

Ohio Elections Commission

Steve Driehaus
3502 Boudinot Avenue
Cincinnati, Ohio 45211

Complainant,

v.

Susan B. Anthony List
1717 L Street NW, Suite 750
Washington, DC 20036

Respondent. _Case No. 2010E-084_

Affidavit of Family Research Council

I, Thomas McClusky, being first duly cautioned and sworn, state as follows:

- 1 I am an adult, over eighteen years of age.
- 2 I am the Senior Vice President of Family Research Council Action ("FRCA"). As such, I have
personal knowledge of FRCA and its activities, and if called upon to testify I would testify
competently as to the matters stated herein.
- 3 Family Research Council Action (FRCA) the non-profit and tax-exempt legislative action arm of
Family Research Council, was founded in 1992 to educate the general public and cultural leaders
about traditional American values and to promote the philosophy of the Founding Fathers
concerning the nature of ordered liberty.
- 4 FRCA is a 501(c)(4), non-profit education and lobbying organization based in Washington, D.C.
FRCA is dedicated to preserving and advancing the interests of family, faith, and freedom in the
political arena.
- 5 Because FRCA opposes abortion, it took special interest in the Patient Protection and Affordable
Care Act ("PPACA"), which was approved by the U.S. Senate on December 24, 2009, then by

the House of Representatives on March 21, 2010, and was signed into law by President Obama on March 23, 2010.

6 FRCA studied the bill as it made its way through Congress, and ultimately determined that the bill, as passed, did allow for taxpayer funded abortion.

7 The PPACA would use government funds to pay for elective abortion and would subsidize health plans that include coverage for elective abortion in several ways.

8 Section 1303 of the PPACA would spend taxpayer money to purchase plans in the Exchange that cover elective abortion, a subsidy for abortion that directly conflicts with the principles of the Hyde amendment. The accounting gimmick established under this section allows issuers of plans that cover abortion to receive federal subsidies as long as these subsidies are kept in separate accounts from an abortion surcharge that everyone will be required to pay. This scheme does not mitigate the fact that this section uses federal funds to pay for people to purchase health plans that include abortion coverage. In contrast, the Hyde amendment prohibits state Medicaid matching contributions from paying for abortion, but allows states to pay for abortion under a completely separate program. By analogy, if this PPACA provision was applied to Medicaid, it would have the effect of allowing states to use their Medicaid matching contribution to pay for abortion so long as the state kept the federal portion in a separate account. In contrast, the Hyde amendment prevents the federal and state portion of Medicaid from paying for abortion, leaving it up to the state to pay for abortion with non-Medicaid funds. The Stupak amendment followed established law, the PPACA does not.

9 Worse, the PPACA accounting gimmick requires individuals in plans that include abortion coverage to pay an abortion fee to be set by the Secretary of Health and Human Services. This provision also prevents health plans from informing participants about the abortion surcharge

except in fine print. While this section allows states to opt out of abortion coverage in the Exchange, it does not allow states to choose to opt out of abortion coverage with specific exceptions. Instead, they must opt out of all abortion, including life, rape and incest, or cover all abortion. For those in states that do not opt out of such coverage, every person paying for those plans will be forced to pay for others' abortions because of the abortion fee. However, even those individuals in states that opt out of abortion coverage will still be required to pay for abortion coverage in other states that provide abortion coverage, because their federal taxes would be used to subsidize abortion in other states.

10 This accounting gimmick was praised by Health and Human Services Secretary Kathleen Sebelius in an interview with pro-abortion Bogher interviewer Morra Aarons-Mele on December 21, 2009, the day before the Senate vote on PPACA. The transcript follows:

11 SEBELIUS: And I would say that the Senate language, which was negotiated by Senators Barbara Boxer and Patty Murray, who are very strong defenders of women's health services and choices for women, take a big step forward from where the House left it with the Stupak amendment, and I think do a good job making sure there are choices for women, making sure there are going to be some plan options, and making sure that while public funds aren't used, we are not isolating, discriminating against, or invading the privacy rights of women. That would be an accounting procedure, but everybody in the exchange would do the same thing, whether you're male or female, whether you're 75 or 25, you would all set aside a portion of your premium that would go into a fund, and it would not be earmarked for anything, it would be a separate account that everyone in the exchange would pay.

12 BLOGHER: It's a bit confusing, but ...

13 SEBELIUS: Okay. It is a bit confusing, but it's really an accounting that would apply across the

board and not just to women, and certainly not just to women who want to choose abortion coverage.

14 BLOGGER: Oh, that's good, that's good.

15 This view seems to be shared by groups that support taxpayer funding of abortion as well. On October 4, 2010 the American Civil Liberties Union, the Center for Reproductive Rights, NARAL Pro-Choice America, the National Family Planning and Reproductive Health Association, Physicians for Reproductive Choice and Health, Planned Parenthood Federation of America filed comments with Secretary Sebelius regarding Exchange-related provisions in Title I of the PPACA. The groups make it clear that the PPACA was devised to allow for abortion funding when they state "*Congress' intent in Section 1303 was to preserve widespread availability of coverage for abortion care both within and outside Exchanges.*"

16 Despite the argument that the accounting gimmicks of Section 1303 somehow maintain the current Hyde restrictions, other sections of PPACA would directly fund elective abortions in three new programs. Section 10503 of PPACA authorizes funds for community health centers and would appropriate \$7 billion for these community health centers. These appropriated funds would not be subject to the Hyde amendment in the annual LHHS appropriations bill, and therefore would directly pay for elective abortions. There are no restrictions or even accounting gimmicks for these funds. Second, Section 1322 of the PPACA creates a non-profit co-op program that could be used for funding elective abortions. The section appropriates \$6 billion for grants and loans to co-ops without any abortion funding restriction. Third, Section 1101 creates a temporary high risk health insurance pool program, and appropriates \$5 billion for this program, without any restriction on funding elective abortion. Each of these provisions would provide direct funding for elective abortion on a massive scale.

17 The PPACA under Section 1334 replaced the public option in previous versions of the bill with a multi-state plan to be managed by the Office of Personnel Management. However, unlike the FEHBP program on which it is modeled, the PPACA allows the Director of OPM to contract and subsidize health plans that include elective abortion. This section would completely deviate from current law governing the FEHBP program which does not allow subsidies for plans that include abortion. This section of the PPACA would violate long-standing practice by subsidizing abortion plans that span multiple states. In the aforementioned letter to Secretary Sebelius the coalition of abortion rights organizations reinforce the fact the plan would cover abortions:

18 *"We urge the Department to harmonize provisions in the Act pertaining to multi-state QHPs and to abortion coverage and to clarify that multi-state plans are allowed to cover abortion, even if that would result in a lack of uniformity across states."*

19 The PPACA also contains an abortion coverage mandate. Section 1001 of the PPACA would amend the Public Health Services Act and mandate that all individual and group health plans provide coverage for preventive care in accordance with guidelines offered by the United States Preventive Services Task Force (USPST). This provision contains an amendment by Senator Barbara Mikulski (D-MD) that would extend the mandate to include preventive services for women under guidelines written by the Health Resources and Services Administration (HRSA). If HRSA included elective abortion as one of the preventative services for women, then all group and individual health plans would be required by law to cover abortion. This scenario is very likely. Court rulings such as that which upheld the Hyde amendment in *Planned Parenthood Affiliates v. Engler* on January 16, 1996, made clear that abortion would be considered a covered medical service unless Congress excludes it. Since the PPACA, and this section on preventative health benefits services for women, does not contain any abortion exclusion, this provision will

guarantee that every health plan in the Exchange includes abortion coverage for women.

20 PPACA also reauthorizes the Indian Health Service Act without a permanent Hyde amendment. Section 10221 of the PPACA provides for restrictions with a cross reference to the annual LHHS bill. However, if the Hyde amendment were not renewed on the LHHS bill in a given year, abortion on demand would be funded under this Act in Indian health services.

21 Last, the PPACA does not contain the conscience protection provision sponsored by Rep. Bart Stupak and contained in the House passed version of the health care bill (Sec. 259). This provision incorporated the principles of the Weldon conscience language renewed each year in the LHHS appropriations bill to protect the conscience rights of health care workers who refuse to participate in abortion. Instead, the Senate rejected the Stupak provision in favor of a weaker nondiscrimination provision in Section 1303. This section says only that health “plans” in the Exchange cannot discriminate against “providers” or “facilities” that are unwilling to participate in abortion. It does not prevent the Federal government from such discrimination, nor does it prevent providers and facilities from discriminating against individual

22 FRCA’s view that PPACA allows for taxpayer funded abortion was reinforced by Congressmen Stupak and 240 fellow Members of Congress, who supported amendments to the House version of the legislation before it passed the House. These Representatives thought that the health care bill allowed for taxpayer funding of abortion without their amendments. The Stupak Amendment is not contained within the final version of PPACA.

23 The Stupak amendment, like the Hyde amendment, would prevent federal funding for elective abortion or subsidies for plans that cover abortion. It specifically would allow health plans on the government run Exchange to include abortion coverage and allow individuals to purchase such plans, or abortion riders, so long as government funds are not used. The Stupak amendment is

consistent with the Hyde amendment and current government funding policy on abortion set forth by the Federal Employees Health Benefits Plan (FEHBP) and the State Children's Health Insurance Plan. Like the Hyde amendment, laws governing both of these government programs prevent federal funding for abortion or funding for health plans that cover elective abortion. In direct contrast, the PPACA allows the use of government funds to pay for elective abortion and would subsidize health plans that include coverage for elective abortion in several ways.

24 After the PPACA was signed into law, the President signed Presidential Executive Order 13535, which purportedly imposed the requirement on the PPACA that no taxpayer money be used to fund abortions, thereby supposedly bringing the PPACA into compliance with the requirements of the 1976 Hyde Amendment, which bans federal taxpayer funded abortions.

25 Our research, however, reveals that EO 13535 still allows for taxpayer funded abortion through the PPACA.

26 FRCA continued to oppose the PPACA even after President Obama Issued an Executive Order which his allies claimed would fix the problems in the PPACA in relation to taxpayer funding of abortion. President Obama and the Democratic leadership know that such a plan, due to legal precedent, would be worth little in the long run. Some examples of courts overruling Executive Orders include:

- The District of Columbia Court of Appeals struck down Executive Order 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts," issued by President Clinton, March 8, 1995, which authorized sanctions on federal contractors that exercise their legal right to permanently replace economic strikers. In *Commerce of U.S. v. Reich*, 74 F.3d 1322. The court ruled that the executive order is regulatory in nature and is preempted by the NLRB, which guarantees

employers the right to hire permanent replacements. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322.

- The *Hamdan* decision struck down President Bush's executive order because Congress, in enacting a statutory military commissions system, had impliedly prohibited the President's invocation of military commission jurisdiction over *Hamdan*. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).
- In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court struck down President Truman's executive order during the Korean War that purported to authorize assuming federal control of certain domestic steel mills due to labor unrest.

27 Further the President's Executive Order (EO) in relation to PPACA did little to address the problems inherent in the PPACA. Section 1 of the EO claims to "extend" the Hyde amendment abortion funding restrictions to the health exchanges that would be created under the PPACA. It also claims to ensure that conscience protections under the Church amendments (long-standing statute) and the Weldon appropriations provision "remain intact." The problem is the PPACA is not bound by the Hyde amendment restricting abortion funding or the Weldon nondiscrimination provision because those restrictions only apply to funds appropriated under the Labor, Health and Human Services (LHHS) appropriations bill. These provisions of law do not constrain the funding under the PPACA because it directly appropriates funds for new programs that would fund abortion.

28 Second, Section 2 of the EO actually reaffirms the subsidies for abortion covering plans in the PPACA Sec. 1303 which expressly authorizes plans in each exchange to include elective abortion. It states that "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of services described in subparagraph (B)(i) or (B)(ii) as part of such

benefits for the plan year.” (B)(i) pertains abortions that are not allowed to be funded currently under the LHHS bill, meaning the Hyde amendment, eg., elective abortion, and (B)(ii) refers to those that are allowed under the LHHS bill, meaning Hyde allowable abortions, e.g., life, rape and incest abortion.

29 So the PPACA clearly authorizes plans in the exchanges which receive federal subsidies to cover elective abortion. This creates two problems. How does EO maintain the Hyde amendment, when the PPACA definition of elective abortions is based on a reference to those abortions the government *cannot* fund under current LHHS law? To claim that the EO incorporates Hyde when the PPACA actually allows those abortions to be covered that Hyde does not allow is a contradiction. Second, even if the PPACA merely defined elective abortion without cross referencing Hyde, the EO clearly maintains the current PPACA’s funding authorization for plans that include elective abortion among its covered benefits. In addition to preventing payment for abortion, this is precisely the second thing Hyde does not allow. Simply saying that the tax credits can’t pay for abortion, says nothing about maintaining the principle in Hyde that prevents subsidies for health care plans that cover abortion. That’s current law, vitiated by the PPACA. The EO does not even attempt to change this.

30 Third, the EO maintains the requirement in the PPACA (Sec. 1303) for individuals to make a second abortion fee payment for their plans that include abortion coverage. The text of the PPACA makes clear that each “issuer of the plan shall.....collect from each enrollee in the plan ... a separate payment for...an amount equal to the portion of the premium to be paid directly by the enrollee for coverage under the plan of services other than services described in paragraph (1)(B)(i)”, meaning non-abortion services. And the insurer will collect a “payment” for the “value of the coverage of services described in paragraph (1)(B)(i)” —that is elective abortions. The bill

requires the insurer to “deposit all such separate payments into separate allocation accounts” that will consist of “all payments described in subparagraph (B)(i)(II) [the cost of abortion excluding tax credits] into a separate account that consists solely of such payments and that is used exclusively to pay for services described in paragraph (1)(B)(i) [elective abortion].”

31 So, each person in a plan that covers elective abortion will be required to pay make an abortion fee and a separate for the remaining cost of the plan. The fact that the insurance company will keep it in two bank accounts does not maintain current law, since it goes beyond Hyde by subsidizing abortion covering plans. And it does so requiring everyone to pay an abortion surcharge, which in essence pays for other people’s abortions. The EO merely tells HHS to write regulations telling insurers how to collect the abortion charge and keep it in separate accounts from the federal subsidies. It does nothing to maintain current law.

32 Fourth, section 3 of the EO only discusses direct funding abortion in the context of the community health center (CHC) program in the PPACA (Sec. 10503, p. 2355). Again, this EO would not trump the PPACA, and the CHC getting federal dollars will be allowed to pay for abortion. But noticeably absent is any mention of other abortion funding problems in the PPACA. The EO does not address the problem of direct funding for abortion in the co-op program (p. 180 (Sec. 1322)). The EO does not mention any restriction of direct funding for abortion in the high risk insurance pool program (Sec. 1101). Nor does the EO address an abortion mandate in Sec. 1001. The provision requires regulations for preventative services. If the Administration chooses to include abortion, then the required coverage of preventative services will mean that every individual and group health plan will necessarily include abortion. The EO does not address this abortion provision at all.

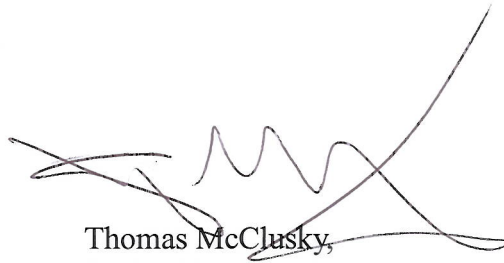
33 Less than a year following the passage of PPACA already the weakness of the arguments that it

would not lead to taxpayer funding of abortion were exposed. Under PPACA a new program was established that provides \$5 billion to operate high risk pools in order to provide Pre-existing Condition Insurance Plans (PCIP) in each state. Whether or not these plans are administered by the state or federal government in your state, the plans will be underwritten with federal dollars and there was concern that the plans in some states may cover elective abortion. The National Right to Life Committee (NRLC) brought to light the fact that the proposals submitted by Pennsylvania, New Mexico and Maryland and approved by HHS would allow coverage for abortion. It was only after the news about abortion funding in Pennsylvania's plan was exposed that the Health and Human Services Department (HHS) issued a statement stating that "abortions will not be covered in the PCIP except in the cases of rape or incest, or where the life of the woman would be endangered." The release also stated that HHS would issue guidance to reiterate this policy, but has not yet taken action to do so. Neither the President's executive orders, nor the new health care statute, prevent states from funding abortion. Only after the abortion funding was exposed in these plans did the Administration respond saying it would issue guidelines (which can be changed at any time) to prevent high-risk pool plans from covering abortion. The only reason the Obama Administration stopped abortion funding in Pennsylvania, New Mexico and Maryland is very simple – their actions were publicly exposed.

- 34 For the reasons stated herein, it remains FRCA's belief and position that (1) the PPACA, as passed, allows for taxpayer funded abortion; and (2) the PPACA, as restricted by EO 13535, still allows for taxpayer funded abortion.

I declare under the penalty of perjury under all applicable law that the foregoing is true and correct, to the best of my belief and knowledge. Executed this 11th day of October, 2010, at

Washington, D.C.

A handwritten signature in black ink, appearing to read 'Thomas McClusky', with a large, sweeping flourish extending upwards and to the right.

Thomas McClusky,
Senior Vice President
Family Research Council Action

Signed and sworn before a Notary Public this 11th day of October, 2010, in Washington, D.C.

A handwritten signature in blue ink, appearing to read 'Stan E. Sykes', with a stylized, cursive script.

Notary Public

06-30-2014