**United States Court of Appeals**

**FOR THE THIRD CIRCUIT**

**Case No. 16-1275**

REAL ALTERNATIVES, INC.; KEVIN I. BAGATTA, ESQ.; THOMAS A. LANG, ESQ.; CLIFFORD W. MCKEOWN, ESQ.,

*Plaintiffs-Appellants*

v.

SYLVIA BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al*.

*Defendants-Appellees.*

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# REPLY BRIEF OF APPELLANTS

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On Appeal from the United States District Court for the
Middle District of Pennsylvania
Civil Case No. 1:15-cv-00105-JEJ (Judge John E. Jones III)

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## INTRODUCTION

The government fails to explain how the contraceptive coverage Mandate rationally advances any governmental interest when imposed on a small pro-life group and its employees who ideologically oppose certain contraceptive items. The Mandate helps no one in that circumstance, since the government has designed the Mandate such that when women do not want contraception, it advances no interest in their health or equality. The government acknowledged this when it fully exempted certain "religious employers" no questions asked, because their employees "likely" oppose some or all contraception. To refuse to extend such an exemption to Real Alternatives is irrational where its small group of pro-life employees all actually oppose these items. For this reason, the Mandate also cannot satisfy RFRA's requirement that it advance a compelling governmental interest. The Mandate simply stole away the health plan desired by Real Alternatives' employees, substantially burdening their religious exercise. In return it provided them with coverage they will not actually use.

## ARGUMENT

### I. The Mandate Is Capricious and Irrational Under the Administrative Procedure Act and Equal Protection Doctrine.

The government fails to explain how the Mandate as applied to Real Alternatives is anything but irrational and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and the constitutional requirement of

equal protection. As the government points out, the standard is similar under either doctrine, Gov. Br. at 12. Thus the Mandate's irrationality invalidates it under both.

The imposition serves no government interest. By the government's own reckoning the Mandate only helps women who "want" contraception, to prevent "unintended" pregnancies. 77 Fed. Reg. at 8,727. The Mandate can only advance "women's health and equality" by means of women using the covered items. 79 Fed. Reg. at 51,123. Employees at small non-religious pro-life groups, such as Real Alternatives, not only do not want certain kinds of contraception—these people work full time at a non-profit organization ideologically opposed to the items and committed to promoting their viewpoint. It is not possible to imagine a population of people *less* benefitted by receiving contraceptive coverage.

The government further recognized the pointless character of imposing the Mandate on groups opposed to these items when it fully exempted "religious employers." The government explained the legitimacy of its exemption by declaring that employees of those religious groups "likely" or "more likely" oppose some or all contraception than employees do within other organizations. 77 Fed. Reg. at 8,728; 78 Fed. Reg. at 8,461; 78 Fed. Reg. at 39,874. Thus, the exemption undermined no government interest, since (as just explained) that interest only helps women who actually want contraception. The government acknowledges this in its brief, conceding that the regulatory exemption of religious employers "was not

expected to 'undermine the overall benefits'" of the Mandate. Gov. Br. at 14 (quoting 77 Fed. Reg. at 8,728). In other words, no government interest is advanced by imposing the Mandate on people who likely oppose those items and will not use the items so as to receive any proposed benefit.

But employees of Real Alternatives do not merely "likely" oppose certain contraceptive items. They avowedly do so, and they work full-time at an organization institutionally committed to spreading that pro-life perspective. It is irrational for the government to recognize the non-advancement of its interest among groups whose employees merely "likely" oppose contraception, but then insist the Mandate must be imposed on Real Alternatives. The government's brief does not identify any interest served by imposing the Mandate on a small pro-life nonprofit.

For these reasons Real Alternatives is being denied its rights under the constitution's equal protection doctrine. It is similarly situated to "religious employers" with respect to this Mandate's purpose and the lack of advancement of that purpose when a group's employees ideologically oppose certain forms of contraception. In fact Real Alternatives is even better situated than "religious employers" since their employees all oppose certain contraceptive items. Yet the government refused to grant leeway to Real Alternatives because it is a secular organization with secular opposition to certain contraceptives, and so it is incapable of qualifying for the "religious employer" exemption.

As the Seventh Circuit concluded in *Center for Inquiry*, it violates rational basis review for the government to “favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions.” *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873 (7th Cir. 2014) (striking down a law letting church chaplains solemnize marriages but not non-religious group leaders); *cf. Welsh v. United States*, 398 U.S. 333, 340 (1970) (requiring parallel treatment for religious and non-religious conscientious objectors in a statutory framework). “[I]t makes no rational sense—indeed, no sense whatsoever—to deny [a non-religious pro-life organization] that same respect” given to churches under this Mandate. *March for Life v. Burwell*, 128 F.Supp.3d 116, 128 (D.D.C. 2015).

## II. Real Alternatives Is Similarly Situated to “Religious Employers” with Respect to This Mandate and the Exemption They Receive.

The government attempts to avoid the logical conclusion that it is irrational to apply the Mandate to people who oppose contraception by inaccurately reframing both Real Alternatives’ position and the government’s explicit regulatory purposes.

The government argues that Real Alternatives claims “the government cannot provide an exemption for houses of worship without extending the same exemption to other objectors.” Gov. Br. at 12–13. This sweeps far beyond the present case to distract the court from the simple principle at issue. The requirement of rationality under the APA, equal protection doctrine, and cases such as *Center for Inquiry* is

not that the government must extend *all* church exemptions to other objectors. It is that where the reasons for the underlying mandate, and the reasons for the religious exception, make religious and non-religious parties similarly situated, the government cannot withhold the same exemption from the non-religious.

Here, by the government's explicit regulatory statements, the Mandate only makes sense for women who want contraception. Thus, "religious employers" can be exempt because their employees merely "likely" oppose it, and so it would not advance a governmental interest to impose the Mandate on them anyway. For that kind of Mandate, and that kind of exemption, it is irrational to refuse to exempt a non-religious non-profit organization whose employees by definition—as a matter of First Amendment protected advocacy—oppose certain contraceptive items and wish to have their health insurance exempted from the requirement. Imposing the Mandate on them makes no sense, and the government has simply recognized that senselessness in the church context. This situation in no way transforms all government allowances for churches into privileges for all "other objectors." When the nature of a requirement and its exemption are tailored to characteristics that churches and non-religious groups share, the non-religious groups cannot be denied the exemption.

The government incorrectly attempts to describe its exemption as a mere acknowledgement of the special protection afforded to churches. This is inaccurate

on the face of the government's regulations. As discussed above, the religious employer exemption was never framed as a mere privilege for churches. The government explicitly described the Mandate itself as something that only helps women who want contraception. Thus, exempting employees of a religious employer who "likely" oppose contraception would not "undermine the overall benefits" of the Mandate. 77 Fed. Reg. at 8,728; 78 Fed. Reg. at 8,461; 78 Fed. Reg. at 39,874. It is also notable that even the religious employer exemption does not exempt merely churches; it also includes "integrated auxiliaries" of churches, which can be separately incorporated and receive up to half of their income from outside of a church. 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)'s listing of integrated auxiliaries); 26 C.F.R. § 1.6033-2(h) (setting income threshold for integrated auxiliaries).

The government's capricious line drawing is demonstrated even within 26 U.S.C. § 6033(a)(3)(A). There the code lists three categories of similar organizations under parts (i), (ii), and (iii). But the government gerrymandered the religious employer exemption of this Mandate, both in choosing that code section at all (it pertains to who must file tax returns, not to anything relating to religious objections), and in choosing only parts (i) and (iii) of that subsection but excluding part (ii), which covered more non-profit organizations. In § 6033(a)(3)(A), non-profit groups are treated like churches, integrated auxiliaries, and other groups. But, when it comes

to this Mandate, the government insists it would be anathema to treat groups like churches or integrated auxiliaries—even though the government itself did so in § 6033(a)(3)(A)(ii). If § 6033 is a different kind of rule than the Mandate, why use it in this context? If it is similar, why treat non-profit groups like churches there, but not here?

This case is not about the government giving churches a privilege because they are churches. It is about the government recognizing that the nature of a particular government requirement (contraceptive coverage) serves no government interest among "religious employers," and an exemption for them undermines no government goal. Yet employers who are similar in their non-profit status, their beliefs about contraception, and the ideological affinity of their employees, are irrationally excluded from receiving an exemption, even though imposing the Mandate on them also serves no government interest. The government asks this Court to ignore the actual explanation in its regulations that the Mandate is not advanced for employees "likely" objecting to contraception, and instead to suppose that the exemption was offered solely because of the "church character" of some religious employers. But the Court "must judge the propriety of such action solely by the grounds invoked by the agency," not by a rationale redescribed during litigation. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The government presents an implausible parade of horribles against Real Alternatives' claims. It warns that "[i]mplementing plaintiffs' proposed exemption would require corroborating whether any plan beneficiary might ever wish to use contraceptives." Gov. Br. at 15. No such thing is required. The existing "religious employer" exemption involves zero corroboration. It is simply a blanket exemption interpreted and imposed by private entities and insurance companies themselves. *See* 45 C.F.R. § 147.131(a). There are no forms to fill out, no review conducted by HHS agents, and no inquiries into the bona fides of groups claiming the exemption. The government does not corroborate whether an exempted group actually opposes contraception, whether any employee of that group actually agrees with that viewpoint (instead of being "likely" to agree with it), or whether any plan beneficiary nevertheless wants contraception anyway.

The government could treat Real Alternatives exactly the same way with no effort on its part. It could declare that non-profit organizations opposing some or all contraceptives also are exempt. Period. The courts, likewise, are perfectly equipped to grant Real Alternatives an exemption protecting their rights under the APA and equal protection doctrine. The fact that Real Alternatives is a non-profit organization opposing certain contraceptives has already been "corroborated" by the sworn complaint supplied in this case. It is undisputed that Real Alternatives' employees oppose certain contraceptive items in this Mandate. The government need not

scrutinize that evidence, just like it need not scrutinizes any of the religious employers it declares to be exempt.

The question in this case is not whether Real Alternatives is identical to a church. It is whether Real Alternatives is similarly situated "with respect to the attribute selected for th[e] accommodation" provided in the religious employer exemption. *Ctr. for Inquiry* 758 F.3d at 872. Similarly, the question is whether Real Alternatives is similar to religious employers "in all relevant aspects," not in all aspects. *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Thus the attributes of church autonomy and forbearance cited by the government and *amici* are not pertinent to this case. Instead, the "attribute selected for" accommodation in the government's religious employer exemption—its "relevant aspects" with respect to *this* Mandate—is that the Mandate advances no governmental interest when applied to people "likely" opposed to contraception. Real Alternatives is no different than exempt "religious employers" in this respect. To refuse to accommodate Real Alternatives because they cannot meet a religious definition under IRS code section 6033(a)(3)(A)(i) or (iii) is an arbitrary line-drawing exercise. It is therefore an irrational violation of the APA and equal protection doctrine. Real Alternatives "has been excised from the fold because it is not 'religious.' This is nothing short of regulatory favoritism." *March for Life*, 128 F. Supp. 3d at 127.

## III. The Mandate Violates Real Alternatives' Employees' Rights Under the Religious Freedom Restoration Act.

As discussed above, imposing the Mandate on Real Alternatives serves no rational government interest. Women's health and equality are not advanced by covering contraception among a population of employees ideologically opposed to it. Therefore, it is also true that the Mandate advances no compelling interest under the Religious Freedom Restoration Act (RFRA). The employees of Real Alternatives had a health plan with which they were morally satisfied. The government's Mandate took that plan away. If they receive a court order under RFRA they will have their plan again. The government is burdening those employees' religious exercise under RFRA without serving any government interest, much less a compelling interest in the least restrictive means possible.

### A. The Mandate burdened the employees by banning their health plan.

The government's attempt to dismiss the clear burden imposed on the Real Alternatives employees' religious beliefs is unavailing. The government relies primarily on the inapplicable case of *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), to claim there is no burden on the employees' religious exercise. But *Lyng* found no burden due to the fact that government action was imposed on its own property—property to which the religious plaintiffs had no claim. *Id.* at 448–49. Those claimants were Native Americans objecting to the construction of a road on government land; though the claimants did not own the

land, they held the undeveloped character of that land sacred. *Id.* at 442. The Court rejected the claim by repeating a distinction it had made previously, that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)).

The present case is not like *Lyng* or *Roy* at all. Here the government Mandate falls upon Real Alternatives employees' own health plan, requiring that "[a] group health plan … shall, at a minimum provide coverage for" the Mandated contraceptive items. 42 U.S.C. § 300gg-13(a). The Real Alternatives employees' health plan is not owned by the government. It is not even owned mostly by the insurance company. In the truest sense the health plan is owned by the plan participants (the employees) and the employer as the plan's sponsor. The government has no ownership over the regulated item whatsoever, unlike in *Lyng*.

If *Lyng* were analogous to this case, the government would have built its road on land *owned by the Native Americans*. But if that had happened, *Lyng* certainly would have found a constitutional burden on religious exercise. The court noted the government's control of its own land is what made the Native Americans' claims inadequate: "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its*

land." *Lyng*, 485 U.S. at 453 (emphasis in original). Indeed, the court in *Lyng* was willing to rule in the Native Americans' favor even if they were merely prohibited "from visiting" the government's land. *Id.* And the court affirmed that religious exercise is burdened where "affected individuals [are] coerced by the Government's action into violating their religious beliefs." *Id.* at 449. That is exactly what occurred here.

*March for Life* held that the Mandate's ban on coverage employees desire, and their employer and insurer are willing to give, burdens religious exercise: "This is not a case of a government program with 'incidental effects . . . which may make it more difficult to practice certain religions,' but rather one which has a 'tendency to coerce individuals into acting contrary to their religious beliefs.'" 128 F. Supp. 3d at 130 (quoting and distinguishing *Lyng*, 485 U.S. at 450). Another District Court recently concurred that "the Mandate imposes a substantial burden" on employees' religious exercise: "[t]he Mandate, in its current form, requires Plaintiffs to now maintain—whether through MCHCP or another provider—a health insurance plan that includes contraceptive coverage. … Whether Plaintiffs maintain or drop their insurance, they must modify their behavior and may not maintain health insurance consistent with their religious beliefs." *Wieland v. United States Dep't of Health & Human Servs.*, No. 4:13-CV-01577-JCH, 2016 WL 3924118, at *5 (E.D. Mo. July

21, 2016) (citing *March for Life*, 128 F. Supp. 3d at 131–32, and distinguishing *Lyng*, 485 U.S. at 450).

The Real Alternatives employees had *their own health plan* banned by this Mandate, and all morally equivalent plans they could get to replace it likewise banned. The Mandate took the plaintiffs' own fiduciary property from them in the form of a religiously acceptable health plan. It imposes a substantial burden on their religious exercise under RFRA according to any legitimate definition.

**B. Applying the Mandate to Real Alternatives advances no interest in a uniform insurance system.**

Finally, the government advances the implausible notion that if Real Alternatives' employees were granted court relief from the Mandate, with the full cooperation of their employer and insurance issuer, it would "fundamentally undermine the group health insurance system." Gov. Br. at 25. This is absurd. Real Alternatives already had a health plan without this coverage and no harm came to the group health insurance system from it, because the employer and employees did not want the coverage, and the insurance company was perfectly willing to sell them the plan without it. The government's blessing on "religious employer" plans exempt from the Mandate "fatally undermines the Government's broader contention that the [contraception Mandate] establishes a closed regulatory system that admits of no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

Moreover, as discussed above, the government itself explicitly allows thousands of church-related groups to have exactly the health coverage Real Alternatives and its employees want. Those plans, omitting contraception, do nothing whatsoever to undermine the group health insurance system. Letting a handful of organizations like Real Alternatives have a plan just like churches have, and that their insurance company is willing to give them (and was offering until this Mandate came along), has no negative impact at all on the health insurance system. Under RFRA the Supreme Court has rejected the same "slippery slope" arguments the government conjures up in this case, that "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.* at 436.

It is important to note that under RFRA, the government cannot merely recite a generalized compelling interest in the insurance system's uniformity. It must show that *exempting Real Alternatives' employees* would undermine that interest in a compelling way. *Id.* at 431 (holding that RFRA requires "scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants," not the alleged harm to "broadly formulated interests justifying the general applicability of government mandates"). Thus, despite the government's overblown descriptions, this case is not about letting all employees tell all employers to tailor all health plans to their liking. This case merely involves recognizing that when Real Alternatives

and its insurer give their religious employees a health plan omitting coverage of certain items they do not want, and the government freely lets thousands of religious employers and their insurers provide equivalent plans, it is a substantial religious burden serving no compelling interest to ban the lack of coverage of those items. Neither the "insurance system," nor any employee, benefits in any way by imposing the Mandate on Real Alternatives' employees in this situation.

## CONCLUSION

Appellants respectfully request that this Court reverse the District Court's decision and remand for further proceedings.

Dated: August 25, 2016

Respectfully submitted,

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**CERTIFICATION OF BAR MEMBERSHIP,
ELECTRONIC FILING, AND WORD COUNT**

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Sophos Endpoint Security and Control software.

I hereby certify that that this brief complies with the requirements of Fed. R. J.A. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. J.A. P. 32(a)(7)(B) because it contains 3,377 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

Respectfully submitted,

*s/ Matthew S. Bowman*
Matthew S. Bowman

**CERTIFICATE OF SERVICE**

I hereby certify that on August 25, 2016, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Opposing counsel are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. Paper copies will be served as required by the Local Rules of this Court.

Respectfully submitted,

*s/ Matthew S. Bowman*

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