Nos. 14-12696-CC, 14-12890, and 14-13239-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETERNAL WORLD TELEVISION NETWORK, INC.,
Plaintiff-Appellant,

v.

SYLVIA BURWELL *et al.*,
Defendants-Appellees.

On appeal from the United States District Court
for the Southern District of Alabama

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA *et al.*,
Plaintiffs-Appellees,

v.

SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

On appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Justin E. Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
jdys@firstliberty.org

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae file this Certificate of Interested Persons and Corporate Disclosure Statement, as required by Local Rules 26.1-1, 28-1(b), and 29-2. This certificate includes the names of all persons and entities listed on previous certificates in this appeal. Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1-1, counsel for *Amici Curiae* Christian and Missionary Alliance Foundation, Inc. ("CMA") represents that CMA is a non-profit entity and does not have parent corporations. No publicly held corporation owns 10 percent or more of any state of stock in *Amici Curiae*. Counsel further certifies, to the best of their knowledge, that the following persons and entities have an interest in this appeal:

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Americans United for Separation of Church and State, *amicus curiae*

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Barbero, Megan, *amicus curiae*

Bennett, Michelle R., counsel for defendants

Becket Fund for Religious Liberty, law firm for appellant EWTN

Blomberg, Daniel Howard, counsel for appellant EWTN

Bondi, Pam, counsel for *amicus curiae* State of Florida

Branda, Joyce R., counsel for defendants

Brasher, Andrew L., counsel for State of Alabama

Brennan & Wasden, LLP, counsel for Diocese of Savannah

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Brown, Kenyen R., counsel for defendants

Burnette, Jason, counsel for Archdiocese of Atlanta et al.

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Butterfield, Justin E., counsel for *Amici Curiae*

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Delery, Stuart F., counsel for defendants

Dewart, Deborah J., counsel for *amicus curiae*

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Duncan, Stuart Kyle, counsel for EWTN

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Metcalf, Janine Cone, counsel for Archdiocese of Atlanta et al.

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Nemeroff, Patrick G., counsel for defendants

Olens, Sam, counsel for *amicus curiae* State of Georgia

Parker, Jr., William G., counsel for EWTN

Perez, Thomas, defendant

Prison Fellowship Ministries, *amicus curiae*

Rassbach, Eric, counsel for the EWTN

Ricketts, Jennifer, counsel for defendants

Rienzi, Mark, counsel for the EWTN

Salzman, Joshua M., counsel for defendants

Schaerr Duncan LLP, law firm for EWTN

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United States Department of the Treasury, defendant

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Williams, James, counsel for Archdiocese of Atlanta et al.

Windham, Lori, counsel for the appellant

/s/ Jeremiah G. Dys
JEREMIAH G. DYS

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Pursuant to Fed. R. App. P. 29(b), 11th Cir. R. 29-1, and 11th Cir. R. 35-6, *Amici Curiae* Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College respectfully move for leave to file the attached Brief of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as *Amici Curiae* in Support of Religious Organizations' Petitions for Rehearing *En Banc* (the "Brief"). All parties in each of the above-styled cases have consented to the filing of this Brief, and this Brief was authored in whole by counsel for *Amici,* and no person other than counsel for *Amici* contributed money for the preparation or submission of this Brief

Amici are four religious, non-profit retirement communities, and two religious, non-profit colleges associated with the Christian and Missionary Alliance ("CMA") denomination. All *Amici* must follow the religious doctrines and teaching of the CMA, which include the belief that all life is equally sacred and blessed of

God and must be preserved and nurtured, in order to maintain association with the church. Because of their belief in the sacredness of all human life, the *Amici*'s sincere religious convictions preclude them from providing for, facilitating, or authorizing, directly or indirectly, the provision of drugs, devices, procedures, or counseling that could harm or destroy a fertilized egg. The HHS requirement that employer-sponsored healthcare plans provide coverage for the full-range of FDA-approved contraceptive drugs and devices would require *Amici* to provide such items, in contravention of their sincerely held religious beliefs. *Amici* have filed a lawsuit challenging the HHS contraceptive mandate under the Religious Freedom Restoration Act of 1993, which is currently pending before this Court. *See Christian & Missionary Alliance Foundation, Inc., et al. v. Burwell*, Nos. 15-11437, 15-11635. *Amici* thus have a strong interest in preserving their rights under the Religious Freedom Restoration Act to choose to offer health insurance coverage that comports with their sincere religious beliefs.

CONCLUSION

For the foregoing reasons, this Court should grant *Amici Curiae's* Motion for Leave to File *Amici Curiae* Brief in Support of Petition for Rehearing *En Banc*.

Respectfully submitted,

Justin E. Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
jdys@firstliberty.org

Counsel for Amici Curiae

May 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on May 16, 2016, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jeremiah G. Dys
JEREMIAH G. DYS

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BRIEF OF CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC. d/b/a SHELL POINT RETIREMENT COMMUNITY; THE ALLIANCE COMMUNITY FOR RETIREMENT LIVING, INC.; THE ALLIANCE HOME OF CARLISLE, PENNSYLVANIA d/b/a CHAPEL POINTE AT CARLISLE; TOWN AND COUNTRY MANOR OF THE CHRISTIAN AND MISSIONARY ALLIANCE; SIMPSON UNIVERSITY; AND CROWN COLLEGE AS *AMICI CURIAE* IN SUPPORT OF RELIGIOUS ORGANIZATIONS' PETITIONS FOR REHEARING *EN BANC*

Justin E. Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
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/s/ Jeremiah G. Dys
JEREMIAH G. DYS

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INTEREST OF *AMICI CURIAE*[1]

This Brief of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as *Amici Curiae* in Support of Religious Organizations' Petitions for Rehearing *En Banc* (the "Brief") is submitted in support of appellant Eternal World Television Network and appellee the Roman Catholic Archdiocese of Atlanta, *et al. Amici* are four religious, non-profit retirement communities, and two religious, non-profit colleges associated with the Christian and Missionary Alliance ("CMA") denomination. All *Amici* must follow the religious doctrines and teaching of the CMA, which include the belief that all life is equally sacred and blessed of God and must be preserved and nurtured, in order to maintain association with the church. Because of their belief in the sacredness of all human life, the *Amici*'s sincere religious convictions preclude them from providing for, facilitating, or authorizing, directly or indirectly, the provision of drugs, devices, procedures, or counseling that could harm or destroy a fertilized egg. The HHS requirement that employer-sponsored healthcare plans

[1] Pursuant to Fed. R. App. P. 29(c)(5), this Brief was authored in whole by counsel for *Amici*, and no person other than counsel for *Amici* contributed money for the preparation or submission of this Brief.

provide coverage for the full-range of FDA-approved contraceptive drugs and devices would require *Amici* to provide such items, in contravention of their sincerely held religious beliefs. *Amici* have filed a lawsuit challenging the HHS contraceptive mandate under the Religious Freedom Restoration Act of 1993, which is currently pending before this Court. *See Christian & Missionary Alliance Foundation, Inc., et al. v. Burwell*, Nos. 15-11437, 15-11635. *Amici* thus have a strong interest in preserving their rights under the Religious Freedom Restoration Act to choose to offer health insurance coverage that comports with their sincere religious beliefs.

STATEMENT OF THE ISSUE

Whether the government's religious "accommodation" to the Patient Protection and Affordable Care Act's contraceptive mandate violates the Religious Freedom Restoration Act of 1993, the Free Exercise Clause, and the Establishment Clause to the extent the accommodation compels some religious organizations to violate their sincerely-held religious beliefs while exempting other religious organizations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A believer's ability to act in accordance with their religious beliefs is paramount. Followers of any religion seek to live according to their faith in all that they do, and allow their faith to guide their actions in every aspect of their lives.

Indeed, free exercise "implicates more than just freedom of belief." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

Despite the command of Congress to protect the religious liberty of all religious believers, when it was implementing the requirement that employer-sponsored healthcare plans provide coverage for all "preventive care" services—including coverage for all FDA-approved contraceptive drugs and devices—without cost-sharing (hereinafter referred to as the "Mandate"), the Department of Health and Human Services ("HHS") categorically decided that only certain religious believers were entitled to the full protection of their religious exercise. According to HHS, non-church religious organizations that share identical religious beliefs with exempt churches—even religious organizations such as the *Amici* that are closely associated with a church—are not worthy of the same protection. Instead, such groups were given an "accommodation." This "accommodation" for non-church religious organizations requires that such employers directly facilitate access to objectionable drugs and devices, in violation of the Religious Freedom Restoration Act ("RFRA") and various constitutional provisions.

The Supreme Court's opinion in *Zubik v. Burwell* reinforces petitioners' argument that the Government must accommodate *all* religious organizations that object to the Mandate – not just those plaintiffs who appear in the "correct" section

of the tax code or have the "correct" level of religiosity. 578 U.S. ___, No. 14-1418, slip op. at 3–4 (2016) (recognizing the "gravity of the dispute" and vacating and remanding the decisions of the Third, Fifth, Tenth, and D.C. Circuits for clarification of the parties' positions and possible resolution of the disputes).

ARGUMENT

The issues presented by *Eternal Word Television Network, Inc. v. Burwell* and *The Roman Catholic Archdiocese of Atlanta v. Secretary, U.S. Dep't of Health and Human Svcs.*, as well as by *Amici*'s case before this Court, *Christian and Missionary Alliance Foundation, Inc.* et al. *v. Secretary, U.S. Dep't of Health and Human Svcs.*, Nos. 15-11437, 15-11635, are fundamental questions of exceptional importance that will either reinforce or overturn established legal doctrines prohibiting the government from making religious determinations about which religious organizations are "religious enough" to have their sincerely-held religious beliefs protected.

I. Congress enacted RFRA in order to provide protection to all religious exercise from substantial burdens under federal law, and not only to objectors deemed worthy by government officials.

Congress enacted the Religious Freedom Restoration Act in order to protect *all* religious exercise from improper intrusion by the federal government. In doing so, Congress made a sweeping statement regarding the national importance of religious liberty. RFRA declared that the "free exercise of religion is an unalienable

right" that the federal government cannot "substantially burden" absent "compelling justification." 42 U.S.C. § 2000bb(a)(1) & (3).

RFRA does not permit an administrative agency to divide religious objectors into favored and disfavored groups based on an irrelevant distinction in tax-exempt status,[2] allowing churches an automatic exemption from the Mandate, while substantially burdening the identical religious beliefs of other religious organizations, including those—like *Amici*—that are closely associated with a church. Instead, RFRA vested in Congress, and only in Congress, the ability to decide whether and how RFRA should apply to similar groups of religious believers that present the same objection to a statutory requirement. *See* 42 U.S.C. §2000bb-3(b) (noting that RFRA's universal protections apply to all federal law unless "[f]ederal statutory law . . . explicitly excludes [its] application"). Therefore, "RFRA is inconsistent with the insistence of an agency . . . on distinguishing between religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). RFRA was enacted to protect *all* religious objectors from any substantial burden on religious exercise as the result of federal law, including agency action, such as the Mandate, that

[2] HHS determined what religious institutions would be exempt from the Mandate using the tax exemption criteria found in the Internal Revenue Code for churches. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)); *see also* 26 C.F.R. § 1.6033-2(g)(1)(i)—(ii).

improperly discriminates among religious believers that HHS has deemed worthy of exemption.

Despite this statutory command, HHS proceeded to issue regulations that directly violate RFRA: the regulations categorically narrow the scope of religious protection, allowing only certain categories of religious objectors—churches and church-related auxiliaries—the ability to opt-out of requirements to carry religiously objectionable items in employer-sponsored health care plans. Such arbitrary, disparate treatment exceeded the regulatory authority of HHS under the limitations imposed by RFRA.

Importantly, HHS was well aware of the objection of religious organizations, and chose to ignore the burdens on religious exercise and continue its coercive requirements. Shortly after HHS issued its proposed regulations to implement the Mandate that individual and group health plans cover preventive services, religious organizations—including churches, non-church organizations, and some of the *Amici*—objected to the requirement to provide coverage for all FDA-approved contraceptive drugs and devices. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The religious objectors noted that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *See id*. Many religious employers, churches and religious organizations associated with a church

alike had never provided such coverage, and they objected to being coerced to do so in violation of their sincerely held religious beliefs. *See id*. HHS responded by "balanc[ing] the extension of any coverage of contraceptive services . . . to as many women as possible" against "the unique relationship between certain religious employers and their employees in certain religious positions." *Id*. In making this determination, HHS offered an exemption to select religious objectors, but denied such exemption to others. Churches and their integrated auxiliaries were exempted from the contraceptive Mandate, and all other religious objectors—including *Amici*—were not. *See* 78 Fed. Reg. 39,870, 39,873–75 (July 2, 2013); *see also* 45 C.F.R. § 147.131. HHS categorically determined that all other religious organizations—as well as the religious conscience that activated them—would be sufficiently "accommodated" if a third party were required to dispense the objectionable contraceptives using the objecting employer's insurance plan. Unsurprisingly, the religious objectors did not agree that this "accommodation" sufficiently protected their religious beliefs, and they have made their religious objections well known. *See* 78 Fed. Reg. at 39,873–75.

In deciding to respect the moral obligations of some churches and the integrated auxiliaries of churches, but not the rest of religious organizations, HHS has attempted to restrike a balance that Congress had already contemplated when it enacted the ACA without exempting or limiting the application of RFRA. Indeed,

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J concurring). Or, as Judge Tjoflat articulated it: "Under RFRA's demanding scrutiny, the Government cannot put religious believers to the choice of abandoning the commands of their faith or paying massive penalties unless it can show that it has no other way of achieving a compelling interest. Just as in *Hobby Lobby*, the Government has failed to make this showing." *Eternal World Television Network, Inc. v. Burwell*, No. 14-12696, slip op. at 93 (11th Cir. Feb. 18, 2016) (Tjoflat, J., *dissenting*).

II. By creating a bifurcated exemption-accommodation scheme, HHS impermissibly discriminates against religious believers by determining the proper degree of "religiosity" worthy of protection, in violation of RFRA.

Both churches and non-church religious organizations have the same objections to the HHS Mandate: the provision of contraceptive items or the facilitation thereof violates their sincerely held religious beliefs. Despite this, HHS arbitrarily decided to fully exempt churches, while forcibly coercing religious organizations which are not an organized arm of churches under the Internal Revenue Code to facilitate the delivery of objectionable drugs and devices to its employees. HHS attempts to justify this arbitrary distinction in two ways: (1) that

employees of churches are "more likely" than other religious organizations to share the faith and attendant beliefs and moral precepts of the organization, and (2) there is a long-standing "tradition" in our society affording churches special protections. These reasons are unsupported by law or fact.

A. HHS's reasons for creating a bifurcated exemption-accommodation system have no basis in law or fact.

The government has repeatedly reiterated that it chose to exempt churches, integrated auxiliaries, religious orders, and congregations of churches because the government deemed (without reference to any evidence whatsoever) that the employees of such entities are "likely" or "more likely" than other religious organizations to agree with the organization's beliefs regarding contraception, and therefore will not want or use the coverage even if it were offered. 77 Fed. Reg. 8,725, 8,728 (Feb. 14, 2012); 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013); 78 Fed. Reg at 39,874. However, it is clear that many non-church religious organizations, including organizations such as *Amici*, have objections to contraceptives identical to those of organized churches. HHS cited no evidence for the proposition that employees of churches are more likely than employees of other religious organizations to hold the religious beliefs of their employer. It does not counsel in reason to force such organizations to facilitate access to contraceptives when their beliefs are identical to the churches (which are exempt) to which the religious organization is associated. It cannot possibly further the purposes of the Mandate

to require religious organizations to provide these items, when religious organizations operate in accordance with religious beliefs typically derived from the exempt churches with which the religious organization is associated and require their employees to hold the same general beliefs.

The Mandate's bifurcated exemption-accommodation scheme is unprecedented in federal law. Churches and non-church religious organizations are generally treated equally under federal law, contrary to HHS' assertions, consistent with the Religious Freedom Restoration Act and the Constitution. A helpful example is employment law: Title VII's exemptions for religious organization hiring extend to *all* religious organizations, including both churches and non-church religious organizations. Title VII generally prohibits discrimination in employment on the basis of religion. *See* 42 U.S.C. §2000e-2. However, Title VII recognizes that religious organizations—including churches, schools, charities, and any organization which operates with a religious purpose—must be permitted to restrict their hiring to those who share the religious beliefs of the organization, and therefore exempts all religious organizations from its prohibition on hiring those of certain religious beliefs. *See* 42 U.S.C. § 2000e-1; *see also Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (finding that a non-church religious organization was entitled to exemption from Title VII).

Finally, the Mandate's discrimination among religious belief leads to absurd results. For example, a church may operate a school that is not organized as an integrated auxiliary for purposes of the tax code, though it may maintain identical hiring processes and requirements for all employees. Under the Mandate, the church itself would be exempt from complying with the Mandate as it relates to employees of the church, but the school would be required to provide such coverage or facilitate access to such coverage, despite the fact that the requirements for employment are identical.

HHS ignored the fact that employees of churches and those of other religious organizations share identical objections to compliance with the Mandate, and has chosen to coerce non-church religious organizations to facilitate access to contraceptive coverage, while fully exempting churches. The government's reasoning for doing so has no basis in law or fact, and improperly burdens religious exercise, in violation of RFRA.

B. The accommodation substantially burdens religious exercise by discriminating among religious organizations.

The Mandate and its accommodation substantially burdens the religious belief of objecting religious objectors such as *Amici* because it compels one "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Religious objectors believe that facilitation of, or complicity in, the provision of abortifacients has eternal

ramifications. It is therefore a substantial burden to require such objectors to facilitate access to abortifacient contraceptives. This Court has declared that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts . . . ." *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1227 (11th Cir. 2004).

The religious objection and consequent burden on religious exercise is identical to those objecting to the Mandate in *Hobby Lobby*. The only difference here is that, rather than choosing to either (1) comply with the Mandate, in violation of sincerely held religious beliefs, or (2) pay enormous fines, non-profit religious organizations have an additional option to (3) file a letter with their Third Party Administrator ("TPA") or Insurer (depending on the type of plan) certifying their objection to providing contraceptive coverage, facilitating the third party's provision of those exact services as a result of the objector's health plan. The third option is equally morally repugnant to the first, despite the government's insistence to the contrary. The third act (the accommodation) is a substantial burden that is not functionally different from requiring religious organizations to provide contraceptive coverage in their healthcare plans. By participating in the

accommodation, the religious objector authorizes the government to use its health plan to provide contraceptive coverage.

Any suggestions that the introduction of the extra "step" of informing a third party of the religious objection, resulting in the provision of the very coverage to which the religious objectors protest, causes the facilitation of contraceptive coverage to somehow morph into a less objectionable burden upon the conscience of a religious organization is "[r]ubbish." *Eternal Word Television Network, Inc. v. Sec'y, United States HHS*, 756 F.3d 1339, 1347 (11th Cir. 2014), (Pryor, J., *specially concurring*).

The accommodation therefore allows other entities to use the objector's own healthcare plan to directly provide contraceptives, in violation of the sincerely held religious beliefs of objecting organizations such as *Amici*. They become complicit in the Mandate, and in most (if not all) cases their insurers, TPAs, or other plan contractors will use their healthcare plans to provide coverage for contraceptive services without cost sharing to participants and beneficiaries. 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 78 Fed. Reg at 39,876. Essentially, the accommodation works as a permission slip to the TPA or insurer: it serves as the document that facilitates their provision of contraceptive coverage to the organization's employees. This is a substantial burden.

Furthermore, it is not appropriate for the government to determine what is "good enough" for the purposes of religious exercise, though that is what HHS has done with its coercive "accommodation." Courts have "no business addressing" moral and philosophical questions regarding "whether the religious belief asserted in a RFRA case is reasonable." *Hobby Lobby*, 134 S. Ct at 2278. Even prior to RFRA, the Supreme Court held that evaluating religious belief was not within the realm of a court to decide. *Hobby Lobby* noted that the Court could not decide whether Hobby Lobby's belief was "unreasonable" because the "circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" are an "important question of religion and moral philosophy" that is not left to the courts. *Id*. at 2778. The accommodation substantially burdens religious belief.

For these reasons, the Mandate violates the rights guaranteed to some religious organizations who object to being complicit in the government's scheme to provide contraceptive coverage pursuant to the Religious Freedom Restoration Act while granting exemptions to those organizations that are "religious enough." *Amici*, facing the same order to violate their sincerely-held religious beliefs as petitioners, have an interest in protecting their rights secured by the Religious

Freedom Restoration Act, and therefore urge this court to grant the petitions for rehearing *en banc*.

CONCLUSION

The Supreme Court's opinion in *Zubik* reinforces petitioners' argument that the Government must accommodate *all* religious organizations that object to the Mandate—not just those plaintiffs who appear in the "correct" section of the tax code or have the "correct" level of religiosity. 578 U.S. ___, No. 14-1418, slip op. at 3–4 (2016). For this and foregoing reasons, this Court should grant the petitions for rehearing *en banc* and bring this case before the entire panel of the Eleventh Circuit.

Respectfully submitted,

Justin E. Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
jdys@firstliberty.org

Counsel for Amici Curiae

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CERTIFICATE OF SERVICE

I hereby certify that, on May 16, 2016, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jeremiah G. Dys
JEREMIAH G. DYS