No. 13-1540

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,

Appellants,

v.

KATHLEEN SEBELIUS, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Colorado
The Honorable Judge William J. Martinez
Civil Action No. 1:13-cv-02611-WJM-BNB

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, PRISON FELLOWSHIP MINISTRIES, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE LUTHERAN CHURCH – MISSOURI SYNOD, AMERICAN BIBLE SOCIETY, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

None of the amici curiae is a subsidiary of any other corporation. Each amicus curiae is a non-stock corporation. No publicly held corporation owns10% or more of its stock. Fed. R. App. P. 26.1.

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

The **Association of Gospel Rescue Missions** ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

The first U.S. gospel rescue mission was founded in New York City in the 1870s and has continuously operated as a Christian ministry to the poor and addicted in the Bowery for 134 years. During that time, generations of men and women have followed their Christian "calling" to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities

[1] Pursuant to FRAP 29(c) (5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund its preparation or submission. Pursuant to FRAP 29(a), all parties have consented to the filing of this brief.

and small communities across America. This "calling" is inseparable from and an outward sign of their faith, as *James* 2:14-17 teaches:

> What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister is poorly clothed and lacking in daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? So also faith by itself, if it does not have works, is dead.

Headquartered in Colorado Springs, Colorado, the **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it by policies such as the HHS Mandate or other means.

Prison Fellowship Ministries (PFM) is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Among other things, PFM: (i) provides in-prison seminars and special events that expose prisoners to the Gospel, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help prisoners mature through coaching and accountability; and (iii) supports released prisoners in a successful restoration to their families and society.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom,

marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Lutheran Church-Missouri Synod**, a Missouri nonprofit corporation, has approximately 6,150 member congregations which, in turn, have approximately 2,400,000 baptized members. The Synod has a keen interest in fully protecting religious liberty, and it opposes the mandate that would require religious organizations, with only narrowly defined exceptions, to include coverage for contraceptives, including those that could cause the death of unborn babies.

Headquartered in Manhattan, the 196-year-old **American Bible Society** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. One of the nation's oldest nonprofit organizations and partnering with hundreds of churches and ministries, today's American Bible Society provides interactive, high- and low-tech resources enabling first-time readers and seasoned theologians alike to engage with the best-selling book of all time.

The **Institutional Religious Freedom Alliance** works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

The **Christian Legal Society** ("CLS") is a non-profit, non-denominational association of Christian attorneys, law students, and law professors, with chapters in nearly every state and on many law school campuses. CLS's legal advocacy division, the Center for Law & Religious Freedom, acts to protect all religious citizens' right to be free to exercise their religious beliefs. CLS also offers its members opportunities to provide legal aid to those who cannot afford legal services, regardless of the clients' faith or lack thereof.

Summary of Argument

Amici share a deep and abiding commitment to religious liberty, not just for themselves, but for Americans of all faith traditions. *Amici* understand that the First Amendment "sponsor[s] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

In the specific context of the HHS Mandate, *amici* may differ in their views regarding whether the general use of contraceptives is acceptable, or whether certain contraceptives act as abortion-inducing drugs. *Amici*, however, believe that our Nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in, or funding, the use of contraceptives generally, or abortion-inducing drugs specifically. The Mandate sharply departs from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience rights in the context of participation in, or funding of, abortion.

Amici further agree that the Mandate's current definition of "religious employer" is grossly inadequate to protect meaningful religious liberty. *Amici* are

troubled that the federal government, when adopting the Mandate's definition of "religious employer," bypassed time-tested federal definitions of "religious employer" – for example, Title VII of the Civil Rights Act of 1964 and its definition of "religious employer" -- in favor of a controversial definition devised by three states.[2]

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable -- institutions represented by many of the *amici* -- epitomized the quintessential "religious employer" and, therefore, were protected under responsible federal definitions of "religious employer." But the Mandate unilaterally re-defined most *religious employers* to be *non-religious employers*. By administrative fiat, religious educational institutions, hospitals, associations, and charities were deprived of their religious liberty.

The Mandate's revised definition of religious employer, adopted on July 2, 2013, continues to violate religious liberty. Only churches, conventions or associations of churches, integrated auxiliaries, or religious orders fall within the Mandate's definition of religious employer. 78 Fed. Reg. 39,870 (July 2, 2013). Many, if not most, religious educational institutions and religious ministries do not

[2] In observing that the controversy may have been avoided had the government begun with Title VII's definition of "religious employer," *amici* do not suggest that Title VII's definition encompasses all the employers legally entitled to an exemption under RFRA and the First Amendment.

qualify for the "religious employer" exemption.[3] The many religious ministries that are independent of, and unaffiliated with, any specific church seemingly are no longer "religious employers."

Because the government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer," even religious educational institutions and religious ministries that *are* affiliated with churches do not necessarily qualify as religious employers. Secretary Sebelius stated that: "[A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the [contraceptive] benefit package," and "Catholic hospitals, Catholic universities, other religious entities will be providing [contraceptive] coverage to their employees starting August 1st."[4]

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[3] The Seventh Circuit conflated the "religious exemption" and the so-called "accommodation" when it characterized the University of Notre Dame as "now [coming] within [the exemption's] scope." *University of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 21, 2014) (Slip op. 5). Notre Dame and Little Sisters do not qualify for the religious exemption because they are not churches. Religious organizations, including many of the *amici*, repeatedly petitioned the government to include religious institutions like Notre Dame, Little Sisters, and other religious ministries within the "religious exemption." But the government most deliberately and definitely refused to extend the exemption to Notre Dame University, Little Sisters, and other religious non-profit organizations. 78 Fed. Reg. at 8458-59. *See* pp. 12-20, *infra.*

[4] Secretary Kathleen Sebelius, U.S. Secretary of Health and Human Services, Remarks at the Forum at Harvard School of Public Health (Apr. 8, 2013), http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (Part 9, Religion and

For those that fall outside of the Mandate's crabbed definition of "religious employer," the so-called "accommodation" does not offer adequate religious liberty protections. The religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. A religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees. The government's argument rests on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences.

The government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality. As a practical matter, Secretary Sebelius has acknowledged, contraceptives are "the most commonly taken drug in America by young and middle-aged women" and are widely "available at sites such as community health centers, public clinics, and

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Policymaking, at 4:50 and 2:48) (last visited Sept. 16, 2013). The enforcement date was delayed until January 1, 2014. 78 Fed. Reg. 39,870 (July 2, 2013).

hospitals with income-based support."[5] Even if contraceptives were not already widely available, the government itself has several conventional means to provide contraceptives coverage to any and all employees, including: 1) a tax credit for the purchase of contraceptives; 2) direct distribution of contraceptives through community health centers, public clinics, and hospitals; 3) direct insurance coverage through state and federal health exchanges; and 4) programs to encourage willing private actors, e.g., physicians, pharmaceutical companies, or interest groups, to deliver contraceptives through their programs.

Given that in 2012 HHS spent over $300 million in Title X funding to provide contraceptives directly to women, why is the government unwilling to spend a modest amount to protect the priceless "first freedom" of religious liberty? In light of the bureaucratic expense and waste that implementation of the "accommodation" will necessarily create for the government and religious organizations, as well as insurers and third-party administrators, it would seem clearly more economical, easy, and efficient for the government itself to provide contraceptives through direct distribution, tax credits, vouchers, or other government programs.

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[5] *See* Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Sept. 16, 2013).

At the end of the day, this case is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive -- but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths. As a constitutional matter, both the Religious Freedom Restoration Act and the First Amendment require that the government respect religious liberty by restoring a definition of "religious employer" that protects all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage.

Argument

I. The Mandate's "Religious Employer" Definition Fails to Protect Most Religious Ministries that Serve as Society's Safety Net for the Most Vulnerable.

The Mandate infringes the religious liberty of non-profit religious organizations in at least two basic ways: 1) its exemption for churches but not other religious organizations is far too narrow; and 2) the so-called "accommodation" promotes the Mandate's unconstitutional requirement that religious organizations facilitate access to drugs that violate their religious convictions.

A. For two years, many religious organizations have sought a definition of "religious employer" that respects all faith communities' religious liberty.

For two years, the government has seemed bent on casting the narrowest net possible in order to protect the fewest religious employers possible. The Mandate exempts only a small subset of religious employers from having to provide coverage for contraceptive methods, including Plan B and *ella*, which many persons regard as abortion-inducing drugs.[6]

The Mandate leaves any exemption for religious organizations entirely to the discretion of the Health Resources and Services Administration (HRSA) of the Department of Health and Human Services. 76 Fed. Reg. 46621, 46623 (published Aug. 3, 2011). In August 2011, HRSA issued a "religious employer" exemption that protects only a severely circumscribed subset of religious organizations. *Id.* at 46623; 45 C.F.R. § 146.130. To qualify as a "religious employer" for purposes of the exemption, a religious organization was required to: 1) inculcate values as its purpose; 2) primarily employ members of its own faith; 3) serve primarily

[6] According to the FDA, an effect of Plan B (Levonorgestrel) is the likely interference with the implantation of the developing human embryo in the uterus. Ella (ulipristal acetate) is an analog of RU-486 (mifepristone), the abortion drug that causes death of the developing human embryo. *See* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (last visited Sept. 16, 2013).

members of its own faith; and 4) be an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). 45 C.F.R. § 147.130(a)(1)(iv)(B). The fourth criteria refers only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

The exemption failed to protect most religious employers, including colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other religious organizations. This failure was intentional. HHS itself stated that its intent was "to provide for a religious accommodation that respects the unique relationship between *a house of worship and its employees in ministerial positions.*" 76 Fed. Reg. at 46623. *See also* 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012).

Arbitrarily transforming the majority of *religious* employers into *nonreligious* employers, HHS reached for a controversial definition of religious employer that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state courts. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). The fact that these state mandates had been challenged by Catholic Charities as a violation of their religious liberty demonstrated that HHS officials knew the exemption would be

unacceptable to many religious organizations. But at least religious organizations could avoid *state* contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the *federal* Mandate.

As soon as this definition was made public, forty-four Protestant, Jewish, and Catholic organizations immediately sent a letter to the Administration explaining the severe problems with the proposed definition of "religious employer." [7] Their critique of the exemption was two-fold. First the definition of "religious employer" was unacceptably narrow. Even many houses of worship failed to fit the Mandate's procrustean bed because of the exemption's peculiar design. To qualify as a "religious employer," a house of worship would have to serve primarily persons of the same faith. But many houses of worship – indeed, many religious charities – would deem it to be a violation of their core religious beliefs to turn away persons in need because they did not share their religious beliefs.[8]

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[7] *See* Letter to Joshua DuBois, Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322 (last visited Oct. 21, 2013.

[8] Consider Jesus' most basic teaching to "love your neighbor as yourself." A legal expert asked Him, "Who is my neighbor?" Jesus responded with the Parable of the Good Samaritan, in which two religious leaders walked past a robbery victim who had been left half-dead beside the road. Finally, a man from Samaria (which to

Second, the Mandate's definition of "religious employer" created a two-class bifurcation among religious organizations.[9] As one hundred twenty-five religious organizations explained in a subsequent letter to the Secretary, the government should not divide the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations – outwardly oriented and given a lesser degree of protection." The letter reasoned:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (*James* 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes both religion and authentic ministry.[10]

Jesus' listeners signaled he was a religious outsider) stopped to care for the helpless man. Jesus then asked the legal expert, "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" When the legal expert replied, "The one who had mercy on him," Jesus replied, "Go and do likewise." *Luke* 10:25-37.

[9] *See* note 7, *supra.*

[10] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367 (last visited Oct. 21, 2013).

Nonetheless, over the sustained protest of wide swaths of the religious community,[11] in February 2012, the government codified into law its excessively narrow definition of "religious employer." While the definition was amended in July 2013 by dropping three of the four criteria, 78 Fed. Reg. 39,870 (July 2, 2013), the current definition remains too narrow because it continues to protect only churches, associations or conventions of churches, integrated auxiliaries, or religious orders' religious activities.

The revised exemption perpetuates the second-class treatment of religious colleges and charities. The government made it clear that its elimination of the first three criteria was not intended to "expand the universe of employer plans that would qualify for the exemption." 78 Fed. Reg. at 8458-59.

Clinging to its definition of "religious employer," the government links a vital religious exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as "preferred" § 6033 organizations because many faith-based organizations are not

[11] The March 2013 NPRM received 408,907 comments, a new record for comments. *See* http://www.regulations.gov/#!documentDetail; D=CMS-2012-0031-63161 (government's website tally of comments); Nancy Watzman, *Contraceptives Remain Most Controversial Health Care Provision*, Sunlight Foundation (Mar. 22, 2013), *available at* http://reporting.sunlightfoundation.com/2013/contraceptives-remain-most-controversial-health-care-provision/(last visited Sept. 16, 2013).

formally affiliated with a religious congregation or denomination.[12] For example, Evangelical Christian institutions often are collaborative efforts across numerous denominations and intentionally independent of any specific denomination. The exemption denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation. Similarly, Catholic organizations often are not formally affiliated with their diocese and also are denied the exemption.[13]

The final definition of "religious employer" actually squeezed the exemption further. Under the version of the exemption adopted in February 2012, before amendment in June 2013, a church could plausibly include church-affiliated religious organizations, such as schools and other ministries that did not otherwise

[12] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, Dec. 21, 2011, *available at* http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

[13] For example, the Roman Catholic Archdiocese of Washington, D.C., qualifies for the exemption, but the Catholic Charities of the Archdiocese of Washington, the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll High School, and Catholic University of America are not exempt. Despite the exemption, the Archdiocese must either sponsor a health plan that facilitates access to the objectionable drugs for the non-exempt organizations' employees or stop covering these ministries. *See* Motion for Preliminary Injunction at 2, *Roman Catholic Archbishop of Washington v. Sebelius,* No. 13-5091 (D.C. Cir. Aug. 12, 2013).

qualify for the exemption, in the church's insurance plan. 77 Fed. Reg. 16501, 16502. But the June 2013 regulation foreclosed that option by restricting the exemption solely to the qualifying religious employer and not to any affiliated organizations covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.") In so doing, the government rejected the comments of the Church Alliance, "an organization composed of the chief executives of thirty-eight church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions," that urged the government to "abandon the employer-by-employer approach and adopt instead a broader plan-based exemption," specifically, "a plan-based exemption for all employers participating in 'church plans.'"[14] The Church Alliance proposal would have applied to church

[14] Comment Letter to Centers for Medicare and Medicaid Services from Stephen H. Cooper on behalf of the Church Alliance, April 8, 2013, *available at* http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf (commenting on HHS Mandate NPRM) at pp. 1, 2, & 4 (last visited March 3, 2014).

plans, such as the Christian Brothers plan, and resolved the problem giving rise to this case.

To justify its differential treatment between churches and other religious organizations, the government asserts that employees of religious non-profit organizations are less likely to share their employers' religious beliefs than are the employees of a church. Yet no evidence is given for this bald assertion. Given the pay differential between most religious non-profits and other employers, it seems highly likely that employees of religious non-profits share their employers' religious beliefs. That is, persons choose to work for religious non-profits because they agree with their religious employers' mission and, therefore, make the necessary financial sacrifices. For example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[15]

Thus the exemption excludes religious ministries that serve as society's safety net for the most vulnerable. Through the exemption, the government has unilaterally re-defined what it means to be a religious organization. Religious

[15] According to *amicus* Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. *See* http://www.acsiglobal.org/acsi-2012-13-school-survey (last visited Oct. 21, 2013).

organizations that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded with a government mandate that assails their conscience rights.

B. The so-called "accommodation" compels non-profit religious organizations to provide access to drugs that violate their religious beliefs.

The so-called accommodation fails to offer adequate religious liberty protection for non-profit religious organizations. Instead, the so-called accommodation coerces religious organizations to facilitate access to drugs to which they have religious objections.

Despite widespread protest from the religious community, the government codified the so-called accommodation for non-exempted, non-profit religious organizations. 78 Fed. Reg. 39870, 39874, 39877-78 (published July 2, 2013). A non-profit organization that holds itself out as a religious organization is eligible for the accommodation if it "[o]pposes providing coverage for some or all of the contraceptive services required." *Id.* at 39874. But by delivering its self-certification that it is eligible for the accommodation to its insurer or a third party administrator, the religious organization itself triggers the provision of abortion-inducing drugs to its employees and their beneficiaries. 78 Fed. Reg. at 39892-93.

Essentially, the so-called accommodation requires a religious organization with religious objections to covering drugs that violate its sincerely held religious convictions to identify an insurer, or a third-party administrator, which the government then requires to pay the costs of contraceptive coverage without any cost-sharing by the employees and (supposedly) without higher premiums charged to the religious organizations. 78 Fed. Reg. 39870 (July 2, 2013).

The so-called accommodation fails on multiple levels. First, the religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. No employee or beneficiary receives the objectionable drugs unless they are enrolled in the religious organization's health insurance plan. When an employee leaves the plan, access to the objectionable drugs ceases.

Second, the "accommodation" certification form, EBSA Form 700, itself states that "[t]his certification is an instrument under which the plan is operated." *See* App. Br. Addendum 1; App. Br. 16. The Mandate effectively embeds contraceptive coverage in the health plan of every religious organization that does not qualify for the "religious exemption," *i.e.*, every religious organization that is not a church. The self-certification form formally makes that coverage part of the plan.

Third, a religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees.

Fourth, the government's assurances – that the so-called accommodation places real distance between religious organizations and access to the objectionable drugs – are hollow. Such assurances rest on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences. But the government has it backwards: the religious organizations, not the government, determine the distance necessary. *See Thomas v. Review Bd*., 450 U.S. 707, 715 (1981) ("Thomas drew a line and it is not for us to say that the line he drew was an unreasonable one.").

Fifth, the so-called accommodation provides no credible means for covering the cost of the objectionable drugs absent the employers' premiums. Even were the coverage "cost-neutral" over a span of years, as the government claims, the upfront costs would be significant and would need to be paid now. 78 Fed. Reg. at 39877-78. The government offers insurers two modest proposals: 1) "set the premium . . .

as if no payments for contraceptive services had been provided to plan participants," or 2) "treat the cost of payments for contraceptive services . . . as an administrative cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." Id. Both proposals lack credibility.

Sixth, the so-called accommodation requires a self-insured religious employer to find a third party administrator to provide the drugs, without cost sharing, to its employees and their beneficiaries, even though the religious employer believes it is wrong to facilitate access to those drugs. *Id.* at 39880. A self- insured religious organization must provide the names of its employees to a third party administrator. The religious organization must constantly coordinate with the third party administrator to update the list of plan participants when employees leave the organization or new employees are hired. *Id*. at 39876. The religious organization must coordinate with the third-party administrator when notices are sent. *Id.*

At bottom, the government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not deal with economic, legal, or moral reality. Religious organizations that offer health insurance do not pay for individual benefits and products at the time they are dispensed. Instead, the religious

organizations pay a premium for a policy that provides access to covered drugs, and that access includes access to the objectionable drugs. Religious organizations are thereby paying an insurer to provide employees with access to the objectionable drugs contrary to their sincerely held religious beliefs. That is the reality.

In light of the bureaucratic expense and waste that implementation of the so-called accommodation will necessarily create for the government and religious organizations, as well as insurers and third party administrators, it clearly would be more economical and efficient for the government itself to provide contraceptives through direct distribution, tax credits, or other government means.

II. The Mandate's Inadequate Definition of "Religious Employer" Departs Sharply from the Nation's Historic Bipartisan Tradition that Protects Religious Liberty, Particularly in the Context of Abortion Funding.

A. Exemptions for religious objectors run deep in American tradition.

Religious liberty is embedded in our Nation's DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact.

America's tradition of protecting religious conscience predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court. Jewish persons

were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century. Even though perpetually outnumbered in battle, George Washington urged respect for Quakers' exemptions from military service. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990) (religious exemptions in early America); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1804-1808 (2006) (same). During a more recent struggle against totalitarianism, Jehovah's Witness schoolchildren won exemption from compulsory pledges of allegiance to the flag. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

"Religion-specific exemptions are relatively common in our law, even after [*Employment Division* v.] *Smith*[, 494 U.S. 872 (1990)]." Michael McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 3 (2000). Responding to *Smith*, with nearly unanimous bipartisan support, Congress passed the Religious Freedom Restoration Act of 1993, providing a statutory exemption for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means. 42 U.S.C. § 2000bb-1. Congress has enacted other

modern exemptions, including the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (protecting religious congregations and prisoners); the American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996 (protecting Native Americans); and the Religious Liberty and Charitable Donation Protection Act, 11 U.S.C. §§ 548(a)(2) (protecting religious congregations).

B. Exemptions for religious conscience have been a bipartisan tradition in the health care context for four decades.

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[16]

Before the ink had dried on *Roe v. Wade*, 410 U.S. 113 (1973), a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect

[16] *See* Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records*, April 30, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5306 (last visited Sept. 16, 2013).

doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.[17]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[18] In upholding its constitutionality, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).[19] Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and

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[17] Most States have enacted conscience clauses, specifically 47 states as of 2007. James T. Sonne, *Firing Thoreau: Conscience and At-will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007).

[18] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976).

[19] In the companion case to *Roe*, the Court noted with approval that Georgia law protected hospitals and physicians from participating in abortion. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("[T]he hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.")

Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded coverage of abortion or other services. Hospitals, doctors and other health care workers who refused to participate in the performance of any health care service on the basis of religious belief or moral conviction were protected. Commercial insurance companies and self-insurers likewise were protected.[20]

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[21]

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[20] Doerflinger, *supra*, note 8. See 103rd Congress, Health Security Act (S. 2351), introduced Aug. 2, 1994 at pp. 174-75 (text at www.gpo.gov/fdsys/pkg/BILLS-103s2351pcs/pdf/BILLS-103s2351pcs.pdf); Sen. Finance Comm. Rep. No. 103-323, *available at* www.finance.senate.gov/library/reports/committee/index.cfm?PageNum_rs=9 (last visited Sept. 16, 2013).

[21] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." *Id.* § 18023(b)(1)(A)(i). "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii).[22]

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that "longstanding Federal Laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide, pay for, provide coverage of,* or refer for abortions." 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added). Former Representative Bart Stupak (D-Mich.), who voted for ACA based on his

[22] The Mandate is also at odds with 21 States' laws that restrict abortion coverage in all plans or in all exchange-participating plans. The ACA does not preempt State law regarding abortion coverage. 42 U.S.C. § 1301(c)(1).

belief that Executive Order 13535 would protect conscience rights, has stated that the Mandate "clearly violates Executive Order 13535" [23] and has filed an amicus brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.[24]

By trampling religious conscience rights, the Mandate disregards the ACA's own conscience protections and defies the traditional commitment to bipartisan protection of religious conscience rights.

III. The Mandate as Applied to Objecting Religious Organizations Violates Basic Federal Statutory and Constitutional Religious Liberty Protections.

Both RFRA and the First Amendment protect the right of religious organizations to follow their basic religious convictions unless the government can show a compelling interest unachievable by a less restrictive means for forcing a particular religious organization to violate its religious conscience. Specifically, as to the "substantial burden" inquiry, by its very existence, the "religious

[23] Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at* http://www.democratsforlife.org/index.php?option=com_content &view=article&id=773:bart-stupak-on-contraception-mandate&catid=24&Item id=205 (last visited Sept. 16, 2013).

[24] Brief *Amici Curiae* of Bart Stupak and Democrats for Life of America in Support of Plaintiffs/Appellees and Supporting Affirmance, Newland, *et al.*, v. Sebelius, *et al.*, No. 12-1380 (filed 10th Cir. Mar. 1, 2013).

employer" exemption demonstrates that the government recognizes that the Mandate creates a substantial burden on employers' religious liberty by forcing them to purchase coverage of drugs that violate their religious beliefs. Yet the Mandate places this identical substantial burden on many other employers with religious convictions against providing such coverage.

In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir.)(en banc), *cert. granted*, 134 S. Ct. 678 (2013), having determined that the corporations had a sincerely held religious belief, the Tenth Circuit then examined "whether the government places substantial pressure on the religious believer" and found it "difficult to characterize the pressure as anything but substantial," given the millions of dollars in fines that the corporations would incur if they did not comply with the Mandate. *Id.* at 1140-41.

The Tenth Circuit then held that the government failed to demonstrate a compelling interest, unachievable by less restrictive means, which justified burdening religious employers' conscience rights to avoid participating in, or funding, abortion-inducing drugs to which they have religious objections. *Id.* at 1143-44. Numerous exemptions for both secular and religious employers exist, including for employers with: 1) grandfathered plans; 2) fewer than 50

employees;[25] 3) membership in a 'recognized religious sect or division' that objects on conscience grounds to acceptance of public or private insurance funds, 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(a)(i) and (ii); or 4) the qualifications necessary to meet the Mandate's "religious employer" definition. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *O Centro v. Gonzales*, 546 U.S. at 433, *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted). The government has conceded strict scrutiny in this case.

Forcing religious employers to fund contraceptives and abortion-inducing drugs is hardly the least restrictive means of achieving the government's purported interests. This is a solution in search of a problem. No one seriously disputes that contraceptives are widely available. HHS itself has ordered religious employers to inform their employees that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based

[25] Employers with fewer than 50 employees may opt to provide no insurance; although if they provide insurance, they must comply with the Mandate.

support."[26] The government has many other policy options available to it, including expanding existing programs.

For many of these reasons, the Mandate also violates the Free Exercise and Establishment Clauses. Religious liberty requires the government to give religious organizations breathing space to define what their mission will be, whom they will employ, and whom they will serve. "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. . . . [Believers] exercise their religion through religious organizations, and these organizations must be protected by the Free Exercise Clause." *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 341 (1983) (Brennan, J., concurring) (quotation omitted).

Conclusion

A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and*

[26] Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Sept. 16, 2013).

the Free Exercise of Religion, 88 U. Det. Mercy L. Rev. 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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I also certify that on March 4, 2014, I will cause seven paper copies of the foregoing brief to be sent by UPS, overnight delivery, to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, The Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257.

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