NOS. 14-1418, -1453, -1505, 15-35, -105, -119, & -191

In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners,
v.
SYLVIA BURWELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

BRIEF OF THE THOMAS MORE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Erin Elizabeth Mersino
Counsel of Record
Kate Oliveri
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
emersino@thomasmore.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Government violates the Religious Freedom Restoration Act ("RFRA") by forcing objecting religious non-profit organizations to comply with the HHS Mandate under an alternative regulatory scheme (hereinafter the "accommodation") that requires these organizations to act in violation of their sincerely held religious beliefs.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE* 1

BACKGROUND 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. THE HHS MANDATE SUBSTANTIALLY BURDENS PETITIONERS' RELIGIOUS EXERCISE BY REQUIRING THEM TO PARTICIPATE IN, FACILITATE, AND TRIGGER THE DISTRIBUTION OF CONTRACEPTIVES AND ABORTIFACIENTS IN VIOLATION OF PETITIONERS' SINCERELY HELD RELIGIOUS BELIEFS . . . 8

II. THE "ACCOMMODATION" FAILS TO USE THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST AS THE HHS MANDATE ITSELF CONTEMPLATES LESS RESTRICTIVE ALTERNATIVES AND EXEMPTS MILLIONS OF HEALTH PLANS FROM ITS PURPORTED COMPELLING INTEREST 13

A. The "Accommodation" is Not the Least Restrictive Means of Providing Free Contraceptives and Abortion Causing Drugs and Devices 14

B. Providing Free Contraceptives and Abortifacients is Not a Compelling Government Interest 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983) 16

Ave Maria Found. v. Burwell,
No. 14-1310 (6th Cir.) 2

Bowen v. Roy,
476 U.S. 693 (1986) 9, 10

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) . . . . . *passim*

Church of Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 19

City of Boerne v. Flores,
521 U.S. 507 (1997) 13

E. Tex. Baptist Univ. v. Burwell,
793 F.3d 449 (5th Cir. 2015) 11

Geneva Coll. v. Sec'y United States HHS,
778 F.3d 422 (3d Cir. 2015) 11

Griswold v. Connecticut,
381 U.S. 479 (1965) 17

Legatus v. Burwell,
No. 14-1183 (6th Cir.) 2

Little Sisters of the Poor Home for the Aged v. Burwell,
794 F.3d 1151 (10th Cir. 2015) 4, 11

Lyng v. Northwest Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 9, 10, 18

Priests for Life v. United States HHS,
772 F.3d 229 (D.C. Cir. 2014) 11

Riley v. Nat'l Fed'n of Blind,
487 U.S. 781 (1988) 14

Thomas v. Review Bd. of Indian Employment Security Div.,
450 U.S. 707 (1981) 6, 8, 9, 10

CONSTITUTION

U.S. Const. amend. I 10

STATUTES AND REGULATIONS

4 C.F.R. § 59.5 . . . . . 7, 14

26 U.S.C. § 4980D(a) 3

26 U.S.C. § 4980D(a)-(b) 3

26 U.S.C. § 4980D(b) 5

26 U.S.C. § 4980H(a) 3, 5

26 U.S.C. § 4980H(c)(1) 3, 5

26 U.S.C. § 4980H(c)(2) 3, 7

26 U.S.C. § 4980H(c)(2)(A) 3

26 U.S.C. § 6033(a)(3)(A)(i) 4, 15, 17, 18

26 U.S.C. § 6033(a)(3)(A)(iii) 4, 15, 17, 18

42 U.S.C. § 300gg-13(a) 2

42 U.S.C. § 300gg-13(a)(4) 3, 17

42 U.S.C. § 2000bb *et seq*. . . . . *passim*

42 U.S.C. § 2000bb-1 8

42 U.S.C. § 2000bb-1(a) 10

42 U.S.C. § 2000bb-1(b) 14

42 U.S.C. § 2000cc-5(7)(A) 8

42 U.S.C. § 18011(a) 7

42 U.S.C. § 18011(a)(2) 3, 4, 17

42 U.S.C. § 18011(e) 7

45 C.F.R. § 147.131(a) 7

45 C.F.R. § 147.131(b) 7

45 C.F.R. § 147.140 . . . . . 4, 17

75 Fed. Reg. 34540 . . . . . 7, 8, 17

77 Fed. Reg. 8725 . . . . . *passim*

78 Fed. Reg. 37874 4

78 Fed. Reg. 39877 12

79 Fed. Reg. 51092 5

RULES

Sup. Ct. R. 37 1

Sup. Ct. R. 37(a) 1

OTHER AUTHORITIES

Family Planning Annual Report: 2011 National Summary, *available at* http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf 7, 15

F.D.A. Birth Control: Medicines to Help You, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm#EC 3

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, the Thomas More Law Center, respectfully submits this brief requesting that the Court defend and protect the free exercise of religion as required by RFRA.[1]

The Thomas More Law Center ("TMLC") has a significant interest in the protection of religious freedom. TMLC is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of all human life from the moment of conception to natural death. TMLC accomplishes its mission through litigation, education, and related activities.

TMLC has over 60,000 members nationwide. TMLC and its members support the preservation and protection of all human life, in part because of religious beliefs. TMLC, therefore, opposes the HHS Mandate that forces religious entities and individuals to provide, facilitate, trigger, and participate in a scheme that

---

[1] Petitioners and Respondents have granted blanket consent for the filing of *amicus curiae* briefs in this matter. Pursuant to Rule 37(a), *Amicus* gave 10-days notice of its intent to file this *amicus curiae* brief to all counsel. *Amicus* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this *amicus* brief.

results in the use of contraceptives and abortifacients. TMLC is a non-profit that believes its exercise of religion is substantially burdened by the requirements of the HHS Mandate even with the non-profit "accommodation." TMLC believes that participation in the "accommodation" requires its cooperation in a scheme that directly violates its sincerely held religious beliefs. Furthermore, failure to abide by the HHS Mandate results in the assessment of crippling IRS penalties—forcing TMLC and other religious non-profit entities to either close their doors or kneel at the altar of the government's "accommodation" and violate their religious beliefs by being complicit in the government's scheme to provide contraceptives and abortion causing drugs and devices.

TMLC has filed twelve lawsuits against the illegal aims of the HHS Mandate, representing thirty-six plaintiffs. TMLC currently represents six religious non-profit employers and is a named plaintiff challenging the "accommodation" as an unlawful overreach of federal authority under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq*. *Legatus v. Burwell*, No. 14-1183 (6th Cir.); *Ave Maria Found. v. Burwell*, No. 14-1310 (6th Cir.). These cases have been consolidated and are currently stayed in the Sixth Circuit Court of Appeals pending the outcome here.

BACKGROUND

The Patient Protection Affordable Care Act ("ACA") requires non-exempt companies, including religious non-profit organizations, with over 50 employees to provide coverage for women's "preventative care and screenings" without cost sharing. 42 U.S.C. § 300gg-

13(a). While an employer with fewer than 50 employees is not required to provide insurance coverage, should one choose to do so, the employer is required to include "preventative care." Congress itself did not define what was included in "preventative care," instead transferring the authority to define "preventative care" to the Health Resources and Services Administration ("HRSA"), a component of the Health and Human Services Department ("HHS"). *See* 42 U.S.C. § 300gg-13(a)(4). HRSA included all Food and Drug Administration ("FDA") approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" in its definition of "preventative care," thereby mandating that employers provide these services without cost sharing. 77 Fed. Reg. 8725 ("HHS Mandate"). These FDA approved contraceptives include abortion causing drugs ("abortifacients"). *See* F.D.A. Birth Control: Medicines to Help You, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm#EC (describing how IUDs and "emergency contraception" stop a fertilized egg from implanting in the mother's uterus). Failure to comply with the HHS Mandate exposes employers to fines of $100 a day per beneficiary. *See* 26 U.S.C. § 4980H(a), (c)(2)(A); 26 U.S.C. § 4980D(a)-(b). Removing all health coverage subjects employers to substantial annual penalties of $2,000 per employee. 26 U.S.C. § 4980H(a), (c)(1). These monumental fines would necessitate closing the doors of most, if not all, non-profits.

Companies with "grandfathered plans"—plans with at least one person continuously enrolled in the plan since March 23, 2010 with no changes to the plan—are

exempt from the HHS Mandate. 42 U.S.C. § 18011(a)(2), 45 C.F.R. § 147.140. There is also an extremely limited exemption for religious employers, which includes only "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activity of any order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

In a failed effort to avoid substantially burdening the religious exercise of non-profits that fall outside the narrow "religious employer" exemption, a non-profit organization receives an "accommodation" from directly providing contraceptives and abortifacients if it:

> (1) Opposes providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria.

78 Fed. Reg. 37874. The self-certification requires the employer to inform its third-party administrator ("TPA") of the TPA's obligation to provide contraceptive and abortifacient coverage. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1163 (10th Cir. 2015). Alternatively, the objecting non-profit can submit a written notice to HHS that contains:

> (1) the name of the eligible organization and the basis on which it qualifies for an accommodation; (2) its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services . . . (3) the plan name and type . . . and (4) the name and

> contact information for any of the plan's third party administrators and health insurance issuers.

79 Fed. Reg. 51092.

Respondents' regulations require non-profit organizations to notify either their insurer or TPA of their belief on the immorality of contraceptives and abortifacients. This thereby triggers the insurer or TPA to send written notice to all employees that contraceptives and abortifacients are available to them without cost sharing and triggers the insurer or TPA's obligation to provide those services without cost sharing. If the organization instead chooses to notify HHS, it must provide it with all of the required information to notify the insurer or TPA of their obligation now to provide services Petitioners believe are morally reprehensible. These options are considered an "accommodation" for non-profits' religious beliefs.

Petitioners and countless other non-profit employers sincerely believe that contraceptives and abortifacients are immoral. Despite this sincere belief, Respondents' regulations compel Petitioners to participate in the distribution of contraceptives and abortifacients, face substantial fines, or cease providing health coverage altogether, which, in addition to violating their sincere religious beliefs, also potentially imposes substantial fines. *See* 26 U.S.C. §§ 4980D(b), 4980H(a), (c)(1). This Court has already determined that the fines for noncompliance with the HHS Mandate impose a substantial burden on employers. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014). The ultimate question, therefore, is

whether compliance is actually against the Petitioners' religion. This is something that is for Petitioners to determine, not the Court.

SUMMARY OF THE ARGUMENT

Petitioners sincerely believe that contraceptives and abortifacients, *i.e.*, abortion causing drugs and devices, are morally wrong. Thus, Petitioners' faith disallows them from being complicit in the distribution of these products because it is a sin. Despite Petitioners' sincerely held religious beliefs, Respondents' regulations require Petitioners to either violate their sincere religious beliefs by participating in the distribution of contraceptives and abortifacients or pay crippling fines. The Court is not the arbiter of sacred scripture and cannot determine whether the notification form and letter are attenuated enough from the provision of contraceptives that they do not substantially burden Petitioners' religion. Delving into this inquiry requires the Court to interpret Petitioners' religious beliefs on the morality of the different levels of complicity with sin. *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 718 (1981). Therefore, the Court can only determine whether Petitioners are being compelled to do something that violates their faith—here, filling out the notification form or writing a notification letter to HHS, both of which trigger the dissemination of contraceptives and abortifacients to their employees in connection with their employee health plans. This Court has already determined that the fines Petitioners will face if they do not violate their beliefs by filling out the notifications constitute a substantial burden. *Hobby Lobby*, 134 S. Ct. at 2776.

Since the HHS Mandate places a substantial burden on the Petitioners' religious exercise, Respondents must prove that the HHS Mandate uses the least restrictive means of furthering a compelling governmental interest. Respondents fail on both accounts. First, the HHS Mandate does not use the least restrictive means of providing free contraceptives and abortifacients. As this Court already determined, the government could easily just provide free contraceptives and abortifacients without involving Petitioners or their health plans at all. *See Hobby Lobby*, 134 S. Ct. at 2780. Indeed, the government already subsidizes contraceptives and abortifacients through its programs and could find ways to expand or increase the efficacy of those existing programs. *See, e.g.,* 4 C.F.R. § 59.5; Family Planning Annual Report: 2011 National Summary, *available at* http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf.

Second, Respondents cannot argue that providing free contraceptives and abortifacients is a compelling governmental interest when their regulations leave so many women without these services. The regulations already provide exemptions for narrowly construed religious employers, employers of fewer than fifty employees, and employers with grandfathered plans. *See* 45 C.F.R. § 147.131(a), (b) (exempting some religious employers but not others); 26 U.S.C. § 4980H(c)(2) (exempting employers with fewer than fifty employees from providing health insurance altogether); 42 U.S.C. § 18011(a), (e) (exempting grandfathered plans). Grandfathered plans are required to comply with provisions of the ACA the regulations describe as "particularly significant." 75 Fed. Reg. 34540. Notably, Congress did not deem the

HHS Mandate one of the particularly significant provisions of the ACA. *Id*.

ARGUMENT

I. THE HHS MANDATE SUBSTANTIALLY BURDENS PETITIONERS' RELIGIOUS EXERCISE BY REQUIRING THEM TO PARTICIPATE IN, FACILITATE, AND TRIGGER THE DISTRIBUTION OF CONTRACEPTIVES AND ABORTIFACIENTS IN VIOLATION OF PETITIONERS' SINCERELY HELD RELIGIOUS BELIEFS

Under RFRA, the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates 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." 42 U.S.C. § 2000bb-1. RFRA protects "any exercise of religion," including providing health coverage to employees, "whether compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also Hobby Lobby*, 134 S. Ct. at 2775.

When determining that a law burdens religion, that determination cannot "turn upon judicial perception of the particular belief" and the "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [] protection." *Thomas*, 450 U.S. at 714. The Court cannot delve into the complex religious analysis of the morality of complicity with sin. *Id*. at 716 ("Courts are not the arbiters of scriptural

interpretation."). Instead, the Court must undertake the narrow function to determine whether Petitioners have an "honest conviction" that cooperation with the HHS Mandate *and* the so-called accommodation is sinful. *See id*.

In *Thomas*, this Court held that courts cannot make determinations on the reasonableness of a person's line for moral complicity where a Jehovah's Witness quit his job after being transferred to a position that required him to produce weapons. *Id*. at 715. His initial position was in the production of sheet steel, some of which was used to make weapons. *Id*. at 713 n. 3. Thomas found this position "sufficiently insulated from producing weapons of war . . . and it is not for [the Court] to say that the line he drew was an unreasonable one." *Id*. at 715. The Court could not determine whether an act by Thomas was sufficiently removed from the act he found objectionable. *Id*.

Distinguishably, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Native Americans claimed that a government road near sacred places substantially burdened their exercise of religion. *Id*. at 441-42. The Court held that this did not burden religion because it involved *only* government conduct on publically owned land. *Id*. at 448-49. Notably, the Court stressed that the individuals ***were not "coerced by the Government's action into violating their beliefs."*** *Id*. at 449 (emphasis added).

Likewise, in *Bowen v. Roy*, 476 U.S. 693 (1986), a person refused to include the social security number ("SSN") of his daughter on an application for government benefits because of his religious beliefs. *Id*. at 698. His religious objections were twofold: (1) he

objected to the government's use of the SSN; and (2) he objected to being required to put the SSN on the application for benefits. *Id*. at 699. The Court held that his first objection did not violate free exercise because he objected to *exclusively* governmental conduct which did not require him to do or prohibit him from doing anything proscribed by his beliefs. *Id*. The second objection, which required *the man* to place his daughter's SSN on the form, did not violate the free exercise of religion *under the First Amendment* because it was "wholly neutral in religious terms and uniformly applicable." *Id*. at 703. However, this reasoning was prohibited by Congress seven years later when it enacted RFRA. RFRA prohibits the government from compelling a person to engage in conduct that his religion prohibits "***even if the burden results from a rule of general applicability***." 42 U.S.C. § 2000bb-1(a) (emphasis added).

This case is like *Thomas* because both Petitioners and Thomas drew a line of demarcation as to what conduct violates their religion. *Thomas*, 450 U.S. at 715. Like in *Thomas*, the Court cannot decide whether the act the government is compelling Petitioners to complete is attenuated enough from the conduct they find sinful. *Id*. Petitioners believe that filling out the "accommodation" form or notifying HHS of their objection violates their religion. It is not for the Court to say otherwise.

This case is dissimilar to *Lyng* and *Roy* because those cases involved ***only*** government conduct and the plaintiffs were not compelled to any actions by the government. *See Lyng*, 485 U.S. at 448-49; *Roy*, 476 U.S. at 699. Here, the government is compelling

Petitioners to fill out a form or provide a detailed notification to HHS ***in direct contradiction to their religious beliefs.*** This is not exclusively government conduct. It is compulsion to actively violate their religious beliefs.

Furthermore, Respondents' argument that the HHS Mandate does not require Petitioners to be complicit with the distribution of contraceptives and abortifacients is faulty and disingenuous. The lower courts erred by finding that the insurers and TPAs were solely responsible for the distribution of contraceptives and abortifacients because of federal law, rather than any act of Petitioners. *See Geneva Coll. v. Sec'y United States HHS*, 778 F.3d 422, 437 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Priests for Life v. United States HHS*, 772 F.3d 229, 252 (D.C. Cir. 2014); *Little Sisters of the Poor*, 794 F.3d at 1173. First, it is only because of Petitioners' health plans that the insurers have the obligation to provide contraceptives and abortifacients to the *specific* persons on Petitioners' health plans. Federal law does not independently require that women receive free contraceptives and abortifacients; it is only required when those women are in a health plan. It is the federal law *in conjunction with Petitioners' health plans* that require the insurers to provide contraceptives and abortifacients to women *in Petitioners' health plans*. If Petitioners' actions were not triggering, complicity with, facilitating, or contributing to providing contraceptives and abortifacients, insurers would have to provide free contraceptives and abortifacients to all women, regardless of whether they are in a health plan or not and regardless of whether Petitioners fill out a

form. Without Petitioners' health plans, these women would not have free contraceptives and abortifacients. Without the notification to the insurers or HHS, the women would not have free contraceptives and abortifacients. Petitioners are a vital link in the causal chain of providing free contraceptives and abortifacients. This act by Petitioners is then undoubtedly complicity and undoubtedly against Petitioners' sincere religious beliefs, leaving Petitioners with the choice to either violate their beliefs or face fines this Court has already determined are substantially burdensome. *Hobby Lobby*, 134 S. Ct. at 2776.

Second, the justification for requiring insurers to provide free contraceptives and abortifacients to women clearly demonstrates the tight, dependant relationship between Petitioners' health plans and the provision of contraceptives and abortifacients. Respondents justify requiring insurers to pay for contraceptives and abortion causing drugs and devices, stating:

> [insurers] would find that providing contraceptive coverage is at least cost neutral because they would be insuring the same set of individuals under both the group health insurance policies and the separate individual contraceptive coverage policies and, as a result, would experience lower costs from improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies.

78 Fed. Reg. 39877. All of the "savings" insurers receive to justify requiring them to pay for

contraceptives and abortifacients are costs that Petitioners are willing to pay for and do insure for in their health plans. The regulations justify requiring insurers to pay for abortifacients and contraceptives by "saving" under Petitioners' health plans. The contraceptive and abortifacient coverage and Petitioners' health plans are inextricably intertwined. Petitioners' health plans necessarily cause, facilitate, and trigger contraceptive and abortifacient coverage, even under the "accommodation." Otherwise, women would receive the contraceptive and abortifacient coverage regardless of whether or not they have a health plan with a specific insurer. The relationship between Petitioners' health plans and the contraceptive and abortifacient coverage requires Petitioners to either violate their sincere, honest religious beliefs or face substantial fines. This is unquestionably a substantial burden on their religious exercise. *See Hobby Lobby*, 134 S. Ct. at 2776.

II. THE "ACCOMMODATION" FAILS TO USE THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST AS THE HHS MANDATE ITSELF CONTEMPLATES LESS RESTRICTIVE ALTERNATIVES AND EXEMPTS MILLIONS OF HEALTH PLANS FROM ITS PURPORTED COMPELLING INTEREST

Because Petitioners have a sincere religious belief that even the so-called accommodation substantially burdens, the Court must determine whether the "accommodation" survives strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997).

A. The "Accommodation" is Not the Least Restrictive Means of Providing Free Contraceptives and Abortion Causing Drugs and Devices

Under RFRA, the government must show that the "accommodation" "is the least restrictive means." 42 U.S.C. § 2000bb-1(b). The government must use alternatives to achieve its desired end even when those alternatives are more costly or less effective. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 799-800 (1988). The requirement for Respondents to use the least restrictive means is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780.

In *Hobby Lobby*, the Supreme Court listed a number of means far less restrictive than the so-called accommodation. The Court stated that the most straightforward way of providing contraceptives and abortifacients is for the government to assume the cost of providing them to any woman whose health plan does not provide them. *Id*. This cost "would be minor when compared with the overall cost of ACA." *Id*. at 2781. In fact, the government already subsidizes contraceptives and abortifacients on a large scale. Since 1970, Title X of the Public Health Service Act has provided funding for contraception and "preventive" health services that involve family planning. *See* 4 C.F.R. § 59.5. In 2011, $276 million of the $1.3 billion spent on delivering Title X-funded family planning services came directly from Title X revenue sources. Certainly forcing religious, non-profit employers, like the Little Sisters of the Poor and Priests for Life, to facilitate and trigger the supply of abortion causing drugs is more restrictive than finding a way to increase

the efficacy of an already established program that has a reported revenue stream of $1.3 billion. *See* Family Planning Annual Report: 2011 National Summary, *available at* http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf.

Additionally, this Court ultimately determined that the requirement at issue in *Hobby Lobby*—for-profit corporations being required to provide contraceptives and abortifacients without an "accommodation" or exemption—was not the least restrictive means because HHS itself provided another way through the non-profit "accommodation" at issue here. *Id*. at 2782.

Likewise, HHS itself provides another less restrictive means to the so-called accommodation—the religious employer exemption. *See Hobby Lobby*, 134 S. Ct. at 2786 ("[T]he record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised . . . that is less restrictive than the means challenged by the plaintiffs in these cases.") (Kennedy, J. concurring). Under the regulations, religious employers are completely exempt from the HHS Mandate without filling out a form or providing a detailed notification to HHS. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (providing an exemption for "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order."). "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat

both equally by offering both of them the same [exemption]." *Id*. at 2786 (Kennedy, J. concurring).

The government could offer grants, go directly to insurers, or engage in countless other options that do not involve the cooperation of Petitioners. Therefore, the so-called accommodation is not the least restrictive means of providing free contraceptives and abortifacients. When the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

B. Providing Free Contraceptives and Abortifacients is Not a Compelling Government Interest

This Court already questioned HHS's faulty assertion that providing free contraceptives and abortifacients is a compelling governmental interest. RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted). To do this, the government cannot just assert "broadly formulated interests." *Id*. The Court must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants . . . [and] look to the marginal interest in enforcing the HHS Mandate in these cases." *Id*. (internal quotation marks and brackets omitted).

While women have a right to *obtain* contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965), this does not mean they have a right to free contraceptives and abortifacients. Moreover, this right certainly does not mean that a person has the right to obtain contraceptives and abortifacients—either directly or indirectly—from their employer at the expense of pillaging the employer's religious liberty. As this Court noted, aspects of the HHS Mandate support the view that free contraceptives and abortifacients via employers are not compelling governmental interests. *Hobby Lobby*, 134 S. Ct. at 2780. For example, many employees, such as those in grandfathered plans, those who work for employers with fewer than 50 employees, and those who work for exempted religious employers, may have no contraceptive or abortifacient coverage at all. 42 U.S.C. § 300gg-13(a)(4), 42 U.S.C. § 18011(a)(2), 45 C.F.R. § 147.140, 26 U.S.C. § 6033(a)(3)(A)(i), (iii); *see also Hobby Lobby*, 134 S. Ct. at 2780. The Court expressly called into doubt the "compelling interest" of contraceptive and abortifacient coverage in light of the exemption for grandfathered plans, stating:

> the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections." 75 Fed. Reg. 34540. But

> the contraceptive mandate is expressly excluded from this subset. *Ibid*.

Id.

Notably, through the religious employer exemption, HHS has also suggested that the exercise of religion is a more compelling interest than whatever the asserted interest free contraceptive and abortifacient coverage might promote. However, HHS limits its respect for religion to only certain employers' religious beliefs. The religious employer exemption sets the religious beliefs of whomever the government deems a religious employer above the same sincerely held beliefs of religious, non-profit organizations that cannot qualify for the religious employer exemption. 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The government cannot determine that the effect of the HHS Mandate is more burdensome on churches than on other religious, non-profits. *See Lyng*, 485 U.S. at 449-50 ("This Court . . . cannot weigh the adverse effects on [a person] and compare them with the adverse effects on [another person]. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other."). The government cannot selectively choose who warrants RFRA protection; it "must apply to all citizens alike." *Id*. at 452.

Respondents already exempt millions of employer health plans from the HHS Mandate. *Hobby Lobby*, 134 S. Ct. at 2751. If free contraceptives and abortifacients are such a compelling interest, Respondents could provide these services themselves

without substantially burdening Petitioners' religious freedom. The many exemptions already provided for under the regulations necessarily destroy any argument that the HHS Mandate serves a compelling interest. As this Court stated, "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 Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 447 (1993) (internal citations omitted). Therefore, since the HHS Mandate already does not apply to millions of health plans, including some plans exempt based on religious beliefs, it does not serve a compelling governmental interest.

CONCLUSION

Therefore, this Honorable Court should reverse the decisions below in order to protect and defend the free exercise of religion guaranteed by RFRA.

Respectfully submitted,

Erin Elizabeth Mersino
Counsel of Record
Kate Oliveri
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
emersino@thomasmore.org

Counsel for Amicus Curiae