No. 13-356

IN THE
# Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., *ET AL*,
*Petitioners*,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## Brief *Amicus Curiae* of Eberle Communications Group, Inc., D&D Unlimited Inc., Joyce Meyer Ministries, Southwest Radio Bible Ministry, Daniel Chapter One, U.S. Justice Foundation, Virginia Delegate Bob Marshall, Institute on the Constitution, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioners

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## INTEREST OF THE *AMICI CURIAE*[1]

Eberle Communications Group, Inc. is a for-profit corporation, headquartered in McLean, Virginia. D&D Unlimited Inc. is a for-profit corporation, headquartered in Orlando, Florida.

Joyce Meyer Ministries is headquartered in Fenton, Missouri. Southwest Bible Radio Ministry is headquartered in Oklahoma City, Oklahoma. Daniel Chapter One is headquartered in Portsmouth, Rhode Island. Each entity is a national Christian ministry, committed to teaching the principles of Holy Scripture to the nations.

U.S. Justice Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Abraham Lincoln Foundation for Public Policy Research, Inc. is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4). The Institute on the Constitution is an educational organization. These legal and policy organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Virginia Delegate Bob Marshall (R-13) is a senior member of the Virginia House of Delegates and was the Chief Patron of the Virginia Health Care Freedom Act denying enforcement of certain government mandates to obtain or maintain health insurance coverage.[2]

## STATEMENT

This *amicus curiae* brief addresses the ways in which the contraceptive services mandate of the Patient Protection and Affordable Care Act of 2009 ("PPACA") exceeds the jurisdictional authority of the federal government, as delimited by the Free Exercise Clause of the First Amendment.[3]

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[2] Virginia's Legislative Information Service, 2010 Session, http://lis.virginia.gov/cgi-bin/legp604.exe?101+sum+HB10

[3] Other parties and *amici curiae* in this case, as well as the companion case, Sebelius v. Hobby Lobby Stores, Inc., No. 13-254, argued below, and will continue to argue to this Court, the applicability of the Religious Freedom Restoration Act, 107 Stat. 1488 (Nov. 16, 1993) ("RFRA"). However, the ultimate issue in these cases cannot be decided solely by reference to that statute. The ultimate issue is whether the federal government has the authority under the U.S. Constitution to impose the contraceptive services mandate on the American people. In the final analysis, even if the government were able to identify some "compelling interest" or takes the position that the burden imposed is not "substantial," under RFRA, the First Amendment requires reversal. The Free Exercise Clause, properly understood, operates

During briefing in this Court, the Solicitor General will doubtless continue to ask the judiciary to defer to choices made by Congress and the President to establish the contraceptive services mandate, portraying it as a democratically-devised refinement to the national health care insurance industry, necessary to provide affordable insurance to the poor and other vulnerable Americans. PPACA is, however, much different than that.

Under the guise of protecting the physical and mental health of men, women, and children, the Congress and the President have conferred upon an unelected federal bureaucracy unprecedented coercive power over the minds, bodies, and hearts of the American people. Nowhere is this coercive power more evident than in the contraceptive services mandate allegedly designed to "reduc[e] unintended pregnancies." *See* Institute of Medicine Committee On Preventive Services for Women ("IOM Comm."), Clinical Preventive Services for Women: Closing the Gaps ("IOM Comm. Report") at 165.

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not by application of judicial balancing tests, which Justice Roberts correctly explained "just kind of developed over the years as sort of baggage that the First Amendment picked up" (District of Columbia v. Heller, 554 U.S. 570 (2008), Oral Argument Transcript, p. 44), and now incorporated into certain statutes, but by the text and original meaning of the First Amendment to the U.S. Constitution. http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf. This *amicus curiae* brief addresses only that ultimate, constitutional issue.

This contraceptive services mandate was not even fashioned by democratically-elected officials. *See* IOM Comm. Report at 29-46. Indeed, PPACA, as enacted by Congress and signed by the President, does not mandate contraceptive preventive services to prevent "unintended pregnancies." *See* Brief for Petitioners ("Pet. Br.") at 6. Nor was the mandate developed by the Department of Health and Human Services ("HHS") or other government officials responsible to the President of the United States. Instead, the contraceptives service mandate adopted by HHS was contrived by a 16-member committee of health care experts chosen by a nongovernment agency — the Institute of Medicine ("IOM").[4] *See* Health Resources Services Administration ("HRSA"),[5] "Women's

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[4] IOM presents itself as "an independent, nonprofit organization that works outside of government to provide unbiased and authoritative advice to decision makers and the public." http://www.iom.edu/About-IOM.aspx. A self-described elite organization, IOM — the health arm of the National Academy of Sciences — asserts that it is "renowned for its research program,"and for its prestigious roster of members from "not only the health care professions but also the natural, social, and behavioral sciences, as well as law, administration, engineering, and the humanities." http://www.iom.edu/About-IOM/Membership.aspx. Operating through committees purportedly "carefully composed to ensure the requisite expertise and to avoid conflict of interests," the IOM claims that it "applies the National Academies' rigorous research process, aimed at providing objective and straightforward answers to difficult questions of national importance." http://www.iom.edu/about-iom/study-pro cess.aspx

[5] HRSA is an administrative arm of HHS. http://www.hrsa.gov/index.html

Preventive Services Guidelines," at 1-2.[6] *See also* Pet. Br. at 6. Without any statutory guidance from Congress, or executive oversight from HRSA or HHS, IOM developed the PPACA contraceptive services mandate to prevent unintended pregnancies. *See* IOM Comm. Report at 102-110, 165. *See also* Pet. Br. at 6.

Composed entirely of health care professionals, the IOM Committee issued its report with only one dissenting opinion.[7] Purporting to apply "evidence-based guidelines" and "evidence-based reviews," the IOM Committee found that women's "well-being" would best be served by preventive measures that effectively reduced the "targeted condition" of "unintended pregnancy":

> The evidence provided to support a recommendation related to unintended pregnancy is based on systematic evidence reviews and other peer-reviewed studies, which indicate that contraception and **contraceptive counseling** are effective at reducing unintended pregnancies. [*See id.* at 10 (Table S-1) (emphasis added).]

On these grounds, the IOM Committee recommended, and HHS adopted, the contraceptive services mandate that "preventive service for women [include] the full-range of Food and Drug Administration-approved contraceptive **methods**,

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[6] http://www.hrsa.gov/womensguidelines/

[7] *See* IOM Comm. Report, Appendix D ("App. D") at 231-35.

sterilization **procedures**, and patient **education and counseling** for women with reproductive capacity." *Id.* (emphasis added). This is the mandate that Conestoga Wood Specialties Corp. and the Hahn family are challenging in this case as violative of their First Amendment rights. *See* Pet. Br. at 1-3.

While the IOM Committee findings and conclusions are purportedly "evidence-based," the studies relied upon in its report do not even show that making contraceptives more readily available to more women would result in fewer unintended pregnancies or promote healthy birth spacing. *See* IOM Comm. Report at 102-10. As Petitioners document in their brief, the IOM Committee Report utterly fails to demonstrate any such scientifically-established causal connections. Pet. Br. at 54-58. Dissenting IOM Committee member, Professor Anthony Lo Sasso,[8] has attributed this gap primarily to "the lack of time [which] prevented a serious and systematic review of evidence for preventive services," and to the dogged "zeal" exhibited by the committee "to recommend something despite the time constraints and a far from perfect methodology." IOM Comm. Report, App. D at 232. Indeed, as the Conestoga company and Hahn family have pointed out,[9] Professor Lo Sasso concluded that the entire Report was "fatal[ly] flawed" (*id.* at 233) because:

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[8] Professor Lo Sasso is Senior Research Scientist, Division of Health Policy and Administration, University of Illinois at Chicago School of Public Health.

[9] *See* Pet. Br. at 58.

> the committee process for evaluation of the evidence lacked transparency and was largely subject to the **preferences** of the committee's composition. Troublingly, the process tended to result in a mix of objective and **subjective interpretations** filtered through a lens of **advocacy**. [*Id.* at 232 (emphasis added).]

Indeed, the IOM Committee Report promotes a one-dimensional view of the educational and counseling components of family planning services, eschewing even one mention whatsoever of abstention or of any moral constraint on sexual activity, focusing exclusively on maximizing the "availability of contraceptive options." *Id.* at 107. Underlying this goal is the unproved assumption that the contraceptive mandate is necessary not only for women's health, but also for her "well-being." *See id.* at 1, 2, 3, 4, 6, 8, 13, 16, 17, 20, 21, 22, and 23. Remarkably, the IOM Committee makes no effort to distinguish between contraceptives that only prevent conception and those that prevent the implantation of an embryo.[10] *See id.*

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[10] The meaning of the term "contraception" has undergone radical transformation. Traditionally, it meant "birth control" which prevented conception, meaning fertilization of an ovum. However, contraception has come to be defined more broadly to include substances or devices used not to prevent fertilization, but to prevent the implantation of the embryo into the lining of the womb by inducing a miscarriage or an abortion. For Bible-believing Christians, including the Hahn family, such "contraceptives" are abortifacients. *See* Pet. Br. at 3-4. Widely-respected Christian author Randy Alcorn's article, "The IUD, Norplant, Depo-Provera, NuvaRing, RU-486 and the Mini-Pill" explains how these abortifacients operate.

at 109-10. Instead, completely absorbed in its goal to reduce "unwanted or mistimed" pregnancies, the IOM Committee recommended any FDA-approved means, even abortion-inducing drugs, to facilitate the life-style of "sexually active" women by reducing the risk of such a pregnancies to zero. *See id.* at 102-04.

Stripped of its "evidence-based" facade, the IOM Committee Report encourages amoral recreational sex without reproductive consequences to be the optimal "quality of life"[11] and "life course orient[ation]"[12] for all American women. This life view is diametrically and transparently the opposite of the "'Hahn Family Statement on the Sanctity of Human Life' — which proclaims the family's 'belie[f] that human life begins at conception' and its 'moral conviction [against] be[ing] involved in the termination of human life through abortion ... or any other acts that involve the taking of human life.'" *See* Pet. Br. at 5. Rather than

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http://www.epm.org/resources/2013/ Feb/22/the-iud-norplant/. *See also* the Alcorn interview video, "Is there a connection between birth control pills and abortion?" http://vimeo.com/16321721. The remarkable story of the campaign undertaken by supporters of abortion to manipulate the medical terminology associated with conception is detailed in Robert G. Marshall & Charles A. Donovan, Blessed are the Barren: The Social Policy of Planned Parenthood (Ignatius Press 1991). One pro-abortion physician explained the purpose of the strategy as follows: "if a medical consensus develops [that] life begins at implantation [rather than fertilization], eventually [theologians and jurists] will listen." *Id.*, p. 293.

[11] *Id.* at 6.

[12] *Id.* at 12.

accommodating the Hahn family business's commitment to Biblical morality, HHS has chosen to adopt the IOM Committee's commitment to secular amorality, coercing the family business to provide financial support to promote the opinions of the IOM Committee members through education, counseling, and the funding of life-ending contraceptive methods and devices. By its actions, HHS has unconstitutionally violated the Hahn family's free exercise of religion, having usurped jurisdiction over their minds, bodies, and hearts that belong exclusively to God.

## SUMMARY OF ARGUMENT

The First Amendment guarantee of the free exercise of religion is rooted in Section 16 of the 1776 Virginia Declaration of Rights. While religion is not defined in the First Amendment, it is defined in the Virginia Declaration to be "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."

As stated, religion is a jurisdictional term delimiting the powers of the civil government to the enforcement only of those duties owed to God that the law of the Creator has authorized civil rulers to enforce. As James Madison wrote in his 1785 *Memorial and Remonstrance,* those duties owed to the Creator that, by the nature of the duty can only be enforced by "reason and conviction," lie completely outside the jurisdiction of civil society, and are governed only by the dictates of individual conscience.

The PPACA contraceptives services mandate violates this jurisdictional principle in three distinct ways.

First, the contraceptives services mandate violates the Hahn family's freedom of the mind. Because Almighty God created the mind free, it is both sinful and tyrannical for a civil government "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors." In violation of this first principle, the contraceptive services mandate requires the Hahn family to purchase health insurance to promote education and counseling which promotes the use of abortifacients in direct contradiction of the Hahn Family Statement on the Sanctity of Human Life.

Second, the contraceptive services mandate violates the Hahn family's belief in the very nature of human life. Designed to promote a recreational sexual lifestyle upon the unproved presumption that a woman's "well-being" is maximized by the liberal use of contraceptives, including abortifacients, the mandate forces the Hahn family to facilitate the PPACA's materialistic view of life in direct contradiction of the Hahn family Statement on the Sanctity of Human Life.

Third, the contraceptives services mandate violates the Hahn family's duty to practice Christian forbearance, by commanding the Hahn family to act in complicity with women engaged in aborting innocent human life, and threatening them with stiff fines if they decline to financially support an immoral activity

that contravenes their deeply held convictions on the sanctity of human life.

## ARGUMENT

### I. THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE DELIMITS THE JURISDICTION OF THE FEDERAL GOVERNMENT BY THE LAW OF THE CREATOR.

#### A. "Religion" Defined.

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise of [religion]." In Reynolds v. United States, 98 U.S. 145 (1878), this Court traced the lineage of this prohibition to the 1776 Virginia Declaration of Rights. *Id.* at 162-63. Because "'religion' is not defined in the Constitution," but is defined in the Virginia Declaration, this Court looked to that definition. *See* Reynolds, 98 U.S. at 162-63. Section 16 of the Virginia Declaration defined religion to be "the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence." *See* Section 16, Constitution of Virginia, reprinted in Sources of Our Liberties 312 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978). In the words of the Reynolds Court, "religion," as so defined, "was not within the cognizance of civil government." *Id.*, 98 U.S. at 163. The Court further acknowledged that this jurisdictional principle was explained in James Madison's *Memorial and Remonstrance,* a document that Madison penned in

June 1785 and circulated among members of the Virginia Assembly in support of Jefferson's Bill for Establishing Religious Freedom. Quoting from Section 16 of the 1776 Declaration, Madison proclaimed:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [citation omitted]. The **Religion** then of every man must be left to the conviction and **conscience** of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an **unalienable right**. It is unalienable, because the **opinions** of men, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men.** [J. Madison, "Memorial and Remonstrance" to the honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution, p. 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added).]

Four months later, the General Assembly enacted into law Thomas Jefferson's "Act for Establishing Religious Freedom," the preamble of which, the Reynolds Court wrote, affirmed this same jurisdictional principle. *Id.*, 98 U.S. at 163. The Act's preamble read:

> Whereas Almighty **God hath created the mind free**; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious **presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, **setting up their own opinions** and modes of thinking as the only true and infallible, and as such endeavouring **to impose them on others**, hath established and maintained false religions over the greatest part of the world, and through all time.... [Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item # 44) (emphasis added).]

**B. Free Exercise of Religion.**

Thus, the 1776 Virginia Declaration not only defined "religion," but also secured its "free exercise," that is, its exercise free from any and all claims of civil jurisdiction. And the choice could not have been more deliberate. As originally drafted by George Mason, Section 16 of that Virginia Declaration read, as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator and the manner of discharging it, can only be by Reason and Conviction, not by force or violence, and therefore that all Men should enjoy the fullest **Toleration in the exercise of religion, according to the dictates of Conscience, unpunished and unrestrained by the magistrate unless under color of religion any man disturb the Peace, the Happiness, or Safety** of Society, or of individuals .... [George Mason & Historic Humans Rights Documents, First Draft May 20-26, 1776) (emphasis added).[13]]

At the state constitutional convention, James Madison objected to the provision "'that all men should enjoy the fullest toleration of the exercise of religion'"[14]:

> Madison wanted to move beyond the tradition of religious toleration introduced by John Locke and the English Toleration Act of 1689.... So the twenty-five year old delegate from Orange County to Virginia's constitutional convention put forward these words: 'All men are equally entitled to the free exercise of religion." [Constitutional Debates on Freedom of Religion at 31.]

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[13] http://www.gunstonhall.org/georgemason/human_rights/vdr_first_draft.html.

[14] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999 ).

"Madison's proposal that a right to 'free exercise of religion' should replace the phrase on religious toleration was approved." *Id.* Thus, Section 16 as adopted by the convention read, in pertinent part, "and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience," excising any and all reference to any and all exceptions for the peace, happiness or safety of the larger society as determined by any civil magistrate.

Nine years later, in his 1785 *Memorial and Remonstrance,* Madison painstakingly explained the absolute principle upon which the free exercise of religion rests. The right "is unalienable ... because what is here a right towards men, is a duty towards the Creator"[15]:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his

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[15] "Memorial and Remonstrance," The Founders' Constitution at 82.

> allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is **wholly exempt** from its cognizance. [*Id.* (emphasis added.)]

### C. Free Exercise Restricted, and Now Revived.

For 170 years after the ratification of the Bill of Rights, Madison's jurisdictional principle went unchallenged.[16] In 1963, however, the Supreme Court departed from that tradition, reducing the free exercise guarantee as if it were a mere rule of religious toleration, limiting the jurisdictional principle to only those cases involving "religious belief," and subjecting laws impacting on "religious practices" to a balancing test whether the law could be justified as protecting the health, safety and welfare of the civil society.[17] That atextual experiment came to an end in 1990 when the Court refused to limit the free exercise guarantee to just religious belief and profession, stating:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service,

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[16] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 *Regent L. Rev.* 7, 10-15 (1995).

[17] *Id.* at 15-22.

> participating in the sacramental use of bread and wine, proselytizing, abstaining from certain modes of transportation. [Employment Division v. Smith, 494 U.S. 872, 877 (1990).[18]]

Having rejected tolerance as the governing principle of the free exercise guarantee, the Smith Court rejected the belief/practice dichotomy, returning the Court to the text's jurisdictional principle. While the state had no jurisdiction to regulate "religion," the free exercise guarantee did not "excuse compliance" with an "otherwise valid law prohibiting conduct that the State is **free** to regulate." Smith, 494 U.S. at 878-79 (emphasis added).

Whether the state is free to regulate particular conduct is, then, determined by the original definition of "religion" in the free exercise guarantee itself. This is the teaching of the original First Amendment text as illumined by the express definition of religion of its Virginia forerunner. And this, in turn, is the lesson of this Court in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ____, 132 S. Ct. 694 (2012). In Hosanna-Tabor, this Court rejected the EEOC's argument that the American Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.*, 132 S.Ct. at 706-07. It did so on the ground that the internal governance of a church body, including the hiring and firing of

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[18] *See also* Titus, "The Free Exercise Clause" at 22-23.

ministers, is outside the jurisdiction of the federal government. While the Court did not explicitly pose the issue as to whether such employment relations involve duties owed to the Creator, enforceable only "by reason and conviction, not by force or violence," the Court relied upon ecclesiastical history to establish that the free exercise guarantee grew out of a jurisdictional conflict between parishioners and the English monarchy over church self-government. *Id.,* 132 S. Ct. at 702-03. "[T]he religion clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown would have no role in filling ecclesiastical offices" — citing in support none other than James Madison who the Chief Justice reminded was "'the leading architect of the religion clauses of the First Amendment.'" *Id.* at 703.

As its chief architect, it was Madison, along with Jefferson, who understood that the First Amendment erected a jurisdictional barrier between matters that belonged to church government and matters that belonged to civil government of the state, the latter having absolutely no jurisdiction over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction."

## II. COMPELLING THE HAHN FAMILY BUSINESS TO PROMOTE THE CONTRACEPTIVE SERVICES MANDATE VIOLATES ITS FREE EXERCISE OF RELIGION.

### A. The Free Exercise Clause Guarantees Freedom of Opinion.

For some time it has been erroneously assumed that the free exercise guarantee protects only **religious** belief, profession, and practices from Government intrusion. *See, e.g.,* J. Nowak, R. Rotunda, & J. Young, Constitutional Law, §§ 17.6-17.16, pp. 1067-1102 (3d ed., West: 1986). However, from the beginning, the free exercise clause protected the freedom of the mind which encompasses the freedom to hold a full range of opinions and beliefs.[19] Thus, Jefferson opened the preamble to his draft bill for establishing religious freedom with these immortal words:

> Well aware that the **opinions and belief** of men depend not on their own will, but follow involuntarily the evidence proposed to their minds, that **Almighty God hath created the mind free**, and manifested his Supreme will that free it shall remain, by making it altogether **insusceptible of restraint**. [T.

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[19] For example, Jefferson's preamble to his bill establishing religious freedom stated that "our civil rights have no dependance on our religious opinions, any more than on our opinions in physiks or geometry." Jefferson's Bill at 77.

> Jefferson, "A Bill for Establishing Religious Freedom," reprinted in 5 The Founders' Constitution 77 (item # 37) (emphasis added).]

On this premise, Jefferson's preamble avers:

> That the **opinions** of men are **not the object of civil government, nor under its jurisdiction:** That to suffer the civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty. [*Id.* (emphasis added).]

In his provocative book, Real Choice Real Freedom, attorney Kerry Morgan elaborates on the divine source upon which Jefferson relied to establish God-given intellectual freedom:

> The Bible recognizes that God is the Creator of all things visible as well as invisible. He created mankind, male and female in His own image. **He created the mind to think**. The Creator gave mankind the faculty of reason to sufficiently know and understand the Creator and creation, including the laws God impressed upon the heavens and the earth. God also recognizes that mankind can abuse reason and pollute the mind, and that mankind's thinking is often at odds with reality. He therefore exhorts each person to renew his or her mind, though **He does not**

**force any person to do so.** [K. Morgan, Real Choice Real Freedom, p. 89 (University Press of America: 1997) (emphasis added).]

### B. The Contraceptive Services Mandate Violates Freedom of Opinion.

Although Jefferson's Bill to Establish Religious Freedom, as enacted by the Virginia Assembly, reduced Jefferson's salutation to the single phrase — "that Almighty God hath created the mind free" — the change did not signal any narrowing of the scope of the Act. To the contrary, both the preamble to the initial Bill and the one in the Act adopted by the Assembly laid the groundwork for the first principle of the free exercise of religion: "[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *See* 5 The Founders' Constitution at 77, 84. And it is this first principle[20] of the free exercise of religion that is violated by the PPACA contraceptive mandate.

As revealed in the opening Statement of this brief, the contraceptive mandate is the product of the 16-member IOM Committee, operating under a charge from the Office of the Assistant Secretary for Planning

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[20] The principle is akin to the "speaker autonomy" rule derived by this Court from the First Amendment. *See* Hurley v. Irish-American Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573, 575 (1995) ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to choose "not to propound a particular point of view.")

and Evaluation ("ASPE") of HHS. IOM Comm. Report at 1. In pertinent part, the charge reads:

> The [IOM] will convene an expert committee to review what preventive services are necessary for women's **health and well-being** and should be considered in the development of comprehensive guidelines for preventive services for women.... ASPE **will use the information and recommendations** from the committee report to guide policy and program development related to the provisions in the [PPACA] addressing preventive services for women. [*Id.* at 2 (emphasis added).]

Among the information and recommendations of the IOM Committee is the contraceptive services mandate, the specific goal of which is "a reduction of unintended pregnancies." IOM Comm. Report at 10. Included in the means to reach this goal are "patient education and counseling for women with reproductive capacity." *Id.* In a more detailed exposition of its recommendation, the IOM Committee Report states that education and counseling "are provided to prevent unintended pregnancies, which is defined "as a pregnancy that is either unwanted or mistimed at the time of conception" (*id.* at 102), the ultimate goal being "that 'all pregnancies should be intended.'" *Id.* at 104.

Unsurprisingly, the IOM Committee's recommended one-dimensional education and counseling services are geared to encourage and guide women with reproductive capacity to use

contraceptives to prevent pregnancies. IOM Comm. Report at 107.

> Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits for the individual woman, and provide instruction in the effective use of the chosen method. [*Id.*]

Based on "[s]ystematic evidence reviews and other peer-reviewed studies [that] provide evidence that contraceptives and contraceptive counseling are effective at reducing unintended pregnancies," the IOM Committee Report strongly recommended that both be added to the "array of preventive services available under the [PPACA]." *Id.* at 109.

The IOM Committee's message is unmistakable. Female sexual activity without risk of pregnancy is to be encouraged by the contraceptive mandate, not only by making a wide range of contraceptives available, but by an education and counseling program designed to ensure that more and more women do not get pregnant unless "at the point of conception" they want to. This mandate is grounded in the "opinion" of the IOM's 16-member committee that a woman's "health and well-being" are adversely affected by the risk of an unwanted pregnancy. To reduce risks of unplanned pregnancies, the IOM Committee recommended, and HHS adopted, an educational and counseling program encouraging and promoting the use of a wide range of

contraceptives, including FDA-approved abortifacients. *See id*. at 109-10.

By adopting IOM Committee opinions on such contraceptive use as necessary to achieve women's health and well-being, HHS is compelling the Hahn family, through PPACA's contraceptive services mandate, to provide the family's employees education and counseling that propagate opinions on women's "health and well-being" with which the family profoundly disagrees. *See, e.g.,* Pet. Br. at 3-6. This coercive program includes not only the purchase of health insurance covering such contraceptive counseling, but stiff monetary fines for noncompliance. *See* Pet. Br. at 8. For HHS to compel the Hahns to subscribe to, and facilitate the implementation of, the IOM Committee's opinion as to the health and well-being of their women employees is "both sinful and tyrannical." It is sinful because HHS is violating the Hahn family's conscience and understanding from the word of God as to the moment when human life begins, and how to achieve a woman's well-being in this life — opinions the truth or falsity of which belong exclusively to God. It is tyrannical because HHS is employing force and violence to require the Hahn family to support and promote an opinion on human reproduction and life held by 15 members of an IOM Committee of men and women who do not share the Hahn family convictions.

As Jefferson's preamble to the Virginia Act for Establishing Religious Freedom states, "truth is great and will prevail if left to herself ... and has nothing to fear from the conflict, unless by human interposition,

disarmed of her natural weapons, free argument and debate; errours ceasing to be dangerous when it is permitted freely to contract them." 5 The Founders Constitution at 85.

The contraceptive services mandate not only misuses the coercive power of the civil government, destroying the free marketplace of ideas established by the free exercise guarantee, but also requires the Hahn family to aid and abet the IOM Committee's proselytizing efforts in support of a female reproductive health policy that would sacrifice innocent life in furtherance of a lifestyle that exalts sexual license without risk of unintended pregnancy. As such, the contraceptive mandate violates the free exercise of religion which prohibits the government from using its power to force any person to engage in any form of "proselytizing" which, according to Smith, is conduct that the state is not free to regulate. *See* Smith, 494 U.S. at 878-79.

## III. COMPELLING THE HAHN FAMILY TO FACILITATE THE CONTRACEPTIVE SERVICES MANDATE FOR ITS INDIVIDUAL EMPLOYEES VIOLATES ITS FREE EXERCISE OF RELIGION.

### A. The Contraceptive Services Mandate Imposes a Materialistic View of a Woman's Well-Being.

In 1943, both the Social Security Board and organized labor "proposed a wholly Federal system of social insurance with the Surgeon General in the role

of gatekeeper for the provision of medical care." *See* L. Snyder, "Passage and Significance of the 1944 Public Health Act," 109 *Public Health Reports*, pp. 721, 723 (Nov.-Dec. 1944). In response, Morris Fishbein, the "American Medical Association's chief editorialist ... called the proposed role of the Surgeon General to be that of a '**virtual gauleiter**'[21] of American medicine." *Id.* (emphasis added). By using "gauleiter" to describe the role of the Surgeon General, the AMA spokesman helped defeat the proposal for "national health insurance," leaving the "financing of personal health services to the marketplace. *Id.* at 724.

Sixty-seven years later, Congress amended the 1944 Public Health Act by enacting PPACA — a measure that not only provides for the financing of personal health services, but places the federal government in full control of the definition, deliverance, and management of those services. This time, instead of putting the Surgeon General in control, Congress anointed the Secretary of Health and Human Services, installing her as the CEO with czar-like powers to do whatever is necessary to make PPACA work. Thus, the Act contains "more than 2,500 references" to the HHS Secretary, including "700 instances in which the Secretary 'shall' do something, and more than 200 cases in which she 'may' take some form of regulatory action if she chooses," as well as "139 occasions [where] the law mentions that the

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[21] A "gauleiter" is a "political functionary occupying [an] important position in a totalitarian regime or hierarchy." N. Webster, Third International Dictionary, p. 941 (1964).

'Secretary determines.'" P. Klein, "The Empress of Obamacare," *The American Spectator* (June 2010).

HHS Secretary Kathleen Sebelius has taken full advantage of these near-dictatorial powers, unilaterally excepting some from coverage, extending time deadlines for others, and waiving numerous mandates.[22] But the HHS Secretary has stood firmly against any waivers of the contraceptive mandate, insisting upon full compliance with the IOM's reproductive health philosophy and recommendations. The government and its supporters insist that the contraceptive mandate is an economic measure that serves a compelling interest, safeguarding the "public health" by regulating the health care and insurance markets. *See, e.g., Amici Curiae* Brief of the National Women's Law Center, p. 11 in Conestoga Wood Specialties Corp. v. Sebelius (U.S. Court of Appeals for the Third Circuit: No. 13-1144). To the contrary, the contraceptive services mandate exploits the health care and insurance markets to impose economic, moral, and religious burdens upon the people to support the private lifestyle choices of certain individuals whose view of health and well-being coincide with a majority of experts chosen by a nongovernment agency.

The government and its supporters would have this Court believe otherwise, contending that the contraceptive services mandate is based upon the

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[22] *See*, *e.g.*, J. Vinci, "The Six Types of Obamacare Waivers" (Heartland Institute), http://heartland.org/policy-documents/six-types-obamacare-waivers.

"unbiased" recommendations of an IOM "committee of independent experts in the subject fields, which employed a rigorous methodology to thoroughly analyze the evidence." *Id.* at 9. One of those experts disagreed. Casting doubt on the contraceptive mandate, which was not one of the services defined by PPACA,[23] dissenting IOM Committee member Anthony Lo Sasso warned:

> Given the combination of the **unacceptably short time frame** for the P[reventive] S[ervices], for W[omen] committee to conduct meaningful reviews of the evidence associated with the preventive nature of the services considered, this dissent advocates that **no additional preventive services beyond those explicitly stated in the Affordable Care Act (ACA) be recommended** for consideration by the Secretary for first dollar coverage until such time as the evidence can be objectively and systematically evaluated and an appropriate framework can be developed. The **long run risks associated with making poorly informed decisions**, and their likely irreversibility once codified, outweigh the ACA-mandated rapidity with which the committee was confronted. [IOM Comm. Report at 231 (Appendix D) (emphasis added).]

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[23] *See* IOM Comm. Report at 29-37.

Professor Lo Sasso noted further that "[w]here I believe the committee erred was with their zeal to recommend something despite the time constraints and a far from perfect methodology." *Id.* at 232.

The IOM Committee was composed of health care academics drawn exclusively from the conventional pharmaceutical-centered allopathic school of medicine. *See* IOM Comm. Report, Appendix C at 223-30. Excluded from its membership were practitioners of alternative schools of medicine, such as homeopathy, naturopathy, acupuncture, American Indian, holistic therapies, midwifery, Chinese or Eastern medicine, and herbal medicine. Additionally, although the Committee acknowledged that there were "ethical, legal and social issues" relevant to "coverage" decisions (*id.* at 7), the IOM did not see fit to appoint any "experts" from any of these fields. Instead, the Committee limited itself to so-called "evidence based" studies to determine the services necessary for the health and well-being of women, notwithstanding their acknowledgment that "[h]ealth outcomes occur because of multiple factors including biology, behavior, and the social, cultural, and environmental contexts in which women live." *Id.* at 18.

### B. It is Outside the Jurisdiction of HHS to Define and Promote Its View of a Woman's Well-Being.

Conspicuously absent from any consideration of what constitutes the "health and well-being" of any concern for, or understanding of, women from a perspective of religious faith, Christian, Moslem, or

otherwise. This omission was not based upon any finding that such faith or any lack thereof was found to be irrelevant to every woman's health and well being, but apparently because the spiritual dimension of life is not "evidence based." As a direct result of this exclusion, the Committee omitted entirely any spiritual considerations in formulating its contraceptive mandate. Instead, the Committee was exclusively preoccupied by a materialistic view of mankind — mere matter in motion — giving no thought whatsoever regarding the effect that the contraceptive services would have on the human soul and spirit. *See* IOM Comm. Report at 102-10.

No doubt supporters of the contraceptive mandate would argue that it is none of the government's business to inquire into such spiritual matters because the First Amendment separates church and state. But the PPACA's contraceptive services mandate is not religiously neutral.[24] Nor can it be made neutral by the IOM Committee by its self-serving statement that its "recommendations [are] the 'gold standard' for evidence-based clinical practice in preventive services." IOM Comm. Report at 29. By definition, evidence-based medicine is "the use of mathematical estimates of the risk of benefit and harm, derived from high-quality research on population samples, to inform clinical decision-making in the diagnosis, investigation

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[24] *See* Sally Steenland, "The Intersection of Faith and Maternal Health" (Center for American Progress: Aug. 15, 2012), http://www.americanprogress.org/issues/religion/news/2012/08/15/12038/the-intersection-of-faith-and-maternal-public-health/.

or management of individual patients."[25] Such a methodology may be instructive in guiding the choice of particular treatment of a specific patient for an identified physical illness, but "evidence-based" medicine, at its best — even without the recurrent problem of statistical manipulation of data to reach a preordained conclusion — is fool's gold when relied upon to assess a woman's "well-being."

Truly, the only pathway to true religious neutrality in devising preventive services for a woman's well-being is to adhere to the jurisdictional barrier against government intrusion into the "health and well-being" of individual women, a matter that belongs exclusively to her Creator, enforceable by reason and conviction. It has been long recognized that "it is the **inherent** right of every freeman to care for his own body and health in such a way as seems best." Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (emphasis added). Central to this God-given right is the right to "refuse unwanted medical treatment." *See* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990). And if it is an inherent right to refuse medical treatment, then it is equally inherent to have the right to pay for, or be a recipient of, a health insurance policy only for medical treatment of one's own choosing. The duty to take care of one's own body, including whether to purchase health insurance, is one owed exclusively to the Creator, outside the jurisdiction of the civil government.

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[25] Trisha Greenhalgh, How to Read a Paper: The Basics of Evidence-Based Medicine, p. 1 (4th ed., Wiley-Blackwell: 2010).

In 1944, the Supreme Court addressed the question whether a person could be tried for, and convicted of, wire fraud for claims that he had the power to heal persons of diseases "which are ordinarily classified by the medical profession as being incurable...." United States v. Ballard, 322 U.S. 78, 79 (1944). The Court ruled that the charges should be dismissed on the ground that "the truth or verity of [defendant's] religious doctrines or beliefs should [not] have been submitted to the jury." *Id.* at 86. In explaining its decision, the Court noted the intimate connection between the Christian faith and physical healing. *Id.* Both the Old and New Testaments reveal that individual human physical health is so intertwined with the spiritual that a person's "well-being" cannot be the defined by the civil government. Yet, the contraceptive services mandate is based upon the presumption that the PPACA "prevention" policies, including the prevention of unintended pregnancies, are to be based upon the civil government's conception of individual "well-being," not the Creator's. There are many who extol the virtues of a career without children, as evidenced by the *amicus curiae* brief submitted in the court of appeals below by the National Women's Law Center ("NWLF") and its affiliates.[26] However, other women live by a world view that guides them down the pathway of marriage and motherhood.

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[26] *See* NWLF Brief at 12-26 (Conestoga Wood Specialties v. Sebelius, No. 13-1144, U.S. Court of Appeals for the Third Circuit).

The book of *Genesis* teaches that man, male and female, are created in the Creator's image. The IOM Committee Report treats the human person as if he and she were created in the image of 15 members of a committee of experts who alone can decide what constitutes an individual person's "well-being." As dissenting Professor Lo Sasso observed, the IOM Committee Report is a "mix of objective and subjective determinations filtered through a lens of advocacy." IOM Comm. Report, App. D., at 232. Through the prism of the Committee's recommended contraceptive mandate, a woman's well-being appears to be the maximization of sexual activity irrespective of marital commitment and unencumbered by the risk of pregnancy. *See* IOM Comm. Report at 103. To that end, the Committee urges regular "[w]ell-woman preventive care visits," presumably to minimize the risk and consequence of a sexually licentious lifestyle. *See id.* at 124.

Dissenting Committee member Lo Sasso lamented the failure of his fellow colleagues to evaluate the evidence with "strict objectivity," the evidence being "largely subject to the preference of the committee's composition." IOM Comm. Report at 232-33. Professor Lo Sasso concluded that, because of this failure, the Report was "fatal[ly] flawed." *Id.* at 233. For the same reasons, the Committee Report, its recommendations, and its contraceptive mandate are constitutionally flawed, in violation of both the "no establishment" and the "free exercise" clauses because they are the product of "the impious presumption of legislators and rulers [who] set[] up their own opinions and modes of thinking, as the only true and

infallible."[27] Such an endeavor to impose their own opinions upon others fractures the American people along sectarian lines, threatening to put people like the Hahn family out of business because they cannot, in good conscience, obey a mandate to aid and abet the killing of a baby in the womb of her mother.

## IV. BY COMMANDING THE HAHN FAMILY TO ACT IN COMPLICITY WITH WOMEN ENGAGED IN ABORTION, THE CONTRACEPTIVE SERVICES MANDATE PREVENTS THE FAMILY FROM PERFORMING THEIR DUTY OF CHRISTIAN FORBEARANCE IN VIOLATION OF THE FREE EXERCISE GUARANTEE.

As Justice Scalia observed in the Smith case, the free exercise guarantee extends not only to the performance of certain physical acts, but also the abstention from certain other acts. *Id.*, 494 U.S. at 877. One of the chief Christian virtues is that of forbearance. According to Section 16 of the 1776 Virginia Declaration, the duty of Christian forbearance, like the duties of love and charity, is "mutual." And according to the free exercise guarantee, it is the "mutual duty of all to practice Christian forbearance, love, and charity." The three virtues are outside the jurisdiction of the civil government because, if enforced by coercive action of the state, the three virtues would be destroyed, the exercise of each requiring freedom of choice.

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[27] 5 The Founders Constitution at 77.

In this case, the Hahn family seeks to continue to exercise its Christian duty to forbear. It simply seeks not to participate in any act that would bring it into complicity with persons who are committing what it understands to be the sin of abortion. The contraceptive mandate commands the Hahn family to become an accomplice of those engaged in what it views to be the sin of abortion, threatening it with stiff fines if it refuses. The contraceptive services mandate commands complicity. Such a mandate is a blatant violation of the free exercise guarantee, unworthy of a free people whose governments, both federal and state, were constituted foremost to secure the unalienable right to life. *See* Declaration of Independence (July 4, 1776).

According to a poll taken in November 25, 2013, fifty-nine percent of Americans oppose the contraceptive services mandate.[28] Nevertheless, those who embrace abortion are unmoved by opposition. Hiding behind carefully-crafted provisions of the law designed to provide political cover and deniability, many members of Congress proclaim that taxpayers, private businesses, and individuals would never be forced to fund abortion.[29] Others are more candid,

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[28] Poll: 59% Oppose Obamacare Insurance Mandate for Abortion, Sterilization CNSnews.com (Nov. 26, 2013). http://www.cnsnews.com/news/article/penny-starr/poll-59-oppose-obamacare-insurance-mandate-abortion-sterilization.

[29] T. Culp-Ressler, "Don't fall for the GOP's fake controversy over Obamacare's Expansion of Abortion Coverage," Think Progress (Dec. 5, 2013). http://thinkprogress.org/health/2013/12/05/3023881/obamacare-abortion-coverage-controversy/.

bragging that "Women across America will benefit from [Obmacare by having] access to a large number of preventive services which will be completely covered by the insurance companies," which include "FDA-approved contraceptive methods, and contraceptive education and counseling."[30] In truth, those who support the contraceptive services mandate care nothing about requiring those who oppose abortion to pay for it through a system of healthcare regulation.

Such callousness is no surprise to Bible-believing Americans who have come to believe that those who sit in high places in government, and those who support them politically, not only do not share their values and beliefs, but hold them in contempt. As noted Christian author Chuck Colson once explained:

> At root, what is happening in American life today is that we are severing the connection between what has become a ruling elite and the people. This is dangerous, because the genius of the American system of government, given to us by the founding fathers, is that the government rules only with consent of the governed. [Chuck Colson, "The Dangerous Disconnect Between People and Government, Religion Today" (May 24, 2010).[31]]

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[30] ObamaCare: Women's Health Services, ObamaCareFacts dispelling the myths, http://obamacarefacts.com/obamacare-womens-health-services.php.

[31] http://www.religiontoday.com/news/the-dangerous-disconnect-between-people-and-government-11632059.html

The nation's ruling elite care little that the Holy Scriptures are not limited to prescribing insular religious practices, but provides guidance for all of life. To Bible-believing Americans who believe in Jefferson's and Madison's Creator God, the Holy Bible is the manufacturer's instruction manual.[32] It comes as no surprise to them that God has views on where human life comes from, and when that life He created begins.

The Holy Scriptures teach that God created human life.

- "The spirit of the Lord hath made me, and the breath of the almighty hath given me life." *Job* 33:4.
- "Thus says the Lord, thy redeemer, and he that formed thee from the womb, I am the Lord that maketh all things." *Isaiah* 44:24.
- "Thou art worthy, O Lord, to receive glory and honour and power: for thou has created all things, and for thy pleasure they are and were created." *Revelation* 4:11.

The Holy Scriptures reveal that life begins in the womb at conception.

- "For thou hast possessed my reigns, thou hast covered me in my mother's womb. I will praise thee; for I am fearfully and wonderfully made

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[32] *See, e.g.*, A. Ogden, The Bible is Your Manufacturer's Instruction Manual, http://www.claychurchofchrist.com/articles/ao-instructions-manual.html.

... My substance was not hid from thee, when I was made in secret... Thine eyes did see my substance, yet being unperfect...." *Psalm* 139:13-16.

- "Before thee camest forth out of the womb I sanctified thee...." *Jeremiah* 1:5.
- As thou knowest not what is the way of the spirit, nor how the bones do grow in the womb of her that is with child: even so thou knowest not the works of God who maketh all." *Ecclesiastes* 11:5.

The Holy Scriptures speak of abortion as sin.

- "These six things doth the Lord hate ... hands that shed innocent blood...." *Proverbs* 6:16-17.
- "If men strive, and hurt a woman with child, so that her fruit depart from thee, ... and any mischief follow [i.e., the child dies] then thou shalt give life for life." *Exodus* 21:22-23.
- "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.

The Holy Scriptures teach that Christians have a duty to defend the innocent unborn.

- "Open thy mouth for the dumb in the cause of all such as are appointed to destruction." *Proverbs* 31:8-9.
- "If thou forbear to deliver them that are drawn unto death, and those that are ready to be slain ... doth he not know it? and shall not he render

> to every man according to his works?" *Proverbs* 24:11-12.

Those who support the PPACA's contraceptive services mandate understand that even if that mandate were struck down, the laws and judicial decisions governing abortion and access to all forms of contraception will remain unchanged by this litigation. However, they insist that women will be harmed unless they can hand the bill for their contraceptive care to others to pay.[33] Indeed, the fight for the contraceptive services mandate is viewed as part of a larger fight to coerce all Americans, and especially private businesses, to lose the freedom to make decisions about how to run their lives and businesses according to their best understanding of God's guidance and direction.[34]

As detestable as this Court's rulings on abortion are viewed by Bible-believing Americans, this Court had refrained from sanctioning mandatory participation in abortion. *See* Harris v. McRae, 448 U.S. 297 (1980). Should the laws of this land, in violation of the "free exercise" jurisdictional principle of the First Amendment, require man to disobey God,

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[33] *See, e.g.,* J. Arons, L. Panza, and L. Rosenthal, "Young Women and Reproductive Health Care" (Center for American Progress: July 39, 2012). http://www.american progress.org/ issues/ women/news/2012/07/30/11863/young-women-and-reproductive-health-care/

[34] A. Marcotte, The GOP's Birth-Control Trojan Horse, The Daily Beast, http://www.thedailybeast.com/articles/2014/01/23/ the-gop-s-birth-control-trojan-horse.html.

it will fracture the nation in a ways that can scarcely be anticipated, for those Bible-believing Americans who believe that life begins at conception also believe that "We must obey God rather than man." Acts 5:29.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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