

117TH CONGRESS
1ST SESSION

S. _____

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

IN THE SENATE OF THE UNITED STATES

Mr. LANKFORD introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

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

6 **SEC. 2. FINDINGS.**

7 Congress finds as follows:

8 (1) Thomas Jefferson stated a conviction com-
9 mon to our Nation’s founders when he declared in
10 1809 that “[n]o provision in our Constitution ought

1 to be dearer to man than that which protects the
2 rights of conscience against the enterprises of the
3 civil authority”.

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

16 (3) Religious diversity adds to the strength of
17 our medical field, and no doctor should have to
18 choose between giving up their faith or moral convic-
19 tions and abandoning a vital medical mission. Con-
20 gress’ enactments to protect this right of conscience
21 in health care include the Church amendments (42
22 U.S.C. 300a–7), the Coats/Snowe amendment (42
23 U.S.C. 238n), and the Weldon amendment approved
24 by Congresses and Presidents of both parties every
25 year since 2004 (including in section 507(d) of divi-

1 sion A of the Further Consolidated Appropriations
2 Act, 2020 (Public Law 116–94; 133 Stat. 2534,
3 2607)).

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

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

1 abortion services did not violate the Weldon amend-
2 ment. At least 28,000 individuals and families sub-
3 sequently lost abortion-free health plans as a result
4 of this mandate.

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

21 (7) On May 21, 2019, the Secretary of Health
22 and Human Services issued a final conscience rule
23 that implements approximately 25 Federal con-
24 science protection provisions and provides mecha-
25 nisms to enforce protections enacted by Congress to

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

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

20 (9) A health care provider's decision not to par-
21 ticipate in an abortion, like Congress' decision not to
22 fund most abortions, erects no barrier to those seek-
23 ing to perform or undergo abortions but leaves each
24 party free to act as he or she wishes.

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

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

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

17 Title II of the Public Health Service Act (42 U.S.C.
18 202 et seq.) is amended by inserting after section 245 the
19 following:

20 **“SEC. 245A. PROHIBITING DISCRIMINATION AGAINST**
21 **HEALTH CARE PROVIDERS THAT DO NOT**
22 **PARTICIPATE IN ABORTION.**

23 “(a) IN GENERAL.—Notwithstanding any other law,
24 the Federal Government, and any person or entity that
25 receives Federal financial assistance, including any State

1 or local government, may not penalize, retaliate against,
2 or otherwise discriminate against a health care provider
3 on the basis that the provider does not or declines to—

4 “(1) perform, refer for, pay for, or otherwise
5 participate in abortion;

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

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

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

11 “(1) to prevent any health care provider from
12 voluntarily electing to participate in abortions or
13 abortion referrals where not prohibited by any other
14 law;

15 “(2) to prevent any health care provider from
16 voluntarily electing to provide or sponsor abortion
17 coverage or health benefits coverage that includes
18 abortion where not prohibited by any other law;

19 “(3) to prevent an accrediting agency, the Fed-
20 eral Government, or a State or local government
21 from establishing standards of medical competency
22 applicable only to those who have knowingly, volun-
23 tarily, and specifically elected to perform abortions,
24 or from enforcing contractual obligations applicable
25 only to those who, as part of such contract, know-

1 ingly, voluntarily, and specifically elect to provide
2 abortions;

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

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

10 “(c) ADMINISTRATION.—The Secretary—

11 “(1) may issue regulations under—

12 “(A) this section;

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

18 “(C) any of subsections (b) through (e) of
19 section 401 of the Health Programs Extensions
20 Act of 1973 (42 U.S.C. 300a–7) regarding an
21 objection based on a religious belief or moral
22 conviction; and

23 “(D) any other law protecting the exercise
24 of conscience or religious freedom under pro-
25 grams or activities funded, administered, or

1 conducted by the Department of Health and
2 Human Services, including any laws listed
3 under the final rule issued by the Secretary of
4 Health and Human Services titled ‘Protecting
5 Statutory Conscience Rights in Health Care;
6 Delegations of Authority’ (84 Fed. Reg. 23170;
7 May 21, 2019);

8 “(2) shall designate the Director of the Office
9 for Civil Rights of the Department of Health and
10 Human Services—

11 “(A) to receive complaints alleging a viola-
12 tion of any provision of this section or any pro-
13 vision of law referred to or listed under para-
14 graph (1); and

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

18 “(3) shall, as permitted under law (including
19 the Constitution of the United States), induce com-
20 pliance of a person or entity, including a State or
21 local government, refusing to comply with a provi-
22 sion of this section, or any provision of law referred
23 to or listed under paragraph (1), by terminating, in
24 whole or in part, any Federal financial assistance
25 provided by the Secretary to such person or entity.

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

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

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

10 “(A) an individual physician, health care
11 assistant, nurse, pharmacist, health researcher,
12 or other health care personnel;

13 “(B) a hospital, laboratory, pharmacy,
14 health system, or other health care or medical
15 research facility or organization (including a
16 party to a proposed merger or other collabo-
17 rative arrangement relating to health services,
18 and an entity resulting therefrom);

19 “(C) a provider-sponsored organization, an
20 accountable care organization, or a health
21 maintenance organization;

22 “(D) a social services provider that pro-
23 vides or authorizes referrals for health care
24 services;

1 “(E) a program of training or education in
2 the health professions or medical research, a
3 participant in such a program, or any individual
4 applying or otherwise aspiring to participate in
5 such a program;

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

8 “(G) a health care sharing ministry;

9 “(H) a health insurance plan, including
10 group, individual, or student health plans, or a
11 sponsor or administrator thereof; or

12 “(I) any other health care organization,
13 program, facility, or plan.

14 “(3) STATE OR LOCAL GOVERNMENT.—The
15 term ‘State or local government’ includes every
16 agency and other governmental unit and subdivision
17 of a State or local government, if such State or local
18 government, or any agency or governmental unit or
19 subdivision thereof, receives Federal financial assist-
20 ance.

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

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

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

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

3 “(A) the Attorney General of the United
4 States; or

5 “(B) any person or entity adversely af-
6 fected by the designated violation without re-
7 gard to whether such person or entity is a
8 health care provider.

9 “(2) DESIGNATED VIOLATION.—The term ‘des-
10 igned violation’ means an actual or threatened vio-
11 lation of section 245A or of any other provision of
12 law referred to or listed under section 245A(c)(1).

13 “(c) ADMINISTRATIVE REMEDIES NOT REQUIRED.—
14 An action under this section may be commenced, and relief
15 may be granted, without regard to whether the party com-
16 mencing the action has sought or exhausted any available
17 administrative remedies.

18 “(d) DEFENDANTS IN ACTIONS UNDER THIS SEC-
19 TION MAY INCLUDE GOVERNMENTAL ENTITIES AS WELL
20 AS OTHERS.—

21 “(1) IN GENERAL.—An action under this sec-
22 tion may be maintained against any person or entity
23 receiving Federal financial assistance, including a
24 State governmental entity. Relief in an action under

1 this section may include money damages even if the
2 defendant is a governmental entity.

3 “(2) DEFINITION.—For the purposes of this
4 subsection, the term ‘State governmental entity’
5 means a State, a local government within a State,
6 and any agency or other governmental unit or sub-
7 division of a State, or of such a local government.

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

10 “(1) all appropriate relief, including injunctive
11 relief, declaratory relief, and compensatory damages
12 to prevent the occurrence, continuance, or repetition
13 of the designated violation and to compensate for
14 losses resulting from the designated violation; and

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