

No. 13-1654

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DOMINO'S FARMS CORP. AND THOMAS MONAGHAN,

PLAINTIFFS-APPELLEES,

v.

KATHLEEN SEBELIUS, *ET AL.*,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 2:12-CV-15488
The Honorable Lawrence P. Zatkoff, Judge Presiding.

**BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF GOSPEL RESCUE
MISSIONS, PRISON FELLOWSHIP MINISTRIES, ASSOCIATION OF
CHRISTIAN SCHOOLS INTERNATIONAL, NATIONAL ASSOCIATION
OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION
OF THE SOUTHERN BAPTIST CONVENTION, INSTITUTIONAL
RELIGIOUS FREEDOM ALLIANCE, THE C12 GROUP, AND CHRISTIAN
LEGAL SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLEES AND
AFFIRMANCE OF THE DISTRICT COURT**

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Ethics & Religious Liberty Commission of the Southern Baptist Convention

Institutional Religious Freedom Alliance

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TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF IDENTITY OF <i>AMICI CURIAE</i> , INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE.....	1
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. For Two Years, Many Religious Organizations Have Sought a Definition of “Religious Employer” that Respects All Faith Communities’ Religious Liberty.....	9
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.....	14
A. Exemptions for religious objectors run deep in American tradition.. ..	14
B. Exemptions for religious conscience have been a bipartisan tradition in the health care context for four decades.....	15
III. The Mandate’s “Religious Employer” Definition Fails to Protect Most Religious Ministries that Serve as Society’s Safety Net for the Most Vulnerable.....	20
IV. Such a Narrow Definition of “Religious Employer” Violates Basic Federal Statutory and Constitutional Religious Liberty Protections. .	25
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE.....	33
CERTIFICATE OF SERVICE.....	34

TABLE OF AUTHORITIES

Cases:

<i>Annex Medical v. Sebelius</i> , 2013 WL 1276025 (8 th Cir. Feb. 1, 2013)	28
<i>Catholic Charities v. Superior Court</i> , 85 P.3d 67 (Cal. 2004)	11
<i>Catholic Charities of the Diocese of Albany v. Serio</i> , 859 N.E.2d 459 (N.Y. 2006)	11
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	29
<i>Conestoga Wood Specialties Corp. v. Secretary of the United States Department of Health and Human Services, et al.</i> , 2013 WL 3845365 (3d Cir. July 26, 2013)	27
<i>Corporation of Presiding Bishop v. Amos</i> , 483 U.S. 327 (1983).....	30
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973).....	17
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990).....	15
<i>Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal</i> , 546 U.S. 418 (2006).....	25, 26, 29
<i>Harris v. McRae</i> , 448 U.S. 297 (1980).....	17
<i>Hobby Lobby Stores, Inc. v. Sebelius</i> , 42013 WL 3216103 (10 th Cir. June 27, 2013) (en banc).....	26, 28
<i>Korte v. Sebelius</i> , 2012 WL 6757353 (7 th Cir. Dec. 28, 2012)	28

LeBoon v. Lancaster Jewish Community Center,
503 F.3d 217 (3d Cir. 2007)23

Morr-Fitz, Inc. v. Quinn,
976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012).....26

Roe v. Wade,
410 U.S. 113 (1973).....16

Stormans, Inc. v. Selecky,
2012 WL 566775 (W.D. Wash. 2012)26

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943).....15

Zorach v. Clauson,
343 U.S. 306 (1952).....5

Constitutional Provisions and Statutes:

Amend. I, U.S. Const. 5-6, 9, 26

American Indian Religious Freedom Act Amendments,
42 U.S.C. § 1996(a) (2012)15

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)16

Consolidated Appropriations Act of 2012,
Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1)18

Health Security Act, 103rd Cong., S. 2351 (intro. Aug. 2, 1994) 17-18

Internal Revenue Code § 6033(a)(1)10, 22

Internal Revenue Code § 6033(a)(3)(A)(i)10, 22

Internal Revenue Code § 6033(a)(3)(A) (iii).....10, 22

The Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 (2010) 18-21

Public Health Service Act,
 42 U.S.C. § 238(n).....17

Religious Freedom Restoration Act of 1993,
 42 U.S.C. § 42 U.S.C. 2000bb-1(a) (2012) 9,15, 25-26

Religious Land Use and Institutionalized Persons Act,
 42 U.S.C. § 2000cc to 2000cc-5 (2012)15

Religious Liberty and Charitable Donation Protection Act,
 11 U.S.C. §§ 544, 546, 548, 707, 1325 (2012).....15

Title VII of the Civil Rights Act of 19646, 23

Weldon Amendment, Sec. 508(d)(1) of Public Law 111-8..... 18-20

26 U.S.C. § 1402(g)(1)29

26 U.S.C. § 5000A.....29

42 U.S.C. 300a-7.....16

42 U.S.C. § 1301(c)(1)19

42 U.S.C. § 18023..... 18-19

Executive Order:

Executive Order 13535 (Mar. 24, 2010).....19

Regulations:

45 C.F.R. § 147.130(a)(1)(iv)(B).....10

75 Fed. Reg. 15599 (Mar. 29, 2010).....19

77 Fed. Reg. 16501 (Mar. 21, 2012).....21, 23

78 Fed. Reg. 8456 (Feb. 6, 2013)22, 23

78 Fed. Reg. 39,870 (July 2, 2013) 6-7, 12, 23

Other Authorities:

Association of Christian Schools International, Annual Survey (Dec. 2012) ...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 (10th Cir. Mar. 1, 2013)20

Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton,
Moynihan, and Kennedy Records, The Public Discourse*,
April 30, 2012.....16, 18

Food and Drug Administration, Label for Plan B9

Food and Drug Administration, Label for *ella* 9

James 1:2721

James 2:14-17 1

Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the
Original Understanding of the Establishment Clause*,
81 Notre Dame L. Rev. 1793 (2006)14

Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*,
88 U. Det. Mercy L. Rev. 407 (2011)31

Letter to Joshua DuBois, Executive Director of The White House Office of
Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies,
Institutional Religious Freedom Alliance.....10

Letter to President Obama from Leith Anderson, President, National
Association of Evangelicals.....23

Letter to President Obama from Paul Corts, President, Council for Christian
Colleges & Universities.....22

Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious
Freedom Alliance, and 125 religious organizations21

Luke 10:25-37 12

Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 Harv. L. Rev. 1409 (1990)	14
Michael W. McConnell, <i>The Problem of Singling Out Religion</i> , 50 DePaul L. Rev. 1 (2000)	15
Remarks of Secretary Kathleen Sebelius, U.S. Secretary of Health and Human Services, Remarks at the Forum at Harvard School of Public Health (Apr. 8, 2013)	7
Regulations.gov website, http://www.regulations.gov/#!/documentDetail;D=CMS-2012-0031-63161	10
Mark Rienzi, <i>God and the Profits: Is There Religious Liberty For Money-Makers?</i> , 21 George Mason L. Rev. 1 (2013)	26
James T. Sonne, <i>Firing Thoreau: Conscience and At-will Employment</i> , 9 U. Pa. J. Lab. & Emp. L. 235 (2007)	16
Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate (September 4, 2012)	19
Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, <i>available at</i> http://www.hhs.gov/news/press/2012press/01/20120120a.html	30
Nancy Watzman, <i>Contraceptives Remain Most Controversial Health Care Provision</i> , Sunlight Foundation (Mar. 22, 2013)	10

STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE¹

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.

Prison Fellowship Ministries (“PFM”) is the largest prison ministry in the world and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners, and their families, regardless of their religious beliefs or lack thereof. With one-on-one mentoring, in-prison seminars and various post-release initiatives, PFM uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime.

The **Association of Christian Schools International** is a nonprofit, non-denominational, religious association that serves nearly 24,000 Christian schools that educate nearly 5.5 million children in over 100 countries, including nearly 3,800 Christian preschools, elementary, and secondary schools and over 100 post-secondary institutions in the United States.

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 of the Southern Baptist Convention** (“ERLC”) is the moral concerns and public policy entity of the Southern Baptist Convention (“SBC”), the nation’s largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy issues including religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom and freedom from governmental interference as guaranteed under the Constitution are indispensable, bedrock values for SBC churches as they follow the dictates of their conscience in the practice of their faith.

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.

The C12 Group is a fee-for-service organization that serves and equips Christian chief executives with nearly 1200 members. The C12 Group is distinctive in that it combines business/leadership best practices and MBA-level content from a Biblical worldview perspective to help its members build thriving platforms for ministering to the thousands of stakeholders that a typical, established, small-to-midsized business serves each year. Ninety-five percent of the C12 Group’s clients are family businesses run by individuals who view themselves as tending to God’s companies as stewards and, therefore, operate according to core principles informed by their deeply-held Christian faith. The HHS Mandate is broadly objectionable to the overwhelming majority of its members as a violation of their Christian consciences.

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. 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.”³

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 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.

³ 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://the_forum.sph.harvard.edu/events/conversation-kathleen-sebelius (Part 9, Religion and 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).

As a practical matter, as 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 hospitals with income-based support.”⁴ 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

⁴ See A 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).

clearly more economical, easy, and efficient for the government itself to provide contraceptives through direct distribution, tax credits, vouchers, or other government programs.

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. For Two Years, Many Religious Organizations Have Sought a Definition of “Religious Employer” that Respects All Faith Communities’ Religious Liberty.

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.⁵ As early as August

⁵ 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

2011, forty-four Protestant, Jewish, and Catholic organizations informed HHS that its proposed definition of “religious employer” was unacceptably narrow.⁶

But over the sustained protest of wide swaths of the religious community,⁷ in February 2012, the government codified into law, an excessively narrow definition of “religious employer.” To be a religious employer, an organization must: 1) inculcate values as its purpose; 2) primarily employ members of its own faith; 3) serve primarily 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).

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).

⁶ *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>.

⁷ 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).

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 court. *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.

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 refuse help to persons who do not share their religious beliefs. 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 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.*

Codified in February 2012, the definition of "religious employer" was amended in July 2013 by dropping three of the four criteria. 78 Fed. Reg. 39,870 (July 2, 2013). But the definition remains too narrow because it protects only churches, associations or conventions of churches, integrated auxiliaries, or religious orders' religious activities.

In its July 2013 rule, the government also codified its so-called "accommodation" for non-exempted, non-profit religious organizations by which a third-party insurance company or administrator theoretically will be compelled to pay the costs of contraceptive coverage for employees, without any cost-sharing by the employees or the religious employers. 78 Fed. Reg. 39,870, 39,892-39, 893 (July 2, 2013). But the government's plan for providing contraceptives coverage for which employers do not pay is really not credible. The government's insistence that religious organizations are not buying objectionable insurance

simply because the government posits contraceptive coverage to be costless does not accord with economic or legal reality. Nor does the regulation provide a convincing accommodation for *self-insured* religious employers.

The July 2013 regulation remains an unacceptably narrow religious exemption that fails to protect most religious employers, including colleges, schools, hospitals, homeless shelters, and food pantries. Protecting only religious ministries that are integrated auxiliaries of a church, the rule excludes religious educational institutions and religious ministries that are independent of any specific church. Even were a church-controlled religious school considered a religious employer, an independent religious school would not be, even though the schools' purposes, curricula, and faculty were identical. But even church-affiliated religious schools and ministries seemingly are not necessarily covered by the government's impoverished, one-size-fits-all misconception of "religious employer."

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.⁸

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 doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.⁹

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.¹⁰ 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

⁸ 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).

⁹ 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).

¹⁰ 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).

termination of a potential life.” *Harris v. McRae*, 448 U.S. 297, 325 (1980).¹¹

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 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.

¹¹ 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.”)

Commercial insurance companies and self-insurers likewise were protected.¹²

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.”¹³

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

¹² 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).

¹³ Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

health plan . . . determine[s] whether or not the plan provides coverage of [abortion].” *Id.* § 18023(b)(1)(A)(ii).¹⁴

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 belief that Executive Order 13535 would protect conscience rights, has stated that the Mandate “clearly violates Executive Order 13535”¹⁵ and has filed an amicus

¹⁴ 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).

¹⁵ 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&Itemid=205 (last visited Sept. 16, 2013).

brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.¹⁶

Furthermore, federal conscience protections are not limited to non-profit religious conscientious objectors, but instead protect both non-profit and for-profit entities and individuals engaged in for-profit commerce. Hospitals, nurses, and doctors do not forfeit their federal conscience protections because they receive compensation for their services. The Hyde-Weldon Amendment and the ACA both protect health insurance plans, contrary to the Mandate's requirements, as well as hospitals, HMOs, and provider-sponsored entities.

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

For two years, the government has been bent on casting the narrowest net possible, in order to protect the fewest religious employers possible. As early as March 2012, the government admitted that its definition failed to encompass most

¹⁶ 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).

religious colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other basic ministries. 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012). The July 2013 regulation perpetuates this second-class treatment of religious charities.

By recognizing religious liberty protections for “churches,” yet denying the same religious liberty protection to religious charities, the Mandate’s definition of “religious employer” creates an unprecedented two-class bifurcation among religious organizations. In a letter to the HHS Secretary, one hundred twenty-five Christian organizations, mostly Protestant, explained their objections to the government’s attempt to 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 continued:

[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.¹⁷

¹⁷ 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>. The Council for Christian Colleges

Until the Mandate, religious educational institutions and religious charities epitomized the quintessential “religious employers” and, therefore, were protected under any responsible federal definition of “religious employer.” But the Mandate transformed the majority of religious employers into nonreligious employers. 78 Fed. Reg. 8456, 8461 (amended definition will not “expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules”).

The government tenaciously clings to a definition of “religious employer” that links a vital religious conscience exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as the “preferred” § 6033 organizations because many faith-based organizations are not formally affiliated with a religious congregation or denomination.¹⁸ Evangelical Christian institutions often are collaborative efforts

& Universities (“CCCU”) expressed similar objections to a two-tier exemption in a letter to the President on behalf of its 138 member and affiliate schools. Letter to President Obama from Paul Corts, President, CCCU, March 9, 2012, *available at* <http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation> (last visited Sept. 16, 2013).

¹⁸ Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama, responding to a concern that the exemption would be broadened only to include faith-based organizations affiliated with a specific

across numerous denominations and are intentionally independent of any specific denomination. This is true for other faiths as well. *See, e.g., LeBoon v. Lancaster Jewish Community Center*, 503 F.3d 217 (3rd Cir. 2007) (non-profit religious association determined to be a religious organization under Title VII despite lack of formal affiliation with any synagogue). For no apparent reason, the government denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation.

The July 2013 regulation actually narrows the “religious employer” exemption even further. Under the February 2012 exemption, a church could plausibly include church-affiliated religious organizations, such as schools and other ministries that did not otherwise qualify for the exemption, in the church’s insurance plan. 77 Fed. Reg. 16501, 16502. But the July 2013 regulation forecloses that option because it seems to restrict the religious employer exemption to the qualifying religious employer and excludes any affiliated organizations covered by its plan unless independently qualified for the exemption. 78 Fed. Reg. at 39,886 (July 2, 2013); see also 78 Fed. Reg. at 8456, 8467 (Feb. 6, 2013) (“This

denomination. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, December 21, 2011, <http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate> (last visited Sept. 16, 2013).

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.”)

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 employers’ mission and are willing to 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.¹⁹

¹⁹ 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 Sept. 16, 2013).

Under the Mandate, religious organizations that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded in return by a Mandate that assails their conscience rights.

IV. Such a Narrow Definition of "Religious Employer" Violates Basic Federal Statutory and Constitutional Religious Liberty Protections.

By implementing such a narrow definition of "religious employer," the Mandate violates the Establishment and Free Exercise Clauses, as well as the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb ("RFRA"). "Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." *Gonzales v. O Centro Espirita*, 546 U.S. 418, 424 (2006)(quotation marks omitted). "The only exception recognized by the statute requires the Government to satisfy the compelling interest test – to demonstrate that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*

RFRA does not distinguish between for-profit and non-profit institutions in its protection. 42 U.S.C. § 2000bb.²⁰ The Tenth Circuit, sitting en banc, held that

²⁰ See Mark Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?*, 21 George Mason L. Rev. 1, 55 (2013).

for-profit corporations “are entitled to bring claims under RFRA.” *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103 at *9-17 (10th Cir. June 27, 2013) (en banc) (holding that for-profit corporations had demonstrated likelihood of success on the merits of their RFRA challenge to the Mandate). The Tenth Circuit relied not only on RFRA’s “plain language,” but also the fact that “the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants’ decision to use the corporate form.” *Id.* at *9, citing *Gonzales, supra*. Likewise, the First Amendment protects the religious conscience rights of for-profit businesses. *See, e.g., Stormans, Inc. v. Selecky*, 2012 WL 566775 (W.D. Wash. 2012) (corporate owners of pharmacies protected from state regulation requiring pharmacists to dispense abortifacients despite their religious objections); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (same).

Without engaging the Tenth Circuit’s thorough reasoning, a Third Circuit panel held to the contrary and ruled that a “for-profit, secular corporation” is unable “to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA.” *Conestoga Wood Specialties Corp. v. Secretary of Health and Human Services*, 2013 WL 3845365 at *1, *3-9 (3d Cir. July 26, 2013). But the dissent criticized the majority for its “deeply disappointing ruling

[that] rests on a cramped and confused understanding of the religious rights preserved by Congressional action and the Constitution” and that allows non-profit corporations “to express religious sentiments while for-profit corporations and their owners are told that business is business and faith is irrelevant.” *Id.* at *9 (Jordan, J., dissenting). The dissent concluded:

[O]ne need not have looked past the first row of the gallery during the oral argument of this appeal, where the [owners] were seated and listening intently, to see the real human suffering occasioned by the government’s determination to either make the [owners] bury their religious scruples or watch while their business gets buried.

Id.

As to the “substantial burden” inquiry, by its very existence, the “religious 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.

The Seventh, Eighth, and Tenth Circuits have correctly framed the burden inquiry as whether requiring religious business owners to “purchase group health insurance with objectionable coverage provisions constitutes a substantial burden

on their exercise of religion.” *Annex Medical v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal). The Seventh Circuit explained that “[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.” *Korte v. Sebelius*, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal).

In *Hobby Lobby*, 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. *Hobby Lobby, supra*, at *20-21.

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 *21-24. Numerous exemptions for both secular and religious employers exist, including for employers with: 1) grandfathered plans; 2) fewer than 50

employees;²¹ 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.” *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).

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 support.”²² The government has many other policy options available to it, including expanding existing programs.

²¹ Employers with fewer than 50 employees may opt to provide no insurance; although if they provide insurance, they must comply with the Mandate.

²² 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).

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 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 COMPLIANCE WITH RULE 32

The undersigned counsel certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(d) because this brief contains 6,263 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) and Circuit Rule 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2013, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Sixth 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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