

**AFFIDAVIT
DRAFT COPY**

October 18, 2010

**Taxpayer-Funded Abortion and
the Health Care Reform Law**



AUL.org

Affidavit of Americans United for Life

I, Charmaine Yoest, being first duly cautioned and sworn, state as follows:

1. I am an adult, over eighteen years of age.
2. I am the President and CEO of Americans United for Life (AUL).

As such, I have personal knowledge of AUL and its activities, and if called upon to testify I would testify competently as to the matters stated herein.

3. AUL was founded in 1971 as the first national pro-life organization in the United States. It is a nonprofit, public-interest law and policy organization whose vision is a nation in which everyone is welcomed in life and protected in law. Currently, AUL is working with pro-life lawmakers to draft, pass, and defend legislation that would do such things as (1) inform women of the physical, psychological, and other risks inherent in abortion; (2) mandate standards for abortion clinics to protect the health and safety of women and correct often substandard conditions; (3) protect parental rights, ensuring parents and guardians are involved in medical decisions of children; (4) protect unborn victims from criminal violence, including homicide; (5) ban all forms of human cloning; (6) promote adult stem-cell, cord blood, and other forms of life-affirming stem cell research; (7) protect the rights of conscience of all health care professionals; and (8) prevent euthanasia and assisted suicide.

4. Because AUL 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.

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

6. The PPACA uses federal tax dollars to subsidize insurance plans that cover abortions, which is equivalent to directly paying for the abortions (Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 896 (Mar. 23, 2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ148.111.pdf).

7. Section 1303 of Title I, Subtitle D of the PPACA provides that Qualified Health Plans (QHPs) may provide abortion coverage to enrollees. While the section creates an accounting mechanism designed to prevent federal subsidies from being used to directly pay for abortions through QHPs, this provision is a departure from the status quo on abortion funding – the Hyde Amendment and other federal programs, such as the Federal Employee Health Benefits Program (FEHBP), prohibit federal subsidies from supporting insurance plans that cover

abortions, regardless of whether the federal dollars are used to directly pay for abortions.

8. Also, the PPACA's limited restriction on the use of federal tax dollars to directly pay for abortions under Section 1303 does not apply to any other funds authorized and/or appropriated in the Act.

9. For example, the Congressional Research Service (CRS) stated that "[a]bortion restrictions included in section 1303 of [the PPACA] . . . would not appear to apply specifically to the funds made available for high risk pools. . . ."

(See Memorandum from Cong. Research Service to S. Comm. on Health, Education, Labor, and Pensions, High Risk Pools Under PPACA and the Coverage of Elective Abortion Services, p. 1 (July 23, 2010), *available at*

<http://help.senate.gov/imo/media/doc/CRS%20Report%20for%20HELP%2007232010.pdf>).

10. The CRS analysis was confirmed by the implementation of the PPACA. After passage of the Act, the Department of Health and Human Services approved state proposals to create high risk pools that included the use of federal tax dollars for abortion coverage. It was not until pro-life groups protested that the Administration agreed to draft regulations prohibiting the use of these funds for abortions (See <http://newmexicoindependent.com/59761/nm-move-to-cover-abortion-in-high-risk-pools-prompts-feds-to-ban-coverage>;

<http://www.kaiserhealthnews.org/Daily-Reports/2010/July/19/Health-Reform-Implementation-Politics.aspx>). This controversy demonstrates how the PPACA permits taxpayer funding for abortion.

11. While the permitted use of high risk pool funds for abortions is being corrected (barring a court decision that without statutory language, such funding is required) there are numerous other loopholes that could permit direct taxpayer funding for abortions, such as the section creating multi-state qualified health plans (Section 1334(a)(6)), which only requires that one multi-State plan in an Exchange not cover abortions, and Section 10221 which prohibits abortion funding and coverage under the Indian Health Care Improvement Act so long as the annual appropriations bill for the Indian Health Service includes a prohibition on abortion funding and coverage (this could be changed annually).

12. If Congress had adopted a comprehensive prohibition on the use of federal funds for abortions and insurance plans that cover abortions in the PPACA, the HHS regulation prohibiting the use of federal funds for abortions in the high risk pools would have been unnecessary. Because Congress failed to do so, there is a continued threat that tax payer dollars authorized through other provisions will be used for abortions. In fact, Nancy-Ann DeParle, the Director of the White House Office of Health Reform, wrote on the White House blog that “The [high risk pool] program’s restriction on abortion coverage is not a precedent for other

programs or policies [covered by the health care reform law] given the unique, temporary nature of the program and the population it serves” (Posting of Nancy-Ann DeParle to the White House Blog, <http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions> (July 29, 2010, 8:40 a.m. EST)).

13. Additionally, history has shown that where abortion funding and coverage is not prohibited by statute, courts or administrative agencies will include it. In the 1996 case *Planned Parenthood v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996), a Circuit Court held that abortion “fall[s] within several of Medicaid’s mandatory categories of care” and that a state law that restricted funding for abortion to those necessary to save the mother’s life conflicts with the “mandate.” The court found that “under Medicaid, certain categories of medical care are mandatory and therefore must be provided by participating states when a physician certifies that the care is medically necessary to the patient.” The court broadly concluded that “abortion fits within many of the mandatory care categories.” *See also* *Hope Medical Clinic v. Edwards*, 63 F.3d 418 (5th Cir 1995); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), cert. denied, 116 S.Ct. 777 (1996); *Hern v. Beye*, 57 F.3d 906, 910 (10th Cir. 1995), cert. denied, 116 S.Ct. 569 (1995).

14. AUL's view that the PPACA allows for taxpayer funded abortion was reinforced by Congressmen Bart Stupak (D-MI-1) and Joe Pitts (R-PA-16), who offered an amendment prohibiting taxpayer funding for abortion to a previous version of healthcare reform in the United States House of Representatives.

15. The Stupak-Pitts amendment was overwhelmingly accepted at that time.

16. The Stupak-Pitts amendment was not included in the PPACA. Further, the House was not given the opportunity to vote to add the Stupak-Pitts Amendment to the PPACA before they passed the PPACA in March.

17. The Stupak-Pitts amendment, if it had been added to the PPACA, would have comprehensively prohibited the use of federal tax dollars for elective abortions under the PPACA, and would have prohibited the use of federal tax dollars to subsidize insurance plans that cover elective abortions.

18. After the PPACA was signed into law, the President signed Presidential Executive Order 13535, which purportedly "establish[ed] an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment" (Exec. Order No. 13,535, 3 C.F.R.

15599 (2010), available at <http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>).

19. Our research, however, reveals that EO 13535 still allows for taxpayer funded abortion through the PPACA. The Executive Order only addressed the insurance exchanges (section 2) and funding for Community Health Centers (CHC's) (section 3). In other words, the Executive Order still left open the possibility that other funds authorized or appropriated through the law could be used to directly pay for abortions.

20. Further, while EO 13535 *references* the insurance exchanges, it fails to *apply* the Hyde Amendment to them. Section 2 of the order provides guidelines for "strict compliance" with the provisions in the bill that address how federal subsidies are handled in plans that cover abortions in the exchanges. However, these guidelines do nothing to *prevent* federal subsidies from going to plans that cover abortions, which directly violates federal principles embodied in the Hyde Amendment and other federal laws, including the Federal Employee Health Benefits Program (FEHBP). Other existing laws forbid federal dollars from going to insurance plans that cover abortions, regardless of whether or not the dollars *directly* pay for abortions. In contrast, the executive order simply calls for strict compliance with the "abortion surcharge" provision in the PPACA, which

segregates the portion of premiums that pays for abortions in plans that cover abortion from federal funds.

21. The PPACA does not prohibit new CHC funds from being used to pay for abortions. While EO 13535 states that the Hyde Amendment and longstanding regulations currently prohibit the use of CHC funds for abortions, the Hyde Amendment is not applied to CHC funding by statutory law, but only by regulations from an administrative agency. This section of the executive order states that the Hyde Amendment will apply to the new authorization and appropriation of CHC funds. This section may effectively prohibit the use of CHC funds for abortions, but may not if a court determines that it goes beyond the statute. In any case, this section does not address other funding sources in the law.

22. While addressing the PCIP program funds, the CRS also expressed doubt, as it did with the PPACA, that EO 13535 adequately prevented the use of all federal funds under the PPACA for abortions: “Executive Order No. 13535 does not specifically address high risk pools and the funds provided under section 1101 of PPACA.”

23. For the reasons stated herein, it remains AUL’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 ____ day of _____, 2010, at Washington, D.C.

NAME & TITLE

Signed and sworn before a Notary Public this __th day of _____, 2010, in Washington, D.C.

Notary Public