RECORD NO. 10-2347

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

Plaintiffs-Appellants,

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the United States Department of Labor in her official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT LYNCHBURG

BRIEF OF AMICI IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

The Virginia Family Foundation, West Virginia Family Policy Council, Maryland Family Alliance, North Carolina Family Policy Council, and Palmetto Family Council advocate for religious liberty, the sanctity of life and Biblical values in their respective states – together comprising the Fourth Circuit. As religious employers themselves, they are very concerned about the employer and HHS mandates' impact on the free exercise rights of religious employers and know that an attack on the religious liberty of some is an attack on the religious liberty of all.

Americans United for Life (AUL) is a non-profit, public-interest law and policy organization founded in 1971. AUL provides expert legislative consultation to state, national, and international legislators on issues involving abortion-inducing drugs, maternal health implications, and freedom of conscience, and has participated in every abortion-related case before the U.S. Supreme Court since *Roe v. Wade*. AUL has been a leading voice in opposing PPACA's violations of the freedom of conscience of employers, individuals and taxpayers.

Alliance Defending Freedom (ADF) is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. ADF is organized as a Virginia non-profit corporation. ADF is presently lead counsel in seven cases challenging the HHS Mandate on behalf of religious employers, secured the first

four injunctions against its enforcement, and is assisting several of its over 2,000 allied attorneys in several other challenges to the HHS Mandate.

STATEMENT OF CONSENT AND DISCLOSURE

The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the initial briefing in this Court, Appellant argued that the Patient Protection and Affordable Care Act's (PPACA) employer mandate violated the free exercise rights of religious employers, in part because it left them at the mercy of the U.S. Department of Health and Human Services' ("HHS") future decisions to force them to provide coverage for services that violate their conscience. Because religious employers are compelled to provide health insurance coverage for their employees under the penalty of crippling fines, HHS's determinations of the scope of that mandated coverage could have drastic implications for religious freedom.

Appellants' concerns have now been validated. Subsequent to the prior briefing in this Court, HHS issued regulations requiring many, but not all, employers, including non-profit and for-profit religious employers who sincerely

believe that human life begins at conception, that each human life is created in the image of God, and therefore that each human life is intrinsically valuable, to provide coverage of abortifacients, sterilizations, and contraceptives at no cost to the employee.

This HHS Mandate violates the Religious Freedom Restoration Act and the First Amendment because it substantially burdens religious exercise and cannot survive the required strict scrutiny. The HHS Mandate is neither "neutral" nor "generally applicable," furthers no compelling governmental interest, and even assuming, *arguendo*, it did advance a compelling governmental interest, is not the least restrictive means of advancing such an interest. The government exempts tens of millions from its coverage while refusing most religious accommodations, cannot demonstrate that an actual problem exists which is in need of a remedy, and bypasses many less restrictive means of serving the supposed interest in favor of conscripting religious employers and forcing them to violate their sincere religious beliefs. Thus, twelve of the seventeen federal courts reviewing the HHS Mandate have enjoined its enforcement.

The HHS Mandate draws all of its compulsive power from the employer mandate challenged by Appellants and is but a symptom of the illness that is the employer mandate's broad grant of power to HHS. So long as HHS holds this power to order religious employers to act in violation of their religious convictions,

backed by the pressure of the employer mandate's crippling fines, religious freedom will remain endangered.

ARGUMENT

I. THE EMPLOYER MANDATE NOW INCORPORATES A REQUIREMENT THAT RELIGIOUS EMPLOYERS PROVIDE COVERAGE OF ABORTIFACIENTS, STERILIZATION, AND CONTRACEPTION IN VIOLATION OF THEIR CONSCIENCE.

PPACA's employer mandate requires that, with certain exceptions, employers of 50 or more employees must provide health insurance plans constituting government-specified "minimum essential coverage." 26 U.S.C. § 4980H. The Act also required that all insurance plans must include, at no cost to the employee, coverage for preventive care and screenings for infants, children, adolescents and women per guidelines from HHS's Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13. Nothing in the law enacted by Congress and signed by the President required that any employer, much less religious employers, be compelled to provide abortifacients, sterilizations, and contraceptives as part of women's preventive health. The law authorized the HHS Secretary the responsibility of determining what should be included in the statutorily mandated preventive care services. 42 U.S.C. § 18022(b).

On August 3, 2011, after briefing had been completed and oral arguments heard in this Court, HHS published amended interim final regulations defining these preventive health provisions and requiring all health insurance plans starting

with the next plan year beginning after August 1, 2012, to include coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 76 Fed. Reg. 46,621. These mandatorily provided FDA approved contraceptive methods include emergency contraceptive drugs, and intrauterine devices ("IUDs"),[1] diaphragms, oral contraceptive pills, injections and implants.

A narrow religious exemption was carved out for those religious employers that: (1) have as their purpose the inculcation of religious values, (2) primarily hire and serve persons who share the religious tenets of the organization, **and** (3) that is a non-profit organization as described in Internal Revenue Code provisions applicable to churches, their integrated auxiliaries, conventions or associations of

[1] For religious employers who believe life begins at conception, the fact that "emergency contraceptives" and the IUD also operate by preventing the implantation of an embryo, means that they are abortifacients no matter how the government defines "abortion." Defendant Sebelius acknowledged that some of the mandated items "are designed to prevent implantation." Interview, available at http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771 (last visited February 25, 2013). See also Transcript of Bench Trial at 91-92, 111, *Morr-Fitz, Inc. v. Quinn*, 2012 IL App (4th) 110398 (Ill. App. Ct. Sept. 20, 2012) (Northwestern University Dr. supporting restriction of conscience protections for emergency contraception and testifying that "there is a new unique human life before" the implantation of an embryo); and *Brief of Amici Curiae* Members of Legatus and Catholic Medical Association filed with this Court (explaining medical and pharmacological basis for deeming "emergency contraception" an abortifacient).

churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.130(a)(1)(iv)(B). Thus, this exemption covered only a handful of religious employers – only ***certain*** churches, church associations, denominations and "integrated auxiliaries." It did not, for example, include most religious schools, most nonprofit religious charities (because they primarily serve without regard to a person's faith), and no for-profit religiously-motivated employers. In response to public outcry, HHS later announced a temporary safe harbor for some other religious non-profits, allowing them an additional year to set aside their religious objections and begin providing the mandated coverage. *See* 77 Fed. Reg. at 8727 (Feb. 15, 2012).

This HHS Mandate has been met with at least 48 lawsuits by 140 religious colleges, charitable service organizations, Catholic Dioceses, and other religious employers.[2] As discussed in Section III, the federal courts have overwhelmingly sided with religious employers in granting injunctive relief against this Mandate on free exercise grounds.

After public outcry and facing multiple lawsuits, in February 1, 2013, HHS announced that it was extending the exemption to all churches, denominations, church associations and their "integrated auxiliaries," eliminating the additional qualifiers. 78 Fed. Reg. 8,456, 8461. It also provided an additional

[2] http://www.becketfund.org/hhsinformationcentral/ (last visited, February 28, 2013).

"accommodation," open only to certain non-profit religious employers. *Id.* at 8461. Under this purported "accommodation," religious non-profits will still be required to provide employee health insurance plans that include coverage for abortifacients, sterilization, and contraception. However, the government proposes that it will require the insurer to pay for these costs itself. *Id.* at 8461. Most religious non-profits, including those who provide health insurance through self-insurance plans, recognized this "accommodation" as a sham that continues to force them to provide these objectionable items as a benefit of employment in violation of the employer's core religious beliefs.[3] Religious for-profit employers will continue to receive no accommodation at all.

Because all insurance plans must include, with no co-pay, abortifacients, sterilization and all forms of contraceptives approved by the FDA, and because employers must provide their employees with insurance plans under the employer mandate, religious employers will be forced to provide this coverage in violation of their conscience.

[3] The "accommodation" here can best be explained by analogy. Imagine the government concludes that access to pornography is essential to its compelling interest in sexual health and compels cable companies to provide those channels. Then, responding to religious colleges' objections, the government requires them simply to provide cable access to their students. However, it orders the cable companies serving those campuses to provide the channels anyway and, supposedly, cover the cost themselves.

II. THE HHS MANDATE VIOLATES THE FREE EXERCISE RIGHTS OF RELIGIOUS EMPLOYERS.

The HHS Mandate violates both the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. RFRA restores the strict scrutiny standard of Free Exercise claims prior to *Employment Div. v. Smith*, 494 U.S. 872 (1990). It requires that federal government action substantially burdening religious exercise must be justified by a compelling interest and the action narrowly tailored to satisfy that interest. 42 U.S.C. § 2000bb-1. However, even after *Smith* strict scrutiny still applies to Free Exercise claims where the burdening government action is not "neutral" or "generally applicable." *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542–43. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004) (Alito, J.) (Strict scrutiny applies when discretionary or categorical exemptions exist but religious objections are denied). Because the HHS Mandate is replete with exemptions, it is not generally applicable, strict scrutiny applies, and the Mandate fails under both the First Amendment and RFRA.

A. The HHS Mandate Substantially Burdens The Religious Exercise of Religious Employers.

A free exercise claimant must show that a religious exercise is "substantially burdened" by the government. 42 U.S.C. § 2000bb-1; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The Fourth Circuit has held that government imposes a

substantial burden where it "through act or omission 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006), *quoting Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

Even indirect burdens may be substantial, such as where a law forces a person or group "'to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand.'" *Lovelace*, 472 F.3d at 187, *quoting Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *Sherbert* held that it was "clear" denying unemployment benefits to an employee was a substantial burden, even though the law did not directly command her to violate her beliefs against working on Saturdays. *Id.* at 403–04. In *Wisconsin v. Yoder*, the Court held that a compulsory school-attendance law substantially burdened the religious exercise of Amish parents. 406 U.S. 205, 208 (1972). The Court found the burden "not only severe, but inescapable," requiring parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

1. The HHS Mandate Directly Penalizes The Exercise Of Religion.

The HHS Mandate's coercion here is even more direct than in *Sherbert*, requiring religious employers like Liberty University to provide coverage for drugs and devices that violate their faith, including by ending the life of a unique

developing human being. Failure to comply with this mandate results in fines of $100 per day per employee. 26 U.S.C. § 4980(D). Religious employers are pressured to conform to the standards of the Administration and sacrifice their religious objection to providing abortifacients to their employees under the weight of these crippling fines. This mandate "'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Lovelace,* 472 F.3d at 187, *quoting Thomas,* 450 U.S. at 718.

The Mandate explicitly makes unlawful a religious employer's religious practice of refraining from covering these items in its employee benefit package. It is a "fine imposed against appellant for" its religious practice, *Sherbert*, 374 U.S. at 404, requiring religious employers to violate "fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Government's imposition of a penalty on religious exercise is a substantial burden on religious exercise – whether or not an individual can bear that burden. *See Yoder,* 406 U.S. at 208 ($5 fine for parents who did not send children to school because of religious objection was a substantial burden). The stifling penalties imposed through both the HHS Mandate ($100 per day per employee), 26 U.S.C. § 4980(D), and the employer mandate ($2000 per employee per year for those refusing to provide coverage at all), 26 U.S.C. § 4980(H), against religious exercise are a substantial burden.

2. The Government Has Acknowledged That Similar Mandates Impose Substantial Burdens on Religious Exercise.

The government has expressly acknowledged the burden that the mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive and sterilization services would conflict with "the religious beliefs of certain religious employers," the government has granted a wholesale exemption for a class of employers, *e.g.*, churches and their auxiliaries, from complying with the mandate. 78 Fed. Reg. 8,456, 8,460. In addition, the government provided a temporary enforcement safe harbor for some non-profit employers failing to provide the required contraceptive services;[4] effectively providing qualifying religious employers with a preliminary injunction.[5] Finally, the government has shielded even for-profit companies from *other* contraception coverage mandates, demonstrating that it understands the substantial burden on religious exercise they impose.[6]

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[4] Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited March 3, 2013).

[5] The government has claimed its safe harbor fully removes any of the Mandate's burdens. *See, e.g.*, Gov. Mot. to Dismiss at 14–16, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989-JEB (D.D.C. doc.# 23-1, Apr. 5, 2012).

[6] *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

3. The Free Exercise Clause Does Not Permit Courts to Judge an Adherent's Theology.

Any argument that the mandate's burden is too attenuated to be substantial simply "misunderstands the substance of the claim." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) at *3. Determining whether government imposes a "substantial burden" on religious exercise is not to be an exercise in court-adjudicated moral theology. "In assessing this burden, courts must not judge the significance of the particular belief or practice in question. [The free exercise strict scrutiny test] "'bars inquiry into whether [the] belief or practice is "central" to a [plaintiff's] religion.'" *Lovelace*, 472 F.3d at 187 n. 2, *quoting Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). The test requires examination of a "substantial burden" not "substantial beliefs" and does not permit the government to try to modify a person's religious beliefs to permit its impositions upon them.

The Supreme Court has explicitly rejected such governmental moral theologizing. In *Thomas*, a war objector was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. at 714–16. The government argued that working in a tank factory was not a burden on his beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected this conclusion and the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he

drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.* Direct penalties are clearly "substantial" burdens on a religious belief (objecting to providing insurance coverage for certain items) even if the government deems them *theologically* (morally) attenuated from the use itself. The government has no role in drawing such a theological line for those whose religious exercise it burdens. *See Thomas*, 450 U.S. at 714 (the burden on a religious belief "is not to turn upon a judicial perception of the particular belief or practice"); *Smith*, 494 U.S. at 886–87 (rejecting the "centrality" test). This is exactly the type of direct burden RFRA was enacted to prevent.[7]

4. A New IRS Regulation Burdens Religious Employers With Fines Not Included in PPACA If They Violate the Employer Mandate in an Effort to Protect Their Religious Freedom.

An additional regulation issued subsequent to oral argument in this Court limits possible relief for the employer mandate's burden on religious exercise. PPACA only imposes penalties against employers that violate the employer mandate where their employees then enroll through a health insurance exchange "in a qualified health plan **with respect to which an applicable premium tax**

[7] As the U.S. District Court for the District of Columbia correctly noted, "*Because it is the coverage, not just the use*, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Tyndale House v. Sebelius*, 2012 WL 5817323 at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(a)(2) (emphasis supplied). Absent these federal tax credits and subsidies for an employee's insurance plan the PPACA employer mandate authorizes no penalty.

PPACA expressly authorized these subsidies in "an exchange created by the state under § 1311" of PPACA. 26 U.S.C. §36B(b)(2). PPACA did not similarly authorize these subsidies in *federally-run* health insurance exchanges created pursuant to PPACA §1321. The employer mandate is the force by which the free exercise burdens of the HHS Mandate are given effect. Thus, in a state where no state health insurance exchange has been created pursuant to PPACA § 1311, like Virginia,[8] a religious employer might escape the HHS Mandate's burden by cancelling coverage altogether and allowing employees to be insured through the federal exchange, not being subject to the employer mandate's crippling fines.

However, an IRS Rule enacted subsequent to the previous briefing and argument in this court treats state and federal exchanges as identically providing subsidies - and thus fines on employers who terminate coverage - despite the language of PPACA. 76 Fed. Reg. 50934 (August 17, 2011). Thus, for religious employers in states like Virginia that have declined to establish a state health

[8] Letter from Governor McDonnell to Secretary Sebelius, http://www.governor.virginia.gov/utility/docs/HealthcareExchangeLetter.pdf (last visited 2/26/2013).

insurance exchange, this IRS Rule removes one last possible means to avoid or lessen the burden on religious exercise.

B. The Government Has No Compelling Interest To Justify This Substantial Burden On Religious Exercise.

The government has completely failed to demonstrate that it has a compelling interest for this burden on religious employers. RFRA, with "the strict scrutiny test it adopted," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S.at 546, and is implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The government cannot propose its interest "in the abstract," but must show a compelling interest "in the circumstances of this case." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (test applies "the challenged law 'to the person'—the particular claimant"). *See also Lukumi*, 508 U.S. at 546 (rejecting assertion that protecting public health was a compelling interest "in the context of these ordinances").

The government has merely asserted the generic and abstract claims that the HHS Mandate will achieve women's health and equality.[9] But *O Centro Espirita* requires the government to demonstrate a compelling interest against "granting specific exemptions to particular religious claimants." 546 U.S. at 431.

1. The Exclusion of Tens of Millions of Women From The Mandate's Coverage, Shows That The Government's Interest is Not Compelling.

If a government interest is truly compelling, one would expect that the government would make its coverage universal rather than exempting many millions from its reach. Yet the government has voluntarily omitted from its supposedly paramount health and equality interests millions of employees, demonstrating that its interests are not compelling.

The HHS Mandate does not cover:

- Tens of millions of women in "grandfathered" plans of "most" large employers. 76 Fed. Reg. at 46623 & n.4 and 75 Fed. Reg. 34,538, 34,540–53;
- Members of *certain* objecting religious groups. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a) ("recognized religious sect or division"); *id.* § 5000A(d)(2)(b)(ii) ("health care sharing ministries");

[9] *Newland v. Sebelius*, 2012 WL 3069154 *9 (D. Colo. July 27, 2012) (Government argued that enjoining the mandate would "undermine [its] ability to effectuate Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be part of the workforce on an equal playing field with men."

- Smaller employers (under 50 employees) allowed to drop employee insurance (including any contraceptive coverage) altogether. 26 U.S.C. § 4980H(c)(2);
- Churches, church auxiliaries, church associations and denominations entitled to a blanket exemption from the mandate. 78 Fed. Reg. 8,456.
- Certain religiously affiliated non-profits offered an additional year before enforcement, *see, e.g.*, 78 Fed. Reg. at 8,458, then subjected to an "accommodation" theoretically relieving them of some involvement, *id.* at 8,461.

HHS has even recently agreed to the entry of a preliminary injunction prohibiting it from applying the mandate to one for-profit employer. *Sioux Chief Mfg v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (granting unopposed motion for preliminary injunction). Moreover, as discussed in part II(A)(4), *supra*, PPACA itself permits no penalties against employers that decline to provide coverage altogether in states without a subsidized state health insurance exchange – now a majority of the states.

Many employers, including for-profit employers totaling millions of employees, are exempted from the HHS Mandate. HHS has also granted waivers of various other provisions of the Act to over 1,200 labor unions and other large employers.[10] But most religious objectors – including all for-profit religious employers - are not offered such an exemption from the part of the law that substantially burdens their religious exercise. "[T]he government is generally not

[10] See http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (last visited February 28, 2013).

permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished." *United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47.

If the government really possessed an interest "of the highest order" to justify coercing religious employers, the government would not voluntarily use grandfathering to omit tens of millions of women from this mandate and otherwise limit its application to so many other religious and secular employers. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[11] Such a large exclusion, made for a merely political reason, betrays the alleged grave character of this interest. Religious freedom objections cannot be considered any less important than a person's or employer's mere personal preference for their old plan. The government is evidently content to leave millions of women with "health

[11] HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Feb. 26, 2013).

risks" and "competitive disadvantages" due to their employer's preference for keeping their old plan, betraying its claim that its interests are truly compelling.

As the United States District Court for the District of Colorado concluded, "the government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, 2012 WL 3069154 *15. See also *Tyndale House*, 2012 WL 5817323 at *17. As in *O Centro*, where government exclusions apply to "hundreds of thousands" (here, millions), RFRA requires "a similar exemption" for the religious employers affected by the HHS Mandate. 546 U.S. at 433. Insisting on compliance for an employer where "most" other employers need not comply is an improper attempt to claim "a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 (2011).

The United States has functioned for over 200 years without a federal mandate of employer contraception coverage in insurance. The government can provide no compelling reason necessitating this rule now, and particularly its implementation against religious employers.

2. Congress Imposed Other Requirements On Grandfathered Plans, Demonstrating Its Interest In The HHS Mandate is Not Compelling.

Tellingly, Congress considered some of PPACA's requirements paramount enough to impose on grandfathered plans – but not the preventive services mandate which gave birth to the HHS Mandate. 75 Fed. Reg. at 34,542 (listing PPACA §§ 2704, 2708, 2711, 2712, 2715, 2718 as applicable to grandfathered plans). These requirements actually surround the preventive services mandate (§ 2713). But by statute, Congress intentionally omitted this mandate from ones it considered important enough to impose on all plans. Moreover, Congress did not consider abortifacients, contraception, and sterilization important enough to list in § 2713. As far as Congress was concerned, HHS need not impose *any* mandate concerning contraception, abortifacients, or sterilization. And HHS acknowledges that Congress gave it authority to exempt *any* religious objectors it wanted to exempt from this Mandate. 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Therefore, by layers upon layers of indifference, Congress deemed certain interests to be "of the highest order" for all health plans and those did not include the HHS Mandate. Such a second-class interest cannot be considered compelling.

3. The Government Cannot Show Compelling Evidence Of A Problem Its Mandate Would Solve.

The government must "specifically identify an 'actual problem' in need of solving" and show that coercing particular individuals is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738. If the government's "evidence is not compelling," it fails to satisfy its burden. *Id.* at 2739. The government must show

not merely a correlation but a "caus[al]" nexus between its mandate and a grave interest. *Id.* The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

There are 28 similar state mandates around the country.[12] But there is zero evidence—not one study—showing that even a single state mandate yielded health and equality benefits for women, much less that one of those laws did so more than "marginal[ly]" as required by *Brown*. *Id.* at 2741. There is no evidence to carry the government's burden that this Mandate will help, in a "paramount" way, the problems that the government alleges exist. At best, The Institute of Medicine Report on which the mandate is based ("2011 IOM"),[13] argues only for a generic health benefit from contraception, lacking the specificity to the religious objector required by *O Centro Espirita*, 546 U.S. at 430–31.

The government can cite no pandemic of unwanted births to employees of religiously objecting entities, nor catastrophic consequences for their employees' health and employee equality. For all the government knows, it could be that employees of such entities have better health and workplace equality than

[12] These provide conscience protections or present some opportunity of avoidance for religious employers.

[13] Inst. of Med., *Clinical Preventive Services for Women:Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited March 5, 2013).

elsewhere. At best, the government does not know, but it "bear[s] the risk of uncertainty" under strict scrutiny. *Brown*, 131 S. Ct. at 2739.

Nowhere does the IOM cite evidence showing that the Mandate would actually increase contraception use—which is a necessary prerequisite to saying health and equality from fewer unintended births will result. Instead, the IOM's sources show: 89% of women avoiding pregnancy are already practicing contraception;[14] among the other 11%, lack of access is not a statistically significant reason for not contracepting;[15] and even among the most at-risk populations, cost is not a barrier to contraception.[16] The studies cited at 2011 IOM

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[14] The Guttmacher Institute, "Facts on Contraceptive Use in the United States (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited February 26, 2013).

[15] Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited February 26, 2013).

[16] R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). A study by The Centers for Disease Control showed that even among those most at risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid=mm6102a1_e (last visited February 26, 2013).

(pp. 109) do not show that cost leads to non-use generally, but only that women switching from one contraception method to another consider cost in their choice.

The government asserts that women incur more preventive care costs generally, 2011 IOM at 19–20, but the IOM's studies don't say they specifically include contraception as part of that cost, nor at what percentage. PPACA already erases any preventive services cost gap, including at religious employers. 42 U.S.C. § 300gg-13. There is no evidence that any gap, much less a grave one, will remain for employees of objecting religious employers.

The government cannot show that the Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. The IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[17] The 1995 IOM admits that no causal link exists for most of its alleged factors. This makes sense, since the intendedness or unintendedness

[17] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited March 5, 2013).

of a pregnancy cannot physiologically change its health effect. Thus, a delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not already disposed to delay or who have a "support network"[18]. Nor is there compelling evidence that the Mandate against religious employers would certainly improve pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used.[19] Multiple peer-reviewed studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion or sexually transmitted diseases.[20]

C. Less Restrictive Means Could Accomplish The Government's Alleged Ends.

Even assuming a valid and compelling interest served by the HHS Mandate's application to religious employers, the government still cannot show that the mandate is "the least restrictive means of furthering" its interests. 42

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[18] *Id.* at 68.

[19] Finer, L. B., and S. K. Henshaw, "Disparities in rates of unintended pregnancy in the United States, 1994 and 2001," 38(2) *Perspectives on Sexual & Reprod. Health* 90–96 (2006) *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited March 5, 2013).

[20] K. Edgardh, et al., "Adolescent Sexual Health in Sweden," Sexual Transmitted Infections 78 (2002): 352-6 (http://sti.bmjjournals.com/cgi/content/full/78/5/352); Sourafel Girma, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," Journal of Health Economic, (March 2011): 373-380; A. Glasier, "Emergency Contraception," British Medical Journal (Sept 2006): 560-561; 37 J.L. Duenas, et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007," Contraception (January 2011): 82-87

U.S.C. § 2000bb-1(b)(2). The government bears the burden of showing that its means is the least restrictive available. *O Centro Espirita*, 546 U.S. at 428–30.

The Government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. The government already amply provides contraception and contraceptive subsidies on a massive scale.[21] Rather than coerce religious employers to provide this coverage in their plans, the government could pursue other means. It could raise the income level as it does in state Medicaid Family Planning Waiver Programs, providing contraceptive management services to women up to 300% of the poverty level in some states. 42 U.S.C. § 1315a(d)(1), *et seq*. Or it might offer such a program just to employees of exempt entities. It could offer tax deductions or credits for the purchase of contraceptives. It could reimburse citizens who pay to use contraceptives. It could create its own contraceptive insurance company. It could provide incentives for states or pharmaceutical companies to provide such products free of charge. These and other options could fully achieve the government's goals

[21] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.;; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

without conscripting religious employers in violation of their conscience. Most critically, there is no evidence at all that the mandate's application against objecting religious employers is the only method to provide the items in question. Nor could such evidence ever be produced since contraception and abortifacients have the same effect regardless of who provides them.

The Mandate must be "the least restrictive means," not the least restrictive means the government chooses. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. 781, 786 (1988). Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *See id.* "The lesson … is that the government must show something more compelling than saving money."[22]

If the government wants to give private citizens contraceptives, including certain abortifacients, it can do so itself instead of forcing private religious citizens to participate in violation of their religious beliefs. Indeed it is already providing

[22] Douglas Laycock & Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 *Tex. L. Rev.* 209, 224 (1994).

free contraception to millions of women in various government programs. Such an obvious alternative renders the Mandate a violation of RFRA and the First Amendment. There is no compelling reason that the government cannot do so for all women or those working at exempt entities, without coercing religiously objecting employers. The government is simply redefining coercion and calling it a requirement for women's freedom.

When the government insists on imposing its mandate in employer-based insurance, it is actually redefining its interest. Claiming an interest in women's health and equality from free contraception is one thing. Claiming that women's health and equality are harmed depending on who gives them the free contraception is something altogether different. There is no evidence that women are helped, not merely by getting free contraception, but by making sure their religious employers are coerced in the process. Coercion is not a compelling interest. If women received their contraception from a different source, there is no evidence they would face "grave" and "paramount" harms for that reason. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *O Centro*, 546 U.S. at 435–37.

The HHS Mandate is a hammer in search of a nail. And it is religious employers that are particularly bearing the force of the mandate's impact because their religious objections, unlike many secular objections, are deemed insufficient

by the government. RFRA does not permit the government to needlessly burden religious exercise in this manner.

Nevertheless, for all its burdens, without the employer mandate's penalties, the HHS Mandate is without effect. The employer mandate provides the coercive power that presages and undergirds the HHS Mandate, just as Appellants feared.

III. COURTS ARE OVERWHELMINGLY CONCLUDING THAT THE HHS MANDATE VIOLATES RELIGIOUS EMPLOYERS' FREE EXERCISE RIGHTS.

The HHS Mandate clearly violates RFRA and the First Amendment. Of 17 cases issuing rulings on the likelihood of success of free exercise challenges to the HHS Mandate, 12 of them have issued preliminary injunctions or restraining orders, including four injunctions from Courts of Appeals for the Seventh and Eighth Circuits.[23] These cases have all involved for-profit religious employers

[23] *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Korte*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Grote Indus. LLC v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *Newland*, 2012 WL 3069154 (D. Colo. July 27, 2012); *Legatus v. Sebelius*, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (preliminary injunction for Weingartz plaintiffs); *Tyndale*, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs.*, No. 6:12-cv-03459 (W.D. Mo. Dec. 20, 2012); *Monaghan v. Sebelius*, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (temporary restraining order); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (temporary restraining order); *Sioux Chief Mfg v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (granting unopposed motion for preliminary injunction); and *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013). *But see Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012);

objecting to this mandate. Because of the government's voluntary abeyance of enforcement of this mandate against some non-profit employers, those religious charities still subject to this mandate have not yet had their day in court. Yet, a supermajority of the courts that have examined this mandate, even in the context of for-profit religious employers, have concluded that it likely violates RFRA and have enjoined its enforcement.

CONCLUSION

The employer mandate Appellants challenge imposes punitive fines on employers, including religious employers, who fail to meet its demands. Its coupling with the broad grant of authority to HHS to order coverage of services that contravene the religious conscience of thousands of religious employers has resulted in an unprecedented attack on religious liberty. Just as Appellants feared, the employer mandate has become the bludgeon with which the government is empowered to violate religious employers' conscience. So long as HHS remains empowered to attack religious exercise and unencumbered by any conviction that religious employers, particularly for-profit employers, have any free exercise rights at all, these violations of religious freedom will continue.

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3d Cir. Feb. 7, 2013); and *Gilardi v. Sebelius*, No. 13-104 (D.C. March 3, 2013).

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007.

2. Exclusive of the table of contents; table of citations; and the certificate of service, the brief contains 6,968 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on 7th day of March, 2013*, the foregoing Brief of Amici Virginia Family Foundation, West Virginia Family Policy Council, Maryland Family Alliance, North Carolina Family Policy Council, Palmetto Family Council, Americans United for Life and Alliance Defending Freedom was filed with the Court electronically using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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*This brief is being filed and served one day out of time with the consent of the parties due to the closure of the Court on March 6, 2013.