NOS. 13-1092 & 13-1093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEGATUS, *ET AL.*,

PLAINTFFS-APPELLEES/CROSS-APPELLANTS,

V.

KATHLEEN SEBELIUS, *ET AL.*,

DEFENDANTS-APPELLANTS/CROSS-APPELLEES.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 2:12-CV-12061
The Honorable Robert Cleland, 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 PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE IN PART AND REVERSAL IN PART

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-1092/13-1093 Case Name: Legatus, et al. v. Sebelius, et al.

Name of counsel: Kimberlee Wood Colby

Pursuant to 6th Cir. R. 26.1, Association of Gospel Rescue Missions & co-amici on Exhibit A
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 30, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Kimberlee Wood Colby
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

EXHIBIT A

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

Christian Legal Society

The C-12 Group

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

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[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.

> 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.

The **Association of Christian Schools International** is a nonprofit, non-denominational, religious association that serves nearly 24,000 Christian schools that educate nearly 5.5 million children in over 100 countries, including nearly 3,800 Christian preschools, elementary, and secondary schools and over 100 post-secondary institutions in 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 issues including religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom and freedom from governmental interference as guaranteed under the Constitution are indispensable, bedrock values for SBC churches 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 on many law school campuses. CLS's legal advocacy division, the Center for Law & Religious Freedom, acts to protect all religious citizens' right to be free to exercise their religious beliefs. CLS also offers its members opportunities to provide legal aid to those who cannot afford legal services, regardless of the clients' faith or lack thereof.

The C12 Group is a fee-for-service organization that serves and equips Christian chief executives with nearly 1200 members. 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 run by individuals who view themselves as tending to God's companies as stewards and, therefore, operate according to core principles informed by their deeply-held Christian faith. The HHS Mandate is broadly objectionable to the overwhelming majority of its members as a violation of their Christian consciences.

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 sharply departs from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience rights in the context of participation in, or funding of, abortion.

Amici further agree that the Mandate's current definition of "religious employer" is grossly inadequate to protect meaningful religious liberty. *Amici* are

troubled that the federal government, when adopting the Mandate's definition of "religious employer," bypassed time-tested federal definitions of "religious employer" – for example, Title VII of the Civil Rights Act of 1964 and its definition of "religious employer" -- in favor of a controversial definition devised by three states.[2]

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable, 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. By administrative fiat, religious educational institutions, hospitals, associations, and charities were deprived of their religious liberty.

Even were the definition of "religious employer" amended along the lines that the government proposed in its Notice of Proposed Rulemaking (NPRM) dated February 6, 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 exempted. 78 Fed.

[2] In observing that the controversy likely would have been avoided had the government begun with Title VII's definition of "religious employer," *amici* do not suggest that Title VII's definition encompasses all the employers legally entitled to an exemption under RFRA and the First Amendment.

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 church-controlled religious school might possibly be considered a religious employer, but an independent religious school would not qualify, even though both schools' purpose, curriculum, and faculty are identical.

Because the government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer," the proposed rule continues to violate the Free Exercise and Establishment Clauses. Secretary Sebelius's recent remarks illustrate the suffocatingly constricted scope of the Mandate's definition of "religious employer: "[A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the [contraceptive] benefit package," and "Catholic hospitals, Catholic universities, other religious entities will be providing [contraceptive] coverage to their employees starting August 1st." [3]

Nor does the NPRM's proposed "accommodation" satisfy religious liberty requirements. The government's insistence that religious organizations are not

[3] Secretary Kathleen Sebelius, U.S. Secretary of Health and Human Services, Remarks at the Forum at Harvard School of Public Health (Apr. 8, 2013), http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (Part 9, Religion and Policymaking, at 4:50 and 2:48).

buying objectionable insurance simply because the government wishfully deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality.

The government claims that the "accommodation" seeks to "provide women with contraceptive coverage without cost sharing . . . while protecting eligible organizations from having to contract, arrange, pay, or refer for any contraceptive coverage to which they object on religious grounds." 78 Fed. Reg. 8456. But as a practical matter, as Secretary Sebelius has acknowledged, contraceptives are "the most commonly taken drug in America by young and middle-aged women" and are widely "available at sites such as community health centers, public clinics, and hospitals with income-based support."[4] Even if contraceptives were not already widely available, the government itself has several conventional means to provide contraceptives coverage to any and all employees, including: 1) a tax credit for the purchase of contraceptives; 2) direct distribution of contraceptives through community health centers, public clinics, and hospitals; 3) direct insurance coverage through state and federal health exchanges; and 4) programs to

[4] *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).

encourage willing private actors, *e.g.*, physicians, pharmaceutical companies, or interest groups, to deliver contraceptives through their programs.

Given that in 2012 HHS spent over $300 million in Title X funding to provide contraceptives directly to women, why is the government unwilling to spend a modest amount to protect the priceless "first freedom" of religious liberty? In light of the bureaucratic expense and waste that implementation of the proposed "accommodation" will necessarily create for the government and religious organizations, as well as insurers and third-party administrators, it would seem clearly more economical, easy, and efficient for the government itself to provide contraceptives through direct distribution, tax credits, vouchers, or other government programs.

As a constitutional matter, both the Religious Freedom Restoration Act and the First Amendment have also already resolved the "problem." The government must respect religious liberty by restoring a definition of "religious employer" that protects all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage.

At the end of the day, this case is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive -- 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 Mandate exempts only a small subset of religious employers from having to provide coverage for contraceptive methods, including Plan B and *ella*, which many persons regard as potential abortion-inducing drugs.[5] As early as August 2011, forty-four Protestant, Jewish, and Catholic organizations had informed HHS that its proposed definition of "religious employer" was unacceptably narrow.[6]

But over the sustained protest of wide swaths of the religious community, in February 2012, the government codified into law, an excessively narrow definition

[5] According to the FDA, an effect of Plan B (Levonorgestrel) 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. *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).

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

of "religious employer." To be a religious employer, an organization 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 an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). 45 C.F.R. § 147.130(a)(1)(iv)(B).

With this definition, the government 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." 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 failed to fit the Mandate's procrustean bed.

In February 2013, the government announced a proposed rule that would amend the hastily codified definition of "religious employer" by dropping three of the four criteria. 78 Fed. Reg. 8456. A religious organization would not need to inculcate values, or hire or serve primarily those of its own faith, *if* it was not required to file a Form 990 under I.R.C. §§ 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). Only a church, association or convention of churches, integrated auxiliary, or

religious order's religious activities could qualify for the amended religious employer exemption.

The government also announced that it would offer non-exempted, non-profit religious employers an "accommodation" by which a third-party insurance company or administrator would be compelled, at least in theory, 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. But the NPRM makes it obvious that the government has no credible plan for providing contraceptives coverage for which employers do not pay. *Id.* at 8462-63. 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. Nor does the NPRM realistically explain how *self-insured* religious employers can provide the coverage without paying for it. *Id.* at 8463-64.

The proposed amended 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 church-controlled religious school might possibly be considered a religious employer, while an independent religious school would not be, even though the schools' purposes, curricula, and faculty were identical. The government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer."

Of course, the February 2013 proposed amendment may never become law. As one administrative law commentator has observed about the NPRM's 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.[7]

See, e.g., *Motor Vehicle Mfrs. Assoc. v. State Farm Mut.*, 463 U.S. 29, 43 (1983).

[7] 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). The March 2013 NPRM received 376,009 comments, reportedly a new record for comments. Nancy Watzman, *Contraceptives Remain Most Controversial Health Care Provision*, Sunlight Foundation (Mar. 22, 2013), *available at* http://reporting.sunlightfoundation.com/2013/contraceptives-remain-most-controversial-health-care-provision/.

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

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

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

America's tradition of protecting religious conscience predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court. Jewish persons were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century. Even though perpetually outnumbered in battle, George Washington urged respect for Quakers' exemptions from military service. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990) (religious exemptions in early America); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1804-1808 (2006) (same). During a more recent struggle against totalitarianism, Jehovah's Witness schoolchildren won exemption from

compulsory pledges of allegiance to the flag. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

"Religion-specific exemptions are relatively common in our law, even after [*Employment Division* v.] *Smith*[, 494 U.S. 872 (1990)]." Michael McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 3 (2000). Responding to *Smith*, with nearly unanimous bipartisan support, Congress passed the Religious Freedom Restoration Act of 1993, providing a statutory exemption for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means. 42 U.S.C. § 2000bb-1. Congress has enacted other modern exemptions, including the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (protecting religious congregations and prisoners); the American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996 (protecting Native Americans); and the Religious Liberty and Charitable Donation Protection Act, 11 U.S.C. §§ 548(a)(2) (protecting religious congregations).

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

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship

at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[8]

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 doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.[9]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[10] 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).[11] Every subsequent Congress has reauthorized the Hyde Amendment.

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[8] *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).

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

[10] 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).

[11] In the companion case to *Roe*, the Court noted with approval that Georgia law protected hospitals and physicians from participating in abortion. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("[T]he hospital is free not to admit a patient for an

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded coverage of abortion or other services. Hospitals, doctors and other health care workers who refused to participate in the performance of any health care service on the basis of religious belief or moral conviction were protected. Commercial insurance companies and self-insurers likewise were protected.[12]

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abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.")

[12] Doerflinger, *supra*, note 8. 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).

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[13]

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential 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).[14]

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that

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

[14] The Mandate is also at odds with 21 States' laws that restrict abortion coverage in all plans or in all exchange-participating plans. The ACA does not preempt State law regarding abortion coverage. 42 U.S.C. § 1301(c)(1).

"longstanding Federal Laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide, pay for, provide coverage of,* or refer for abortions." 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added). Former Representative Bart Stupak (D-Mich.), who voted for ACA based on his belief that Executive Order 13535 would protect conscience rights, has stated that the Mandate "clearly violates Executive Order 13535" [15] and has filed an amicus brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.[16]

Furthermore, federal conscience protections are not limited to non-profit religious conscientious objectors, but instead protect both non-profit and for-profit entities and individuals engaged in for-profit commerce. Hospitals, nurses, and doctors do not forfeit their federal conscience protections because they are paid for their services. The Hyde-Weldon Amendment and the ACA both protect health

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[15] 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&Item id=205 (last visited Feb. 18, 2013).

[16] Brief *Amici Curiae* of Bart Stupak and Democrats for Life of America in Support of Plaintiffs/Appellees and Supporting Affirmance, Newland, *et al.*, v. Sebelius, *et al.*, No. 12-1380 (10th Cir. Mar. 1, 2013).

insurance plans, contrary to the Mandate's requirements, as well as hospitals, HMOs, and provider-sponsored entities. Nor does RFRA distinguish between for-profit and non-profit institutions in its protection. 42 U.S.C. § 2000bb.[17] The First Amendment protects the religious conscience rights of for-profit businesses. *See, e.g.*, *Stormans, Inc. v. Selecky*, 2012 WL 566775 (W.D. Wash. 2012) (corporate owners of pharmacies protected from state regulation requiring pharmacists to dispense abortifacients despite their religious objections); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (same).

By trampling religious conscience rights, the Mandate disregards the ACA's own conscience protections and defies the traditional commitment to bipartisan protection of religious conscience rights.

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

HHS reached for a controversial definition of religious employer that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state 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

[17] *See* Mark Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?*, 21 George Mason L. Rev. 1, 55 (2013).

exemption against Catholic Charities' religious liberty challenge demonstrates that HHS officials knew the exemption would be unacceptable to many religious organizations. Importantly, religious organizations could avoid the *state* contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the ACA.

In reaching for its controversial definition of religious employer, the Mandate ignored a mainstay of federal law for nearly fifty years, Title VII, which exempts "a religious corporation, association, educational institution, or society" from federal employment discrimination laws regarding hiring on the basis of religion. 42 U.S.C. § 2000e-1(a). *See also*, 42 U.S.C. § 2000e-2(e)(1) & (2).

A. The Mandate's currently codified definition of "religious employer" 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. But currently to qualify as a religious employer, 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"? *See Spencer v. World Vision*, 633 F.3d 723, 735, 737-38 (2011) (O'Scannlain, J., concurring) (Christian international relief organization was religious employer under Title VII even though it gave assistance indiscriminately to persons in need, regardless of their religious beliefs).

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

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? 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. 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 protect most religious ministries that serve as society's safety net for the most vulnerable.

In the March 2012 ANPRM, the government admitted that its codified 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). The February 2013 NPRM would perpetuate this second-class treatment of religious charities.

By recognizing religious liberty protections for "churches," yet denying the same religious liberty protection to religious charities, the Mandate's definition of "religious employer" creates an unprecedented two-class bifurcation among religious organizations. In a letter to the HHS Secretary, one hundred twenty-five

Christian organizations, mostly Protestant, explained their objections to the government's attempt to divide the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations -- outwardly oriented and given a lesser degree of protection." The letter 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]

Until the Mandate, religious educational institutions and religious charities serving society's most vulnerable epitomized the quintessential "religious employer" and, therefore, were protected under any responsible federal definition of "religious employer." But the Mandate transformed the majority of religious employers into nonreligious employers. 78 Fed. Reg. 8456, 8461 (amended

[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.

definition will not "expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules").

The government tenaciously clings to a definition of "religious employer" that links a vital religious conscience exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as the "preferred" § 6033 organizations because many faith-based organizations are not formally affiliated with a religious congregation or denomination.[19] 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, even though its purpose, curriculum, and faculty are just as religious as the church-controlled school. Evangelical Christian institutions often are collaborative efforts across numerous denominations and intentionally independent of any specific denomination. This is true for other faiths as well. *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 under

[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 Feb. 18, 2013).

Title VII despite lack of formal affiliation with any synagogue). For no apparent reason, the government denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation.

Instead the February 2013 NPRM proposes to further narrow the "religious employer" exemption. Under the February 2012 exemption, a qualified religious employer's insurance plan arguably could include affiliated religious organizations that did not otherwise qualify for the exemption. 77 Fed. Reg. 16501, 16502. But the government now proposes to restrict the exemption solely to the qualifying religious employer and not to any affiliated organizations that are covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.")

To justify its differential treatment among religious organizations, the government claims that employees of religious non-profit organizations are less likely to share their employers' religious beliefs than are the employees of a religious organization that qualifies for the exemption. Yet no evidence is given for this unfounded assertion. Given the pay differential between most religious

non-profits and other employers, the opposite most likely is true: persons choose to work for religious non-profits because they agree with their religious employers' mission and are willing to make the necessary financial sacrifices. For example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[20]

The government is attempting to unilaterally re-define religion. Inward-focused religions are favored. Religious organizations that provide assistance to all persons, regardless of religion or creed, are penalized for their inclusivity. Charities that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded in return by a government mandate that assails their conscience rights.

C. Administration of such a narrow definition of "religious employer" violates 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

[20] According to *Amicus* Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. *See* http://www.acsiglobal.org/acsi-2012-13-school-survey.

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*, 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 its very existence, the codified "religious employer" exemption demonstrates that the government recognizes that the Mandate creates a substantial religious liberty burden on religious employers when it forces them to purchase health insurance with objectionable coverage provisions. Yet the Mandate places this identical substantial burden on many other employers with religious convictions against providing such coverage.

The Seventh and Eighth Circuits correctly framed the burden inquiry as whether requiring religious business owners to "purchase group health insurance with objectionable coverage provisions constitutes a substantial burden on their exercise of religion." *Annex Medical v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal). The Seventh Circuit explained that

"[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Korte v. Sebelius*, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal). In contrast, in denying a preliminary injunction pending appeal, the Tenth and Third Circuits incorrectly framed the "substantial burden" inquiry by stating that "the line . . . delineating when the burden on a plaintiff's religious exercise becomes 'substantial' . . . does not extend to the speculative 'conduct of third parties with whom plaintiffs have only a commercial relationship.'" *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *inj. denied*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J.) (request for Supreme Court to grant injunctive relief pending appellate review did not meet "demanding standard for the extraordinary relief" sought at this time); *Conestoga Wood Specialties Corp. v. Sebelius*, 2013 WL 1277419 (3d Cir. Feb. 8, 2013) (denying injunction pending appeal).

The government cannot demonstrate a compelling interest, unachievable by less restrictive means, that justifies burdening religious employers' conscience rights to avoid participating in, or funding, abortion-inducing drugs and procedures

to which they have religious objections. Numerous exemptions for both secular and religious employers exist, including for employers 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 such an opaque "religious employer" definition, government officials will violate religious liberty. For example, the codified 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). 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

[21] 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).

and state." *Id.* 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.

Respectfully submitted,

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April 30, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32

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 6,988 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 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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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2013, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on those participants as follows will be accomplished by the CM/ECF system:

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