

ORAL ARGUMENT NOT YET SCHEDULED**Nos. 12-5273 & 12-5291 (consolidated)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

WHEATON COLLEGE and BELMONT ABBEY COLLEGE, *Appellants*,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and
Human Services, *ET AL.*, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

**BRIEF OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS,
PRISON FELLOWSHIP MINISTRIES, COUNCIL FOR CHRISTIAN
COLLEGES & UNIVERSITIES, CHRISTIAN MEDICAL ASSOCIATION,
ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL,
NATIONAL ASSOCIATION OF EVANGELICALS, QUEENS
FEDERATION OF CHURCHES, DIOCESE OF THE MID-ATLANTIC OF
THE ANGLICAN CHURCH IN NORTH AMERICA, ETHICS &
RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST
CONVENTION, PATRICK HENRY COLLEGE, INSTITUTIONAL
RELIGIOUS FREEDOM ALLIANCE, AND CHRISTIAN LEGAL SOCIETY
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

Pursuant to Circuit Rule 28 (a)(1), undersigned counsel certifies that, to the best of her knowledge, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants, except for the following:

- *Amici* Christian Legal Society, Association of Rescue Gospel Missions, Prison Fellowship Ministries, Christian Medical Association, Council for Christian Colleges & Universities, Association of Christian Schools International, National Association of Evangelicals, Queens Federation of Churches, Diocese of the Mid-Atlantic of the Anglican Church in North America, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Patrick Henry College, and Institutional Religious Freedom Alliance;
- *Amici* Women Speak for Themselves;
- *Amici* Roman Catholic Archbishop of Washington, a Corporation Sole; Consortium of Catholic Academies of the Archdiocese of Washington; Archbishop Carroll High School; Catholic Charities of the Archdiocese of Washington; and Catholic University of America;

- *Amici* American Center for Law and Justice and Regent University;
- *Amici* Association of American Physicians & Surgeons, American Association of Pro-Life Obstetricians & Gynecologists, Catholic Medical Association, The National Catholic Bioethics Center, Physicians for Life, and National Association of Pro Life Nurses

B. Rulings Under Review

Undersigned counsel further certifies that, to the best of her knowledge, references to the rulings at issue appear in the Brief for Appellants and are incorporated by reference herein.

C. Related Cases

Undersigned counsel further certifies that, to the best of her knowledge, there are no related cases other than those set forth in the Brief for Appellants, which are incorporated by reference herein.

D. Corporate Disclosure

Pursuant to FRAP 26.1 and Circuit Rule 26.1, the *amici* represented on this brief are not publicly held corporations, do not issue stock, and do not have a parent corporation. Because none of the *amici* represented on this brief issues

stock, no publicly held corporation owns 10% or more of any stock of any of the *amici*.

Each of the *amici* represented on this brief is a religious non-profit ministry and a religious employer, whose ministry will be affected by the Mandate's extremely narrow definition of "religious employer." As further described in their statements of identity and interest, beginning at page one of the brief, many of the *amici* minister to persons who are homeless, sick, hungry, in prison, or otherwise in need. Several of the *amici* provide education to the young. Each *amici* is also concerned that religious liberty be maintained in this country through the proper application of federal statutory and constitutional protections for religious liberty.

CIRCUIT RULE 29(D) CERTIFICATE

Under Circuit Rule 29(d), "[a]*amici* on the same side must join in a single brief to the extent practicable." To the best of the undersigned counsel's knowledge, no other *amicus curiae* brief is covering the precise subject matter discussed in this brief and filing a joint brief is not practicable.

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GLOSSARY

ABBREVIATIONS

DEFINITIONS

ACA

Affordable Care Act

AGRM

Association of Gospel Rescue
Missions

ANPRM

Advanced Notice of Proposed
Rulemaking

CCCU

Council for Christian Colleges &
Universities

FDA

United States Food & Drug
Administration

HHS

United States Department of Health &
Human Services

The Mandate

“Coverage of Preventive Services,”
45 C.F.R. § 147.130

STATUTES AND REGULATIONS

Undersigned counsel certifies that, to the best of her knowledge, all applicable statutes, etc., are contained in the Addendum to the Brief for Appellants and are incorporated by reference herein.

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

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

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

¹ Pursuant to FRAP 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money 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) and D.C. Circuit Rule 29(b), 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 1990 to ensure that its protections included prisoners.

Founded in 1976, the **Council for Christian Colleges & Universities** (“CCCU”) is an international association of 172 Christ-centered institutions of higher education committed to the integration of Christian faith and higher

learning. The CCCU's mission is: "To advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth." All full-time faculty and administrators at CCCU member institutions are Christians. The CCCU currently includes 118 member institutions and 54 affiliate institutions in 33 U.S. states, 6 Canadian provinces, and 19 nations worldwide. CCCU member and affiliate campuses serve over 400,000 students in the U.S. annually and have graduated 1.6 million alumni. Additionally, nearly 30,000 faculty members teach at CCCU U.S. member and affiliate institutions.

Christian Medical Association ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 16,000, CMA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for the poor and needy from their commitment to practicing according to faith-based moral standards.

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 **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation’s ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty as manifest in the present action.

The **Diocese of the Mid-Atlantic of the Anglican Church in North America** is a regional diocese dedicated to reaching North America with the transforming love of Jesus Christ. The Diocese consists of 39 member churches in Washington, D.C., Virginia, Maryland, and northeastern North Carolina actively engaged in serving Christ and their communities by sharing the good news of Jesus Christ, operating such outreach ministries as temporary shelter, clothing and feeding programs and financial assistance for those in need, providing intercessory and healing prayer and other acts of Christian love and service, offered without regard to the religious affiliations of those whom they are serving.

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.

Patrick Henry College, founded in 2000, is a multi-denominational Christian liberal arts college located in Virginia. The College seeks to follow the original American collegiate model, understood as a combination of academic rigor, honest inquiry, a classical curriculum, and biblically grounded Christian faith. Representing over 20 denominations, and coming from 43 states, the college's 350 students achieve results that put them at the highest level in standardized tests and graduate school placement.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, 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 (“Center”) 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.

Summary of Argument

Representing different faith traditions, *amici* may differ on various religious, political, and social issues. *Amici*, however, 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 congregations 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 may also differ as to whether for-profit religious employers, or only nonprofit religious employers, should be exempt from the Mandate. *Amici*, however, agree that the Mandate's current definition of "religious employer" inadequately protects 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.

Amici agree that religious educational institutions, such as Appellants Wheaton College and Belmont Abbey College, epitomize the quintessential "religious employer" and, therefore, must be protected by any responsible definition of "religious employer." Had the government employed Title VII's time-tested definition of religious employer – rather than scouring the states for a novel definition – these religious educational institutions unquestionably would have been protected.

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”),² 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.³ Coverage of

² References to the ACA encompass the accompanying Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

³ *Amicus* Christian Medical Association explains that: 1) 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; and 2) *ella* (ulipristal acetate) is an analog of RU-486 (mifepristone), the abortion drug that definitely

sterilization procedures as well as reproductive education and counseling is also mandated.⁴

Simultaneously, HHS proposed an exemption for a small subset of religious employers. 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 transforms the majority of *religious* employers into *nonreligious* employers. As this appeal itself demonstrates, two quintessential religious colleges fail to qualify as “religious employers” under the Mandate. But even many houses of worship seem not to fit the Mandate’s procrustean bed. For example, many religious employers do not

causes death of the developing human embryo. Many CMA members 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 October 12, 2012).

⁴ 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 Oct. 12, 2012).

qualify as I.R.C. § 6033 organizations. Many hire outside their faith community for a variety of religious reasons. And many choose not to “serve primarily members of [their] own faith,” but instead concentrate their mission on serving others regardless of their faith.

Diverse religious groups, including some *amici*, immediately informed HHS that its proposed definition of “religious employer” was too narrow. For example, some *amici* joined with forty-four Protestant, Jewish, and Catholic organizations on a letter to the Administration that explained why the religious exemption was too narrow.⁵

In response to sustained criticism, on January 20, 2012, HHS announced that religious employers who did not meet the narrow definition would have an additional year to comply, but only if they qualified for a “temporary enforcement safe harbor.”⁶ A religious employer could invoke the “temporary enforcement safe harbor” only if it: 1) was organized and operated as a non-profit entity; 2) had not

⁵ 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>.

⁶ 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 Oct. 12, 2012).

provided contraceptive coverage as of February 10, 2012, because of its religious beliefs;⁷ 3) provided notice to its employees that contraceptive coverage would not be provided for the plan year beginning on or after August 1, 2012; and 4) self-certified by the first day of its plan year that the first three criteria had been met.⁸

The government's announcement of this "temporary enforcement safe harbor" merely intensified many religious employers' objections. The government seemingly had calculated that religious employers would abandon their religious convictions if given an additional year to ponder their plight. On February 15, 2012, the restrictive definition of "religious employer" became law. 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012).

Contemporaneously, the government announced that it would propose, at some unknown future time, a possible accommodation for *some* of the religious

⁷ February 10, 2012, is the date that the President and the HHS Secretary issued a public statement regarding the Mandate. Why that date arbitrarily determines which religious employers qualify, or fail to qualify, for the "temporary enforcement safe harbor" is unclear.

⁸ 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 Oct. 12, 2012).

employers excluded from the Mandate's definition of "religious employer."⁹ In March, the Administration issued an Advance Notice of Proposed Rulemaking (hereinafter ANPRM) that put forth no specific accommodation language but merely sought comments regarding 1) which dispossessed religious employers might be given an accommodation, and 2) which third-party might be induced, or coerced, to pay the economic costs of a nebulous accommodation, if neither the employers nor the employees were required to pay for coverage. 77 Fed. Reg. 16501 (Mar. 21, 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.¹⁰ On August 15, 2012, HHS slightly widened the "temporary

⁹ White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions> (last visited Oct. 12, 2012).

¹⁰ An employer must comply with the Mandate when its next insurance plan year begins after August 1, 2012. "Grandfathered health plans," that is, plans that are materially unchanged since ACA's enactment on March 23, 2010, are exempt from most of ACA's provisions. 42 U.S.C. § 18011. According to HHS estimates, 98 million individuals will be covered by grandfathered group health plans in 2013. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010).

enforcement safe harbor” to include religious employers who had unsuccessfully sought to exclude contraceptives coverage from their insurance plan before February 10, 2012.¹¹

To date, the government still has not produced a specific written accommodation. The Mandate’s definition of “religious employer” remains the narrowest religious exemption in federal law. Not only does it fail to protect all houses of worship, but it excludes most religious employers, including colleges, schools, hospitals, homeless shelters, and food pantries.

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

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

Religious liberty is embedded in our Nation’s DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact.

America’s tradition of protecting religious conscience predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in

¹¹ 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 Oct. 12, 2012).

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). Similarly, during the struggle against totalitarianism in World War II, 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 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.¹²

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

¹² 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 Oct. 12, 2012).

funds from forced participation in abortion or sterilization, as well as protecting 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.¹³ 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).¹⁴ Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton’s health reform legislation, Senate Majority Leader George Mitchell and

¹³ 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).

¹⁴ 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.”)

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 a religious belief or moral convictions were protected. Commercial insurance companies and self-insurers likewise were protected.¹⁵

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

¹⁵ Doerflinger, *supra*, note 12. 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 Oct. 12, 2012).

refusal to “provide, pay for, provide coverage of, or refer for abortions.”¹⁶ While the Church, Hyde, and Weldon Amendments are the preeminent conscience protections, numerous other federal statutes protect religious conscience in the health care context.¹⁷

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

¹⁶ Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

¹⁷ *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).

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 Current 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,” the controversy over the Mandate would have been avoided had it simply borrowed 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 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, HHS requires a "church, integrated auxiliary, convention or association of churches, or religious activities of religious orders" to 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"?

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-Episcopalians visitors in order to maintain its status as a religious employer?

The government should not incentivize religious congregations to become more homogeneous as to the persons they serve or the persons they employ. The government seems bent on casting the narrowest net possible, in order to protect the fewest religious employers possible. In so doing, the government penalizes religious congregations for helping society's vulnerable without regard to their religious beliefs.

2. The government should not penalize those religious congregations 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 assistant pastor? 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.

B. The Mandate's "religious employer" definition certainly does not 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 Protestants, 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.¹⁸

The ANPRM admits that the narrow definition fails to encompass most religious colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other basic ministries of religious congregations in communities across the country. 77 Fed. Reg. 16501, 16502. 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 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).

¹⁸ 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>.

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. Many faith-based organizations are not formally affiliated with a religious congregation or denomination.¹⁹ *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 true for religious groups that have an intentional interdenominational or ecumenical affiliation. It is particularly characteristic of evangelical Christian institutions that are often collaborative efforts across numerous denominations.

Some religious organizations believe that they can preserve their religious identities without requiring all of their employees to share their faith. Some believe that, while leaders must share their institutional religious beliefs, other employees may be drawn from a variety of faiths. For example, the President of

¹⁹ 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 Oct. 12, 2012).

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.²⁰

Nor do all religious ministries have the inculcation of values as their purpose. The purpose of a Seventh-day Adventist hospital is 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 hungry men and women without subjecting them to a sermon. Indeed, some religious organizations may actually sometimes view the inculcation of religious values to be a hindrance to their religious duty to serve all in need.

²⁰ Letter to President Obama from Paul Corts, President, CCCU, December 23, 2012, *available at* <http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation>.

C. Administration of such a narrow definition of “religious employer” would 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.”²¹ 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 the 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); *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696 (1976).

²¹ *See* 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 June 16, 2012).

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, 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 (2012). 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,

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CERTIFICATE OF COMPLIANCE

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 6,950 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). Furthermore, this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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