10-556

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHERINA LORENA CENZON-DECARLO,

Plaintiff-Appellant,

v.

MOUNT SINAI HOSPITAL,
a New York Not-for-Profit Corporation,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of New York, No. 09-cv-3120

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF PROLIFE NURSES, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, PHYSICIANS FOR LIFE, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AND CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE EASTERN DISTRICT OF NEW YORK

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae National Association of Prolife Nurses, American Association of Pro-Life Obstetricians and Gynecologists, Physicians for Life, Christian Medical & Dental Associations, and Catholic Medical Association have no parent corporations or stock of which a publicly held corporation can hold.

/s/ Mailee R. Smith.
Mailee R. Smith
Counsel of Record

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STATEMENT OF INTEREST[1]

Amici are national professional medical organizations which affirm a healthcare professional's right to object to participation in medical procedures which violate his or her conscience.

Amicus National Association of Prolife Nurses (NAPN) is a national nurses' organization with members in every state of the union. NAPN is dedicated to promoting respect for every human life from conception to natural death and to affirming that the destruction of that life, for whatever reason and by whatever means, does not meet the ideals and standards of good nursing practice. NAPN supports and encourages nurses to exercise their Constitutional right to object to participation in abortion and abortion-related procedures for reasons of conscience.

Amicus American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. AAPLOG maintains the position that healthcare

[1] According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief. No party's counsel has authored this brief in whole or in part, nor has a party or party's counsel contributed money that was intended to fund preparing or submitting the brief. Funding for the preparation and submitting of this brief was provided solely by *Amici's* counsel, Americans United for Life.

professionals may object to participation in medical procedures for reasons of conscience, and in particular religious, ethical, or moral reasons.

Amicus Physicians for Life is also a nonprofit medical organization. The organization exists to inform and educate the general public about stem-cell research, human cloning, fetal development, and other life-related issues. In addition, the organization seeks to encourage physicians to educate their patients regarding the innate value of human life at all stages of development. As a pro-life medical organization, *Amicus* affirms a healthcare professional's right to object, on religious, moral, or ethical grounds, to participation in medical procedures adverse to his or her conscience.

Amicus Christian Medical & Dental Associations (CMDA) is a non-profit professional medical organization consisting of over 16,000 members, mostly physicians. After much thoughtful consideration and debate, CMDA has adopted the position that "all healthcare professionals have the right to refuse to participate in situations or procedures that they believe to be morally wrong and/or harmful to the patient or others. In such circumstances, healthcare professionals have an obligation to ensure that the patient's records are transferred to the healthcare professional of the patient's choice."

Amicus Catholic Medical Association (CMA) consists of over 1,000 physician members and hundreds of allied health members nationwide. CMA

members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that human life begins at conception and that women are harmed by abortion. CMA also exists to lead the Christian community in the work of communicating Catholic medical ethics to the medical profession and the community-at-large.

The professional careers and practices of members represented by *Amici* will be directly impacted by this case. As individuals and American citizens, *Amici* members are guaranteed the freedom to object to medical procedures for reasons of conscience. If *Amici's* rights, traditionally and historically protected and affirmed in this nation, are not protected, *Amici* members will face choosing between their chosen professions and their religious or moral beliefs.

For the reasons set forth below, *Amici* urge this Court to reverse the decision of the court below.

SUMMARY OF ARGUMENT

Freedom of conscience is as celebrated as this nation is itself. Affirmed by our Founders and our Supreme Court, it is a freedom guaranteed to every citizen—including Plaintiff Mrs. DeCarlo. In short, our history and tradition affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs. With this freedom explicitly in mind, Congress enacted

42 U.S.C. § 300a-7(c), emphasizing and affirming the rights that Mrs. DeCarlo already possesses.

Part I of this brief examines our nation's history and tradition of affirming freedom of conscience. First, freedom of conscience is as historic as the founding of this nation itself. In addition, the U.S. Supreme Court has, time and time again, affirmed the freedom of conscience of all U.S. citizens. From pledge recitation cases to military draft cases to abortion jurisprudence, the Supreme Court has made clear that state and federal governments may not require persons to commit acts that are violative of their consciences.

Part II explains that failing to allow Mrs. DeCarlo to continue in her lawsuit undermines her guaranteed freedom of conscience and eviscerates the very purpose of 42 U.S.C. § 300a-7(c). As such, this Court must reverse the decision of the court below.

ARGUMENT

As this court is well-aware, the legal provision in dispute in this appeal is 42 U.S.C. § 300a-7(c). Part (c)(1)[2] was an amendment offered by Representative H.

[2] Part (c)(1) provides the following:

> (1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after [June 18, 1973], may—

John Heinz III, who was concerned that healthcare providers not be "forced to engage in any procedure that they regard as morally abhorrent." 119 Cong. Rec. 17462 (1973). Representative Heinz specifically stated the following in the Congressional Record:

> ***[F]reedom of conscience is one of the most sacred, inviolable rights that all men hold dear***.

Id. (emphasis added).[3]

Representative Heinz was certainly correct. From the founding of the United States (and even before), freedom of conscience has been an integral part of

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> (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
>
> (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

42 U.S.C. § 300a-7(c)(1). Part (c)(2) employs the same non-discrimination language and relates to biomedical or behavioral research.

[3] Mrs. DeCarlo has outlined a complete legislative history detailing Congress' intent in guaranteeing her individual rights, which, in the interest of avoiding redundancy before this Court, *Amici* incorporate by reference into this brief. *See* Appellant's Brief at 11-16.

who we are as a nation. There has never been a time under our Constitution when freedom of conscience was not inextricably interwoven with our rights as citizens.[4] Freedom of conscience has always been seen as an individual right and has been affirmed by our Founding Fathers and by our Supreme Court. To fail to allow Mrs. DeCarlo to continue in her legal action against Defendant Mt. Sinai Hospital would undermine Congress' clear intent to protect her rights as well as the history and tradition in this nation to protect individual freedom of conscience.

In light of the history and tradition of individual conscience rights in the United States, there is no question that Part (c) was enacted within this context to grant individual rights of action to healthcare providers who are denied their longstanding freedoms. Freedom of conscience has always been seen as an individual right and thus was seen as such when Part (c) was codified—it is not merely a policy choice about government funding which does not implicate a right or legal remedy, as Defendant would have this Court believe.

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[4] When § 300a-7 was discussed on the Senate floor, Senator Kennedy noted the following:

> Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions. Indeed, in many cases, ***the Constitution itself is sufficient*** to grant an exemption to protect persons from official acts that infringe on their free exercise of religion.

119 Cong. Rec. 9602 (1973) (emphasis added). He therefore supported the "full protection to the religious freedom of physicians and others." *Id*.

I. FREEDOM OF CONSCIENCE IS A HISTORIC RIGHT STEEPED IN THE TRADITION OF THE UNITED STATES AND ITS CONSTITUTION

A. Freedom of conscience is a fundamental right affirmed by our Founders

The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience." Having recently shed blood to throw off a government which attempted to dictate and control their religious practices and beliefs, a government which guaranteed freedom of conscience was foremost in their hearts and minds.[5]

The most often-quoted Founder and author of the Declaration of Independence, Thomas Jefferson, made it clear that freedom of conscience is not to be submitted to the government:

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[6]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[7]

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[5] The Founders often used the terms "conscience" and "religion" synonymously. Thomas Berg, *Establishment of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 310 (2005). Thus, adoption of the "religion" clauses does not mean that the Founders were ignoring freedom of conscience. The two were inextricably intertwined.

[6] Thomas Jefferson, *Notes on Virginia* (1782).

Jefferson also maintained that forcing a person to contribute to a cause to which he or she abhorred was "tyrannical."[8] This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[9] Jefferson—who considered it "tyrannical" to force a person to contribute monetarily to a position he disagreed with—would obviously be aghast at a hospital requiring an individual to provide an actual procedure that is objectionable to that individual for reasons of conscience.

James Madison, considered the Father of the Bill of Rights—the same rights that still protect healthcare professionals today—was also deeply concerned that the freedom of conscience of each American be protected. In his renowned *Memorial and Remonstrance against Religious Assessments*, Madison stated:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*.[10]

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[7] Thomas Jefferson, Letter to New London Methodists (1809).

[8] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779).

[9] Thus, not only is Jefferson the author of the Declaration of Independence, but he is also the author of one of this Nation's first statutes granting the right to object to participation in an activity based upon conscience. Jefferson was so proud of this accomplishment that he had "Author of the … Statute of Virginia Religious Freedom…" etched on his gravestone.

[10] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (June 20, 1875) (emphasis added).

In fact, Madison described the conscience as "the most sacred of all property."[11] Madison also amended the Virginia Declaration of Rights to state that all men are entitled to full and free exercise of religion, "according to the dictates of conscience."[12]

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations or rules, statutes, judicial orders, and professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law. Madison considered it "the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[13]

Our first President, George Washington, maintained that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle," and he advised Americans to "labor to keep alive in your breast that little

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[11] James Madison, *Property* (Mar. 29, 1792).

[12] Similarly, Samuel Adams wrote that the liberty of conscience is an original right. Harry Alonzo Cushing, THE WRITINGS OF SAMUEL ADAMS 350-59 (vol. II, 1906).

[13] James Madison, Speech Delivered in Congress on Religious Exemptions from Militia Duty (Dec. 22, 1790).

spark of celestial fire called conscience."[14] Washington also maintained that the government should accommodate persons on the basis of conscience:

> [T]he conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[15]

Clearly, a full enumeration of the Founders' commitment to freedom of conscience is beyond the word-limit of this brief.

Moreover, freedom of conscience is not limited to "religious" mindsets. Indeed, it was conscience that inspired transcendentalists such as Ralph Waldo Emerson and Henry David Thoreau. For example, Thoreau wrote:

> Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward…. The only obligation which I have a right to assume is to do at any time what I think right.[16]

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[14] Michael Novak & Jana Novak, WASHINGTON'S GOD 111(2006); The George Washington Society and Foundation, *Our Mission* (2010), available at http://www.georgewashingtonsociety.org/Mission.html (last visited Apr. 29, 2010). His statement on the "spark of celestial fire called conscience" was one of many maxims drawn up by Washington for his future conduct which he called "Rules of Civility and Decent Behavior in Company." *See Maxims of George Washington*, in GASKELL'S COMPENDIUM OF FORMS (1883), available at http://people.virginia.edu/~rmf8a/gaskell/Maxims.htm (last visited Apr. 29, 2010).

[15] George Washington, Letter to the Annual Meeting of Quakers (Sept. 1879).

[16] Henry David Thoreau, *Civil Disobedience* (1849).

Thoreau taught that each citizen has an obligation to disobey any law that requires him to violate his own conscience.

Thus, forcing Mrs. DeCarlo to participate in an abortion to which she is conscientiously opposed eviscerates the very principles and purposes for which this nation was founded, and the purpose and intent upon which the Part (c) was enacted.

B. Freedom of conscience is a fundamental right affirmed by the United States Supreme Court

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[17] This is evident not only from the Founders' intentions for this nation, as discussed above, but also by the U.S. Supreme Court's shaping of Free Exercise jurisprudence.[18]

The Supreme Court has stated that "***[f]reedom of conscience*** and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Cantwell v. Conn*., 310 U.S. 296, 303 (1940)

[17] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990).

[18] The Court's decisions affirming freedom of conscience are too numerable to discuss here. Thus, a few examples must suffice.

(emphasis added). While the "freedom to believe" is absolute, the "freedom to act" is not; however, "in every case," regulations on the freedom to act cannot "unduly [ ] infringe the protected freedom." *Id*. at 303-04.

In the 1940s, the Court considered regulations requiring public school students to recite the pledge to the American flag. In 1940, the Court ruled against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).[19] However, just three years later, the Court entirely shifted course and reversed itself. In *West Virginia State Board of Education v. Barnette*, the Court considered another public school policy requiring students to recite the pledge against their religious convictions. 319 U.S. 624 (1943). The majority opinion stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein…. We think the action of the local authorities in compelling the flag statute and pledge transcends constitutional limitations on their power and invades the

[19] Even though *Gobitis* was ultimately decided incorrectly, Justice Frankfurter, writing the majority opinion, did expound upon the balance between the interest of the schools and the interest of the students. He saw that the claims of the parties must be reconciled so as to "prevent either from destroying the other." *Gobitis*, 310 U.S. at 594. Because the liberty of conscience is so fundamental, "every possible leeway" must be given to the claims of religious faith. *Id*. On the other hand, Justice Frankfurter stated that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id*. at 594-95.

> sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 642. In other words, the Court ruled it unconstitutional to force public school children to perform an act that was against their religious beliefs. The Court also stated, "[F]reedom to differ is not limited to things that do not matter much…. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id*.[20]

Barnette has been affirmed on numerous occasions, including in *Planned Parenthood v. Casey*. 505 U.S. 833, 851 (1992). *Casey* stated:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.

Id. (citing *Barnette*, 319 U.S. 624) (other citations omitted).

In the 1960s and 1970s, the Court continued to protect the freedom of conscience of the American public—but this time in the form of protecting men

[20] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and ***to establish them as legal principles to be applied by the courts***. One's … freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (emphasis added). This language tracks language quoted herein by Thomas Jefferson. *See* Part I.A, *supra*.

who were conscientiously opposed war. Section 6(j)[21] of the Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service due to "religious training and belief." In *United States v. Seeger* and *Welsh v. United States*, the Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970) (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that § 6(j) protected persons with "intensely personal" convictions—even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Like Seeger, Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice." *Id*. at 337. Important here is Welsh's statement:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being…. I cannot, therefore conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.

[21] Section 6(j) was not a "new" idea or exemption. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

Id. at 343 (quoting Welsh). While the draft cases were related to a statutory exemption not at issue here, the holdings of these cases and the others cited herein demonstrate the strong commitment to freedom of conscience in this nation.

Just one year after *Welsh*, the Court stated the following in a case requiring bar applicants to make certain statements about their personal beliefs:

> And we have made it clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."

Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971). Indeed, "freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See, e.g*., *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 n.2 (1969) (specifically referencing "constitutionally protected freedom of conscience").

Like Welsh, Mrs. DeCarlo believes that human life is valuable—at all stages and in all situations. She cannot injure or kill another human being. Even though Mt. Sinai Hospital might deem her beliefs "incomprehensible" or "incorrect," it—as an entity which receives approximately $200 million in federal grants each year and is therefore subject to Part (c)—simply cannot require that she assume duties she believes are immoral and from which she is protected against under Part (c). The vast history of the Supreme Court jurisprudence affirming freedom of conscience demands such a conclusion.

II. FAILING TO ALLOW MRS. DECARLO TO PROCEED IN THIS ACTION UNDERMINES HER FREEDOM OF CONSCIENCE AND EVISCERATES THE VERY PURPOSE OF 42 U.S.C. § 300a-7(c)

A fundamental canon of statutory construction is that legislative intent is interpreted according to the meaning of words as understood "at the time Congress enacted the statute." *See, e.g.*, *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). When Congress enacted the Part (c), freedom of conscience had already been an individual right in this country for almost 200 years. It was not some new policy aimed at trying to get entities to comply with federal funding restrictions. It is within this context of guaranteed individual rights that Part (c) was enacted.

But the lower court disenfranchised Mrs. DeCarlo of her individual freedom of conscience. By failing to allow her to pursue her legal claims, it undermined this guaranteed freedom and eviscerated the very purpose of Part (c). If the decision of the lower court is left to stand, Part (c) is essentially toothless. Congress did not intend for there to be no enforceable remedy for the very individuals it sought to protect. To the contrary, the legal context and legislative history conclusively demonstrate an individual right and remedy under Part (c).[22]

In light of Mrs. DeCarlo's guaranteed freedom of conscience and the fact that Part (c) was enacted within the context of such an individual right, there is no

[22] And as Mrs. DeCarlo states in her Appellant's Brief, the Supreme Court has never failed to recognize an implied right of action in a statute the purpose of which is to guarantee individual rights. *See* Appellant's Brief at 28.

other purpose that can be seen in Part (c) than to affirm and further guarantee these individual rights. If Mrs. DeCarlo is not allowed to proceed in her action against Defendant Mt. Sinai Hospital, Part (c) does not protect the individuals it was enacted to protect.

CONCLUSION

The decision of the Eastern District of New York must be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,072 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2010, the foregoing *Amicus Curiae* Brief was served via U.S. priority mail, as well as electronic service, on the following recipients:

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