

**NARAL***Reproductive Freedom & Choice*

To: Interested Persons
From: NARAL® Legal Department
Re: RLPA's implications for pro-choice issues
Date: February 25, 2000

History and Current Status of the Religious Liberty Protection Act (RLPA)

The Religious Liberty Protection Act (RLPA) (S. 2081) is the most recent in a line of efforts since 1990 to give religious beliefs heightened protection under our laws. Prior to 1990, the Supreme Court had ruled that in order to pass constitutional scrutiny laws that burden religious beliefs must pass the compelling interest test. *Employment Division v. Smith*, 494 U.S. 872, 883 (1990), citing *Sherbert v. Verner*, 374 U.S. 398 (1963). In 1990, the Supreme Court changed course by holding that the Constitution does not require laws of general applicability that burden religious beliefs to pass the compelling interest test. *Id.* In response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which sought to reinstate the compelling interest test by statute. In 1997, the Supreme Court struck down RFRA in part, holding that Congress had exceeded its constitutionally limited power to legislate under the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response to *Boerne*, Congress has introduced RLPA. RLPA attempts to remedy the defect in RFRA by legislating under Congress's power under the commerce and spending clauses, and, like RFRA, RLPA seeks to enact the compelling interest test by statute.

RLPA (H.R. 1691) passed the House on July 15, 1999 and RLPA (S. 2081) is awaiting Senate action. Until now most of the objections to the bill from liberal interest groups have concerned the lack of an exception for civil rights laws that protect, among others, people of color, women, gays and lesbians, and persons with disabilities from discrimination in employment, housing, and other public accommodations. The implications for women's reproductive rights have not been fully explored or addressed. As shown below, we believe RLPA would endanger a woman's right to choose an abortion and other aspects of reproductive freedom. Moreover, certain civil rights exceptions would not remedy the anti-choice defects in the bill.

II. General Summary of the Legal Effect of RLPA

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RLPA provides that government (federal, state or local) through a program or activity that receives Federal financial assistance shall not substantially burden -- including with laws of general applicability -- a person's religious exercise unless the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. The bill protects religious objections with a compelling interest test, the highest form of scrutiny possible under our legal system.

We have two general concerns with this bill:

- First, this high standard ensures that many religious objections to laws protecting and furthering women's health, particularly those involving abortion, contraception, and sexuality education, will be recognized, trumping women's reproductive rights.
- Second, the bill's failure to define "person" -- a legal term of art that includes corporations and other entities in many areas of the law -- means that the bill's provisions would exempt not only individual human beings but also organizations and corporations. Such an exemption is particularly dangerous because these entities have more power to hinder women's health than any individual.

III. Specific Implications for Pro-Choice Issues

RLPA could be used as a shield or a sword. Many people and organizations have religious objections not only to abortion but also to less controversial pro-choice issues, including contraception and sexuality education. RLPA would shield individuals and organizations with religious objections from a whole host of laws protecting women's access to reproductive health care and women's right to know about their reproductive health options. RLPA also could be used as a sword by those who want to affirmatively pursue an anti-choice agenda by forestalling laws or enforcement of laws which further women's reproductive health, as well as to demand special protection for anti-choice activities. The following are a few examples of how the proposed broad federal protections for religious objectors threaten women's reproductive freedom:

- Providing a national "conscience clause" for individuals and entities, allowing them to avoid abortion counseling and referrals. Under state common law, health care providers must inform women of the risks, benefits and alternatives of their treatment. Many states have conscience clauses that allow individuals to refuse to perform or assist in an abortion procedure but do not grant individuals the right to refuse to provide

information. Other "conscience clauses" in state and federal law protect those who do provide abortions, counseling or referral (e.g., 42 USC §300a-7 [the Church amendment], IN, IA, KY, MI, PA, SD, TX, and WA). RLPA would override all these laws by allowing persons and entities to refuse to provide the full range of reproductive health services, and even to discriminate against persons who have had or provided an abortion, or counseling or referral.

- Providing a national "conscience clause" for employers and insurers to avoid contraceptive coverage requirements. Ten states now require comprehensive contraceptive coverage (CA, CT, GA, HI, ME, MD, NV, NH, NC, VT); most others offer partial protection either for state employees or in the private market (CO, ID, IA, KS, KY, MA, MI, MN, MS, NJ, NM, NY, OH, OK, OR, PA, SD, TN, TX, UT, VA, WV, WI). As the battles in state legislatures have shown, some employers and insurers object to providing contraceptives for their employees or enrollees, and the Catholic Church in particular resists contraceptive coverage requirements. In several states, pro-choice advocates have been able to pass contraceptive coverage without a conscience clause (e.g., GA, NH, and VT) or with a narrow one (e.g., CT, ME, and NV). If RLPA passes, any insurer or employer with a religious objection could avoid providing or purchasing contraceptive coverage as required by state law, thereby inserting a conscience clause where none existed or a broader one than currently exists.
- Providing a national "conscience clause" for pharmacies and pharmacists to avoid dispensing or prescribing contraceptives. Since emergency contraception has gained more attention, some states have considered pharmacist conscience clauses that would permit pharmacists with religious objections to opt out of prescribing prescription drugs such as emergency contraception (SD passed one in 1998 applicable to drugs where there is reason to believe they could cause an abortion and several other states, including IN, KS, KY, LA, MN, OR, and WI considered bills in 1999 or are considering pharmacist conscience clause legislation currently). These clauses are dangerous to women's health, especially in the area of emergency contraception when time is of the essence. RLPA would permit individuals and organizations to refuse to sell or prescribe many contraceptives – consistent with the view of some religious persons that contraceptives that may operate to block implantation are in fact abortifacients and are thus prohibited by their religious tenets.
- Permitting teachers with an objection to teaching contraception or

sexuality education to minors to avoid Board of Education or state law requirements to provide this information. Allowing teachers to opt out of standardized curriculum requirements would create financial and administrative burdens on already over-burdened schools and sexuality education programs and deny young people crucial information.

- Permitting abortion clinic protestors to challenge laws that protect abortion providers. Although the Freedom of Access to Clinic Entrances Act (FACE) has been upheld in a challenge under the Religious Freedom Restoration Act (RFRA) (42 USC § 2000bb to 2000bb-4), a precursor to RLPA, there would be new litigation under RLPA. Moreover, RLPA could be used to challenge the state and local laws that protect clinics, such as disorderly conduct and trespass statutes, as applied to non-violent religious civil disobedience.
- Allowing health care providers who, on the basis of religion, object to state laws protecting minors' confidentiality, to inform parents of their children's requests for contraception, STD testing, abortion, and mental health treatment. Moreover, RLPA would allow parents who have a religious objection to confidential treatment of their children to prevent such treatment and/or to access their children's confidential medical records, overriding federal (e.g., Title X) and state laws protecting minors' confidentiality and jeopardizing minors' reproductive health.
- Allowing medical schools and individual professionals with religious objection to abortion to refuse to provide abortion and reproductive health related training to medical students and residents. This would exacerbate the already dwindling number of abortion providers.

IV. Conclusion

It appears from this analysis and from some anti-choice websites that support RLPA for the very reasons identified here that serious issues regarding reproductive rights are at stake.