No. 12-6294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, 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.

On Appeal from the United States District Court for the Western District of Oklahoma, No. 5:12-cv-01000-HE
Hon. Joe Heaton, United States District Judge

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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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, the Right Reverend W. Thomas Frerking, OSB, and Missouri Roundtable For Life, a Missouri non-profit corporation, 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 can own more than 10 percent of stock.

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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. He believes that a clear and rigorous description of the burden on religious liberty asserted in this case, from the perspective of Christian moral theology, will assist this Court in understanding both the nature of the liberty interest asserted, and the nature of the burden on that interest imposed by the challenged regulations.

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 regulatory interpretation of 42 U.S.C. § 300gg-13(a) requiring employers to provide insurance coverage for abortifacient drugs and devices (hereinafter "the Mandate") imposes a substantial burden on the religious liberty of Catholic employers and other religious dissenters, such as Appellants, who object on religious grounds to providing insurance coverage for abortifacients. 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 Christian religious principles. The Roman Catholic theological tradition has well-developed principles used to assess whether a believer may "cooperate in"—*i.e.*, facilitate or assist—the religiously objectionable action of a third party. 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. These criteria also serve to distinguish other cases of less direct financial support for objectionable practices, which are not viewed as impermissible by most religious believers—such as paying federal taxes that finance the federal death penalty, or paying cash to employees who may go on to use the money for objectionable purposes.

First, the Catholic tradition considers the gravity of the wrongdoing in which the believer is asked to cooperate. Graver wrongdoing requires a more serious reason to justify cooperation. The Mandate requires cooperation in the intentional destruction of human life in its early stages, which is viewed as very gravely objectionable under principles shared by Catholics and many other Christians, including Appellants.

Second, many Catholic theologians consider 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 religious 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 would very likely compel religious employers to become but-for causes of such actions. It requires the employer's health care plan to finance the entire out-of-pocket cost of the objectionable services, which will very likely increase the use of those services.

Fourth, many 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 dissenting employers to provide just such means. It requires them to provide funding that is specifically designated in advance for the sole purpose of purchasing abortifacients. This is similar to requiring religious 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.

In addition, on such moral-theological questions, Catholic employers are guided by 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.

The fact that a Catholic employer is engaged in profitmaking activity, or is operating through corporate entities, makes no difference to that employer's religious obligation to avoid such close cooperation in these serious wrongs.

Because all these criteria are satisfied, the Mandate thrusts religiously dissenting employers into a "perfect storm" of moral complicity in the forbidden actions. It requires employers to cooperate in gravely objectionable actions, by making a substantial and direct causal contribution to those actions, when such actions would likely not happen without the employers' contribution, through the provision of funds that are specifically designated in advance for the sole purpose of paying for the forbidden actions, under circumstances that are likely to create the appearance of endorsement of those forbidden actions.

ARGUMENT

I. The Mandate Imposes a Substantial Burden On the Religious Free Exercise of Catholics and Other Religious Dissenters Because It Compels Them To Share Significant Moral Responsibility for the Forbidden Actions of Third Parties.

On December 20, 2012, this Court issued an order denying Plaintiffs-Appellants' application for an injunction pending appeal. *Hobby Lobby Stores, Inc. v. Sebelius*, Doc. 01018971585, No. 12-6294 (10th Cir. Dec. 20, 2012). The order adopted the district court's reasoning that the Mandate imposes only "an indirect and attenuated" burden on the free exercise of religion:

> The particular 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 corporate plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Id. at 7 (square brackets omitted) (emphasis in original) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)).

The district court's account of third-party responsibility presumes that an actor who knowingly assists in the performance of an objectionable action by another does not share in moral responsibility for that action. Catholic moral theology does not share this presumption. Catholic theology instructs that, in many cases, someone who knowingly facilitates another's action can come to share in the responsibility for that action. The Mandate burdens the free exercise of

religion by forcing Catholics and other religious dissenters, such as Appellants, to engage in serious violations of religious conscience.

A. The District Court Misidentified the Nature of the Religious Liberty Interest Asserted by Appellants, and Thus Failed Properly To Defer to Appellants' Interpretation of Their Own Religion.

As an initial matter, the district court erred by misunderstanding the asserted religious liberty interest in this case. The district court defined the liberty interest as avoiding "participation in an activity that is condemned by plaintiffs' religion," namely the use of abortifacient drugs. *Hobby Lobby*, 870 F. Supp. 2d at 1294. But Appellants assert a more specific liberty interest in refraining from "participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices." Brief of Appellants, at 27. By misidentifying the liberty interest asserted, the district court inadvertently substituted its own judgment for that of the Greens and their businesses on the quintessentially religious question whether the Christian religion forbids a Christian employer to provide such health coverage. *See id.* at 19, 26-27.

In so doing, the district court ran afoul of three principles clearly 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.*

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." *Id.* "Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 716. Thus, in this case, it is irrelevant that not

every Christian necessarily shares the Greens' assessment of the requirements of the Christian religion. What is relevant is whether the Greens' assessment is sincere and religiously motivated—which the district court conceded. *Hobby Lobby*, 870 F. Supp. 2d at 1293.

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 protection under the Free Exercise Clause, and by extension, the Religious Freedom Restoration Act (RFRA). *See* 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).

Once the district court had held that "[n]o one questions that the Greens' beliefs are sincerely held or that the mandate burdens, at least indirectly, the Green's own exercise of their sincerely held religious beliefs," *Hobby Lobby*, 870 F. Supp. 2d at 1293 (brackets and quotation marks omitted), that should have ended the inquiry on the first prong of RFRA. It was error for the district court to

go on to consider whether providing health care coverage for abortifacients was too "indirect and attenuated" to burden the Greens' religious faith. *Id.* at 1294. The Greens' interpretation of their own faith is what matters. As long as their conclusion—that providing their employees with health care coverage for abortifacients is forbidden by their religion—is sincere and not "so bizarre, so clearly nonreligious in motivation" as to warrant extreme judicial skepticism, *Thomas*, 450 U.S. at 715, no further inquiry was necessary, or even appropriate.

B. The Greens' Unwillingness To Provide Health Care Coverage For Abortifacient Drugs Reflects a Reasonable and Highly Persuasive Application of Christian Religious Principles.

In fact, the Greens' religious judgment on this issue is neither "bizarre" nor "clearly nonreligious in motivation." *Id.* Rather, it reflects a reasonable and highly persuasive application of Christian theological principles.

The Roman Catholic tradition employs a well-developed set of moral and theological principles to analyze issues of complicity in the forbidden actions of others. Though the Greens are not Catholic, they acknowledge that "[t]he moral reasoning behind the Greens' religious exercise is both familiar and widely shared across religious faiths." Brief of Appellants, at 27. An analysis of this issue from the perspective of Catholic moral theology illuminates why Christian believers, like the Greens, could reasonably and sincerely "draw the line" against providing insurance coverage for abortifacients, 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 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 (last visited February 18, 2013) (hereinafter "Ascension Health"). "Cooperation" thus encompasses a broad range of conduct, ranging from the plainly impermissible to the plainly permissible.

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 third party. *See id.* Formal cooperation in forbidden actions is never permissible. "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. *Id.*

Material cooperation is sometimes permissible, and sometimes not permissible. 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. *Id.*

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 share in 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; and (5) whether the believer, by cooperating, will send a confusing message to others that the objectionable action is, in fact, permissible. In addition, Catholics in particular

must also consider (6) whether there is a specific directive from Church authorities forbidding the cooperation.

1. The Mandate forces Catholic and other dissenting employers to assist in the performance of actions that are gravely objectionable under religious teachings.

The first criterion is how grave or serious is the wrongdoing that the believer is assisting. For material cooperation in wrongful actions, the graver the wrongdoing, the more problematic the cooperation in that wrongdoing. In general, "the moral distance of the cooperator [from the wrongdoing] must be proportionate to the gravity of the wrongdoing." Ascension Health. As one commentator puts it, 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 (hereinafter "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 Catholic employers to cooperate in actions that are gravely wrongful according to Catholic teachings. 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), at 547 (hereinafter "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, at 455. "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, at 548. Appellants assert a very similar understanding of the gravity of taking innocent human life. *See* Brief of Appellants, at 4-5, 19. Cooperation in the destruction of such life is correspondingly grave, both for Appellants and for Catholic employers.

2. The Mandate requires religious dissenters to make a substantial and direct contribution to forbidden actions.

Second, in assessing the cooperator's moral responsibility, many 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 (4th ed. 1997), at 195. "Thus if we compare the cooperation of a nurse who prepares the operating room in an abortion clinic with that of a janitor who cleans the building … the nurse's action is more proximate and the janitor's more remote from the … act of abortion." *Id.* 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 (emphases in original). According to an ethics manual of the National Catholic Bioethics Center, "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 (hereinafter "Manual") (emphasis in original).

The notion that one bears increased responsibility for an effect which one causes more substantially and directly is also reflected in American tort law, which typically requires proof that a tortfeasor is the "proximate cause" of an injury to establish legal responsibility for it. *See, e.g., Carl v. City of Overland Park*, 65 F.3d 866, 872 (10th Cir. 1995).

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 be due to 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). The monetary contribution required is thus many orders of magnitude greater than in the case of the dissenting Catholic taxpayer, discussed above, 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 religiously dissenting 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" or essential contributor to the objectionable action. 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 (5th ed. 2006) (hereinafter "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). In many cases, of course, it is difficult to tell whether the forbidden action would have occurred without the believer's cooperation. In such cases, the likelihood that the believer will serve as a but-for cause is relevant. "[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., June v. Union Carbide Corp.*, 577 F.3d 1234, 1238-39 (10th Cir. 2009).

For a typical employer of significant size, such as Hobby Lobby Stores, it is very likely that the employer's provision of the mandated health care plan will cause an increase in the use of abortifacients, which otherwise would not have occurred. As noted above, the Mandate requires the employer to provide a health plan with coverage for such services with no cost sharing by the employee. 42 U.S.C. § 300gg-13(a). In other words, the Mandate changes the out-of-pocket cost to the employee of objectionable services to zero. For any employer of significant size, such as Appellants' business, it is very likely that the use of these services will increase as the out-of-pocket cost diminishes to nothing. *Cf. Baude v. Heath*, 538 F.3d 608, 614 (7th Cir. 2008) ("Anything that raises the cost of an activity will diminish the quantity"). It follows that Appellants, and similarly situated Catholic employers, can reasonably anticipate that their provision of the mandated health coverage will expand the use of abortifacient drugs and devices among their employees. Thus, the Mandate puts Appellants in the morally problematic position

of becoming but-for causes of acts of destruction of human life, which are gravely objectionable under Appellants' religion.

4. The Mandate requires 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 necessary relationship exists when the means is tailor-made, so to speak, to assist in the performance of the forbidden action. "[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.

The notion that one becomes morally responsible when there is a necessary relationship between the means provided and the objectionable action reflects commonsense moral intuitions. For example, suppose that someone who strongly opposes the death penalty works at a chemical factory which manufactures a particular chemical that is used in the lethal injection process. If lethal injection is 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 is use in the lethal injection process, the worker would probably feel much more uncomfortable about that line of work.

When there is a very close relationship between the means provided by the cooperator and the third party's action—when the means provided is precisely tailor-made for the performance of the objectionable action—one can often conclude that the cooperator must necessarily share in the third party's intention to perform the objectionable action. This is especially relevant in cases where, as here, the cooperation takes the form of *paying for* a third party to commit the objectionable action. Typically, when someone knowingly pays for something to occur, she shares in the intention that it occur, provided that the money is specifically designated or "earmarked" in advance for the objectionable purpose. For example, if a daughter approaches her parents and asks for $500 to fund an abortion, and the parents give her the money to be used for that specific purchase, one would typically conclude that the parents share in the intention that the abortion be performed.

As another example, suppose that Jane employs Bill, knowing that Bill enjoys violent hard-core 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 hard-core pornography. But because she gives him money that is not earmarked for any particular purpose, Jane typically does not intend that Bill 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 pornography, because Jane gave him money that was *specifically designated in advance* for the sole purpose of purchasing pornography.

Providing a wrongdoer with funds that are specifically designated for sole use in wrongdoing, such as the coupon for objectionable pornography, is problematic for two other reasons as well. The "earmarking" of those funds 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. It is more thus more likely that Bill will engage in the objectionable activity, given that he was provided with means specifically tailored to do so. 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.

Under the Mandate, the employer-provided health plan must include funding that is specifically designated in advance for objectionable services. It is analogous to providing employees with a coupon or certificate for those objectionable services. 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" includes a coupon for the use of abortificients, among many other services. When the employer provides this book of coupons to the employees, she does not know whether any individual employee will use the objectionable ones, but she can foresee that many of them will likely do so.

Therefore, the Mandate is deeply problematic for Catholics and other religious dissenters who oppose the use of abortifacients. It requires them to provide funding that is specifically designated in advance for the sole purpose of purchasing abortifacients. It is analogous to forcing religious dissenters to provide "abortion coupons" to their employees. The Mandate thus requires much closer cooperation in objectionable actions than merely paying cash to employees who may go on to use the cash for objectionable purposes.

5. The Mandate places religious 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, at 550. "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, at 551.

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. 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), at 37 (*available at* http://www.ncbcenter.org/document.doc? id=147) (last visited February 18, 2013)

(hereinafter "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 many States, which adopt the rule against creating the "appearance of impropriety" of Canon 9 of the Model Code of Professional Responsibility. *See, e.g., Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1170 (10th Cir. 2003).

In the case of the Mandate, the provision of a health care plan providing coverage for abortifacients 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 are forced to provide direct financing for the objectionable actions, this 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, at 550-51.

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

Because it satisfies all five criteria discussed above, the Mandate compels religious employers to undertake a very high level of moral complicity in the forbidden actions. In addition, of particular relevance to Catholics, the U.S. Conference of Catholic Bishops has uniformly condemned the Mandate as infringing upon the religious liberty of Catholic and other religious employers. Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already forbidden Catholic health care organizations to engage in particularly close cooperation with abortion and sterilization, which teaching is highly persuasive to Catholics. Directives ¶ 70, at 37 ("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."). 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." Catechism ¶ 2034, at 491. 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, at 493.

To be sure, the Greens are not Catholic. Thus, unlike the other moral-theological principles discussed above, the teaching authority of the Catholic bishops is not particularly relevant to them. But to similarly situated Catholic employers, who may be affected by the disposition of this case, the teaching of the Catholic bishops on this issue provides an additional compelling reason, based on sincere religious principles, to avoid the conduct compelled by the Mandate.

C. The Religious Obligation To Avoid Complicity In Forbidden Actions Applies With Equal Force To the Believer Who Is Engaged In Profitmaking Activity, and Using the Corporate Form.

Furthermore, under Catholic teaching, the religious obligation to avoid complicity in forbidden actions applies with equal force to the believer when she is engaged in profitmaking activity, and/or acting through the corporate form. 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 (last visited February 18, 2013). "It is essential that within a business the legitimate pursuit of profit should be in harmony with the irrenounceable [*sic*] protection of the dignity of the people who work at different levels in the same company." *Id.* ¶ 340. 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. Appellants in this case assert a very similar understanding of their Christian faith in relation to their businesses. *See, e.g.,* Brief of Appellants, at 3-5. Cooperating in the objectionable actions of others is forbidden by Catholic teaching, not only because of its moral effect on the cooperator, but also because of its moral and spiritual effect on the person committing the objectionable actions. *See* Fisher, at 54. Accordingly, Catholic business owners are just as obligated to avoid close cooperation in forbidden actions in the conduct of their businesses, as they are in the conduct of their private lives. And because RFRA does not exempt from protection persons exercising religious liberty in the conduct of their for-profit businesses, the Mandate imposes a substantial burden on the conscience of religious business owners.

* * *

Because it satisfies all of the criteria of moral involvement set forth above, the Mandate places Catholic and other dissenting employers in the midst of a "perfect storm" of moral complicity in the forbidden activity of using abortifacients. It would require 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 very likely that many 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, and (5) where there is a serious risk of scandal to others, all (6) in the face of an authoritative directive of the Catholic bishops forbidding close cooperation in these wrongs. Thus, the religious judgment of Appellants, and of similarly situated Catholic employers, that the Mandate infringes upon their religious liberty reflects an eminently reasonable and persuasive application of Christian 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 6,845 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.
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Dated: February 19, 2013

/s/ Stephen Robert Clark
Stephen Robert Clark

CERTIFICATE OF SERVICE

The undersigned certifies that on February 19, 2013, I caused the foregoing *Brief of the Right Reverend W. Thomas Frerking, OSB, and Missouri Roundtable For Life as Amici Curiae In Support of Appellants and Urging Reversal* to be filed electronically with the Clerk of the Court using the CM/ECF filing system, to be served by electronic service on counsel for all parties, and that counsel of record for all parties are registered CM/ECF users and have been served by that system.

Dated: February 19, 2013

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