No. 13-3238

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN B. ANTHONY LIST,
Counterclaim Defendant-Appellee,
v.
STEVEN DRIEHAUS,
Counterclaim Plaintiff-Appellant.

Appeal from the United States District Court for the
Southern District of Ohio, No. 1:10-cv-00720
Honorable Timothy S. Black, District Judge, Presiding

BRIEF *AMICI CURIAE* OF BIOETHICS DEFENSE FUND, ALLIANCE DEFENDING FREEDOM AND LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

Nikolas T. Nikas
Dorinda C. Bordlee
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254

Catherine W. Short
Allison K. Aranda
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 1313
Ojai, CA 93023

Steven H. Aden, *Counsel of Record*
M. Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393-8690
saden@alliancedefendingfreedom.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *Amici*, Bioethics Defense Fund, Alliance Defending Freedom and Life Legal Defense Foundation, each make the following disclosure:

1. Is amicus a subsidiary or affiliate of a publicly owned corporation? **No.**
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

/s/ Steven H. Aden
Steven H. Aden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

Amici curiae, Bioethics Defense Fund, Alliance Defending Freedom, and Life Legal Defense Foundation are non-profit, public interest legal organizations. *Amici* have served as counsel on many amicus briefs addressing the ACA's abortion related provisions and regulations, including an amicus brief in the landmark case of *NFIB v. Sebelius*, No. 11-398/11-399/11-400 (U.S. 2011), to set forth the scheme of the abortion premium mandate in relation to the challenged individual mandate.

Amicus Alliance Defending Freedom is counsel in several cases addressing the religious freedom implications of the abortion-inducing drugs required by the ACA's HHS Mandate, including a case in which the U.S. Supreme Court has granted certiorari: *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (oral argument scheduled March 25, 2014).

This case is of central concern to *Amici* because it relates to truthfulness of their assertions in litigation and public education that the ACA authorizes taxpayer funding of abortion, and that grave implications for religious conscience are thereby implicated.

---

[1] Pursuant to Cir. Rule 29, counsel certifies that the parties have consented to the filing of this brief, and further certifies that no party or party's counsel authored this brief in whole or in part, or contributed money to fund the brief.

SUMMARY OF ARGUMENT

Appellant Driehaus alleges that Susan B. Anthony List [SBA List] defamed him by asserting that his vote for the Affordable Care Act was a vote for "taxpayer funded abortion." It is a bedrock principle of law that only false statements may form the basis of a defamation claim. *See, e.g.,* Br. of SBA List at 40. In other words, truth is an affirmative defense to libel. SBA List ably explains why the District Court's decision was correct on the grounds on which it was decided. But because this Court can affirm on any ground, *Amici* submit that Driehaus's complaint fails for an even more fundamental reason. SBA List's assertions were and are demonstrably and unequivocally true.

This brief therefore addresses the underlying question of whether the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010 ("ACA," "PPACA," or "the Act"), authorizes taxpayer funding of abortion. As set forth below, the answer is "Yes," it does. Therefore, assertions equating a political candidate's vote for the ACA with a vote for taxpayer-funded abortion are truthful.

Speculation is no longer required. The various phases of implementation of the ACA have provided concrete instances where taxpayer dollars have been authorized to directly fund abortion or subsidize

health plans that cover elective abortion. Yet, confusion persists not only because of the complexity of the statutory framework, but also because a reading of the text of the Act alone does not convey the relevant case law and the bill's drafting history–both of which are essential to understanding the ACA's authorization of abortion funding.

The jurisprudential context in which the ACA was passed, discussed in Section A(1) of this brief, shows that beginning with Medicaid, federal statutes authorizing funding of general health services and health coverage have been consistently construed by courts to compel coverage of abortions essentially without restriction, except when Congress explicitly prohibits such subsidies, such as it did in 1976 with the Hyde Amendment.

The well-publicized drafting history of the ACA, summarized in Section A(2), shows that a Hyde-like amendment adopted by the House of Representatives was repeatedly stripped and thwarted.

Section A(3) of the brief explains that abortion funding is not precluded by the Hyde Amendment, by Executive Order 13535, or by any provision of the ACA. Section A concludes that neither the ACA nor the related Executive Order contain language that would prohibit the bill's multiple self-appropriated funding streams from being used for abortion funding or for subsidies of health plans that include elective abortion.

This brief then outlines four non-exhaustive examples. The first two involve authorization for the use of taxpayer funding of abortion in federal programs, namely, in the Pre-existing Condition Insurance Plan program (discussed in Section B(1)) and in Community Health Centers (discussed in Section B(2)).

The remaining two examples involve provisions that authorize federal subsidies for private health plans that cover elective abortion purchased in the state and federal Exchanges. Section C(1) explains the abortion surcharge imposed without exception in subsidized plans that include abortion, even on objecting enrollees who later discover that they cannot decline abortion coverage in their plan even though it was hidden by the ACA's secrecy clause. Section C(2) briefly addresses federal subsidies of health plans that are required by the HHS Mandate to include abortifacient drugs and devices.

Taken alone, any of the four examples would provide ample basis to validate the truthfulness of an assertion that a vote for the ACA was a vote for federal funding of abortion. But these examples do not represent an exhaustive list. The deliberate absence of any bill-wide Hyde-type restriction, combined with the vast discretionary power that the ACA granted to the Secretary of Health and Human Services explains why

concrete examples of ACA enabled taxpayer-funded abortion continue to surface. *See*, *e.g.*, Cong. Chris Smith, *Of 112 Obamacare Plans for Congress and Staff, 103 are Pro-Abortion* (Dec. 3, 2013) (federal employee health plans now cover elective abortion).

Whether viewed as a matter of law or a matter of fact, the ACA authorizes taxpayer-funded abortion.

ARGUMENT

I. THE AFFORDABLE CARE ACT AUTHORIZES BOTH FEDERAL FUNDING OF ABORTION AND SUBSIDIES OF PRIVATE HEALTH PLANS THAT COVER ABORTIONS

In the context of this case, questions about the truthfulness of assertions that a candidate who voted for the ACA voted for taxpayer funded abortion began when the Ohio elections commission stated in a one-page letter, without supporting reasoning, that such speech violated Ohio's false-statement law.[2]

This conclusion was superficial, and therefore, erroneous; it ignored both the jurisprudential context in which the ACA was enacted, and the Act's drafting history showing that the ACA was intentionally passed without abortion limiting language.

---

[2] *Letter of Ohio Elections Commission to Susan B. Anthony List* (October 18, 2010).

The final Act did not—and still does not—contain a Hyde-like amendment that limits abortion funding across the entire Act.[3] This has resulted in concrete abortion funding problems that have prompted continued, yet unsuccessful, congressional efforts to amend the ACA with "No Taxpayer Funding for Abortion" legislation.[4]

As explained below, the ACA consequently allows for taxpayer funding of abortion, and this reality is not remedied by the Hyde Amendment, any language in the ACA, or by the hollow Executive Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010).

A. The ACA is contrary to the two principles of the Hyde Amendment, and the President's Executive Order Does Not Provide a Fix for the Act's Lack of a Hyde-Like Amendment

Amici's ongoing review of the ACA in light of its drafting history and jurisprudential context leads us to agree with and adopt portions of the legal

---

[3] *See, e.g., Affidavit of Douglas D. Johnson, National Right to Life (NRLC) Committee,* at ¶¶ 7-12, 22, 27 (Oct. 11, 2010)(Dkt. No. 11-1)("the Johnson Affidavit"). Citations to the affidavit are for purposes of legal analysis, and not to indicate *Amici*'s endorsement or opposition to any past or pending legislation.

[4] It is telling that President Obama threatened a veto of the "No Taxpayer Funding for Abortion Act," H.R. 3, passed on May 4, 2011, discussed *infra* in Section A(2). And on January 28, 2014, in light of continued abortion funding problems, the House passed H.R. 7, the "No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act," with a bipartisan vote of 227-188 (House Roll Call No. 30)).

analysis of the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) issued in a memorandum dated March 25, 2010.[5]

That memorandum clarifies that there are two parts to the Hyde Amendment. *See* Omnibus Appropriations Act, 2009, Div. D, tit. V, § 507. The first provides that no appropriated federal funds can be used for *elective abortion services*.[6] *Id*. § 507(a). The second provides that no such funds can be used to pay for *health insurance coverage* that includes such abortions. *Id*. § 507(b). The ACA is contrary to both parts of this policy, and the Executive Order does not provide a remedy.

1. Courts Have Consistently Interpreted Congressional Statutes Authorizing the Provision of Broad Health Services to Compel Abortion Funding, Unless Congress Expressly Excludes It

Courts have held that when Congress authorizes the provision of comprehensive health services, it *must* pay for "medically necessary

---

[5] 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* (March 25, 2010), http://www.peopleforlife.org/healthcare/usccblegalbrief.pdf ("USCCB Memo of March 25, 2010")(all internet sites last visited March 18, 2014). With the permission of counsel, *Amici* have utilized significant portions of this memo verbatim.

[6] Throughout this brief, the phrase "elective abortion" will be used to refer to abortions that have long been ineligible for federal funding in major health programs—that is, all abortions except for cases of rape, incest, or danger to the life of the mother.

abortions,"[7] except insofar as Congress *expressly* excludes abortion funding. *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 637-38 (6th Cir. 1996) (holding that a state's refusal to pay for "medically necessary" abortions for which federal funding is not expressly barred by Congress violates Medicaid's general requirement that the state provide medically necessary services).

This issue originally arose in the context of Medicaid in the 1970s. In the years before the Hyde Amendment was first enacted by Congress in 1976, Medicaid was required to pay for about 300,000 abortions a year.[8]

---

[7] In the abortion context, "health" has been construed broadly to include any abortion undertaken for physical, emotional, psychological, familial, or age-related reasons relevant to the well being of the patient. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Under this broad definition, it has long been interpreted that virtually any abortion a physician is willing to perform can be deemed "medically necessary." *See* John T. Noonan, Jr., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 12 (1979); *see also* Douglas Johnson, Statement to the House, Subcommittee on Health, Committee on Energy and Commerce, *Testimony on the Protect Life Act of 2011*, Hearing, at 4 and n.6 (February 9, 2011), http://www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf.

[8] *Id*., Johnson Testimony at 4, n.4; The Hyde Amendment is the most successful domestic "abortion reduction" policy ever enacted by Congress. *Id*. at 18 ("There is abundant empirical evidence that where government funding for abortion is not available under Medicaid or the state equivalent program, at least one-fourth of the Medicaid-eligible women carry their babies to term, who would otherwise procure federally funded abortions."); *see also* National Committee for Human Life Amendment, *The Hyde*

"Because abortion fits within many of the mandatory care categories, including 'family planning,' 'outpatient services,' 'inpatient services,' and 'physicians' services,' Medicaid covered medically necessary abortions between 1973 and 1976," even though the Medicaid statute itself never used the word "abortion." *Engler*, 73 F.3d at 636. If broad language of this type were not read as mandating payment for abortion, there would have been no need for Congress to include the Hyde Amendment as a rider to the annual the Department of Health and Human Services (HHS) appropriations bill each year for the last 38 years.

Since *Engler*, courts have repeatedly and consistently interpreted statutory language that describes relatively broad categories of medical services to compel—not just *allow*, but *compel*—abortion funding. *See*, *e.g.*, *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 427 (5th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497, 502-03 (8th Cir. 1995), *rev'd in part on other grounds*, 516 U.S. 474 (1996); *Hern v. Beye*, 57 F.3d 906, 910-13 (10th Cir.), *cert. denied*, 516 U.S. 1011 (1995). *See also Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980) (holding that the Hyde Amendment

---

Amendment 3 (April 2008), http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf.

substantively modified the Medicaid Act so that a state's refusal to pay for Hyde-eligible abortions violated the Act); *Hodgson v. Bd. of County Com'rs*, 614 F.2d 601, 608 (8th Cir. 1980) (holding that a state's refusal to pay for Hyde-eligible abortions was not based on a uniform standard of medical need as required by the Medicaid statute); *Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) (holding that a state's refusal to pay for Hyde-eligible abortions was "unreasonable" and "inconsistent with the objectives of the [Medicaid] Act" in violation of the Act); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) (same).

In this jurisprudential context, the ACA expressly enacted only one narrow statutory ban on the direct funding of abortion with federal taxpayer dollars appropriated under the Act. Namely, the ACA provides for grants to school-based health centers, and at the same time defines those centers so that they "do[] not perform abortion services." ACA, § 4101. But this leaves all remaining federal funds appropriated under the Act without Hyde-like restrictions—which means that under the cases noted above those funds *must* be used to pay for abortions where the statutory language describing the services is broad enough to encompass abortion.

2. Hyde-like abortion restrictions do not apply to the ACA because of the rejection of the Stupak Amendment and the Nelson-Hatch Amendment, and the adoption of the Manager's Amendment

Along with the ACA's statutory structure and jurisprudential context, the Act's drafting history confirms that the ACA dramatically changed decades of federal law by authorizing taxpayer funded elective abortion. *See Burgess v. United States*, 553 U.S. 124, 133 (2008) ("The drafting history of the CSA reinforces our reading of [that statute]"); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (citing the "evolution of [RICO's] statutory provisions" as an aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended.")

By its very terms, the Hyde Amendment only applies to appropriations to which the Amendment is attached – i.e., to the annual HHS appropriations bill and the federal Medicaid program that is funded primarily through that bill. Omnibus Appropriations Act, 2009, Div. D, tit. V, § 507 (a) & (b) (stating that "[n]one of the funds appropriated in *this* Act ... shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion") (emphasis added).

The ACA as enacted (Public Law 111-148) authorized multiple new streams of federal funding outside of HHS, and also contained multiple provisions that directly appropriated large sums for new or expanded health programs (such as the federal programs discussed below). These "direct appropriations" were outside the regular funding pipeline of future HHS appropriations bills and therefore are entirely untouched by the Hyde Amendment, even if one assumed that the Hyde Amendment would be renewed for each successive fiscal year in perpetuity.[9]

Because of this legal landscape, the legislative action committees of several pro-life organizations "informed members of Congress that any health care restructuring bill that created new health programs and new funding streams must also include a permanent prohibition on the use of those programs and funds for elective abortion."[10]

However, the final passage of the ACA did not include any language even remotely similar to the Hyde limitation, including the Stupak-Pitts Amendment which had been adopted onto a previous version of the bill by a bipartisan vote of 240-194. House Roll Call No. 884 (Nov. 7, 2009). The Stupak-Pitts Amendment was bill-wide and permanent. It stated in part, "No

[9] *Affidavit of Douglas D. Johnson, National Right to Life Committee*, supra, n. 3, at ¶ 9.

[10] *Id*. at ¶ 10.

funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an act of rape or incest." *Id*. at ¶ 12.

After the majority abandoned the House bill containing the Stupak Amendment, Senators Ben Nelson and Orrin Hatch failed in their effort to add a nearly identical amendment to the substitute Senate version of the bill that ultimately was enacted as the ACA. The Nelson-Hatch Amendment was tabled on a vote of 54-45, and therefore did not become part of the ACA as enacted. Senate Roll Call No. 369 (Dec. 8, 2009)

Instead, so-called "compromise" language known as a "manager's amendment" was considered and adopted on December 21, 2009. Sometimes referred to as the "Nelson-Boxer language," the amendment created Section 1303 relative to a program to subsidize the purchase of health plans that contain coverage for elective abortion, as discussed *infra*, in Section C of this brief.

In a final attempt to remove taxpayer funded abortion from the ACA, Congressman Stupak, joined by ten original cosponsors (including Congressman Driehaus), introduced a formal resolution, H. Con Res. 254. That resolution, if enacted, would have removed objectionable language added by the manager's amendment dealing with the premium subsidy program, and would have added bill-wide, permanent abortion prohibitions.

House Speaker Nancy Pelosi refused to allow a vote on the Stupak resolution/amendment. Mr. Stupak and some (but not all) of the other lawmakers in the "Stupak group" soonafterward abandoned their resistance against the abortion-funding ACA and voted to send H.R. 3590 to President Obama for his signature. House Roll Call No. 165 (Mar. 21, 2010).

Congressman Stupak and some of the other Members of Congress in his group justified their votes by leaning heavily on the hollow claims regarding the content of Executive Order 13535, signed by President Obama on March 24, 2010, and more fully discussed below.

No subsequent enactment by Congress has modified any provisions of the ACA that authorize abortion funding policy. To the contrary, when the "No Taxpayer Funding for Abortion Act," H.R. 3, passed the House on May 4, 2011, with a bipartisan vote of 251-175, the President threatened a veto. *See* Executive Office of the President, *Statement of Administration Policy:*

H.R. 3, No Taxpayer Funding for Abortion Act (May 2, 2011) ("The Administration will strongly oppose legislation that unnecessarily restricts women's reproductive freedoms and consumers' private insurance options. If the President is presented with H.R. 3, his senior advisors would recommend that he veto the bill."), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3r_20110502.pdf.

The federal programs discussed in Section B of this brief therefore allow taxpayer funding of abortion, and, as discussed below, the Executive Order does not and cannot provide any enforceable fixes.

3. The President's Executive Order Contains No Operative Provisions to Prohibit Taxpayer Funding of Abortion in the ACA

The very need for an Executive Order to purportedly limit the funds appropriated in the ACA evidences that the Act itself does indeed allow for taxpayer-funding of elective abortion.[11] The problem is the Executive Order was a meaningless act; it has no operative provisions to prohibit taxpayer funded abortion.

[11] Moreover, the Hyde Amendment itself, which the Order purports to apply, authorizes federal funds to pay for abortions at least in some cases (such as rape or to protect the life of the mother), making assertions about abortion funding factually true regardless.

It is telling that in the wake of the passage of the ACA, Cecile Richards, the president of Planned Parenthood Federation of America (PPFA), the nation's largest abortion provider, characterized the Executive Order as "a symbolic gesture."[12] Harvard Law professor Lawrence Tribe called it "magic" that "amounts to a signing statement on steroids."[13]

These characterizations are consistent with the careful analysis of the USCCB Memo of March 25, 2010, *supra* n. 5, which concludes that "none of the provisions of the Order represent valid fixes to those shortcomings" concerning abortion funding and subsidies.

Exec. Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010), in its operative sections, superficially references only two of the abortion-related components of the bill. Regarding the abortion premium-subsidy program, Section 2 of the Executive Order does little more than reiterate the statutory language, under which federal tax-based subsidies will help pay for

---

[12] *Statement of Cecile Richards, President of PPFA, on House Passing Historic Health Care Reform Bill* (March 25, 2010), http://www.plannedparenthood.org/about-us/newsroom/press-releases/statement-cecile-richards-president-ppfa-house-passing-historic-health-care-reform-bill-32230.htm.

[13] Thomas Peters, *White House Knew Obamacare Abortion Funding "Ban" a Sham*, Lifenews.com (Nov. 15, 2011) (linking to Email of Larry Tribe (March 21, 2010), obtained by Judicial Watch, *available at* http://www.judicialwatch.org/files/documents/2011/doj-kagan-docs-11102011.pdf#page=2).

health plans that cover elective abortions (addressed in Section C of this brief). In Section 3 of the Order, involving Community Health Centers, the Executive Order purports to prohibit the use of funds appropriated under one narrow section of the Act for abortions—but this component of the order is not enforceable, since it lacks a foundation in the language of the statute itself.

Of course, it is the constitutional duty of the President and the Executive Branch to "take Care that the Laws be faithfully executed." U.S. CONST. Art. II, § 3, cls. 4. The legislative authority, however, is reserved to Congress and the Legislative Branch. *See Id*. Art. I. Correspondingly, in his actions to enforce the law, such as issuing an Executive Order, the President may not amend or otherwise contradict the legislative mandates expressed by Congress in the form of statutory law. *See Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172, 188-89 (1999). *See also The Confiscation Cases*, 87 U.S. 92, 112-13 (1873) ("No power was ever vested in the President to repeal an act of Congress.").[14]

[14] That the President has subsequently seen fit unilaterally to disregard portions of the ACA does not mean those actions are lawful or proper exercises of executive power. *See, e.g*., Ed. Board, *The Obama administration has a mandate on the health-care law, too*, The Washington Post (Feb. 11, 2014) ("But none of that excuses President Obama's increasingly cavalier approach to picking and choosing how to enforce this law.").

In light of these principles, the USCCB Memo set forth an in-depth four-part analysis of the hollow Executive Order, concluding in pertinent part that the ACA "does *not* prohibit the federal funding of abortion anywhere [] among its own appropriations, with the exception of school-based health centers. PPACA § 4101. Nor does the Act prohibit—indeed, it explicitly permits—tax-credits and cost-sharing reduction payments to be made for *insurance policies* that include abortion, in violation of the second principle of the Hyde Amendment. PPACA, § 1303(a)(2). [Therefore,] the Executive Order does nothing to fix these shortcomings of the statute—nor could it, for if it did, it would involve an intrusion of the Executive Branch into the legislative power." USCCB Memo of March 25, 2010, *supra* n. 5, at 6.

B. The ACA Authorizes Taxpayer Funded Abortion in Federal Programs

1. Taxpayer Funded Abortion in High Risk Pools

An early and graphic demonstration that the statutory language of the ACA does indeed authorize taxpayer funding of abortion is a pertinent component of the ACA that has already been implemented. Specifically, that provision is Section 1101 of the ACA, 42 U.S.C. § 18001, creating the

Pre-Existing Condition Insurance Plan (PCIP), also known as the "high-risk pool" program.

As detailed in paragraphs 34-45 of the Johnson Affidavit, *supra*, n.3, this program is completely federally funded by the ACA. It directly authorizes $5 billion in federal taxpayer funds for this program alone, which (before the January 1, 2014 effective date of the ACA) provided coverage for high-risk uninsured people who were unable to secure coverage from private carriers. As explained above, the ACA contains no restriction on the use of these funds for abortion.

Since Section 1101 mandated launching the PCIP program within 90 days of enactment of the law, the federal Department of Health and Human Services invited states that wished to operate the program in their respective states to submit proposals by June 1, 2010. During July, 2010, National Right to Life Committee (NRLC) examined those state-submitted proposals and found that three states had submitted and apparently received HHS approval for plans that covered elective abortion (Pennsylvania, New Mexico, and Maryland). Johnson Affidavit at ¶ 35.

FactCheck.org, a nonpartisan entity operated by the Annenberg Public Policy Center, examined NRLC's July 13, 2010 press release regarding the HHS-approved PCIP proposal for Pennsylvania and concluded that it did

indeed cover elective abortion. *Taxpayer Funded Abortions in High Risk Pools* (July 22, 2010), http://www.factcheck.org/2010/07/ taxpayer-funded-abortions-in-high-risk-pools/.

FactCheck.org also verified that the State of New Mexico explicitly listed "elective termination of pregnancy" as covered under the federal PCIP in that state, in a document provided on a state website to prospective enrollees. *Id*.

The Congressional Research Service (CRS), a nonpartisan research support agency for Congress, issued a report confirming that neither the Hyde Amendment nor any provision of the ACA prevented the use of funds in the PCIP program from being used to cover all elective abortions. The CRS report also correctly noted that Executive Order 13535 was entirely silent on the PCIP component of the PPACA. Congressional Research Service, *High Risk Pools under PPACA and the Coverage of Elective Abortion Services* (July 23, 2010).

Under mounting public attention, the federal Department of Health and Human Services issued a regulation specifying that it will not allow coverage of abortions under the PCIP in any state, except to save the life of the mother, or in cases of rape or incest. 75 Fed. Reg. 45014 (2010). Notably, HHS did not assert that this decision was legally dictated by any

provision of the ACA or by Executive Order 13535, but implicitly recognized that this was not the case, by observing that similar restrictions were in force in "certain federal programs that are similar to the PCIP program."

On the same day the regulation was issued, the head of the White House Office of Health Reform issued a statement on the White House blog explaining that the discretionary decision to exclude abortion from the PCIP "is not a precedent for other programs or policies [under the ACA] given the unique, temporary nature of the program."[15] The director of the Washington legislative office of the American Civil Liberties Union urged protest of that decision before it was finalized, stating, "The White House has decided to *voluntarily* impose the ban for all women in the newly-created high risk insurance pools…. What is disappointing is that there is *nothing in the law* that requires the Obama Administration to impose this broad and highly restrictive abortion ban."[16]

---

[15] Nancy-Ann DeParle, *Insurance for Americans with Pre-Existing Conditions*, The White House Blog (July 29, 2010), http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions.

[16] Julian Pecquet, *ACLU steps into healthcare reform fray over abortion*, The Hill (July 17, 2010) (emphasis added), http://thehill.com/blogs/healthwatch/health-reform-implementation/109383-aclu-steps-into-healthcare-reform-fray-over-abortion.

The series of events surrounding the implementation of the PCIP provides a concrete demonstration that the ACA does authorize taxpayer funding of abortion; and that such funding is not precluded by the Hyde Amendment by any provision of the ACA or of Executive Order 13535.

2. Taxpayer Funded Abortion Allowed in Community Health Center Fund

The ACA established the "Community Health Center Fund" and directly appropriated "$11 billion over a five year period for the operation, expansion and construction of health centers throughout the Nation."[17] Community Health Centers ("CHCs") provide primary health services, including "health services related to family medicine, internal medicine, … obstetrics, or gynecology that are furnished by physicians," and "family planning services." ACA § 10503, codified at 42 U.S.C. § 254b. Thus, the statutory terms that describe the services provided by the CHC program are as broad as the terms used in the Medicaid statute, and in the case of "family planning services," the terms are identical. Therefore, by virtue of the same reasoning applicable to the Medicaid statute, *supra* Section A(1), courts are highly likely to conclude that the CHC program *must* provide tax-funded abortions unless Congress attaches to the CHC funds a Hyde-type limitation.

[17] U.S. Dept. of Health and Human Services, *The Affordable Care Act and Health Centers*, http://bphc.hrsa.gov/about/healthcenterfactsheet.pdf.

And because the ACA appropriates CHC funds without including a Hyde-type limitation in that appropriation, those funds, under the court precedent referenced above, *must* be used for abortions.

CHCs have existed for more than 45 years, and so far they have not provided abortions except in the narrow range of cases where Hyde has authorized them (rape, incest, and threat to maternal life). But that is precisely because all of their federal funding, at least so far, appears to have been made through annual appropriations bills that included the Hyde Amendment. The problem with the ACA is that it makes a *separate* appropriation of billions of dollars to a newly created "Community Health Center Fund" *without* including Hyde-type language to cover that appropriation. ACA, § 10503. Thus, the ACA-appropriations to the new "CHC Fund" are unrestricted by any existing Hyde limitation, and must under the cases described earlier be expended on abortions.

The Secretary of HHS wrote recently that HHS regulations exclude federal funding of abortions in CHCs, subject to life-of-the-mother, rape, and incest exceptions. We agree that the HHS regulations she cites are perfectly valid as to funds that Congress appropriated specifically subject to the annual Hyde restriction. But those regulations rely for their statutory authority—and their validity—on the annual Hyde Amendment. Because

that annual Hyde Amendment does not apply to ACA appropriations for CHCs, and because that section of ACA does not have Hyde language of its own, the regulations are highly likely to be found unenforceable as to these ACA-appropriated funds.

Indeed, the fact that the HHS regulations currently call for abortions to be provided in the CHC program in cases when the mother's life is endangered (42 C.F.R. § 50.304), and in cases of rape or incest (42 C.F.R. § 50.306), is an implicit acknowledgment that abortions are generally within the range of services that CHCs provide, subject only to such limitations as Congress has imposed through the Hyde Amendment. The problem is that the ACA makes an appropriation to the CHC program *without* an accompanying Hyde Amendment, thereby depriving the regulations of any statutory basis as applied to the funds that the ACA appropriates for CHCs.

In sum, the combination of (a) the statutory mandate that CHCs currently have to provide comprehensive health services, and (b) the absence of any Hyde limitation on the funds that the ACA appropriates for CHCs, means that (c) courts are highly likely to read the ACA to require the funding of abortions at CHCs in the absence of a statutory correction.

C. The ACA Expressly Directs Taxpayer Subsidies for Exchange Plans that Cover Elective Abortion

Section 1303 of the ACA includes express language that allows Exchange plans to include coverage for elective abortion, contrary to our nation's long-standing policy on prohibiting taxpayer subsidies of abortion plans.[18] Further, while that section included a "two check" accounting scheme added by the manager's amendment to avoid the appearance of federal funds subsidizing abortion, the ACA's implementation shows that the "separate payments" requirement is being flouted as the superficial formality that it always has been. Therefore, in the states that have not opted out of abortion as a covered service, there is neither an actual, nor a functional segregation of funds as required by the ACA.

1. The Abortion Premium Surcharge and its Secrecy Clause Force Taxpayers to Personally Fund the Abortions of Other Enrollees in Subsidized Plans

[18] The ACA breaks with the consistent federal policy since 1996 of prohibiting coverage for elective abortion in subsidized plans offered through the Federal Employees Health Benefits Plan, military insurance through TRICARE, or Indian Health Services. Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (November 11, 2009), http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/.

This section addresses how Section 1303 of the Affordable Care Act, as codified at 42 U.S.C. § 18023, forces taxpayers in certain subsided Exchange plans to personally fund the abortions of other enrollees.

What would become Section 1303 of the Act was described by Senator Nelson as follows:

> [I]n the Senate bill [which later became the ACA], if you are receiving Federal assistance to buy insurance, and if that plan has any abortion coverage, the insurance company must bill you separately, and you must pay separately from your own personal funds—perhaps a credit card transaction, your separate personal check, or automatic withdrawal from your bank account—for that abortion coverage. Now, let me say that again. You have to write two checks: one for the basic policy and one for the additional coverage for abortion. The latter has to be entirely from personal funds.

CONG. REC. S14134 (Dec. 24, 2009)(statement of Sen. Nelson).

In plans where the insurer includes abortion coverage, each enrollee is mandated to make "a separate payment" from their own personal funds or payroll deduction directly into an allocation account to be "used exclusively to pay for" other people's elective surgical abortions. 45 C.F.R. § 156.280(e) (implementing ACA, Section 1303(b)(2)(B), as codified at 42 U.S.C. § 18023). This abortion premium mandate applies "without regard to the enrollee's age, sex, or family status," 45 C.F.R. § 156.280(e)(2)(i), and with no religious exemption for enrollees who consider the practice and direct funding of other enrollees' surgical abortions to be a grave moral evil.

NRLC informed congressional members that, "[t]he new abortion language [adding Section 1303] solves none of the fundamental abortion-related problems with the underlying Senate bill, and it actually creates some new abortion-related problems. The abortion-related language violates the principles of the Hyde Amendment by requiring the federal government to pay premiums for private health plans that will cover any or all abortions." *Id*. at ¶ 20.

Implementation of the ACA confirms that the segregation requirement of Section 1303 was superficial window dressing designed to hide the fact that the ACA authorizes taxpayer-funded abortion; it has now been established that the "two check" scheme is not being enforced by the federal government as required by law. Gretchen Borchelt, director of state reproductive health policy at the National Women's Law Center, told the Huffington Post that "we used to talk about it as being two checks that the consumer would have to write because of the segregation requirements, but that's not the way it's being implemented."[19]

[19] Jeffrey Young, *Obamacare Provokes 21 States Into Banning Abortion Coverage by Private Health Insurers*, Huffington Post (Sept. 3, 2013), http://www.huffingtonpost.com/2013/09/03/ obamacare-abortion-coverage_n_3839720.html.

In fact, a bulletin from the Maryland Insurance Administration expressly states that insurers offering health plans in the federally subsidized Exchange are not required to charge a separate premium for elective abortion coverage. *See* Maryland Insurance Administration, Bulletin 13-24 at 4 (July 31, 2013)("issuers are not required to provide enrollees with separate invoices for non-excepted abortion services … nor to provide enrollees with itemization on a single invoice for non-excepted abortion services. . . .").[20]

Although Maryland does require insurers to segregate the "actuarial value" of the covered elective abortions, there is no requirement that the premiums received from the enrolled insured must be segregated. *See, Id.*, at 1-4. The net effect is that in Maryland, federal funds *directly* subsidize elective abortions.

Similar bulletins and guidance have been uncovered in New York, Washington State, and Rhode Island, who spokeswoman admitted that "the

[20] *Available at* http://www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin-13-24-nelson-amendment-073113.pdf.

customer is not billed a separate fee." As PolitiFact notes, "it turns out to be a hidden fee."[21]

From a pro-life perspective, even if the Section 1303 two-check requirement were being effectuated, it would not mitigate the fact that massive federal premium subsidies are now flowing to Exchange plans that cover elective abortion (a sharp departure from the longstanding policy of the Hyde Amendment), and that every taxpayer enrolled in an abortion inclusive plan will have a portion of their premium placed into an allocation account solely to pay for other people's elective abortions. But it is telling that part of the very "deal" that secured passage of the ACA—that separate payments be collected from enrollees in abortion-covering Exchange plans—is now being deliberately flouted. *Id*.

[21] PolitiFact Rhode Island (Oct. 2, 2013), http://www.politifact.com/rhode-island/statements/2013/oct/23/barth-bracy/anti-aborti on-activist-barth-bracy-says-people-who/. For other examples of State insurance commissions who are not being required by the Obama administration to abide by the "separate payments" requirement of Section 1303, *see* Susan T. Muskett, *Bait-and-Switch: The Obama Administration's Flouting a Key Part of Nelson 'Deal' on Obamacare*, National Right to Life News (Dec. 9, 2013) (quoting bulletins and guidance from state insurance commissioners in Maryland, New York and Washington State advising insurance companies that the state will not require them to collect the separate payments from enrollees, nor to even issue an itemized bill setting forth the separate abortion surcharge).

Moreover, the ACA creates abortion-funding landmines for American taxpayers by preventing pro-life Americans shopping in the Exchanges from being able to get a straight answer on which plans include elective abortion.[22] The ACA includes express language that acts as a secrecy clause because it instructs insurers to conceal abortion coverage and abortion premiums when advertising in the Exchanges (and even to conceal the breakout of the separate abortion premium in the summary of benefits provided at enrollment). 45 C.F.R. § 156.280(f), 77 Fed. Reg. 18472-73 (insurer must provide notice of abortion coverage "only . . . at the time of enrollment" in "any advertising" the insurer "must provide information only with respect to the total amount of combined payments," thus instructing that the separate abortion payment not be disclosed).[23]

As the full implementation of the Exchanges proceeds, millions of taxpayers will increasingly discover that they are paying surcharge premiums into allocation accounts set aside for other people's elective

---

[22] Julie Rovner, *Which Plans Cover Abortion? No Answers on HealthCare.gov*, NPR (Nov. 1, 2013); *See also* G. Plaster and C. A. Donovan, *Elective Abortion Coverage Information Still Elusive*, Charlotte Lozier Institute (Dec. 13, 2013).

[23] For a two-page review of the regulations' abortion surcharge and secrecy clause, *see* USCCB, *Backgrounder: The New Federal Regulation on Coerced Abortion Payments*, http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Backgrounder-The-New-Federal-Regulation-on-Coerced-Abortion-Payments.pdf .

abortions, and that their premiums are co-mingled with tax-dollars that subsidize those plans for eligible enrollees. The ACA's mechanisms do indeed implement tax-payer funded abortion.

2. The ACA Subsidizes Plans Required by the HHS Mandate to Cover Abortion-Inducing Drugs and Devices

Enrollees who somehow navigate the murky waters of the taxpayer subsidized Exchanges to find a plan that does not include surgical abortion coverage will nonetheless be subjected to the HHS "Women's Preventive Services" Mandate covering abortifacient drugs and devices, without the ability to decline coverage.

To be sure, ACA § 1334(a)(6) requires at least one qualified health plan in each Exchange that does not cover surgical elective abortion. But this option does not provide relief from the HHS Mandate that requires all plans to cover certain abortion-inducing drugs and devices. *See* 77 Fed. Reg. 8725 (implementing 42 U.S.C. § 300gg-13(a), requiring all group and individual plans, including those in the taxpayer subsidized Exchanges, to include '[a]ll FDA approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.").

As discussed at length in briefing before the U.S. Supreme Court in the pending *Hobby Lobby/Conestoga Woods* cases, Nos. 13-354, 13-356, FDA-approved "contraceptives" include drugs and devices that are capable of terminating the life of a human being at the embryonic stage of development. *See*, *e.g.,* Brief *Amicus Curiae* of Catholic Medical Association in Support of Hobby Lobby, No. 13-354 (U.S. 2014). The mandatory inclusion of these life-ending drugs and devices as an "essential benefit" is one more example of an administrative decree under the ACA implements taxpayer funded abortion.

Whether the issue is viewed as a matter of fact or a matter of law, the ACA authorizes taxpayer-funded abortion.

CONCLUSION

Amici respectfully urge this Court to affirm the district court's dismissal of the defamation claim.

Dated: March 21, 2014.

/s/ Steven H. Aden
Steven H. Aden
Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393-8690
saden@alliancedefendingfreedom.org

Nikolas T. Nikas
Dorinda C. Bordlee
BIOETHICS DEFENSE FUND
6811 E. Voltaire Ave.
Scottsdale, AZ 85254
dbordlee@bdfund.org
(504) 231-7234

Catherine W. Short
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 1313
Ojai, CA 93023

Counsel for Amici

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 28.1(e)(2). This brief contains **6664** words and was prepared in Microsoft Word for Mac 2011.

Dated: March 21, 2014.

/s/ Steven H. Aden
Steven H. Aden
Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393-8690
saden@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2014, I caused true and correct copies of the foregoing Brief for Amici Curiae Bioethics Defense Fund, Alliance Defending Freedom and Life Legal Defense Foundation to be served on the following via the Electronic Case Filing (ECF) service:

Michael A. Carvin
JONES DAY
51 Louisiana Avenue NW
Washington, D.C. 20001
(202) 879-7658

Counsel for Appellee

Paul M. DeMarco
Markovits, Stock & DeMarco, LLC
119 East Court Street, Suite 530
Cincinnati, Ohio 45202

Katherine Demarest
Dorsey & Whitney
1031 W. Fourth Avenue, Suite 600
Anchorage, Alaska 99501

Counsel for Appellant

Dated: March 21, 2014.

/s/ Steven H. Aden
Steven H. Aden
Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393-8690
saden@alliancedefendingfreedom.org

Counsel for Amici Curiae