IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5406

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.,
Plaintiff- Appellant,

v.

ALBERTO GONZALES, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF AMICI CURIAE OF CONGRESSMEN HENRY HYDE, DAVE WELDON, M.D., TODD AKIN, CHARLES PICKERING, JR., C. L. "BUTCH" OTTER AND MARK SOUDER, THE AMERICAN CENTER FOR LAW AND JUSTICE, AMERICANS UNITED FOR LIFE CENTER FOR RIGHTS OF CONSCIENCE, AND THE FELLOWSHIP OF CHRISTIAN PHYSICIAN ASSISTANTS IN SUPPORT OF DEFENDANTS-APPELLEES

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
James M. Henderson, Sr.
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Except for the amici currently submitting this brief amici curiae, all parties, intervenors, and amici appearing in this court are listed in the Brief for Plaintiff-Appellant.

B. Rulings Under Review. References to the ruling at issue appear in the Brief for Plaintiff-Appellant.

C. Related Cases. All related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C) appear in the Brief for Plaintiff-Appellant.

Dated: May 26, 2006.

Respectfully submitted,

/s/ *James Matthew Henderson, Sr.*
James Matthew Henderson, Sr. (#452639)

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT (RULE 26.1)

Amici the American Center for Law and Justice, Americans United for Life Center for Rights of Conscience, and the Fellowship of Christian Physician Assistants are non-profit organizations. They have no debt or other securities held by the public, and no publicly-traded company has any interest in amici. Collectively, these amici have represented many health care professionals in the defense of their freedom of conscience on issues relating to abortion and emergency contraception. Their purpose relevant to this litigation is to ensure that Congress' authority to use its spending power to protect the freedom of conscience of health care providers is upheld. The other amici are individual members of the United States Congress.

Dated: May 26, 2006.

Respectfully submitted,

/s/ *James Matthew Henderson, Sr.*
James Matthew Henderson, Sr. (#452639)

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT (RULE 26.1) ii

TABLE OF AUTHORITIES iv

GLOSSARY ix

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. CONGRESS PROPERLY EXERCISED ITS SPENDING POWER TO PREFER CHILDBIRTH OVER ABORTION IN ENACTING THE HYDE-WELDON AMENDMENT. 7

II. THE HYDE-WELDON AMENDMENT SERVES TO ALLEVIATE A SIGNIFICANT BURDEN UPON HEALTH CARE PROFESSIONALS AND INSTITUTIONS WHO CONSCIENTIOUSLY OPPOSE ABORTIONS BY PROVIDING A MUCH-NEEDED COMPLIMENT TO EXISTING STATE RIGHT OF CONSCIENCE LAWS. 12

CONCLUSION 16

APPENDIX: State Laws Protecting the Rights of Conscience of Health Care Providers and Institutions 17

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

ACLU v. Mineta, 319 F. Supp. 2d 69 (D.D.C. 2004). 11

Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998). 11

Barbour v. WMATA, 374 F.3d 1161 (D.C. Cir. 2004). 11

Brauer v. Kmart Corp., Case No. 1:99-cv-618 (S.D. Ohio 2004). 1

Citizens for the Abatement of Aircraft Noise v. Metro Washington Airport Authority, 917 F.2d 48 (D.C. Cir. 1990). 11

Diaz v. Cty. of Riverside Health, Case No. 5:00-CV-00936 (C.D. Cal. 2002). 1, 15

Hanna v. Plumer, 380 U.S. 460 (1965). 9

Harris v. McRae, 448 U.S. 297 (1980). 10

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981). 9

Koch v. Indian Health Service, IHS-027-01. . . . . 1, 15

Maher v. Roe, 432 U.S. 464 (1977). 5

McCulloch v. Maryland, 17 U.S. 316 (1819). 9

Menges v. Blagojevich, Case No. 05-3307 (C.D. Ill. 2006). 1, 15

Planned Parenthood v. Casey, 505 U.S. 833 (1992). 5

Poelker v. Doe, 432 U.S. 519 (1977). 5

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003). 4

Regan v. Taxation with Representation, 461 U.S. 540 (1983). 10

Roe v. Wade, 410 U.S. 113 (1973). 5

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297 (2006). 6

* Rust v. Sullivan, 500 U.S. 173 (1991). 4, 8-11

United States v. Harris, 106 U.S. 629 (1883). 4

United States v. Morrison, 529 U.S. 598 (2000). 4

Statutes

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 (Dec. 8, 2004). 2

Public Law 109-149 (Dec. 30, 2005), Section 508(d). 2-9, 11-13, 15

Title X of the Public Health Service Act, 42 U.S.C. § 300. . . . . 3, 9

ALASKA STAT. § 18.16.010(b) (Michie 2005). . . . . 17 (Appendix)

ARIZ. REV. STAT. ANN. § 36-2151 (West 2005). . . . . 17 (Appendix)

ARK. CODE ANN. § 20-16-601 (Michie 2005). . . . . 17 (Appendix)

CAL. HEALTH & SAFETY CODE § 123420 (West 2005). . . . . 17 (Appendix)

COLO. REV. STAT. ANN. § 18-6-104 (West 2005). . . . . 17 (Appendix)

CT. AGENCIES REGS. § 19-13-D54(f) (Conn. L.J., vol. LVIII, no. 30 (Jan 21, 1997): 8B-9B). . . . . 17 (Appendix)

DEL. CODE ANN. tit. 24, § 1791 (2005). . . . . 17 (Appendix)

FLA. STAT. ANN. § 390.0111 (8) (West Supp. 2005). . . . . 17 (Appendix)

GA. CODE ANN. § 16-12-142 (2005). . . . . 17 (Appendix)

HAW. REV. STAT. ANN. § 453-16(d) (Michie 2005). . . . . 17 (Appendix)

IDAHO CODE § 18-612 (2005). . . . . 17 (Appendix)

720 ILL. COMP. STAT. ANN. 510/13 (2005). . . . . 17 (Appendix)

745 ILL. COMP. STAT. ANN. 70/1 to 70/14 (2005). . . . . 17 (Appendix)

IND. CODE. ANN. §§ 16-34-1-3 to 1-7 (West 2005). . . . . 17 (Appendix)

IOWA CODE ANN. §§ 146.1-146.2 (West 2005). . . . . 17 (Appendix)

KAN. STAT. ANN. §65-443, -444, -446, -447 (2005). . . . . 17 (Appendix)

KY. REV. STAT. ANN. § 311.800 (2005). . . . . 17 (Appendix)

LA. REV. STAT. ANN. §§ 40:1299.31 to 1299.33 (2006). . . . . 17 (Appendix)

ME. REV. STAT. ANN. tit. 22, §§ 1591-1592 (West 2005). . . . . 17 (Appendix)

MD. CODE ANN. § 20-214 (2005). . . . . 17 (Appendix)

MASS. ANN. LAWS ch. 112, § 12I; ch. 272 § 21B (2005). . . . . 17 (Appendix)

MICH. COMP. LAWS. ANN. §§ 333.20181 to 333.20184, 333.20199 (West 2005). . . . 17 (Appendix)

MINN. STAT. ANN. § 145.414 (West 2005). . . . . 17 (Appendix)

MISS. CODE ANN. §§ 41-107-5 to -9 (2005). . . . . 17 (Appendix)

MO. ANN. STAT. §§ 188.100, .105, .110, .115, .120 (West 2005). . . . . 17 (Appendix)

MONT. CODE. ANN. § 50-20-111 (2005). . . . . 18 (Appendix)

NEB. REV. STAT. §§ 28-337 to -341 (2005). . . . . 18 (Appendix)

NEV. REV. STAT. ANN. §§ 449.191, 632.474 (Michie 2005). . . . . 18 (Appendix)

N.J. STAT. ANN. §§ 2A:65A-1 to -4 (West 2005). . . . . 18 (Appendix)

N.M. STAT. ANN. § 30-5-2 (Michie 2005). . . . . 18 (Appendix)

N.Y. [CIV. RIGHTS] LAW § 79-i (McKinney 2005). . . . . 18 (Appendix)

N.C. GEN. STAT. §§ 14-45.1(e), (f) (2005). . . . . 18 (Appendix)

N.D. CENT. CODE § 23-16-14 (2005). . . . . 18 (Appendix)

OHIO REV. CODE ANN. § 4731.91 (Anderson 2005). . . . . 18 (Appendix)

OKLA. STAT. ANN. tit. 63, § 1-741 (West 2005). . . . . 18 (Appendix)

OR. REV. STAT. §§ 435.475, 435.485 (2005). . . . . 18 (Appendix)
PA. CONS. STAT. ANN. tit. 18, § 3213(d) (West Supp. 2005). . . . . 18 (Appendix)

PA. CONS. STAT. ANN. tit. 43, § 955.2 (West 2005). . . . . 18 (Appendix)

R.I. GEN. LAWS § 23-17-11 (2005). . . . . 18 (Appendix)

S.C. CODE ANN. §§ 44-41-40, -50 (Law Co-op. 2005). . . . . 18 (Appendix)

S.D. CODIFIED LAWS §§ 34-23A-11 to -15 (Michie 2005). . . . . 18 (Appendix)

TENN. CODE ANN. §§ 39-15-204, -205 (2005). . . . . 18 (Appendix)

TEX. REV. CIV. STAT. ANN. art. 4512.7 (West Supp. 2005). . . . . 18 (Appendix)

UTAH CODE ANN. § 76-7-306 (West Supp. 2005). . . . . 18 (Appendix)

VA. CODE ANN. § 18.2-75 (Michie 2005). . . . . 18 (Appendix)

WASH. REV. CODE ANN. §§ 9.02.150, 48.43.065, 70.47.160 (2005). . . . . 18 (Appendix)

W. VA. CODE § 16-2F-7 (2005). . . . . 18 (Appendix)

WIS. STAT. ANN. § 253.09 (West 2005). . . . . 18 (Appendix)

WYO. STAT. ANN. §§ 35-6-105, -106, -114 (Michie 2005). . . . . 18 (Appendix)

Other Authorities

U.S. CONST. art. I, § 8, cl. 1. 9

U.S. CONST. art. I, § 8, cl. 18. 9

42 C.F.R. § 59.5(a)(5)(ii). 8

Americans United for Life, *Defending Life 2006: A State-By-State Legal Guide to Abortion, Bioethics, and the End-of-Life* (2006). 14

David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should "Can" Imply "Ought"?*, 44 DRAKE L. REV. 439 (1996). 12

Centers for Medicare & Medicaid Services, *Overview of Medicaid, at* http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp (last visited May 9, 2006). 8

Judith F. Daar, *A Clash at the Bedside: Patient Autonomy v. A Physician's Professional Conscience*, 44 HASTINGS L.J. 1241 (1993). 12

Bruce G. Davis, *Defining the Employment Rights of Medical Personnel Within the Parameters of Personal Conscience*, 1986 DETROIT C.L. REV. 847. 12

Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002). 12

Michael J. Frank, Note, *Safeguarding the Consciences of Hospitals and Health Care Providers: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation*, 14 ST. LOUIS U. L.J. 311 (1996). 12

Guttmacher Institute, *State Policies in Brief: Restricting Insurance Coverage of Abortion* (2006), *at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf. 14

David W. Hepplewhite, *A Traditional Legal Analysis of the Roles and Duties of Pharmacists*, 44 DRAKE L. REV. 519 (1996). 12

Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2003). 12

Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POL'Y 47 (1994). 12

Pope, *An Essay on Man, Moral Essays, and Satires*. 12

Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993). 12

Cases upon which we chiefly rely are marked with an asterisk.

GLOSSARY

Plaintiff-Appellant National Family Planning and Reproductive Health Association, Inc.	NFPRHA
Public Law 109-149 (Dec. 30, 2005), Section 508(d)	Hyde-Weldon Amendment

INTEREST OF AMICI

All parties have consented to the filing of this brief amici curiae. The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court, this Court, and other federal courts. The ACLJ has represented numerous individuals on issues relating to conscientious objection to participation in abortion, emergency contraception and related issues.[1] The ACLJ's demonstrated commitment to preserving the constitutional rights of American citizens makes it especially interested in a right of conscience for professionals in the health care community. The underlying matters of national policy at issue in this case are not unique to religious objections to abortion; consequently, the outcome of this case is of great interest and significant import to health care providers throughout the country. Since the proper resolution of this

---

1. ACLJ litigation in this area includes: Menges v. Blagojevich, Case No. 05-3307 (C.D. Ill. 2006) (phamacists refused to dispense the morning after pill); Brauer v. Kmart Corp., Case No. 1:99-cv-618 (S.D. Ohio 2004) (pharmacist's conscientious objection to dispensing post-coital contraceptives was covered under Ohio law prohibiting discrimination against persons who decline to participate in "medical procedures which result in abortion"); Koch v. Indian Health Service, Case No. IHS-027-01 (pharmacist refused to dispense the morning-after-pill); Diaz v. County of RS Health, Case No. 5:00-cv-936 (C.D. Cal. 2002) (nurse fired because of her refusal to dispense the so-called morning-after pill).

case is a matter of substantial concern to the American Center for Law and Justice, it participated as an amicus before the District Court in this case.

The Americans United for Life Center for Rights of Conscience advocates on behalf of the rights of conscience (based on religious beliefs, ethical values or other concerns) of all healthcare providers. The Center accomplishes its goal of protecting health care rights of conscience through legislation, litigation, and education. It directly represents the interests of health care providers in a variety of administrative actions and in state and federal litigation.

The Fellowship of Christian Physician Assistants (FCPA) is a non-denominational fellowship of physician assistants that, *inter alia*, provides a network of professional support for Christian physician assistants and encourages its members in incorporating their faith in their clinical practices and within the profession. FCPA represents the interests of more than 540 physician assistants practicing throughout the United States whose practices and professional interests are directly implicated by the protections provided by the Hyde-Weldon Amendment.

Representatives Henry Hyde, Dave Weldon, M.D., Todd Akin, Charles Pickering, Jr., C. L. "Butch" Otter, and Mark Souder currently are members of the United States House of Representatives in the One Hundred Ninth Congress. These Congressmen support the provision of law in dispute in the present litigation. Congressman Hyde and Congressman Weldon, a physician by education and training, introduced the amendment at issue in this case.

The amici urge this Court to uphold the District Court's judgment in favor of the Defendants-Appellees.

SUMMARY OF THE ARGUMENT

On December 8, 2004, the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, became law. A number of agency appropriation acts were included within the Consolidated Appropriations Act, including the Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005, which contains the Hyde-Weldon Amendment, section 508(d).[2] The Hyde-Weldon Amendment imposes a plain and clearly drawn limitation on all funds appropriated under the Act, stating:

> None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

Section 508(d). While Plaintiff-Appellant National Family Planning and Reproductive Health Association, Inc. (NFPRHA) has brought this facial challenge to the Hyde-Weldon Amendment on the basis of its purported impact on NFPRHA's members (Title X family planning grantees), the Amendment is clearly more broadly crafted to restrict funding in *all* programs funded under the Act.

At the same time, because NFPRHA complains about the Hyde-Weldon Amendment's impact on would-be grantees under Title X family planning programs,[3] it should be noted that the Amendment serves as a form of protection for those institutions and individuals that refuse to participate in abortion or to provide referrals, funding, insurance coverage or counseling for abortion

---

2. The pertinent provisions were reenacted by Public Law 109-149 (Dec. 30, 2005). For ease of reference and clarity, the challenged provisions will be referred to throughout this brief as the "Hyde-Weldon Amendment."

3. Title X of the Public Health Service Act is the national family planning program, which provides millions of dollars annually in funding to public and private agencies for "pregnancy prevention." 42 U.S.C. § 300.

services. The Hyde-Weldon Amendment does this by denying funding to all government grantees that discriminate against entities that refuse to participate in such practices.

The Hyde-Weldon Amendment limits all funds appropriated under the Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 2005. The Amendment's prohibition on funding discriminatory practices applies to discrimination against both institutions and individuals. "Health care entity includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility or organization or plan." Section 508 (d)(2).

In the view of the amici, the Hyde-Weldon Amendment is a reasoned exercise of Congress' spending power to advance its legitimate interest in promoting childbirth over abortion. The limitation is, in kind and character, very like the one previously approved by the Supreme Court in Rust v. Sullivan, 500 U.S. 173 (1991). Because the Hyde-Weldon Amendment is a reasonable exercise of Congress' spending power well within its authority to prefer childbirth over abortion, the Plaintiff-Appellant cannot prevail in its challenge to the legislation.

As the Supreme Court explained in United States v. Morrison, "we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." 529 U.S. 598, 607 (2000). The Court in United States v. Harris said:

> Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.

106 U.S. 629, 635 (1883). As this Court has previously stated:

> As the Supreme Court held in United States v. Salerno, to mount a successful facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."

Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1077-78 (D.C. Cir. 2003) (citation omitted). NFPRHA cannot prevail without showing that there is no set of circumstances in which the Hyde-Weldon Amendment can be applied without violating the Constitution.

In addition, amici seek to inform this Court that there are other interests at stake than those represented by NFPRHA. Among these important interests is the desirability of vindicating the constitutional authority of Congress to prefer childbirth over abortion and to define and fund programs in accord with its Spending Clause authority. Also, beyond these constitutionally-freighted governmental interests, there are institutions and individuals across the Nation that have been victimized by the precise discrimination addressed by the Hyde-Weldon Amendment. These institutions and individuals, opposed to participating in abortion practices, will be injured substantially if the judgment in favor of Defendants-Appellees is reversed.

ARGUMENT

While the United States Supreme Court has concluded that women have a liberty interest that enables them to receive reproductive health services,[4] the Court has never recognized a

4. See generally Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992). These decisions have created significant philosophical debate and societal dispute and have been questioned by several Supreme Court Justices in their dissenting opinions. Such arguments are beyond the scope of this brief. These decisions are merely cited to show the Supreme Court's acceptance of this basic right.

corresponding constitutional duty of governments to provide such reproductive services. See Poelker v. Doe, 432 U.S. 519 (1977). Rather than finding that the constitutional dimensions of that liberty interest compels governments to facilitate or provide abortion services, the Court has concluded that governments may prefer childbirth over abortion as a matter of social policy.[5]

NFPRHA seeks to have enforcement of the Hyde-Weldon Amendment enjoined. In so doing, it takes on the significantly burdensome responsibility and duty of demonstrating the facial invalidity of the Hyde-Weldon Amendment. NFPRHA cannot sustain its burden in this case.[6] The Hyde-Weldon Amendment reflects the judgment of Congress that no funds appropriated under the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 2005, should be available to government entities – either federal or State – that discriminate against institutions and entities that do not provide, pay for, provide coverage of, or refer for abortions. This judgment is well within Congress' spending power to prefer childbirth over abortion. This limitation does not deny to agencies, programs, or governments the ability to discriminate in

---

5. See Maher v. Roe, 432 U.S. 464, 475-76 (1977). In fact, Congress has expressly acted to further the national interest in preferring childbirth over abortion. For example, the federally funded family planning program – commonly known as Title X – reflects Congress' considered judgment that the preference for childbirth over abortion was sufficiently significant to deny federal funds to proposed Title X grantees that provided or referred for abortion.

6. There are several significant defects in NFPRHA's case. For example, NFPRHA does not suffer from any present injury. Consequently, it lacks standing to complain on its own behalf. Recognizing the difficulty that its own lack of injury presents, NFPRHA has also claimed that the rights of its members will be injured by the Hyde-Weldon Amendment. This argument fails for two simple reasons: the Hyde-Weldon Amendment only applies to governments, so the private organizations and entities that are members of NFPRHA plainly are unaffected by the challenged restriction; and, the government entities that are members of NFPRHA remain free to provide and refer for abortions and thus are not injured by the provision.

this way; instead, entities that wish to do so must simply choose to forego grant funding. The Supreme Court of the United States unanimously upheld a somewhat similar funding restriction in a recent case. See Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297 (2006) (upholding a funding restriction which prohibited the recipients of certain funds from discriminating against military job recruiters).

Moreover, other parties will suffer if this Court reverses the District Court's judgment in favor of Defendants-Appellees. Congress is entitled to craft programs funded by its spending power and to insist that funding recipients comply with the express parameters of such programs. In addition, with a view toward the broadly held opposition to unrestricted abortion in the United States, Congress was right to consider whether its funding of Labor, Health and Human Services, Education, and related agency programs could be crafted to reflect the legislative preference for childbirth over abortion. In fact, the Hyde-Weldon Amendment does just that and, in the process, extends a solicitous nod to individuals and institutions that do not participate in abortion services. Those institutions and individuals would be adversely affected if this Court were to reverse the District Court's judgment in favor of Defendants-Appellees.

I. CONGRESS PROPERLY EXERCISED ITS SPENDING POWER TO PREFER CHILDBIRTH OVER ABORTION IN ENACTING THE HYDE-WELDON AMENDMENT.

This case is not about an indefatigable right of would-be government recipients of appropriated funds to receive federal funds. No such right exists under the American system of law. Rather, this case is about the power of Congress to define the contours of the programs that it creates and funds. Though NFPRHA complains about the impact of the Hyde-Weldon Amendment on Title

X program grantees, the Amendment is much broader in scope and serves as a complete prohibition on the granting of any funds appropriated under the Act to governments, agencies, and programs engaging in discrimination.

While NFPRHA has brought into focus the applicability of the Hyde-Weldon Amendment to Title X grantees,[7] it is important to consider the broader application of the Amendment, which restricts *all* funds appropriated under the Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 2005. Among major programs to which the Hyde-Weldon Amendment's restriction applies, undoubtedly the largest is the Medicaid program,[8] under which

---

7. This brief does not address in full NFPRHA's assertion that the Hyde-Weldon Amendment puts its members that receive Title X funding in a double bind, due to the effect of apparently inconsistent obligations under the Hyde-Weldon Amendment and a federal regulation, 42 C.F.R. § 59.5(a)(5)(ii). It is sufficient to note that, if there is a conflict between the federal law enacted by Congress and a federal regulation, the provision of the federal statute certainly governs.

8. The Centers for Medicare and Medicaid Services, within the Department of Health and Human Services, describes the program on its website as follows:

> This program, known as Medicaid, became law in 1965 as a cooperative venture jointly funded by the Federal and State governments (including the District of Columbia and the Territories) to assist States in furnishing medical assistance to eligible needy persons. Medicaid is the largest source of funding for medical and health-related services for America's poorest people.
>
> Within broad national guidelines established by Federal statutes, regulations, and policies, each State (1) establishes its own eligibility standards; (2) determines the type, amount, duration, and scope of services; (3) sets the rate of payment for services; and (4) administers its own program. Medicaid policies for eligibility, services, and payment are complex and vary considerably, even among States of similar size or geographic proximity. Thus, a person who is eligible for Medicaid in one State may not be eligible in another State, and the services provided by one State may differ considerably in amount, duration, or scope from services provided in a similar or neighboring State.

State and local government agencies provide medical care assistance to the poor.

The Supreme Court has already considered and upheld the validity of a regulatory judgment limiting Title X program funds to providers that do not refer for or provide abortions in the Rust case. Here, Congress has simply concluded that the advancement of its policy judgments – regarding the preference for childbirth over abortion as well as the social harm of discrimination against persons who conscientiously decline to participate in abortion practices – fully justified the restriction imposed by the Hyde-Weldon Amendment.

Under the Constitution's Spending Clause, Congress has authority to appropriate federal monies to promote the general welfare. U.S. CONST. art. I, § 8, cl. 1. Under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, Congress has a corresponding authority to insure that taxpayer dollars appropriated under that power are in fact spent accordingly. See generally McCulloch v. Maryland, 17 U.S. 316 (1819) (rational basis review under the Necessary and Proper Clause); see also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981) (same); Hanna v. Plumer, 380 U.S. 460, 472 (1965) (same). Congress need not await the thwarting of its will in order to act. See, e.g., McCulloch, 17 U.S. at 417 (the power to "'establish post-offices and post-roads'" includes the power to "punish those who steal letters").

In Rust, the Supreme Court rejected First Amendment free speech challenges to a restriction within the federal Title X family planning program and affirmed a 1988 regulation promulgated by

---

Centers for Medicare & Medicaid Services, *Overview of Medicaid, at* http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp (last visited May 9, 2006).

the Secretary of Health and Human Services that was intended to clarify certain issues that had arisen in the administration of Title X programs. As the Supreme Court noted, the regulations attached three conditions on the grant of federal funds under Title X:

> First, the regulations specif[ied] that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." . . . Second, the regulations broadly prohibit[ed] a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." . . . Third, the regulations require[d] that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. To be deemed physically and financially separate, "a Title X project must have [had] an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies [was] not sufficient."

Rust, 500 U.S. at 179-80 (citations omitted). Title X funding recipients challenged these limitations on the use of Title X funding, asserting that "the regulations violate the First Amendment by impermissibly discriminating based on viewpoint . . . ." Id. at 192. The Supreme Court rejected their arguments, however, holding that Congress was well within its sphere of authority to prefer childbirth over abortion. Id. As the Court explained, when the "government appropriates public funds to establish a program, it is entitled to define the limits of that program." Id. at 194.

In sum, Rust made it clear that the First Amendment does not prevent Congress from appropriating funds and directing their expenditure using criteria that are based on the content of the recipients' speech or activities. The Court warned:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.[9]

9. Rust, 500 U.S. at 194 (citation omitted). The Court reached a similar conclusion in 2006. See

There remains no doubt after Rust that "the Government [might] choose[] to subsidize one protected right" without being obligated to "subsidize analogous counterpart rights."[10] Id. The Court reaffirmed, "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 192-93 (citing Maher, 432 U.S. at 475).

The decisions of this Court are in full accord with the outcome in Rust. For example, in Barbour v. WMATA, 374 F.3d 1161 (D.C. Cir. 2004), this Court explained that Congress may "condition its grants of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions." 374 F.3d at 1163 (citation omitted). In Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998), this Court overturned an injunction against the enforcement of a ban prohibiting inmates from receiving pornographic materials while in prison and at the expense of the Bureau of Prisons, specifically relying on the Spending Clause and the prior decision of the Supreme Court in Rust.

Rumsfeld, 126 S. Ct. at 1309 ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

10. In reaching this conclusion, the Supreme Court relied on Regan v. Taxation with Representation, 461 U.S. 540 (1983) and Harris v. McRae, 448 U.S. 297 (1980).

The Hyde-Weldon Amendment falls squarely within the Rust Court's statement that the "government can, without violating the Constitution, selectively encourage certain activities it believes to be in a public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way." 500 U.S. at 193. Congress remains free to continue fine-tuning its Title X family planning program in ways that allow it to pursue the legitimate governmental preference for childbirth over abortion. See Citizens for the Abatement of Aircraft Noise v. Metro Washington Airport Authority, 917 F.2d 48, 55 (D.C. Cir. 1990) (noting that it is "well established that Congress may use its Spending Clause powers to advance policies that lie beyond the reach of its constitutional authority to legislate directly"); ACLU v. Mineta, 319 F. Supp. 2d 69, 80 (D.D.C. 2004) (concluding that the challenged restriction and the purpose of the funding do not have to be "particularly closely related" to be upheld, and that there was a paucity of case law "striking down a condition on federal funding solely because it was insufficiently related to the federal interest in the program funded"). Consequently, the Hyde-Weldon Amendment is a permissible restriction on the granting of federal funds under the Spending Clause.

II. THE HYDE-WELDON AMENDMENT SERVES TO ALLEVIATE A SIGNIFICANT BURDEN UPON HEALTH CARE PROFESSIONALS AND INSTITUTIONS WHO CONSCIENTIOUSLY OPPOSE ABORTIONS BY PROVIDING A MUCH-NEEDED COMPLIMENT TO EXISTING STATE RIGHT OF CONSCIENCE LAWS.

The Hyde-Weldon Amendment deals with an issue - the right of conscience of health care providers with regard to abortion - that has generated considerable moral, medical, religious and political debate. Discussions of the competing rights and interests of employers and medical

professionals within the legal literature often focus on the rights of doctors and medical students,[11] although some attention has been paid to the dilemmas faced by private hospitals, nurses, and pharmacists.[12] When a health care professional, out of deeply held personal beliefs, refuses to provide abortion related services and the organization employing that professional demands that such services be provided, satisfactory solutions are difficult to reach. As Alexander Pope wondered, "Who shall decide when doctors disagree?" Pope, *An Essay on Man, Moral Essays, and Satires.* While Pope contemplated the problem of doubt, this case presents the question of whether Congress may insist, "when doctors disagree," that funds Congress provides will not be used by grantees who discriminate against persons of conscience. In other words, it falls to this Court to decide who prevails when potential funding recipients and Congress disagree. It is no small question.

In recognizing the complex moral and legal issues surrounding this subject, Congress has followed the example of the many states that have already developed laws to provide protection from

---

11. See, e.g., Judith F. Daar, *A Clash at the Bedside: Patient Autonomy v. A Physician's Professional Conscience*, 44 HASTINGS L.J. 1241 (1993); Bruce G. Davis, *Defining the Employment Rights of Medical Personnel Within the Parameters of Personal Conscience*, 1986 DETROIT C.L. REV. 847; Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POL'Y 47 (1994); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993); Michael J. Frank, Note, *Safeguarding the Consciences of Hospitals and Health Care Providers: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation*, 14 ST. LOUIS U. L.J. 311 (1996).

12. See, e.g., David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should "Can" Imply "Ought"?*, 44 DRAKE L. REV. 439 (1996); David W. Hepplewhite, *A Traditional Legal Analysis of the Roles and Duties of Pharmacists*, 44 DRAKE L. REV. 519 (1996); Bryan A Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002); Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2003).

discrimination for conscientious objectors. The Hyde-Weldon Amendment represents the considered judgment of Congress that an entire segment of the medical community - those who sincerely believe that abortion is immoral - should not be subject to adverse or discriminatory treatment due to their beliefs. Today, health care entities – institutions, large and small, and individuals – enjoy a small breathing space from otherwise intrusive governmental demands that abortion services be provided or abortion referrals be given. These doctors, pharmacists, nurses, hospital associations, health maintenance organizations, and other entities benefit greatly from the funding restrictions imposed and the protections offered by the Hyde-Weldon Amendment. If this Court reversed the judgment in favor of the Defendants-Appellees, these health care providers would be directly injured by the message that such a decision would send to governments, federal, state and local: that such discrimination is permissible.

Contrary to NFPRHA's contention, the Hyde-Weldon Amendment imposes no real "burden" on recipients of federal funds by seeking to protect the rights of conscience of individual health care providers, institutions, and payers. The Amendment merely serves to supplement the laws existing in 47 states that prohibit discrimination against individual health care providers and religiously-affiliated and other private hospitals that decline to provide or refer for abortions. See *Appendix* (summarizing state laws protecting health care rights of conscience of individuals and religiously-affiliated and other private hospitals). For example, 31 states protect the right of public hospitals to refuse to allow their facilities to be used to perform elective abortions. Only Alabama, New Hampshire, and Vermont have failed to enact any protections for individual or institutional health care providers, and only New York, Rhode Island, and West Virginia have failed to extend their

protection of individual health care providers to public or private institutions. Illinois and Mississippi have extended rights of conscience protection to health care payers, including companies and health maintenance organizations doing business in and with the state.

In addition to these right of conscience provisions for health care providers, 11 states have exercised their sovereign right to act in accordance with their "collective" right of conscience, significantly limiting the expenditure of state funds for abortion coverage for public employees and/or prohibiting private insurers from offering coverage for elective abortions except where a woman's life is endangered. See generally Americans United for Life, *Defending Life 2006: A State-By-State Legal Guide to Abortion, Bioethics, and the End-of-Life* (2006) at 91-96; Guttmacher Institute, *State Policies in Brief: Restricting Insurance Coverage of Abortion* (2006), *at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf. These policy limitations range from a complete prohibition on coverage of abortion to offering coverage only when the abortion is necessary to preserve the woman's health and life, or where the pregnancy resulted from rape or incest or entails fetal abnormalities.[13] While state laws of this nature should not be necessary given the lack of real harm that conscientious objectors pose to organizations such as NFPRHA, Congress is certainly justified in ensuring that its funding is not used by those who engage in discrimination

---

13. Colorado and Kentucky completely ban insurance coverage for abortion for public employees, while Illinois, Nebraska, and North Dakota provide abortion coverage for public employees only when a woman's life is endangered. (In Nebraska, an individual employee may pay for a policy rider covering abortion in other instances.) Massachusetts, Mississippi, Ohio, Pennsylvania, Rhode Island, and Virginia limit coverage for public employees to situations where a woman's life or health is endangered or in cases of rape, incest or fetal abnormality. Moreover, Idaho, Kentucky, Missouri and North Dakota prohibit private insurance companies from covering abortion except in cases where a woman's life is endangered.

against persons of conscience within the medical profession given the reality of the situation.[14] Clearly, the important protections advanced by the Hyde-Weldon Amendment compliment existing state laws and impose no recognizable burden on recipients of federal funds.

In sum, NFPRHA simply cannot show that the Hyde-Weldon Amendment exceeded Congress' authority. The discrimination that often flows from the clash of views over the propriety of abortion allows room within the medical profession only for those willing to participate in or support abortion related services. Today, the Hyde-Weldon Amendment protects organizations – such as health maintenance organizations and religiously affiliated health associations – and individuals – such as nurses, pharmacists, physicians' assistants, and doctors. While the shield established by the Hyde-Weldon Amendment is limited because a government can choose to forego funds and engage in such discriminatory practices (subject, of course, to state law conscience clause considerations), the Amendment is a much-needed aid to persons of conscience within the health care profession. A decision to reverse the judgment in favor of Defendants-Appellees would injure

---

14. As explained in the Interest of Amici section, amici know firsthand that the harms faced by medical professionals who adhere to the dictates of their conscience are real, not hypothetical. For example, amicus ACLJ has represented medical professionals in California, Illinois, Louisiana and elsewhere who have faced disciplinary actions or loss of their employment for adhering to the dictates of their conscience. See, e.g., Menges v. Blagojevich, Case No. 05-3307 (C.D. Ill. 2006); Diaz v. Cty. of Riverside Health, 5:00-CV-00936 (C.D. Cal. 2002); Koch v. Indian Health Service, IHS-027-01.

the associations, organizations, and individuals relying on its protection.

CONCLUSION

For the foregoing reasons, the District Court's judgment in favor of the Defendants-Appellees should be affirmed.

Dated: May 26, 2006.

Respectfully submitted,

/s/ *James Matthew Henderson, Sr.*
James Matthew Henderson, Sr. (#452639)

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

APPENDIX

State Laws Protecting the Rights of Conscience of Health Care Providers and Institutions

State	Statute(s)	Doctors	Nurses	Physician Assistants	Medical & Nursing Students	Medical Technicians & Assistants	Private & Religiously-Affiliated Hospitals	Public Hospitals
AL	No Law							
AK	ALASKA STAT. § 18.16.010(b) (Michie 2005)	X	X	X		X	X	
AZ	Ariz. REV. STAT. ANN. § 36-2151 (West 2005)	X	X	X		X	X	X
AR	Ark. CODE ANN. § 20-16-601 (Michie 2005)	X	X	X		X	X	X
CA	CAL. HEALTH & SAFETY CODE § 123420 (West 2005)	X	X	X	X	X	X	
CO	COLO. REV. STAT. ANN. § 18-6-104 (West 2005)	X	X	X		X	X	X
CT	CT. AGENCIES REGS. § 19-13-D54(F) (CONN. L.J., VOL. LVIII, NO. 30 (JAN 21, 1997): 8B-9B)	X	X	X		X	X	X
DE	DEL. CODE ANN. tit. 24, § 1791 (2005)	X	X	X		X	X	X
FL	FLA. STAT. ANN. § 390.0111 (8) (West Supp. 2005)	X	X	X		X	X	X
GA	GA. CODE ANN. § 16-12-142 (2005)	X	X	X		X	X	X
HI	HAW. REV. STAT. ANN. § 453-16(d) (Michie 2005)	X	X	X		X	X	X
ID	IDAHO CODE § 18-612 (2005)	X	X	X		X	X	X
IL	745 ILL. COMP. STAT. ANN. 70/1 to 70/14 (2005); 720 ILL. COMP. STAT. ANN. 510/13 (2005)	X	X	X	X	X	X	X
IN	IND. CODE. ANN. §§ 16-34-1-3 to 16-34-1-7 (West 2005)	X	X	X		X	X	
IA	IOWA CODE ANN. §§ 146.1-146.2 (West 2005)	X	X	X		X	X	
KS	KAN. STAT. ANN. §§ 65-443, 65-444, 65-446, 65-447 (2005)	X	X	X		X	X	X
KY	KY. REV. STAT. ANN. § 311.800 (2005)	X	X	X	X	X	X	X
LA	LA. REV. STAT. ANN. §§ 40:1299.31 to 1299.33 (2006)	X	X	X	X	X	X	X
ME	ME. REV. STAT. ANN. tit. 22, §§ 1591-1592 (West 2005)	X	X	X	X	X	X	X
MD	MD. CODE ANN. § 20-214 (2005)	X	X	X		X	X	X
MA	MASS. ANN. LAWS ch. 112, § 12I; ch. 272 § 21B (2005)	X	X	X	X	X	X	X

MI	MICH. COMP. LAWS. ANN. §§ 333.20181 to 333.20184, 333.20199 (West 2005)	X	X	X	X	X	X	X
MN	MINN. STAT. ANN. § 145.414 (West 2005)	X	X	X		X	X	
MS	MISS. CODE ANN. §§ 41-107-5 to § 41-107-9 (2005)	X	X	X	X	X	X	X
MO	MO. ANN. STAT. §§ 188.100, 188.105, 188.110, 188.115, 188.120 (West	X	X	X	X	X	X	X
MT	MONT. CODE. ANN. § 50-20-111 (2005)	X	X	X		X	X	
NE	NEB. REV. STAT. §§ 28-337 to 28-341 (2005)	X	X	X		X	X	X
NV	NEV. REV. STAT. ANN. §§ 449.191, 632.474 (Michie 2005)	X	X	X		X	X	
NH	No law							
NJ	N.J. STAT. ANN. §§ 2A:65A-1 to 2A:65A-4 (West 2005)	X	X	X		X	X	X
NM	N.M. STAT. ANN. § 30-5-2 (Michie 2005)	X	X	X		X	X	X
NY	N.Y. [CIV. RIGHTS] LAW § 79-i (McKinney 2005)	X	X	X		X		
NC	N.C. GEN. STAT. §§ 14-45.1(e), 14-45.1(f) (2005)	X	X	X		X	X	X
ND	N.D. CENT. CODE § 23-16-14 (2005)	X	X	X		X	X	X
OH	OHIO REV. CODE ANN. § 4731.91 (Anderson 2005)	X	X	X		X	X	X
OK	OKLA. STAT. ANN. tit. 63, § 1-741 (West 2005)	X	X	X		X	X	
OR	OR. REV. STAT §§ 435.475, 435.485 (2005)	X	X	X		X	X	
PA	PA. CONS. STAT. ANN. tit. 43, § 955.2; tit. 18, § 3213(d) (West Supp. 2005)	X	X	X	X	X	X	X
RI	R.I. GEN. LAWS § 23-17-11 (2005)	X	X	X		X		
SC	S.C. CODE ANN. §§ 44-41-40, 44-41-50 (Law Co-op. 2005)	X	X	X		X	X	
SD	S.D. CODIFIED LAWS §§ 34-23A-11 to 34-23A-15 (Michie 2005)	X	X	X		X	X	X
TN	TENN. CODE ANN. §§ 39-15-204 and 39-15-205 (2005)	X	X	X		X	X	X
TX	TEX. REV. CIV. STAT. ANN. art. 4512.7 (West Supp. 2005)	X	X	X	X	X	X	
UT	UTAH CODE ANN. § 76-7-306 (West Supp. 2005)	X	X	X		X	X	
VT	No law							
VA	VA. CODE ANN. § 18.2-75 (Michie	X	X	X		X	X	X
WA	WASH. REV. Code ANN. §§ 9.02.150, 48.43.065, 70.47.160 (2005)	X	X	X		X	X	
WV	W. VA. CODE § 16-2F-7 (2005)	X	X	X		X		
WI	WIS. STAT. ANN. § 253.09 (West 2005)	X	X	X	X	X	X	X
WY	WYO. STAT. ANN. §§ 35-6-105, -106, -114 (Michie 2005)	X	X	X		X	X	

The information contained in this Appendix relates only to abortion. A number of states also protect the rights of conscience of health care providers who, based on religious, moral and/or ethical concerns, refuse to participate in sterilization, the dispensation of contraception, artificial insemination, assisted suicide, euthanasia, and other medical procedures.

CERTIFICATE OF COMPLIANCE

This brief amici curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the relevant portion of the brief (as defined by Fed. R. App. P. 32(a)(7)(B)(iii)) contains 4,899 words. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & (6) and D.C. Circuit Court Rule 32(a)(1) because it has been prepared in a proportionally spaced typeface using WordPerfect 12 for Windows in Times New Roman, 12-point font.

Dated: May 26, 2006.

Respectfully submitted,

/s/ *James Matthew Henderson, Sr.*
James Matthew Henderson, Sr. (#452639)

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5406

NATIONAL FAMILY PLANNING)
AND REPRODUCTIVE HEALTH)
ASSOCIATION, INC.,)
Plaintiff-Appellant,)
)
v.)
)
ALBERTO GONZALES, *et al.*,)
Defendants-Appellees.)

CERTIFICATE OF SERVICE

James Matthew Henderson, Sr., a member of the bar of the Court, hereby certifies that he caused the foregoing brief amici curiae to be served on all parties required to be served through a commercial carrier.

Dated: May 26, 2006.

Respectfully submitted,

/s/ *James Matthew Henderson, Sr.*
James Matthew Henderson, Sr. (#452639)

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Edward R. Martin, Jr.
Denise M. Burke
AMERICANS UNITED FOR LIFE
310 S. Peoria St, Ste. 500
Chicago, IL 60607
(312) 492-7234

Attorneys for Amici Curiae

SERVICE LIST

James L. Feldesman
Feldesman, Tucker, Leifer, Fidell LLP
2001 L Street, N.W.
2nd Floor
Washington, DC 20036
(202) 466-8960

Attorney for Plaintiff-Appellant the National Family Planning & Reproductive Health Assoc., Inc.

Robert Mark Loeb
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-4332

Attorney for Defendants-Appellees Alberto Gonzales, Attorney General of the United States, Michael O. Leavitt, Secretary of the U.S. Department of Health and Human Services, Elaine L. Chao, Secretary of the U.S. Department of Labor, and Margaret Spellings, Secretary of the U.S. Department of Education.

Steven Henry Aden
Center for Law and Religious Freedom
8001 Braddock Road
Suite 300
Springfield, VA 22151
(703) 642-1070

Attorney for Intervenor Defendants-Appellees the American Association of Pro-Life Obstetricians and Gynecologists and the Christian Medical Association.