No. 10-2347

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, INCORPORATED, 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; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity

Defendants-Appellees.

On Appeal from the U.S. District Court for the Western District of Virginia;
On Remand from the
Supreme Court of the United States, No. 11-438

BRIEF OF 281 MEMBERS OF LEGATUS, AND CATHOLIC MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Nikolas T. Nikas
*Dorinda C. Bordlee
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, Arizona 85254
(602) 751-7234
ntnikas@bdfund.org
dbordlee@bdfund.org

*COUNSEL OF RECORD

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amici curiae are Catholic business executives and medical professionals who each have a moral duty[2] to oppose the egregious violations of conscience and free exercise rights imposed by the abortion-related mandates of the Affordable Care Act.[3]

281 Members of Legatus, whose names are listed in the Appendix, file in their individual capacity. With over 70 chapters across the United States, Legatus is an organization of Catholic business leaders. *Amici* Legatus members joining this brief are CEOs, Presidents, Managing Partners, Business Owners, and spouses who participate as separate members. *Amici* Legatus members present a closer look at the surgical "Abortion Premium Mandate" that applies in *certain* Exchange

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[1] Pursuant to Cir. Rule 29, counsel certifies that all parties have consented to the filing of this brief, and further certifies that no counsel for any party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of the brief.

[2] As practicing Catholics, *Amici* assent to the teaching of Blessed Pope John Paul II: "Abortion [is a] crime[] which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection." *Evangelium Vitae*, 73 (1995).

[3] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)(hereinafter "ACA").

plans; and, more importantly, *Amici* bring this Court's attention to the fact that the HHS Preventive Mandate applies to *all* group and *individual* health plans, thus making it impossible for *Amici* or Plaintiffs to find *any* health plan, whether from their employer or in the individual market, that does not include drugs and devices capable of terminating the life of a human being at the embryonic stage of development. Once bootstrapped into the individual mandate with its "minimum essential coverages requirement," *Amici* will be unable to comply with their consciences without undergoing the substantial burden of placing themselves in the ranks of the uninsured *and* paying the individual mandate tax of 26 U.S.C. § 5000A.

Catholic Medical Association ("CMA") seeks to assist the Court by presenting the pharmacology of certain abortifacient drugs included in the HHS Preventive Mandate. CMA is a nonprofit national organization founded in 1932 to assist Catholic physicians in upholding and witnessing to the principles of their faith in the science and the practice of medicine. Comprised of over 1,500 members covering over 75 medical specialties, CMA helps to educate the medical profession and society at large about issues in medical ethics, including abortion and public health and rights of conscience issues, through its annual conferences and quarterly journal, *The Linacre Quarterly*. CMA supports Catholic hospitals in faithfully applying Catholic moral principles in health care delivery.

SUMMARY OF THE ARGUMENT

Like a Russian nesting doll, the individual mandate provision of 26 U.S.C. § 5000A has nestled within it two abortion-related mandates: one mandate relates to surgical abortion premiums that are inescapable in *certain* Exchange health plans; and the other relates to abortifacient drugs and devices imposed as essential "preventive" benefits in *all* health plans, both group *and individual*, each without an exemption for individuals with religious objections.

This amicus brief more fully addresses the individual mandate tax as impacted and triggered by the inner workings of these two internal mandates. Each mandate is being implemented under the guidance of two sets of federal regulations that were finalized by the Department of Health and Human Services (HHS) after this Court's prior consideration of the pending matter, and even after final briefing was submitted to the U.S. Supreme Court by the parties in the case of *United States Dep't. of Health and Human Services v. State of Florida*, decided *sub nom. NFIB v. Sebelius*, 132 S.Ct. 2566 (2012) (No. 11-398).

The "Abortion Premium Mandate" regulations issued on March 27, 2012 implement Section 1303 of the ACA.[4] These regulations would burden the free exercise rights of *Amici* and millions of pro-life Americans who find themselves in

[4] *Segregation of funds for abortion services*, 45 C.F.R. § 156.280, 77 Fed. Reg 18472 (March 27, 2012)(implementing ACA, Section 1303 as codified at 42 U.S.C. § 18023)(hereinafter "Abortion Premium Mandate").

Exchange plans that cover elective abortion after January 1, 2014. Pro-life individuals may find themselves in such a plan because it was the choice of their employer, or because they were entrapped via the "secrecy clause" that effectively instructs issuers to conceal abortion coverage and abortion premiums when advertising in the Exchanges. 45 CFR § 156.280(f). With no ability to decline the 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 abortion. 45 CFR § 156.280(e). This abortion premium mandate applies "without regard to the enrollee's age, sex, or family status," and with no exemption for enrollees who consider the practice and direct funding of surgical abortion to be a grave moral evil.

While the the "Abortion Premium Mandate" applies only to enrollees in *certain* Exchange plans, the equally immoral abortifacient drugs imposed as a "minimum essential coverage" by the "HHS Preventive Mandate" regulations[5] apply to *all* health plans, both group *and individual*, including plans that do not cover elective abortion.

[5] *Certain Preventive Services under the Affordable Care Act*, 77 Fed. Reg. 8725 (February 15, 2012)(hereinafter "HHS Preventive Mandate"). This mandate applies not only to plans purchased in the subsidized Exchanges, but also to all group and individual plans by virtue of the mandate being on all "issuers." *Id.*

In Section I (B), *Amici* bring this Court's attention to the lesser known, but determinative provision showing that the coercive HHS Preventive Mandate is applicable not only to group health plans (via the employer mandate), but also to every *individual* health plan purchased pursuant to the individual mandate. *See* 77 Fed. Reg. 8725 ("requires that non-grandfathered group health plans and health insurance issuers offering group **or individual health insurance coverage** provide benefits for certain preventive health services without imposition of cost sharing . . . .that include . . . . '[a]ll FDA approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. . . .'")(emphasis added).

The HHS Preventive Mandate thus twists the individual mandate tax into a weapon that inflicts a crisis of conscience not only on *Amici* and Plaintiffs, but on every American who objects to collaborating in the payment and no-cost provision of abortifacient drugs (even to their minor dependents who have reached "reproductive capacity").

Section II demonstrates that *Amici's* religious objections to the abortifacient capabilities of the mandated "emergency contraceptives" are reinforced by science. This Section sets forth the uncontroverted evidence that the life of a unique human individual begins at fertilization, not implantation. It then presents a brief survey on the pharmacology of two of the many abortifacient drugs included in the HHS

Preventive Mandate, Plan B and *ella*, which are capable of terminating the life of a human being at the embryonic stage of development by either preventing implanation, or by causing an already implanted human embryo to lose sustenenance from the uterine lining.

The bottom line in light of the law and the science is that it will be impossible for *Amici* and Plaintiffs to avoid the individual mandate tax of § 5000A. The internal mandates operate such that all qualified health plans, both group and individual, will cover either surgical abortion or abortifacient drugs, or both, with no exception for individuals like *Amici* whose religious beliefs prohibit their collaboration with either of these grave moral evils.

The Affordable Care Act thus coerces *Amici* and the individual Plaintiffs to either violate their conscience with the purchase of morally unacceptable qualified health plans, or place themselves in the ranks of the uninsured. Because the conscience protecting option of dropping all coverage subjects *Amici* and the individual Plaintiffs to the individual mandate tax imposed via 26 U.S.C. § 5000A, it is – in effect – an unconstitutional tax on pro-life conscience.[6]

[6] Legatus members undertake a mission "to study, live and spread the Catholic faith in their business, professional and personal lives." While this brief addresses objections to abortion and abortifacient drugs, *Amici* note that the inclusion of surgical sterilization and contraceptive drugs and devices are also in conflict with Catholic teaching. *See Catechism of the Catholic Church*, ¶¶ 2366-2372.

CONCLUSION

The individual mandate of 26 U.S.C. § 5000A and its internal mandates coercively impose an ideology that normalizes elective abortion and abortifacient drugs as "healthcare." *Amici* join Plaintiffs in the belief that the killing of vulnerable human beings at the beginning of their lives is far from healthcare; rather, it is a crime against the dignity of the human person and a grave moral evil.

Multiple mandates compel Plaintiffs and *Amici* to purchase health plans that inescapably include abortion and/or abortifacient drugs, with the only conscience-protecting option being to drop all health insurance *and* pay a tax for practicing their religious beliefs. The government has no legitimate power to compel such a choice. The First Amendment and RFRA do not sanction a tax on pro-life conscience.

Amici urge reversal.

Respectfully submitted this 6th day of March, 2013,

/s/ Dorinda C. Bordlee_____

Nikolas T. Nikas
Dorinda C. Bordlee, *Counsel of Record*
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
(480) 483-3597
dbordlee@bdfund.org

APPENDIX OF *AMICI CURIAE*

281 MEMBERS OF LEGATUS

281 Legatus Members join as amici curiae in their individual capacity:

Alabama

Frank Calagaz
Daphne, AL

Walter Drey
Theodore, AL

Douglas Eckert
Birmingham, AL

Bry Sheilds
Mobile, AL

Susan Duffey
Mobile, AL

Julia Drey
Theodore, AL

Robert Clapper
Mobile, AL

Timothy Hughes
Mobile, AL

Todd Engerson
Mobile, AL

Arizona

Maureen Adams
Scottsdale, AZ

Phillip Adams
Scottsdale, AZ

David Sherf
Paradise Valley, AZ

Dave Wilson
Phoenix, AZ

Keith Tigue
Phoenix, AZ

Gayle Somers
Phoenix, AZ

Anna Tigue
Phoenix, AZ

California

Lisa Andrews
San Mateo, CA

William Applegate
San Francisco, CA

Ann Armstrong
Rancho Palos Verdes, CA

Desmond Armstrong
Torrance, CA

James P Baldwin
Laguna Beach, CA

Ric Brutocao
Laguna Hills, CA

Laurie Cadieux
Laguna Niguel, CA

William Campbell
Villa Park, CA

Jerry Hackbarth
Oak Hills, CA

Catherine Clark
Yorba Linda, CA

Ken Clark
Yorba Linda, CA

Roger Kirwan
Newport Coast, CA

William DeMucci
La Quinta, CA

John Dorman
Menlo Park, CA

Willhilmina Jorgensen
La Jolla, CA

Benjamim Glenn
San Carlos, CA

Mark Jorgensen
La Jolla, CA

George Esseff
Westlake Village, CA

Mary Cesario
Newport Beach, CA

Maureen Cummings
San Gabriel, CA

RScott Turicchi
Santa Barbara, CA

James Ledwith
El Cajon, CA

Mary Ledwith
El Cajon, CA

Rita Liebelt
Glendale, CA

Paul McDonnell
Granite Bay, CA

Kenneth Meyers
Nevada City, CA

Otilia Montano
Tustin, CA

Carol E Morton
Indian Wells, CA

Sandra Murphy
San Diego, CA

Martin O'Toole
La Canada, CA

Pat and Carol Park
San Diego, CA

Dino and Sandra Parkes
Granite Bay, CA

Valerie Rafferty
San Juan Capistrano, CA

Steven and Carmen Ramirez
Elk Grove, CA

Terrya Rez
San Diego, CA

Joseph Russoniello
San Francisco, CA

Doug Sherman
Tahoma, CA

Barbara Stephen
Huntington Beach, CA

Douglas Stephen
Huntington Beach, CA

Roy Wensley
Playa del Rey, CA

Colorado

Mark Bauman
Englewood, CO

Kenneth Cavanaugh
Longmont, CO

Joseph Faricy
Canon City, CO

Michael Faricy
Colorado Springs, CO

Robert Jaeger
Colorado Springs, CO

Kevin Kopp
Greenwood Village, CO

Steve Helbing
Colorado Springs, CO

Jeff Schmitz
Greenwood Village, CO

Kris Spreche
Colorado Springs, CO

Nancy Kopp
Greenwood Village, CO

Arthur Nutter
Colorado Springs, CO

Joan Ronchetti
Colorado Springs, CO

Mike Sullivan
Denver, CO

Richard Todd
Centennial, CO

Paul Zakovich
Greenwood Village, CO

Sharyl Sullivan
Denver, CO

DC

Julian Heron
Washington, DC

Florida

Charles Carter
Windermere, FL

Marieke Carter
Windermere, FL

Chris Casselberry
Mary Esther, FL

John Clegg
Ponte Vedra, FL

Louis DePrisco
Naples, FL

David Grabosky
Orlando, FL

Dick Erickson
Jacksonville, FL

Angela Flippin-Trainer, M.D.
Naples, FL

Mark Keenan
Longwood, FL

Kathie Hunt
Naples, FL

John Hunt
Naples, FL

Helen Lestage
Fleming Island, FL

August Klein
Ponte Vedra Beach, FL

Daniel Lestage
Fleming Island, FL

Thomas Moran
Orlando, FL

Stephen Mona
Ponte Vedra Beach, FL

Jeanne Moran
Altamonte Springs, FL

John Whelan
Holmes Beach, FL

Robert Mylod
Ponte Vedra Beach, FL

Kenneth Peach
Orlando, FL

Louise Rainey
Windermere, FL

John-William Trainer
Naples, FL

Georgia

Mary McKenzie
Atlanta, GA

William McKenzie
Atlanta, GA

John Riordan
Milton, GA

Thomas Wessels
Atlanta, GA

Iowa

Lyle Carpenter
Bondurant, IA

Donald Stanforth
Davenport, IA

Illinois

Keith Armato
Park Ridge, IL

Alan DeBord
Peoria, IL

Robin Hake
Edwardsville, IL

Ron and Merilea Blake
North Barrington, IL

Michael Winn
Lake Forest, IL

Christopher Yep
Lemont, IL

Mary Ann Yep
Lemont, IL

Indiana

Kim Dickman
Indianapolis, IN

Charles J O'Drobinak
Indianapolis, IN

LaVonne Snoke
Lebanon, IN

Thomas Spencer
Indianapolis, IN

Kansas

Gerald Aaron
Wichita, KS

Robert Simpson
Wichita, KS

Kentucky

Michael Fister
Lexington, KY

Lee Hall
Lexington, KY

Gary Rudemiller
Nicholasville, KY

Charles Walter
Lexington, KY

Donna Walter
Lexington, KY

Louisiana

John Becker
Mandeville, LA

Mary Jane Becker
Mandeville, LA

Sidney Bowden
Baton Rouge, LA

Joseph Carrere
New Orleans, LA

Guy Chiappetta
Slidell, LA

Theresa Darnell Chiappetta
Slidell, LA

Johnny Conrad
Berwick, LA

Stephen Cory
Mandeville, LA

Julie Ungarino
Metairie, LA

Donald Daigle
Baton Rouge, LA

Anne Dardis
New Orleans, LA

John Dardis
New Orleans, LA

Alison Dazzio
Zachary, LA

Carol Dazzio
Baton Rouge, LA

Peter Dazzio
Baton Rouge, LA

Betty DeMars
Baton Rouge, LA

Jonathan Kernion
Covington, LA

Bill Knobles
Baton Rouge, LA

Jay Labarre
Denham Springs, LA

Tere Labarre
Denham Springs, LA

C J Ladner
Mandeville, LA

Wanda LaPorte
Metairie, LA

Caroline Lemann
Baton Rouge, LA

David Lukinovich
Baton Rouge, LA

Kim Lukinovich
Baton Rouge, LA

Mary Read
Covington, LA

Edward Rispone
Baton Rouge, LA

Linda Rispone
Baton Rouge, LA

Rock Rockenbaugh
Baton Rouge, LA

Charles Schutte
Baton Rouge, LA

Carmen Sims
Winnsboro, LA

Gordon Stevens
Metairie, LA

Stephen Stumpf
Madisonville, LA

Matthew Ungarino
Metairie, LA

Victor Weston
Baton Rouge, LA

Ray Whatley
Saint Francisville, LA

Massachusetts

Ann Southworth
Springfield, MA

Maryland

Michael Huke
Rockville, MD

Gregory Maier
Potomac, MD

Susan Maier
Potomac, MD

Deborah Peroutka
Severna Park, MD

Timothy Watkins
Hunt Valley, MD

Michigan

Gerard Andree
Bloomfield Village, MI

Bernadette Barron
Metamora, MI

Paul Barron
Oxford, MI

Michael Brown
Troy, MI

David Fischer
Beverly Hills, MI

Daniel Weingartz
Shelby Township, MI

Richard Hendricks
Saline, MI

Thomas Lewry
Birmingham, MI

John Lynch
Ypsilanti, MI

Karen Mersino
Lapeer, MI

Rodney Mersino
Lapeer, MI

Douglas Reaume
Bloomfield Hills, MI

Andrew Shmina
Brighton, MI

Salvatore Simone
Romeo, MI

Jerome Timlin
Franklin, MI

Yvonne Timlin
Franklin, MI

Raymond Weingartz
Macomb, MI

Minnesota

John Norris
Columbia Heights, MN

Jim Oricchio
Eagan, MN

John Radick
Victoria, MN

Jon and Sue Westerhaus
Chanhassen, MN

Missouri

Leonard Dino
Chesterfield, MO

John Hake
Saint Louis, MO

Michael Mooney
Saint Louis, MO

Mike Heck
Saint Louis, MO

Scott Hummel
Saint Louis, MO

Susan MacDonald
Saint Louis, MO

Thomas Reh
Saint Louis, MO

Nebraska

Brian Allison
Lincoln, NE

Michael Lawler
Omaha, NE

Jeffrey Lindholm
Omaha, NE

Liam Barr
Lincoln, NE

Mike Decker
Lincoln, NE

Dan Drvol
Omaha, NE

Chris Kidwell
Lincoln, NE

New Jersey

Birger Brinck-Lund
Basking Ridge, NJ

John Deitchman
Bernardsville, NJ

Sean Flanagan
Florham Park, NJ

Angel Gonzalez
Watchung, NJ

Katharine Lawrence
Asbury, NJ

Thomas Oswald
Far Hills, NJ

Nevada

Howard Tribble
Henderson, NV

New York

Thomas Danaher
New York, NY

Paul Durnan
Rockville Centre, NY

Sherry Durnan
Rockville Centre, NY

Ohio

Rick Costello
Richfield, OH

Marilyn Crisafi
Cleveland, OH

Michael DAndrea
Westerville, OH

Brian Dean
Brecksville, OH

Alan Dekker
Columbus, OH

Kathleen Faist
Sylvania, OH

Peggy Hartshorn
Columbus, OH

Dick Hinterschied
Columbus, OH

Amy Imm-Knapke
London, OH

Philip Buerk
Monclova, OH

Patricia Bullard
Sylvania, OH

Bernadette Kane
Cleveland, OH

Mary Ann Jepsen
Powell, OH

Stephen Jepsen
Powell, OH

Julie Naporano
Columbus, OH

Bob Kane
Cleveland, OH

Kevin Kelly
Sylvania, OH

Robert Schulte
Delphos, OH

Greg Ochalek
Aurora, OH

Ingrid Ochalek
Aurora, OH

Otto Weik
Maumee, OH

Ronald Sibila
Massillon, OH

Roger Sustar
Mentor, OH

Denise Zimmerman
London, OH

Neil Whitford
Avon Lake, OH

Peggy Wolock
Columbus, OH

Oregon

Vincent Mesa
Tigard, OR

Joe Williams
West Linn, OR

Pennsylvannia

Kathleen Clay
Huntingdon Valley, PA

Jack Donnelly
Berwyn, PA

Alvin Clay
Huntingdon Valley, PA

Robert Farrell
Perkiomenville, PA

Fred Hespenheid
Mars, PA

Kathy Donnelly
Berwyn, PA

Gregory Rice
Drexel Hill, PA

Tim Twardzik
Frackville, PA

Charles Piola
West Chester, PA

Rhode Island

Kevin McDevitt
East Greenwich, RI

Texas

Brock Akers
Houston, TX

Christopher Aubert
Spring, TX

John Sheedy
Arlington, TX

Harry Flavin
San Antonio, TX

Bruce Hotze
Houston, TX

John Kafka
Houston, TX

Patrick McCarthy
Houston, TX

Barbara Sanders
Flower Mound, TX

Virginia

John Bruchalski
Fairfax, VA

Marjorie Dannenfelser
Arlington, VA

Erin Dausch
Leesburg, VA

Jeff Dausch
Leesburg, VA

David DeWolf
Centreville, VA

Randy Dominick
Haymarket, VA

Mary Ferguson
Great Falls, VA

Brian Fimian
Falls Church, VA

Keith Fimian
Oakton, VA

John Guevremont
Washington, VA

Rebecca Irving
Bristow, VA

Kathleen Kampa
Oak Hill, VA

Suzy Kelly
Chesapeake, VA

Stephen Moriarty
Great Falls, VA

Timothy O'Donnell
Front Royal, VA

Frank O'Reilly
Front Royal, VA

Nancy Tanner
Great Falls, VA

Mark Weber
Oakton, VA

Paul Wise
Oak Hill, VA

Washington

Ann Kelly
Seattle, WA

JTS Mullally
Seattle, WA

Jeff Thiede
Vancouver, WA

Frederic Weiss
Seattle, WA

Wisconsin

Robert Gunderson
Franklin, WI

Paul Hundt
Elm Grove, WI