to refuse to perform certain health care services and research activities to which they object for religious or moral reasons.¹⁵ The proposed Bush Rule expanded the categories of individuals and health care institutions who can refuse to provide reproductive health care and expanded the categories of health care services and procedures that they can refuse to provide. The proposed Rule was immediately sharply criticized by numerous medical professionals and health care advocates as an unwarranted expansion of existing conscience protections that could potentially “significantly limit women’s access to basic reproductive health services”¹⁶ and “expand[] the scope of providers who can claim [conscience] objections” and thus refuse to provide reproductive health care.¹⁷ Despite these criticisms, the Bush Rule went into effect on January 20, 2009.¹⁸

Partly as a result of this controversy, on March 6, 2009, the Obama Administration proposed to rescind the Bush Rule and on February 18, 2011, it revised and rescinded, in part, the Bush Rule.¹⁹ The final Obama Rule retracted the broad and controversial interpretations that were included in the Bush Rule while retaining a mechanism for health care providers to enforce the protections afforded under the Church Amendment, the Weldon Amendment, and the Coats Amendment.²⁰ The final Obama Rule recognized and restored long-standing interpretations of the Church, Weldon, and Coats Amendments and, in doing so, eliminated the substantial confusion and controversy created by the 2008 Bush Rule.²¹

The controversy over the Bush Rule focused on the potential expansion of refusal protections—that is, the Bush Rule’s attempted expansion of who, under existing federal law, can refuse to provide reproductive health care and its expansion of the types of procedures and services they can refuse to

health professionals training program on the ground that such person or entity refuses to receive or provide training in induced abortions, to perform such abortions, or to provide referrals for such training or such abortions).

¹⁴ Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 508d, 123 Stat. 3034, 3280 (2009); *see also infra* Part II (discussing Weldon Amendment).

¹⁵ 73 Fed. Reg. 78,072 (Dec. 19, 2008) (previously codified at 45 C.F.R. pt. 88).

¹⁶ Letter from concerned advocacy groups to Michael O. Leavitt, Sec’y, Dep’t of Health and Human Services (July 21, 2008), *available at* http://www.nwlc.org/sites/default/files/pdfs/Leavitt_Letter08.pdf (letter opposing draft rule signed by “medical, public health, religious, advocacy, and research groups”).

¹⁷ Letter from medical professionals to Michael O. Leavitt, Sec’y, Dep’t of Health and Human Services (July 29, 2008), *available at* <http://www.nwlc.org/sites/default/files/pdfs/HHSMedicalProfessionals.pdf>.

¹⁸ 73 Fed. Reg. 78,072 (Dec. 19, 2008) (previously codified at 45 C.F.R. pt. 88).

¹⁹ Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88); *see also* NAT’L WOMEN’S LAW CTR., HHS RESCINDS PORTIONS OF HEALTH CARE REFUSAL RULE THAT THREATENED WOMEN’S HEALTH I (2011), *available at* http://www.nwlc.org/sites/default/files/pdfs/hhs_rescinds_portions_of_health_care_refusal_rule_v.2_0.pdf.

²⁰ Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. at 9972.

²¹ *Id.* at 9968–74.

provide. Largely unaddressed during the controversy over the Bush Rule and the subsequent revision by the Obama Administration, however, has been the critically important parallel issue of health care providers' affirmative rights to *provide* reproductive health care in accordance with their consciences. This Article thus seeks to explore the question of whether and to what extent conscience-based employment protections available to those medical professionals opposed to the provision of abortion care should also be available to health care professionals who seek, based on their religious or moral beliefs, to affirmatively provide abortion care at religiously affiliated medical facilities. Part I examines the prevalence of religiously affiliated medical institutions that refuse to provide abortion care and the ways in which these prohibitions violate the consciences of some health care professionals who seek, as a matter of religious or moral conviction, to provide abortion care to their patients. Part II examines whether existing employee legal protections such as Title VII of the 1964 Civil Rights Act²² or the Church Amendment,²³ both of which prohibit various forms of employment "discrimination" based on moral, ethical, or religious beliefs, can be used to protect health care providers' affirmative right to provide, as a matter of conscience, abortion care. While both laws have been used to protect employees' conscience-based refusals to provide reproductive health care, Part II explores whether and to what extent these same laws could also provide meaningful remedies for medical professionals who seek to provide conscience-based abortion care. Recognizing that existing employment conscience protections for employees seeking to provide abortion care are in some ways limited, the final part briefly concludes that policymakers and courts must begin to recognize that the conscience-based provision of abortion care can be rooted in beliefs held with a strength equal to the beliefs underlying the conscience-based refusal of such care, and as such must craft new and enforce existing laws to provide protection for both.

I. THE CONFLICT²⁴

A. *Religiously Affiliated Medical Facilities and Barriers to the Provision of Abortion Care*

The rise of religiously affiliated medical facilities has been well documented.²⁵ Approximately thirteen percent of all community-based hospitals are religiously affiliated or sponsored, accounting for nearly twenty percent

²² 42 U.S.C. § 2000e (2006).

²³ 42 U.S.C. § 300a-7 (2006).

²⁴ This section draws heavily on the structure of Eisenstadt, *supra* note 4, at 137–39.

²⁵ Though the term "religiously affiliated medical facilities" largely refers to religiously affiliated hospitals, the term also includes other facilities, such as a hospital's ancillary clinics. While "hospital" will be used throughout for ease of reference, our use of the term includes other such facilities, as well.

of hospital beds.²⁶ The number of hospitals affiliated with the Catholic Church is particularly significant; the Catholic Health Association estimates that as of 2008 there were 636 Catholic hospitals in the United States, which constitutes over twelve percent of community hospitals.²⁷ Last year, Catholic hospitals employed almost 770,000 individuals.²⁸

Some religiously affiliated hospitals have policies that “prohibit physicians who work in their facilities from providing medical interventions that conflict with religious teaching, such as . . . abortion.”²⁹ Catholic hospitals, for example, prohibit the provision of abortion care in accordance with the Ethical and Religious Directives for Catholic Health Care Services.³⁰ This set of seventy-two directives issued by the U.S. Conference of Catholic Bishops includes an explicit prohibition on the provision of abortion care:

Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.³¹

²⁶ Debra B. Stulberg, Ryan E. Lawrence, Jason Shattuck & Farr A. Curlin, *Religious Hospitals and Primary Care Physicians: Conflicts Over Policies for Patient Care*, 25 J. GEN. INTERNAL MED. 725, 725 (2010). The number has risen over the past decade. See Eisenstadt, *supra* note 4, at 137 (“Catholic hospitals are the largest single group of non-profit hospitals, constituting, as of 2001, eleven percent of all community hospitals.”).

²⁷ *Fast Facts*, CATHOLIC HEALTH ASS’N OF THE UNITED STATES, http://www.chausa.org/Pages/Newsroom/Fast_Facts/ (last visited Mar. 9, 2011). The American Hospital Association defines community hospitals as:

all nonfederal, short-term general, and other special hospitals. Other special hospitals include obstetrics and gynecology; eye, ear, nose, and throat; rehabilitation; orthopedic; and other individually described specialty services. Community hospitals include academic medical centers or other teaching hospitals if they are nonfederal short-term hospitals. Excluded are hospitals not accessible by the general public, such as prison hospitals or college infirmaries.

Fast Facts on U.S. Hospitals, AM. HEALTH ASS’N, <http://www.aha.org/aha/resource-center/Statistics-and-Studies/fast-facts.html> (last updated Dec. 6, 2010).

²⁸ *Advocacy Agenda 2010–2011*, CATHOLIC HEALTH ASS’N OF UNITED STATES, <http://www.chausa.org/advocacyagenda/> (last visited Mar. 9, 2011). This number has also risen over the last decade. See Eisenstadt, *supra* note 4, at 138 (noting that “as of 2001, Catholic hospitals employed 731,000 full and part-time workers”). While beyond the scope of this Article, it is worth noting that the prevalence of Catholic hospitals also directly affects patients; it is estimated that “1 in 6 patients in the United States is cared for in a Catholic hospital each year.” *Advocacy Agenda 2010–2011*, *supra*.

²⁹ Stulberg et. al., *supra* note 26, at 725.

³⁰ NO STRINGS ATTACHED, *supra* note 4, at 21; see also DIRECTIVES, *supra* note 5 (providing Catholic-based directives for health care providers).

³¹ DIRECTIVES, *supra* note 5, at Directive 45.

This directive is binding on all Catholic health care service providers and, importantly, all employees of any Catholic health care facility; Directive 9 explicitly states, “[e]mployees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives.”³²

While many employees of sectarian hospitals support their employer hospitals’ religiously based policies and thus desire to comply with them, at least some are likely to disagree with their employers’ stances on the provision or prohibition of certain types of care, including abortion care. Indeed, in a recent survey, approximately one in five physicians (nineteen percent) who reported providing care to patients in a religiously affiliated hospital had experienced a conflict with the institution’s religiously based patient care policies.³³ Some of this conflict no doubt centers on religiously affiliated medical facilities’ prohibitions on the provision of reproductive health care.³⁴ One physician, “Dr. S,” recounts how his previous employer’s religiously based regulations impeded his provision of necessary medical care:

I’ll never forget this; it was awful—I had one of my partners accept this patient at 19 weeks. The pregnancy was in the vagina. It was over And so he takes this patient and transferred her to [our] tertiary medical center, which I was just livid about, and, you know, “we’re going to save the pregnancy.” So of course, I’m on call when she gets septic, and she’s septic to the point that I’m pushing pressors on labor and delivery trying to keep her blood pressure up, and I have her on a cooling blanket because she’s 106 degrees. And I needed to get everything out. And so I put the ultrasound machine on and there was still a heartbeat, and [the ethics committee] wouldn’t let me because there was still a heartbeat. This woman is dying before our eyes. I went in to examine her, and I was able to find the umbilical cord through the membranes and just snapped the umbilical cord and so that I could put the ultrasound—“Oh look. No heartbeat. Let’s go.” She was so sick she was in the [intensive care unit] for about 10 days and very nearly died She was in DIC [disseminated intravascular coagulopathy] Her bleeding was so bad that the sclera, the

³² *Id.* at Directive 9; *see also id.* at Directive 5 (“Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel.”).

³³ Stulberg, *supra* note 26, at 725, 727 (physicians were asked whether they “‘ever had a conflict with that practice/hospital regarding its religiously based policies for patient care?’”).

³⁴ *See generally* NO STRINGS ATTACHED, *supra* note 4 (discussing bars on the provision of reproductive health care, including abortion care, at sectarian hospitals); *see also* notes 4–5 and accompanying text (discussing restrictions on provision of reproductive health care).

white of her eyes, were red, filled with blood And I said, “I just can’t do this. I can’t put myself behind this. This is not worth it to me.” That’s why I left.³⁵

Likewise, Sister Mary Margaret McBride, the nun who permitted the life-saving abortion for a young mother at an Arizona Catholic hospital, was excommunicated and apparently demoted for her decision to allow the care in the face of the Catholic Directives.³⁶ Incredibly, other physicians working at religiously affiliated medical institutions have faced this conflict even when providing abortion care at a *different facility*. For example, Dr. Richard Willard, an obstetrician-gynecologist employed by a Catholic medical center in Virginia, is currently “under review” for performing abortions not at his Catholic affiliated employer, but at an unaffiliated Planned Parenthood.³⁷

Such policies pose a very real barrier to a medical professional’s ability to provide this range of abortion care, as the price for non-compliance might well be one’s job. A medical professional who does not adhere to her employer’s policies and procedures—whether by advocating pro-choice views, referring a patient to another facility for an abortion, or performing an abortion in a medical emergency—is at risk for disciplinary action, demotion, loss of promotion and advancement opportunities, denial of hospital admitting privileges, or even termination. A physician who desires to advocate for or provide abortion care in the face of her employer’s prohibitions against doing so must then make a choice: cede her beliefs and refrain from providing abortion care to her patients or potentially risk her job.

Plainly, failure to comply with an employer’s generally applicable rules and policies is often a legitimate reason for discipline or even termination; for example, an employee who fails to arrive at work at a designated hour, does not comply with company codes of conduct, or does not fulfill core contractual job functions can fairly expect adverse consequences. This general rule, however, has an important and well recognized exception: federal law, including, as discussed below, Title VII and the Church Amendment, provides protections to ensure that employees do not have to choose between keeping their jobs and adhering to their own religious beliefs.³⁸ The question is whether the desire to provide abortion care can be motivated by a religious belief or moral conviction in the same manner and to the same extent as an objection to providing such care may be. We argue in Section IB that it can,

³⁵ Lori R. Freedman, Uta Landy & Jody Steinauer, *When There’s a Heartbeat: Mis-carriage Management in Catholic-Owned Hospitals*, 98 GOV’T POL. & L. 1774, 1777 (Oct. 1, 2008), available at <http://escholarship.org/uc/item/8dm907hm#page-1>.

³⁶ See *supra* notes 2–3 and accompanying text (discussing nun’s excommunication and demotion).

³⁷ Fox, *supra* note 5.

³⁸ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (“EEOC”), COMPLIANCE MANUAL § 12-IV (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.html>.

and that such beliefs may sound in traditional religions or strongly held moral or ethical beliefs.

B. Conscience-Based Provision of Abortion Care

Plainly, health care providers who are prohibited by their religiously affiliated employers from providing abortion care may experience significant conflict when their employers' policies prevent them from acting in accordance with their own consciences in providing care to their patients. This section, then, explores the ways in which the provision of abortion care can be motivated by an individual's religious beliefs, moral convictions, or "conscience."

Some doctors who perform abortions very explicitly see their work as one of religious and moral obligation. For example, abortion provider Dr. Mary Smith writes, "I continue to do abortions after 25 years In the small still hours of the night I am at peace with myself and with God, who gave me this mission in life."³⁹ Dr. Marc Heller similarly explains:

Abortion services are the essence of public health in this country. We are charged with the task of offering kind, compassionate care so that women can have babies they want. Parenthood is a sacred trust that should never be undertaken under duress. I feel a strong moral imperative to make this service available and couldn't imagine practicing ob/gyn without providing abortion services.⁴⁰

Other physicians may understand their commitment to aiding women in their exercise of autonomous choice as a moral imperative. Frances Kissling, former President of Catholics for a Free Choice, articulates the moral dimensions of the decision to terminate a pregnancy:

For me, when women claim they have a right to choose . . . [t]hey are laying claim to a right, a concept that philosophers and theologians have asserted is an essential element of freedom and rationality Even within Catholicism which like other branches of monotheism struggled with reconciling the idea that God knew and determined all action in the world with the idea of free will, Aquinas wrote on the subject of free choice. He said [,] ["]Without doubt it must be said that man has free choice. Faith demands that we hold this position, since without free choice one could not merit or demerit, or be justly rewarded or punished["].

. . . .

³⁹ PHYSICIANS FOR REPROD. CHOICE & HEALTH, 3 WHY I PROVIDE ABORTIONS 2 (June 2005), <http://documents.scribd.com/s3.amazonaws.com/docs/6plubqy24gmjplf.pdf?t=1280841593> [hereinafter WHY I PROVIDE ABORTIONS].

⁴⁰ *Id.* at 7.

[T]he link between freedom, free will, choice and responsibility is an important one that is part of making choices. As women who claim our moral agency, our right to free choice, we also accept our responsibility for the consequences of the choices we make.⁴¹

Kissling's statements regarding the ethics of choice and autonomy are echoed by abortion provider William Harrison: "I am firmly committed to the ideal that all people, male and female, should have as much autonomy as possible and that they should have the best medical care feasible. That means that some caring and competent physicians in each community should provide abortions."⁴²

Another possible basis for a health care provider's conscientious provision of abortion care could center on a health care provider's ethical obligation to provide necessary health care to patients, particularly in emergency situations. The statement of the anonymous abortion provider in the opening vignette suggests that she provides abortion care as a result of an ethical commitment to saving the life of the mother: "But there aren't any conscience rules in place to protect people who, if their home [medical] institution believes otherwise, provide medications or [abortion] procedures they believe would save a life—the mother's."⁴³

Dr. S, Sister Mary McBride, and the anonymous provider clearly all experienced a conflict between their employers' beliefs and their own deeply held obligations to care for their patients. In such a circumstance, a physician could certainly be motivated by a religious belief to provide care for a patient where failing to do so would sacrifice her health or even her life. As the Religious Coalition for Reproductive Choice has articulated, the Jewish faith, for example, recognizes the moral imperative to protect existing life:

These, then, become the guiding principles on abortion in Jewish tradition: a woman's life, her pain, and her concerns take precedence over those of the fetus; existing life is always sacred and takes precedence over a potential life; and a woman has the personal freedom to apply the principles of her tradition unfettered by the legal imposition of moral standards other than her own.⁴⁴

As demonstrated above, some health care providers may ground their provision of abortion care in moral, ethical, or religious beliefs. A health care professional working at a religiously affiliated hospital may, however,

⁴¹ Frances Kissling, *The Positive Meaning and Value of Choice*, RH REALITY CHECK (Jan. 22, 2010, 7:00 AM), <http://www.rhrealitycheck.org/blog/2010/01/22/the-positive-meaning-and-value-choice>.

⁴² WHY I PROVIDE ABORTIONS, *supra* note 39, at 5.

⁴³ Dr. X, *supra* note 1, at 1266–67.

⁴⁴ RABBI RAYMOND A. ZWERIN & RABBI RICHARD J. SHAPIRO, RELIGIOUS COAL. FOR REPROD. CHOICE, JEWISH PERSPECTIVES ON ABORTION 4, *available at* http://trcc.org/pdf/jewish_perspectives.pdf.

be barred from acting on those beliefs because of the conflict between her conscience-based desire to provide abortion care and the hospital's conscience-based objection to the provision of abortion care. If an employee faces disciplinary action for this non-adherence—for example, if she provides an abortion referral to a patient and is subsequently fired—the next question is whether existing federal laws prohibiting employment discrimination on the basis of religion could provide a meaningful remedy for the employee.

II. AVAILABLE LEGAL RESOURCES

This section explores whether two laws, Title VII of the 1964 Civil Rights Act and the Church Amendment, provide colorable remedies for health care professionals who seek, as a matter of conscience, to provide abortion care at religiously affiliated hospitals or institutions and suffer resultant adverse employment actions.

A. *Title VII of the 1964 Civil Rights Act*

Under Title VII, religious “discrimination” includes a range of adverse employment actions made on the basis of religion, including an employer’s refusing to hire, discharging, or otherwise discriminating against an employee “with respect to his compensation, terms, conditions, or privileges of employment.”⁴⁵ There are several distinct theories of Title VII liability available to a health professional plaintiff, including an accommodation claim, a disparate treatment claim, or a harassment claim.⁴⁶ This section outlines each of these theories, focusing on the prima facie case a plaintiff must establish, the potential hurdles a plaintiff must clear to establish employer liability under Title VII, and the remedies available for the successful plaintiff.⁴⁷ This section then confronts the threshold question of whether an

⁴⁵ 42 U.S.C. § 2000e-2 (2006). Title VII also prohibits employment discrimination on the bases of race, color, sex, and national origin. § 2000e-2(a). The plaintiff has the burden to prove that the hospital was an “employer” subject to Title VII. Under Title VII, “the term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b) (2006). For claims against all but the smallest hospitals this element is likely easily established.

⁴⁶ EEOC, *supra* note 38, § 12-I (outlining potential Title VII religious discrimination claims).

⁴⁷ In addition to the Title VII elements defined in Part II, any employee pursuing a Title VII claim would also need to establish that she is an “employee” falling under Title VII’s auspices. Because Title VII circularly defines “employee” as “an individual employed by an employer,” 42 U.S.C. § 2000e(f) (2006), this question would turn on the nature of an employment relationship. A physician or medical professional working directly for a hospital under a traditional employment contract would clearly be considered an “employee,” but the answer is less clear for those medical professionals who have less traditional employment arrangements. For example, courts have routinely found that in-

employer hospital could successfully assert that it qualifies for Title VII's religious organization exemption, and thus adding an additional hurdle for a potential plaintiff.⁴⁸

1. *Title VII Religious Accommodation*

A traditional Title VII religious accommodation claim is based on an employee's request that the employer accommodate her religious beliefs or practices; it is "intended to relieve individuals of the burden of choosing between their jobs and their religious convictions."⁴⁹ For example, an employee who attends religious worship services on Sundays might ask her employer to "accommodate" this belief by refraining from scheduling her to work on Sundays.

As an initial matter, the employee has the burden to show that she has a "sincerely held" religious belief that conflicts with an employment requirement, that she informed her employer of her belief, and that she suffered an adverse employment action "for fail[ure] to comply with the conflicting employment requirement."⁵⁰ Title VII requires that, upon the employee's request, an employer "reasonably" accommodate such a belief if, and only

dependent contractors do not warrant protection under Title VII. *See, e.g.*, *Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 226 (2d Cir. 2008) ("Once a plaintiff is found to be an independent contractor and not an employee—whether on summary judgment or after a trial—the Title VII claim must fail."). Others have noted, however, that the distinction between an employee and an independent contractor is not always easy to discern given that determining the nature of an employment relationship is a multi-factored, highly individualized inquiry. *See, e.g., id.* at 226–27 (listing thirteen factors to consider in determining whether a hired person is an "employee"); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 259 (4th Cir. 1997) (listing ten factors to consider when determining, for purposes of Title VII liability, whether a health professional employed at a hospital was an "employee" or an independent contractor). Additionally, particularly in the health care worker context, courts have been willing to recognize Title VII claims outside of a traditional employment relationship where the worker was "denied a benefit or opportunity by a hospital or other health care facility, on the ground that such a denial interferes with their employment opportunities with patients." 5 EMP. COORD., EMPLOYMENT PRACTICES § 21:6 (2011).

Additionally, though somewhat beyond the scope of this Article, it is possible that an employer would argue that a health care professional contractually waived her Title VII rights by agreeing to work for a religiously affiliated entity. However, courts have routinely held that Title VII protections cannot be prospectively waived. Thus, a health care provider who enters into a contract with a religiously affiliated hospital does not waive her Title VII protections. *See, e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII."); *Richardson v. Sugg*, 448 F.3d 1046, 1053–54 (8th Cir. 2006) (stating that the "general rule" is that "Title VII rights cannot be waived").

⁴⁸ 42 U.S.C. § 2000e-1(a) (2006).

⁴⁹ EEOC, *supra* note 38, § 12-IV.

⁵⁰ *Wilson v. U.S. W. Commc'ns.*, 58 F.3d 1337, 1340 (8th Cir. 1995); *see also* EEOC, *supra* note 38, § 12-I(A) (explaining that an employee's belief is "religious" under Title VII if "it is a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by . . . God").

if, the employer can do so without an “undue hardship” on the business.⁵¹ The “reasonableness” inquiry is an intensely fact-specific examination based on “the unique circumstances of the individual employer-employee relationship.”⁵² Importantly, though also a case-specific inquiry, the “undue hardship” threshold is quite low; if an employer can demonstrate that the requested accommodation would “impose more than a de minimis cost,” the employer need not grant the accommodation.⁵³ A health care professional seeking to provide abortion care under an accommodation claim would thus need to (1) establish that her desire to provide such care was rooted in a “sincerely held” religious belief or practice and (2) refute any argument put forth by the employer that the requested accommodation—namely, to provide some form of abortion care—was an unreasonable accommodation or posed more than a de minimis burden on the employer hospital.⁵⁴

a. *Religious Beliefs*

As discussed above, courts and legislatures have routinely acknowledged that *opposition* to abortion can be grounded in religious beliefs;⁵⁵ the open question is whether *support* for abortion will be afforded the same treatment or be considered a “mere” political belief. There is a colorable argument that a health care professional’s commitment to the conscientious provision of abortion care warrants recognition as a protected “religious” belief under Title VII.

⁵¹ See EEOC, *supra* note 38, § 12-IV(B) (“An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship.”); see also *id.* § 12-I (“Title VII prohibits . . . denying a requested reasonable accommodation of an applicant’s or employee’s sincerely held religious beliefs or practices—or lack thereof—if an accommodation will not impose an undue hardship on the conduct of the business.”).

⁵² *Id.* at § 12-IV(A)(3). Common accommodations that generally do not pose undue hardship on employers include scheduling changes, adjustment of job tasks, and changes to dress codes. *Id.*; see also EEOC, *Questions and Answers: Religious Discrimination in the Workplace* (July 22, 2008), http://www.eeoc.gov/policy/docs/qanda_religion.html [hereinafter, EEOC, *Questions and Answers*] (identifying common religious accommodations, including use of the job facility for religious observance).

⁵³ EEOC, *supra* note 38, § 12-IV(B).

⁵⁴ See *id.* at § 12-IV(A) (“A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. However, it is subject to the limit of more than de minimis cost or burden.”). The employer bears the burden of proving undue hardship. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004) (“First, the plaintiff must make her prima facie case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action. If the plaintiff establishes her prima facie case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship.”).

⁵⁵ See *Wilson*, 58 F.3d at 1340 (employee’s opposition to abortion stipulated by parties and accepted by court as religious belief); *Kenny v. Ambulatory Ctr. of Miami, Fla., Inc.*, 400 So. 2d 1262, 1265 (Fla. Dist. Ct. App. 1981) (employee’s opposition to abortion accepted as religious belief); *supra* notes 2–5 and accompanying text (discussing conscience clause legislation).

As discussed in Part I, some health care professionals may ground their beliefs that providing abortion care is a moral imperative in religion,⁵⁶ and this belief may well deserve Title VII protection. “Religion” is broadly defined under Title VII, encompassing “all aspects of religious observance and practice, as well as belief,”⁵⁷ regardless of whether those beliefs are “new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or . . . seem illogical or unreasonable to others.”⁵⁸ Admittedly, a physician’s commitment to providing abortion care may be outside the mainstream tenets of a particular religion; it could certainly be persuasively posited that, for example, the Catholic Church does not support the provision of abortion.⁵⁹ EEOC guidance makes clear, however, that “[t]he fact . . . that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee.”⁶⁰ For example, the Religious Coalition for Reproductive Choice articulates an interpretation of Catholicism supportive of the provision of abortion care:

Church teachings, tradition and core Catholic tenets—including the primacy of conscience, the role of the faithful in defining legitimate laws and norms, and support for the separation of church and state—leave room for supporting a more liberal position on abortion. The church has acknowledged that it does not know when the fetus becomes a person and has never declared its position on abortion to be infallible. Catholics can, in good conscience, support access to abortion and affirm that abortion can be a moral choice.⁶¹

Thus, a health care provider could ground her beliefs in a traditional religion and still warrant Title VII protection even if such a belief diverges from the official dictates of that religion. Likewise, an employee’s beliefs need not be affiliated with an organized church or religion in order to qualify for Title VII protection; “[t]he fact that no religious group espouses such beliefs . . .

⁵⁶ See *supra* Part I (arguing that abortion care can be based in religious, moral, or ethical beliefs).

⁵⁷ 42 U.S.C. § 2000e(j) (2006).

⁵⁸ EEOC, *supra* note 38, § 12-I(A)(1).

⁵⁹ See, e.g., *Select Quotations on Life Issues from His Holiness Pope Benedict XVI & the U.S. Conference of Catholic Bishops*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/prolife/tdocs/popebquotes2008.shtml> (last visited Mar. 9, 2011) (quoting Pope Benedict XVI as stating, “As far as the right to life is concerned, we must denounce its widespread violation in our society Abortion and embryonic experimentation constitute a direct denial of that attitude of acceptance of others which is indispensable for establishing lasting relationships of peace.”).

⁶⁰ 29 C.F.R. § 1605.1 (2006).

⁶¹ Jon O’Brien & Sara Morello, *Catholics for Choice and Abortion*, RELIGIOUS COAL. FOR REPROD. CHOICE, <http://rcrc.org/perspectives/catholic.cfm> (last visited Mar. 9, 2011).

will not determine whether the belief is a religious belief of the employee or prospective employee.”⁶²

Further, federal regulations interpreting the definition of “religion” make clear that beliefs warranting Title VII protection need not have traditionally religious underpinnings; “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views” also warrant Title VII protection.⁶³ Thus, a health care professional who could demonstrate that her sincerely held moral or ethical beliefs contributed to her desire to provide abortion care would not need to demonstrate that her beliefs stemmed from the tenets of an organized religion—she could, as argued above, ground them in conscience-based theories of moral choice or ethics.

While admittedly a novel approach, evidence of such an ethical belief could potentially rest, for some physicians, on the fact that many new physicians take the Hippocratic oath and swear to provide comprehensive care to patients. The oath requires that physicians “apply, for the benefit of the sick, all measures [that] are required” and that the whole patient be considered: “I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person’s family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.”⁶⁴

Dr. Edward Perrin, echoing portions of the oath, explains the obligation to provide complete health care to women:

I want to provide complete health care, which is what a family doctor does. Complete is not carving out a little bit here, or carving out a little bit there, within my physical and mental ability to provide. I don’t want to say I’m going to help you during your pregnancy and during your delivery, but I’m not going to help you if you don’t want to be pregnant. That’s incomplete care. I want to

⁶² 29 C.F.R. § 1605.1 (2010); *see also* Peterson v. Wilmur, 205 F. Supp. 2d 1014, 1021–24 (E.D. Wis. 2002) (White supremacist belief system called “Creativity” was a “religion” within meaning of Title VII because employee had a sincere belief in the teachings of Creativity; purely “moral and ethical beliefs” can be religious “so long as they are held with the strength of religious convictions.”); EEOC, *supra* note 38, § 12-I(A)(1) (“Religion includes not only traditional, organized religions . . . but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”).

⁶³ 29 C.F.R. § 1605.1 (2010) (citing *Welsh v. United States*, 398 U.S. 333 (1970) and *United States v. Seeger*, 380 U.S. 163 (1965)).

⁶⁴ Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/doctors/oath.html>. While the classic version of the oath contained a prohibition against abortion, the “modern version,” written in 1964, does not. It states, in relevant part, “I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given to me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.” *Id.*

treat the whole woman, psychologically, emotionally and physically.⁶⁵

Though novel, there is thus at least some support for the proposition that the Hippocratic oath can form the basis for a moral or ethical belief deserving of legal protection.⁶⁶

Whether proceeding under a theory that traditional or nontraditional beliefs formed the basis for conscience-based provision of abortion care, a plaintiff would still need to demonstrate the sincerity of those beliefs. In evaluating “sincerity,” courts engage in a case-specific analysis, looking to factors such as whether the asserted belief has been consistently held and whether the accommodation sought is likely for nonreligious reasons.⁶⁷ It is this distinction between beliefs that are grounded in religious, moral, or ethical beliefs and those that are not that may prove to be a stumbling block for some plaintiff medical professionals. The EEOC and the courts have made clear that, while in most cases the religious nature or sincerity of a person’s belief is usually not in question, the parameters of the definition of “religion” are not without limits. In particular, “[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not ‘religious’ beliefs protected by Title VII.”⁶⁸ Certainly some abortion providers have, for example, exclusively nonreligious motivations for their work and thus would not be able to avail themselves of Title VII. However, the fact that some abortion providers act without religious motivation does not preclude the conclusion that others act with religious, moral, or ethical motivations; “[t]he same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons.”⁶⁹

In sum, the question of whether a health care provider seeking to provide conscience-based abortion care will be deemed to be acting with religious or moral motivations will be largely dependent on the facts of the specific case. Given the broad interpretation of “religion” under Title VII, some plaintiff medical professionals will likely be able to establish that their

⁶⁵ WHY I PROVIDE ABORTIONS, *supra* note 39, at 10.

⁶⁶ At least one court has recognized that the oath is evidence of a conscience-based belief. *See Hager v. Sec’y of Air Force*, 938 F.2d 1449, 1460 n.11 (1st Cir. 1991) (reversing district court refusal to grant conscientious objection status; one asserted basis for refusal was Hippocratic Oath).

⁶⁷ EEOC, *supra* note 38, § 12-I(A)(2). However, “although prior inconsistent conduct is relevant to the question of sincerity, an individual’s beliefs—or degree of adherence—may change over time, and therefore an employee’s newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.” *Id.*

⁶⁸ EEOC, *Questions and Answers*, *supra* note 52; *see also Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992) (KKK is “political and social in nature” and thus not religious); *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973) (anti-semitic ideology of Klan organization “takes on, as advanced by that organization, a narrow, temporal and political character inconsistent with the meaning of ‘religion’” as contemplated by Title VII).

⁶⁹ EEOC, *Questions and Answers*, *supra* note 52.

conscience-based commitment to providing abortion care is protected under Title VII.

b. Accommodation

A plaintiff seeking an accommodation for her religious beliefs and practices would also need to overcome the probable arguments from her employer that the accommodation sought is unreasonable and would pose an undue hardship on the employer. The question of whether an accommodation poses such a hardship turns, of course, on the nature of the accommodation requested.⁷⁰ That said, the threshold of “undue hardship” is low, allowing the employer to refuse to provide any accommodation posing more than a de minimis cost on the business.⁷¹ Some commentators have even argued that the Supreme Court’s interpretation of the “undue hardship” standard has made it difficult for a health care worker plaintiff to prevail.⁷²

In undertaking the undue hardship analysis, courts look to obvious costs such as direct monetary costs, but also the “costs” associated with business efficiency and, potentially significant in this context, possible interference with other employees’ rights.⁷³ While “[u]ndue hardship requires more than proof that some co-workers complained . . . evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work” will likely constitute such a hardship.⁷⁴ With the issue of abortion, where co-workers are likely to have strongly held views, the potential for disruption is high. For example, the Eighth Circuit has held that an employer does not have to accommodate an employee’s request to wear an antichoice button depicting a fetus.⁷⁵ The court relied heavily on the fact that wearing the button caused substantial disruption in the workplace: other employees filed grievances, complained to management, and refused to attend meetings with the employee once she began wearing the button.⁷⁶ An employee seeking to actually perform abortions would almost certainly cause more disruption in the workplace than one wearing an advocacy button, and, in that case, it is likely that such an accommodation would pose a work disruption. That said, if there were no actual evidence of such a disruption, an employer would not be able to rely on a mere speculative threat of disruption to claim burden; the “showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would *actually*

⁷⁰ See EEOC, *supra* note 38, § 12-IV(B)(1). Other factors “may include the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.” *Id.*

⁷¹ See *id.* at § 12-IV.

⁷² See, e.g., Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 218 (1993).

⁷³ See EEOC, *supra* note 38, § 12-IV(B)(2).

⁷⁴ *Id.* at § 12-IV(B)(4).

⁷⁵ *Wilson v. U.S. W. Commc’ns.*, 58 F.3d 1339, 1339–40 (8th Cir. 1995).

⁷⁶ *Id.*

infringe on the rights of co-workers or cause disruption of work” and “general disgruntlement, resentment, or jealousy of co-workers” does not meet this burden.⁷⁷

Though providing abortion procedures may, in some circumstances, be deemed an “undue hardship” on a religiously affiliated institution, abortion care, as discussed above, can encompass a wide range of care outside of actually performing abortions at the employer hospital. Accommodations for such practices could pose few or no burdens on hospitals. For example, a physician might seek to provide comprehensive options counseling, including counseling about the availability of abortion, to pregnant patients. Likewise, a physician working in a religious hospital, cognizant of a hospital’s prohibition on abortion provision, may seek to refer patients to unrelated, nonreligious institutions for abortion care. Or a provider, such as Dr. Richard Willard,⁷⁸ might seek to personally provide abortion care for his patients at a different facility on the days he does not work at the religiously affiliated hospital. These accommodations, particularly the ability to provide abortion care at an unrelated facility or refer a patient to an unrelated facility, would arguably pose much lighter or even nonexistent burdens on hospitals. They would not require the involvement of other staff nor would they require substantial (or perhaps any) use of the religious hospital’s facilities or resources. Likewise, it is hard to imagine how providing comprehensive, nondirective options counseling at the employer hospital could burden the employer if the physician provided such counseling discretely and without involving other staff.

That said, simply because the burden is “less” does not mean a court would find it is “less” than *de minimis*. An employer may still be able to successfully argue, for example, that even the provision of comprehensive options counseling caused disruption among the staff or risked backlash from a certifying religious sect—but, as explained above, the employer would need actual examples of such disruption to support such a claim. Thus, while the path for a plaintiff medical professional pursuing a religious accommodation claim is not without potential roadblocks, the fact-specific nature of the inquiry regarding the sincerity of the employee’s beliefs and the burden on the employer leaves room for the success of at least some accommodation claims, particularly those falling short of the performance of actual abortion procedures at a religious hospital.

2. *Title VII Disparate Treatment*

Another type of Title VII claim is one alleging disparate treatment. The essence of a disparate treatment claim is that the employer “treat[s] . . .

⁷⁷ See EEOC, *supra* note 38, § 12-IV(B)(4) (emphasis added).

⁷⁸ See *supra* note 37 and accompanying text (describing doctor “under review” for providing abortion care at a separate facility).

employees differently . . . based on their religious beliefs or practices.”⁷⁹ The plaintiff must first establish a prima facie case of discrimination—namely, that she belongs to a protected class, and that the adverse employment action was rooted in religion. The burden of production then shifts to the employer to prove that the adverse employment action was due to a legitimate, non-discriminatory reason.⁸⁰ The plaintiff may then introduce evidence showing that the employer’s proffered nondiscriminatory reason is pretextual.⁸¹ The ultimate burden of proving the unlawful discrimination remains with the plaintiff at all times.⁸²

Accommodation claims and disparate treatment claims differ in two significant respects. First, because the employee pursuing a disparate treatment claim is not seeking an exception from a generally applicable employment rule or practice, “the accommodation framework . . . has no application” to such claims.⁸³ Rather, a plaintiff alleging disparate treatment is alleging that she is being treated differently on the basis of religion, and seeks, at base, to be treated the same as other employees.

Second, as discussed above, under an accommodation theory the employee bears the burden of demonstrating a sincerely held religious belief requiring accommodation.⁸⁴ Plaintiffs pursuing a disparate treatment claim may not face this same requirement, particularly if pursuing a “non-adherence” theory of discrimination. Under a disparate treatment claim of “non-adherence,” the plaintiff essentially alleges that she faced discrimination not because of her own religious beliefs, but because she did not share her employer’s religious beliefs; “it is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim.”⁸⁵ Thus, “it is the motivation of the discriminating official, not the actual beliefs of the individual alleging discrimination, that are typically relevant in determining if the discrimination that occurred was because of religion.”⁸⁶

⁷⁹ EEOC, *supra* note 38, § 12-I.

⁸⁰ Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment—Supreme Court Cases*, 182 A.L.R. FED. 61, § 2a (2002) (discussing Title VII burden shifting framework).

⁸¹ *Id.*

⁸² *Id.* (noting that rejection of proffered non-discriminatory reason for adverse employment action does not mandate judgment in favor of plaintiff; the plaintiff retains the ultimate burden of persuasion).

⁸³ *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) (finding a plaintiff survived summary judgment where she alleged her discharge was due to her refusal to accede to her employer’s religious beliefs).

⁸⁴ See *supra* Section II.B.1 (discussing Title VII accommodation claim).

⁸⁵ *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168–69 (9th Cir. 2007) (citing *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1038 (10th Cir. 1993) (internal quotation marks omitted)).

⁸⁶ EEOC, *supra* note 38, § 12-I(A)(2); see also *Turic v. Holland Hospitality, Inc.*, 842 F. Supp. 971, 979–80 (W.D. Mich. 1994) (holding that plaintiff survived a motion to dismiss her claim that she was fired for considering abortion because “her views on the

These distinctions between an accommodation claim and a disparate treatment claim are potentially important ones for health care providers alleging religious discrimination, as plaintiffs proceeding under a non-adherence theory of religious discrimination, while still facing some hurdles, would not have the additional burden of proving either the religious belief or accommodation elements. The issue for a plaintiff pursuing a disparate treatment claim, however, is that by definition, an employee pursuing such a claim is asking to be treated the same as other employees. If the hospital does not permit any employees to perform abortions, provide abortion counseling, or provide abortion referrals, an employee could not argue that she was being treated differently if she was not permitted to engage in these same practices. Likewise, if an employee were able to prove that she was treated differently simply because of her commitment to providing abortion care—that she was, for example, not hired or denied a raise because of her nonconforming beliefs or because of previously provided abortion care—the remedy would be that she be hired, awarded the raise, or be made whole in some other way.⁸⁷ The remedy would not be that she be able to provide abortion care. Seeking a remedy of being able to provide abortion care in any form—even a simple request to refer a patient in an emergency for an abortion—would arguably transform the disparate treatment claim into a claim for accommodation, thus posing the (potentially surmountable) hurdle of refuting claims of employer hardship.

3. *Title VII Harassment*

Finally, and again dependent on the facts of a case, a health care professional working in a religiously affiliated hospital may be able to pursue a claim of harassment based on religion. Title VII recognizes a form of harassment known as hostile work environment harassment.⁸⁸ To succeed in a hostile work environment harassment claim, a plaintiff must establish that the harassment was religiously motivated, unwelcome, and “sufficiently severe or pervasive to alter the conditions of employment by creating an intimidating, hostile, or offensive work environment.”⁸⁹ The question of whether the harassment is “severe or pervasive” is intensely fact-specific, and courts will examine the “totality of the circumstances,” including “the frequency of the alleged discriminatory conduct, whether it was physically threatening or emotionally humiliating, as opposed to a mere offensive utterance, and

morality of abortion differed from those of the Christian staff, [and] she was treated differently than they were on the basis of religion”).

⁸⁷ See generally EEOC, *supra* note 38, § 12-II (describing claims for disparate treatment).

⁸⁸ *Id.* § 12-III(A)(2); see also David J. Stephenson, Jr., Annotation, *What Constitutes Religious Harassment in Employment in Violation of Title VII of Civil Rights Act of 1964*, 149 A.L.R. FED. 405, § 2(b) (1998) (noting that facts of an individual case could give rise to both disparate treatment and harassment claims).

⁸⁹ EEOC, *supra* note 38, § 12-III(A)(2).

whether it unreasonably interfered with the employee's work performance."⁹⁰

It is likely that a health care professional will, under the appropriate facts, be able to succeed on a harassment claim. For example, there are conceivable circumstances where an employer hospital's repeated expressions of hostility to those who provide abortion care would create a hostile work environment for a medical professional whose commitment to providing abortion care was grounded in religious or moral beliefs.⁹¹ However, as with the disparate treatment claim, the issue is once again one of remedy. An employee who is harassed at work is typically seeking an end to the harassment and, under appropriate facts, she could likely be entitled to such a remedy. However, succeeding on a harassment claim alone would not, for example, entitle the successful plaintiff to the remedy of being permitted to express support for providing abortion care in the workplace; that remedy would be one of accommodation and thus subject to the accommodation analysis (with the concomitant hurdles) discussed above.

4. *Title VII's Religious Organization Exemption*

Finally, a hurdle for a plaintiff proceeding under Title VII is Title VII's religious organization exemption (often referred to as the Section 702 exemption).⁹² This exemption permits qualifying organizations to "give employment preference to members of their own religion;"⁹³ that is, it essentially allows a qualifying religious organization to discriminate on the basis of religion in its employment decisions.⁹⁴ Specifically, Title VII provides that prohibitions on religious discrimination "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."⁹⁵

⁹⁰ Stephenson, *supra* note 88, § 2(b).

⁹¹ EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 316–19 (4th Cir. 2008) (remanding the case for trial because a reasonable factfinder could conclude that a Muslim employee was subjected to hostile work environment religious harassment when fellow employees repeatedly called him "Taliban" and "towel head," made fun of his appearance, and questioned his allegiance to the United States); Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (concluding that religious harassment can be solely verbal).

⁹² Other commentators have argued that Title VII's religious organization exemption would preclude any protection for conscience-based abortion care. See, e.g., Eisenstadt, *supra* note 4, at 140–43.

⁹³ EEOC, *supra* note 38, § 12-IC(1).

⁹⁴ Importantly, the exemption does not permit religious organizations to discriminate on other bases prohibited by Title VII, such as race or gender. See *id.* ("The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability.").

⁹⁵ 42 U.S.C. § 2000e-1(a) (2006).

The analysis of whether an organization is primarily religious in nature is extremely case-specific. Courts have developed a list of factors to consider in determining whether the exemption applies, including:

- (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.⁹⁶

The weight afforded to each factor varies depending on the parameters of each specific case.⁹⁷

Some courts have found that some religiously affiliated hospitals qualify for the Section 702 exemption. For example, in 2006 an Iowa district court found that a hospital qualified for this exemption where the hospital “was founded by sectarian entities,” was “supported and controlled by a Catholic institution,” was “permeated with religious overtones, as demonstrated by religious decoration and iconography throughout the Hospital,” provided employees with “handbooks and orientation materials . . . inform[ing] them of [the hospital’s] religious mission and religious foundation,” and engaged in “the regular practice of religious ceremonies, such as prayers and devotions broadcast on the hospital speaker system.”⁹⁸

Though some courts have found some religiously affiliated hospitals to qualify for the exemption, the religious organization exemption is not insurmountable. Given the multifaceted, fact-intensive nature of the analysis, there is a colorable argument that at least some religiously affiliated hospitals would not qualify for the exemption. Indeed, guidance issued by the U.S. Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, interprets the exemption quite narrowly,

⁹⁶ *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (citing *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618–19 (9th Cir. 1988); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980)).

⁹⁷ *LeBoon*, 503 F.3d at 226–27 (“[T]he decision whether an organization is ‘religious’ for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.”).

⁹⁸ *Saemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d 1021, 1037 (N.D. Iowa 2006) (internal citations and quotation marks omitted).

stating that the exemption “applies only to those institutions whose purpose and character are primarily religious.”⁹⁹ Likewise, at least some courts have read this exemption equally narrowly, holding that the exemption only applies to “churches, synagogues, and the like, and organizations closely affiliated with those entities.”¹⁰⁰ These courts have relied on the legislative history underlying Title VII’s religious organization exemption; one court characterized the congressional debate as follows: “Congress’s conception of the scope of [the religious organization exemption] was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.”¹⁰¹ A court applying this narrow construction to, for example, a public hospital that contracted with a religiously affiliated health system to operate the hospital but that was not closely aligned with a specific church and did not employ clergy members on its staff, would likely be reluctant to extend the exemption’s protections.¹⁰² It is also possible that in some circumstances, even courts usually willing to more broadly construe the exemption may find that under the multifactor analysis a hospital’s particular activities and affiliations place it outside of the exemption. If a court found the exemption did not apply to a religiously affiliated hospital, the traditional Title VII analyses outlined above would apply to a plaintiff’s claim.

Moreover, even a hospital qualifying for the exemption does not have free range to engage in all forms of religious discrimination. While courts and the EEOC have made clear that the exemption applies to a religious organization’s decisions regarding whether to hire or retain an employee, the exemption is only a “partial” exemption and does not provide immunity for all forms of religious discrimination.¹⁰³ EEOC Guidance makes clear, for example, that “the exemption only applies to hiring and discharge, and does not apply to terms, conditions, or privileges of employment, such as wages

⁹⁹ See EEOC, *supra* note 38, § 12-IC(1) (citing *Townley*, 859 F.2d at 618).

¹⁰⁰ *Townley*, 859 F.2d at 619 (holding that employer did not qualify for religious exemption, though employer “encloses Gospel tracts in its outgoing mail, prints Bible verses on its commercial documents (such as invoices and purchase orders), financially supports churches, missionaries, a prison ministry, and Christian radio broadcasts, and . . . conducts a weekly devotional service”); see also *LeBoon*, 503 F.3d at 239 (Rendell, J., dissenting) (arguing that religious exemption should not apply based on legislative history of exemption, as “Congress understood § 702(a) to cover only those entities that . . . are controlled by a religious sect”).

¹⁰¹ *Townley*, 859 F.2d at 618.

¹⁰² See NO STRINGS ATTACHED, *supra* note 4, at 34–35 (describing a variety of business affiliations between public hospitals and religiously affiliated organizations).

¹⁰³ EEOC, DIRECTIVES TRANSMITTAL, COMPLIANCE MANUAL, § 2(III)(B)(4)(b), available at <http://www.eeoc.gov/policy/docs/threshold.html> [hereinafter EEOC, DIRECTIVES TRANSMITTAL] (characterizing the exemption as a “partial” exemption applying to hiring and discharge); see also *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (holding that the exemption allows termination of an employee from a Catholic organization because her “conduct does not conform to Catholic mores”).

or benefits.”¹⁰⁴ Likewise, at least one court has made clear that while the religious organization exemption “may give religious institutions carte blanche in considering religion in deciding whom to employ, promote, or terminate, it does not follow that it gives them free rein to harass an individual once hired, even on religious grounds.”¹⁰⁵ Thus, while the exemption may allow qualifying hospitals to refuse to accommodate the conflicting beliefs of a physician with a conscience-based commitment to abortion care,¹⁰⁶ a hospital qualifying for the exemption will not be permitted to assert the exemption as a defense for harassing an employee for her conscience-based commitment to the provision of abortion care, nor will such an employer be permitted to deny such an employee the benefits accorded all employees.

On balance, a medical professional seeking Title VII’s protections for her conscience-based commitment to the provision of abortion care may, under the right factual circumstances, be able to prevail. The most likely sticking point is one of remedy. A health care provider with a conscientious commitment to providing abortion care could almost certainly, for example, obtain relief from on-the-job religiously based harassment or religiously based disparate treatment such as differentials in pay or provision of fringe benefits—whether or not the hospital qualified for the Section 702 exemption. If the hospital did qualify for the exemption, that same provider would likely fail on an accommodation claim. If, however, the hospital did not qualify for the exemption, making the case that a physician should be able to affirmatively provide abortion care—be it referrals, counseling, or abortion performance—in a religiously affiliated hospital would turn on whether the accommodation sought posed more than a *de minimis* burden on the hospital.

B. Church Amendment

In addition to Title VII’s prohibition against religious discrimination, which may, in some circumstances, require religiously affiliated hospitals to accommodate the religious beliefs and moral convictions of employees who provide a range of abortion care, another statute, known as the Church Amendment, provides specific employment protections for such health care professionals.¹⁰⁷ The Church Amendment, named after its author, Senator Frank Church of Idaho, prevents health care facilities from being required to

¹⁰⁴ EEOC, DIRECTIVES TRANSMITTAL, *supra* note 103, at § 2(III)(B)(4)(6).

¹⁰⁵ Kennedy v. Villa St. Catherine’s, Inc., 709 F. Supp. 2d 404, 411 (D. Md. 2010).

¹⁰⁶ EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154, 1157 (W.D. Wash. 1992) (holding that a Christian retirement home qualifying for exemption did not have to accommodate a Muslim employee’s request to wear head scarf, as “the § 702 exemption alleviates significant governmental interference with the ability of religious organizations to define and carry out their religious missions”).

¹⁰⁷ 42 U.S.C. § 300a-7 (2006).

provide abortion services¹⁰⁸ because they receive certain federal funds and prohibits these same facilities from discriminating against an individual who provides or refuses to provide abortion services.¹⁰⁹ Though the Church Amendment is typically described as a “conscience clause” for health care professionals and institutions that refuse on religious or moral grounds to provide abortion services,¹¹⁰ the provision also includes less recognized protections for health care professionals who provide abortion care.¹¹¹

This section will explore both the scope of the Church Amendment’s protections for health care professionals who provide abortion care in accordance with their religious or moral convictions¹¹² and the likely limitations

¹⁰⁸ It is important to note that the Church Amendment provides varying protections for the provision of abortion, sterilization, and “any lawful health service or research activity.” *See id.* Since the focus of this paper is on protections available for those who provide or refuse to provide abortion services, the discussion of the Church Amendment that follows will be limited to a description of the protections available to individuals and health care facilities that provide or refuse to provide abortion.

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* JODY FEDER, CONG. RESEARCH SERV., THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS 1–2 (2005), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf> (“Conscience clause laws allow medical providers to refuse to provide medical services to which they have religious or moral objections. . . . Passed in 1973, the Church Amendment was the first conscience clause enacted into law.”).

¹¹¹ The proposed Bush Rule, for example, did not mention discrimination against those who *provide* abortion services in its description of the problem the rule intended to address, but rather focused only on those who refuse to provide such care. *See* Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50,274 (proposed Aug. 26, 2008) (previously codified at 45 C.F.R. pt. 88) (describing the problem the rule sought to address as “an attitude toward the health professions that health care professionals and institutions should be required to provide or assist in the provision of medicine or procedures to which they object, or else risk being subjected to discrimination”).

¹¹² It is an open question whether a health care professional who provides abortion care must do so because of religious belief or moral conviction in order to file a discrimination claim under the Church Amendment. The text of the statute is ambiguous:

No entity . . . may . . . discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions respecting sterilization procedures or abortions.

42 U.S.C. § 300a-7(c) (2006). One reading of the provision is that the phrase “would be contrary to his religious beliefs or moral convictions” modifies both “because he performed or assisted” and “because he refused to perform or assist,” which would mean that a physician who performed abortion would have to prove that it was motivated by religious belief or moral conviction to be protected against discrimination. Alternatively, because there is a comma between the “because he performed or assisted” clause and the “because he refused to perform or assist” clause, the provision could be read to mean that “would be contrary to religious beliefs or moral convictions” modifies only “because he refused.” Under this interpretation, health care professionals who refused to provide abortion care would have to prove that their refusal was motivated by religious belief or moral conviction, while those seeking protection because they provided abortion care

of those protections. The first part explains the Church Amendment's provisions and details the entities bound by the Church Amendment. The second part discusses the actions available to an individual seeking protection under the Church Amendment. The third part explores the range of activities for which a health care professional could claim protection under the Church Amendment.

1. *Provisions of the Church Amendment*

Passed as an amendment to the Health Programs Extension Act of 1973, the Church Amendment provides varying protections to health care professionals and health care facilities that provide or refuse to provide abortion or sterilization. The Church Amendment consists primarily of two parts:¹¹³ a noncompulsion clause that prevents the receipt of certain federal funds from being used to compel health care professionals or health care institutions to provide abortions when doing so would violate the individual's or institution's religious beliefs,¹¹⁴ and a nondiscrimination provision

would not. This distinction, however, may not be of much consequence in practice. Even if the provision were to require that the provision of abortion care is motivated by religious belief or moral conviction, the terms "religious belief" and "moral conviction" have been understood broadly in other, related contexts. See 42 U.S.C. § 2000e(j) (2006) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief . . ."). As discussed above, Title VII defines "religion" broadly, and would include many, though perhaps not all, sources of motivation for a health care professional's provision of abortion care. See *supra* Section II.A.1 (defining religion in Title VII context) and notes 57–58 and accompanying text (explaining Title VII's definition of "religion").

¹¹³ The Church Amendment is often said to include three other related provisions. The first prohibits any entity that receives a federal grant or contract for biomedical or behavioral research from discriminating in employment against any health care professional

because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

42 U.S.C. § 300a-7(c)(2) (2006). The second states,

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

Id. § 300a-7(d). The third prohibits any entity that receives certain streams of federal funding from denying admission or otherwise discriminating against any applicant for training or study because of the applicant's "reluctance[] or willingness" to "in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." *Id.* § 300a-7(e). Though some of the discussion that follows may pertain to these provisions, these provisions are largely outside the scope of this paper.

¹¹⁴ *Id.* § 300a-7(b).

that prohibits discrimination against health care professionals for providing or refusing to provide abortion care or for the views they hold about abortion.¹¹⁵

The noncompulsion provision was adopted in response to a specific 1973 case in which a Montana district court issued a preliminary injunction that compelled a Catholic hospital, St. Vincent's Hospital, to perform a tubal ligation¹¹⁶ in contravention of its religiously motivated policy against doing so.¹¹⁷ The plaintiffs, Gloria and James Taylor, alleged in their complaint that the hospital's refusal to perform a tubal ligation infringed "certain rights guaranteed . . . by the United States Constitution."¹¹⁸ The district court based its injunction on a finding that the hospital acted under color of state law by virtue of its receipt of certain federal funds.¹¹⁹ In direct response to this decision, Senator Church offered an amendment to the Health Programs Extension Act of 1973 to prohibit courts from finding that the mere receipt of federal funds renders a health care facility a state actor and thus requires the facility to provide abortions.¹²⁰ The amendment also proposed to prohibit a federal agency from conditioning the receipt of federal funds on an individual or facility's willingness to provide abortion or sterilization, if doing so is contrary to the facility's religious beliefs or moral convictions.¹²¹ The text of the noncompulsion provision is as follows:

The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

¹¹⁵ *Id.* § 300a-7(c)(1).

¹¹⁶ A tubal ligation, sometimes known as getting one's "tubes tied," is a surgical method of sterilization in which a woman's fallopian tubes are permanently closed. See Nat'l Library of Med., *Tubal Ligations*, MEDLINEPLUS (Mar. 30, 2010), <http://www.nlm.nih.gov/medlineplus/ency/article/002913.htm>.

¹¹⁷ *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 949 (D. Mont. 1973).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 950.

¹²⁰ The original amendment offered by Senator Church prohibited the receipt of any federal funding from being used to require an individual or health care facility to perform an abortion. 119 CONG. REC. 9595 (1973). The parliamentarian later ruled that the provision was not germane to the underlying legislation. As a result, the provision was narrowed to prohibit the receipt of grants, contracts, loans, or loan guarantees under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act from being used to compel an individual or health care facility to perform an abortion. 119 CONG. REC. 18,069 (1973).

¹²¹ 42 U.S.C. § 300a-7(b) (2006) (internal citations omitted).

- (2) such entity to—
- (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or
 - (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.¹²²

The Church Amendment nondiscrimination provision was adopted during this debate. Senator Jacob Javits of New York introduced this second part of the Church Amendment out of concern for health care professionals who do not agree with the views of their employing health care institution. He argued, “Should we not provide that no such [religious] institution . . . may discriminate against a doctor or against health personnel who do not entertain those religious or philosophical beliefs, rather than . . . allow that view on the part of the institution itself to affect the individual liberty of the individuals who do not agree?”¹²³ As a result of Senator Javits’s and similar concerns raised during the debate in the U.S. House of Representatives, Congress adopted the following nondiscrimination provision:

- (1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after June 18, 1973, may—
 - (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
 - (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.¹²⁴

The Church Amendment nondiscrimination provision applies only to those entities that receive certain streams of federal funding—namely, fund-

¹²² *Id.*

¹²³ 119 CONG. REC. 9599 (1973).

¹²⁴ 42 U.S.C. § 300a-7(c)(1) (2006) (internal citations omitted).

ing under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act.¹²⁵ Importantly, a health care facility that does not receive these federal funds is not bound by the nondiscrimination requirements. The legislative history clarifies this point. Asked by another member what the penalty would be if a hospital discharged a physician if the discharging hospital did not receive federal funds, Senator Javits responded, “None whatever, and the law does not apply.”¹²⁶ Thus, if a health care facility does not receive federal funds under the above-named streams, the nondiscrimination provision does not apply and the health care facility is not bound by its terms. The rule promulgated by the Bush Administration estimated that 571,947 health care entities must comply with various federal conscience laws, but did not provide an estimate of the more limited number of health care entities that must comply with the Church Amendment’s nondiscrimination provision.¹²⁷

2. *Actions Available to Health Care Professionals Under the Nondiscrimination Provision*

The question of whether and how an individual can enforce his or her rights under the Church Amendment nondiscrimination provision has been the subject of some recent controversy. Based on a recent federal appellate ruling, it is unlikely that a health care professional has a private cause of action to enforce her rights—that is, it is unlikely that she can sue for a personal accommodation or other remedy in court. The Church Amendment nondiscrimination provision does not contain an explicit right of action for an individual who has been discriminated against by his or her employer.¹²⁸ Courts have considered whether there is an *implied* private right of action in the Church Amendment nondiscrimination provision; no court has found that it contains one.¹²⁹ Indeed, most recently, the Second Circuit held that, as “simply a ban on discriminatory conduct,” the Church Amendment nondiscrimination provision does not imply a private right of action.¹³⁰ Despite these court rulings, however, some commentators have argued that such a right of action should be implied.¹³¹ In addition, in response to these court

¹²⁵ *Id.*

¹²⁶ 119 CONG. REC. 9604 (1973).

¹²⁷ 73 Fed. Reg. 78,072, 78,094 (Dec. 19, 2008) (previously codified at 45 C.F.R. pt. 88).

¹²⁸ 42 U.S.C. § 300a-7(c) (2006).

¹²⁹ *See, e.g.,* Nead v. Bd. of Trustees of E. Ill. Univ., No. 05-2137, 2006 WL 1582454, at *5 (C.D. Ill. June 6, 2006) (considering a motion to dismiss claim on ground that 42 U.S.C. § 300a-7 contains no private right of action).

¹³⁰ *Cenzo-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 696–99 (2010) (holding that 42 U.S.C. § 300a-7(c) does not confer a private right of action to enforce its terms).

¹³¹ *See Eisenstadt, supra* note 4, at 162 (arguing that the Church Amendment includes a private right of action that may offer employment protection to pro-choice health care providers).

decisions, lawmakers introduced legislation in the U.S. House of Representatives to expand existing federal conscience laws including an explicit private cause of action,¹³² and a recent hearing on the legislative proposal indicated that the language was added in part in response to the Second Circuit ruling.¹³³

Even if a plaintiff is not successful in arguing that there is an implied private right of action under the Church Amendment, there is still some recourse available to a health care professional through the Office of Civil Rights. The final rule promulgated by the Obama Administration, which rescinded most of the earlier Bush Rule on federal health care conscience protection statutes,¹³⁴ retained the portion of the Bush Rule that created an enforcement mechanism to “protect the rights afforded to health care providers . . . under the Federal health care provider conscience protection statutes.”¹³⁵ The final rule designates the Office of Civil Rights at the Department of Health and Human Services (HHS) to receive and investigate complaints from individuals who have been discriminated against by their employers or otherwise had their consciences violated in contravention of the federal conscience laws.¹³⁶ Responsibility for enforcing federal conscience laws, including the Church Amendment nondiscrimination provision, lies with the components within HHS that award the respective grants or other funds that serve as the basis for a health care facility’s compliance obligation, in conjunction with the Office of Civil Rights.¹³⁷

The rule suggests that HHS may attempt to force compliance from a noncomplying institution by rescinding certain streams of federal funding.¹³⁸ Thus, a complaining health care professional who successfully alleges that the Church Amendment nondiscrimination provision has been violated could essentially force an institution to choose between amending its policy to comply with the statute and forgoing the receipt of particular federal funds.

¹³² Protect Life Act, H.R. 358, 112th Cong. § 2(g) (2011).

¹³³ *Protect Life Act: Hearing on H.R. 358 Before the H. Comm. on Energy & Commerce Subcomm. on Health*, 112th Cong. 9 (2011) (statement of Helen M. Alvare, Assoc. Professor of Law, George Mason Univ. School of Law), available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Health/020911_Health_ProLife/Alvare.pdf.

¹³⁴ See *supra* notes 11–21 and accompanying text (describing scope and status of Bush Rule and subsequent partial rescission).

¹³⁵ Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9971 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).

¹³⁶ *Id.* at 9975.

¹³⁷ *Id.* at 9972.

¹³⁸ *Id.*

3. *Abortion-Related Activities Protected Under the Church Amendment's Nondiscrimination Provision*

Though there remains an issue as to whether there is a private right of action under the Church Amendment, and thus a significant question about how such rights are to be enforced, the Church Amendment nondiscrimination provision nonetheless plainly protects health care professionals from discrimination for a range of abortion-related activities and beliefs. This section will explore the range of abortion-related activities for which health care facilities cannot, under the Church Amendment, discriminate.

The Church Amendment's nondiscrimination provision plainly protects several activities. First, the text of the statute is explicit that health care professionals who hold pro-choice views may not be discriminated against because of their views: "No entity . . . may . . . discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or . . . in the extension of staff or other privileges . . . because of his religious beliefs or moral convictions respecting . . . abortions."¹³⁹ The phrase "respecting . . . abortions" plainly captures any religious beliefs or moral convictions about abortion, whether in support of, opposed to, or indifferent to abortion. This provision likely also protects the concomitant expression of religious beliefs or moral convictions concerning abortion.

Next, providing abortion services at a previous point in one's career is also a plainly protected activity. The text of the amendment is clear: "No entity . . . may discriminate in the employment . . . of any physician . . . because he performed or assisted in the performance of a lawful . . . abortion."¹⁴⁰ A health care professional who performed abortions *at some previous point* in her career is protected against any adverse employment action taken on the basis of this prior abortion performance. If, for example, a Catholic hospital learned that a physician was previously employed at a local abortion clinic and fired her because of her previous connection to that facility, the physician would have recourse under the Church Amendment nondiscrimination provision.

Third, presently providing abortions *at another facility* is also a protected activity. The legislative history of the amendment supports this interpretation. During Senate debate, Senator Javits clarified his intent, stating,

[I]f a physician who was part of a staff of a Catholic hospital . . . who was not himself a Catholic and had no compunction about performing sterilization or abortion operations[] were to perform them in some other hospital . . . where there is no feeling against

¹³⁹ 42 U.S.C. § 300a-7(c)(1) (2006).

¹⁴⁰ *Id.*

it, then he would not be discriminated against by the Catholic hospital for having performed those operations elsewhere.¹⁴¹

Discrimination on this basis is not merely a speculative worry. As discussed above, the Ethical and Religious Directives for Catholic Health Care Services that Catholic hospitals must follow warn against “the danger of scandal in any association with abortion providers.”¹⁴² According to the Catholic Health Association (CHA), which represents Catholic health care organizations in the United States, CHA lawyers field “several inquiries each month” about whether a hospital is legally permitted either to refuse or terminate admitting privileges of a physician who is engaged in abortion activities outside the Catholic hospital’s facilities.¹⁴³ Though CHA lawyers agree that the Church Amendment prohibits Catholic hospitals from taking adverse employment actions against a health care professional because she performs abortions at another facility,¹⁴⁴ the fact that they field several inquiries a month suggests that Catholic hospitals routinely contemplate terminating health care professionals who provide off-site abortion care, and would do so but for the Church Amendment nondiscrimination provision.

While it is clear that the Church Amendment nondiscrimination provision protects activities performed off-site or at a previous point in one’s career, the question of whether it may, in some circumstances, prohibit discrimination against a health care provider who provides abortion care at a facility where she is presently employed is more complicated. Though there is some evidence that the Church Amendment nondiscrimination provision may not protect the provision of abortion care in religiously affiliated health care facilities, there is also evidence that at least some abortion care provided within religiously affiliated facilities may be protected in certain circumstances.

This possibility—that the Church Amendment nondiscrimination provision protects the activities of health care providers who provide abortion care in contravention of hospital policy—is premised on a key argument: that the language used in the nondiscrimination provision compels a parallel reading of the protections afforded to those who provide abortion care and those who refuse to provide such care. The statute prohibits a health care facility from discriminating against an employee “because he performed or assisted in the performance of a . . . lawful . . . abortion, [or] because he refused to perform or assist in the performance of such a procedure.”¹⁴⁵ The

¹⁴¹ 119 CONG. REC. 9603 (1973).

¹⁴² DIRECTIVES, *supra* note 5, at Directive 45. For a brief discussion of Catholic understandings of “scandal” in this context, see Peter Leibold & Charles S. Gilham, *When Physicians Perform Abortions Outside the Catholic Hospital*, HEALTH PROGRESS, March–April 1998, at 13–14, available at www.chausa.org/workarea/DownloadAsset.aspx?id=5342.

¹⁴³ Leibold & Gilham, *supra* note 142, at 12.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ 42 U.S.C. § 300a-7(c)(1)(2006).

statute limits neither the performance of nor the refusal to perform an abortion to a particular facility or to a previous time in one's career. Moreover, both use the same tense—"performed" and "refused to perform"—indicating that the same reading was intended to apply to both activities.¹⁴⁶

Under this theory, a parallel reading of the nondiscrimination provision would mean that either: (a) both the health care professional who provides abortion care in contravention of hospital policy and the health care professional who refuses to provide abortion care in contravention of hospital policy are protected against adverse employment action by the hospital, or (b) the protections against adverse employment action by hospitals are limited, in both instances, to health care professionals whose performance or refusal occurred in other facilities or at a previous point in one's career. Insofar as the protection against adverse employment action for health care professionals who refuse to provide abortion care is read to apply *within a facility* that otherwise requires the provision of medically necessary abortion services, this theory of parallel construction, as we will call it, would compel a reading of the nondiscrimination provision that would allow health care professionals to provide abortion care even in facilities with an objection to such services. As a result, if a health care provider who refuses to provide abortion care in contravention of her current employer hospital's policy has recourse under the Church Amendment, so too must a health care provider who provides abortion care in contravention of her current employer hospital's policy.

There may, however, be some limits to this parallel reading. As described above, the nondiscrimination provision is only one part of the Church Amendment. The other part, the noncompulsion provision, prohibits the receipt of certain federal funds from being used to compel any health care facility to make its facilities available for the provision of abortion.¹⁴⁷ The noncompulsion provision only explicitly prevents the receipt of federal funds from compelling a health care facility to make its facilities available for the performance of abortions; it does not provide parallel protections for a facility willing to provide such care. As a result of the "one-way" noncompulsion provision, a truly parallel reading of the nondiscrimination provision may not be available. Rather, the nondiscrimination provision may only protect abortion-related activities in contravention of a hospital policy to the extent that the noncompulsion provision does not foreclose such an interpretation.

¹⁴⁶ *Id.* When a statute's construction is parallel, as it is here, courts will commonly read the same or similar language in a statutory text to have the same meaning. See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); see also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). This presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); see also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329–30 (2000).

¹⁴⁷ 42 U.S.C. § 300a-7(b) (2006).

Reading the noncompulsion provision to limit the scope of the nondiscrimination provision is supported, albeit in dicta, by the only court that has considered the Church Amendment nondiscrimination provision under a claim brought by a physician seeking to provide abortion care. Though the court, in dicta, interpreted the provision to provide a substantial set of protections available to a physician under the nondiscrimination provision, it read the noncompulsion provision to limit the scope of the nondiscrimination provision, and, in so doing, limited the circumstances in which the protection afforded for the provision of abortion care reached into the religious hospital itself.

The case, *Watkins v. Mercy Medical Center*, involved a doctor seeking injunctive and monetary relief under 42 U.S.C. § 1983 on grounds that the hospital, acting under color of state law, deprived him of his constitutional right to the free exercise of religion and due process.¹⁴⁸ Dr. Watkins was denied staff privileges at Mercy Hospital Center when he refused in his employment agreement to comply with or abide by the Ethical and Religious Directives for Catholic Health Care Facilities because they prohibit staff physicians from performing abortions and other services in the hospital.¹⁴⁹ His claim for relief under § 1983 was based on the premise that the hospital acted under color of state law by virtue of its receipt of federal Hill-Burton funds.¹⁵⁰ Citing the then-recently enacted Church Amendment, which specifically prohibited any court from compelling a health facility to perform an abortion on the ground that its receipt of certain federal funds rendered the facility a state actor, the court denied that the plaintiff could use the hospital's facilities to provide abortion.¹⁵¹

In dicta, the *Watkins* court spoke of the “double-edged sword” of the Church Amendment's noncompulsion provision and its nondiscrimination provision.¹⁵² The court read the Church Amendment's prohibition against discrimination on the basis that a health care professional provides abortions together with its prohibition against compelling a facility to provide abortions in such a way as to preclude the physician from providing abortion care in the hospital:

The hospital cannot discriminate against those who believe otherwise, but it can set up reasonable safeguards to insure that others do not use their facilities for services which the hospital does not believe should be offered. . . . [Plaintiff] cannot force Mercy Medical Center to allow him to perform [abortions] in its hospital. To hold otherwise would violate the religious rights of the hospital.¹⁵³

¹⁴⁸ *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 800 (D. Idaho 1973).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 801.

¹⁵¹ *Id.* at 803.

¹⁵² *Id.* at 802.

¹⁵³ *Id.* at 803.

Though limited, the *Watkins* court's dicta provides some evidence that a health care professional seeking to provide abortion care in contravention of a hospital's religious or moral objection to the procedure may not be protected.¹⁵⁴ It also provides evidence that the noncompulsion provision limits the set of activities for which a health care provider cannot be discriminated against.

In sum, because the language is parallel, the nondiscrimination provision should be read to protect the same activities for those who refuse to provide abortions as it does for those who provide abortions. However, the scope of the nondiscrimination provision is likely limited, as recognized by the *Watkins* court and as described in the legislative history, by the noncompulsion provision. The nondiscrimination provision may only compel a health care facility to allow a health care professional to provide abortion care in its facilities to the extent that such provision is not foreclosed by the noncompulsion provision. As such, the next sections will consider the scope of the noncompulsion provision in order to identify the potential activities that fall within the nondiscrimination provision.

a. "Assisting in the Performance of an Abortion" in Contravention of a Religiously Affiliated Hospital's Policy

Even when the nondiscrimination provision is read with the noncompulsion provision, as the *Watkins* court's dicta and legislative history suggest, the nondiscrimination provision can be interpreted to protect a health care professional from discrimination if she "assists in the performance" of an abortion in violation of a religiously affiliated hospital's policy. The Church Amendment noncompulsion provision prevents a hospital only from being compelled to "make its facilities available for the performance of . . . abortion."¹⁵⁵ The nondiscrimination provision provides broader protections; it prohibits health care professionals from being discriminated against because they "performed or assisted in the performance" of an abortion or because they refused to "perform or assist in the performance" of an abortion.¹⁵⁶ Since there is nothing in the Church Amendment that prevents a facility from being compelled to "assist in the performance" of an abortion, the nondiscrimination provision must be read to provide employment protections for a health care professional who "assists in the performance" of an

¹⁵⁴ The legislative history also supports the reading that the nondiscrimination provision does not allow a health care provider to perform abortions in violation of a religiously affiliated hospital policy. In a colloquy on the Senate floor, Senator Javits sought to clarify the scope of the protection afforded. In reference to a discussion about a religiously affiliated hospital that objected to abortion, Senator Javits stated: "I wish to make it clear that that particular amendment simply will protect anybody who works for that hospital against being fired or losing his hospital privileges if he does not agree with the policy of the hospital and goes elsewhere and does what he wishes to do, but he cannot do it in that hospital There, the hospital controls." 119 CONG. REC. 9,603 (1973).

¹⁵⁵ 42 U.S.C. § 300a-7(b)(2)(A) (2006).

¹⁵⁶ *Id.* § 300a-7(c)(1).

abortion, even when she does so in violation of her religiously affiliated hospital's policy.¹⁵⁷

The scope of protection afforded to a health care professional who provides abortion care under the nondiscrimination provision depends, therefore, on the scope of the term "assist in the performance." Though the statute does not define "assist in the performance," the Bush Rule defined it broadly, as "any activity with a reasonable connection" to the procedure, including "counseling," "referral," and a range of other activities.¹⁵⁸ Many argued that this interpretation of the statute was specious, because it encompassed individuals with only a tenuous connection to the performance of the procedure itself.¹⁵⁹ In response to these concerns, the Obama Administration rescinded the Bush administration's definition of "assist in the performance," thereby restoring an interpretation that complies with the plain meaning of the phrase.

The nondiscrimination provision's parallel structure suggests that "assist in the performance of abortion" must have the same meaning both for those who provide and those who refuse to provide abortion care. Had the Bush Rule remained in effect, with its broad definition of "assist in the performance" that included referral, counseling, and the provision of information about abortion, the nondiscrimination provision would likewise have prohibited discrimination against those who provide this broad range of abortion care. With the definition of "assist in the performance" properly narrowed, however, the nondiscrimination provision may only protect a health care provider working in a religiously affiliated hospital in a limited set of circumstances. For example, if a doctor performed an abortion in a medical emergency in violation of a religiously affiliated hospital's policy, and a nurse assisted during the procedure, the nondiscrimination provision, properly read, would prevent the hospital from firing or taking other adverse employment actions against the assistant nurse. Thus, while now more circumscribed, the nondiscrimination provision can still be read to protect health care providers who, in accordance with their consciences, take steps

¹⁵⁷ Though outside the scope of this Article, it should be noted that, following the same analysis, the Church Amendment's nondiscrimination provision may allow a religiously or morally motivated health care professional to provide abortions at a facility that has a secular policy against doing so. The Church Amendment's noncompulsion provision provides protections for facilities only in circumstances where the performance of the procedure is prohibited by the hospital on the basis of religious belief or moral conviction. 42 U.S.C. § 300a-7(b) (2006). Since the noncompulsion provision applies only to religiously motivated refusals to provide abortion services, a health care professional may have recourse under the Church Amendment nondiscrimination provision if she performs an abortion in violation of a secular hospital's policy. This could include a desire to avoid unwanted harassment, for example, or because of financial burdens or other costs.

¹⁵⁸ 73 Fed. Reg. 78,072, 78,097 (Dec. 19, 2008) (previously codified at 45 C.F.R. § 88.2) (recognizing that some of the comments on the rule considered the Bush Rule's definition too broad because it included these kinds of activities).

¹⁵⁹ *Id.* at 78,075 ("Many comments suggested that the proposed definition of 'assist in the performance' was too broad.")

to provide abortion care—specifically, who assist in the performance of an abortion—even when within a religiously affiliated hospital.

b. Providing an Abortion in a Medical Emergency

The nondiscrimination provision, even when read in conjunction with the noncompulsion provision, may also prohibit an employer from taking adverse employment action against a health care provider who performs an abortion in a medical emergency. The noncompulsion provision prevents a religiously affiliated hospital from being compelled to “make its facilities available for the performance” of abortion.¹⁶⁰ Similarly, the *Watkins* court interpreted the Church Amendment, in dicta, to prohibit a health care provider from requiring a hospital to allow her to perform abortions in the hospital.¹⁶¹ The language used in both instances suggests that the hospital cannot be compelled to accommodate a health care provider who seeks to perform abortions by granting her affirmative approval, in advance, to perform abortions. What is unclear is whether, if a health care provider did, in an unusual circumstance like a medical emergency, perform an abortion in accordance with her conscience, the nondiscrimination provision could protect her from being fired or otherwise facing an adverse employment action for her failure to comply with the religiously affiliated hospital policy. In a circumstance described in Part I, for example, where a “woman was dying before [their] eyes,” and a physician terminated the pregnancy in violation of hospital policy, it is possible that the nondiscrimination provision could prevent the hospital from firing the physician. In such a circumstance, the hospital is not being compelled to make its facilities available for abortion; rather, it is simply being prevented from firing an employee if the employee, in accordance with her conscience, performs the emergency procedure in contravention of hospital policy. While perhaps a fine distinction, such a reading is at least a possible interpretation of the Church Amendment that could provide even broader protections for a health care provider who seeks to provide abortion care in accordance with her conscience.

In sum, the Church Amendment likely provides recourse to a health care professional who is discriminated against because she provides abortion care at another facility or at a previous time in her career. In some circumstances, it may also provide recourse to a health care professional who is discriminated against because she “assists in the performance” of an abortion in violation of a religiously affiliated hospital policy. It is also possible that a health care provider could not face adverse employment action if, in some unforeseen circumstance such as a medical emergency, the provider performs an abortion in violation of hospital policy. However, because few courts have considered the merits of a claim under the Church Amendment,

¹⁶⁰ 42 U.S.C. § 300a-7(b) (2006).

¹⁶¹ *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Idaho 1973).

it remains unclear to what extent these protections are enforceable or what remedies are available to a health care professional whose rights have been violated.

CONCLUSION

As the above discussion illustrates, there are legal protections available for health care professionals who provide abortion care as a matter of religious belief or moral conviction. Both the Church Amendment and Title VII of the Civil Rights Act of 1964 provide some legal recourse to health care providers who are subject to employment discrimination from their religiously affiliated hospitals as a result of their religious beliefs or moral convictions concerning abortion. In addition, both statutes provide some legal recourse to health care professionals employed by religiously affiliated hospitals who are discriminated against because they provide abortion care and in some cases may require a hospital to accommodate the religious beliefs or moral convictions of health care professionals by allowing them to refer for or provide abortions. In practice, however, some of these protections may be limited, and health care professionals continue to face serious practical and legal obstacles to providing abortion care free from incursion.

To begin to address this problem, courts and policymakers should recognize the religious rights at stake when a physician who is motivated by a religious or moral commitment to providing abortion care is prohibited by her employer from providing such care. As we have argued, this prohibition is a violation of an employee's conscience at least commensurate with the harm experienced when a religious physician is compelled to provide abortion care in a hospital that requires her to do so. To address this important concern, we recommend that courts and policymakers, in creating, interpreting, and implementing conscience protections, seek to provide at least parity between the legal protections available to health care professionals who provide abortion care as a matter of conscience and health care professionals who refuse to do so.

Recently, some policymakers have raised the importance of providing parallel protections for those who seek, as a matter of conscience, to provide abortion care. The House of Representatives is currently considering legislation that would codify and expand the rights of health care entities to refuse to provide abortion care.¹⁶² During debate over these legislative proposals, Members of Congress offered amendments that would provide parity between the protections afforded to those who refuse to provide abortion care and those who provide such care.¹⁶³ Though the amendments were

¹⁶² No Taxpayer Funding for Abortions Act, H.R. 3, 112th Cong. (2011); Protect Life Act, H.R. 358, 112th Cong. (2011).

¹⁶³ Amendment to the Amendment in the Nature of a Substitute to H.R. 3 offered by Rep. Nadler, *available at* [http://judiciary.house.gov/hearings/pdf/Roll%20Call%20Vote%](http://judiciary.house.gov/hearings/pdf/Roll%20Call%20Vote%20)

defeated, several Members of Congress articulated a compelling case for the conscience rights at stake when a health care provider is prohibited by her employer from providing needed or even emergency care to her patients.¹⁶⁴

Providing parity between the protections afforded to those who provide abortion care and those who refuse appropriately recognizes that a physician's conscientious commitment to the provision of abortion care can be held with the same strength of a physician's objection to such care. Providing parity also ensures that the religious beliefs of those who refuse to provide abortion care are not privileged over the religious beliefs of those who feel compelled to provide such care. Finally, parity helps to ensure that religiously affiliated hospitals do not force health care providers to make the difficult choice between retaining their jobs and acting in accordance with their consciences.

207Nadler%20Amdt%206%20TEXT.pdf; Amendment to the Amendment in the Nature of a Substitute to H.R. 358 offered by Rep. Engel, *available at* <http://republicans.energycommerce.house.gov/Media/file/Markups/Health/021111/engel.pdf>.

¹⁶⁴ See *No Taxpayer Funding for Abortions Act: Markup of H.R. 3 Before the H. Comm. on the Judiciary*, 112th Cong. (Mar. 3, 2011), *available at* <http://judiciary.house.gov/hearings/pdf/3%203%2011%20HR%203%20Full%20Comm%20Markup.pdf>.