No. 14-1507

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHARPE HOLDINGS, INC., OZARK NATIONAL LIFE INSURANCE COMPANY, CNS CORPORATION, NIS FINANCIAL SERVICES, INC., CNS INTERNATIONAL MINISTRIES, INC., HEARTLAND CHRISTIAN COLLEGE, CHARLES N. SHARPE, JUDY DIANE SCHAEFER, and RITA JOANNE WILSON,

PLAINTIFFS-APPELLEES,

v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, SYLVIA BURWELL, UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, UNITED STATES DEPARTMENT OF THE TREASURY, and JACOB J. LEW,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Eastern District of Missouri, No. 12-cv-92 (Hon. David D. Noce)

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, AMERICAN BIBLE SOCIETY, THE LUTHERAN CHURCH – MISSOURI SYNOD, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF APPELLEES AND AFFIRMANCE

Kimberlee Wood Colby
Counsel of Record
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
Phone: (703) 894-1087
Facsimile: (703) 642-1075
Email: kcolby@clsnet.org

CORPORATE DISCLOSURE STATEMENT

None of the *amici curiae* is a subsidiary of any other corporation. Each *amicus curiae* is a non-stock corporation; therefore, no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions and Statutes:

Executive Order:

Regulations:

Other Authorities:

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"

---

[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 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.

to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities 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. ACSI members' 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, works to protect all 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 life-destroying 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 life-destroying 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

[2] That the controversy might have been avoided had the government begun with Title VII's definition of "religious employer" does not mean that Title VII's definition encompasses all the employers legally entitled to an exemption under RFRA and the First Amendment. *See Burwell v. Hobby Lobby Stores, Inc.,* --- U.S. ---, 2014 WL 2921709 (2014).

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). Incredibly, many, if not most, religious educational institutions and religious ministries do not qualify for the "religious employer" exemption.[3] Also, the many religious ministries that are independent of, and unaffiliated with, any specific church seemingly are no longer "religious employers."

---

[3] Some courts have mistakenly conflated the "religious exemption" and the so-called "accommodation." *See, e.g., University of Notre Dame v. Sebelius,*743 F.3d 547, 550 (7th Cir. 2014) (mistakenly characterizing Notre Dame as "now [coming] within [the exemption's] scope" when Notre Dame actually only qualifies for the so-called "accommodation"). Religious organizations, including many of the *amici,* repeatedly petitioned the government to include religious institutions like Notre Dame and other religious ministries within the "religious exemption." But the government most deliberately and definitely refused to extend the exemption to Notre Dame University and other religious non-profits. 78 Fed. Reg. 8456, 8458-59 (Feb. 6, 2013). *See* pp. 15-24, *infra.*

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. Former HHS 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]

For those that fall outside of the Mandate's miserly definition of "religious employer," the so-called accommodation does not offer adequate religious liberty protections. 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.

---

[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://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) (emphasis added).

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. As Judge Pryor has observed, the government "disputes the [religious organization's] interpretation of what the regulations require. But the [religious organization's] legal interpretation is beside the point. What matters is whether the [religious organization's] participation in the contraception scheme – however minimal – violates its religious beliefs." *Eternal Word Television Network, Inc. v. Secretary, U.S. Dept. of HHS,* --- F.3d ---, 2014 WL 2931940, at *8 (11th Cir. 2014) (Pryor, J., concurring). He concludes, "[I]t is not our role to second guess this 'difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.'" *Id., quoting Hobby Lobby,* 2014 WL 2921709, at *21. Or, as the Supreme Court explained when it condemned the government's similarly dismissive

treatment of the religious objections in *Hobby Lobby*, "Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step." 2014 WL 2921709, at *21.

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, former HHS Secretary Sebelius acknowledged that 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."[5] Even if contraceptives were not already widely available, the government itself has several conventional means to provide contraceptive coverage to any and all employees. In *Hobby Lobby*, the Court observed, "The most straightforward way of doing this

[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).

would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby, id.,* at *24. The Court concluded, "This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown . . . that this is not a viable alternative." *Id.* Without endorsing any particular alternative, *amici* note that specific alternatives might include: 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 so-called 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.

At the end of the day, this case is not about whether contraceptives will be readily available, but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths. 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 religious organizations 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 three years, many religious organizations have sought a definition of "religious employer" that respects all faith communities' religious liberty.

For three 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]

[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 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 (Aug. 3, 2011). In August 2011, HRSA issued a "religious employer" exemption that protected 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 original exemption, a religious organization was required to: 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). The fourth criterion refers only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

---

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).

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 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 a violation of their

[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).

religious beliefs to turn away persons in need because they did not share their religious beliefs.[8]

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

---

[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 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*.

> 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]

Nonetheless, over the sustained protest of wide swaths of the religious community,[11] in February 2012, the government codified into law this 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 protects only churches, associations or conventions of churches, integrated auxiliaries, or religious orders' religious activities.

---

[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).

[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).

The current 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 formally affiliated with a religious congregation or denomination.[12] For example, Evangelical Christian institutions often are collaborative efforts across numerous denominations and are intentionally independent of any specific denomination. The exemption denies religious liberty to religious organizations that have an intentional interdenominational or

[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).

ecumenical affiliation. Similarly, Catholic organizations often are not formally affiliated with their diocese and also are denied the exemption.

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 qualify for the exemption, in the church's insurance plan. 77 Fed. Reg. at 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. at 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.")

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.[13]

Thus the "religious employer" exemption excludes most religious employers, including 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 employer.

[13] 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).

Religious 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.

Despite widespread protest from the religious community, the government codified the so-called accommodation for non-exempted, non-profit religious organizations. 78 Fed. Reg. at 39874, 39877-78. 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. Under the so-called accommodation, "it is undeniable that the United States has compelled the [religious organizations] to participate in the mandate scheme by requiring the [religious organizations] not only to sign but also to deliver the form to its third-party administrator of its health insurance

plan." *Eternal Word Television Network, Inc.*, 2014 WL 2931940, at *8 (Pryor, J., concurring).

First and foremost, the government requires a religious organization to provide Form 700, not to the government, but to its insurer or third-party administrator "[b]ecause without the form, the administrator has no legal authority to step into the shoes of the [religious organizations] and provide contraceptive coverage to the employees and beneficiaries." *Id., citing* 78 Fed. Reg. at 39,879-80. "Because the regulations provide that Form 700 is one of the 'instruments under which the [health insurance] plan is operated,' that form gives the third-party administrator legal authority to become the plan administrator for purposes of contraceptive coverage." *Id.,* at *2, *citing* 78 Fed. Reg. at 39,880.

Relatedly, the government's requirement that the dissenting religious organization sign and send Form 700 to its insurer or third-party administrator "requires *participation* in an activity prohibited by religion" for the religious organizations. *Id.,* at *8 (original emphasis) (citation and quotation marks omitted). Regardless of whether

contraceptive coverage is required by federal law "whether or not the [religious organization] signs the form[,] . . . the problem . . . is that federal law compels [the religious organization] to *act*." *Id.*, at *9 (original emphasis). Therefore, "compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Id.*

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 ("RFRA"), 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.[14]

---

[14] *See The State of Religious Liberty in the United States:* Hearing Before the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary (June 10, 2014) (Kimberlee Wood Colby, Christian Legal Society) (RFRA protects all Americans' religious liberty by creating a level playing field for all faiths), *available at* http://judiciary.house.gov/_cache/files/9c07c2b1-2560-4f96-913c-e17f683def2e/06102014-colby.pdf (last visited July 10, 2014).

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. Prime examples of bipartisanship, the federal conscience laws have been sponsored by both Democrats and Republicans.[15]

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

---

[15] *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).

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.[16]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[17] 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).[18] Every subsequent Congress has reauthorized the Hyde Amendment.

---

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

[17] 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).

[18] 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.")

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. Commercial insurance companies and self-insurers likewise were protected.[19]

[19] Doerflinger, *supra*, note 15. See 103rd Congress, Health Security Act

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."[20]

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

---

(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).

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

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).[21]

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" [22] and filed an amicus brief in the Supreme Court, explaining

---

[21] 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).

[22] Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at*

how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.[23]

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.

---

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).

[23] Brief *Amici Curiae* of Democrats for Life of America and Bart Stupak in Support of Hobby Lobby and Conestoga Wood, U.S.S.C. Nos. 13-354 & 356 (filed Jan. 28, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_dfla.authcheckdam.pdf.

As discussed *supra* at pp. 24-26, forcing religious organizations to sign and deliver Form 700 to their insurer or third-party administrator places a substantial burden on their religious exercise because the Form is necessary to authorize the insurer or third-party administrator to deliver the life-destroying drugs. *See Eternal Word Television Network, Inc.,* 2014 WL 2931940, at *8-9 (Pryor, J., concurring). The fine for failing to provide the required contraceptive coverage in its health plan is "up to $36,500 per year per employee," or "$2,000 per year per full time employee." *Archdiocese of St. Louis v. Burwell,* ---F.Supp.2d ---, 2014 WL 2945859, at *2 (E.D. Mo. 2014). "By requiring Plaintiffs to choose between providing contraceptive coverage to the employees and paying substantial financial penalties if they refuse to do so, the mandate applies substantial pressure on Plaintiffs to engage in conduct contrary to their religious beliefs. Therefore, Plaintiffs have established a substantial burden under RFRA." *Id.,* at *8.

Specifically, as to the "substantial burden" inquiry, the "religious employer" exemption itself 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. As the Court noted in *Hobby Lobby,* the Mandate places the identical substantial burden on the exempted religious employers as it does on the unexempted religious employers. 2014 WL 2921709, at *21 n.33.

As in *Hobby Lobby,* the government here fails to demonstrate that there is no less restrictive alternative to achieve its interest. 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."[24] The

[24] Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012press/01/20120120a.html (last visited Sept. 16, 2013). This brief's discussion of the availability of less restrictive alternatives does not constitute an endorsement of any particular alternative by any *amicus curiae*.

government has many other policy options available to it, including expanding existing programs. As the Court explained in *Hobby Lobby,* "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 2014 WL 2921709, at *24. As Judge Pryor concluded, the government "could require the [religious organizations] to provide a written notification of its religious objection to [HHS] instead of requiring the [religious organization] to submit Form 700 – an instrument under which the health insurance plan is operated – to the third-party administrator." *Eternal Word,* 2014 WL 2931940, at *10 (Pryor, J., concurring). *See Little Sisters of the Poor v. Sebelius,* 571 U.S. ----, 134 S. Ct. 1022 (2014); *Wheaton College v. Burwell,* --- U.S. ---, 2014 WL 3020426 (2014). *See also, Archdiocese of St. Louis,* 2014 WL 2945859, at *10 (noting "options [that] have been recognized as feasible alternatives by other courts," such as the government providing direct coverage to employees, or through grants or tax credits).

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,

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road, Suite 302
Springfield, VA 22151
Telephone: (703) 894-1087
Facsimile: (703) 642-1075
Email: kcolby@clsnet.org
Counsel of Record for Amici Curiae

July 28, 2014

Certificate of Compliance with Rule 32(A)

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 6580 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 (b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolhouse font.

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby
Center for Law and Religious Freedom
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
Telephone: (703) 894-1087
Facsimile: (703) 642-1070
Email: kcolby@clsnet.org

July 28, 2014

CERTIFICATE OF VIRUS CHECK

The electronic version of the brief has been scanned for viruses and is virus-free.

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby

July 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I electronically submitted the foregoing *amicus curiae* brief to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby
Christian Legal Society
8001 Braddock Road, Suite 302
Springfield, VA 22151
Telephone: (703) 894-1087
Facsimile: (703) 642-1075
Email: kcolby@clsnet.org
Counsel for Amici Curiae

July 28, 2014

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

July 29, 2014

Ms. Kimberlee Wood Colby
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151

RE: 14-1507 Sharpe Holdings, et al v. HHS, et al

Dear Counsel:

The amici curiae brief of the Association of Gospel Rescue Missions, et al., was received by the court on 7/28/14 with consent and filed on 7/29/14. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Ms. Leila Abolfazli
Ms. Brigitte Amiri
Mr. J. Matthew Belz
Mr. Timothy Belz
Ms. Gretchen Borchelt
Mr. Charles E. Davidow
Ms. Deborah Jane Dewart
Mr. Grant R Doty
Ms. Karin Dryhurst
Ms. Andree J. Goldsmith
Ms. Marcia D. Greenberger
Mr. Adam C. Jed

Ms. Alisa Beth Klein
Ms. Jennifer Lee
Mr. Daniel Mach
Ms. Emily J. Martin
Ms. Christina Bahr Moore
Mr. Patrick Nemeroff
Ms. Martha Jane Perkins
Mr. Jacek Pruski
Mr. Anthony E. Rothert
Mr. Mark B. Stern
Ms. Judith G. Waxman
Gillian R. Wilcox

District Court/Agency Case Number(s): 2:12-cv-00092-DDN