No. 12-6294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., *ET AL.*,

PLAINTIFFS-APPELLANTS,

v.

KATHLEEN SEBELIUS, *ET AL.*,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Western District of Oklahoma, No. Civ. 12-1000-HE,
The Honorable Joe Heaton, Judge Presiding.

BRIEF OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS, PRISON FELLOWSHIP MINISTRIES, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE C12 GROUP, AND CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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) 642-1075
Email: kcolby@clsnet.org
Counsel for Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

None of the *amici curiae* is a subsidiary of any other corporation. Each *amicus curiae* is a non-stock corporation; therefore, no publicly held corporation owns 10% or more of its stock. Fed. R. App. P. 26.1.

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES……...v

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

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. For Over a Year, Many Religious Organizations Have Sought a Definition of "Religious Employer" that Respects All Faith Communities' Religious Liberty. 9

II. The Mandate's Inadequate Definition of "Religious Employer" Departs Sharply from the Nation's Historic Bipartisan Tradition that Protects Religious Liberty, Particularly in the Context of Abortion Funding.....14

A. Exemptions for religious objectors run deep in American tradition.. 14

B. Exemptions for religious conscience have been a bipartisan tradition in the health care context for four decades…….....16

III. The Definition of "Religious Employer" Fails to Provide Adequate Protection for Religious Liberty.....21

A. The Mandate's definition is so narrow that many religious congregations may fail to qualify as a "religious employer".....22

1. Many religious congregations would view it as wrong -- even sinful -- to condition their assistance on whether a sick, hungry, or homeless person shares their religious beliefs. 23

2. The government should not penalize those religious congregations who choose to hire persons of other faiths.....24

B. The Mandate's "religious employer" definition fails to cover most religious ministries that serve as society's safety net for the most vulnerable. 25

C. Administration of such a narrow definition of "religious employer" would violate basic federal statutory and constitutional religious liberty protections.....29

CONCLUSION…….. .33

CERTIFICATE OF COMPLIANCE…….. 34

CERTIFICATE OF SERVICE……..……..35

TABLE OF AUTHORITIES

Cases

Catholic Charities v. Superior Court,
85 P.3d 67 (Cal. 2004).....22

Charities of the Diocese of Albany v. Serio,
859 N.E.2d 459 (N.Y. 2006) 22

Church of the Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993).....30

Corporation of Presiding Bishop v. Amos,
483 U.S. 327 (1983).....32

Doe v. Bolton,
410 U.S. 179 (1973).....17

Employment Div. v. Smith,
494 U.S. 872 (1990)..... 15-16

Fowler v. Rhode Island,
345 U.S. 67 (1953).....31

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,
546 U.S. 418 (2006)..... 29-30

Harris v. McRae,
448 U.S. 297 (1980).....17

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,
132 S. Ct. 694 (2012)..... 31-32

LeBoon v. Lancaster Jewish Community Center,
503 F.3d 217 (3d Cir. 2007) 27

Motor Vehicle Mfrs. Assoc. v. State Farm Mut.,
463 U.S. 29, 43 (1983)……...14

Roe v. Wade,
410 U.S. 113 (1973).....17

Rosenberger v. Board of Visitors,
515 U.S. 819 (1995).....31

Spencer v. World Vision,
633 F.3d 723(2011) 27

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

Widmar v. Vincent,
454 U.S. 263 (1981).....31

Zorach v. Clauson,
343 U.S. 306 (1952).....6

Constitutional Provisions and Statutes

Amend. I, U.S. Const. .....*passim*

American Indian Religious Freedom Act Amendments,
42 U.S.C. § 1996(a) (2012) 16

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) 17

Consolidated Appropriations Act of 2012,
Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1) 19

Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act,
Pub. L. No. 112-74, Div. I, Title III 19

Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 19

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

Internal Revenue Code § 6033(a)(1) 10, 12, 22

Internal Revenue Code § 6033(a)(3)(A)(i) 10, 12, 22

Internal Revenue Code § 6033(a)(3)(A) (iii) 10, 12, 22

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

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

Religious Freedom Restoration Act of 1993,
42 U.S.C. § 42 U.S.C. 2000bb-1(a) (2012) 2, 16, 29

Religious Land Use and Institutionalized Persons Act,
42 U.S.C. § 2000cc to 2000cc-5 (2012) 16

Religious Liberty and Charitable Donation Protection Act,
11 U.S.C. §§ 544, 546, 548, 707, 1325 (2012) 16

Title VII of the Civil Rights Act of 1964 ..... 7, 21, 26-27

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

18 U.S.C. § 3597 23

20 U.S.C. § 1688 19

26 U.S.C. § 1402(g)(1) 30

26 U.S.C. § 5000A 30

42 U.S.C. 300a-7 ..... 17, 20

42 U.S.C. § 1396w-22(j)(3)(B) 19

42 U.S.C. § 18023 19-20

42 U.S.C. § 2000e-1(a) 21

42 U.S.C. § 2000e-2(e)(2) 21

Executive Order

Executive Order 13535 (Mar. 24, 2010).....20

Regulations

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

75 Fed. Reg. 15599 (Mar. 29, 2010).....20

76 Fed. Reg. 46621 (Aug. 3, 2011) 10

77 Fed. Reg. 8725 (Feb. 15, 2012) 11

77 Fed. Reg. 16501 (Mar. 21, 2012).....10, 12, 26

78 Fed. Reg. 8456 (Feb. 6, 2013) 8, 12, 14

Other Authorities

Leland E. Beck, "Monday Morning Regulatory Review – 2/4/13" *available at* http://www.fedregsadvisor.com/2013/02/03/monday-morning-regulatory-review-2412/.....14

Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (February 10, 2012).....11

Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (August 15, 2012).....11

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

Food and Drug Administration, Label for Plan B 9

Food and Drug Administration, Label for *ella* 9

Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011) 10

James 1:27 26

James 2:14-17 2

Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause,* 81 Notre Dame L. Rev. 1793 (2006) 15

Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion,* 88 U. Det. Mercy L. Rev. 407 (2011) 33

Letter to Joshua DuBois, Executive Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance 11

Letter to President Obama from Leith Anderson, President, National Association of Evangelicals 27

Letter to President Obama from Paul Corts, President, Council for Christian Colleges & Universities 28

Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations 26

Luke 10:25-37 23

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409 (1990) 15

Michael W. McConnell, *The Problem of Singling Out Religion,* 50 DePaul L. Rev. 1 (2000) 15

News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012) 11, 31

Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate (September 4, 2012) 20

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

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

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

---

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

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

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

Prison Fellowship Ministries ("PFM") is the largest prison ministry in the world and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners, and their families, regardless of their religious beliefs or lack thereof. With one-on-one mentoring, in-prison seminars and various post-release initiatives, PFM uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime. PFM has also vigorously defended the right of inmates of all faiths to practice their faith in prison. PFM was active during congressional consideration of the Religious Freedom Restoration Act of 1993 to ensure that its protections included prisoners.

The **Association of Christian Schools International** is a nonprofit, non-denominational, religious association providing support services to more than 3,800 Christian preschools, elementary, and secondary schools in the United

States. One hundred forty-five post-secondary institutions are members of ACSI. ACSI also serves more than 22,000 schools outside the United States.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves fifty member denominations and associations, representing 45,000 local churches and over thirty million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries.

The **Ethics & Religious Liberty Commission of the Southern Baptist Convention** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for SBC churches. 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 **Institutional Religious Freedom Alliance** ("IRFA") 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 at approximately 75 public and private law schools. For three decades, CLS's legal advocacy division, the Center for Law & Religious Freedom, has worked to protect all religious citizens' right to be free to engage in the free exercise of religion. CLS also seeks to provide its members with opportunities to provide legal aid to those who cannot afford legal services, without regard to the clients' faith or lack thereof.

The C12 Group is a fee-for-service organization that serves and equips Christian chief executives with the goal of helping them 'Build GREAT Business for a GREATER Purpose.' The C12 Group, a North Carolina LLC, is America's leading equipper of Christian CEOs and business owners, facilitating monthly peer executive roundtables and providing monthly one-on-one counsel, since 1992, for

more than 4,000 companies with annual revenue ranging from a million dollars to more than a billion dollars. Its current membership roster involves nearly 1200 members and 60 C12 Area Chairs serving in 75 markets and 30 states. The C12 Group engages chief executives with highly targeted lifelong learning and facilitated brainstorming, prayer, and group feedback on the issues affecting their businesses, families, and personal lives. The C12 Group is distinctive in that it combines business/leadership 'best practices' and MBA-level content from a Biblical worldview perspective to help its members build thriving platforms for ministering to the thousands of stakeholders that a typical, established, small-to-midsized business serves each year.

Ninety-five percent of the C12 Group's clients are family businesses, while a relatively small number are more broadly-held partnerships or public companies. These individuals are generally Bible-believing, evangelical Christians who view their work as God's primary calling to stewardship and ministry through their lives. They view themselves as tending to God's companies as stewards and ambassadors, and generally operate according to core principles (*i.e.*, vision, purpose, values) informed by their deeply-held Christian faith. The HHS mandate is broadly objectionable to the overwhelming majority of the C12 Group's members as a violation of their Christian conscience that is incompatible with their

liberty as Americans and their stated core values in the workplace as disciples of Christ and servant leaders.

Summary of Argument

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

In the specific context of the HHS Mandate, *amici* may differ in their views regarding whether the general use of contraceptives is acceptable, or whether certain contraceptives act as abortion-inducing drugs. *Amici*, however, believe that our Nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in, or funding, the use of contraceptives generally, or abortion-inducing drugs specifically. The Mandate 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 the preeminent federal definition of "religious employer," found in Title VII of the Civil Rights Act of 1964, in favor of a controversial definition devised by three states.

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable, two categories that encompass most of the *amici*, epitomized the quintessential "religious employer" and, therefore, were protected under any responsible federal definition of "religious employer." But the Mandate unilaterally re-defined most religious employers to be non-religious employers. Had the government employed Title VII's time-tested definition of religious employer – rather than scouring the states for a novel definition – these religious ministries unquestionably would have been protected.

Even were the definition of "religious employer" amended along the lines that the government proposed on February 1, 2013, the amended definition would still fail to protect religious liberty. The proposed rule explicitly states that it does not intend to "expand the universe of employer[s]" beyond those who were originally exempt. "Coverage of Certain Preventive Services Under the Affordable

Care Act," Notice of Proposed Rulemaking, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). The proposed amendment would protect only religious ministries that are integrated auxiliaries of a church; however, many religious educational institutions and religious ministries are independent of any specific church. For example, a religious school that is controlled by a church may now be considered a religious employer, while an independent religious school does not qualify as a "religious employer," even though its purpose, curriculum, and faculty are just as religious as the church-controlled school. The proposed rule would continue to violate the free exercise and establishment clauses because the government would continue to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer."

Nor does the proposed "accommodation" satisfy religious liberty requirements. The government's insistence that religious organizations are not buying objectionable insurance simply because the government wishfully deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality.

At the end of the day, this case is not about which religious viewpoints regarding contraceptives or abortion are theologically correct – a question, of

course, beyond the competency of the courts – but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths.

Argument

I. For Over a Year, Many Religious Organizations Have Sought a Definition of "Religious Employer" that Respects All Faith Communities' Religious Liberty.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (hereinafter "ACA"), requires all employers to provide employees with insurance coverage, without cost sharing, of certain drugs and procedures identified as women's "preventive care." On August 1, 2011, the Department of Health and Human Services ("HHS") adopted guidelines requiring that employers' coverage of "preventive care" for women must include all FDA-approved contraceptive methods, including Plan B and *ella*, which some, although not all, *amici* regard as potential abortion-inducing drugs.[2] Coverage of sterilization procedures as well as reproductive education and counseling is also mandated.[3]

---

[2] One of the effects of Plan B (Levonorgestrel), according to the FDA, is the likely interference with the implantation of the developing human embryo in the uterus. Ella (ulipristal acetate) is an analog of RU-486 (mifepristone), the abortion drug that causes death of the developing human embryo. Many Christian health care workers cannot in good conscience participate in prescribing these drugs. *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 Feb. 18, 2013).

HHS exempts a small subset of religious employers from the Mandate. To qualify, a religious employer must: 1) inculcate values as its purpose; 2) primarily employ members of its own faith; 3) serve primarily members of its own faith; *and* 4) be a nonprofit organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). Interim Final Regulation, 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011), codified at 45 C.F.R. § 147.130(a)(1)(iv)(B).

This definition of "religious employer" arbitrarily transformed the majority of *religious* employers into *nonreligious* employers. As the government acknowledged, many quintessential religious employers, such as religious schools, may no longer qualify as "religious employers" under the Mandate. 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012) (implicitly acknowledging that some religious schools may not be covered by the Mandate's definition of "religious employer"). Even many houses of worship seem not to fit the Mandate's procrustean bed.

Forty-four Protestant, Jewish, and Catholic organizations including some *amici*, immediately informed HHS that its proposed definition of "religious

---

[3] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/(last visited Feb. 18, 2013).

employer" was too narrow.[4] In a meager response to sustained criticism, HHS announced on January 20, 2012, that religious employers who did not qualify for the Mandate's narrow exemption would have an additional year to comply if they qualified for a "temporary enforcement safe harbor" that expires August 2013.[5]

On February 15, 2012, the government finalized into law its highly criticized definition of "religious employer." 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012). On August 1, 2012, the Mandate took effect for the majority of religious employers who do not 1) have a grandfathered plan; 2) qualify under the narrow definition of "religious employer"; or 3) qualify for the temporary enforcement safe harbor.

---

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

[5] *See* News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013). Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (February 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Feb. 18, 2013); *see also,* Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012) *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 18, 2013) (slightly broadening the temporary safe harbor).

On February 1, 2013, the government announced a proposed rule that would amend the codified definition of "religious employer" by dropping three of the four criteria. A religious organization would not need to inculcate values, or hire or serve primarily those of its own faith *if* it were not required to file an IRS Form 990 under IRC § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii), *i.e.*, a church, association or convention of churches, integrated auxiliary, or religious order's religious activities.

The government also announced on February 1, 2013, that it would offer non-exempted, non-profit religious employers an "accommodation" by which a third-party insurance company or administrator ostensibly will be compelled to bear the economic costs of contraceptives coverage for religious organizations' employees, without any cost-sharing by the employees or the employers. 78 Fed. Reg. 8456 (Feb. 6, 2013); *cf.*, 77 Fed. Reg. 16501 (Mar. 21, 2012). But the NPRM makes it obvious that the government has no credible plan for providing contraceptives coverage for which employers do not pay. 78 Fed. Reg. at 8462-63. Nor does the NPRM realistically explain how *self-insured* religious employers can provide the coverage without paying for it. *Id.* at 8463-64.

Even were the definition of "religious employer" amended along the lines that the government proposed on February 1, 2013, the Mandate's definition of

"religious employer" remains an unacceptably narrow religious exemption that fails to protect most religious employers, including colleges, schools, hospitals, homeless shelters, and food pantries. The proposed amendment would protect only religious ministries that are integrated auxiliaries of a church; however, many religious educational institutions and religious ministries are independent of any specific church. A religious school that is controlled by a church may now be considered a religious employer, while an independent religious school is not considered a "religious employer," even though its purpose, curriculum, and faculty are just as religious as the church-controlled school. The new definition continues to violate the free exercise and establishment clauses because the government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer."

Nor does the proposed "accommodation" satisfy religious liberty requirements. The government's insistence that religious organizations are not buying objectionable insurance simply because the government posits contraceptive coverage to be costless does not accord with economic or legal reality.

Finally, a proposed rule is not law and, of course, may never become law. As one administrative law commentator has observed about the February 2013 NPRM and its potential deficiencies:

> The proposed rule summarizes some 200,000 comments on the advanced notice of proposed rulemaking in six short typescript pages, but the proposed rule does not address the substance of the comments. . . . Although the legal and policy issues are highly significant, OMB review was either clearly abbreviated or under the radar.[6]

See, e.g., *Motor Vehicle Mfrs. Assoc. v. State Farm Mut.*, 463 U.S. 29, 43 (1983). Because the February 2013 proposed rule may never be adopted, the remainder of this brief will address the constitutional concerns raised by the February 2012 rule, which is the existing law.

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.

---

[6] Leland E. Beck, "Monday Morning Regulatory Review – 2/4/13," *available at* http://www.fedregsadvisor.com/2013/02/03/monday-morning-regulatory-review-2412/ (last visited Feb. 18, 2012) (noting OMB reviewed the proposed rule in a single day).

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. Jews were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century. Exemptions for Quakers and other religious objectors to military service became common. Even though perpetually outnumbered in battle, George Washington urged respect for Quakers' exemptions from military service. *See* Michael W. 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, the Supreme Court exempted Jehovah's Witness schoolchildren 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 W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 3 (2000). In response

to *Smith*, with overwhelming bipartisan support, Congress passed the Religious Freedom Restoration Act of 1993, providing a statutory exemption to all federal laws for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means. 42 U.S.C. § 2000bb-1. Congress has enacted other modern exemptions, including the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (protecting religious congregations and prisoners); the American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996 (protecting Native Americans); and the Religious Liberty and Charitable Donation Protection Act, 11 U.S.C. §§ 548(a)(2) (protecting donors).

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

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[7]

---

[7] *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 Feb. 18, 2013).

Before the ink had dried on *Roe v. Wade*, 410 U.S. 113 (1973), a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect from discrimination doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[8] 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).[9] Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to

---

[8] 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).

[9] In the companion case to *Roe*, the Supreme 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.")

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.[10]

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

[10] Doerflinger, *supra,* note 7. See 103rd Congress, Health Security Act (S. 2351), introduced Aug. 2, 1994 at pp. 174-75 (text at www.gpo.gov/fdsys/pkg/BILLS-103s2351pcs/pdf/BILLS-103s2351pcs.pdf); Sen. Finance Comm. Rep. No. 103-323, *available at* www.finance.senate.gov/library/reports/committee/index.cfm?PageNum_rs=9 (last visited Feb. 18, 2013).

refusal to "provide, pay for, provide coverage of, or refer for abortions."[11] While the Church, Hyde, and Weldon Amendments are the preeminent conscience protections, numerous other federal statutes protect religious conscience in the health care context.[12]

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

---

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

[12] *See, e.g.,* 20 U.S.C. § 1688 (federal sex discrimination law cannot be interpreted to force anyone to participate in an abortion); 18 U.S.C. § 3597 (protecting persons who object for moral or religious reasons to participating in federal executions or prosecutions); 42 U.S.C. § 1396w-22(j)(3)(B) (protecting Medicare managed care plans from forced provision of counseling or referral if they have religious or moral objections); Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 (since 1999, protects religious health plans in federal employees' health benefits program from forced provision of contraceptives coverage, and protects individual religious objectors from discrimination); Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act, Pub. L. No. 112-74, Div. I, Title III (since 1986, prohibits discrimination in the provision of family planning funds against applicants who offer only natural family planning for religious or conscience reasons).

qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." *Id.* § 18023(b)(1)(A)(i). "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii).

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 (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), 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.) and several other pro-life Democrats voted for ACA based on their belief that Executive Order 13535 would protect conscience rights as to ACA's implementation. Former Representative Stupak has stated that the Mandate "clearly violates Executive Order 13535."[13]

13 Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at* http://www.democratsforlife.org/index.php?option=com_content&view=article&id=773:bart-stupak-on-contraception-mandate&catid=24&Itemid=205 (last visited Feb. 18, 2013).

Thus, despite ACA's own conscience protections and the accompanying executive order, the Mandate tramples religious employers' conscience rights and thereby discredits the time-honored commitment to respect religious conscience rights in the health care context.

III. The Definition of "Religious Employer" Fails to Provide Adequate Protection for Religious Liberty.

The Mandate also ignores the preeminent congressional definition of "religious employer" that has been a mainstay of federal law for nearly fifty years. In Title VII of the Civil Rights Act, Congress exempts "a religious corporation, association, educational institution, or society" from federal employment discrimination laws that generally prohibit hiring on the basis of religion. 42 U.S.C. § 2000e-1(a). The exemption is broad and explicitly includes "a school, college, university, or other educational institution or institution of learning . . ., in whole or in substantial part, owned, supported, controlled, or managed by a particular religion[,] . . . religious corporation, association, or society, or if the curriculum of such [institution] . . . is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

While HHS was not required to adopt Title VII's definition of "religious employer," some of the controversy over the Mandate would have been avoided had it simply looked to the familiar federal definition. But instead, HHS reached

for a controversial definition of religious employer that was seriously problematic for leading religious charities. Used by only three states, the definition had twice been challenged in state court. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). The fact that these state courts upheld the exemption against Catholic Charities' religious liberty challenge merely signifies that HHS officials knew the exemption would be unacceptable to many religious organizations. Importantly, religious organizations in those three states could avoid the contraceptive mandates by utilizing federal ERISA strategies, an option now blocked by the ACA.

A. The Mandate's definition is so narrow that many religious congregations may fail to qualify as a "religious employer."

The exemption's peculiar design belies any government claim that all houses of worship will qualify as "religious employers." If that were true, then only the single criterion requiring that the employer "be a nonprofit organization described in Internal Revenue Code § 6033 (a)(1) and § 6033(a)(3)(A)(i) or (iii)" would have been necessary. That is, § 6033 speaks of organizations that are a "church, integrated auxiliary, convention or association of churches, or religious activities of religious orders." Yet to qualify as a religious employer under the Mandate, a house of worship must meet three *additional* criteria: 1) inculcate values as its

purpose; 2) hire primarily persons of the same faith; and 3) serve primarily persons of the same faith.

1. Many religious congregations would view it as wrong -- even sinful -- to condition their assistance on whether a sick, hungry, or homeless person shares their religious beliefs.

Many houses of worship do not "serve primarily persons of the same faith." Many would deem it to be a violation of their core religious beliefs to refuse help to persons who do not share their religious beliefs. For example, in response to Jesus' most basic teaching to "love your neighbor as yourself," a legal expert asked Him, "Who is my neighbor?" To define "neighbor," Jesus told 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 he replied, "The one who had mercy on him," Jesus replied, "Go and do likewise." *Luke* 10:25-37.

Last year, *amicus* 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. Do these rescue missions really have to choose between serving those in need and maintaining their status as "religious employers"?

Yet religious congregations with particularly robust community outreach programs risk disqualification as a "religious employer" if they serve too many persons of other faiths or none. For example, as part of its mission, the National Cathedral frequently holds public memorial services for national leaders from all faiths or none. Is a memorial service for former President Ford (an Episcopalian) permissible, but not a service for former President Reagan (a Presbyterian)? Must its services be conducted only by Episcopal clergy and no longer include Catholic, Jewish, or Muslim clergy, as did the service in response to September 11th? Must the Cathedral shut its doors to non-Episcopalian visitors in order to maintain its status as a religious employer?

2. The government should not penalize those religious organizations who choose to hire persons of other faiths.

Certainly many religious organizations place a high premium on their right to hire only persons who share their faith. But, for a variety of valid reasons, some congregations do not wish to limit their hiring to co-religionists. Congregations that place great value on ecumenicalism may want to hire, for religious reasons, persons who belong to a different denomination. For example, if the Episcopalian

and Lutheran denominations decide to develop stronger formal ties in the name of ecumenicalism, does an Episcopalian church lose its status as a religious employer because it hires a Lutheran as assistant rector? Must the Presbyterian Church refuse to hire the most accomplished organist because he is a Methodist? It seems perverse for the government to punish secular employers for hiring on the basis of an applicant's faith, and then turn around and punish religious employers for hiring an applicant without regard to her faith. Inclusive congregations ought not to be punished for practicing religious diversity.

The government should not incentivize religious congregations to become more homogeneous as to the persons they serve or the persons they employ. Yet HHS seems bent on casting the narrowest net possible, in order to protect the fewest religious employers possible.

B. The Mandate's "religious employer" definition fails to cover most religious ministries that serve as society's safety net for the most vulnerable.

The Mandate's definition of "religious employer" imposes a two-class concept of religious organizations that is unprecedented. In a letter to the HHS Secretary, one hundred twenty-five Christian organizations, mostly Protestant, explained their objections to the government's attempt to bifurcate the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based

service organizations -- outwardly oriented and given a lesser degree of protection." The letter continued:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that 'pure religion' is 'to look after orphans and widows in their distress' (*James* 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes both religion and authentic ministry. [14]

In the March 2012 ANPRM, the government itself admitted that the narrow definition failed to encompass most religious colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other basic ministries. 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012). Despite qualifying as religious employers for purposes of Title VII, most religious ministries do not qualify under the Mandate's definition, because they serve persons of different faiths or no faith. Yet the Ninth Circuit Court of Appeals rejected the argument that a Christian international relief

---

[14] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367. The Council for Christian Colleges & Universities ("CCCU") expressed similar objections to a two-tier exemption in a letter to the President on behalf of its 138 member and affiliate schools. Letter to President Obama from Paul Corts, President, CCCU, March 9, 2012, *available at* http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation.

organization was not a religious employer for purposes of Title VII because it gave assistance indiscriminately to persons in need, regardless of their religious beliefs. *Spencer v. World Vision*, 633 F.3d 723, 735, 737-38 (2011) (O'Scannlain, J., concurring).

Many religious organizations employ persons from a variety of faith backgrounds, particularly when religious persons from many different faiths come together to better serve their common communities. Many religious ministries do not qualify as the "right" § 6033 organizations for many faith-based organizations are not formally affiliated with a religious congregation or denomination.[15] *See, e.g., LeBoon v. Lancaster Jewish Community Center,* 503 F.3d 217 (3rd Cir. 2007) (non-profit religious association determined to be a religious organization for purposes of Title VII despite lack of formal affiliation with any synagogue). This is particularly true for religious groups that have an intentional interdenominational or ecumenical affiliation. Evangelical Christian institutions often are collaborative efforts across numerous denominations.

---

[15] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama, responding to a concern that the exemption would be broadened only to include faith-based organizations affiliated with a specific denomination. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, December 21, 2011, http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

Some religious organizations believe that they can preserve their religious identities without requiring all of their employees to share their faith. For example, the President of the Council for Christian Colleges & Universities, on behalf of its 138 member and affiliate schools, explained:

> While all CCCU members hire only professing and practicing Christians for all administrative and full-time faculty positions, our institutions have implemented different policies for hiring support staff and adjunct faculty that reflect their respective understandings of how best to accomplish their missions in light of their theological traditions . . . . The decision made by each institution, however, reflects the different theological interpretations of the Christian faith, the Bible, and mission of the respective institution. These decisions should continue to be guided by mission, not regulatory requirements.[16]

Nor do all religious ministries have the inculcation of values as their purpose. A Seventh-day Adventist hospital aims to heal the sick, not inculcate values. The homeless sleep in the Methodist Church one winter night, and the Jewish synagogue the next, because the ecumenical religious association that coordinates the homeless ministry wants to keep people alive, not inculcate values. The Presbyterian soup kitchen feeds the hungry without subjecting them to a

[16] Letter to President Obama from Paul Corts, President, CCCU, December 23, 2011, *available at* http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation.

sermon. Indeed, some religious organizations may actually view the inculcation of religious values to be a hindrance to their religious duty to serve all in need.

C. Administration of such a narrow definition of "religious employer" will violate basic federal statutory and constitutional religious liberty protections.

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

By exempting a small subset of religious employers, the government has already recognized that a substantial burden exists for religious employers. Nor can the government meet its burden to demonstrate a compelling interest, unachievable by less restrictive means, that justifies burdening religious

employers' conscience right to avoid participating in, or funding, abortion-inducing drugs and procedures to which they have religious objections. Both ACA and the Mandate provide numerous exemptions for both secular and religious employers, including those with: 1) grandfathered plans; 2) fewer than 50 employees; 3) membership in a 'recognized religious sect or division' that objects on conscience grounds to acceptance of public or private insurance funds, 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(a)(i) and (ii); or 4) the qualifications necessary to meet the Mandate's "religious employer" definition. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales,* 546 U.S. at 433, *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah,* 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted).

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

support."[17] The government has many other policy options available to it, including expanding existing programs.

For many of these same reasons, the Mandate violates the Free Exercise and Establishment Clauses. But in addition, by administering such an opaque "religious employer" definition, government officials will violate religious liberty. For example, the definition fails to specify which tenets, or what percentage of the employer's tenets, a beneficiary or employee must share with a religious employer. Few employees agree with every tenet a religious employer holds. That fact does not somehow diminish a religious organization's freedom to function without governmental interference. A congregation's free exercise right does not depend on its members, employees, or beneficiaries agreeing with its beliefs. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (religious school prevailed despite its employee's disagreement with a particular religious belief).

By what process will the government make such a determination without creating excessive entanglement? The Supreme Court has repeatedly warned that government officials are not competent to make religious determinations. *See*,

[17] Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013).

e.g., *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (government officials cannot distinguish "religious talk" from "sermon"); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (government officials cannot distinguish religious speech from prayer and worship); *Rosenberger v. Board of Visitors*, 515 U.S. 819, 844-45 (1995) (government officials cannot distinguish religious discussion from proselytization).

That the government presumes to assess the religious commitments of a religious organization's employees, and to require that a religious organization mete out its assistance according to recipients' religious beliefs, violates any meaningful understanding of "separation of church and state." *See Hosanna-Tabor*, 132 S. Ct. at 702-703. Religious liberty requires the government to give religious organizations breathing space to define what their mission will be, whom they will employ, and whom they will serve. "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. . . . [Believers] exercise their religion through religious organizations, and these organizations must be protected by the Free Exercise Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1983) (Brennan, J., concurring) (quotation omitted).

Conclusion

A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion,* 88 U. Det. Mercy L. Rev. 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

Amici urge that the judgment below be reversed.

Respectfully submitted,

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby
CENTER FOR LAW &
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
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

February 19, 2013

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 6,944 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 (a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby
CENTER FOR LAW &
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
Counsel for Amici Curiae

February 19, 2013

CERTIFICATE OF DIGITAL SUBMISSIONS

I hereby certify that:

(1) all required privacy redactions have been made;

(2) with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(3) the digital submission has been scanned for viruses with the most recent version of the commercial virus scanning program AVG, Version 9.0.932, Virus Database 2639.1.1/5616 (last updated February 19, 2013), and, according to the program, is free of viruses.

Dated: February 19, 2013

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Center for Law and Religious Freedom
Christian Legal Society
8001 Braddock Rd., Suite 302
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on the participants that follow will be accomplished by the CM/ECF system:

Stuart Kyle Duncan
Eric Baxter
Luke William Goodrich
Adele Auxier Keim
Mark Rienzi
Lori Halstead Windham
The Becket Fund for Religious Liberty
3000 K Street, NW, Suite 220
Washington, DC 20007

Derek Brandon Ensminger
Charles E. Geister, III
Hartzog Conger Cason & Neville
201 Robert S. Kerr Avenue, Suite 1600
Oklahoma City, OK 73102

Deborah Jane Dewart
Liberty, Life & Law Foundation
620 East Sabiston Drive
Swansboro, NC 28584

Mailee R. Smith, Esq.
Americans United for Life
655 15th Street, NW, Suite 410
Washington, DC 20005

Michelle Renee Bennett
U.S. Department of Justice-DC-Federal Programs
20 Massachusetts Avenue N.W.
Washington, DC 20008

Alisa Beth Klein
Mark B. Stern
U.S. Department of Justice
Appellate Staff, Civil Division 7235
950 Pennsylvania Avenue, NW
Washington, DC 20530

Jay Sekulow
American Center for Law and Justice
201 Maryland Avenue, NE
Washington, DC 20002

Dorinda Bordlee
Nikolas T. Nikas
Catherine W. Short
Bioethics Defense Fund
Firm: 480/483-3597
6811 East Voltarie Avenue
Scottsdale, AZ 85254

Michael R. Connelly
Angela C. Thompson
United States Justice Foundation
10218 Timber Trail Drive
Dallas, TX 75229

I also certify that on February 19, 2013, I caused seven paper copies of the foregoing brief to be sent by UPS, second day delivery, to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, The Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257.

/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 for Amici Curiae**