No. 13-1118

United States Court of Appeals
For the Eighth Circuit

ANNEX MEDICAL, INC.; STUART LIND; TOM JANAS,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

Appeal from the United States District Court for the
District of Minnesota, in No. 12-2804,
Hon. David S. Doty, District Judge, Presiding

BRIEF AMICUS CURIAE OF THE MINNESOTA CATHOLIC CONFERENCE IN SUPPORT OF APPELLANTS AND REVERSAL

NOEL J. FRANCISCO
RYAN D. NEWMAN
DAVID T. RAIMER
JENNIFER BRADLEY LICHTER
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: njfrancisco@jonesday.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Minnesota Catholic Conference discloses that it has no parent corporation and is a nonprofit entity that issues no stock. Accordingly, no publicly held corporation owns 10% or more of its stock.

/s/ Noel J. Francisco
NOEL J. FRANCISCO

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

The Minnesota Catholic Conference (MCC) is the official public policy voice of the Catholic Church in Minnesota regarding state and national matters. Its board of directors is comprised of the active bishops of Minnesota's six Catholic dioceses, as well as the retired bishops emeritus of those same dioceses. Those dioceses, in turn, are communities of Roman Catholics that provide a wide range of spiritual, educational, and social services to residents throughout the state of Minnesota.

The regulations at issue here (the "Mandate"), which require the provision of insurance coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling, force Catholic business owners to choose between facilitating services and speech that violate their religious beliefs or exposing their companies to devastating penalties. In particular, the Catholic Church prohibits not only the use of contraceptives, but also considers subsidizing or facilitating the use of these products and services by others in the manner required by the Mandate to be impermissible cooperation in an act that violates the universal moral law, and thus forbidden. Here, the court effectively treated the

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person, other than the amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

Mandate's requirement that Appellants subsidize and facilitate access to prohibited products and services as a de minimis—or insubstantial—violation of Catholic beliefs. As explained below, that is plainly wrong. Perhaps more importantly, it constitutes a judicial usurpation of the role of local bishops, including MCC's board of directors, which, unlike the courts, are the authorities responsible for the accurate proclamation of Catholic teaching within their respective dioceses. This, in turn, caused the court to improperly conclude that the Mandate does not impose a substantial burden on Appellants' religious exercise under the Religious Freedom Restoration Act ("RFRA"). Because the Constitution ensures that private citizens and religious institutions—not federal courts—are the ultimate arbiters of matters of faith, MCC has a unique interest in ensuring the proper application of the substantial burden test.

STATEMENT OF THE CASE

Under the auspices of the Patient Protection and Affordable Care Act, Appellees enacted a Mandate requiring group health plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 75 Fed. Reg. 41,726 (July 19, 2010). Failure to provide health insurance is punishable by annual fines of $2,000 per employee for employers with more than fifty employees, 26 U.S.C. § 4980H(a), (c)(1), or daily fines of $100 per

affected beneficiary if any employer provides health insurance without the mandated coverage, *id.* § 4980D(b). Although a narrow category of "religious employers" is exempt from the Mandate, that exemption cannot benefit for-profit entities, such as Appellant Annex Medical, Inc., or Catholic owners of such entities, such as Appellant Stuart Lind.

In response to the public uproar over the Mandate, the Government announced (1) a temporary safe harbor for nonexempt, nonprofit religious employers,[2] and (2) an intention to "propose and finalize a new regulation" to attempt to address "religious objections."[3] The Government thereafter issued an Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a Notice of Proposed Rulemaking ("NPRM"), 78 Fed. Reg. 8456 (Feb. 6, 2013), seeking comments on how to structure this proposed "accommodation." Neither the ANPRM nor the NPRM, however, offers any relief to for-profit institutions.

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[2] Press Release, U.S. Dep't of Health & Human Servs., 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.

[3] White House, Office of the Press Secretary, 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.

Accordingly, Appellants filed suit, alleging violations of, *inter alia*, RFRA and the First Amendment. In denying Appellants' request for a preliminary injunction, the court expressly declined to "determine whether a secular, for-profit corporation, such as Annex, is capable of exercising religion" within the meaning of RFRA. *Annex Med., Inc. v. Sebelius,* No. 12-2804, 2013 WL 101927, at *5 n.9 (D. Minn. Jan. 8, 2013). Thus, applying the same analysis it presumably would adopt with respect to a nonprofit entity—such as a Catholic diocese—the court concluded that the Mandate imposes no cognizable burden on Appellants' religious beliefs. *Id.* at *4–5. Appellants appealed, and this Court granted them an injunction pending appeal. *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's holding that the Mandate does not substantially burden the religious exercise of objecting individuals or the businesses they own rests on a fundamentally flawed understanding of the substantial burden test. Although a minority view,[4] the court's analysis nonetheless mirrors that of several courts that

[4] Courts in twelve cases, including this Court, have given preliminary relief to plaintiffs like Appellants. *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *see also Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Korte v.*

have improperly conflated RFRA's "religious exercise" and "substantial burden" inquiries.

RFRA requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In identifying the relevant exercise of religion, a court must accept the "line" drawn by plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs.

Here, the district court ignored this straightforward two-step analysis. Rather, it claimed that "the Mandate places only a de minimis, not substantial,

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Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. 50); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

burden on plaintiffs' practice of religion," because Appellants would subsidize their employees' use of contraceptives only "'after a series of independent decisions by health care providers and patients covered by [Appellants'] plan.'" *Annex*, 2013 WL 101927, at *4–5 (quoting *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-0476, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012)). This, however, is not an evaluation of the pressure placed on Appellants to modify their behavior. Instead, it is a *religious* judgment that compliance with the Mandate does not really violate Appellants' beliefs—or that it violates those beliefs only in a "de minimis" way. Other courts have made similar mistakes, erroneously concluding—despite plaintiffs' protestations to the contrary—that compliance with the Mandate does not violate objectors' religious beliefs, or at least, that it does not *substantially* violate those beliefs.[5]

[5] *See, e.g.*, *Gilardi v. Sebelius*, No. 13-104, 2013 WL 781150 (D.D.C. Mar. 3, 2013); *Briscoe v. Sebelius*, No. 13-cv-00285, 2013 U.S. Dist. LEXIS 26911, at *15–19 (D. Colo. Feb. 27, 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *10–14 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144, 2013 U.S. App. LEXIS 2706, at *6 (3d Cir. Jan. 29, 2012) (denying injunction pending appeal); *Grote Indus., LLC v. Sebelius*, No. 12-00134, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012*), appeal docketed*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (same). Some courts have even suggested plaintiffs' religious beliefs would not be violated so long as they themselves refrain from using the

Whatever the merits of these courts' moral views, these quintessentially religious inquiries lie well beyond judicial competence. In each case, the error is the same: courts viewed the word "substantial" as requiring an inquiry into the nature of the employer's religious beliefs, rather than an inquiry into the degree of pressure the Mandate places on the objecting employer to violate its beliefs. But the question for a federal court is not whether compliance with the Mandate is a substantial violation of an objecting employer's beliefs; instead, the question is whether compliance with the Mandate substantially pressures the objecting employer to violate its beliefs.

This subtle, yet radical, transformation of the substantial burden analysis from a measure of the government's coercive mechanism into a judicial exploration of moral theology runs contrary to black-letter law. Simply put, "[i]t is not within the judicial function and judicial competence" to determine whether a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982) (internal quotation marks omitted). Although courts can

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objectionable items. *See, e.g.*, *O'Brien*, 2012 WL 4481208, at *4–6. Others have reasoned that providing the mandated coverage is no more morally problematic than providing employees a salary with which they can obtain contraceptives. *See, e.g.*, *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *appeal docketed*, No. 12-2673, 2012 U.S. App. LEXIS 26736, at *4 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal).

question whether the *pressure* placed on individuals to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action in fact transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that the Mandate places substantial pressure on Appellants to cross that line. As noted above, Catholic doctrine prohibits Appellants not just from themselves using abortion-inducing drugs, contraceptives, sterilization services, and related education and counseling; in addition, it also considers subsidizing or facilitating the use of these products and services by others in the manner required by the Mandate to be impermissible cooperation in an act that violates the universal moral law, and thus forbidden. The Mandate thus forces Appellants to do precisely what Catholic teaching forbids. It is therefore beyond question that the Mandate imposes a substantial burden on Appellants' religious exercise. This burden, moreover, cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

Accordingly, the district court's denial of the requested injunction should be reversed.

ARGUMENT

I. THE DISTRICT COURT FUNDAMENTALLY MISUNDERSTOOD THE NATURE OF THE SUBSTANTIAL BURDEN INQUIRY

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral and generally applicable laws burdening religious practices did not violate the Free Exercise Clause. Repudiating *Smith*, Congress enacted RFRA "to restore the compelling interest test" set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)–(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* This initial inquiry necessarily requires courts to (1) identify the particular exercise of religion at issue and then (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute).

Here, the court below, like several others, improperly merged these steps. Instead of first identifying the religious beliefs at issue, and then assessing whether the Mandate pressures objectors to violate those beliefs, these courts have purported to assess whether the Mandate requires objectors to violate their religious beliefs at all—or at least, whether it requires them to "substantially" violate those beliefs. In doing so, they have concluded that the burden on free exercise imposed by the Mandate is "de minimis" or too "remote and attenuated" to be cognizable. *Annex*, 2013 WL 101927, at *5; *Grote*, 2012 WL 6725905, at *5; *supra* note 5.

This, however, is clear legal error. As Appellants accurately explained below, their Catholic beliefs forbid them from complying with the Mandate. By failing to accept Appellants' representations regarding their beliefs and, even more egregiously, by making an inherently religious judgment about the extent to which the Mandate violates those beliefs, the court below ran roughshod over well-established Supreme Court precedent that has repeatedly warned courts not to delve into religious matters. Once Appellants' sincerely held belief that sponsoring the mandated coverage violates Catholic doctrine is acknowledged, it becomes all too apparent that the Mandate imposes a substantial burden on Appellants' religious exercise.

A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion

RFRA defines "exercise of religion" broadly to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). An exercise of religion is a precept or practice "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted). It involves "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

Whether a particular belief or practice is religious, and thus entitled to protection, is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also Lee*, 455 U.S. at 257 (same); *Koger*, 523 F.3d at 797 (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (rejecting government attempts to question claimant's representation that a particular item

was necessary to celebrate a religious festival); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) ("accept[ing]" plaintiffs' representation that condemnation of a cemetery would be a "sacrilege"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Id.*; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."); *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so."); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."). For this reason, the Supreme Court "[r]epeatedly and in many different contexts" has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of

religious doctrine or beliefs. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As the Supreme Court recently reiterated, each religion is entitled to "shape its own faith," free of judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

Given their "profound limitation[s]" regarding judgments about religious matters, courts have generally recognized that judicial competence only "extends to determining 'whether the beliefs professed by a claimant are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick*, 745 F.2d at 157 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)); *see also Ali*, 682 F.3d at 710–11 (finding error when the district court questioned claimant's "interpretation of Islamic doctrine" instead of "simply evaluating whether her practice was rooted in her sincerely held religious beliefs"); *Colvin v. Caruso*, 605 F.3d 282, 298 (6th Cir. 2010) ("[T]he touchstone for determining whether a religious belief is entitled to free-exercise protection is an assessment of 'whether the beliefs professed are *sincerely held*,' not whether 'the belief is accurate or logical.'" (citation omitted)); *Jolly*, 76 F.3d at 476 (same). The notion that a federal court would don ecclesiastical robes and purport to tell citizens that they do not correctly perceive the tenets of their faith is entirely foreign to American law.

Yet that is exactly what the district court below purported to do. Without disputing the sincerity of Appellants' beliefs, the court conducted its own analysis

of whether compliance with the Mandate would transgress the precepts of Catholic doctrine. *Annex*, 2013 WL 101927, at *4–5. In doing so, it held that any violation of Appellants' beliefs was "de minimis," and thus insubstantial, because Appellants would subsidize their employees' use of contraceptives only "'after a series of independent decisions by health care providers and patients covered by [Appellant's] plan.'" *Annex*, 2013 WL 101927, at *4–5 (quoting *O'Brien*, 2012 WL 4481208, at *6). The district court, however, had no authority to disregard Appellants' representations regarding their religious beliefs simply because those beliefs prohibit them from "'indirect[ly]'" facilitating access to abortion-inducing drugs, contraceptives, and sterilization. *Id.* at *4. Indeed, the Supreme Court has squarely rejected such analysis.

For example, in *Thomas*, the Court held that the denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his pacifist convictions as a Jehovah's Witness. 450 U.S. at 713–18. Rather than questioning whether working in a factory—as opposed to being handed a gun and sent off to war—was too "remote and attenuated" a breach of those beliefs, the Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Likewise, in *Lee*, the Court rejected the Government's contention that payment of social security taxes into the general treasury was too indirect a

violation to "threaten the integrity of" the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the Amish's own representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257.

Like the Supreme Court in *Thomas* and *Lee*, the district court should have accepted at face value Appellants' earnest belief that providing the mandated coverage would violate the tenets of their faith. The question that the district court should have asked and answered, therefore, is whether the penalties for failing to provide that coverage would substantially pressure Appellants to abandon their religious convictions. But instead of assessing whether the Mandate substantially *burdens* Appellants' religious beliefs, the court stepped into the shoes of Appellants' local bishop and assessed whether the Mandate substantially *violates* those beliefs.[6] In other words, rather than analyzing whether the Mandate puts substantial pressure on Appellants to abandon their religious opposition to providing the mandated coverage—as it should have done—the court evaluated

[6] It is no answer to claim, as some courts have, that a substantial "burden *must* be 'substantial' to trigger strict scrutiny." *Korte*, 2012 WL 6553996, at *10. This is, of course, entirely true. But this tautology does not give courts license to evaluate the *substance* of plaintiffs' religious beliefs. Rather, it empowers them only to determine whether the Mandate "put[s] substantial pressure on [plaintiffs'] to modify [their] behavior and to violate [their] beliefs." *Thomas*, 450 U.S. at 717–18.

whether compliance with the Mandate amounted to a significant violation of Appellants' religious beliefs.

This distinction is not without a difference: the former analysis involves an exercise of *legal* judgment, while the latter analysis involves an inherently *religious* inquiry into whether, in the court's view, providing the objectionable coverage constitutes a "'slight,'" as opposed to a "substantial," violation of Appellants' beliefs. *Annex*, 2013 WL 101927, at *5 (quoting *O'Brien*, 2012 WL 4481208, at *6). "[T]he Court," however, "is in no position to declare that acting through [their] company to provide certain health care coverage to [their] employees does *not* violate [Appellants'] religious beliefs. They are, after all, [*their*] religious beliefs." *Monaghan*, 2012 WL 6738476, at *3. If Appellants interpret the "creeds" of Catholicism to prohibit provision of the mandated coverage, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699. Ultimately, courts simply have no competence to determine the point at which degrees of separation render conduct religiously permissible. The question of whether providing insurance coverage constitutes illicit facilitation of prohibited practices is one for religious authorities and individuals, not the courts. *See supra* pp. 12–13. Here, Appellants' answer to

that question must be respected, regardless of whether a court finds it to be "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714.[7]

Nor can it be argued that the burden is too attenuated because the Mandate merely requires Appellants to subsidize "'*someone else's* participation in an activity that is condemned by plaintiffs' religion.'" *Annex*, 2013 WL 101927, at *4

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[7] For similar reasons, courts lack authority to make the *religious* claim that "the contribution to a health care plan has no more than a de minimus [sic] impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees," which they may then use to purchase contraceptives. *O'Brien*, 2012 WL 4481208, at *7; *see also Autocam*, 2012 WL 6845677, at *6. As the *Newland* court remarked, this "argument requires impermissible line drawing, and [should be] reject[ed] out of hand." 881 F. Supp. 2d at 1296 n.9. Even were the line between salary and health insurance "unreasonable," it would not be for a court to second guess an employer that had drawn that line. *See Thomas*, 450 U.S. at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate turrets for tanks).

But in any case, the line here is eminently reasonable. Employees may use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary simply belongs to the employee, and the employer has no input into its use. But when an employer purchases contraceptive coverage, it effectively hands its employees a free ticket that can only be redeemed for those drugs or devices. Under those circumstances, there is a specific line item in the health plan provided by the employer entitling its employees to contraceptives, and the employer's premiums necessarily go toward paying for them. The employer is thus made complicit in the purchase of products to which it objects. *See* Comments of U.S. Conference of Catholic Bishops at 12 (May 15, 2012), *available at* http://www.usccb.org/about/ general-counsel/rulemaking/upload/ comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf. In that respect, mandating that employers purchase objectionable coverage for their employees is qualitatively different from leaving it to the employees to use their paychecks as they see fit.

(quoting *O'Brien*, 2012 WL 4481208, at *6). Indeed, the assertion that RFRA's protections are inapplicable whenever the religious belief at issue forbids aiding and abetting activities by others is, to put it mildly, astounding.[8] In any event, Supreme Court precedent is clear: courts must accept plaintiffs' sincere representations regarding the nature of their beliefs. *See, e.g.*, *Thomas*, 450 U.S. at 715. It is wholly immaterial that the particular beliefs at issue prohibit the facilitation of illicit acts by others.

Here, in accordance with Catholic doctrine, "it is the coverage, not just the use, of [contraceptives] to which the plaintiffs object." *Tyndale*, 2012 WL 5817323, at *13. Accordingly, "it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties." *Id.* (rejecting "the proposition that a plaintiff can never demonstrate that its religious exercise is substantially burdened by a law that forces it to pay for services to which it objects

[8] This concept of responsibility for an act committed by another is not unique to the Catholic faith. Indeed, it is the basis for the federal statute criminalizing acts that "aid" or "abet" the commission of a crime by another. 18 U.S.C. § 2. Just as an individual may be held accountable for aiding and abetting a crime even if he did not personally commit it, so too may a Catholic act in violation of the moral law if he cooperates in the commission by others of acts that are contrary to Catholic beliefs. The same applies to Catholic entities, which bear a particular responsibility to witness to the Church's teachings and which commit the further offense of giving scandal when they act in a way inconsistent with those teachings. *See* Catechism of the Catholic Church ¶¶ 2284–87.

that are ultimately chosen and used by third parties"); *see also Korte*, 2012 WL 6757353, at *3 ("The 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 contraceptives or related services."); *Grote*, 2013 WL 362725, at *3 (same).

To be sure, Appellants are not themselves "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 2012 WL 4481208, at *6, but for purposes of this Court's inquiry, *it is equally improper* to require them to do that which is forbidden by Catholic doctrine—namely, complying with the Mandate to facilitate the use of contraception, abortion-inducing drugs, and sterilization procedures by others. *Cf. Sherbert*, 374 U.S. at 404 ("Governmental imposition of such a choice [like that facing Appellants] puts the same kind of burden upon the free exercise of religion as would a fine imposed [for] Saturday worship."). After all, by its very terms, RFRA protects "*any* exercise of religion." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

It is likewise error to assert, as some courts have done, that exempting employers from covering religiously-objectionable services would be tantamount to imposing the employers' beliefs on their employees. *See, e.g.*, *Grote*, 2012 WL 6725905, at *6. Observing that RFRA "is not a means to force one's religious practices upon others," these courts have concluded that "RFRA does not protect

against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien*, 2012 WL 4481208, at *6. Needless to say, the refusal to pay for services that violate one's religion hardly forces one's religious practices upon others. Indeed, the court's suggestion gets things exactly backwards. Appellants' employees remain free to use whatever services they want whether Appellants pay for it or not. But the Mandate forces Appellants to pay for the choices of their employees, even though doing so conflicts with Appellants' sincerely held religious beliefs.

It should come as no surprise, therefore, that the district court's misguided reading of RFRA runs contrary to the statute's legislative history, which confirms that Congress enacted RFRA precisely to prevent the Government from compelling persons and organizations to provide religiously-objectionable services to others. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute safeguarded "such familiar practices" as "permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of Nadine Strossen, President, Am. Civ. Liberties Union). Members of Congress made similar statements on the floor. 139 Cong. Rec. 9685 (1993)

(statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same). Ultimately, there can be little doubt that RFRA does protect individuals and entities from being forced to facilitate the use of religiously-objectionable services by others.[9]

In the end, by concluding that compliance with the Mandate would only amount to a "de minimis" violation of Appellants' sincerely held beliefs, the court engaged in a fundamentally religious inquiry. This was clear error. Instead, the district court should have accepted Appellants' representation that their religious beliefs precluded them from providing such coverage. The only relevant question

[9] Insofar as the court held that Appellants' religious beliefs were not violated because they could express opposition to contraception through other means, *Annex,* 2013 WL 101927, at *4, that conclusion again misinterprets the nature of Appellants' religious beliefs. This is not a circumstance where believers merely want to express a religious viewpoint and the government has limited the channels by which that viewpoint can be expressed. *Cf. Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011). Rather, Appellants are being forced to take action they affirmatively believe to be wrong. *See, e.g.*, *Thomas*, 450 U.S. at 713–18 (concluding that compelling plaintiff to take action that would violate his pacifist beliefs imposed a substantial burden, without analyzing whether his beliefs could be expressed in other ways, such as participation in antiwar demonstrations); *cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15–16 (1986) (plurality op.) (refusing to force objectors "to affirm in one breath that which they deny in the next"). No amount of counter-speech can cure that harm.

for the court should have been whether the Mandate imposes substantial pressure on Appellants to violate those beliefs.[10] As explained below, it plainly does.

B. The Mandate Imposes a Substantial Burden on Appellants' Religious Beliefs

Once Appellants' religious exercise is properly identified, the substantial burden analysis is straightforward. Although RFRA does not itself define "substantial burden," courts routinely apply the standard found in pre-*Smith* cases like *Yoder* and *Sherbert.* Thus, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs" on threat of penalty, *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18; *Ali*, 682 F.3d at 711 ("[A]n order requiring someone either to act affirmatively in violation of a sincerely held religious belief or face criminal penalties substantially burdens the free exercise of religion.").

[10] This standard does not give religious actors carte blanche to exempt themselves from federal law. Courts still must evaluate whether (1) the religious belief is sincerely held, (2) the law places "substantial pressure" on adherents to modify their beliefs; (3) the Government has a "compelling interest" in the law; and (4) the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b); *supra* p. 13. Likewise, courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715. None of those circumstances, however, are at issue here.

Here, the Mandate plainly puts substantial pressure on Appellants to violate their religious beliefs. If Appellants offer their employees health care but fail to include the mandated coverage, then they face a penalty of $100 per affected beneficiary for each day of noncompliance. 26 U.S.C. § 4980D(b). If they choose to drop their health coverage to avoid these penalties, they would likewise violate their religious beliefs, which they assert "compel[them] to purchase health insurance for Annex Medical's employees." *Annex*, 2013 U.S. App. LEXIS 2497, at *9 n.3. Thus, to avoid the penalties, Appellants must either violate their religious beliefs by providing the mandated coverage, or violate their religious beliefs by dropping coverage altogether. The pressure the fines impose therefore is the epitome of a substantial burden.[11] The potential magnitude of the fines makes the burden all the more apparent, as the Supreme Court has found that a penalty as low as $5 can impose a substantial burden. *Yoder*, 406 U.S. at 208, 218.

In short, putting Appellants to the choice of breaching their faith or paying a penalty creates precisely the sort of pressure to abandon sincerely held religious beliefs that constitutes a substantial burden.[12]

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[11] The absence of this analysis from the district court's opinion provides further evidence that it erroneously assessed the substance of Appellants' beliefs, rather than the pressure placed on them to violate those beliefs.

[12] The result is no different if the Seventh Circuit's articulation of the substantial burden test for use in RLUIPA cases, cited below by the district court,

II. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY

Because the Mandate substantially burdens Appellants' religious exercise, the Government must prove it furthers "a compelling governmental interest" through "the least restrictive means." 42 U.S.C. § 2000bb-1(b). As Appellants persuasively explain, the Government has not remotely carried its burden of proof. *See* Appellants' Br. at 36–57.

A. The Government Cannot Demonstrate a Compelling Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*,

(continued…)

is applied. By putting Appellants to the inescapable choice of financial ruin or violating their beliefs, the Mandate has a "direct, primary, and fundamental responsibility for rendering [their] religious exercise" "effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

546 U.S. at 431. The Government, therefore, cannot rely on blithe assertions of generalized interests, but rather must show a compelling interest in dragooning Appellants—"the particular claimant[s] whose sincere exercise of religion is being substantially burdened"—into being the instruments by which its purported goals are advanced. *O Centro*, 546 U.S. at 430–31; *Tyndale*, 2012 WL 5817323, at *15 (same). Ultimately, the Government must establish an interest so compelling that it can require Appellants to take actions they would otherwise find anathema. This, it cannot begin to do.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297–98. Here, the Government cannot claim an interest of the "highest order" where it exempts millions of employees from the Mandate through the Act's grandfathering provisions. In other words, the Government cannot plausibly maintain that Appellants' employees must be provided with the mandated coverage when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that

"if you like your plan, you can keep it."[13] An interest is hardly compelling if it can be trumped for reasons of political expediency. Such a broad exemption "completely undermines any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *see also Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *70–72 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 2012 WL 5817323, at *18.

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar

[13] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

exception for" the religious use of *hoasca*. *Id.* Likewise, "everything the Government says" about its interests in requiring Appellants to provide the mandated coverage "applies in equal measure" to entities that meet the Mandate's definition of "religious employer."

Finally, the Government's interest cannot be compelling where, at best, the Mandate would only "[f]ill[a] modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). Indeed, the Government's own admissions demonstrate that the Mandate creates a solution in search of a problem. The Government acknowledges that contraceptives are widely available and covered by "over 85 percent of employer-sponsored health insurance plans," 75 Fed. Reg. at 41,732; Press Release, *supra* note 2. In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

B. The Government Cannot Demonstrate That the Mandate Is the Least Restrictive Means to Accomplish Its Asserted Interests

Finally, the Government cannot show that the Mandate is the least restrictive means of achieving its interests. Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected

activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

Here, the Government has myriad ways to achieve its interests without burdening Appellants' beliefs. MCC in no way recommends these alternatives, and, indeed, opposes many of them as a matter of policy. The fact, however, that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Appellants to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (i.e., Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's

failure to consider these alternatives is fatal, as strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

CONCLUSION

The district court's position is clearly, and dangerously, wrong. Under its analysis, federal courts, not individuals or religious institutions, would be the ultimate arbiters of matters of faith and morals. If correct, the Government in principle would be free not only to require employers to provide coverage for contraceptives, but also to force them to cover surgical abortions or assisted suicide—these burdens, too, would apparently only amount to a "de minimis" violation of religious beliefs. And because the district court's analysis applies with equal force to nonprofit organizations, this would mean that even entities such as Catholic dioceses would not be able to challenge such gross infringements of religious liberty. This is not, and cannot possibly be, the law. Indeed, RFRA was enacted precisely to prevent such oppressive governmental action. The district court's judgment should therefore be reversed.

March 14, 2013

Respectfully submitted,

/s/ Noel J. Francisco
NOEL J. FRANCISCO

RYAN D. NEWMAN
DAVID T. RAIMER
JENNIFER BRADLEY LICHTER
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: njfrancisco@jonesday.com

Counsel for Amicus Curiae

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I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

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March 14, 2013

/s/ Noel J. Francisco
NOEL J. FRANCISCO

Counsel for Amicus Curiae

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March 14, 2012

/s/ Noel J. Francisco
NOEL J. FRANCISCO

Counsel for Amicus Curiae

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I hereby certify that, on the 14th day of March, 2013, I electronically filed the original of the foregoing document with the clerk of this Court by email. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

March 14, 2013

/s/ Noel J. Francisco
NOEL J. FRANCISCO

Counsel for Amicus Curiae