

Record No. 10-2347

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G.
WADDELL; JOANNE V. MERRILL,

Plaintiffs-Appellants

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in
his official capacity; KATHLEEN SEBELIUS, Secretary of the United States
Department of Health and Human Services, in her official capacity; HILDA L.
SOLIS, Secretary of the United States Department of Labor in her official
capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his
official capacity,

Defendants-Appellees,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

BRIEF AMICUS CURIAE OF PROJECT LIBERTY
supporting the Appellants and urging reversal

Stephen B. Presser
Raoul Berger Professor of Legal
History, Northwestern University
School of Law;
Professor of Business Law, Kellogg
School of Management & Member of
Faculty, Department of History,
Northwestern University
357 E. Chicago Ave.
Chicago, IL 60611

Kathleen Cassidy Goodman
Law Office of Kathleen Cassidy
Goodman
12274 Bandera Road, Ste. 228
Helotes, TX 78023

Steven W. Fitschen
Counsel of Record
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

Allan E. Parker
R. Clayton Trotter
The Justice Foundation
7210 Louis Pasteur Dr., Ste. 200
San Antonio, TX 78229

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Pursuant to Fed. R. Civ. P. 26.1 and Local Rule 26.1, *Amicus Curiae*, Project Liberty, makes the following disclosure:

1. Project Liberty is NOT a publicly held corporation or other publicly held entity.
2. Project Liberty does NOT have any parent corporations.
3. Project Liberty does NOT have stock that is owned by a publicly held corporation or other publicly held entity.
4. There is NOT another publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.
5. Project Liberty is NOT a trade association.
6. This case does NOT arise out of a bankruptcy proceeding.

These disclosures were also made and served on the Appellees on March 6, 2013, as part of this Brief.

/s/ Steven W. Fitschen

Steven W. Fitschen

Attorney for *Amicus Curiae*, Project Liberty

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INTEREST OF *AMICUS CURIAE*

Project Liberty is comprised of 80 individual United States citizens named in Appendix A who have joined together as Project Liberty. (This Brief will henceforth use the plural, “*Amici*,” to reflect the individual members of the Project.) These members of Project Liberty believe that the Patient Protection and Affordable Care Act (hereinafter “the Act”)¹ unconstitutionally compels them to fund abortion and does not provide adequate conscience protection for those who oppose abortion. The individual members of Project Liberty are men and women from all walks of life, including many post-abortive women who now regret their past choices and have vowed to never again assist in any way with abortion. Project Liberty was created specifically to allow these men and women to provide their insight as an aid to judicial determination of the constitutionality of the Act. In particular, the *Amici* address the problems with the so-called individual mandate.

The following are representative statements from *Amici* that demonstrate the deep-seated interests and religious convictions of *Amici*. *Amici* argue that their religious liberty would be violated by being forced to pay for abortions. When asked why they wanted to join this Brief and how they are hurt by the Act, they

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

stated the following:

◆ Statement of JoAnn Fleming:

I believe the Act . . . violates our religious liberties under the First Amendment

◆ Statement of K.J.A.:

Government control over my life will increase, and I will gradually lose the freedoms that God has granted me.

◆ Statement of Tina C. Brock:

I want to join this Project because I personally believe, for religious reasons, that all life is precious to God and having suffered from an abortion over 25 years ago, I know the pain I felt for years has had a tremendous effect on my life. I do not want to be forced to pay for something that I do not believe in and I do not believe in abortion.

I will suffer emotionally if I am forced to pay for abortions. I suffered for many years after having an abortion and now have found healing and forgiveness. It would be a devastating turn in my life if . . . I am forced to pay for abortions. It is murder of the ones who can not fend for themselves and I am totally against abortion.

◆ Statement of Brenda L. Bamburg:

It will hurt my soul in the fact that I will be a part of murder in taking

the life of babies.

- ◆ Statement of Fr. Tom J. Kennedy, (Roman Catholic Priest since 2007):

I am opposed to paying for abortion in any way. . . . Before I became a priest, I was the father of a child aborted by my wife without my knowledge. I was devastated when I learned of it and am to this day.

- ◆ Statement of J.G.B.:

Now I have a voice. I cry out for justice in the earth. Abortion is a deadly injustice to the families of the earth. We've lost six (6) babies in three (3) generations. No more abortions!

- ◆ Statement of Melanie A. Carmichael:

It will force me to fund abortions, which violates the tenets of my faith.

- ◆ Statement of Jason Hershey:

I have devoted my life to praying to Jesus for the ending of abortion in America, the greatest injustice and moral evil of our time. I stand regularly outside the Supreme Court praying for "Life". I find two moral issues at stake here: the moral issue of liberty and the moral issue of life for an unborn child. This violates my religious liberty.

- ◆ Statement of Jean:

I have personally been affected by long term depression following an

abortion and it would grieve me deeply to know my tax money would promote abortions. I know women/men would suffer symptoms of post abortion trauma.

◆ Statement of Glenn:

I have witnessed the long term depression of my wife following an abortion and do not believe my tax dollars should be used to cause this hurt to any other person or family. I also have experienced the depression of post abortion trauma.

◆ Statement of Brother Stanley L. Culotta:

I am a Brother in a Catholic order (Brothers of the Holy Cross) deeply opposed to abortion, and the President of a Catholic high school.

In particular, I do not want to pay for abortions and the suffering that women encounter as a result of abortion.

◆ Statement of Brother Daniel R. Durig:

It will cause me to pay to murder unborn children and scar women for life.

◆ Statement of Sammie J. Falls:

I am a follower of Jesus Christ; I do not want to be responsible for the murder of innocent babies.

◆ Statement of Melanie T. Fleming:

I had an abortion in 1992 and it has left a terrible and lasting impact on me.

- ◆ Statement of Lynn Frederick Frame and Carolyn Sue Day Frame:

It will give my tax money to pay for providing abortions. That is murder of innocent life, which is against my religious principles.

- ◆ Statement of Katharine Marie Hill:

I am a woman who was hurt by abortion starting at age 16. I am sick of the stench of death that is hanging over our country. I am one who formerly believed abortion was okay. It isn't! I am the reason that stench of death is here.

My conscience and religious liberty will be shackled by paying for abortion.

- ◆ Statement of Joseph M. Hill:

The [Act] directly makes me a participant in abortion through the mandatory funding of abortion.

- ◆ Statement of Robert B. Hill:

For religious reasons, I want to protect the unborn and bring morality and truth back to America—I am a **post-abortive male** who has 2 children in heaven. I will now fight to see that people don't make the same mistake that I did.

Murder is against the law and yet the Act forces me to systematically pay for abortion—which is the murder of an unborn child. It is not only against the law—**it is against my moral and religious obligation to my own soul.**

◆ Statement of Karen J. Holdren:

The [Act] interferes with my Constitutional rights and beliefs. I believe life begins at conception in the womb of a woman, and this bill allows health care to remove life from the womb, again violating what I believe in.

◆ Statement of Brad L. Lundberg:

It will use my tax dollars to pay for something I feel is morally wrong and a violation of my religious belief protected by the first amendment, especially the use of my tax dollars to fund abortions on demand.

◆ **Statement of Linda J. Martin (Pediatrician):**

It will force me to pay for abortions—the killing of the innocent unborn, to my way of religious belief. It will also destroy our health care system and our economy and our children’s economic future. **It will make it very difficult for me to practice excellent, moral medicine.**

◆ Statement of Dawn R. Nolen:

I want to make a stand for the innocent lives of the unborn babies! I

do not want to pay for something that goes against my religious beliefs. **I had an abortion and I know how it can affect you for life. I do not want to see anyone forced to do something that could harm them for the rest of their life. I have had years of counseling because of the abortion I had in 1974. I do not want to go through all of the mental anguish that paying for murder would cause me. It is a sin in God's eyes and it is a sin in mine! I would hurt emotionally over this demand by the federal government!**

◆ Statement of Sharra A.:

I had an abortion 3 decades ago and have experienced first-hand the devastation it brings. I have had many health problems in the past few years that I believe to be the result of that decision to abort my child, including a breast cancer scare.

I paid one time for an abortion and I will not pay again for me or anyone else as I would not wish on anyone the fallout of the decision. I am a diabetic today, unable to get affordable insurance, but through this health care bill? No way. I'll go without insurance first.

◆ Statement of Linda R. Reagan:

I believe abortion is taking a human life: therefore, U.S. Citizens that pay for this medical procedure are participating in murder.

- ◆ Statement of Dardine M. Roedel:

I am 65 and on Medicare as my primary health care. . . . It is against my conscience to use federal money to support abortion. This is spiritually very disturbing to me.

- ◆ Statement of David L. Rosa:

I object as an orthodox Pro-Life Catholic sidewalk counselor being forced to pay for abortions, which I consider murder, thus violating the free exercise of my Catholic Religion under the First Amendment.

- ◆ Statement of Carla A. Stream:

I cannot even fathom paying for someone else's abortion after what my own abortion did to me and my life! I oppose it on religious grounds, as well as emotional ones!

- ◆ Statement of Carri A. Taylor:

I believe in the sanctity of life—created by God. It takes my freedom of real choice away and will use my tax dollars to fund abortion.

- ◆ Statement of Betty D. Underwood:

I am extremely greived to think that my tax dollars would be used to “snuff out” the life of an unborn child.

◆ Statement of Nicole W. Cooley:

My abortion following rape was the most deeply painful experience of my life. I learned the hard way that abortion doesn't help women and only further traumatizes rape victims, making healing from both events infinitely more difficult. Since the abortion, I have been unable to participate in anything remotely similar to abortion, which includes insisting on traditional deliveries after two miscarriages and refusing chemical contraception. I also have written a book about my story and shared in numerous public venues, most recently on college campuses, to help other women avoid my mistakes.

It violates my personal religious and moral beliefs to participate in abortion in any way. **My personal experience with rape and abortion compels me to my present convictions.** I feel I would be forced to be an unwilling participant in abortions that I view as the murder of innocent human beings. **Knowing that my money would be spent against my will to inflict further trauma on women and their unborn children will cause me tremendous additional pain and heartache.**

◆ Statement of Lizbeth L. Liefer-Hall:

The voices of the women who have been negatively affected by abortion need to be heard so people realize abortion destroys two lives - the

mother's life and the baby's life.

I DO NOT want to pay for abortions for other women as it will grieve my heart to know I am also participating in destroying two lives each and every time an abortion is performed.

◆ Statement of Debra C. Picarello:

I do not want to see any woman suffer the physical, emotional, and psychological damage that comes from abortion. *I actively work with women, like myself, who have had an abortion, and have suffered terribly from it. I do not want to see my tax dollars go towards what I so vehemently oppose.* The killing of innocent children must stop and I oppose having to pay for it.

Knowing that my tax dollars would be directly paying for abortions violates my conscience. *I cannot fathom having to pay for abortions, knowing how badly having an abortion affected me for many years after the abortion.* Being forced to pay for abortions, through Obamacare, violates my conscience and causes me mental anguish just thinking about it. I actively now work to help women who have suffered the emotional, physical, and spiritual fallout from having an abortion.

Amici believe the Act is unconstitutional in that it violates individual liberties under the First Amendment, including the right of individuals to object to

being forced to pay for abortions, which they consider murder, thus violating the free exercise of their religion under the First Amendment;

The Supreme Court has acknowledged that “whether to have an abortion is a *difficult and painful moral decision.*” *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). Since their deeply and sincerely held religious beliefs impact their morality, *Amici’s* religious liberty is infringed by the Act. Thus, the Supreme Court has already acknowledged the interest of those *Amici* who, as noted, have actually participated in abortion to their deep pain, repentance, and regret.

The Supreme Court also recognized that “*severe depression and loss of esteem*” can follow an abortion for some women. *Id.* (emphasis added). This has been the fate of some of the *Amici*. The issue is whether *Amici* and others like them will now be forced to participate in causing that same severe loss of esteem and depression in others.

Amici’s deeply and sincerely held religious beliefs are based in part upon Scriptures—which are considered sacred and divinely inspired by them—that *Amici* believe apply to abortion. Of course, others may disagree with these scriptures, thus exercising their own religious liberty. But in light of these Scriptures, if the Act is upheld, *Amici* and innumerable other Christian and Jewish citizens will be forced into an agonizing crisis of conscience.

◆ “Do not give any of your children to be sacrificed to Molech [a god

worshipped by, among others, the ancient Canaanites], for you must not profane the name of your God. I am the LORD.” Leviticus 18:21.

- ◆ “The LORD sent . . . raiders . . . to destroy Judah, . . . in order to remove them from his presence *because of the sins of Manasseh and all he had done, including the shedding of innocent blood*. For he filled Jerusalem with innocent blood, and the LORD was not willing to forgive.” 2 Kings 24:2-4.
- ◆ “The LORD said [to Cain], ‘What have you done? Listen! Your brother’s [Abel’s] blood cries out to me from the ground.’” Genesis 4:10.
- ◆ “For God will deliver the needy who cry out, the afflicted who have no one to help. He will take pity on the weak and the needy and save the needy from death. He will rescue them from oppression and violence, for *precious is their blood in his sight*.” Psalm 72:12-14.
- ◆ “There are six things the LORD hates, seven that are detestable to him: haughty eyes, a lying tongue, *hands that shed innocent blood . . .*” Proverbs 6:16-17.
- ◆ “Therefore as surely as I live, declares the Sovereign LORD, I will give you over to bloodshed and it will pursue you. *Since you did not hate bloodshed, bloodshed will pursue you*.” Ezekiel 35:6.
- ◆ “For you formed my inward parts; you knitted me together in my mother’s womb. I praise you, for I am fearfully and wonderfully made. Wonderful are

your works; my soul knows it very well. My frame was not hidden from you, when I was being made in secret, intricately woven in the depths of the earth.” Psalms 139:13-15.

Many other Scriptures could be provided by *Amici*.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party’s counsel authored this Brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

The Act violates the free exercise rights of people of faith, such as *Amici*, by forcing them to pay for the abortions of others. Because the Act is not a neutral, generally applicable law, it must survive strict scrutiny. This it cannot do because Congress did not and cannot explain why it allowed exemptions for those who have religious objections to insurance *per se*, but not for those who have religious objections to abortion. Similarly, Congress did not and cannot explain why it allowed exemptions for some religious persons but not others. A related constitutional infirmity is the Act’s lack of an adequate conscience protection

provision for religious health care providers.

ARGUMENT

I. The Act Unconstitutionally Infringes upon the Free Exercise Rights of Those Who Oppose Abortion.

In their Brief on the Individual Mandate, the so-called Private Respondents employed an apt analogy to explain why the Individual Mandate is unconstitutional:

[W]hile the “substantial effects” doctrine allows Congress to regulate local bootleggers because of their aggregate harm to the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed. Yet the uninsured regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market.

Br. of Private Resp’ts on Individual Mandate at 30, *Dep’t of HHS v. Florida*, decided *sub nom. NFIB v. Sebelius*, 132 S.Ct. 2566 (2012) (No. 11-398).

This analogy applies with particular force to the objections of *Amici*. Just as many teetotalers object to the consumption of alcohol on deeply-held religious grounds, so the *Amici* object to funding abortion on deeply-held religious grounds.

People of faith will often be at special risk when government seeks to compel action. Any time the compelled action conflicts with deeply-held religious beliefs, the free exercise rights of those holding such beliefs will be trampled.

Admittedly, government can enact neutral laws of general applicability with which religious adherents must comply. *Employment Div., Dep’t of Human*

Resources of Ore. v. Smith, 494 U.S. 872, 881-82(1990). As will be explained below, however, the Act is not such a law. Instead, it is a law that on its face “burden[s] religious practice that is not neutral or not of general application [and that therefore] must *undergo the most rigorous of scrutiny*.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993) (emphasis added). In other words, “[t]o satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Id.* (internal quotation marks & citation omitted).

The free exercise of religion—as documented by the statements included above in the Interest of *Amici*—encompasses the right to refuse to participate in abortion, which *Amici* believe to be an unjust evil, just as do many Americans of virtually every religious stripe. See, e.g., *US Religious Views on Abortion: 10 Largest Christian Denominations and Five Largest non-Christian Religious Groups*, Apr. 4, 2011, <http://abortion.procon.org/view.resource.php?resourceID=004208> (last visited Mar. 6, 2013) (compiling statistic data about and official positions of 15 religious bodies). Prior to this Act, the federal government refused to force citizens to pay for other people’s abortions, and the Act imposes a radical new compulsion and crisis of conscience on people of faith.

As a preliminary matter, *Amici* note that the district court below and some

other courts have rejected the argument that the Act forces people of faith to fund abortions. *See, e.g., Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010); *Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011). This view is incorrect for two reasons. First, this view relies on an Executive Order that applies the Hyde Amendment to the Act and on the fact that individuals will be able to enroll in a health benefit exchange that does not cover abortion services. *See, e.g., Liberty University*, 753 F. Supp. 2d at 642-43; *Calvey*, 792 F. Supp. 2d at 1272-73. This view misses the point that neither the Executive Order nor (through it or otherwise) the Hyde Amendment apply to the Community Health Center *direct* funding in the Act. *See*, Secretariat of Pro-Life Activities, *The Senate Health Care Reform Bill: Funding Abortion at Community Health Centers*, Mar. 16, 2010, <http://nchla.org/datasource/idocuments/Community%20Health%20Centers.pdf> (last visited Mar. 6, 2013) (documenting provisions of the then-pending bill and explaining the application of this Court’s Hyde Amendment jurisprudence to them). Thus, the direct funding of Community Health Centers could easily include Planned Parenthood, the largest abortion provider in America. Planned Parenthood operates “more than 750 health centers around the country.” Planned Parenthood, *Health Info & Services*, http://www.plannedparenthood.org/health-center/?utm_source=dotorg&utm_medium=highlight&utm_campaign=locate (last visited Mar. 1, 2013). It also misses the point that even if people of faith have an avenue to

personally enroll in a no-abortion exchange, their tax dollars are still paying for the abortions of others, in violation of their conscience.

The view that the Act does not force people of faith to fund abortion is wrong for a second reason. These courts have not recognized that some forms of “contraception” are actually abortifacients.

The fears of *Amici* that the Act would be used to radically expand and fund abortions have already come to pass with regard to such contraceptive abortions, despite the Administration’s protestations during the passage battle that abortion would not be funded and despite the Executive Order and the Hyde Amendment. On January 20, 2012, Health and Human Services Secretary Kathleen Sibelius (using her powers under the Act) announced:

[T]he final rule on *preventive health services* will ensure that women with health insurance coverage will have access to the full range of the Institute of Medicine’s recommended preventive services, including all FDA approved forms of contraception. Women will not have to forego these services because of expensive co-pays or deductibles, or because an insurance plan does not include contraceptive services. . . . Beginning August 1, 2012, most new and renewed health plans will be required to cover these services without cost sharing for women across the country.

A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sibelius, Jan. 20, 2012, www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 8, 2012) (emphasis added).

As Liberty University has explained, both prior to and subsequent to this

announcement, the status of various exemptions and temporary measures has been in a fairly constant state of flux. (Supplemental Br. of Appellant 5-10). Whatever may be—or may come to be—the state of affairs for employers, *Amici* still face significant violations of their religious freedoms *as individuals*.

Covered contraceptives include intra-uterine devices (I.U.D.'s), which in many instances prevent the birth of a live human being by preventing the implantation of a fertilized egg already having the complete separate DNA characteristic of another living human being from implanting onto the uterine wall. The human being is thus killed by the I.U.D., and expelled or absorbed by the body. *See*, WebMD, *Intrauterine Device (IUD) for Birth Control*, <http://www.webmd.com/sex/birth-control/Intrauterine-device-iud-for-birth-control> (last visited Mar. 6, 2012); *Intra-Uterine Device (IUD)/Mirena by Bayer*, Sept. 2011, <http://www.physiciansforlife.org/content/view/182/36/> (last visited Mar. 6, 2013). The rule also covers “Ella”, a morning after pill that can also act as an abortifacient, killing the child. *See*, <http://www.ella-rx.com/whatisella.asp> (last visited Mar. 6, 2013).

Tellingly, the interest of several organizations that participated as *Amici* on the other side of this issue before the Supreme Court confirms the link between abortion and the Act. Brief for The National Women’s Law Center, *et al.* as *Amici Curiae* in support of Petitioner on the Minimum Coverage Provision, *Dep’t of HHS*

v. Florida, decided *sub nom. NFIB v. Sebelius*, 132 S.Ct. 2566 (2012) (No. 11-398). Among the organizations that served as *Amici* are the following:

- ◆ “The Chicago Abortion Fund (CAF) [which] is an abortion fund in the Midwest that is working from a reproductive justice framework [and that] has worked for 26 years to provide the most marginalized and disadvantaged women with financial assistance for their second trimester abortion procedures. . . . CAF believes that without access there is no choice.” *Id.* at 6a.
- ◆ “National Advocates for Pregnant Women (‘NAPW’) [which] is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women, especially the most vulnerable including low income and women of color. NAPW advocates for reproductive justice, including the right to an abortion,” *Id.* at 14a.
- ◆ “NARAL Pro-Choice America [which] is a non-profit organization dedicated to developing and sustaining a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. *The Affordable Care Act presents an historic opportunity to advance America’s healthcare system and promises to improve greatly*

women's access to reproductive-health services. *NARAL Pro-Choice America is concerned about the impact that the Court's decision may have on women's access to affordable insurance coverage, particularly to coverage of reproductive- and preventive-health services.*" *Id.* (emphasis added).

Furthermore, these *amici* specifically trumpeted the Act as a source of contraceptive funding—including, as noted above, abortion-producing contraceptives: "As a result of the ACA, women will also have access to prescription contraceptives and family planning services without cost, as well as other important preventive care." *Id.* at 21.

Thus, it is not only by purported contraception that funding can find its way to abortion. For example, in defining "essential health benefits" the Secretary shall: "take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups." 42 U.S.C. § 18022(b)(4)(C) (2012). Thus, the HHS Secretary arguably—and perhaps beyond arguably—has discretion under the Act to include the provision of abortion within the "needs" of women. Despite *Amici's* belief that killing the child in the womb is not healthcare, it is obvious the current administration disagrees, as may future administrations.

Additionally, nothing in the Act precludes the interpretation of "essential"

services, “essential health benefit,” “ambulatory patient services,” or “prescription drugs,” from including abortion within their ambits. Indeed as noted above, the FDA has already approved an abortifacient drug in the name of contraception.

Finally, if the Act is interpreted to provide assisted reproductive technologies such as *in vitro* fertilization (IVF), then it would be supporting the destruction of unwanted embryos, which *Amici* consider to be just as much living members of the species *homo sapiens* as anyone else outside of a womb. Many of those frozen embryos have now been born and adopted through “snowflake” adoptions. *See, e.g.*, Nightlight Christian Adoptions, <http://www.nightlight.org/adoption-services/snowflakes-embryo/adopting-parents.aspx> (last visited Mar. 6, 2013).

II. The Differential Treatment Accorded to Those Qualifying for “Religious Exemptions” Violates *Lukumi*.

As noted above, the Act tramples on the free exercise and conscience rights of *Amici*, which it may not do because it is not a neutral, generally applicable law. Specifically, 26 U.S.C. § 5000A(d)(2) (2012) creates “religious exemptions” that are applicable only to members of favored religious groups, but not *Amici*. The § 5000A exemptions, which confer privileged status on the limited categories of qualifying individuals based on their religious objection to insurance is not narrowly tailored to serve a compelling state interest as *Lukumi* requires.

In allowing exemptions for those who have religious objections to insurance,

Congress acknowledged that allowing exemptions based on religion does not threaten the Act's scheme. In doing so, however, the categories of individuals who may have religious objections were left under-inclusive. Section § 5000A(d)(2) allows only two categories of individuals who are exempt from the penalties: those with a "*religious conscience*" objection to insurance and those who are members of a "health care sharing ministry." *Amici* fit neither category; while believing strongly that abortion is murder, they have no religious objection to insurance itself that does not cover murder.

The religious conscience exemption applies to anyone who is "a member of a recognized religious sect or division thereof described in section 1402(g)(1) [of the Internal Code]" and meets the additional requirements laid out in that section. The additional requirements limit the exemptions to (1) sects that have been in existence since December 31, 1950 and (2) sects that "make provision for their dependent members which [are] reasonable in view of their general level of living." Members of religious groups that meet those criteria do not have to comply with the mandates and will not be subject to the penalties for non-compliance. *Amici, who are not part of those denominations, however, must comply with the requirements or pay the penalties, placing them at a disadvantage for no reason other than they do not belong to the preferred religious group(s).* Their particular religious objection to paying for a procedure they believe is

murder is ignored.

As already mentioned briefly, Congress did not and cannot explain how exempting certain uninsured people from the provisions meets the goals of increasing demand for health insurance, decreasing the number of uninsured, and attaining near universal coverage. *See* 42 U.S.C. § 18091 (2012). Congress did not and cannot explain how exempting members of fifty-year-old religious sects with member care programs and conscientious objections to insurance, but not members of similar sects that are less than fifty years old, advances its stated goals. Nor can Congress explain how exempting members of “healthcare sharing ministries” that are at least ten years but not members of similar ministries that are less than ten years old advances its legislative goals.

All of these congressional omissions occurred in the face of this Court’s recognition in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that

though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophical enterprise. *Abortion is a unique act.* It is an act fraught with consequences for others . . . for the spouse, family, and society which must confront the knowledge that these procedures exist, *procedures some deem nothing short of an act of violence against innocent human life*; and, depending on one’s beliefs, for the life or potential life that is aborted.

Id. at 852 (emphasis added). The Court also stated, “[a]s with abortion, reasonable people will have differences of opinion about these matters

[contraception]. *Id.* at 853.

Finally, this Court’s statement that one “could classify *Roe* as *sui generis*,” *id.* at 857, means that religious liberty can be upheld in this matter of abortion without necessarily extending such a rule to other areas of government funding with which people might disagree. A separate exemption for abortion could be created.

After all, in matters of life and death, we recognize a conscientious objection even to being required to serve in the military in the capacity that would require a person to kill someone. 50 App. U.S.C. §456(j) (2012). National security is a much higher value than whether government should fund abortions, and national survival in war could even be considered a compelling governmental interest, which is absent from “healthcare” provisions and insurance requirements.

There is a vast difference between requiring individuals to live in a society that tolerates abortion for others, and forcing them by compulsory laws to either purchase insurance or pay penalties that requires them to participate in or pay for others’ roles in the killing of children in the womb.

While individuals may disagree with how their government spends their funds for a variety of reasons, abortion is a matter of life and death

and is *sui generis*. This case—like the time-honored recognition of conscientious objection from military conscription—would not have to establish a precedent for other objections to government spending.

III. The Act Fails to Prohibit the Government from Discriminating Against Abortion Conscience Objectors.

The Act is entirely silent regarding *government* discrimination against health care facilities and health care providers on the basis of religious, moral and philosophical objection to abortion as murder. *Amicus* Dr. Linda Martin is a healthcare provider who believes abortion kills a human child in the womb. *See, supra*, p. 9. Because the scope of the prohibition against discrimination is limited to state health insurance exchanges, only a state health insurance exchange is prohibited from discriminating against any individual health care provider or health care facility for refusing “to provide, pay for, provide coverage of or refer for abortions.” §1303(d)(4). *The prohibition against discrimination by other state or federal governmental entities, however, is never mentioned.* The absence of language prohibiting government agencies and government entities from discriminating against health care facilities has tremendous implications for Catholic hospitals, among others, and for *Amicus* Dr. Martin. Because all *Amici* will be forced to support the Act’s scheme directly or through the Act’s penalties, the coercive effect of potential government discrimination is of concern to all *Amici* and many other Americans.

Catholic hospitals provide a significant portion of this nation's health care, treating 2,486,769 Medicare patients (16.5% of all "community hospital" Medicare patients) and 976,802 Medicaid patients (13.7% of all "community hospital" Medicare patients) in 2011. Catholic Health Association of the United States, *Fast Facts*, http://www.chausa.org/Pages/Newsroom/Fast_Facts/ (last visited Mar. 6, 2013) (explaining that figures are approximate since all hospitals participated in the survey).

Discrimination by governmental entities against Catholic hospitals may occur by the government's refusal to provide federal funding for those health care providers and health care facilities refusing to provide, pay for, provide coverage of, or refer for abortions. Such discrimination by the government could devastate healthcare as it currently exists in the United States. Historically, Catholic and non-profit health care systems, premised on their moral and religious goals to care for the sick and the poor, have provided many of the general public with health care institutions and health care providers. Without protection against discrimination in the Act, the tenets of those health care facilities and health care workers are in jeopardy and will be ripe for discrimination under the Act.

It is very significant that while the original § 1303 of Subtitle D mandated a general prohibition against discrimination for specific conscience protections, the Amendments to that section *eliminate* the *general* prohibition against

discrimination. Prior to the Amendment to Subtitle D, Section 1303, the following language was applicable:

PROVIDER PROTECTIONS.—No individual health care provider or health care facility may be discriminated against because of a willingness or an unwillingness, if doing so is contrary to the religious or moral beliefs of the provider or facility, to provide, pay for, provide coverage of, or refer for abortions.

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, Subtit. D, § 1303(a)(3).

This protection was intentionally removed in the Amendments to Subtitle D. See 42 U.S.C.A. § 18023, Historical and Statutory Notes. Without clearly articulated conscience protections—and with the clear inference that *no* protection is accorded other than protection from state exchanges, health care facilities are left without guidance regarding their ability to refuse to provide, to pay for, cover, refer for abortion or to provide or participate in training to provide abortion.² The ambiguity created by the Amendments is not resolved by §18023(c) (2)(A) of the Act, which provides:

In general
Nothing in this Act shall be construed to have any effect on
Federal laws regarding—

² One might argue that the change created by the Amendments was simply to change the sentence from (truncated) passive voice to active voice. However, in making this change, the Amendments added a subject to the sentence. As noted, the subject of the sentence, i.e., those who cannot discriminate—was limited to the state exchanges, despite the fact that any number of individuals or entities could have been include in those who cannot discriminate.

- (i) conscience protection;
- (ii) willingness or refusal to provide abortion; and
- (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.

At the present time, Federal law regarding conscience protection is non-existent as it relates to the Act. Section 1303(c)(2)(A).³ Combined with the elimination of conscience protection from the Original §1303 and the promulgation of rules promoting contraception (with, as discussed *supra*, very narrow conscience protections), the current section 1303(c)(2)(A) is virtually toothless. Conscience rights of health care providers will be violated by this critical omission in the Act.

Finally, this Court should consider the big picture. In addition to individual *Amici* being forced to pay for insurance coverage or penalties that cover abortion and the billions of dollars appropriated to community health centers that can fund abortion, *the overall forced inclusion of millions of Americans like Amici in this “system” will finance a vast increase in the overall number of abortions*, a result that is anathema to the conscience of *Amici*. How will that happen?

Individuals who were “uninsured” will now be covered under the Act by Medicaid or forced to buy insurance. Many of these individuals will have no

³ A search of an electronic version of the Act produces no results except the religious exemption discussed *supra* and the conscience protection provision discussed here.

qualms about getting abortions (as they could do at their own expense before the Act). Thus, the overall number of abortions paid for by this “system” will increase vastly. This vast expansion of abortion (along with other medical procedures) is further expanded by the forced, compulsory inclusion of Americans like *Amici* who object on religious grounds. Therefore, forcing individuals to participate in a “system” that promotes more abortions, violates their conscience and is a violation of their religious liberty.

This may be a somewhat non-traditional way of looking at a religious liberty issue, but the Act is a non-traditional way of violating religious liberty on a massive scale and requires a big picture analysis.

CONCLUSION

The issue of whether forcing Americans to pay for abortions that they believe are murders is of deep national interest and personal moral and religious interest to *Amici*.

It is one thing for *Amici* to live in a country that tolerates abortion on the grounds that it should be a “woman’s free and voluntary choice.” *It is entirely another to force Amici with their sincere, deeply-held religious, moral, and philosophical beliefs that such action is murder to actually participate in such murder. Where is freedom of choice for Amici?*

Our country is stronger when we allow diversity of religious belief. The Act

can survive without compelling *Amici* to surrender their conscience and their religious liberty.

For the foregoing reasons and for other reasons stated in Liberty University's Brief, this Court should declare the Individual Mandate unconstitutional and grant other relief as requested by Liberty University and the other Plaintiffs.

Respectfully submitted,
this 6th day of March, 2013,

/s/ Steven W. Fitschen
Steven W. Fitschen, *Counsel of Record*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133
nlf@nlf.net

Stephen B. Presser
Raoul Berger Professor of Legal History, Northwestern University School of Law;
Professor of Business Law, Kellogg School of Management & Member of Faculty,
Department of History, Northwestern University
357 E. Chicago Ave.
Chicago, IL 60611

Allan E. Parker
R. Clayton Trotter
The Justice Foundation
7210 Louis Pasteur Dr., Ste. 200
San Antonio, TX 78229

Kathleen Cassidy Goodman
Law Office of Kathleen Cassidy Goodman
12274 Bandera Road, Ste. 228
Helotes, TX 78023

APPENDIX A

Project Liberty Members

Below are listed the members of Project Liberty. Due to the highly sensitive nature of disclosing actual abortion participation, as many members did when joining Project Liberty, first names and initials have been used for confidentiality purposes.

Each member of Project Liberty also joined the Project's Brief filed with the United States Supreme in *National Federation of Independent Businesses. v. Sebelius*, 132 S. Ct. 2566 (2012).

Mary M.	Brother Daniel	Scott A.
Mackie G.	Sammie J.	Debra K.
Karen	Melanie T.	Gary E.
Brenda L.	JoAnn	Holly
Nancy.	Rebecca S.	Dawn
J.G.	Lynn	Susie
Linda F.	Carolyn Sue	Sharra A.
James	Sharon	James
Tina C.	Jason	Linda R.
Arthur L.	Katharine M.	Kathy
Melanie A.	Robert B.	Jimmie D.
Jean M.	Joseph M.	Dardine M.
Glenn R.	Marcia K.	David L.
Brother Stanley	Robert R.	Carol L.
Charlotte H.	Father Tom J.	Wilma
Hope	J.D.	Dr. Ann Marie
Doris K.	Nelda	Carla
Richard C.	Barbara	Lauretta M.
Robert	Sharon	Betty D.
Jan	Brad L.	Dale
Dr. Wiley S.	John	Nicole
Darlene A.	Dr. Linda J.	Lizbeth L.

Debra C.
Ralph
K.J.
Mark
Marion E.

Joan M.
Sunny
Anabel
Patti
Laura

Alan
Gloria
Dr. Ted
Carri

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 6,559 words as calculated by Microsoft Word 2007.

s/ Steven W. Fitschen

Steven W. Fitschen

Counsel of Record for *Amicus Curiae*,
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, Virginia 23454
(757) 463-6133

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2013, I electronically filed the foregoing Brief *Amicus Curiae* of Project Liberty in the case of *Liberty University, et al. v. Geithner et al.*, No. 13-2347, with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Steven W. Fitschen

Steven W. Fitschen

Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Suite. 204
Virginia Beach, Virginia 23454
(757) 463-6133
nlf@nlf.net