Testimony of Mary E. Harned, Esq.
Staff Counsel, Americans United for Life
Before the Washington Senate Health Care Committee
On HB 1044
April 1, 2013

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Mary E. Harned, staff counsel with Americans United for Life (AUL). I thank you for the opportunity to offer written testimony on behalf of AUL in this hearing today. AUL is a national public interest law firm with a practice in abortion and bioethics law. AUL attorneys are experts on constitutional law and abortion jurisprudence, including the constitutionality of laws restricting or prohibiting the use of public funds for abortions and abortion coverage, and laws that regulate abortion coverage by private insurance contracts, plans, or policies ("insurance plans") within a state.

HB 1044 would create an unprecedented requirement in the State of Washington that all health plans which provide "coverage for maternity care or services [] must also provide a covered person with substantially equivalent coverage to permit the voluntary termination of a pregnancy." The bill states that "[t]he legislature recognizes that every individual possesses a fundamental right to exercise their religious beliefs and conscience," and purports to protect that right. However, the bill's provisions fail to provide adequate conscience protections, particularly for insurance carriers.

Our testimony today addresses the draconian nature of the requirements in HB 1044 and the insufficiency of the conscience protections within the bill.

I. THE REQUIREMENT IN HB 1044 THAT ALL HEALTH PLANS THAT PROVIDE MATERNITY COVERAGE ALSO PROVIDE ABORTION COVERAGE IS UNPRECEDENTED.

Most states have one or more prohibitions on *public* funding for abortions and/or insurance coverage for abortions.[1] Further, 21 states have restrictions on *private* insurance coverage of abortion in (a) all health insurance plans within their state or (b) in the plans that will participate in their new state Exchanges established pursuant to the Affordable Care Act (ACA). These laws—many recently enacted—recognize that most Americans do not want their tax dollars or their insurance premiums used to pay for abortions.[2]

Given this clear trend in public policy across the country, Washington will stand in stark contrast to other states if HB 1044 is enacted. This bill is far more coercive than state statutes requiring taxpayer funding for abortion; HB1044 actually targets *private* health plans and forces nearly all healthcare payers in the state of Washington to pay for abortion-on-demand not only through tax-dollars, but through their insurance premiums.

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[1] The United States Supreme Court has repeatedly affirmed the constitutionality of federal and state restrictions on public funding for abortions and laws that favor childbirth over abortion. In *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment, a federal appropriations rider that restricts the use of federal and state matching Medicaid funds for abortions. The Court held that a "[s]tate that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment . . . [and] that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment." 448 U.S. 297, 326 (1980). *See also Beal v. Doe*, 432 U.S. 438 (1977) (holding that Pennsylvania's refusal to extend Medicaid coverage to "nontherapeutic abortions" was not inconsistent with the Social Security Act); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding the constitutionality of a state welfare regulation under which Medicaid recipients received payment for services related to childbirth, but not for "nontherapeutic abortions"); *Poelker v. Doe*, 432 U.S. 519 (1977) (holding that the Constitution did not forbid a state or city from expressing a preference for childbirth over nontherapeutic abortions by providing services for childbirth and not abortions); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding the state's restrictions on the use of public employees and facilities for the performance or assistance of "nontherapeutic abortions"); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that federal regulations prohibiting recipients of Title X funds from engaging in abortion-related activities were a permissible construction of the underlying legislation and were constitutional. It is permissible for a State to engage in unequal subsidization of abortion and other medical services to encourage alternative activity deemed in the public interest).

[2] *See U.S. Voters Oppose Health Care Plan by Wide Margin, Quinnipiac National University Poll Finds; Voters Say 3-1, Plan Should Not Pay for Abortions*, QUINNIPIAC UNIVERSITY, (Dec. 22, 2009); *See also Poll: Majority favor abortion funding ban*, CNN POLITICS (Nov. 18, 2009.

II. HB 1044 DOES NOT ADEQUATELY PROTECT THE FREEDOM OF CONSCIENCE.

Freedom of conscience is a fundamental right that has been revered since the founding of our nation. The First Amendment of the United States Constitution promises that Congress shall make no law prohibiting the free exercise of religion.[3] At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[4] As Thomas Jefferson wrote, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[5] Indeed, it cannot be disputed that the right of conscience lies at the very core of the free exercise clause of the First Amendment.

The State of Washington also recognizes freedom of conscience, and the sponsors of HB 1044 purport to protect that freedom in the bill. However, the proposed protections fall short.

A. Health carriers are not sufficiently protected.

While HB 1044 states that "[n]o individual health care provider, *religiously sponsored* health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion," the bill also provides that "[e]ach health carrier [that objects to covering abortions for reason of conscience or religion] shall . . . provide written information describing how an enrollee may directly access services [*i.e.,* abortion] in an expeditious manner; and Ensure that enrollees refused services under this section have prompt access to the information developed. . . ."

In other words, a health carrier that objects to paying for abortions because to do so would violate its conscience or religious beliefs **must still aid someone in obtaining an abortion** by providing written information describing how they can obtain one. Further, this "conscience protection" only applies to "religiously sponsored" health carriers. This is inadequate.

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[3] U.S. CONST. amend. I.
[4] *See generally* M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).
[5] Thomas Jefferson to New London Methodists (1809).

The freedom of conscience of all Americans should be equally protected, regardless of one's religious status.

B. Mandatory abortion coverage and freedom of conscience are fundamentally incompatible.

HB 1044 gives the insurance commissioner authority to "establish by rule a mechanism or mechanisms to recognize the right to exercise conscience while ensuring enrollees timely access to services and to assure prompt payment to service providers." Such authority is likely to entirely undermine any protection of conscience. Further, this task will be impossible to accomplish. Mandatory abortion coverage and freedom of conscience are not compatible.

As discussed above, requiring a health carrier that conscientiously objects to paying for abortions to provide information to an enrollee that assists her in obtaining an abortion fundamentally violates that carrier's conscience. The same concern will arise for employers if the insurance commissioner forces conscientiously objecting employers to provide similar information to their employees.

Conclusion

HB 1044 would isolate Washington as the only state in the United States that forces private health insurance plans to pay for abortions, treating abortion as equivalent to maternity care. The bill also has insufficient conscience protections to ensure that individuals with religious, ethical, or moral objections to abortion do not have to contribute to the provision of abortion.