No. 11-398

In The Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CATHOLIC MEDICAL ASSOCIATION, PHYSICIANS FOR LIFE, NATIONAL ASSOCIATION OF PRO LIFE NURSES, AND MEDICAL STUDENTS FOR LIFE OF AMERICA IN SUPPORT OF RESPONDENTS AND AFFIRMANCE ON THE INDIVIDUAL MANDATE ISSUE

(MINIMUM COVERAGE PROVISION)

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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 effectively forcing millions of individuals to personally pay a separate abortion premium in violation of their sincerely held religious beliefs.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are six national organizations whose members include physicians and other healthcare professionals who have a profound interest in defending the sanctity of human life in their dual roles as both healthcare providers and consumers.

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 healthcare affordability and accessibility. However, *Amici* have a profound interest in opposing the Act because its imposition of the non-generally applicable

[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all *amicus* briefs. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

individual mandate forces them in some health plans to make separate personal payments for elective abortion in violation of their sincerely held moral convictions. *Amici* include the following medical associations:

American College of Pediatricians ("College") is a national scientific organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. Formed in 2002, the College is committed to fulfilling its mission by producing sound policy, based upon the best available research, to assist parents, and to influence society in the endeavor of childrearing. The College currently has members in 47 states, and in four countries outside of the United States. Of particular importance to the College is the sanctity of human life from conception to natural death. As a scientific organization, the College promotes a society where all children, from the moment of their conception, are valued unselfishly.

Christian Medical & Dental Associations ("CMDA") is a non-profit 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.

American Association of Pro-life Obstetricians & Gynecologists ("AAPLOG") is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. The purpose of AAPLOG is to reaffirm the unique value and dignity of individual human life in all stages of growth and development from fertilization onward. AAPLOG views the physician's role as a caregiver, responsible, as far as possible, for the well-being of both the mother and her unborn child. AAPLOG is concerned about the "universal access to abortion" and the "abortion as a fundamental human right" pressures that are being brought to bear through the Act.

Catholic Medical Association ("CMA") is a non-profit 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 healthcare rights of conscience, through its annual conferences and quarterly

journal, *The Linacre Quarterly.* CMA 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.

Physicians for Life ("PFL") is a national non-profit medical organization that exists to draw attention to the issues of abortion, teen pregnancy, and sexually-transmitted diseases. PFL encourages physicians to educate their patients not only regarding the innate value of human life at all stages of development, but also on the physical and psychological risks inherent in abortion.

National Association of Pro Life Nurses ("NAPN") is a national not-for-profit nurses' organization with members in every state. NAPN unites nurses who seek excellence in nurturing for all, including the unborn, newborn, disabled, mentally and/or physically ill, the aged, and the dying. As a professional organization, NAPN seeks to establish and protect ethical values of the nursing profession.

Medical Students for Life of America ("MedSFLA") is a non-profit national organization of future medical professionals committed to sustainable patient health care 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 adopt the arguments of respondents, and present another argument that independently demonstrates the unconstitutionality of the Patient Protection and Affordable Care Act[2] ("the Act"): Its individual mandate, which is not generally applicable, effectively imposes an "abortion premium mandate" that violates the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I, § 1.

Like a Russian doll, the individual mandate has nestled within it a hidden, but equally unconstitutional, scheme that effectively imposes an "abortion premium mandate" that violates the free exercise rights of millions of Americans who have religious objections to abortion. 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.

Section I(A) of this brief sets forth and decodes the provisions collectively referred to herein as the

[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).

"abortion premium mandate." Found in Section 1303 of the Act, the infringing provisions impose inescapable requirements upon millions of Americans who will be, even unwittingly, enrolled in employer or individual health plans that happen to include elective abortion coverage.

Such enrollees are compelled by the Act to pay a separate premium *from their own pocket* to the insurer's actuarial fund designated *solely* for the purpose of paying for other people's elective abortions. As explained below, the Act denies enrollees the ability to decline abortion coverage based on religious or moral objection.

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

Section I(B) of this brief explains that the Free Exercise Clause is implicated because the Act's government-imposed burden on *Amici*'s free exercise rights is far from neutral and generally applicable as required in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Section 1501 of the Act 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.

Section I(C) of this brief outlines our nation's deeply-rooted history of respecting and protecting the conscience rights of individuals to avoid being forced into the practice or *funding* of elective abortion. *Amici* emphasize how these provisions strike at and undermine their most basic principles of morality and religion that call them to respect and protect vulnerable unborn children and to avoid collaborating in the moral evil of directly paying for elective abortion.

It should be noted that the Act's violation of the Free Exercise Clause addressed in this brief arises from core provisions in the body of the Act, and are distinct from and prior to the recent regulatory decision issued by HHS to mandate virtually all employers to provide insurance coverage for sterilizations,

contraceptives and abortion-inducing drugs, without a meaningful religious employer exemption. Even without the most recent HHS developments, the abortion premium mandate provisions found in the original Act are sufficient alone to substantially burden *Amici*'s free exercise of religion.

Finally, Section II sets forth the basics of the Founders' concept of a limited government designed to protect individual liberty, which suffers when Congress oversteps its enumerated powers. This view of federalism is completely disregarded by the Act's individual mandate and abortion premium mandate, to the detriment of *Amici*'s first and foundational individual liberty, namely, religious liberty.

ARGUMENT

I. THE ACT AND ITS INDIVIDUAL MANDATE VIOLATE THE FREE EXERCISE CLAUSE BY EFFECTIVELY IMPOSING AN "ABORTION PREMIUM MANDATE" ON MILLIONS OF AMERICANS WITHOUT REGARD TO RELIGIOUS OBJECTION

The Eleventh Circuit below properly ruled that the individual mandate of the Patient Protection and

Affordable Care Act[3] ("the Act") is "an unprecedented exercise of congressional power." *Florida v. United States Dep't of Health and Human Servs.*, 648 F.3d 1235, 1311 (11th Cir. 2011). *Amici* herein adopt the arguments of respondents, and present another argument that independently demonstrates the unconstitutionality of the entire Act; namely, that even if, for the sake of argument, this Court were to find that the individual mandate is within the limits of the Commerce Clause, the Act's "abortion premium mandate" violates the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I, § 1.

A. The Act effectively imposes an "Abortion Premium Mandate" that compels enrollees in certain health plans to pay a separate abortion premium from their own pocket, without the ability to decline abortion coverage based on religious or moral objection

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 that will impact millions of Americans: the "abortion premium mandate."

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[3] 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).

The drafters of the Act sought to include, for the first time in our nation's history, health plans that cover elective abortion within the government subsidized insurance exchanges. Due to the public uproar, the drafters devised a scheme to avoid the direct *federal* funding of abortion. This goal of avoiding the use of tax-payer subsidies for abortion coverage was unfortunately achieved by a means that violates the First Amendment; namely, by compelling the tax-payer to *personally* pay a separate abortion premium. The unconstitutional scheme can be found in Section 1303, which provides that the issuer of a federally subsidized plan that covers elective abortions "shall" obtain a separate and private payment from every enrollee, without exception, to be used by the insurer solely for the payment of other people's elective abortions. Act, § 1303(b)(2)(B).

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 are compelled by the Act to pay a separate premium from their own pocket to the insurer's actuarial fund designated solely for the purpose of paying for other people's elective abortions. As explained below, the Act denies enrollees the ability to decline abortion coverage based on religious or moral objection.

Section 1303(b)(1)(B)(i) of the Act refers to elective abortions as "Abortions For Which Public

Funding is Prohibited" ("elective abortions").[4] 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 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 Act's provision 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).

Once some Americans find themselves, for whatever reason, in plans with abortion coverage, the Act denies such enrollees the ability to decline payment for such coverage. This is evidenced by Section 1303(b)(2)(B)(i), which provides that the abortion premium "shall" be collected "without regard to the enrollee's age, sex, or family status." This mandate violates the Free Exercise Clause because the Act lacks an exception for enrollees with religious

[4] *See* USCCB Memo, *infra*, note 17, addressing "elective abortions" as any abortion other than in cases of rape, incest or danger to the life of the mother.

objections to abortion to decline personal payment into the insurer's abortion fund.[5]

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."[6] After first 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[7] by

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[5] The only religious exemption found in the entire Act is in Section 1501, which exempts groups such as the Amish who have religious objection to insurance as a whole. Section 1501 of the Act provides that the individual mandate does not apply to members of a "recognized religious sect or division" with "established tenets or teachings" that bar the "acceptance of benefits of any private or public insurance." By favoring the religious liberty of one group, but disregarding the religious objection to abortion held by millions of Americans, the Act shows itself to fail the "generally applicable" test required by this Court, as discussed in Part I(B) of this brief.

[6] *Abortion Haggling Looms Over Health Care Debate in Senate* (Nov. 10, 2009), *available at* http://www.foxnews.com/politics/2009/11/10/abortion-haggling-looms-health-care-debate-senate#ixzz1LF6XshKX (last visited Feb. 6, 2012).

[7] 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

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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 compelling 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.[8] The "abortion

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> 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 since 1996 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 (Nov. 11, 2009), *available at* http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/ (last visited Feb. 6, 2012).

[8] Another part of the compromise was the inclusion of a "State Opt-Out of 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 November 2011, only 13 states had enacted "opt-out" laws: Arizona, Florida, Idaho, Indiana, Kansas (in litigation), Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, Tennessee, Utah, and Virginia. *See* National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges* (Nov. 2011),

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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[9] 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 Univ. v. Geithner, 753 F. Supp. 2d 611, 643 (W.D. Va. 2010).[10]

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available at http://www.ncsl.org/default.aspx?tabid=21099 (last visited Feb. 6, 2012).

[9] The court used 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, *infra*, note 17.

[10] 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

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Thus, while Section 1303 cleverly (though superficially) avoids the direct use of tax-payer funds to pay for elective abortions, it in fact does so by forcing private individuals to fund them directly *from their own pockets*, 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

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fund against their consciences and sincerely held religious beliefs.

> 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). Because "enrollment" occurs after a person has already paid for the plan, that means he or she is left in the dark regarding the requirement to pay an itemized abortion premium until payment for enrollment has already been made.

An individual's free exercise of religion should not depend on the vagaries of an insurance exchange market imposed and manipulated by the Act's individual mandate that put them in this position in the first place. The Act and its individual mandate subject *Amici* and Americans with similar moral convictions or religious beliefs into the untenable position of having limited health insurance choices. First, the government forces *Amici* into the market – and then the government limits *Amici*'s options by refusing to honor and protect their rights of conscience and free exercise. In order to have the same healthcare 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.[11]

B. The Act and its Individual Mandate are invalid under the Free Exercise Clause because the provisions are not generally applicable and fail strict scrutiny

For the many millions of Americans who oppose the practice of elective abortion, being forced by the government to *pay* for it – not with tax dollars, but *directly out of their own pockets* – will violate their deeply held religious beliefs and moral convictions. As this 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

[11] It is no cure to the constitutional defect to argue that someone could theoretically choose the abortion-free insurance plan required by the Nelson Compromise discussed above. First, many individuals are provided insurance by their employer and have no say as to what plan is available; they should not have to forgo employee benefits to pay more money in the individual market to protect their conscience from the Act's requirement of private abortion payments. Second, there is no guarantee that an abortion-free plan would have the required coverages or physicians in the person's preferred network. An individual should not be forced by the Act to violate her religious beliefs in order to have access to reasonable choices regarding doctor network or insurance coverage.

> 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 Act's abortion premium mandate imposes a substantial burden on the Free Exercise rights of millions of Americans.[12]

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[12] Not surprisingly, Congress' act of overreaching via the challenged Act to impose a coast-to-coast one-size-fits-all mandatory insurance regime has subsequently infringed religious liberties in other severe ways. In particular, the recent regulatory decision by HHS to force virtually all employers to provide insurance coverage for contraceptives, sterilizations, and abortion-inducing drugs will force many religious individuals and organizations into a choice to either violate their religion or pay exorbitant penalties that could put them out of business. *See, e.g.*, *Belmont Abbey College v. Sebelius*, 1:11-cv-01989-JEB (D. D.C.); *Colorado Christian Univ. v. Sebelius*, 1:11-cv-03350-CMA-BNB (D. Colo.); *EWTN v. Sebelius*, 2:12-cv-00501-SLB (N.D. Ala., So. Div.).

Under the Interim Final Rule on Preventive Services, 76 Fed. Reg. 46621 (Aug. 3, 2011) (finalized Feb. 10, 2012), HHS has provided a grossly inadequate religious employer exemption that would not cover most religious organizations. Nor would it cover *any* individuals morally or religiously opposed to these practices. This is because under the Interim Rule, a "religious employer" is exempt only if, *inter alia,* "it primarily serves persons who share [the organization's religious] tenets," *id.,* a requirement that itself is antithetical to the Christian call to serve all members of the human family regardless of their faith. Specifically, several *Amici* are organizations that ascribe to

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Under this Court's decision in *Employment Div. 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 replete with exceptions, and the Department of Health and Human Services has granted hundreds of waivers from its provisions on a case-by-case basis. *See, e.g.,* Robert Pear, *Making Exceptions in Obama's Health Care Act Draws Kudos, and Criticism*, THE NEW YORK TIMES, Mar. 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

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religious tenets and employ persons in their mission to serve people of all faiths or no faith; yet they are left completely unprotected.

HHS has not explained the basis for this extremely cramped view of religious liberty. But regardless of HHS's reasons, it was never supposed to have the power to put religious objectors in this position in the first place because the Founders wisely denied Congress the power to pass onerously invasive laws such as the challenged Act. *See* Section II, *infra*.

strict and demanding. Maine has just won a three-year reprieve from a provision of the law. . . .").

By definition, the existence of such a system of waivers renders the law not generally applicable. As this Court said in *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 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 moral or 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., id*. 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.[13]

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[13] For similar reasons, even if the Act were found "neutral and generally applicable," it would be invalid under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4,

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C. 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 this 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). This 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, this 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

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because it is not the least restrictive means of serving a compelling government interest. *Id*. at § 2000bb-1(b)(1) & (2).

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[14] have enacted laws to protect healthcare practitioners' right of conscience to some degree or another, many providing full exemptions to any health 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 pregnancy.").[15] In many ways, the widespread agreement to protect provider conscience is unique in our history, and it ranks the right of individual conscience in the abortion area as, in fact, fundamental.[16]

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[14] *See, e.g.*, Protection of Conscience Project, *States and Territories, available at* http://www.consciencelaws.org/laws/usa/law-usa-01.html (last visited Feb. 6, 2012).

[15] 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 issue), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788 (last visited Feb. 6, 2012).

[16] *See id.* at 10-11 ("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

(Continued on following page)

A similar history from *Roe* to the present arises on the question of whether individual tax-payers 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 tax-payers would not be used for elective abortions.[17] This Court upheld the Hyde Amendment in *Harris v. McRae*, 448 U.S. 297, 325 (1980), recognizing that "[a]bortion is inherently

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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.")

[17] 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, 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 (Mar. 25, 2010), *available at* http://www.usccb.org/about/general-counsel/upload/Healthcare-EO-Memo.pdf (last visited Feb. 6, 2012) ("USCCB Memo").

different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[18]

To be clear, *Amici* emphasize that this brief does not address the hotly debated issue of whether the Act enabled direct federal funding of elective abortion

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[18] This 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." *Gonzales v. Carhart,* 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. at 846). 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 (Oct. 2008), *available at* http://www.westchesterinstitute.net/resources/white-papers/351-white-paper (last visited Feb. 6, 2012) (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 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)).

due to the omission of a Hyde-like amendment.[19] 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, even beyond the current threats of the HHS abortifacient mandate discussed *supra* in note 12.[20]

Rather, *Amici* have focused narrowly on the concrete provisions of the Act's "abortion premium mandate" that directly violate the conscience and free exercise rights of millions of Americans.

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[19] *See* USCCB Memo, *supra*, note 17.

[20] *Id.*; *see 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 (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 theNew Healthcare Law Endangers Conscience* (June 29, 2010), *available at* http://www.thepublicdiscourse.com/2010/06/1402 (last visited Feb. 6, 2012).

II. THE FOUNDERS' PROTECTION OF INDIVIDUAL LIBERTY, INCLUDING RELIGIOUS LIBERTY, IS DIRECTLY UNDERMINED BY THE ACT'S TRANSGRESSION OF THE CONSTITUTIONAL LIMITS ON CONGRESSIONAL POWER

The analysis of Congress' First Amendment overreach regarding the Act's abortion premium mandate, as demonstrated in the sections above, finds its grounding in the traditional and recently affirmed understanding of federalism constructed by the Founders to protect individual liberty. Allowing the Act's threat to religious liberty – our nation's first freedom – to stand would fly in the face of the very system of limited Government established by our nation's Founders.

Our nation was founded on the principle that the best way to protect individual liberty was to create a government with limited and enumerated powers. When Congress transgresses these Constitutional limits on its powers, liberty is at risk – especially religious liberty.

When the Founders met in Philadelphia in 1787 to construct a better government, they were performing a task set forth for them in the Declaration of Independence. The Declaration explains that "Governments are instituted among Men" for the purpose of securing their rights. When a form of government fails in this regard, the Declaration proclaims the right of the people to "institute new Government, *laying its foundation on such principles and organizing its*

powers in such form, as to them shall seem most likely to effect their Safety and Happiness." DECLARATION OF INDEPENDENCE (emphasis added).

The Founders believed that they had created a government that would not endanger individual liberty because they had "la[id] its foundation on such principles" and "organiz[ed] its powers in such form" as to create a limited government, with enumerated powers. The architects of the Constitution were so convinced that liberty would be protected in this manner that they initially believed a Bill of Rights was not even necessary. *See, e.g.,* Alexander Hamilton, *The Federalist* No. 84 ("The truth is, after all the declamations we have heard, that the Constitution is itself, in every practical sense, and to every useful purpose, a Bill of Rights."). Instead, they believed that the careful limitations they had placed on the powers of the new national government would provide the best protection for liberty.

This Court has frequently recognized the fact that the Constitution's careful limitations on government power exist to protect liberty. For example, as Justice Kennedy explained in *Clinton v. City of New York*,

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used principles of separation of powers

> and federalism to secure liberty in the fundamental political sense of the term. . . .

524 U.S. 417, 450 (1998) (Kennedy, J., concurring).[21]

This Court recently and unanimously reaffirmed the critical role these restraints play in protecting liberty in *Bond v. United States*:

> *Federalism secures the freedom of the individual*. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . . [T]he individual liberty secured by federalism is not simply derivative of the rights of the States.
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.*

131 S.Ct. 2355, 2364 (2011) (emphasis added).

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[21] *See also I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, *we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution*.") (emphasis added).

These principles are directly at stake in this case, as Congress' overreaching has threatened individual liberty. This overreaching threatens to give "one government complete jurisdiction over all the concerns of public life" and therefore exposes "the individual [to] arbitrary power." This threat to liberty is particularly acute in the area of religious liberty.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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