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INDEPENDENT REGULATORY
REVIEW COMMISSION

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Independent Regulatory Review Commission
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333 Market Street
Harrisburg, Pennsylvania 17101

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**Re: Objections to Proposed Amendments to Department of Health
Regulation Relating to Sexual Assault Victim Emergency Services**

Dear Sir/Madam:

I am the Pennsylvania litigation counsel for the American Catholic Lawyers Association (ACLA), a not for profit religious organization whose activities pertaining to the Catholic faith include the representation of Catholics across the land in a variety of matters, including civil rights and religious liberty litigation.

I am writing to voice legal objections to the possible promulgation of Department of Health ("DOH") regulation relating to sexual assault victim emergency services and amending 28 Pa. Code Chapter 117. I write not in the capacity of a lobbyist, but rather as a constitutional law and civil rights litigator who sees in this proposed regulation potential constitutional and civil rights violations that would have to be addressed by litigation to challenge the regulation.

At the outset, it must be known that I am deeply sympathetic with any victim of a sexual assault. Indeed, my objections, in addition to being legally valid, demonstrate my genuine concern for such victims, as the proposed regulation may mislead a woman into aborting an unborn child without appreciating that fact or the full consequences of doing so.

A. The regulation would require Catholics and Catholic hospitals to act contrary to their religion.

The purpose of the amendment to the regulations is to ensure that Pennsylvania hospitals administer in "emergencies" a drug or device which not only acts as a contraceptive to prevent pregnancy, but also acts as an abortifacient by preventing the implantation of fertilized ovum within the victim's uterus.

According to the teaching of the Catholic Church, to which Catholics and Catholic hospitals are bound to adhere, the prevention of the implantation in the uterus of a fertilized ovum is an abortion. As discussed below, current Pennsylvania legislation also recognizes this.

Although the proposed regulation at §117.57 and the statute on which it purports to be based, 35 P.S. § 448.101, *et seq.*, provide an exemption for hospitals whose stated religious and moral beliefs proscribe the administration of emergency contraception because, among other things, such administration could cause an abortion.

However, §117.57 runs afoul of the religious and moral beliefs of Catholics and Catholic hospitals. Specifically, that section compels hospitals whose religious and moral beliefs entitle them to an exception to aid and abet the provision of abortions through the use of emergency contraception by providing transportation of a sexual assault victim to the closest hospital where the victim could obtain emergency

contraception. See proposed § 117.57 (5) and (6). This provision would violate Catholic teaching against any form of material cooperation in an abortion.

In essence, the Department of Health, which is sponsoring the proposed regulation, is declaring that while it acknowledges the religious and moral beliefs of Catholics and Catholic hospitals, the Department has the right to define and circumscribe the practice of those beliefs *and even to mandate conduct plainly contrary to those beliefs*. It would be difficult to imagine a more flagrant violation of the Free Exercise Clause of the First Amendment by state action than this provision. See-discussion below.

The provision is not only a presumptuous and arrogant exercise of state power, it also illogical. By analogy to criminal law, if it were still a crime in Pennsylvania to provide abortions, Catholics and Catholic hospitals could be found guilty of aiding and abetting the commission of the crime ^{1/} by providing transportation to a facility for the obtainment of an abortion.

B. The proposed regulation is totally unnecessary.

It appears that introduction of the emergency contraceptive Plan B is what has motivated the Department of Health to propose regulations infringing on the fundamental religious and moral beliefs of Catholics and Catholic hospitals. But as a practical matter there is no need to do so, for a number of reasons.

First, Plan B has received an enormous amount of publicity and is now available over the counter, i.e., without a prescription. Presumably, therefore, most women of child bearing age are aware of Plan B, its uses, and its ready availability.

^{1/} Pennsylvania now allows abortions under certain circumstances and outlaws others. 18 P.S. § 3201 et seq.

Second, if law enforcement and ambulance and emergency care and transport agencies who are notified that a given hospital does not provide emergency contraception, mistakenly bring a sexual assault victim to that hospital, they can simply transport the victim to a facility providing such services without any involvement by the exempt hospital.

Third, the victim, unless physically disabled because of the sexual assault or otherwise, could transport herself, or her loved ones could transport her, to a facility providing such services.

Thus, the proposed regulations have every appearance of the Department of Health attempting to "make a point" of using its power gratuitously to force Catholics and Catholic hospitals to participate in what Pope John Paul II rightly called "the culture of death."

C. The proposed regulation violates existing Pennsylvania statutes, including the very statute it purports to "implement."

Emergency contraception as required by the regulation involves, among other things, the administration of a drug or device after intercourse even if such drug or device would prevent the implantation of a fertilized ovum in the uterus. See §§ 101.4, 117.52 and 117.53 of the proposed regulations.

As already noted, preventing the implantation of a fertilized ovum constitutes an abortion pursuant to Catholic religious and moral beliefs.

Requiring Catholic hospitals to participate in such an act is prohibited by the Health Care Facilities Act, 35 P.S. § 448.101 et seq.. Section 448.902 of the Act, which the proposed regulation purports to "implement," specifically provides:

(a) No health care provider shall be required by any provisions of this act or rules and regulations promulgated thereunder, to provide facilities or *render services* contrary to the stated religious or moral beliefs of the provider, nor shall any applicant be denied a certificate of need or the right to apply for or receive public funds on the grounds he will not provide the facilities or render the services for such reasons.

Providing transportation for the purpose of obtaining emergency contraception which would or could cause an abortion is a "service" within the meaning of § 448.902. Therefore, the proposed regulation is inconsistent with the Act it purports to "implement." It is black letter law that a regulation promulgated to implement a statute cannot be inconsistent with that statute.

Moreover, the proposed regulation is also inconsistent with the Pennsylvania Abortion Control Act (PACA), 18 P.S. § 3201 et seq. Section 3203 of PACA provides that:

(d) Right of conscience.—It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

Section 3213 of PACA provides:

(d) Participation in abortion.- Except for a facility devoted exclusively to the performance of abortions, no medical personnel or medical facility, nor any employee, agent or

student thereof, shall be required against his or its conscience to *aid, abet or facilitate performance of an abortion or dispensing of an abortifacient* and failure or refusal to do so shall not be a basis for any civil, criminal, administrative or disciplinary action, penalty or proceedings, nor may it be the basis for refusing to hire or admit anyone.

Plan B is clearly an abortifacient in that it would prevent a fertilized ovum from being attached in the uterus. Thus, no Catholic hospital or its employees can be compelled by the proposed regulation to "aid, abet or facilitate performance of an abortion or dispensing of an abortifacient" by assisting sexual assault victims in obtaining an abortion through the administration of Plan B at another facility.

D. The proposed regulation violates the First Amendment and Pennsylvania Constitution, Art. I, §§ 3 and 7.

Even if the proposed regulation were not in conflict with pre-existing statutes, to require a Catholic hospital to "provide oral and written notice" to a victim of the hospital's obligation to arrange for transportation of the victim would violate the First Amendment, which protects the right of the hospital and its staff to remain silent and not be forced to speak contrary to its beliefs.

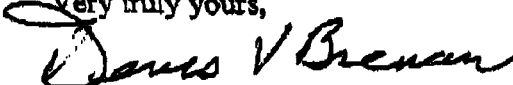
Furthermore, the forced participation by Catholic hospitals and their employees to assist sexual assault victims in preventing the implantation of a fertilized ovum would violate the Free Exercise Clause of the First Amendment because such conduct is forbidden by their religion.

The Pennsylvania Constitution has similar, but even broader, protections with regard to freedom of speech and religion. Pennsylvania Constitution, Art. I, §§ 3 and 7.

E. Conclusion: the proposed regulation will lead to litigation.

For the reasons stated, promulgation of the proposed regulation will surely lead to expensive and extensive litigation, including a request for injunctive relief. That litigation would be unnecessary if the offending, and in my judgment illegal, requirements were deleted from the proposed regulation.

Thank you for your consideration of these objections.

Very truly yours,

Denis V. Brennan

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