

Sworn Affidavit

I, Douglas D. Johnson, being first duly cautioned and sworn, state as follow:

1. I am the Federal Legislative Director for the National Right to Life Committee (“NRLC”), having served in that capacity since 1981. NRLC was incorporated in 1973 in response to two United States Supreme Court decisions, *Roe vs. Wade* and *Doe vs. Bolton*, which invalidated the laws against abortion in all 50 states. NRLC is a federation of affiliated state organizations. NRLC seeks to foster government policies and laws that protect the right to life of all innocent human beings, including unborn children. NRLC maintains a lobbying presence on Capitol Hill and serves as a resource provider for state affiliates, local chapters, individual members, the press, and the public.

2. During much of the current 111th Congress, the primary focus of NRLC’s legislative program was to resist enactment of health care legislation that would provide authority for federal subsidies for abortion and/or new authorities for federal regulatory decrees that would expand access to abortion. NRLC also opposed components of the proposed bills that would create mechanisms that will result in government-imposed rationing or denial of lifesaving medical treatments, but the rationing-related components of the legislation are not addressed in this affidavit.

3. In recent months, a number of organizations have sponsored advertising or issued other public communications in which they have asserted that the sweeping health care restructuring bill (H.R. 3590), “Patient Protection and Affordable Health Act” (PPACA), enacted

in March, 2010 (Public Law 111-148), authorizes “government funding for health plans that pay for abortion on demand,” and authorizes “federal funding of abortion,” “government funding of abortion,” or “taxpayer-funded abortion.” The purpose of this affidavit is to present some of the evidences that such statements are truthful and accurate, based on multiple provisions of the bill that was approved by the Senate on December 24, 2009 and by the House of Representatives on March 21, 2010, and enacted into law.

4. The PPACA also contains multiple provisions that provide authorities under which federal Executive Branch agencies may in the future force expansions in access to elective abortion through regulations or other discretionary agency actions, and/or under which courts may order such expansions, but these “abortion mandate” provisions are outside the scope of this affidavit, which addresses only provisions related to federal subsidies.

5. NRLC was supportive of the initial enactment of the “Hyde Amendment” in 1976, and has been instrumental in the annual renewal of that law. The “Hyde Amendment” is a provision, technically known as a “limitation amendment” or “limitation provision,” that for years has been added annually to the appropriations bill for the federal Department of Health and Human Services (DHHS). This limitation provision prohibits the use of any funds that flow through that particular appropriations bill (1) to pay directly for abortions, or (2) to subsidize health plans that include coverage of abortions (with exceptions in both prohibitions for abortions to save the life of the mother, or in cases of rape or incest).

6. Starting early in the 111th Congress, in 2009, NRLC advised members of Congress on multiple occasions that under sweeping new health care restructuring legislation, such as was being advanced by Democratic leaders in both houses of Congresses, the Hyde Amendment

would not prevent future federal taxpayer funding of abortion, for two reasons, as enumerated in (7) and (8) below.

7. Each version of the health care restructuring legislation that was proposed by senior congressional Democrats and backed by President Obama's White House, including the "Patient Protection and Affordable Health Act" (PPACA) as enacted (Public Law 111-148), contained multiple provisions that created new legal authorities for -- or in technical parlance "authorized" -- multiple new streams of federal funding, and each version also contained multiple provisions that directly appropriated large sums for new or expanded health programs. These "direct appropriations" were outside the regular funding pipeline of future DHHS appropriations bills and therefore would be entirely untouched by the Hyde Amendment (which controls only funds appropriated through the regular DHHS appropriations bills), even if one assumed that the Hyde Amendment would be renewed for each successive fiscal year in perpetuity.

8. The health care legislation also would create new or expanded authorities for certain health programs to which the Hyde Amendment did apply, but even in those instances, the Hyde Amendment alone would not provide adequate protection against federal funding of abortion, because most of the legal authorities for the programs implicating abortion policy created by the legislation would not expire, but the Hyde Amendment does expire. The Hyde Amendment is not a permanent law, but a temporary limit on the appropriations provided for a given fiscal year or portion thereof. The Hyde Amendment expires at least once per year, and will lapse on any occasion in which Congress fails to approve and/or the President fails to sign legislation renewing it for another year.

9. Because of the realities described in (7) and (8), NRLC 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, and that the failure to include such protective language in the new law predictably would ultimately result in large-scale federal funding of abortion.

10. The version of the health care bill (H.R. 3962) that reached the floor of the U.S. House of Representatives on November 7, 2009, was 2,014 pages long. It contained multiple provisions that would have authorized federal subsidies for abortion, including but not limited to a section that explicitly authorized a new federal program operated directly by the federal government (the “public option”) to pay for any type of elective abortion. When a federal agency pays for elective abortions, that is federal funding of abortion, whatever attempts may be made by some to disguise that reality.

11. Because H.R. 3962 was riddled with deficient abortion-related provisions, on the House floor, a comprehensive remedial amendment was offered by Reps. Bart Stupak (D-Mi.) and Joseph Pitts (R-Pa.). The Stupak-Pitts Amendment (Exhibit D) was supported by NRLC and numerous other pro-life organizations. The Stupak-Pitts Amendment did two things: (1) It surgically removed provisions of the bill that directly authorized abortion funding, except when necessary to prevent the death of the mother or in cases of rape or incest; and (2) it imposed a blanket prohibition on any provision in the bill being interpreted or employed to allow abortion subsidies. The prohibition contained in the Stupak-Pitts Amendment was bill-wide and permanent (i.e., not contingent on any requirement for perpetual annual renewal). The amendment stated in part, “No 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.”

12. The Stupak-Pitts Amendment was adopted by a bipartisan vote of 240-194 (House Roll Call No. 884), after which the House approved H.R. 3962 and sent it to the Senate.

13. Because of the adoption of the Stupak-Pitts Amendment, H.R. 3962 as passed by the House did not include federal government funding of abortion, except in very narrow circumstances, and therefore a vote in favor of passing H.R. 3962-as-amended was not a vote in favor of federal funding of elective abortion.

14. However, H.R. 3962 was not the bill that was ultimately enacted into law. The bill that was ultimately enacted had many abortion-related elements in common with the version of H.R. 3962 that existed before the adoption of the Stupak-Pitts Amendment. The bill as enacted lacked any protective language remotely comparable to the Stupak-Pitts Amendment. It is truthful to say that any member of the U.S. Senate or the U.S. House of Representatives who voted for the bill that was actually enacted, the PPACA (now Public Law 111-148), voted to authorize federal funding of abortion, because the enacted bill contained multiple provisions that do in fact authorize (i.e., create legal authority for) federal funding of elective abortion and for health plans that cover elective abortion, and that predictably will result in such funding in the future -- unless the law itself is repealed, or unless the law is revised by a future Congress to include statutory language along the lines of the Stupak-Pitts Amendment.

15. Following adoption by the House of the Stupak-Pitts Amendment on November 7, 2009, many influential persons and organizations on the pro-abortion side of the debate expressed strong dismay at the House's action in approving the amendment, and expressed their determination that no such abortion-neutralizing language should win approval in the U.S. Senate. Among the public critics of the House's adoption of the Stupak-Pitts Amendment were President Barack Obama and House Speaker Nancy Pelosi (D-Ca.).

16. In this environment, a new version of the health care legislation was written, behind closed doors, by Senate Majority Leader Harry Reid (D-Nv.), and released to the public on November 18, 2009, with the new title of "The Patient Protection and Affordable Care Act" (hereafter, "PPACA"). This rewritten bill did not contain the House-approved Stupak-Pitts language. Rather, the abortion-related provisions that it contained were parallel, in many respects, to most objectionable abortion-related provisions of the original House bill, prior to the November 7, 2009 adoption of the corrective Stupak-Pitts Amendment.

17. On the Senate floor, Senators Ben Nelson (D-Ne.) and Orrin Hatch (R-Utah) offered an amendment (Senate Amendment No. 2962, Exhibit E) that was very similar to the Stupak-Pitts Amendment, in that it would have prevented any component of the bill from being used to subsidize abortions or insurance plans that cover abortion (except to save the life of the mother, or in cases of rape or incest). The amendment stated in part, "No 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.”

18. NRLC supported the Nelson-Hatch Amendment, but the amendment was tabled (killed) on a vote of 54-45 on December 8, 2009, and therefore did not become part of the enacted law as ultimately enacted.

19. Weeks later, the Senate considered a final package of revisions to the pending bill, known as a “manager’s amendment.” The manager’s amendment left most of the abortion-related components of the bill unchanged, but inserted new language (sometimes referred to as the “Nelson-Boxer language”) into the section creating a program to subsidize the purchase of health insurance by persons who meet certain eligibility requirements. (The new language is found in Section 10104 of the enacted bill, in Section 1303 as amended.) In a letter to members of the Senate dated December 20, 2009 (Exhibit F), NRLC characterized the new (and final) abortion-related language contained in the “manager’s amendment,” as follows: “Regarding abortion policy, the language of the manager’s amendment is light years removed from the Stupak-Pitts Amendment that was approved by the House of Representatives on November 7 by a bipartisan vote of 240-194. The new abortion language solves none of the fundamental abortion-related problems with the underlying Senate bill, and it actually creates some new abortion-related problems. We view a vote for cloture on the amendment as a vote to advance legislation to allow the federal government to subsidize private insurance plans that cover abortion on demand, to oversee multi-state plans that cover elective abortions, and to empower federal officials to mandate that private health plans cover abortions even if they do not accept subsidized enrollees. . . . 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.”

20. Notwithstanding such objections from NRLC and other pro-life organizations, the Senate adopted the “manager’s amendment” on December 21, 2009.

21. In a letter to members of the U.S. Senate dated December 22, 2009 (Exhibit G), NRLC expressed its strong objections to multiple provisions of the final bill. Among other objections, the NRLC letter said that the Senate 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.”

22. Notwithstanding objections from NRLC and other pro-life organizations, the Senate passed the PPACA on December 24, 2009, under the bill number H.R. 3590, and sent it to the House of Representatives.

23. Subsequently, at the urging of the White House, House Speaker Nancy Pelosi indicated her intention to force an up-or-down vote on the Senate-passed H.R. 3590, without allowing further amendments to be offered to it.

24. In a three-page single-spaced letter to U.S. House members dated March 19, 2010 (Exhibit H), NRLC again detailed the multiple abortion-expanding components of the pending Senate-passed bill, stating in part: “The bill is riddled with provisions that predictably will result in federal subsidies for private insurance plans that cover abortion (some of which will be administered directly by the federal government), direct federal funding of abortion through Community Health Centers, and pro-abortion federal administrative mandates. The sum of these provisions makes H.R. 3590 the most abortion-expansive piece of legislation ever to reach the

floor of the House of Representatives. . . . [T]he purported protections in the Senate bill are all very narrow, riddled with loopholes, and/or rigged to expire. There is nothing in the Senate bill remotely resembling the Stupak-Pitts Amendment, added to H.R. 3962 by the House of Representatives on November 7, 2009, which was an effective, bill-wide, permanent prohibition on subsidies for abortion under the programs authorized by the bill.”

25. Similar assessments of the Senate language were issued by other knowledgeable analysts, including “Legal Analysis of the Provisions of The Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection,” issued by the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) on March 25, 2010 (Exhibit I).

26. Enactment of the health care legislation was a top priority for President Obama and for House Speaker Nancy Pelosi (D-Ca.), and for many special interest groups, but during January, February, and early March, as widely reported at the time, there was not a majority in the House of Representatives willing to vote for the Senate-passed bill. One of the major impediments was the refusal of a group of House Democrats, led by Congressman Bart Stupak (D-Mi.), to support the Senate-passed bill because of its abortion-subsidizing and abortion-expanding provisions. All of the members of this “Stupak group” had voted to pass H.R. 3962 after the adoption of the Stupak-Pitts Amendment on November 7, 2009, but they were unwilling to support the Senate-passed bill because it contained pro-abortion provisions and did not contain a bill-wide prohibition on federal funding of abortion. Congressman Stupak and various other members of the “Stupak group” expressed these objections in numerous interviews in the news media during this period.

27. As late as March 19, 2010, Congressman Stupak, joined by ten original cosponsors, introduced a formal resolution (H. Con Res. 254) to fix the pro-abortion provisions in the Senate-passed health bill. This resolution, if enacted, would have removed objectionable language added to the Senate-passed bill by the Reid manager's amendment (dealing with the premium subsidy program), and added bill-wide, permanent prohibitions on any provision of the bill being used to authorize pro-abortion subsidies or administrative decrees. The original co-sponsors of this proposed amendment to H.R. 3590, whose names are printed on the first page of the bill along with that of Mr. Stupak, were Reps. Marion Berry (D-Ar.), Sanford Bishop Jr. (D-Ga.), Anh "Joseph" Cao (R-La.), Kathleen Dahlkemper (D-Pa.), Steve Driehaus (D-Oh.), Brad Ellsworth (D-In.), Marcy Kaptur (D-Oh.), Daniel Lipinski (D-Ill.), Alan Mollohan (D-WV), and Nick Rahall (D-WV).

28. Regrettably, House Speaker Nancy Pelosi did not agree to allow a vote on the Stupak resolution/amendment. Regrettably, Mr. Stupak and some (but not all) of the other lawmakers in the "Stupak group" then abandoned their resistance and voted to send H.R. 3590 to President Obama for his signature, on March 21, 2010 (House Roll Call No. 165).

29. The bill, as passed, contained no revisions to any of the abortion-expanding provisions discussed in NRLC's letter of March 19. The bill, as passed, still contained all of the objectionable pro-abortion language that H. Con. Res. 254 would have stricken, and did not contain the bill-wide prohibition on federal funding of abortion that H. Con. Res. 254 would have inserted.

30. Any member of the House of Representatives who voted to pass H.R. 3590 on March 21, 2010, did in fact vote to authorize federal funding of abortion in multiple provisions

of the bill, as enumerated in the previously referenced documents.

31. The PPACA was signed into law by President Obama on March 23, 2010, and is now designated as Public Law 111-148.

32. No subsequent enactment by Congress has modified any of the provisions of the PPACA that implicate abortion policy as listed in the March 19, 2010 NRLC letter, nor have any of the provisions discussed in the paragraphs below been altered by any subsequent enactments.

33. In seeking to justify their decisions to vote to enact exactly the same bill that they had for months refused to support, Congressman Stupak and some of the other defectors leaned heavily on certain claims regarding the content of Executive Order 13535 ((75 Fed. Reg. 15599 (2010)), which was signed by President Obama on March 24, 2010. However, a federal executive order is a unitary act by a president of the United States, which is not voted on by members of Congress. There may be any number of administrative regulations, executive orders, and/or court decisions interpreting the multitudinous provisions of the PPACA, but what the members of the House “voted for” were the provisions of H.R. 3590.

34. One of the defectors, Congressman Steve Driehaus (D-Oh.), has asserted in a complaint filed with the Ohio Elections Commission: “Both the PPACA and Executive Order 13535 contain provisions ensuring that there will be no taxpayer-funded abortions as a result of the passage of the PPACA.” However, the actual abortion-related language found in the PPACA falls very far short of supporting that assertion, and the language of the Executive Order, if it is deemed pertinent at all, also falls very far short of supporting that assertion. Executive Order 13535, in its operative sections, addresses only two of the abortion-related components of the bill. Regarding the 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 health plans that cover elective abortions, as explained in other paragraphs in this affidavit. In Section 3, 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 the enforceability of this component of the order has been disputed, since it lacks a foundation in the language of the statute itself.

35. The PPACA, as enacted, was 906 pages long. It contained multiple provisions that authorize new programs or expand authorizations for existing programs that are authorized to cover abortion, either explicitly or implicitly. Some of these provisions are entirely untouched by any limitation on abortion in existing law or in the PPACA itself, and others are subject only to limitations that are temporary or contingent. Statutes authorizing or requiring government funding for health services, broadly defined, consistently are construed by courts to encompass abortion services except when Congress excludes abortion in explicit language. But the legislation as enacted contained no bill-wide abortion restriction comparable to the Stupak-Pitts Amendment that had been part of the House-passed bill. Thus, any House member who voted for the PPACA did indeed vote to authorize “taxpayer funding of abortion,” not just in one component of the law, but under multiple programs and authorities created by the law.

36. What I describe is what the law actually authorizes, even though most of the provisions have not yet been implemented, and some will not be implemented until 2014 or even later.

37. However, one pertinent component of the PPACA has already been implemented, which is Section 1101 (42 U.S.C. § 18001) creating the Pre-Existing Condition Insurance Plan

(PCIP), also known as the “high-risk pool” program. This program is completely federally funded and may cover up to 400,000 people when fully implemented. The PPACA directly authorizes \$5 billion in federal funds (“taxpayer funds”) for this program alone. As NRLC noted in its letter to the House of Representatives dated March 19, 2010 (Exhibit H, on page 2, paragraph 2), the bill contained no restriction on the use of these funds for abortion.

38. 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, and many states did submit proposals by that date or soon thereafter. During July, 2010, I and other NRLC staff persons examined the state-submitted proposals that were made available to the public. Most of the submitted state plans were not made available, but of those we were able to obtain, we found that three states had submitted and apparently received DHHS approval for plans that covered elective abortion (Pennsylvania, New Mexico, and Maryland).

39. Beginning on July 13, 2010, NRLC issued a series of statements to news media, objecting to the DHHS actions in approving state-submitted PCIP plans that covered elective abortion. (The initial NRLC release on the matter, focusing on the DHHS-approved PCIP plan for Pennsylvania, is Exhibit J.)

40. In a report published on July 22, 2010 report, www.FactCheck.org, a nonpartisan entity operated by the Annenberg Public Policy Center, examined NRLC’s July 13 press release regarding the DHHS-approved PCIP proposal for Pennsylvania and concluded that NRLC was correct in asserting that it covered abortion. The FactCheck.org report is posted here: <http://www.factcheck.org/2010/07/taxpayer-funded-abortions-in-high-risk-pools/> (Exhibit K).

41. 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 (Exhibit L), as officials at the New Mexico agency confirmed to the Associated Press (Exhibit M).

42. On July 23, 2010, the Congressional Research Service (CRS), a nonpartisan research support agency for Congress, issued a report (Exhibit N) confirming that neither the Hyde Amendment nor any provision of the PPACA 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. The CRS report also correctly noted that the PPACA gives the Secretary of HHS authority to impose “any other requirements determined appropriate by the Secretary” specifically with respect to the high-risk pool program. The CRS report is posted on the internet at <http://www.nrlc.org/AHC/CRSReportAbortionandHighRiskPools.pdf>

43. In a press release dated July 14, 2010 (Exhibit O), DHHS spokeswoman Jenny Backus announced that “abortions will not be covered in the Pre-existing Condition Insurance Plan (PCIP) except in the cases of rape or incest, or where the life of the woman would be endangered.” The statement did not suggest that anything in the PPACA or the Executive Order prohibited the use of the PCIP funds for abortion, and clearly implied otherwise.

44. On July 29, 2010, 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))) (Exhibit P). DHHS did not assert that this decision was legally dictated by any provision of the

PPACA or by Executive Order 13535, but implicitly recognized that this was not the case, merely observing that similar restrictions were in force in “certain federal programs that are similar to the PCIP program.”

45. On the same day the regulation was issued – July 29, 2010 – the head of the White House Office of Health Reform, Nancy-Ann DeParle, 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 PPACA] given the unique, temporary nature of the program . . .” (Exhibit Q)

46. Many commentators for pro-abortion groups publicly criticized the DHHS action in excluding abortion coverage from the PCIP program, and pointed out that there is nothing in the PPACA or the Executive Order restricted the use of PCIP funds for abortion. For example, Laura Murphy, director of the Washington Legislative Office of the American Civil Liberties Union, said, “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.” (“ACLU steps into healthcare reform fray over abortion,” *The Hill*, July 17, 2010.)

47. The entire series of events surrounding the implementation of the PCIP provides an early and graphic demonstration that the statutory language of the PPACA does authorize taxpayer funding of abortion; and that such funding is not precluded by the Hyde Amendment or any other existing law, or by any provision of the PPACA or of Executive Order 13535. The section of the PPACA creating the PCIP authorized coverage of general health services and did not exclude abortion; various states submitted plans that explicitly included elective abortion

and were approved by DHHS; and the Administration did not even claim that its ultimate decision to exclude elective abortion from the PCIP was compelled either by language in the law or by language in Executive Order 13535 (since no such language exists in either document). In response to political imperatives, DHHS ultimately drew on the discretionary administrative authority that the bill conferred specifically with respect to the PCIP program to shut off abortion funding in the PCIP – even as the senior White House health policy aide underscored that this would not be a precedent for implementation of other components of the PPACA.

48. NRLC and other organizations provided detailed analyses and advisories to the members of the House of Representatives, prior to the March 21, 2010 roll call by which H.R. 3590 was approved, warning that the bill contained multiple provisions that could be used to fund elective abortion. NRLC explicitly listed Section 1101 (creating the PCIP program) among the examples of such provisions. Assertions that a lawmaker who voted to enact H.R. 3590 voted to authorize federal funding of abortion are truthful and are validated by the example of the PCIP program – as confirmed by the Congressional Research Service and other analysts, such authority exists with respect to the \$5 billion PCIP program.

49. While the abortion-funding authority created by the PPACA for the PCIP alone would suffice to demonstrate the truthfulness of such assertions, there are multiple additional provisions of the law which also provide abortion-funding authorities.

50. The PPACA, Section 1401 (26 U.S.C. §36B) establishes a new program under which federal tax-based subsidies will be used to assist tens of millions of Americans in purchasing health insurance. Under the House-passed bill, in order to qualify for such a federal subsidy, a private health plan would have been required not to cover abortions (except to save the

life of the mother, or in cases of rape or incest). (H.R. 3962, Engrossed in House of Representatives, §265.) Congress has long imposed just such a requirement with respect to the Federal Employees Health Benefits program (Public Law 111-117, Consolidated Appropriations Act, 2010, Division C, Title VI, General Provisions, 123 Stat. 3034, 3203) and the Medicaid program (Public Law 111-117, Consolidated Appropriations Act, 2010, Division D, Title V, General Provisions, 123 Stat. 3034, 3280). However, the PPACA contains no such prohibition. Rather, it contains language (in Section 1303 as amended, found in 42 U.S.C. §18023) that allows federal funds to subsidize private plans that cover all abortions. The language says that federal funds may be used to pay for any abortions that could be funded, in any future fiscal year, under the annual appropriations bill that funds the Department of Health and Human Services. This means that if Congress ever fails to renew the Hyde Amendment (which is a provision of the annual DHHS appropriations bill that expires annually), and thereby permits federal funding of abortion on demand under Medicaid, then the PPACA explicitly authorizes the new premium subsidy program to also pay for abortion on demand with federal funds. This language is in stark contrast with the NRLC-backed Stupak-Pitts and Nelson-Hatch amendments, which, if either amendment had been enacted, would have explicitly prohibited any funds authorized under any part of the massive health care law from funding elective abortion, regardless of what policy Congress and the President set for Medicaid in any future fiscal year through the DHHS appropriations bill.

51. With respect to the premium subsidy program created by the PPACA, Executive Order 13535 merely reiterates the provisions of the bill as outlined above. Under the Executive Order, federal funds will subsidize the purchase of private plans that cover elective abortion as

soon as the program is implemented, and also require the carriers to collect from each enrollee an additional payment to cover abortions. Some apologists for the law have asserted that this two-payment scheme does not amount to federal funding of abortion, but as we see it, when the federal government pays premiums for an insurance plan, it subsidizes what that insurance plan covers, notwithstanding any cosmetic bookkeeping requirements.

52. NRLC’s analysis is consistent with that found in “Legal Analysis of the Provisions of The Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection,” issued by the Office of General Counsel of the U.S. Conference of Catholic Bishops (USCCB) on March 25, 2010 (Exhibit I), which notes: “[U]nder Section 1303, the tax credits are still used to pay overall premiums for health plans covering elective abortions. This violates the principle reflected in the second part of the Hyde Amendment, which forbids use of federal funds for any part of a health benefits package that covers elective abortions. Omnibus Appropriations Act, 2010, Div. D, tit. V, §507(b).”

53. Moreover, nothing in the PPACA or in the Executive Order will in any way prevent private insurance carriers from using the federal tax-based subsidies directly to pay for coverage of all elective abortions on any future date in which Medicaid reimbursement for abortion is permitted because of failure to renew the Hyde Amendment. Indeed, such direct use of the federal funds to pay for unrestricted abortion coverage is explicitly authorized in the PPACA, and is made effective six months following the date that the Hyde Amendment lapses. The pertinent provision of the PPACA is found in Section 10104, which creates an amended Section 1303(b)(1)(B)(ii) (42 U.S.C. §18023), which reads, “(ii) ABORTIONS FOR WHICH

PUBLIC FUNDING IS ALLOWED. -- The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.”

54. Any lawmaker who voted for the bill, with Section 10104 and the amended Section 1303(b)(1)(B)(ii) contained therein, voted to authorize taxpayer funding of elective abortion without restriction, under a future contingency (i.e., non-renewal of the Hyde Amendment, even though the Hyde Amendment only applies directly to Medicaid and other programs unrelated to the premium-subsidy program). Even taken alone, this provision would be sufficient to justify an assertion that a vote for the bill was a vote to authorize federal funding of abortion. But again, there is more.

55. The PPACA, Section 10503 (42 U.S.C. §254b-2), directly appropriated \$7 billion in new federal funding for Federally Qualified Community Health Centers (hereafter, “CHCs”). At least two pro-abortion advocacy organizations, the Reproductive Health Access Project and the Abortion Access Project, have active projects underway to persuade CHCs to provide abortions induced by the drug RU486. The \$7 billion provided for CHCs are not touched by any restriction on their use for abortion in the bill itself or in existing law. NRLC highlighted this concern in a memorandum sent to members of the U.S. House of Representatives on February 12, 2010, updated on March 18, 2010 (Exhibit R).

56. Analysts at the U.S. Conference of Catholic Bishops (USCCB) concluded that the bill language, coupled with existing federal laws governing subsidies to CHCs, would be

interpreted by courts to not only authorize (allow) but also mandate provision of abortion services by federally funded CHCs. (See “Legal Analysis,” Exhibit I.)

57. In support of its analysis, the USCCB circulated a letter from Robert A. Destro, professor of law at The Catholic University of America, dated March 20, 2010 (Exhibit S). Prof. Destro notes in the letter that he has been personally involved in abortion-funding litigation since 1977.

58. Congressman Steve Driehaus (D-Oh.) has asserted that Executive Order 13535 was “intended ‘to establish a comprehensive, Government-wide set of policies and procedures . . . to make certain that all relevant actors – Federal officials, State officials (including insurance regulators) and health care providers – are aware of their responsibilities’ under the PPACA.” The quoted language is taken from Section 1 of the Executive Order. But the language of Section 1 is purely discursive and rhetorical; it contains no binding directives from the chief executive to his subordinates whatsoever. The two operative sections of the Executive Order (Sections 2 and 3) are very narrowly focused and do not establish any bill-wide barrier to federal funding of abortion – much less establish any “government-wide” barrier to federal funding of abortion.

59. The fourth and final section of the Order reiterates that the Order must be construed consistently with applicable laws and does not affect pre-existing agency authorities – which underscores why it is the language of the law that is pertinent here.

60. Congressman Steve Driehaus has asserted that the Order “actually prohibits the government, its agencies, and all relevant actors from using federal funds provided for under the law to pay for abortions.” In addition, he has asserted that the Order “has the force of law

governing federal expenditures under the PPACA.” These assertions are so overstated as to be highly misleading. There are no directives in the Order that apply to all, or even to most, of the provisions of the PPACA. The operative provisions that are actually contained in the Order are extremely narrow and highly qualified, as discussed above.

61. Mr. Driehaus has also quoted a statement, also found in Section 1 of the Executive Order, that the PPACA “maintains” current Hyde Amendment restrictions. This is typical of the rhetorical and non-substantive character of Section 1 of the Order. The Hyde Amendment is a provision that applies only to funds appropriated through the annual DHHS appropriations bill, with the pertinence to abortion policy being primarily the question of whether the federal Medicaid program (which is funded primarily through that bill) will pay for elective abortions during any given fiscal year. The PPACA contained multiple new authorities and direct appropriations that are entirely untouched by the Hyde Amendment, and therefore the Order’s reference to “maintaining” the Hyde Amendment is no more than an artfully worded exercise in misdirection.

62. In my professional opinion, Executive Order 13535 has the hallmarks of a primarily political document. It has the appearance of having been very carefully crafted to provide as much as possible in the way of political “optics,” by which I mean rhetorical political “cover” for certain members of Congress – the “Stupak group” defectors -- while at the same time containing as little as possible in “force of law” provisions that would offend the pro-abortion advocacy groups with which President Obama has long been allied.

63. Consistent with my professional opinion as expressed in paragraph (62) were the assessments of the Order made by some prominent advocates on the pro-abortion side of the

debate. For example, Cecile Richards, the president of the Planned Parenthood Federation of America (PPFA), the nation's largest abortion provider, said that the Order amounted to "a symbolic gesture" (*USA Today*, March 25, 2010)

64. Regarding the Order, the careful analysis by the Office of General Counsel of the U.S. Conference of Catholic Bishops (Exhibit I), dated March 25, 2010, observed, "Apparently cognizant of the constitutional prohibition on the Executive Branch's exercising legislative power, the Executive Order does not describe itself as creating any new restrictions with regard to abortion. Instead, the Order only purports to describe what the Act already provides, and to enforce those existing provisions. The main problem is that two of the operative provisions of the Order misdescribe what PPACA actually does. Correspondingly, the enforcement of those provisions in accordance with the Order's misdescription is highly likely to be held invalid as exceeding the President's authority, if challenged in court. Two other provisions of the Order do accurately describe features of PPACA . . . But they suffer from a different problem instead – though legally valid, those provisions fail to meet the standard of the Hyde Amendment regarding the ban on funding plans that cover abortion, mirroring the failure of the statute itself in this regard. Thus, none of the provisions of the Order represent valid fixes to those shortcomings of PPACA."

65. Section 10104 of the PPACA enacted revised language in Section 1334 (42 U.S.C. §18054) which establishes "multi-state" plans that will be administered by the federal Office of Personnel Management (OPM). The bill provides that "at least one" of the multi-state plans are subject to a restriction on abortion coverage, contingent on continuation of the Hyde Amendment, but this clearly authorizes OPM to mandate abortion coverage in any number of

additional multi-state plans. In this case, the abortion-covering plans will be both administered by a federal agency (which operates on taxpayer funds) and subsidized by the tax-based premium-subsidy program.

66. The four examples given in paragraphs numbered 37 through 65 above – involving authorization for abortion coverage under the Pre-existing Condition Insurance Plan (paragraphs 37-49), federal subsidies for private health plans that cover elective abortions (paragraphs 50-54), authorization for abortion funding through Community Health Centers (paragraphs 55-57), and authorization for inclusion of abortion coverage in health plans administered by the federal Office of Personnel Management (paragraph 65) – are provided for illustration. Any of the four examples given, taken alone, would provide ample basis to validate the truthfulness of an assertion that a vote for the bill was a vote to authorize federal funding of abortion and/or federal funding of health plans that cover elective abortion. But these examples do not represent an exhaustive list of all the provisions of the PPACA that may provide federal subsidies for abortion. Because of the absence of any bill-wide restriction on federal funding of abortion, and because even the narrow restrictions contained in the bill are temporary, there are other provisions that also may be employed in the future to provide federal funds for abortion, including those dealing with Indian health programs and health co-ops.

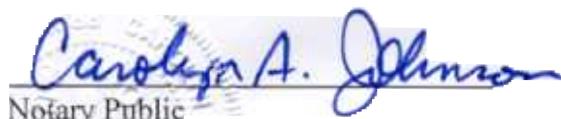
67. All of these authorizations for future federal funding of abortion would have been closed by enactment of the Stupak-Pitts or Nelson-Hatch amendments – but any lawmaker who voted to enact the bill without such an amendment did, in objective truth, vote to create legal authorization for taxpayer funding of abortion, through multiple funding pipelines and programs

I solemnly swear 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 28th day of October, 2010, in Prince George's County, Maryland



Douglas D. Johnson, Federal Legislative Director
National Right to Life Committee

Signed and sworn before a Notary Public this 28th day of October, 2010, in Prince George's County, Maryland.



Notary Public

My Commission Expires
December 8, 2013