

No. 13-1118

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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ANNEX MEDICAL, INC.; STUART LIND; and TOM JANAS,  
*Plaintiffs-Appellants,*

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,  
*Defendants-Appellees.*

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**On Appeal from the United States District Court for  
the District of Minnesota – Minneapolis  
David S. Doty, United States District Judge**

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**BRIEF OF THE RIGHT REVEREND W. THOMAS FRERKING, OSB,  
AND MISSOURI ROUNDTABLE FOR LIFE AS *AMICI CURIAE* IN  
SUPPORT OF APPELLANTS AND URGING REVERSAL**

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Dated: March 14, 2013

## **CORPORATE DISCLOSURE STATEMENT**

*Amici Curiae* have not issued shares to the public, and no *Amicus* has any parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company owns 10 percent or more of stock of any *Amicus*.

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Sacred Congregation for the Doctrine of the Faith, *Responses to Questions  
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## **INTEREST OF *AMICI CURIAE***

The Right Reverend W. Thomas Frerking, OSB, is the Abbot of a monastery of Benedictine monks located in St. Louis, Missouri. Abbot Thomas was educated at Harvard University and completed his D.Phil. in Philosophy at Oxford University, where he studied as a Rhodes Scholar under the eminent Catholic moral philosopher G.E.M. Anscombe. Abbot Thomas taught on the faculty of the University of Notre Dame before becoming a Benedictine monk. Abbot Thomas brings a unique perspective to the questions of Christian moral theology implicated in this case because he has had to grapple with these issues not only as a trained theologian and ethicist, but also as the supervisor of Catholic non-profit institutions that might have been seriously affected by the challenged regulations but for regulatory exemptions.

Missouri Roundtable For Life is a Missouri nonprofit corporation whose purposes include education and advocacy on behalf of human life, especially where misunderstanding or the lack of adequate legal protection threatens human life. Missouri Roundtable For Life pursues its goals through communication with citizens and public officials; promoting legislation, regulation, and ballot initiatives; and engaging in other forms of education and advocacy. Missouri Roundtable For Life believes that protection of human life must include protection for the religious liberty and freedom of conscience of individuals and

organizations, such as Appellants, who adopt policies designed to promote and foster human life.

*Amici Curiae* file this Brief with the consent of all parties.

**STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)(5)**

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the Brief.

## SUMMARY OF THE ARGUMENT

The Mandate imposes a substantial burden on the religious liberty of Catholic employers and other religious dissenters who object on religious grounds to providing insurance coverage for abortifacients, elective sterilization, and contraceptives. This Court must defer to Appellants' interpretation of their own religion, and must accept Appellants' conclusion that compliance with the Mandate would violate their religious principles unless that conclusion is so bizarre and so clearly nonreligious in motivation as to warrant extreme judicial skepticism.

No such showing is possible in this case, because Appellants' unwillingness to comply with the Mandate reflects a reasonable and highly persuasive application of Catholic religious principles. The Roman Catholic theological tradition has well-developed concepts used to assess whether a believer may "cooperate in"—*i.e.*, facilitate or assist—the religiously objectionable action of another person. Several objective criteria, commonly invoked by the Catholic theological tradition, determine whether such cooperation would too closely associate the religious believer with the forbidden action, causing the believer to share in moral responsibility for that action. In this case, each of these criteria indicates that compliance with the Mandate would violate the religious conscience of Catholic and other religiously dissenting employers.

First, the Catholic tradition considers the gravity of the wrongdoing in which the believer may cooperate. Graver wrongdoing requires a more serious reason to justify cooperation. By mandating coverage for abortifacients, the Mandate requires Catholic employers to cooperate in the intentional destruction of human life, which is very gravely objectionable under Catholic doctrines. Catholic teaching also treats elective sterilization and contraception as seriously wrongful.

Second, the Catholic tradition considers how substantially and directly the believer contributes to the performance of the forbidden action. The more substantial and direct one's involvement, the greater one's share in the moral responsibility for that action. The Mandate requires very substantial and direct participation by Catholic employers in the forbidden actions. It requires them to finance 100 percent of the cost, and their involvement is triggered by only one intervening cause, namely the decision of the employee who seeks the objectionable services.

Third, the Catholic tradition considers whether the objectionable action would have happened anyway without the believer's participation, *i.e.*, whether the believer is a but-for cause of the objectionable action. It is particularly problematic for a Catholic believer knowingly to assist in the destruction of innocent human life when such destruction would not occur without the believer's contribution. The Mandate creates the possibility that Catholic employers may become but-for

causes of such actions. Though contraceptives, including abortifacients, are widely available at relatively low cost from other sources, the Mandate forces the employer to finance the entire cost of such services, which may result in increased usage.

Fourth, some Catholic theologians consider whether the cooperator is providing the third party with a means that is specifically designed for use in the forbidden action. One's share in the moral responsibility for that action increases if one is providing a means that is tailor-made, so to speak, to assist in the performance of the forbidden action. The Mandate requires Catholic employers to provide funding that is specifically designated in advance for the sole purpose of purchasing abortifacients, contraceptives, and sterilization services. This is similar to requiring Catholic employers to purchase "abortion coupons" for distribution to their employees.

Fifth, the Catholic tradition considers whether cooperation in the third party's forbidden action would cause "scandal" by sending a message that the believer endorses, or at least does not seriously disapprove of, the forbidden action. By compelling religious employers to provide direct financing for the use of abortifacients, the Mandate places such employers in the position of appearing to endorse these actions.

Sixth, on such matters of faith and morals, Catholic employers are called to give great deference to the teaching authority of the Catholic bishops, who have uniformly condemned the Mandate, and who had already forbidden close cooperation in abortion and sterilization procedures prior to the Mandate.

Because the Mandate requires substantial, direct, and indispensable cooperation in very gravely wrongful actions, including the intentional destruction of human life, Appellants can reasonably conclude that no proportionate reason justifies such cooperation.

Because all these criteria are satisfied, the Mandate thrusts Catholic employers into a “perfect storm” of moral complicity in the forbidden actions. It requires employers to cooperate in (1) gravely objectionable actions, (2) by making a substantial and direct causal contribution to those actions, (3) when such actions may be less likely to happen without the employers’ contribution, (4) through the provision of funds that are specifically designated in advance for the sole purpose of paying for the forbidden actions, (5) under circumstances that are likely to create the appearance of endorsement of those forbidden actions, all (6) in the face of authoritative guidance from the Catholic bishops to avoid close cooperation in such actions.

## ARGUMENT

### **I. The Mandate Imposes a Substantial Burden On the Religious Liberty of Catholic Employers Because It Compels Them To Become Morally Complicit in the Forbidden Actions of Others.**

On January 8, 2013, the district court entered an order denying the motion for preliminary injunction of Plaintiff-Appellants Annex Medical, Inc., and Stuart Lind. *Annex Medical, Inc. v. Sebelius*, No. 12-CV-2084 DSD, 2013 U.S. Dist. LEXIS 2699 (D. Minn. Jan. 8, 2013). The district court predicted that plaintiffs would fail to demonstrate a “substantial burden” on their religious free exercise:

The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the plan, subsidize someone else’s participation in an activity that is condemned by plaintiffs’ religion. This Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiffs’ religious exercise.

*Id.* at \*11-12 (square brackets omitted) (quoting *O’Brien v. U.S. Dep’t of Health and Human Servs.*, No. 4:12-CV-476, 2012 U.S. Dist. LEXIS 140097 (E.D. Mo. Sept. 28, 2012), at \*6).

The district court’s analysis presupposes that forcing a religious dissenter to provide financial support for the objectionable activities of others cannot constitute a “substantial burden” on that dissenter’s religious conscience. *See id.* at \*14. This presupposition is contrary to law, contrary to commonsense moral intuitions, and most importantly, contrary to the Appellants’ professed religion of Roman

Catholicism. Catholic moral theology instructs that someone who knowingly facilitates another's objectionable action does, in many cases, come to share in personal responsibility for that action. Catholic theological principles strongly indicate that the Mandate forces Catholic employers to undertake an unacceptable level of moral complicity in actions forbidden by the Catholic faith.

**A. The District Court Ran Afoul of Three Principles Established by the Supreme Court for Assessing Religious Liberty Claims.**

In adopting the reasoning of *O'Brien*, the district court effectively substituted its own judgment for that of Appellants in determining the dictates of Appellants' religion. Without disputing the sincerity of Appellants' claim that the Mandate seriously violates their religious principles, the district court nevertheless concluded that the burden on Appellants' religious conscience is too "indirect," "slight," and "de minimis" to be countenanced under the Religious Freedom Restoration Act ("RFRA"). *Id.* at \*12, 14.

In so determining, the district court ran afoul of three principles established by the Supreme Court in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). First, *Thomas* makes clear that the adequacy of one's religious beliefs does not "turn upon a judicial perception of the particular belief or practice in question." 450 U.S. at 714. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* In *Thomas*, a Jehovah's Witness was

willing to work in a roll foundry producing sheet metal that might later be used for military purposes, but was unwilling to work on the production of tank turrets, which were inevitably destined for military use. *Id.* at 715. The Supreme Court held that courts should defer to the believer’s assessment of what is required by his own religion: “Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.” *Id.* In this case, the district court violated *Thomas* by relying on its own judgment, instead of deferring to Appellants’ judgment, on the critical—and fundamentally theological—question whether the Mandate forces devout Catholics to undertake, in the eyes of the Christian God, an unacceptable level of moral complicity in the forbidden actions of others.

Second, *Thomas* makes clear that courts are not to choose sides in intrafaith disputes. Where two believers sincerely interpret the precepts of their shared religion differently, the courts are to treat each side of the intrafaith disagreement as an equally valid exercise of religion. In *Thomas*, the petitioner disagreed with another Jehovah’s Witness, who did not believe working on tank turrets violated the precepts of their faith. *Id.* The Supreme Court commented that “[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences.... Courts are not arbiters of scriptural interpretation.” *Id.* at 715-16; *see also, e.g., United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012); *Love v. Reed*, 216 F.3d

682, 688 (8th Cir. 2000). Thus, in this case, it is irrelevant that not every Catholic necessarily shares Appellants' interpretation of the requirements of the Catholic religion. What matters is Appellants' sincere interpretation of their own faith.

Third, *Thomas* acknowledged only one exception to this principle of near-total deference to the believer's sincere interpretation of the requirements of his own religion. *Thomas* commented, "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." 450 U.S. at 715. Only claims that are "so bizarre, so clearly nonreligious in motivation" are unworthy of recognition under the Free Exercise Clause, and by extension, RFRA. *Id.*; see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 n.2 (1989); 42 U.S.C. § 2000bb-1. "[A]part from that narrow category, courts carefully avoid inquiring into the merits of particular religious beliefs in an effort to gauge sincerity." *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991); see also, e.g., *Ford v. McGinnis*, 352 F.3d 582, 589-91 (2d Cir. 2003) (Sotomayor, J.) ("By looking behind Ford's sincerely held belief, the district court impermissibly confronted what is, in essence, [an] 'ecclesiastical question'"); *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002) (holding that a substantial burden on religious exercise exists where the

asserted religious practice is “neither bizarre nor incredible” and “the practice is important and based on a sincere religious belief”).

**B. Appellants’ Refusal to Provide Health Care Coverage for Abortifacients, Sterilization, and Contraception Reflects a Reasonable and Highly Persuasive Application of Catholic Religious Principles.**

In this case, Appellants’ judgment that compliance with the Mandate would violate their religious conscience is neither “bizarre” nor “clearly nonreligious in motivation.” *Thomas*, 450 U.S. at 715. Rather, it reflects a reasonable and highly persuasive application of Catholic theological principles.

The Roman Catholic tradition employs a well-developed set of theological concepts to analyze issues of complicity in the forbidden actions of others. These concepts explain why so many devout Catholics, like Appellants, have reasonably and sincerely drawn a line against providing insurance coverage for abortifacients and contraceptives, while not objecting to other forms of less direct financial support for objectionable actions—such as paying federal taxes, or paying cash to employees who may go on to use the money for objectionable purposes.

First, in ascertaining whether knowingly contributing to someone else’s forbidden actions is morally permissible, Catholic moral theology speaks of “cooperation” with the forbidden actions. “Cooperation,” in this context, is understood broadly to include “any physical or moral assistance knowingly given ... to the commission of a morally objectionable act principally performed by

another.” Ascension Health, *Key Ethical Principles: Principles of Formal and Material Cooperation*, [http://www.ascensionhealth.org/index.php?option=com\\_content&view=article&id=82:principles-of-formal-and-material-cooperation&Itemid=171](http://www.ascensionhealth.org/index.php?option=com_content&view=article&id=82:principles-of-formal-and-material-cooperation&Itemid=171) (last visited March 5, 2013) (“Ascension Health”); *see also, e.g.*, M. Cathleen Kaveny, *Appropriation of Evil: Cooperation’s Mirror Image*, 61 *Theological Studies* 280, 283 (June 2000) (“Kaveny”).

Next, the Catholic tradition draws a distinction is between “formal” and “material” cooperation. “Formal” cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. *See* Ascension Health; Orville N. Griese, *Catholic Identity in Health Care: Principles and Practice* 387-88 (1987) (“Griese”); Germain Grisez, *The Way of the Lord Jesus, Vol. 3: Difficult Moral Questions* 872-73 (1997) (“Grisez”); Kaveny, at 284. “Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending.” Grisez, at 873; *accord* Kaveny, at 284; Ascension Health. “Material” cooperation occurs when the believer foresees that his action will facilitate or assist the performance of the objectionable action by the third party, but does not share in the intention that the action should be committed. Ascension Health; *accord* Grisez, at 873; Griese, at 388. Material cooperation is sometimes permissible, and sometimes impermissible. Whether it is permissible depends on weighing the good one hopes to achieve by cooperating against the

nature of the bad action and the closeness of one's contribution to it. Ascension Health; Grisez, at 876; Kaveny, at 284. A "proportionate reason"—*i.e.* some good to be achieved that is significant enough to counterbalance the bad action and the closeness of one's complicity in it—is required to justify material cooperation in a forbidden action. Grisez, at 876; *accord* Ascension Health; Gary Atkinson et al., *A Moral Evaluation of Contraception and Sterilization* 79-80 (1979) ("Atkinson").

Several objective criteria are commonly and repeatedly invoked in the Catholic theological tradition to determine whether such material cooperation is permissible, or whether it would violate the religious conscience of believers. These criteria are supported by commonsense moral intuitions, and many have close parallels in the manner that our laws allocate legal responsibility. In this case, all of these criteria point in the same direction. Each one indicates that compliance with the Mandate would violate the religious conscience of dissenters by forcing them to undertake an intolerable degree of moral responsibility for forbidden actions.

These criteria include: (1) the gravity of the wrongdoing that the believer facilitates; (2) the magnitude and directness of the believer's causal contribution to that wrongdoing; (3) whether the wrongdoing would have occurred without the believer's cooperation, *i.e.*, whether the believer is the "but for" cause of the objectionable action; (4) whether there is a necessary relationship between the

means provided by the believer and the objectionable action; (5) whether the believer, by cooperating, will send a confusing message to others that the objectionable action is, in fact permissible; and (6) whether there is a specific directive from Church authorities forbidding the cooperation.

**1. The Mandate forces Catholic employers to cooperate in actions that are gravely objectionable under Catholic doctrine.**

The first criterion is how grave or serious is the wrongdoing that the believer is assisting. The graver the wrongdoing, the more problematic is cooperation in that wrongdoing. In general, “the more serious the harm from the sin, the more significant must be the good sought to justify cooperation.” Atkinson, at 80. “[T]he moral distance of the cooperator [from the wrongdoing] must be proportionate to the gravity of the wrongdoing.” Ascension Health. A proportionately stronger justification is required “the graver ... the evil of the principal agent’s act in itself,” and “the graver ... is the harm which may be caused to third parties especially the innocent,” by the objectionable action. Bishop Anthony Fisher, O.P., *Cooperation in evil: understanding the issues, in Cooperation, Complicity & Conscience: Problems in healthcare, science, law, and public policy* (Helen Watt ed. 2005), at 54 (“Fisher”).

The insight that a more serious justification is required to perform actions that facilitate more serious wrongdoing accords with commonsense moral intuitions. This insight is also reflected in the law, which naturally assigns greater

culpability to one who aids and abets a more serious offense, by making the punishment for aiding and abetting proportionate to the punishment for the underlying crime. *See, e.g.*, 18 U.S.C. § 2.

The Mandate requires Appellants to cooperate in actions that are gravely wrongful according to Catholic teachings. First, under Catholic doctrine, the use of abortifacient drugs and devices is a moral wrong of the first order. The Catholic Church teaches that “[h]uman life must be respected and protected absolutely from the moment of conception.” *Catechism of the Catholic Church* ¶ 2270 (1994) (“Catechism”). “From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.” *Id.* Under Catholic doctrine, the intentional destruction of innocent human life—including embryonic human life—is a violation of the Fifth Commandment, “Thou shalt not kill,” and thus a serious moral wrong. *Id.* ¶ 1858. “Since it must be treated from conception as a person, the [human] embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.” *Id.* ¶ 2274.

Elective sterilization and contraception are also viewed as seriously wrongful under Catholic teachings, though not as gravely wrongful as the taking of innocent human life. “[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural

consequences, proposes, whether as an end or as a means, to render procreation impossible” is impermissible. *Id.* ¶ 2370. “Any sterilization which ... has the sole immediate effect of rendering the generative faculty incapable of procreation ... remains absolutely forbidden according to the doctrine of the Church.” Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization In Catholic Hospitals (Quaecumque Sterilizatio)* ¶ 1 (March 13, 1975), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19750313\\_quaecumque-sterilizatio\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html) (last visited March 5, 2013).

**2. The Mandate requires Catholic employers to make a substantial and direct contribution to forbidden actions.**

Second, Catholic theologians consider the magnitude and directness of the believer’s causal contribution to the forbidden action. This concept is often expressed by distinguishing between “proximate” and “remote” forms of cooperation. “‘Proximate versus remote’ refers to how closely ... cooperation is connected with the evil in some way but not as an instrument of its performance.” Benedict M. Ashley, OP, et al., *Health Care Ethics: A Theological Analysis* 195 (4th ed. 1997). Because a more substantial and direct contribution to an objectionable action tends to increase one’s share in the moral responsibility for that action, “*proximate* ... material cooperation requires a more serious reason for cooperation than *remote* ... material cooperation.” Ascension Health (italics in

original). “All else being equal, the more proximate an act of cooperation is to the illicit activity of the principal agent, the harder it is to justify.” Kaveny, at 285 n.10; *see also* Atkinson, at 80 (noting that permissibility depends in part on “how closely connected with the sinful action are the circumstances in which there is cooperation”). Conversely, “the more an institution is *causally removed* from the immoral procedure or activity, the more acceptable is its material cooperation” in that objectionable action. The Ethicists, The National Catholic Bioethics Center, *Cooperating With Non-Catholic Partners*, in *Catholic Health Care Ethics: A Manual For Ethics Committees* (Peter J. Cataldo et al. eds., 2009), at 27/3 (“Manual”) (italics in original).

American tort law incorporates this notion that one bears increased responsibility for an effect that one more substantially and directly causes, by typically requiring proof that a tortfeasor is the “proximate cause” of an injury to establish legal responsibility for it. *See, e.g., Nemmers v. Ford Motor Co.*, 686 F.3d 486, 491 (8th Cir. 2012).

To illustrate this point, consider the case of a religious dissenter who opposes the death penalty. Each year, that dissenter pays her federal taxes, knowing that a portion of her tax money will be used to finance the federal death penalty. Because her own individual tax money makes a minuscule and indirect causal contribution to any particular execution, typically this would not much

trouble her conscience. But suppose that one year, the government directs her to purchase the drugs for a lethal injection and personally deliver them to the federal facility where the execution will take place, instead of paying her taxes. Most such individuals would balk at doing this, even if they knew that the execution would still proceed regardless of their participation. The dissenter's reluctance would arise from the commonsense intuition that she would be participating far more substantially and directly in the execution, and such participation would cause her to share personally in the moral responsibility for the execution.

In fact, this example is very similar to the facts of *Thomas*. As discussed above, in *Thomas*, the religious dissenter “testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry,” but that he could not in good conscience work directly in the manufacture of weapons. *Thomas*, 450 U.S. at 711. The Supreme Court held that this judgment was a valid exercise of religious liberty. *Id.* at 716.

In this case, the Mandate would require Catholic and other dissenting employers to make a very substantial and direct causal contribution to their employees' use of abortifacients. First, the Mandate requires the employer to finance 100 percent of the cost of the objectionable services, with no cost-sharing by the employees. *See* 42 U.S.C. § 300gg-13(a). Thus, the monetary contribution

required by the Mandate, in proportion to the total cost of the objectionable action, is many times greater than in the case of the dissenting Catholic taxpayer, whose taxes make a minuscule contribution to the cost of any particular federal execution. Likewise, the employer's provision of health insurance is a direct manner of contributing to the objectionable actions. It is triggered by the independent decision of only one other party—the person committing the objectionable action, in consultation with his or her physician—which must occur in every case of cooperation. The employer's contribution to the objectionable actions is thus significantly more direct than in the case of the dissenting taxpayer, whose monetary contribution to the death penalty is mediated through decisions of Congress, prosecutors, judges, and the criminal defendant.

### **3. The Mandate requires Catholic employers to become but-for causes of objectionable actions.**

Third, in weighing the cooperator's degree of moral responsibility for the forbidden action of a third party, Catholic moral theologians consider whether the forbidden action would have happened anyway if the believer had not facilitated it. In other words, they consider whether the believer is a but-for cause, or essential contributor, to the objectionable action. One important factor in assessing material cooperation is "how indispensable is the cooperation for the sinful action to occur." Atkinson, at 80. Cooperation is particularly problematic when one "participate[s] in the evil act by doing something necessary for the actual performance of the evil

act,” such that “one’s action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator.” Benedict M. Ashley, O.P., et al., *Health Care Ethics: A Catholic Theological Analysis* 56 (5th ed. 2006) (“Health Care Ethics”); *see also* Manual, at 27/2 (stating that a Catholic hospital would be morally responsible when “immoral procedures would not be taking place but for the collaboration” of the hospital). A much stronger justification is required “[i]f forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects,” Grisez, at 882-83, or “[i]f the action furnished by the cooperator is essential for the principal agent to succeed in carrying out his or her wrongful action,” Kaveny, at 285 n.11. “[T]he more difficult it would be for the principal agent to proceed without the cooperator’s involvement,” the more serious the justification required to cooperate. Fisher, at 55.

Again, tort law reflects the notion that but-for causation is relevant to assessing one’s responsibility for the effects of one’s actions. Typically, a tortfeasor can be held legally responsible for an injury only if his or her negligence was a but-for cause of that injury. *See, e.g., Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 406 (8th Cir. 2004).

For a religious employer of significant size, there is a reasonable possibility that compliance with the Mandate will cause an increase in the use of

abortifacients, contraceptives, and elective sterilizations, which would not occur without the mandated coverage. To be sure, contraceptives (including abortifacients) are already widely available from other sources, at relatively low cost. And the Government has many alternative methods available to increase access to such services, other than forcing religiously dissenting employers to pay for them. But the Mandate changes the out-of-pocket cost to the employee of objectionable services to zero, creating the possibility that usage will increase under the Mandate. *Cf. Baude v. Heath*, 538 F.3d 608, 614 (7th Cir. 2008) ("Anything that raises the cost of an activity will diminish the quantity"). To the extent that this may occur, it would place Catholic employers in the untenable position of becoming but-for causes of acts of the destruction of innocent human life.

**4. The Mandate requires Catholic employers to provide funding that is specifically designated in advance for use in forbidden actions.**

Certain Catholic moral theologians also consider whether there is a necessary relationship between the means provided by the cooperator and the forbidden action, weighing the cooperator's responsibility more heavily when there is such a necessary relationship. "[A] causal contribution that is directly ordered to an objectionable act requires greater justification than a causal contribution that is indirectly ordered to an objectionable act." *Ascension Health*. In other words, the

cooperator's moral complicity greatly increases where there is an "essential tie" or "intelligible link" between the cooperator's action and the wrongdoing. Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2013) at <http://www.thepublicdiscourse.com/2013/01/7403/> (last visited March 5, 2013).

For example, suppose that someone who strongly opposes the death penalty works at a chemical factory that manufactures a particular chemical that is used in the lethal injection process. If lethal injection were just one of hundreds of uses of that particular chemical, the death penalty opponent might not feel very uncomfortable about participating in that job. But if the only commercial application of that chemical were use in the lethal injection process, *i.e.* if the chemical were specifically designed for use in executions, the worker would probably feel much more uncomfortable about that line of work.

Such an "essential tie" is particularly problematic when the cooperation takes the form of paying for someone else to perform an objectionable action. For example, suppose that Jane employs Bill, knowing that Bill enjoys violent hardcore pornography that Jane finds morally offensive. When Jane pays Bill his salary, she foresees that Bill is likely to use some of the money to purchase hardcore pornography. But because she gives him money that is not earmarked for any particular purpose, Jane typically does not become personally responsible for Bill's decision to use his paycheck to purchase pornography. But if, instead of money,

Jane were to give Bill a gift certificate or coupon for the pornography store, one would assume that Jane shares in the intention that Bill purchase such violent pornography, because Jane gave him money that was specifically designated in advance for the purpose of purchasing such pornography.

The earmarking of funds for a specific purpose both makes it more likely that the wrongdoer will use the funds for the objectionable purpose, and makes it more likely that the funder's personal contribution will go toward the wrongful action. If Jane gives Bill an undifferentiated payment of \$100, Bill might use that money for any number of unobjectionable purposes, such as buying groceries, an oil change for his car, etc. But if she gives him a \$100 gift certificate for hard-core pornography, it becomes inevitable that the money will be used for that objectionable purchase, if it is used at all. Likewise, if Jane gives Bill a payment of \$100 cash, Bill may have many other sources of funds, and he may use those other funds to finance his objectionable actions. But if Jane gives him funds pre-designated for the objectionable use, it becomes inevitable that Jane's personal contribution to Bill's finances will go toward the objectionable use. In fact, if Jane provides funds that are specifically designated in advance for an objectionable use, one can typically assume that Jane *intends* for the funds to be used for that purpose—which, as discussed above, would constitute always-impermissible “formal” cooperation with wrongdoing under the Catholic tradition.

Under the Mandate, the employer-provided health plan must include funding that is specifically designated in advance for objectionable services. “[G]iving money, a perfectly fungible good, differs significantly from giving insurance, which has an intelligible link to a limited range of products and services.” *Id.* The mandated insurance is analogous to providing employees with a coupon or “gift certificate” for those objectionable services. *Id.* Indeed, an employer-provided health plan is like a large book of coupons—a coupon for every health care service included in the plan’s coverage. Under the Mandate, this book of coupons must include coupons for abortifacients and other objectionable services. The Mandate is thus analogous to forcing Catholics to provide “abortion coupons” to their employees.

**5. The Mandate places Catholic employers in the position of appearing to endorse acts deemed objectionable by their faith.**

Fifth, the Catholic moral tradition considers whether cooperation in evil might cause “scandal,” *i.e.*, encouraging other persons to engage in wrongdoing. “Scandal is an attitude or behavior which leads another to do evil.” Catechism ¶ 2284. “Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged.” *Id.* ¶ 2287.

In the context of cooperation in the wrongdoing of others, the Catholic moral tradition consistently emphasizes the risk of causing “scandal” by creating the

appearance of endorsing the third party's wrongdoing. "In the case of ... cooperation one must also consider the element of scandal because it is sinful to lead a third party to sin or think less of the teaching of the Church, even though one may not be committing a sin by reason of one's personal action." Health Care Ethics, at 57; *accord* Griese, at 410-12; Grisez, at 881. In other words, an action that is otherwise acceptable may be forbidden because it creates the confusing appearance of endorsing or approving of the wrongdoing. In 2009, the U.S. Catholic bishops applied this teaching on scandal specifically to cooperation in acts such as abortion and direct sterilization: "The possibility of scandal must be considered when applying the principles governing cooperation. Cooperation, which in all other respects is morally licit, may need to be refused because of the scandal that might be caused." U.S. Conference of Catholic Bishops, *Ethical and Religious Directives For Catholic Health Care Services* ¶ 71 (5th ed. 2009), available at <http://www.ncbcenter.org/document.doc?id=147> (last visited March 5, 2013) ("Directives"). The closer one's involvement in the wrongdoing, the greater the risk that one may appear to endorse the wrongdoing and thus set a bad example for others. *See* Fisher, at 55.

A very similar concern about avoiding the appearance of endorsing wrongdoing is reflected in the ethical laws of those States that have adopted the rule against creating the "appearance of impropriety" of Canon 9 of the Model

Code of Professional Responsibility. *See, e.g., Harker v. Comm’r of Internal Revenue*, 82 F.3d 806, 808-09 (8th Cir. 1996).

In the case of the Mandate, the provision of health coverage for abortifacients, sterilization, and contraceptives would involve a serious risk of scandal by a Catholic employer. Today, there is widespread confusion about Catholic doctrines about abortion, contraception, and sterilization, including among practicing Catholics. If prominent figures who are publicly committed to these teachings begin to provide direct financing for the objectionable actions, such complicity would likely be taken by many as a signal that the Catholic Church is not seriously committed to its opposition to these practices.

To be sure, the risk of scandal is particularly acute when the employer is an explicitly religious non-profit organization officially affiliated with the Church, such as a Catholic hospital, school, or diocese. “Catholic institutions are bound to a more rigorous application of the principles limiting cooperation in evil than individuals, because Catholic institutions stand as very public witnesses to Catholic teaching and morality.” *Manual*, at 27/4. But Catholic individuals are also subject to a solemn obligation to avoid causing scandal by creating the public appearance of endorsing wrongful behavior. *Catechism* ¶ 2285.

**6. Compliance with the Mandate requires Catholic employers to engage in conduct that is contrary to the teaching of the Catholic bishops.**

Sixth, for Catholic employers, the judgment of their bishops on religious matters of faith and morals is to be treated with unique deference and respect. The bishops are “authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice.” *Id.* ¶ 2034. The Catholic’s individual conscience “should take account of ... the authoritative teaching of the Magisterium on moral questions,” and “[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church.” *Id.* ¶ 2039. Specific guidance from the bishops on moral questions, therefore, is to be treated as authoritative and highly persuasive by Catholic believers.

In this case, the U.S. Conference of Catholic Bishops has expressed “vigorous and united opposition” to the Mandate as infringing upon the religious liberty of Catholic employers. United States Conference of Catholic Bishops, Ad Hoc Committee For Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, at <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm> (last visited March 5, 2013). Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already instructed that “Catholic health care organizations are not permitted to

engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.” Directives ¶ 70. The teaching of the Catholic bishops provides an additional compelling theological reason for Catholic employers to avoid the conduct compelled by the Mandate.

**7. No proportionate reason justifies the substantial, direct, and necessary cooperation in grave moral wrongs required by the Mandate.**

As noted above, in cases of material cooperation, the Catholic tradition calls for the cooperator to consider whether there is a “proportionate reason” that might justify one’s facilitation of another’s wrongdoing. Grisez, at 876. As each of the factors discussed above is satisfied, however, an increasingly compelling proportionate reason is required to justify the cooperation. *See* Grisez, at 400-01. Where, as here, all the factors discussed above are implicated, it becomes difficult to imagine any realistic proportionate reason that would justify the cooperation. This is particularly true where the wrongdoing includes the taking of innocent human life, viewed as a moral wrong of the highest gravity by the Catholic faith; and where the causal contribution to that destruction of life would be very substantial and very direct, potentially necessary for the achievement of the wrongdoing, and likely to cause scandal. Considering the analogous hypothetical of a Catholic nurse required by her employer to engage in substantial, direct, and

necessary cooperation in abortion procedures, GRIESE comments: “[C]onsidering not only the proximity and indispensability of her cooperation but also the scandal element, it is difficult to suggest a reason which might justify such cooperation in an intrinsically evil procedure.” *Id.* at 401 (italics omitted). He concludes that “only a definitely-established danger of serious physical harm to the nurse or her immediate family members (major disfigurement, rape, kidnapping, etc.) could provide a sufficient and proportionate reason to justify her continued cooperation” in the taking of innocent human life. *Id.* at 402.

No doubt because “proportionate reasons” sufficient to justify substantial, direct, and necessary cooperation in the taking of innocent human life are scarce to the point of non-existence, the Directives of the U.S. Conference of Catholic Bishops simply categorically forbid immediate material cooperation in abortion procedures. Directives ¶ 70.

**C. Appellants’ Belief that the Catholic Religion Requires Them to Provide Health Care Coverage to Their Employees Whenever Possible also Reflects a Reasonable Interpretation of Catholic Moral Theology.**

Appellants in this case also contend that their interpretation of their Catholic faith compels them to provide health care coverage for the employees whenever possible. Again, this conclusion is neither “bizarre” nor “clearly nonreligious in motivation,” *Thomas*, 450 U.S. at 715, but reflects a reasonable application of Catholic religious principles. The Catholic “Church’s social teaching is quite clear”

in instructing that “the economy, in all its branches, constitutes a sector of human activity” that is subject to the ethical values of Christianity, including Christianity’s commitment to “justice and authentic human welfare.” Pope Benedict XVI, Encyclical Letter, *Charity In Truth* ¶ 45 (June 29, 2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html) (last visited March 7, 2013). Under Catholic social teaching, “a business’s objective must be met in economic terms and according to economic criteria, but the authentic values that bring about the concrete development of the person and society must not be neglected.” Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* 338, available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html) (last visited March 5, 2013). Catholic “[b]usiness owners and management must not limit themselves to taking into account only the economic objectives of the company,” but also have a “precise duty to respect concretely the human dignity of those who work within the company.” *Id.* ¶ 344. “The demands of the common good,” under Catholic social doctrine, require “the provision of essential services to all, some of which are at the same time human rights,” including “basic health care.” *Id.* ¶ 196. Thus, Appellants’ conclusion that the Catholic faith instructs them to provide health care coverage as part of a comprehensive and just treatment

of the human dignity of their employees represents a reasonable interpretation of long-established principles of Catholic social teaching.

\* \* \*

Because it satisfies all of the criteria of moral involvement set forth above, the Mandate places Catholic employers in the midst of a “perfect storm” of moral complicity in actions forbidden by the Catholic faith. It requires Catholic employers to cooperate in (1) actions that are very seriously wrongful under Catholic teaching, (2) by making a very substantial and direct causal contribution to those actions, (3) in circumstances where it is possible that some of these wrongs would not otherwise occur, (4) by furnishing funding that is specifically designated in advance for the sole purpose of paying for the objectionable actions, (5) where there is a serious risk of scandal to others, all (6) in the face of authoritative guidance from the Catholic bishops forbidding close cooperation in these wrongs. Thus, the religious judgment of Appellants that the Mandate substantially infringes upon their religious liberty reflects an eminently reasonable and persuasive application of Catholic theological principles.

## CONCLUSION

For the reasons stated, *Amici* respectfully request that this Court reverse the judgment of the district court.

Respectfully submitted,

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## CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,881 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2010.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
3. Pursuant to Eighth Circuit Local Rule 28A(h), the electronic version of this brief has been scanned by the latest version of Symantec anti-virus software and determined to be virus-free.

Dated: March 14, 2013

/s/ Stephen R. Clark  
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**CERTIFICATE OF SERVICE**

I, Stephen Robert Clark, hereby certify that on March 20, 2013, I caused true and correct paper copies of the foregoing to be sent to the following counsel for the parties by first class mail:

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