HEALTHCARE PROFESSIONALS

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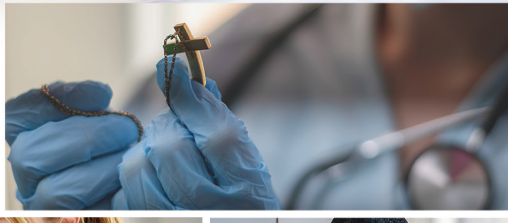
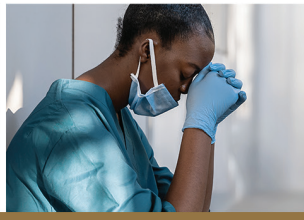
RELIGIOUS LIBERTY PROTECTION KIT

Guard Your Healthcare from Legal Attack





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DEAR FRIEND OF RELIGIOUS FREEDOM,

Thank you for your desire to protect **healthcare professionals** against increasingly hostile legal threats to their freedom to believe and to act upon your beliefs. I hope you find this **Religious Liberty Protection Kit** a simple but high-quality tool for helping you guard the most precious freedom you or anyone in our society has: religious liberty, our first liberty in the Bill of Rights.

Please let us know any further way we can help you.

Kelly Shackelford, Esq.
President, CEO & Chief Counsel

FIRST LIBERTY INSTITUTE® RELIGIOUS LIBERTY PROTECTION KIT FOR HEALTHCARE PROFESSIONALS

First Liberty Institute's Religious Liberty Protection Kit for Healthcare Professionals provides general guidance to assist you in responding to current legal threats to your rights of conscience and religious liberty. This document does not create an attorney-client relationship, and it is not a substitute for legal advice from a licensed attorney. Because the law is constantly changing and each legal and factual situation is unique, First Liberty Institute and its attorneys do not warrant, either expressly or impliedly, that the law, cases, statutes, and rules discussed or cited in this guide are applicable or have not been changed, amended, reversed, or revised. If you have a legal question or need legal advice, please contact an attorney. First Liberty Institute's attorneys may be contacted by requesting legal assistance at www.FirstLiberty.org.

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INTRODUCTION

The healthcare industry in the United States employs 11% of the workforce, and many of those healthcare professionals chose to enter healthcare because they felt God calling them to care for the sick and to help the underserved. Unfortunately, the same religious convictions that led many healthcare professionals to serve are frequently challenged in the healthcare field. Employers, supervisors, and even government officials often demand that doctors, nurses, pharmacists, and other healthcare professionals choose between their calling to serve and obedience to God in refusing to participate in certain procedures, such as abortions, that they believe are wrong. What can a nurse do when ordered to assist in an abortion? What about a pharmacist who is presented with a scrip for a drug that the pharmacist cannot fill in good conscience?

First Liberty Institute's attorneys have advised many healthcare professionals about these questions and have worked to ensure that those in power protect the rights of conscience and religious liberty of healthcare professionals. First Liberty Institute is a nationwide, nonprofit law firm dedicated to protecting religious liberty for all Americans, at no cost to our clients. Our President and CEO, Kelly Shackelford, has over 30 years of experience defending the constitutional rights of organizations like yours.

This Religious Liberty Protection Kit for Healthcare Professionals summarizes the recommendations that we have developed over the years. In it, you will find guidance on your rights as a religious healthcare professional to maintain your religious convictions. While this protection kit focuses on the specific questions that our attorneys receive most often, much of its guidance is applicable to a wide range of religious beliefs. Our mission is to protect religious liberty for all Americans, and many of the legal principles given in this guide apply to religious communities of all faiths.

Thank you for the important work that you do in serving America's communities in the healthcare field, and thank you for standing up for your and all Americans' religious liberty rights—our First Amendment's First Liberty.

For our other protection kits visit:
FirstLiberty.org/kits

Overview

Overview

As a healthcare professional, you have many roles that can implicate your religious liberty rights. You may be both an employee and an employer. You are licensed by one or more government entities. You may be subject to standards imposed by private or public universities, hospitals, governments, and professional associations. And any of these employers, supervisors, government officials, other healthcare professionals, or even patients may demand at some point that you take an action you believe would violate your deepest religious convictions. In a recent poll by the Christian Medical Association, 59% of "faith-based health professionals" surveyed reported having been discriminated against and/or knowing of someone who has been discriminated against because of their religious or moral beliefs. [2]

While this complex web of professional relationships may be unnerving when it seems focused on pulling you in a direction that you will not—indeed, cannot—go, there is good news. Many legal protections ensure that healthcare professionals do not have to choose between their service in the healthcare field and their religious convictions. These protections, such as the First Amendment's religion clauses, state and federal religious freedom restoration acts, and protections against religious employment discrimination, apply not only to healthcare professionals but to Americans generally. While this Religious Liberty Protection Kit for Healthcare Professionals will touch on these general protections, you should read the Religious Liberty Protection Kit for Religious Employees to learn more about these general protections.

Instead, this Religious Liberty Protection Kit for Healthcare Professionals will focus on conscience protections in American law designed to address the unique religious liberty issues facing healthcare professionals today. These laws, such as the Church Amendments, the Weldon Amendment, and the Coats-Snowe Amendment provide targeted protections in areas of particular concern to religious healthcare professionals, such as abortions, euthanasia, sterilizations, and medical research. Furthermore, many of these healthcare protections apply to anyone who receives various Federal funding, which can

encompass a great many healthcare organizations, while many of the general protections mentioned above apply only to governmental and not private entities.

What is a Conscience Clause?

Generally, a "conscience clause" is a "legislative provision that allows a person to claim an exemption from compliance, usually on religious-freedom grounds." [3] In the healthcare context, a conscience clause is typically a protective law through which healthcare professionals and organizations may refuse to participate in objected-to services or procedures, such as abortions or sterilizations. Many of the federal healthcare conscience clauses were enacted shortly after *Roe v. Wade* [4] and *Doe v. Bolton* [5] legalized abortion. These protections were designed to prevent healthcare professionals from being coerced to participate in abortions and in recognition of the Supreme Court's favorably citing an American Medical Association resolution on abortion stating "[t]hat no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles." [6] Likewise, in *Doe*, the Supreme Court approved of a Georgia law protecting healthcare professionals from participating in abortions "for moral or religious reasons." [7] Since the 1970's, however, as the healthcare field has attempted to normalize ever more procedures and services to which many persons of faith object, the federal government has expanded healthcare conscience protection laws to encompass many additional procedures and services.

Citations:

2. Christian Medical Association / Freedom2Care, "Question Detail: 2019 national survey of faith-based health professionals," *available at* https://www.freedom2care.org/polling (2019).

3. *Conscience Clause*, BLACK'S LAW DICTIONARY (9th ed. 2009).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

5. *Doe v. Bolton*, 410 U.S. 179 (1973).

6. *Roe*, 410 U.S. at 143–44.

7. *Doe*, 410 U.S. at 197–98.

General Protections for Religious Beliefs

States and the federal government each provide some general protections for religious beliefs that may apply to healthcare professionals in some circumstances. While this section will describe these protections generally, you can learn more about them in First Liberty Institute's *Religious Liberty Protection Kit for Religious Employees*.

The most general of these protections is Title VII of the Civil Rights Act. [8] Title VII protects almost all healthcare professionals from employment discrimination because of any religious belief, but it only does so under current legal precedent if accommodating that religious belief imposes almost no burden on the employer. As a result, it is rare for employees to prevail in defending their rights of conscience under Title VII as employers can often point to some burden or added expense in accommodating a healthcare professional's religious convictions.

The other general protections for religious liberty that apply to many healthcare professionals are the protections found in state and federal constitutions and religious freedom restoration acts. These protections, such as the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act, [9] can provide strong protections for healthcare professionals—indeed, for any persons or organizations—who want to stand up for their religious beliefs. The downside to the protections provided by state and federal constitutions and religious freedom restoration acts is that the vast majority of these protections only apply if the burden on religious freedom comes from a governmental entity, such as a government-run hospital or clinic, a public school district, or a federal or state agency. While many healthcare professionals work for governmental employers, those who do not are unlikely to be covered by these laws and constitutional provisions.

Each of these general protections for religious liberty rights are governed by a wide range of court decisions, and whether any particular religious liberty protection will apply to a given situation is a complex and fact-specific question that may even change from state to state. If you are being pressured to act in a way that violates your religious convictions, reach out to First Liberty's attorneys by using the "Get Legal Help"

function of our website at www.FirstLiberty.org, and our team of attorneys can review the unique facts of your situation and determine if some of these general protections will apply to you.

Citations:

8. 42 U.S.C. § 2000e *et seq.*
9. 42 U.S.C. § 2000bb *et seq*.

Rights of Conscience in Healthcare Generally

In addition to the general religious liberty protections mentioned above, there are some healthcare conscience protections that protect any religious objection in the healthcare field regardless of the specific nature of the objection. That is, the religious objection does not have to be about abortion, sterilization, or euthanasia, for example, in order to receive protection under these statutes. As such, these protections are applicable to all of the more specific topics discussed throughout this *Religious Liberty Protection Kit for Healthcare Professionals*, as well as to unique situations that do not have a specific conscience protection law.

The Church Amendments

The Church Amendments [10] comprise a series of five federal healthcare conscience protections that cover a range of religious and moral issues within the healthcare field, including some provisions that apply regardless of the particular issue. An important distinction from most of the general religious liberty protections that exist in law is that the Church Amendments, like many federal healthcare conscience protections, can only be enforced by the federal government; they have no "private right of action." [11] That is, healthcare professionals or organizations that suffer discrimination because of their religious beliefs and by an entity that receives the relevant federal funding subject to the Church Amendments cannot file a lawsuit under these protections to enforce their rights. Instead, they must submit a complaint to the federal government, usually to the U.S. Department of Health and Human Services' Office for Civil Rights, which may or may not act upon the complaint.

The third provision [12] of the Church Amendments prohibits any entity that receives "a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services" from discriminating against a healthcare professional in employment or in the extension of staff or other privileges because that healthcare professional "performed or assisted in the performance of any lawful health service or research activity," "refused to perform or assist in the performance of any such service or activity" because of the healthcare professional's religious beliefs or moral convictions, or otherwise held "religious beliefs or moral convictions respecting any such service or activity."

This third provision of the Church Amendments is very narrow in that it only applies to entities that receive particular grants or contracts (specifically, those administered by the Secretary of Health and Human Services) for biomedical or behavioral research. This third provision of the Church Amendments, then, is most likely to be applicable to research institutions and universities. Unlike many of the general protections for religious liberty, however, this can include private organizations and not just governmental entities. This third provision is also, however, very broad in that it applies to "any lawful health service or research activity." That is, regardless of what the lawful health service may be, if a healthcare professional at a relevant institution holds a religious objection to such a health service, that professional is protected. Note, too, that the lawful health service or research activity does not have to actually be related to the biomedical or behavioral research grant or contract.

Unfortunately, the third provision of the Church Amendments can also threaten rights of conscience for some organizations who are morally opposed to some lawful health services or research activities. Unlike most other federal conscience protections for healthcare professionals, this provision of the Church Amendments protects not only the refusal to participate in a lawful health service or research activity but also the participation itself. In other words, under this provision, a hospital that objects to some lawful activity, such as abortion, sterilization, or gender reassignment surgery, cannot discriminate against a healthcare professional because that person performs or supports those lawful health services. This provision, then, is of concern to religious healthcare organizations who cannot support the full range of lawful health services or research activities. Because the Church

Amendments can only be enforced by the federal government, however, any such religious healthcare organization will always have the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act as defenses against being compelled to hire, promote, or retain healthcare professionals who do not conform to the religious tenets of the organization.

The fourth provision [13] of the Church Amendments 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.

Again, this provision of the Church Amendments is both very narrow and very broad. It is narrow in that it only applies in the context of participation in a health service program or research activity funded under a program administered by the Secretary of Health and Human Services, [14] but it is very broad in that it protects any religious objection within the scope of that program or activity. Nevertheless, there are many health service programs or research activities that meet the requirements of this conscience protection, and this provision provides important protections for rights of conscience generally in those situations.

Citations:

10. 42 U.S.C. § 300a-7.

11. This may not be true for the fourth provision of the Church Amendments, which is phrased like other laws that have been held to provide a private right of action.

12. 42 U.S.C. § 300a-7(c)(2). The first, second, and fifth provisions of the Church Amendments are specific to abortions and sterilizations and are, therefore, discussed in those sections of this *Religious Liberty Protection Kit for Healthcare Professionals.*

13. 42 U.S.C. § 300a-7(d).

14. A program may be "administered" by the Secretary of Health and Human Services even if the funds for that program do not come from the Department of Health and Human Services. Often, determining whether an organization is receiving the relevant federal funding to apply federal healthcare conscience protection statutes is the most complicated part in upholding a healthcare professional's religious beliefs.

Abortion

Abortion

Healthcare professionals have no greater protections for their rights of conscience than when it comes to being forced to participate in or refer for an abortion. Since *Roe v. Wade* was decided, state and federal lawmakers have enacted numerous laws designed to ensure that no healthcare professional is ever made to choose between their service in the healthcare field and their deepest religious convictions against abortion. [15] Some of these laws also extend to patients, so that doctors or judges, for example, cannot force a person to receive an abortion against that person's will.

The Weldon Amendment

The Weldon Amendment [16] is a federal law that has been enacted each year since 2004 as an amendment to the appropriations act for the Departments of Labor, Health and Human Services, and Education. The Weldon Amendment prohibits any federal agency or program or any state or local government that receives funds under that appropriations act from discriminating against any healthcare institution or professional because that healthcare professional or institution does not "provide, pay for, provide coverage of, or refer for abortions."

Like the general constitutional protections for religion and many of the religious freedom restoration acts, the Weldon Amendment only applies to certain governmental actors, but unlike those general protections, the Weldon Amendment provides an absolute bar to any discrimination because a healthcare professional or institution does not "provide, pay for, provide coverage of, or refer for abortions," regardless of the reasons for the refusal to do so or any other considerations.

Unfortunately, as with the Church Amendments, the Weldon Amendment has no private right of action. That is, if a healthcare professional or organization has suffered discrimination because of their refusal to provide, pay for, provide coverage of, or refer for abortions, they cannot file a lawsuit under the Weldon Amendment to enforce their rights. Instead, they must submit a complaint to the federal government.

The Church Amendments

As mentioned above, the Church Amendments [17] comprise a series of five federal healthcare conscience protections that cover a range of moral issues within the healthcare field. One of the primary specific topics covered by the Church Amendments is abortion (the other is sterilizations, discussed in its own section below).

The first provision [18] of the Church Amendments ensures that healthcare professionals who receive certain federal funding [19] cannot be forced by their receipt of that funding to perform or assist in the performance of an abortion if doing so would violate their religious beliefs or moral convictions. This provision also provides that any healthcare organizations that receive such federal funding cannot thereby be compelled to permit abortions in their facilities or to supply personnel to perform or assist in the performance of an abortion if doing so would be against their religious beliefs or moral convictions. Note that this first Church Amendment provision does not provide the same sort of absolute protection that the Weldon Amendment provides against discrimination on the basis of refusal to participate in abortions; rather, this first Church Amendment provision only protects against coercion to participate in abortions on the basis of receipt of certain federal funding. As such, the first provision of the Church Amendments is rarely relevant.

The second provision [20] of the Church Amendments, however, is a very important provision for protecting the conscience rights of healthcare professionals who work for private employers. This second provision prohibits any entity, including private entities, who receive certain federal funding [21] from discriminating against a healthcare professional in employment decisions or in the extension of staff or other privileges because that healthcare professional performed or assisted in, or refused to perform or assist in, an abortion because of the healthcare professional's religious beliefs or moral convictions or because of that healthcare professional's religious beliefs or moral convictions regarding abortion generally.

Because this second provision of the Church Amendments applies to any entity that receives certain federal funding, it can apply to private organizations that often cannot be reached by the Weldon Amendment or by many of the general religious liberty protections that only apply to governmental entities. In prohibiting even some private employers from discriminating against their employees because of the employees' refusal to participate in abortions, then, the second provision of the Church Amendments is vital in safeguarding healthcare professionals' religious convictions with respect to abortion.

Unfortunately, the second provision of the Church Amendments can also threaten rights of conscience for some organizations who are morally opposed to abortion. Unlike other federal conscience protections for healthcare professionals, this provision of the Church Amendments protects not only the refusal to participate in an abortion but also the participation itself. In other words, under this provision, a hospital that objects to abortions cannot discriminate against a healthcare professional because that person performs or supports abortions (this situation is sometimes referred to as "reverse Church discrimination"). This provision, then, is of concern to religious healthcare organizations who cannot support abortion. Because the Church Amendments can only be enforced by the federal government, however, any such religious healthcare organization will always have the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act as defenses against being compelled to hire healthcare professionals who do not conform to the religious tenets of the organization.

The third provision [22] of the Church Amendments is discussed in the section titles "Rights of Conscience for Healthcare Generally" in this Religious Liberty Protection Kit for Healthcare Professionals because it is not explicitly a conscience protection for abortion; but, for purposes of its impact on rights of conscience with respect to abortion, see footnote 21.

Likewise, the fourth provision [23] of the Church Amendments is discussed under the section titled "Rights of Conscience for Healthcare Generally" as it is not specific to abortion.

The fifth and final provision [24] of the Church Amendments prohibits any entity that receives certain federal funding

[25] from denying admission to or discriminating against any applicant for training or study (including residencies or internships) because of the applicant's "reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions . . . contrary to or consistent with the applicant's religious beliefs or moral convictions." This provision protects persons seeking to become healthcare professionals from being discriminated against because of their religious or moral convictions regarding abortions. As with the second and third provisions of the Church Amendments, however, this provision also protects persons who support abortion and, therefore, may itself challenge the religious exercise of some religious schools and healthcare organizations. Again, though, such organizations should be able to rely upon the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act in such a situation.

The Coats-Snowe Amendment

The Coats-Snowe Amendment, [26] enacted in 1996, prohibits the federal government and any state or local government that receives federal financial assistance from discriminating against physicians, physician training programs, and students who refuse to perform, refer for, train or be trained in the performance of abortions. It also prohibits those same governments from discriminating against healthcare professionals because they attend or attended a healthcare training program that does not require, provide, or refer for training in the performance of abortions. Examples of prohibited discrimination include denial of licensure, financial assistance, or other services or benefits. Governments subject to the Coats-Snowe Amendment must also treat healthcare training programs as accredited if the only reason a third-party accreditation agency refuses to accredit the program is because of its refusal to require, provide, or refer for training in the performance of abortions.

As with the Church Amendments and the Weldon Amendment, the Coats-Snowe Amendment does not provide a private right of action, and any violations of the Coats-Snowe Amendment must be reported to the federal government, such as by submitting a complaint to the U.S. Department of Health and Human Services' Office for Civil Rights, for possible federal enforcement of the statute.

Protection Against Coercion to Have an Abortion

Finally, while not a protection for healthcare professionals' religious convictions with respect to abortion, there is a federal law that healthcare professionals should be aware of as they may be in a position to determine whether the law is being violated: 42 U.S.C. § 300a-8 makes it a federal crime for any employee of the federal government, any person who administers or supervises a program receiving federal financial assistance, or any person who receives compensation for services under any program that receives federal financial assistance to coerce or endeavor to coerce any person to undergo an abortion by threatening such person with the loss of benefits or services under the program receiving federal financial assistance. Breaking this federal law can result in up to one year in prison and a $1,000 fine.

Citations:

15. Unfortunately, some employers or supervisors remain unaware that it is illegal to coerce healthcare professionals to participate in abortions or believe that their doing so will not be challenged. For example, just last year, the U.S. Department of Justice sued the University of Vermont Medical Center ("UVMMC") alleging that the UVMMC scheduled a nurse that it knew had religious objections to participating in abortions to assist in an elective abortion and mislead her to believe that the procedure was not an abortion. *United States v. Univ. of Vt. Med. Ctr.*, No. 2:20-cv-213, 2020 WL 7867303, at *1 (D. Vt. Dec. 16, 2020).

16. *E.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. H, sec. 507(d), 134 Stat. 1182, 1622 (2020).

17. 42 U.S.C. § 300a-7.

18. 42 U.S.C. § 300a-7(b). There is no paragraph (a).

19. Specifically, any grant, contract, loan, or loan guarantee under the Public Health Service Act, 42 U.S.C. § 201 *et seq.*; the Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*; or the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. § 6000 *et seq, repealed by* Pub. L. No. 106-402, Title IV § 401(a), 114 Stat. 1737.

20. 42 U.S.C. § 300a-7(c)(1).

21. Specifically, any grant, contract, loan, or loan guarantee under the Public Health Service Act, 42 U.S.C. § 201 *et seq.*; the Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*; or the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. § 6000 *et seq*. Note also that, while this

Contraceptives

second provision of the Church Amendment is triggered by the same federal funds as the first provision, the discussion of the second provision's protection of rights of conscience with respect to abortion applies equally to the parallel third provision of the Church Amendments, which adds the following federal funding as another trigger: "a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services." Therefore, this discussion of the second provision of the Church Amendments applies equally to any entity that receives such funding.

22. 42 U.S.C. § 300a-7(c)(2).

23. 42 U.S.C. § 300a-7(d).

24. 42 U.S.C. § 300a-7(e).

25. Specifically, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, 42 U.S.C. § 201 et seq.; the Community Mental Health Centers Act, 42 U.S.C. § 2689 et seq.; or the Developmental Disabilities and Bill of Rights Act of 2000, 42 U.S.C. § 15001 et seq.

26. 42 U.S.C. § 238n.

Contraceptives

Increasingly, healthcare professionals, particularly pharmacists, are being told that they cannot refuse to provide contraceptives, even when doing so would violate their religious beliefs. The provision of health insurance coverage for contraceptives also became an important conscience issue when regulations and guidance issued under the Affordable Care Act required that group health insurance plans provide coverage for the full range of contraceptives, [27] regardless of the religious convictions of the organizations providing the insurance coverage. [28] Unfortunately, unlike with some of the other issues addressed in this *Religious Liberty Protection Kit for Healthcare Professionals*, there are few conscience protections that explicitly apply to the provision of contraceptives, and most that do exist are state laws.

Some healthcare professionals hold religious objections to only a subset of contraceptives that can prevent the implantation of a fertilized egg or that can cause an abortion as a side effect. Some religious objectors

with this concern about the abortive effect of certain contraceptives have argued that the federal conscience protection statutes that apply to abortion should also apply to those contraceptives, but the U.S. Department of Health and Human Services, which is the federal department primarily responsible for enforcing the federal conscience protection statutes, has decided that drugs that can cause an abortion as an unintended side effect (unlike RU-486, which causes abortion as a primary effect and is therefore considered an abortifacient and not a contraceptive) are not covered by those statutes and will, therefore, not attempt to enforce the federal abortion conscience provisions under their jurisdiction against requirements that healthcare professionals provide contraceptive services.

When the requirement to provide contraceptives is based on a federal law, such as the Affordable Care Act's Contraceptive Mandate, which requires group health insurance plans to include coverage of "the full range of female-controlled contraceptives," [29] religious objectors can use the general protections for religious beliefs that apply to the federal government to challenge the application of the requirement to the religious objector. For example, Hobby Lobby, a for-profit corporation whose owners hold religious objections to four contraceptives [30] that they consider to be abortifacients, successfully sued the federal government under the Religious Freedom Restoration Act to receive an exemption from having to provide insurance coverage for those four contraceptives. [31] Similarly, individuals and religious non-profit organizations, while subject to slightly different rules under the Contraceptive Mandate, successfully sued the federal government to avoid having to provide insurance coverage for objected-to contraceptives. [32]

Most laws that impact healthcare professionals with respect to contraceptives, however, are found in state law. Some states provide strong protections for pharmacists and other healthcare professionals so that they do not have to prescribe or fill prescriptions for contraceptives. Arkansas, for example, protects healthcare professionals who "refus[e] to provide contraceptive procedures, supplies, and information when the refusal is based upon religious or conscientious objection. [33]" California, on the other hand, permits a pharmacist to refuse to dispense a contraceptive (or any other lawfully prescribed drug or device) only if the pharmacist has previously notified the pharmacist's employer in writing of any religious objection and the pharmacist's employer can "provide a reasonable accommodation" to the pharmacist without "undue hardship" to the employer and while ensuring that the patient has "timely access" to the prescribed drug or device. [34] New Jersey takes an even more extreme position: "A pharmacy practice site has a duty to properly fill lawful prescriptions for prescription drugs or devices that it carries for customers, without undue delay, despite any conflicts of employees to filling a prescription and dispensing a particular prescription drug or device due to sincerely held moral, philosophical, or religious beliefs." [35] In other words, New Jersey does not care about pharmacists' religious convictions.

Unfortunately, challenging these state law contraceptive requirements can be difficult, especially in states with no state version of the Religious Freedom Restoration Act. For example, the Washington State Board of Pharmacy issued a rule requiring pharmacies to stock and sell contraceptives. The Stormans family owned a grocery store and pharmacy in Olympia, Washington. Like Hobby Lobby, the Stormans had religious objections to providing contraceptives that they considered to be abortifacients, such as Plan B. The Stormans, along with two other pharmacists, sued Washington, arguing that the Washington State Board of Pharmacy's rule violated their religious liberty rights. Without a state religious freedom restoration act, however, the Stormans had to rely on the weaker protections of the First Amendment to the U.S. Constitution. While the district court ruled in the Stormans' favor, the state appealed to the Ninth Circuit, which upheld the pharmacy board's rule against the Stormans. [36] The Supreme Court refused to hear the Stormans' appeal. [37]

As the two very different outcomes in *Hobby Lobby* and *Stormans* demonstrate, successfully protecting rights of religious conscience in areas that depend on general religious liberty protections—as rights on conscience with respect to contraceptives usually do—depends on many factors, from the nature of the law that is violating your religious convictions to the state or circuit in which you are located. While pharmacists in Washington State

are presently forced to provide contraceptives with which they may disagree, pharmacists in other states may challenge problematic state laws and succeed because of changing legal circumstances and being before different judges. When Hobby Lobby stood up for their rights and fought the Contraceptive Mandate to the U.S. Supreme Court, they set a national precedent ensuring that those who hold religious objections to providing group health insurance coverage for objected-to contraceptives cannot be forced to violate their religious convictions on this issue. If you are facing a requirement that you provide contraceptives against your religious convictions, reach out to the attorneys at First Liberty Institute by going to www.FirstLiberty.org so that we can review the unique facts of your case and determine if we would be able to fight for your religious liberty rights in this area.

Citations:

27. See 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2020); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2020); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2019); Health Res. Servs. Admin., "Women's Preventive Services Guidelines," *available* at https://www.hrsa.gov/womens-guidelines-2019 (Oct. 2020).

28. Following a long series of lawsuits and the U.S. Department of Health and Human Services' issuing conscience protection regulations for the Contraceptive Mandate, the HRSA guidelines that provide the list of required coverage under the Affordable Care Act were revised in 2017 to exempt organizations with religious or moral objections to the provision of coverage for contraceptives, so unless there is another revision to the guidelines that removes this conscience protection, the Affordable Care Act's "Contraceptive Mandate" should no longer compel organizations to provide group health insurance coverage for contraceptives against their religious convictions.

29. Health Res. Servs. Admin., "Women's Preventive Services Guidelines," *available at* https://www.hrsa.gov/womens-guidelines-2019 (Oct. 2020).

30. The four contraceptives that Hobby Lobby's owners objected to were Ella, Plan B, and hormonal and copper intrauterine devices.

31. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

32. *See DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019) (enjoining application of the Contraceptive Mandate to religious objectors under the Religious Freedom Restoration Act).

33. Ark. Code § 20-16-304(5).

34. Cal. Bus. & Prof. Code § 733(b)(3) (2014).

35. N.J. Rev. Stat. § 45:14-67.1(a) (2007).

36. *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

37. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016).

Sterilizations

Healthcare professionals are increasingly facing pressure to participate in sterilization procedures. Like with abortion, however, healthcare professionals' religious rights to not be coerced into performing sterilizations are heavily protected.

The Church Amendments

Much of the protection for healthcare professionals with respect to sterilizations comes from the Church Amendments. [38] As mentioned above, the Church Amendments comprise a series of five federal healthcare conscience protections that cover a range of moral issues within the healthcare field. One of the primary specific topics covered by the Church Amendments is sterilizations (the other is abortion, discussed above).

The first provision [39] of the Church Amendments ensures that healthcare professionals who receive certain federal funding [40] cannot be forced by their receipt of that funding to perform or assist in the performance of "any sterilization procedure" if doing so would violate their religious beliefs or moral convictions. This provision also provides that any healthcare organizations that receive such federal funding cannot thereby be compelled to permit sterilization procedures to be performed in their facilities or to supply personnel to perform or assist in the performance of a sterilization procedure if doing so would be against their religious beliefs or moral convictions.

The second provision [41] of the Church Amendments prohibits any entity, including private entities, who receive certain federal funding [42] from discriminating against a healthcare professional in employment decisions or in the extension of staff or other privileges because that healthcare professional performed or assisted in, or refused to perform or assist in, a sterilization procedure because of the healthcare professional's religious beliefs or moral convictions or because of that healthcare professional's religious beliefs or moral convictions

regarding sterilization procedures generally.

Unfortunately, the second provision of the Church Amendments can also threaten rights of conscience for some organizations who are morally opposed to sterilization procedures. This provision of the Church Amendments protects not only the *refusal* to participate in a sterilization procedure but also the participation itself. In other words, under this provision, a hospital that objects to sterilization procedures cannot discriminate against a healthcare professional because that person performs or supports them. This provision, then, is of concern to religious healthcare organizations who cannot support sterilizations. Because the Church Amendments can only be enforced by the federal government, however, any such religious healthcare organization will always have the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act as defenses against being compelled to hire healthcare professionals who do not conform to the religious tenets of the organization.

The third provision [43] of the Church Amendments is discussed in the section titles "Rights of Conscience for Healthcare Generally" in this *Religious Liberty Protection Kit for Healthcare Professionals* because it is not explicitly a conscience protection for sterilization procedures; but, for purposes of its impact on rights of conscience with respect to sterilizations, see footnote 42.

Likewise, the fourth provision [44] of the Church Amendments is discussed under the section titled "Rights of Conscience for Healthcare Generally" as it is not specific to sterilization procedures.

The fifth and final provision [45] of the Church Amendments prohibits any entity that receives certain federal funding [46] from denying admission to or discriminating against any applicant for training or study (including residencies or internships) because of the applicant's "reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of . . . sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." This provision protects persons seeking to become healthcare professionals from being discriminated against because of their religious or moral convictions regarding sterilizations. As with the second and third provisions of the Church Amendments, however, this provision also protects persons who *support* sterilizations and, therefore, may itself challenge the religious exercise of some religious schools and healthcare organizations. Again, though, such organizations should be able to rely upon the First Amendment's Free Exercise Clause and the federal Religious Freedom Restoration Act in such a situation.

Sterilizations and Gender Reassignment Procedures

Much of the increasing pressure that healthcare professionals are under to participate in sterilization procedures comes from increasing demands that healthcare professionals provide gender reassignment procedures, some of which result in sterilization. While most challenges to requirements that healthcare professionals participate in gender reassignment procedures have been brought under general religious liberty protection laws such as the Religious Freedom Restoration Act or Title VII of the Civil Rights Act, the U.S. Department of Health and Human Services issued a regulation that recognized the Church Amendments' protections regarding sterilizations may apply to those gender reassignment procedures that result in sterilization. [47] Additionally, in at least three cases in which religious organizations filed lawsuits challenging participation in gender reassignment procedures, the federal government has pointed to the Church Amendments as providing protection for healthcare professionals who hold religious objections to such procedures when they would result in sterilization. [48] In all three of those cases, the religious organizations prevailed under the Religious Freedom Restoration Act.

Ultimately, while the sterilization-specific conscience protections may encompass sterilizations due to gender reassignment procedures, this is an area in which healthcare professionals cannot rely on the government to enforce those protections. Instead, religious liberty laws with private rights of action, such as state and federal

religious freedom restoration acts and Title VII of the Civil Rights Act, will become increasingly important to prevent healthcare professionals from being coerced to participate in sterilizations against their religious convictions when the sterilization is performed as part of gender reassignment.

Protection Against Coercion to Undergo a Sterilization Procedure

Finally, while not a protection for healthcare professionals' religious convictions with respect to sterilizations, there is a federal law that healthcare professionals should be aware of as they may be in a position to determine whether the law is being violated: 42 U.S.C. § 300a-8 makes it a federal crime for any employee of the federal government, any person who administers or supervises a program receiving federal financial assistance, or any person who receives compensation for services under any program that receives federal financial assistance to coerce or endeavor to coerce any person to undergo a sterilizations procedure by threatening such person with the loss of benefits or services under the program receiving federal financial assistance. Breaking this federal law can result in up to one year in prison and a $1,000 fine.

Citations:

38. U.S.C. § 300a-7.

39. 42 U.S.C. § 300a-7(b). There is no paragraph (a).

40. Specifically, any grant, contract, loan, or loan guarantee under the Public Health Service Act, 42 U.S.C. § 201 *et seq.*; the Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*; or the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. § 6000 *et seq*.

41 U.S.C. § 300a-7(c)(1).

42. Specifically, any grant, contract, loan, or loan guarantee under the Public Health Service Act, 42 U.S.C. § 201 et seq.; the Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*; or the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. § 6000 *et seq*. Note also that, while this second provision of the Church Amendment is triggered by the same federal funds as the first provision, the discussion of the second provision's protection of rights of conscience with respect to sterilization procedures applies equally to the parallel third provision of the Church Amendments, which adds the following federal funding as another trigger: "a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services." Therefore, this discussion of the second provision of the Church Amendments applies equally to any entity that receives such funding.

43. 42 U.S.C. § 300a-7(c)(2).

44. 42 U.S.C. § 300a-7(d).

45. 42 U.S.C. § 300a-7(e).

46. Specifically, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, 42 U.S.C. § 201 *et seq.*; the Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*; or the Developmental Disabilities and Bill of Rights Act of 2000, 42 U.S.C. § 15001 *et seq*.

47. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23205 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

48. *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019) (mem. op.); *Religious Sisters of Mercy v. Azar*, No. 3:16-cv-00386, 2021 WL 191009, at *1 (D.N.D. Jan. 19, 2021); *Cath. Benefits Ass'n v. Azar*, No. 3:16-cv-00432, 2021 WL 191009, at *1 (D.N.D. Jan. 19, 2021).

Euthanasia or Assisted Suicide

An area of increasing concern for healthcare professionals whose religious convictions prohibit them from killing or assisting in the death of innocent patients is the rise of legalized assisted suicide. Assisted suicide, first legalized in Oregon in 1997, involves a healthcare professional enabling a patient to commit suicide at the patient's request. Assisted suicide is presently legal in ten states, California, Colorado, Hawaii, Maine, Montana, New Jersey, New Mexico, Oregon, Vermont, and Washington, plus the District of Columbia. Euthanasia, in which a healthcare professional kills a patient without the patient's consent, is presently illegal in every jurisdiction in the United States.

Section 1553 of the Affordable Care Act, [49] which was passed in 2010, is the primary [50] federal conscience protection statute that specifically addresses end of life issues such as euthanasia and assisted suicide. Section 1553 prohibits the federal government and any state or

local government or healthcare provider the received federal financial assistance under the Affordable Care Act from discriminating against any healthcare professional or organization because they do not "provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing." [51] Like most other federal healthcare conscience protection statutes, Section 1553 does not provide for a private right of action. Instead, Section 1553 provides that complaints under this law are to be sent to the U.S. Department of Health and Human Services' Office for Civil Rights so that the federal government can enforce the law.

Because there are no federal laws that should be interpreted as requiring a healthcare professional to participate in euthanasia or assisted suicide, threats to healthcare professionals' religious convictions in this area will come primarily from laws in the eleven jurisdictions in which assisted suicide is legal. While most of these states have protections to prevent healthcare professionals from being required to participate in assisted suicides, not all of those protections are all-encompassing. For example, while Vermont protects healthcare professionals from being required to participate in assisted suicide, it does not protect healthcare professionals from being required to counsel patients as to the availability of assisted suicide. [52]

Because the nature of threats to religious convictions and the availability of protections against those threats in this area of the law depend so much on your particular facts and the state in which you are providing healthcare services, if you believe that you will be faced with having to participate in an assisted suicide to preserve your career, please reach out to our attorneys at www.FirstLiberty.org so that we can review your unique situation and determine if we can assist you.

Citations:

49. 42 U.S.C. § 18113.

50. Other federal conscience protection statutes relevant to assisted suicide or euthanasia are specific to healthcare professionals' responsibilities with regard to advance directives and are discussed below in that section.

51. 42 U.S.C. § 18113(a).

52. *See, e.g., Vt. All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227, 234 (D. Vt. 2017) ("The fact that Act 39 imposes no duty on the plaintiffs' Vermont members does not mean that the members have no professional obligation to counsel a patient concerning the potential availability of assisted suicide. Rather, 18 V.S.A. § 1871 and 12 V.S.A. § 1909(d) continue to govern physicians in all aspects of their care of the terminally ill. Under these provisions, physicians must inform patients about all choices and options relevant to their medical treatment.").

Advance Directives

Healthcare professionals may find that they are pressured or ordered to engage in end-of-life conduct in which they cannot in good conscience participate, even in states that do not permit assisted suicide, because of state law provisions enforcing advance directives.

Conscience protections that are specific to advance directives are almost entirely grounded in state law—even federal conscience provisions for advance directives are only as protective as the conscience provisions found in state law. Both of the primary federal laws that deal with procedures for following advance directives provide that their purpose is "to ensure compliance with requirements of State law . . . respecting advance directives." [53] Similarly, federal advance directive conscience protections are tied to state law, providing that federal law on advance directives shall not "be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive." [54] Another federal conscience provision for advance directives provides that the federal laws on advance directives,

> shall not be construed—(1) to require any provider or organization, or any employee of such a provider or organization, to inform or counsel any individual regarding any right to obtain an item or service furnished for the purpose of causing, or the purpose of assisting in causing, the death of the individual, such as by assisted suicide, euthanasia, or mercy killing; or (2) to apply to or to affect any requirement with respect to a portion of an advance directive that directs the purposeful causing of, or the purposeful assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing. [55]

This statute provides what is called a "rule of construction." Unlike many of the other federal conscience provisions, which affirmatively prohibit discrimination, this rule of construction merely means that the federal laws regarding advance directives cannot be interpreted in such a way as to create an independent requirement that would violate healthcare providers' rights of conscience. This rule of construction does not, however, provide an affirmative protection again state laws that might violate rights of conscience.

Because state laws are so important in governing healthcare professionals' rights when dealing with advance directives, it is important to know what your state laws on this topic are. For example, Texas permits healthcare providers to refuse to follow advance directives, but they must provide a written statement as to which procedures the healthcare provider is unable or unwilling to follow. [56] Other states, like Iowa, require healthcare providers that hold conscience objections to certain provisions of advance directives must "take all reasonable steps to transfer the patient" to another healthcare provider. [57]

Because the particular requirements vary so much from state to state and the available religious liberty protections also vary from state to state, you may want to discuss the extent of your religious rights when facing problematic advance directives with the religious liberty attorneys at First Liberty Institute.

Citations:

53. 42 U.S.C. §§ 1395cc(f)(1)(D) and 1396a(w)(1)(D).

54. 42 U.S.C. § 1396a(w)(3).

55. 42 U.S.C. § 14406.

56. Tex. Health & Safety Code § 166.004 (2015).

57. Iowa Code § 144D.3(5) (2012).

Vaccinations

Vaccinations

As more and more healthcare providers require their employees to be vaccinated, often with vaccines developed using aborted fetal cell lines, numerous healthcare professionals have reached out to First Liberty Institute with questions about their religious liberty rights with respect to vaccines—both in providing them to others and in receiving the immunizations themselves.

The vast majority of specific conscience protections with respect to vaccines are for religious exemptions to mandatory vaccines for students. Healthcare professionals who hold religious objections to receiving certain vaccines are usually forced to rely on the general religious liberty protections described above. Those healthcare professionals, then, who work for private employers are usually limited to Title VII of the Civil Rights Act's religious accommodation provisions, which are very limited. Healthcare professionals who work for governmental organizations have more options to fight for their religious liberty rights using state or federal religious freedom restoration acts or constitutional provisions.

Healthcare professionals who object to providing certain vaccines to others have a few more protections because they are covered not only by the general religious liberty protections discussed above but also by the generally applicable portions of the Church Amendments, so long as their provision of vaccines is covered by one of the relevant government funding streams.

Counseling

Counseling by healthcare professionals can take a wide variety of forms, from a physician counseling a patient on available treatments to a psychologist providing a therapy session, and each type of counseling may vary in the extent to which its provision or refusal is protected by religious liberty laws.

A healthcare professional who has religious objections to providing counseling regarding certain types of treatments, such as abortion or assisted suicide, is often protected from being compelled to engage in such counseling by the same laws that protect against participation in the procedure. For instance, the fifth provision of the Church Amendments specifically protects persons who have "reluctance . . . to counsel . . . in the performance of abortions or sterilizations." [58] Conscience protection laws that protect healthcare professionals from having to facilitate or refer for objected-to procedures also encompass many forms of counseling. Not all such specific conscience protections include protections for counseling, however. For example, as mentioned above in the section on Assisted Suicide and Euthanasia, Vermont's conscience protection rules for assisted suicide protect healthcare professionals from being coerced to participate in an assisted suicide but do not protect healthcare professionals from being coerced to provide counseling about assisted suicide. [59]

Healthcare professionals who provide therapy can also experience conflicts with their religious convictions when state laws or licensing organizations require their counseling to affirm behaviors that the healthcare professionals believe to be wrong, such as having sexual relations outside of marriage. Protections for counselors in this situation will often depend on the general religious liberty protection laws available in the counselor's state, though some states have now enacted specific conscience protections for therapy services. Tennessee, for example, provides that:

> No counselor or therapist providing counseling or therapy services shall be required to counsel or serve a client as to goals, outcomes, or behaviors that conflict with the sincerely held principles of the counselor or therapist; provided, that the counselor or therapist coordinates a referral of the client to another counselor or therapist who will provide the counseling or therapy. [60]

Additionally, some courts have held that laws restricting purely speech-based therapy violate the Free Speech Clause of the First Amendment to the U.S. Constitution. [61] The Free Speech Clause provides protection against state and federal laws and employers, but it does not provide protections against private employers who mandate that their employee healthcare professions provide certain counseling services.

Citations:

58. 42 U.S.C. § 300a-7(e).

Gender Reassignment Procedures

Gender Reassignment Procedures

Healthcare professionals who hold religious objections to performing gender reassignment procedures may face claims that they are discriminating on the basis of sex [62] if they perform those same procedures for non-gender-reassignment purposes. For example, under the federal government's most recent interpretation of Section 1557 of the Affordable Care Act, a doctor who performs hysterectomies for cancer treatment but refuses to perform hysterectomies for gender reassignment can be penalized for engaging in sex discrimination.

Because Section 1557 is a federal law, healthcare professionals can defend their religious rights of conscience under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. Indeed, three courts have held that Section 1557 cannot be used to force healthcare professionals to violate their sincerely held religious beliefs against participating in gender reassignment procedures. [63]

Healthcare professionals with conscience objections to gender reassignment procedures but who provide services that may be used in gender reassignment should be careful to ensure that they understand the relevant laws that may permit or prohibit them from continuing their practice of performing those dual-use procedures while holding to their religious beliefs.

Citations:

59. *See Vt. All. for Ethical Healthcare, Inc*, 274 F. Supp. 3d at 234 ("The fact that Act 39 imposes no duty on the plaintiffs' Vermont members does not mean that the members have no professional obligation to counsel a patient concerning the potential availability of assisted suicide.").

60. Tenn. Code Ann. § 63-22-302 (2016).

61. *See, e.g., Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

62. 42 U.S.C. § 18116.

63. *Franciscan All.*, 414 F. Supp. 3d at 928; *Religious Sisters of Mercy,* 2021 WL 191009, at *1; *Cath. Benefits Ass'n,* 2021 WL 191009, at *1.

Conclusion

Healthcare professionals are governed by a wide variety of laws from an enormous number of sources. Understanding your rights within this broad legal field depends on the particular facts, circumstances, and even geographic location of your practice. This *Religious Liberty Protection Kit for Healthcare Professionals* only touches on those topics about which we have received the most questions so that you can begin to understand some of the factors that can impact your ability to live out your faith as a healthcare professional.

We at First Liberty Institute hope that you will think about the issues raised in this protection kit and consider whether you need to reach out to religious liberty experts to more fully understand the extent of your religious liberty rights and what you can do to protect them if they are challenged. If you decide that you need advice or legal assistance on some of the topics address in this protection kit, you can contact First Liberty's attorneys by using the "Request Legal Help" function of our website at www.FirstLiberty.org, and our team of attorneys can review the unique facts of your situation and determine if we can assist you.

Again, thank you for all that you do in serving communities across America. Our goal is to enable you to continue to do so without having to choose between your calling and your deepest religious convictions.

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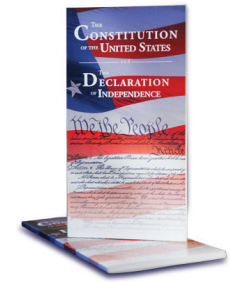

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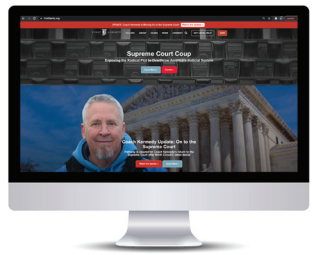

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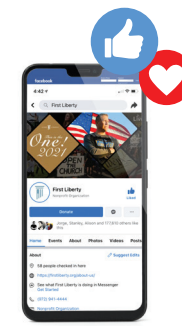

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Justin Butterfield

Deputy General Counsel, First Liberty's Healthcare Professionals' Rights Expert

First Liberty is our nation's largest legal organization solely dedicated to protecting religious liberty for all Americans. We have won cases at all court levels, including the United States Supreme Court, federal and state courts, and administrative courts and agencies. Victories are won through a nucleus of top-ranked staff attorneys who coordinate a national network of top litigators from firms that include 24 of the largest 50 in the world.

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