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.[1]

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable -- institutions represented by many of the *amici* -- epitomized the quintessential "religious employer" and, therefore, were protected under responsible federal definitions 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.

The Mandate's revised definition of religious employer, adopted on July 2, 2013, continues to violate religious liberty. Only churches, conventions or associations of churches, integrated auxiliaries, or religious orders fall within the Mandate's definition of religious employer. 78 Fed. Reg. 39,870 (July 2, 2013). Many, if not most, religious educational institutions and religious ministries do not qualify for the "religious employer" exemption.[2] The many religious ministries

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[1] In observing that the controversy may 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.

[2] The Seventh Circuit conflated the "religious exemption" and the so-called "accommodation" when it characterized the University of Notre Dame as "now [coming] within [the exemption's] scope." *University of Notre Dame v. Sebelius,* No. 13-3853 (7th Cir. Feb. 21, 2014) (Slip op. 5). Notre Dame and Appellants in

that are independent of, and unaffiliated with, any specific church seemingly are no longer "religious employers."

Because the government continues to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer," even religious educational institutions and religious ministries that *are* affiliated with churches do not necessarily qualify as religious employers. Secretary Sebelius stated that: "[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]

For those that fall outside of the Mandate's crabbed definition of "religious employer," the so-called "accommodation" does not offer adequate religious liberty protections. The religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. A

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this case do not qualify for the religious exemption because they are not churches. Religious organizations, including many of the *amici*, repeatedly petitioned the government to include religious institutions like Notre Dame and other religious ministries within the "religious exemption." But the government most deliberately and definitely refused to extend the exemption to Notre Dame University and other religious non-profit organizations. 78 Fed. Reg. at 8458-59. *See* pp. 12-20, *infra*.

[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) (last visited Sept. 16, 2013) (emphasis supplied). The enforcement date was delayed until January 1, 2014. 78 Fed. Reg. 39,870 (July 2, 2013).

religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees. The government's argument rests on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences.

The government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality. As a practical matter, 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

[4] *See* 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 Sept. 16, 2013).

coverage through state and federal health exchanges; and 4) programs to 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 "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.

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. As a constitutional matter, both the Religious Freedom Restoration Act and the First Amendment require that the government 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.