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Florida v. HHS - Amicus Brief of Catholic Medical Association et al.

Catholic Medical Association

Nos. 11-11021 & 11067

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through Attorney General Pam Bondi, *et al.*,
Plaintiffs-Appellees / Cross-Appellants,
v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants / Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF *AMICI CURIAE* CATHOLIC MEDICAL ASSOCIATION, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, AND MEDICAL STUDENTS FOR LIFE OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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State of Florida, et al. v. U.S. Department of Health & Human Services, et al., Nos. 11-11021 & 11067

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, Catholic Medical Association (CMA), Christian Medical and Dental Association (CMDA), and Medical Students for Life of America (MedSFLA) as an unincorporated subdivision of Students for Life of America (collectively referred to as "Amici") certify that:

(1) None of the Amici have a parent corporation;

(2) None of the Amici issue stock; and

(3) Upon belief, the certificate contained in the brief filed in this case by counsel for the Appellee State Attorneys General and the National Federation of Independent Business on May 4, 2011 is complete with the exception of the following interested persons and parties (listed alphabetically):

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MAY 9, 2011

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STATEMENT OF THE ISSUE PRESENTED

Whether the Patient Protection and Affordable Care Act, by virtue of the lack of general applicability of its individual mandate, violates the Free Exercise Clause of the First Amendment by forcing some individuals to personally pay a separate abortion premium in violation of their sincerely held religious beliefs.

INTEREST OF AMICI CURIAE[1]

Amici curiae are three national organizations whose members include physicians, health care professionals and medical students with a profound interest in defending the sanctity of human life in their dual roles as both health care providers and consumers. *Amici* vigorously oppose abortion as contrary to traditional, historical and Judeo-Christian medical ethics, as well as to their sincerely held religious beliefs.

As professionals with a vocation to serve every member of the human family, *Amici* are sensitive to healthcare disparities and are supportive of a variety of public, private, and charitable efforts that address health care affordability and accessibility. However, *Amici* have a profound interest in opposing the Act because its imposition of the non-neutral individual mandate forces them in some

[1] Pursuant to Fed. R. App. P. 29, *Amici* certify that all parties have consented to the filing of this brief; no party or party's counsel authored this brief in whole or in part; and no person other than *Amici* contributed money intended to fund the brief's preparation or submission.

health plans to make separate personal payments for elective abortion in violation of their sincerely held religious beliefs and moral convictions. *Amici* include the following medical associations:

Catholic Medical Association (CMA) is a nonprofit national organization founded in 1932 to assist Catholic physicians in upholding the principles of their faith in the science and the practice of medicine and in witnessing to these principles within the medical profession, the Church and society at large. Comprised of over 1,500 members covering over 75 medical specialties, CMA helps to educate the medical profession and society at large about issues in medical ethics, including health care rights of conscience, through its annual conferences and quarterly journal, *The Linacre Quarterly;* supports Catholic hospitals in faithfully applying Catholic moral principles in health care delivery; and helps Catholic physicians to collaborate and support one another in their common goal of providing conscientious health care that respects the dignity of the human person.

Christian Medical and Dental Association (CMDA) is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. In addition to its physician members, it also has associate members from a number of allied health professions, including nurses and physician assistants. CMDA provides up-to-date information on the legislative, ethical and medical aspects of defending conscience in health care for its members

and other healthcare professionals, as well as for patients, institutions, and students in training. CMDA is opposed to the practice of abortion as contrary to Scripture, a respect for the sanctity of human life, and traditional, historical and Judeo-Christian medical ethics.

Medical Students for Life of America ("MedSFLA") is a nonprofit national organization of future medical professionals committed to sustainable patient healthcare improvement and ethical medicine. MedSFLA is an unincorporated subdivision of Students for Life of America, representing a combined 620 student groups in 48 states. The mission of MedSFLA is to highlight a rediscovery of the patient-doctor relationship with care for every patient – regardless of race, developmental stage, socioeconomic status, and special needs.

SUMMARY OF THE ARGUMENT

Amici urge affirmance of the district court ruling, and present an additional argument that demonstrates the unconstitutionality of the Patient Protection and Affordable Care Act[2] ("the Act"): its individual mandate, which is not generally applicable, imposes an "abortion premium mandate" that violates the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I, § 1.

The "individual mandate" found in Section 1501 of the Act provides that, beginning in 2014, Americans must either purchase federally-approved health insurance or pay a monetary penalty. Nestled within this "individual mandate" are provisions collectively referred to herein as the "abortion premium mandate," which, as addressed in Section A, offend *Amici's* most basic principles of morality, and substantially burden their free exercise of religion.

As addressed more fully in Section B of this brief, the Act sought to include plans that cover abortion, while attempting to segregate funds to avoid the appearance of federal funding of abortion. It achieved this under Section 1303 by mandating that the issuer of a federally subsidized plan that covers elective abortions "shall" obtain a separate and private payment from every enrollee,

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

without exception, to be used by the insurer solely for the payment of other people's elective abortions. Act, § 1303(b)(2)(B).

In conjunction with the forced purchase required by the individual mandate, Section 1303's abortion premium mandate directly encumbers the conscience and free exercise rights of millions of Americans by imposing an unconstitutional burden on them within the private insurance marketplace. Members of *Amici* medical associations and their similarly-situated patients are subject under the Act to being unwillingly enrolled by their employer in a plan that covers abortion; or alternatively, *Amici* have their choices impermissibly limited under the Act by being forced to choose between plans that respect their conscience versus other plans that may better meet their health needs or their choice of doctor network, but would require them to personally pay an abortion premium.

Although such government imposed burdens might arguably be permissible if imposed through a neutral and generally applicable law under the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), they are impermissible here because the Act as a whole—and the individual mandate in particular—are not generally applicable. As discussed in Section C, Section 1501 provides express statutory exceptions to the individual mandate for certain religious objections, but not for religious objections to abortion. The lack of

general applicability is further demonstrated by the hundreds of waivers to the individual mandate granted by the Secretary of the Department of Health and Human Services on a case by case basis. Because the Act and its individual mandate do not meet *Smith*'s neutral and general applicability standard, it is subject to strict scrutiny, a standard it cannot meet.

ARGUMENT

I. THE ACT AND ITS NON-NEUTRAL INDIVIDUAL MANDATE VIOLATE THE FREE EXERCISE CLAUSE BY IMPOSING AN "ABORTION PREMIUM MANDATE" WITHOUT REGARD TO RELIGIOUS OBJECTION

A. Our nation has a long and deeply-rooted history of respecting and protecting the conscience rights of individuals not to be forced into the practice or funding of elective abortion

As the Supreme Court has recognized, "the sensitive and emotional nature of the abortion controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." *Roe v. Wade*, 410 U.S. 113, 116 (1973). The Supreme Court's abortion jurisprudence is replete with the understanding that the practice of human abortion has "profound moral and spiritual implications," *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that "men and women

of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." *Id.*

Although legal, this Court has recognized that "reasonable people" will differ as to the morality of abortion, *id.*at 853, and "there are common and respectable reasons for opposing it." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Indeed, as recently as the 2000 *Carhart* decision, the Supreme Court acknowledged that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child," *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

In the wake of *Roe*, federal and state laws were quickly enacted to ensure that no provider or hospital should be forced to participate in abortions against their will. A full forty-seven states[3] have enacted laws to protect health care practitioners' right of conscience to some degree or another, many providing full exemptions to any health care practitioner who conscientiously declines to participate in abortion. See, e.g., Fl. Stat. Ann. § 390.0111(8) ("No person . . . who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of

[3] *See, e.g.*, Protection of Conscience Project, *States and Territories, available at* http://www.consciencelaws.org/laws/usa/law-usa-01.html (last visited May 7, 2011).

pregnancy.").[4] In many ways, the widespread agreement to protect provider conscience is unique in our history, and ranks the right of individual conscience in the abortion area as, in fact, fundamental.[5]

A similar history from *Roe* to the present arises on the question of whether individual taxpayers may be forced to contribute to abortion services with their tax dollars. Responding to the conscience objections of millions of Americans, Congress endeavored from 1976 onward to make clear with the annual passage of a budget rider known as the Hyde Amendment that while *Roe* had made abortion legal, federal funds collected from taxpayers would not be used for elective abortions.[6] The Supreme Court upheld the Hyde Amendment in *Harris v. McRae*,

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[4] For a broader discussion of the widespread adoption of such conscience provisions in the wake of *Roe v. Wade*, see Mark L. Rienzi, *The Constitutional Right to Refuse*: *Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 39 (forthcoming October 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788 (last visited April 29, 2011).

[5] *See* Rienzi at 10-11, *supra* note 4 ("In light of the long history of legal and ethical prohibitions on abortion in many contexts until the 1970s, and the repeated, nearly unanimous, and nearly universal legislative actions to protect objectors after *Roe*, this Part concludes that a right to refuse to participate in abortions satisfies the Court's traditional analysis for protection under the Fourteenth Amendment.")

[6] Consistent with a legal analysis of the Act by the Office of the General Counsel for the U.S. Conference of Catholic Bishops, the phrase "elective abortion" is used in this brief to refer to abortions that have long been ineligible for federal funding in major health programs – specifically, all abortions except for cases of rape,

448 U.S. 297, 325 (1980), recognizing that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[7]

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incest, or danger to the life of the mother. The term is used here not as an expression of medical or moral judgment, but rather as shorthand for longstanding federal policy. For a cogent yet comprehensive analysis of how the Act impacts abortion funding and conscience issues beyond the "abortion premium mandate" addressed in this brief, *see* Anthony Picarello and Michael Moses, *Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection,* United States Conference of Catholic Bishops (March 25, 2010), *available at* http://www.usccb.org/healthcare/03-25-10Memo-re-Executive-Order-Final.pdf (last visited May 7, 2011)("USCCB Memo").

[7] The Court has since eschewed this inaccurate "potential life" terminology and instead used terms such as "ending fetal life," and recognizing the state's interest in "protecting the health of the woman and the life of the fetus." *Gonazles v. Carhart,* 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. 833, 846 (1992),. In fact, the *Gonzales* majority was unequivocal in recognizing that abortion destroys a separate human life when it stated: "It is, however, precisely this lack of information concerning the way in which the *fetus will be killed* that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed." *Id.* at 159 (emphasis added).

This is supported by modern developmental biology establishing that at every phase of human embryonic and fetal development, the unborn child is not a "potential life," but rather an individual human being. *See, e.g.*, William Larsen, Human Embryology 4 (3rd ed. 2001)(explaining that male and female sex cells "unite at fertilization to initiate the embryonic development of a *new individual*.")(emphasis added); *see also* Maureen L. Condic, Ph.D., *When Does Human Life Begin? A Scientific Perspective*, Westchester Institute White Paper (October 2008), available at http://www.westchesterinstitute.net/images/wi_whitepaper_life_print.pdf (the human zygote (single cell phase) has "all the properties of a fully complete (albeit immature) human organism; it is 'an individual constituted to carry on the

To be clear, *Amici* emphasize that this brief does not address the hotly debated issue of whether the Act enables direct federal funding of elective abortion due to the omission of a Hyde-like amendment.[8] Nor does it address future threats to the conscience protections of healthcare providers due to the omission of longstanding conscience protections that were not applied to the Act's separate funding stream.[9] Despite the important and valid concerns surrounding federal funding of abortion or threats to provider conscience, the speculative nature of how the Act might or might not be implemented in the future makes these issues not yet ripe for judicial review. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

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activities of life by means of organs separate in function but mutually dependent: a living being.'"(citing the Medical Dictionary of the National Library of Medicine, available at http://www.nlm.nih.gov/medlineplus/mplusdictionary.html).

[8] *See* USCCB Memo, *supra*, note 6.

[9] *Id;* S*ee also* Michael A. Fragoso, Note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 101, 114 (forthcoming July 2011) ("As the PPACA contains its own revenue stream (not relying on general omnibus Congressional appropriations), the Hyde-Weldon and Church Amendments would not apply to it. Further, the Act was passed without a comprehensive conscience rider—although Senator Tom Coburn (an obstetrician) of Oklahoma proposed one. The result is that the Act contains the potential to contravene established physicians' conscience protections in the area of reproductive health in its regulatory interpretation."); *see also,* Helen Alvare, *How the New Healthcare Law Endangers Conscience*, June 29, 2010, *available at* http://www.thepublicdiscourse.com/2010/06/1402 (last visited April 29, 2011).

Rather, this brief focuses narrowly on the concrete provisions of the Act's "abortion premium mandate" that substantially burden the conscience and free exercise rights of millions of Americans.

B. The "Abortion Premium Mandate" violates conscience and free exercise rights by forcing enrollees in certain health plans to personally pay a premium to a private insurer dedicated to covering other people's elective abortions.

The "individual mandate" that compels Americans by threat of penalty to purchase only federally-approved health insurance plans results in the imposition of another unconstitutional mandate: the "abortion premium mandate."

Under Section 1303 of the Act, all individuals who, even unwittingly, are enrolled in a plan – either on their own or by their employer – that happens to include elective abortion coverage must pay a separate premium from their own pocket to the insurer's actuarial fund designated solely to pay for other people's elective abortions.

Section 1303(b)(1)(B)(i) of the Act refers to elective abortions as "Abortions For Which Public Funding is Prohibited" ("elective abortions").[10] The Act then provides that the issuer "shall estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for including coverage under a qualified health plan of the services described in paragraph (1)(B)(i) [i.e., elective

[10] See USCCB Memo, *supra* note 6, addressing "elective abortions" as any abortion other than in cases of rape, incest or danger to the life of the mother.

abortions]." Act, §1303(b)(1)(D)(i). Section 1303(b)(1)(D)(ii) mandates that the abortion premium mandate shall not be estimated "at less than $1 per enrollee, per month."

The enrollee must separately pay the abortion premium from his or her own private funds by virtue of the provision of the Act stating that in plans covering elective abortion, "the issuer of the plan shall not use any amount attributable to" either tax credits or "cost-sharing reductions" for "the purposes of paying for [elective abortion] services." Act, § 1303(b)(2)(A).

The abortion premium mandate applies without exception for Americans who have conscience objections to abortion, and even without the ability for enrollees to decline abortion coverage for any reason, even on the basis that the enrollee is a man who would never need reimbursement for an abortion. Act, § 1303 (b)(2)(B)(i) (abortion premium "shall" be collected "without regard to the enrollee's age, sex, or family status.").

Ironically, the offending language arose out of an attempt by Senator Ben Nelson, a pro-life Democrat, to find language that would "make it clear that [the healthcare bill] does not fund abortion with government money."[11] After first

[11] *Abortion Haggling Looms Over Health Care Debate in Senate*, (November 10, 2009), *available at* http://www.foxnews.com/politics/2009/11/10/abortion-haggling-looms-health-care-debate-senate#ixzz1LF6XshKX (last visited May 2, 2011).

threatening a filibuster unless the Senate version included the pro-life Stupak amendment that mirrored the Hyde Amendment, Senator Nelson later agreed to accept certain negotiated language. Now codified at Section 1303 of the Act, the "Nelson Compromise" allows the federal government to break with former federal policy[12] by allowing Americans to use federal tax credits and subsidies to buy plans that include abortion coverage, provided that their federal subsidies are not applied by insurance companies toward the abortion coverage in such plans. As explained above, this was achieved by mandating enrollees in such plans to make a separate payment from their own private funds to an insurance account designated solely for the payment of other people's elective abortions. [13] The "abortion

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[12] The Act is not in accord with the consistent federal policy since 1996. As explained by the Heritage Foundation before passage of the Act:

> The FEHBP (Federal Employees Health Benefits Plan) provides insurance for millions of federal workers, including Members of Congress. Administered through the federal Office of Personnel Management, FEHBP lets workers choose from a variety of different health insurance plans, but since1996 the law has required all of these plans to exclude abortion coverage, excepting only rape, incest and the life of the mother. And it's not just FEHBP. Military insurance through TRICARE does not cover abortion unless the mother's life is at risk. Nor does the Indian Health Service.

Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (November 11, 2009), *available at* http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/ (last visited May 5, 2011).

[13] Another part of the compromise was the inclusion of "State Opt-Out of

premium mandate," although not referred to as such, was accurately described by a court in the Western District of Virginia:

> In plans that do provide non-excepted [elective] abortion[14] coverage, a separate payment for non-excepted [elective] abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted [elective] abortion services. Act § 1303(b)(2)(B), (C).
>
> Insurers are prohibited from using funds attributable to premium tax credits or [federal] cost-sharing reductions … to pay for non-excepted [elective] abortion services. Act § 1303(b)(2)(A).

Liberty University v. Geithner, 2010 WL 4860299, at *24 (W.D. Va. Nov. 30, 2010).[15]

Abortion" provision. Under Section 1303(a), a "State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State," but a State may later "repeal" such law "and provide for the offering of [abortion] services through the Exchange." As of the filing of this brief, only eight states had enacted "opt-out" laws: Arizona, Idaho, Indiana, Louisiana, Mississippi, Missouri, Tennessee, Utah, Virginia. *See* NCSL, *Health Reform and Abortion Coverage in the Insurance Exchanges* (April 2011), *available at* http://www.ncsl.org/default.aspx?tabid=21099 (last visited May 5, 2011).

[14] The court is using the phrase "non-excepted" to describe elective abortions (all abortions other than those in cases of rape, incest or life of the mother). Act, §1303(b)(1)(B); *see also* USCCB Memo, *supra*, note 6.

[15] The federal district court in *Liberty University v. Geithner* focused on the provisions that prohibit federal subsidies from being applied to abortion coverage, missing the point of plaintiffs' argument about the unconstitutional nature of compelling individuals to personally pay into a segregated private abortion fund against their consciences and sincerely held religious beliefs.

Thus while Section 1303 cleverly (though superficially) avoids the direct use of taxpayer funds to pay for elective abortions, it does so by forcing private individuals to fund them directly from their own pockets, and without regard to conscientious objection to the direct and personal funding of abortion.

To make matters worse, the Act does not require clear and sufficient advance notice of which plans in the Exchange contain coverage for elective abortion. In fact, the Act seems to provide to the contrary, such that Americans could easily be forced by the individual mandate into the unwitting purchase of an abortion plan that causes them to personally pay for elective abortions, against their sincerely held religious beliefs:

> (3) RULES RELATING TO NOTICE.—
> (A) NOTICE.—A qualified health plan that provides for coverage of the services described in paragraph (1)(B)(i) [elective abortion] shall provide a notice to enrollees, **only** as part of the summary of benefits and coverage explanation, **at the time of enrollment**, of such coverage.
> (B) RULES RELATING TO PAYMENTS.—The notice described in subparagraph (A), any advertising used by the issuer with respect to the plan, any information provided by the Exchange, and any other information specified by the Secretary shall provide information **only with respect to the total amount of the combined payments** for services described in paragraph (1)(B)(i) [elective abortion] and other services covered by the plan.

Act, § 1303(b)(3) (emphasis added).

The Act and its individual mandate thus forces *Amici* and citizens with similar religious beliefs and moral convictions into the untenable position of having limited health insurance choices. In order to have the same choices as other citizens, the members of the *Amici* medical organizations must be willing to violate their consciences by entering into private contracts – possibly unwittingly or unwillingly – with private insurers in which they must actively cooperate with their personal funds in the payment of elective abortions.

C. The Act and the Individual Mandate are invalid because they are not generally applicable and fail strict scrutiny.

For many of the millions of Americans who oppose abortion, being forced by the government to pay for abortions – not with tax dollars, but directly out of their own pockets – will violate their deeply held religious beliefs or moral convictions. As the Supreme Court has explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 718 (1981).

Accordingly, the individual mandate combined with the abortion insurance mandate imposes a substantial burden on the Free Exercise rights of millions of Americans.

Under the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the government is generally free to impose substantial burdens on religion, so long as those burdens are imposed by neutral and generally applicable law. Here, however, the burden is imposed by a law that does not meet *Smith's* neutral and generally applicable standard. Accordingly, the individual mandate that imposes the abortion premium mandate is subject to strict scrutiny under the Free Exercise clause, a standard it cannot meet.

First, as has been well-documented in the media, the Act is rife with exceptions and the Department of Health and Human Services has granted hundreds of waivers from its provisions on a case by case basis.[16] By definition, the existence of such a system of waivers renders the law not generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993)("As we noted in *Smith,* in circumstances in which individualized

[16]*See, e.g., Making Exceptions in Obama's Health Care Act Draws Kudos, and Criticism*, Robert Pear, *The New York Times*, March 20, 2011 at A21 (noting waivers "for more than 1,000 health plans covering 2.6 million people. . . .[E]xceptions like these have become increasingly common. They provide wiggle room in a law originally thought to be strict and demanding. Maine has just won a three-year reprieve from a provision of the law . . .").

exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.' Respondent's application of the ordinance's test of necessity devalues religious reasons . . . by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.").

Second, the individual mandate itself is subject to several exceptions allowing individuals to opt-out for various reasons—including some apparently government-approved *religious* reasons—but not for religious objection to personally funding abortion. For example, section 1501 of the Act exempts from the individual mandate those who are members of a "recognized religious sect or division" with "established tenets or teachings" barring the "acceptance of benefits of any private or public insurance." Section 1501 also exempts other groups, including those participating in "health care sharing ministries," native Americans, and the poor. The existence of these exceptions demonstrates that the government does not actually need to force every individual to purchase healthcare insurance. *See Lukumi*, 508 U.S. at 547 (no compelling interest where government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort").

In light of these waivers and exemptions, it simply cannot be said that the Act is a generally applicable law. Simply put, the law does not apply generally at all. Accordingly, the Act is subject to strict scrutiny.

Here, the Act itself shows that there is no compelling interest in forcing all Americans to purchase health insurance. Both the statutory exceptions and the hundreds of waivers confirm that the individual mandate clearly does *not* need to be imposed in every case, and that the government judges some reasons (though apparently not conscientious objection to abortion) to be sufficiently important to trump its interests. *See, e.g., Lukumi* 508 U.S. at 546 (strict scrutiny failed where the "proffered objectives are not pursued with respect to analogous non-religious conduct"). As such, the Act's individual mandate that imposes an abortion premium mandate is invalid under the Free Exercise Clause of the First Amendment.

CONCLUSION

For these reasons, the final judgment of the United States District Court for the Northern District of Florida should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face and volume limitations set forth in Rule 32(a)(7(C) of the Federal Rules of Appellate Procedure. The relevant body of the brief contains 4367 words. I relied on my word processor, Microsoft Word: Mac 2011, to obtain the count.

DATED: May 9, 2011

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Dorinda C. Bordlee

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2011, I caused the requisite number of copies of the foregoing brief to be electronically filed with the Clerk of the Court by the appellate CM/ECF system, and for paper copies to be delivered by no later than May 11, 2011 to the Court and to each of the following by overnight courier service:

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