

November 1, 2012

TO: Interested Parties
FROM: Sarah Trumble, Policy Counsel
RE: Possible Romney Executive Action on Social Policy

If elected President, Republican Nominee Mitt Romney could turn back years of progress in his first days in office. There are several policy changes a President Romney could enact immediately upon assuming the presidency, either through executive order (EO) or executive directive of some kind. Below, please find a brief description of some possible social policy changes, Romney's position, and the likelihood they will be enacted.

Possible Executive Actions

Stem Cells/Human Embryos

Romney Likely to Repeal Obama Executive Order.

President Obama's EO 13505 repealed former-President George W. Bush's EO 13435, which had limited federal funding for stem cell research to only 60 preexisting stem cell lines. Under the Obama order, federal funding has been restored for the creation and use of new stem cell lines in accordance with NIH guidelines that ensure all research is scientifically worthy and responsibly conducted.¹ Though the restoration of funding under Obama was challenged in court, in August 2012 the U.S. Circuit Court of Appeals for the District of Columbia threw out the lawsuit and upheld the Obama order.²

Romney appears very likely to appeal Obama's EO and reinstate the Bush rule. During his campaign for the 2008 presidential nomination, Romney said he opposed using federal funds to create new stem cell lines,³ and his website states "quite simply, America cannot condone or participate in the creation of human life when the sole purpose of its creation is its sure destruction." Additionally, as Governor of Massachusetts, Romney vetoed a stem cell research bill—the first sign of his impending abortion rights flip-flop.⁴

Mexico City Policy (Presidential Memorandum)

Romney Promised Reversal of Obama Policy.

Romney has stated unequivocally that if elected, "I will reinstate the Mexico City policy, which keeps us from using foreign aid for abortions overseas."⁵

The Mexico City Policy, also known as the Global Gag Rule, prohibits any NGO receiving U.S. aid from performing, referring, or discussing abortion in their international efforts. First announced in 1984 by President Reagan, the policy has since

been reinstated or continued under every Republican president and revoked by every Democratic one, including sitting President Obama.⁶

Contrary to popular belief, the Mexico City Policy is not enacted or revoked by executive order, but by a presidential memorandum to the Secretary of State and the USAID Administrator.⁷

Constitutionality of the Defense of Marriage Act (Executive Branch Determination)

Romney Promised Reversal of Obama Policy.

Under Obama, the Justice Department has declined to defend the Defense of Marriage Act (DOMA), relinquishing the defense of several ongoing court cases to the Bipartisan Legal Advisory Committee (BLAG), controlled by Congressional House leadership.

A President Romney has promised to reaffirm the federal government's defense for and support of the law, an exercise of executive branch determination. On his campaign website, Romney says he will "not only appoint an Attorney General who will defend the Defense of Marriage Act—a bipartisan law passed by Congress and signed by President Clinton—but he will also champion a Federal Marriage Amendment to the Constitution defining marriage as between one man and one woman."⁸

It seems unlikely that Romney would order his Justice Department to take back the courtroom case from BLAG unless he can keep its star lawyer Paul D. Clement—perhaps by appointing him as Solicitor or Attorney General. A Romney administration certainly could, however, submit briefs supporting DOMA and request time during oral arguments, as the Obama Justice Department did during the *Fisher v. Texas* affirmative action case.

Deferred Action for Childhood Arrivals (Prosecutorial Discretion)

Romney Promised Reversal of Obama Policy.

The Obama administration's Deferred Action for Childhood Arrivals (DACA) Policy was announced in June 2012. While it is in fact an exercise of prosecutorial discretion in the form of a directive from the Director of the Department of Homeland Security (who is appointed by the President) rather than an executive order, it is a policy expected to be rescinded by a Romney administration.⁹ Under Obama's DACA policy, undocumented immigrants currently under 31 years of age who have been in the United States since before their 16th birthday and who either currently attend or have graduated from high school are eligible for 2 years of deferred deportation and work authorization.¹⁰

Though it is hard to nail down, it appears Romney's position is that if elected, the DACA program will end on his inauguration day, January 21, 2013. All those who have already received work authorization and deferred status will be able to keep it ("I'm not going to take something that they've purchased"), but no new authorizations will

be granted. It is unclear what will happen to those people who have applied by that date but not yet received a determination.¹¹ For this reason, advocates suspect that many potential DACA beneficiaries are waiting to see who wins the November 2012 election before outing themselves and their families as undocumented.¹²

Immigration Lawsuits (Executive Branch Determination)

Romney Promised Reversal of Obama Policy.

The Obama Justice Department either already has sued or is currently in the process of suing Arizona, Oklahoma, Missouri, Utah, Alabama, Georgia, South Carolina and Indiana over their recently enacted extreme immigration laws.¹³ During the primary debates, candidate Romney promised to “drop those lawsuits on day 1.”¹⁴ Whether to move forward with court cases is an issue decided via executive branch determination, meaning a President Romney would not need to issue an executive order to end the lawsuits, but could merely instruct his Justice Department drop the cases.

Conscience Clauses (Agency Rulemaking)

Romney Very Likely to Reverse Obama Policy.

One of George W. Bush’s “midnight regulations,” put in place at the very end of his second term, HHS Rule 88 prohibited any recipient of federal funds from discriminating against health care organizations, training programs, or applicants who refused to provide or undergo abortion training or services. Under the rule, no health care institution or individual employed by one could be forced to participate in or provide facilities for abortion or sterilization care if doing so conflicted with their moral or religious beliefs.¹⁵

Additionally, the rule stated that neither HHS nor federally-funded health service programs or research activities could require any individual to assist in or perform any service or activity that “would be contrary to his religious beliefs or moral convictions.” Nor could any such person be discriminated against or punished for having these beliefs or performing or refusing to perform any act or service contrary to them.¹⁶ Thus, Rule 88 could potentially have been used by health care providers to justify refusal of any health care service, including providing contraceptives or treating entire classes of people they felt lived lifestyles that conflicted with their moral or religious beliefs (such as people who are gay or who engage in sexual activity outside the bond of marriage).¹⁷

In 2008, the Obama administration proposed repealing the rule in its entirety, and in 2011 the final rule rescinded almost all of Rule 88’s substantive sections. The only remnant of Rule 88 currently in force is the complaint procedure run through the Office of Civil Rights.¹⁸ Of course, federal refusal laws enacted decades ago still allow health care personnel to refrain from performing or assisting in abortions.¹⁹

Romney is expected to re-instate Rule 88 (or another rule like it) if elected. He has referred to the conscience clause revocation as “an assault on religion unlike anything

we have ever seen”²⁰ and promised on his website to “protect the right of health care workers to follow their conscience in their work.”²¹

Focused Immigrant Deportation (Prosecutorial Discretion)

Romney Could Reverse Obama Policy.

Under Obama, USCIS has relied on prosecutorial discretion to refocus its deportation efforts (beyond DACA) on those undocumented immigrants who have criminal records and no strong family ties in the country. As a result, immigrants who apply for legal status and are rejected are no longer immediately placed in deportation.²² Perhaps even more groundbreaking, DHS has begun to recognize gay and lesbian relationships as the family ties they are. This exercise of prosecutorial discretion could easily be reversed under a Romney administration that will be hostile to relationship recognition for gay couples and may take a hard line on immigration. While Romney has promised immigration reform if elected, he has been vague on the specifics (other than advocating for self-deportation), so it is unclear how exactly he would order his DHS Director to exercise discretion.

Endnotes

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⁴ “Values: Marriage, Family, Life,” Romney for President. Accessed October 31, 2012. Available at: <http://www.mittromney.com/issues/values>.

⁵ Nedra Pickler and Steve Peoples, “Romney Vows Jobs as Obama Acknowledges Debate Loss,” Yahoo! News, October 10, 2012. Accessed October 31, 2012. Available at: <http://news.yahoo.com/romney-vows-jobs-obama-acknowledges-debate-loss-203404601--election.html>.

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⁹ Emily Arrowood, "Exercising Prosecutorial Discretion Is Different From Issuing An Executive Order," Media Matters for America, June 16, 2012. Accessed October 31, 2012. Available at: <http://mediamatters.org/research/2012/06/16/exercising-prosecutorial-discretion-is-differen/162970>.

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¹⁶ Ibid.

¹⁷ Julie Rovner, Interviewed by Michele Norris, "White House Revises Bush-Era 'Conscience Clause'," *All Things Considered*, NPR, February 18, 2011. Accessed October 31, 2012. Available at: <http://www.npr.org/2011/02/18/133875483/White-House-Revises-Conscience-Clause>.

¹⁸ Id.

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