No. 12-3841

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYRIL B. KORTE, et al,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois

BRIEF *AMICI CURIAE* OF PROFESSOR OF LAW DAVID M. WAGNER, PROFESSOR OF LAW BRADLEY P. JACOB, PROFESSOR EMERITUS OF LAW CHARLES E. RICE, COMMON GOOD FOUNDATION, COMMON GOOD ALLIANCE, AND CATHOLIC ONLINE, LLC, SUPPORTING APPELLANTS AND URGING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-3841

Short Caption: Cyril B. Korte, et al, v. United States Department of Health and Human Services, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1 .

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Charles E. Rice, David M. Wagner, Bradley P. Jacob, Common Good Foundation, Common Good Alliance, and Catholic Online, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Attorney's Signature: /s/ Steven W. Fitschen **Date:** February 4, 2013

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N/A

Attorney's Signature: /s/ John P. Tuskey **Date:** February 4, 2013

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INTEREST OF *AMICI CURIAE*

David Wagner is Professor of Law at Regent University Law School and teaches and writes about constitutional law, including religious liberty. Professor Wagner is concerned that the HHS mandate that forces employers to provide insurance for contraceptives, abortifacients, and sterilizations despite the employers' religious objections unjustifiably attacks those employers' religious liberty. Professor Wagner is also concerned that the district court's holding that the mandate does not substantially burden the Kortes' religious liberty unduly restricts the protection that RFRA provides for the free exercise of religion.

Charles E. Rice is Emeritus Professor of Law at Notre Dame Law School. Professor Rice taught Constitutional Law and has written extensively on the constitutional and moral issues surrounding abortion and contraception. Professor Rice is concerned about the HHS mandate's attack on religious liberty and the district court's decision that unduly restricts RFRA's protections.

Bradley P. Jacob is Associate Professor of Law at Regent University Law School. He specializes in Constitutional Law and religious liberty. From 1991 to 1993, Professor Jacob was Executive Director and CEO of the Christian Legal Society, which was a leading member of the Coalition for the Free Exercise of Religion during the legislative debates that led to RFRA's passage. Professor

Jacob is concerned to see RFRA applied in a way, contrary to the district court's decision, that affirms RFRA's robust protection for religious liberty.

Common Good Foundation is a 501(c)(3) organization. Common Good Alliance is a 501(c)(4) organization. Founded by Keith A. Fournier, a Catholic apologist and constitutional lawyer, both organizations are informed by classical Christian social teaching and committed to building a culture of life, family, and freedom, while affirming classical Christian teaching, including that concerning religious freedom. Common Good Foundation and Common Good Alliance each have a Legal Defense Fund that provides legal advocacy and support in the form of amicus briefs or intervention in cases concerning the organizations' missions. To perform their missions, Common Good Foundation and Common Good Alliance rely upon a robust interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Common Good Foundation and Common Good Alliance are concerned that the district court's decision in this case unduly restricts the protection RFRA provides for religious liberty.

Catholic Online is a business that serves Catholics and all people of good will by providing news and content over its global integrated media network. Catholic Online operates its business in fidelity with the Catholic Church's teachings and is thus committed to building a culture of life, family, freedom, and solidarity. Catholic Online affirms classical Christian teaching, including that

concerning religious freedom. Catholic Online's business mission depends upon a proper interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Catholic Online is concerned that the district court's decision in this case unduly restricts the protection RFRA provides for religious liberty.

Amici Curiae file this brief with all parties' consent.

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

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 ARGUMENT

This brief makes two arguments: First, a Catholic employer, following fundamental principles of Catholic moral teaching, could reasonably conclude that complying with the HHS mandate and making available resources that employees can use specifically for the purpose of paying for contraceptives, abortifacients, and sterilizations constitutes formal cooperation or illicit material cooperation (in the theological sense) with his employees' use of the insurance to obtain contraceptives, abortifacients, and sterilizations and therefore is contrary to the employer's Catholic faith. Second, courts are incompetent to decide (in the legal

sense) whether the Kortes were wrong to believe that complying with the HHS mandate would violate their Catholic faith as the district court implicitly decided in finding that the mandate imposed no substantial burden on their religious exercise.

The Catholic Church teaches that contraception, sterilization, and abortion are immoral. Cooperating with another person's immoral act by providing the means for that person to commit the act also can be morally wrong. For example, if a person loans somebody a gun knowing the person will use that gun to shoot somebody and sharing in the shooter's evil intent, that person is morally culpable for cooperating with murder. This is an example of formal cooperation, which occurs when one who shares a person's evil intent performs an act that assists that person in doing evil. Formal cooperation is always morally wrong because it involves intentional participation in evil.

A person who does not share the evildoer's intent but performs an act that assists that person in doing evil is said to have materially cooperated in that act. Material cooperation is not always morally wrong. Whether it is depends essentially on weighing the gravity of the evil being assisted and harms that flow from assisting that evil against the goodness of the goal the cooperator is pursuing.

A Catholic employer reasonably could conclude that complying with the HHS mandate constitutes formal cooperation. The employer, by specifically providing for the mandated coverage is intentionally acting to provide a pool of

money for his employees to use to pay for contraceptives, abortifacients, and sterilizations. Thus, this employer could reasonably be thought to share the intent of those who would use the coverage, at least to the extent of sharing the intent that those goods and services be available for those who wish to use them.

Even if providing the mandated coverage is only material cooperation, a Catholic employer could reasonably conclude the cooperation is illicit. The evils assisted by providing access to contraception, abortifacients, and sterilization are grave evils, and a Catholic employer could conclude that providing for those goods and services in his employees' health insurance would encourage employees to use those goods and services and seriously undermine his Catholic witness and cause scandal by leading people to believe that the Church's teaching on these matters should not be taken seriously.

That some Catholics disagree with the conclusion that complying with the mandate constitutes formal or illicit material cooperation is irrelevant. The Supreme Court has held that courts are not competent to determine whether a believer's understanding of what his faith requires is wrong. For Catholic employers like the Kortes, who conclude that complying with the mandate would violate their Catholic faith, the mandate imposes a stark choice—violate your faith, or pay enormous fines. The district court's holding that this choice imposes no substantial burden on the Kortes' exercise of their Catholic faith is not only wrong;

it nullifies the protection RFRA promises for the free exercise of religion.

ARGUMENT

I. INTRODUCTION

This case poses one fundamental question: May the federal government impose a significant penalty on a person who refuses to act in a way that he believes violates his religious faith? The Religious Freedom Restoration Act provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the "least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000bb-1(a) & (b) (2012). A federal mandate that penalizes a person who declines to violate his sincerely held religious beliefs (in other words, that penalizes him for not sinning) would seem to be the quintessential substantial burden on religious exercise. That conclusion is consistent with Supreme Court precedent defining what constitutes a substantial burden on religious exercise for Free Exercise Clause purposes. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (mandatory attendance law requiring parents to send their children to school beyond eighth grade or face fines from $5 to $50 and three months imprisonment imposed a "severe" burden on Amish parents by "compel[ling] them . . . to perform acts undeniably at odds with the fundamental tenets of their religious beliefs"); *Thomas v. Review Board*, 450 U.S. 707, 717-18 ("where a state conditions receipt of an important benefit upon

conduct proscribed by religious faith . . . , thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a [substantial] burden on religion exists.")

Cyril and Jane Korte are Catholics who desire to operate their business, Korte & Luitjohan Contractors, Inc., consistently with their faith. The Kortes accept the Church's teaching that abortion, sterilization, and contraception are gravely immoral.[1] The Kortes also believe their faith does not allow them to facilitate others' access to these goods and services. Therefore, the Kortes believe that they would violate their Catholic faith—that is, they would sin—if they allowed their business to provide employees with health insurance that covers contraception, abortifacients, and sterilization.

The Department of Health and Human Services, however, has promulgated a regulation requiring that employers (with exceptions that do not include the Kortes' business) provide their employees health insurance that covers all FDA-approved contraceptive methods and sterilization procedures. Among these

[1] *See e.g.*, Pope John Paul II, *Evangelium Vitae* ¶¶ 58-62 (1995) *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelim-vitae_en.html; (last visited Nov. 19, 2012) Pope Paul VI, *Humanae Vitae* (1968) *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (last visited Jan. 31, 2013); Pope Pius XI, *Casti Conubii* ¶¶ 53-56 (1930) *available at* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-conubii_en.html (last visited Jan.31, 2013); *Catechism of the Catholic Church*, ¶¶ 2366, 2399 (1997).

approved contraceptives are drugs (Ella, Plan B) that act as abortifacients.[2] If the Kortes do not comply with the HHS mandate, their business will be subject to annual fines of over $700,000. (*See* Appellant's Br. 14) Because the mandate forces the Kortes' business to pay enormous fines unless the business provides its employees with the HHS-mandated coverage, and because the Kortes believe that to provide that coverage would be a sin, the HHS mandate imposes on the Kortes a stark choice: Do what your consciences tell you violates your Catholic faith—in other words, commit serious sin—or pay substantial fines. If that does not substantially burden the Kortes' exercise of their religion, RFRA is pointless.

The district court, at least in the abstract, seems to have acknowledged that forcing a person to pay a penalty if he does not engage in conduct that violates his religious beliefs substantially burdens that person's religious exercise. Thus, the court correctly characterized *Yoder* as a case in which "parents were forced to choose between endangering their salvation and criminal penalties." *Korte v. United States Dept. of Health and Human Servs.*, No. 3: 12-CV-01072, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012). And the court correctly stated that in *Thomas* the Supreme Court held that where government puts "substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon

[2] *See* Michael Fragoso, *The Stealth Abortion Pill* (Aug. 17, 2010) http://www.thepublicdiscourse.com/2010/08/1515/ (last visited Jan. 31, 2013).

religion exists." *Id*. Based on what the district court itself wrote about *Yoder* and *Thomas*, if one accepts the Kortes' profession of their beliefs at face value, it follows that the burden that the HHS mandate imposes on them is substantial under RFRA. Forcing the Kortes to pay enormous fines if they fail to do what they believe violates their faith certainly puts "substantial pressure on [the Kortes] to modify [their] behavior and violate [their] beliefs" and "force[s] [the Kortes] to choose between endangering their salvation" and paying a significant penalty, *id*.

But despite the severe penalty the HHS mandate imposes if the Kortes do not violate their faith, the district court reached the startling conclusion that the mandate imposes no substantial burden on the Kortes' religious exercise. The district court thought the burden "*de minimus*," *id*., "because the connection between the government regulation and the burden upon the Kortes' religious beliefs is too distant to constitute a substantial burden," *id*. While its reasoning is somewhat muddled, the court appears to have reached this conclusion for two primary reasons: first, the court appears to have fixated on the fact that the Kortes operate their business as a corporation. *See id*. at *11 ("K&L is not a person and only reflects the Kortes' beliefs. The fact that a 'corporate veil'. . . stands between the Kortes and K&L and the group health plan cannot be ignored"); *id*. ("by assuming the corporate form, the Kortes chose to accept the limitations of that form. Plaintiffs would rather obliterate any distinction between business entities

and individuals"). Second, the court appears to have adopted the reasoning first set forth in *O'Brien v. United States Dept. of Health and Human Services*, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012). *See Korte*, 2012 WL 6553996, at *11 (citing *O'Brien*). The *O'Brien* court opined that the HHS mandate did not substantially burden a Catholic employer's religious exercise because the employer would have to subsidize employees' use of contraception, abortifacients, or sterilization services only "after a series of independent decisions" by covered employees and their health care providers. *See O'Brien*, 2012 WL 4481208, at *6. In the *O'Brien* court's view, a view the district court here shared, "'RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.'" *Korte*, 2012 WL 6553996, at *11 (quoting *O'Brien*, 2012 WL 4481208, at *6).

The district court's apparent reasons for finding that the HHS mandate imposed no substantial burden on the Kortes' religious exercise miss the mark. The fact remains that the Kortes believe it would be inconsistent with their Catholic faith—that is, it would be a sin—to direct the corporation they own and manage to provide employees with health insurance that covers contraception, abortifacients, and sterilization. The HHS mandate forces the Kortes to do what their consciences tell them is a sin or to pay enormous fines. If one grants the

Kortes' understanding of what their faith requires, this is not, to quote *O'Brien*, 2012 WL 4481208, at *5, an "insignificant or remote" burden on the exercise of that faith. Rather, the mandate imposes substantial and direct pressure on the Kortes to violate their faith.

That the district court found otherwise raises the reasonable inference that the court did not grant the Kortes' understanding of what their faith requires. In other words, it is fair to conclude that the district court, at least implicitly, decided that the Kortes are wrong to believe that complying with the mandate would violate their Catholic faith. In so deciding, the district court effectively made itself the arbiter of what the Catholic faith requires of employers who must decide whether to comply with the HHS mandate. The Supreme Court, however, has held that courts are incompetent to determine whether a believer's understanding of what his faith requires is correct. *Thomas*, 450 U.S. at 714-18.

Perhaps the district court found it difficult to believe or understand that employers like the Kortes could conclude that making health insurance covering morally objectionable goods and services available to employees who may or may not use that coverage is morally wrong. But a religious belief need not be "comprehensible to others" to warrant protection. *Id*. In any event, the Kortes' belief—besides being the conclusion their consciences led them to reach—is reasonable as a matter of basic Catholic moral teaching. A reasonable Catholic

employer *can* conclude that complying with the HHS mandate—that is, providing his employees health insurance that covers contraception, abortifacients, and sterilization—would constitute illicit cooperation with what Catholic moral teaching regards as the evils of contraception, abortion, and sterilization. Moreover, that some Catholics disagree with this conclusion does not mean that the Kortes' belief that they may not comply with the mandate is wrong. As noted, the Supreme Court held in *Thomas*, 450 U.S. at 715, that courts are incompetent to determine who is right when believers disagree about what their faith requires.

The next section of this Brief will discuss why a reasonable Catholic could conclude it would be contrary to his Catholic faith to comply with the HHS mandate.[3] The Brief will proceed to explain why the Supreme Court's decision in *Thomas* requires federal courts to refrain from deciding whether people like the Kortes correctly understand what their faith requires.

[3]Your *Amici* do not address this point necessarily to convince this Court that complying with the mandate would violate Catholic teaching, because as we will expand upon further, it is not generally within a court's competence to determine whether a believer's understanding of his faith is correct. Rather, we address this point to demonstrate how the district court gave short shrift to the Kortes' beliefs and to demonstrate that the Kortes' understanding of their duty as Catholics is "not so bizarre . . . as not to be entitled to protection," s*ee Thomas* 450 U.S. at 715.

II. A REASONABLE CATHOLIC COULD CONCLUDE THAT COMPLYING WITH THE HHS MANDATE WOULD VIOLATE HIS FAITH.

A. Cooperating With Another Person's Evil Act by Providing the Means for that Person to Perform the Act can be Morally Blameworthy.

It is, of course, morally wrong to deliberately perform an evil act (for example, intentionally killing another without justification). But in any number of circumstances, cooperating with another person's evil act—that is, assisting a person to do what is evil (for example, by providing the means for that person to do evil)—is also morally wrong. This general concept is not difficult to grasp. Suppose that Baker approaches Able and asks in a way that makes it clear he is serious, "May I borrow your gun so I can kill my wife?" If Able gives Baker the gun knowing that Baker intends to use the gun to kill his wife ("Here's the gun. Go get her."), no one would seriously suggest that Able, though he did not pull the trigger, would not be morally culpable for assisting Baker's evil act.

This is not to say that providing the means for a person to perform an evil act is always morally blameworthy. If Baker had told Able he wanted to use the gun for target shooting at the shooting range, and Able had no reason to think Baker wanted to use the gun for an immoral purpose, it is difficult to see how Able could be morally culpable for cooperating with Baker's wife's murder.

These two examples illustrate the two general types of cooperation with evil

of which Catholic moralists speak. The first is an example of formal cooperation; the second is an example of material cooperation. Formal cooperation is generally considered to be cooperation by which the cooperator "not only acts in such a way to help an evil-doer achieve his goal, but also joins with the evil-doer in the latter's bad willing."[4] In the first example, Able formally cooperated because he shared Baker's evil intention to kill his wife. This sharing of the evildoer's will can be implicit. Even if Able had not explicitly joined in Baker's evil will, one can infer that Able shared Baker's bad intent by loaning the gun to Baker knowing Baker's intent to shoot his wife; why else would Able loan Baker the gun in those circumstances? And Able would be morally culpable even if Baker changed his mind and decided not to kill his wife. As far as Able knew when he loaned Baker his gun, Baker intended to kill his wife. Able loaned Baker his gun with the intent that the gun be used to commit a murder. The evil intent that Able harbored made it morally wrong for him to loan Baker the gun. Formal cooperation is always

[4] William Newton, *Avoiding Cooperation with Evil: Keeping Your Nose Clean in a Dirty World*, Homiletic & Pastoral Review (Sept. 21, 2012), *available at* www.hprweb.com/2012/09/avoiding-cooperation-with-evil-keeping-your-nose-clean-in-a-dirty-world/ [hereinafter *Avoiding Cooperation*] (last visited Jan. 31, 2013); *see also* Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), *available at* http://www.newadvent.org/cathen/01100a.htm (last visited Jan. 31, 2013) ("to formally cooperate in the sin of another is to . . . share in the perverse frame of mind in the other"); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), *available at* www.immunize.org/concerns/vaticandocument.htm [hereinafter *Vatican Statement on Vaccines*] (last visited Jan. 31, 2013) ("Formal cooperation is carried out when the [cooperator] cooperates with the immoral action of another person, sharing the latter's evil intention.")

morally wrong, because by definition, "it represents a form of direct and intentional participation in the sinful action of another person."[5]

The second example, in which Able loaned Baker his gun thinking Baker was going to use it for target practice is an example of material cooperation. Material cooperation occurs when a person who does not share the wrongdoer's evil intent assists the wrongdoer's act by an action that is in itself good or morally indifferent.[6] In the second example, while Able assisted Baker in shooting his wife by loaning Baker his gun, Able could not have shared Baker's evil intent because he had no reason to know that evil intent. As is apparent from the example, material cooperation, unlike formal cooperation, is not always morally blameworthy. It would be absurd to impute moral blame to Able for loaning Baker his gun for target practice just because, without reason for Able to know, Baker intended to use his wife as the target.

That said, material cooperation can be morally wrong when a person knows or should know that his otherwise blameless activity is helping others to do evil. Whether material cooperation is wrong depends primarily on whether the cooperator has a sufficiently good reason to tolerate the evil that his action is assisting (an evil he does not intend).[7] That, in turn, requires one to consider the

[5] *See Vatican Statement on Vaccines*, *supra* note 4.
[6] Joseph Delaney, *Accomplice*, *supra* note 4.
[7] *See* Newton, *Avoiding Cooperation*, *supra* note 4.

gravity of the evil being assisted and the goodness of the goal the cooperator is pursuing.[8] Or, as other authors have put it, one must consider "the fairness of [the cooperator's] choice as judged by its foreseen good and evil effects upon all concerned."[9] The harms that could arise from material cooperation include, among other things, "all the wrongs that would have been averted if [one] hadn't played a role; their toll on others; and the false beliefs about right and wrong that people infer from [one's] involvement."[10]

To illustrate, suppose that Charlie and David are hospital janitors. Their duties include cleaning operating rooms after surgical procedures, including abortions. Charlie has a large family to support and cannot find another job. He thinks abortion is wrong but generally keeps that thought to himself. David, on the other hand, is economically well-off and left a lucrative job to work at the hospital because he enjoys the hospital environment and manual labor. David is also a professed practicing Catholic who publicly professes that he opposes abortion.

Neither Charlie nor David actually perform abortions. Cleaning operating rooms after surgery is in itself not morally wrong and is necessary to prepare operating rooms for any number of morally blameless surgeries. But cleaning operating rooms does support and assist the performance of abortions at the

[8] *See id*.
[9] Sherif Girgis & Robert P. George, *Morals and Mandates* (Feb. 14, 2012), http://www.thepublicdiscourse.com/2012/02/4736 (last visited Jan. 31, 2013).
[10] *Id*.

hospital. Charlie and David, who both oppose abortion, materially cooperate with abortion. Is either's material cooperation immoral?

While one cannot say definitely that either is acting immorally by working at the hospital, there is a far stronger case that David is acting immorally. Both Charlie and David are accomplishing good by preparing operating rooms for morally sound surgeries. Both are accomplishing the good of earning a living. But unlike Charlie, who needs his job to feed his large family, David is working at the hospital only because he likes the job. Thus, the total sum of good David is accomplishing is arguably less than the total sum of good Charlie is accomplishing and thus more likely to be outweighed by the evil of the abortions his work is helping to accomplish. Moreover, as a professed pro-life Catholic, David's working at the hospital carries a greater risk of scandal, which is defined in the Catechism of the Catholic Church as "behavior which leads another to do evil."[11] Those who know David to be a pro-life Catholic might conclude from his work at the hospital that the Church's teaching on abortion is not as important as the Church claims; why else would a professed pro-life Catholic be working at a hospital in a way that ultimately helps doctors at the hospital to perform abortions?[12]

[11] *Catechism of the Catholic Church* ¶ 2284.

[12] This is not to suggest that your *Amici* believe Charlie's cooperation with abortion is morally sound. Your *Amici* only suggest that Charlie's case is a closer

Having discussed general principles of cooperation, the next question is whether Catholic employers like the Kortes could reasonably conclude that providing insurance coverage to their employees for contraceptives, abortifacients, and sterilizations, as the mandate requires, is morally wrong (or, in other words, whether it would be reasonable for a Catholic employer to conclude that providing that coverage constitutes formal or illicit material cooperation with evil). The next section discusses that question.

B. A Reasonable Catholic Could Conclude that Providing Insurance Coverage for Contraceptives, Abortifacients, and Sterilizations Constitutes Formal or Illicit Material Cooperation.

Catholic employers like the Kortes reasonably could conclude that providing the coverage required by the HHS mandate is morally wrong because providing that coverage constitutes formal cooperation with evil. A series of examples illustrates this. Suppose an employer decides to establish a "Hitman Compensation Fund" for his employees. Any employee who needs a hitman's services may draw from the fund to pay for those services. This employer has intentionally chosen specifically to provide his employees access (or more ready access) to murder-for-hire services by specifically providing them the means to pay for those services. It is not unreasonable to say that if any employee draws from the fund to hire a

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call than David's. Ultimately, Charlie must follow his own conscience (after appropriately informing that conscience and carefully considering the matter) to decide whether he can continue to work at the hospital. *See infra* at 25-26.

hitman, the employer has formally cooperated with the employee's evil act because he shares the employee's will to have the means to pay the hitman. In fact, even if no employee takes advantage of the hitman fund, it is reasonable to say that the employer still harbors an intent to see that his employees are able to pay for and thus obtain murder-for-hire services.

Few would doubt that an employer who intentionally and specifically provides the means for his employees to pay for murder-for-hire services is acting immorally. But if the employer who establishes the hitman fund is acting immorally, it must be reasonable for the employer who, based on his faith, believes that contraception, abortion, and sterilization are morally wrong to conclude that intentionally and specifically providing his employees the means to pay for contraception, abortifacients, and sterilization is morally wrong (and thus contrary to his faith). Suppose an employer establishes a fund to reimburse employees for contraceptive purchases. Just as the employer who establishes the hitman fund is intentionally deciding specifically to provide the means for his employees to pay for murder-for-hire services, the employer who establishes the fund to reimburse employees for contraceptives is intentionally deciding specifically to provide his employees the means to pay for contraceptives. Like the employer who establishes the hitman fund, this employer can reasonably be thought to share the intent of those who would use the fund to help pay for contraceptives, at least to the extent

that he shares the intent to have contraceptives available, or more readily available, for employees who wish to use them. It is thus reasonable to consider this employer to be formally cooperating with his employees' contraceptive use. And like the employer who establishes the hitman fund, it could reasonably be said of this employer that even if no employee draws funds from the contraception fund, the employer harbors an intent to see that his employees are able to pay for and thus obtain contraceptives.

If it is reasonable to conclude that an employer who establishes a fund specifically to pay for contraceptives is formally cooperating with the evil of contraceptive use, it is also reasonable to conclude that an employer who in effect establishes such a fund by providing health insurance for his employees that specifically includes coverage for contraceptives is formally cooperating with the evil of contraceptive use. That he is doing this through a contract with a third party does not matter because the end result is the same—in each case, the employer has in effect intentionally provided a pool of money for his employees to use specifically to pay for contraceptives. Each employer has deliberately chosen specifically to make the means of paying for (and thus obtaining or more easily obtaining) contraceptives available to his employees. Thus, this employer could reasonably be thought to share the intent of those who would use the insurance to pay for contraceptives.

The district court in *O'Brien* opined that providing to employees health insurance that specifically covers contraception, abortifacients, and sterilization is no different than paying employees wages or salary that they could use to pay for those goods and services. *O'Brien*, 2012 WL 4481208, at *7. The suggestion is that if an employer does not consider paying employees a salary to be morally wrong (even though an employee may use that salary to pay for contraceptives), it cannot be a substantial burden on the employer's exercise of religion to provide health insurance that covers contraception.

But there is a significant difference between paying an employee a salary and providing insurance that specifically covers contraception:

> The difference is analogous to the difference between giving cash to someone and giving someone, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no essential tie between your gift and that particular use of it. In the latter case, you are giving a voucher for the procurement of *a specific and limited range of goods and services;* there is an intelligible link between your gift and the use to which the recipient might put it.[13]

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"[14] so a person who believes contraception is wrong could reasonably believe it wrong to provide health

[13] Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2010), http//www.thepublicdiscourse.com/2013/01/7403/ (last visited Jan. 28, 2012).
[14] *Id*.

insurance that can be used to pay only for those goods and services the policy covers and that specifically covers contraceptives. While it is not reasonable to say that an employer who pays his employees wages shares their intent regarding how they spend those wages, it is reasonable to say that the employer who provides a means to pay specifically for contraceptives is acting specifically to assist his employees to obtain contraceptives and therefore shares the intent to use contraceptives.

The conclusion that one formally cooperates with evil by providing employees with health insurance that covers contraceptives, abortifacients, and sterilization is not an outlier in Catholic moral thought. Indeed, one high-ranking member of the Catholic hierarchy, Raymond Cardinal Burke, Prefect of the Apostolic Signatura,[15] has stated publicly that providing the mandated coverage

> "is not only a matter of what we call '*material cooperation*' in the sense that the employer by giving this insurance benefit is *materially providing* for the contraception but it is also '*formal cooperation'* because he is *knowingly and deliberately* doing this, making this available to people. There is no way to justify it. It is simply wrong."[16]

[15] The Apostolic Signatura is an office of the Roman Curia that "functions as the supreme tribunal and also ensures that justice in the Church is correctly administered." *Apostolic Signatura*, www.catholic-heirachy.org/diocese/dxtas.html (last visited Jan. 31, 2013).

[16] Steven Ertelt, *Catholic Cardinal: A Sin to Cooperate With Obama Mandate*, (Apr. 10, 2012), http://lifenews.com/2012/04/10/catholic-cardinal-sin-to-cooperate-with-obama-mandate (last visited Jan. 30, 2012) (quoting an interview of Cardinal Burke by Thomas McKenna).

Other Catholic writers also have argued that providing the mandated coverage constitutes formal cooperation.[17]

But even if providing the mandated coverage is only material cooperation, a reasonable Catholic employer could find the cooperation to be illicit. The evils being assisted by providing access to contraception, abortifacients, and sterilization are seen by the Catholic Church to be grave evils. Providing employees the means to pay for and thus more readily obtain contraceptives, abortifacients, and sterilization may encourage employees to use those goods and services. Moreover, a Catholic employer who takes his faith seriously and makes that commitment known could well be concerned that providing the mandated coverage would undermine his Catholic witness and cause scandal by leading people to believe that the Church's teaching on contraception, sterilization, and abortion should not be taken all that seriously.[18] He could conclude that given these harms, he must follow the examples of the Apostles Peter and John who in defiance of an order by authorities not to preach the gospel responded, "we must obey God rather than

[17] *See, e.g.*, Michael Pakaluk, *Does the HHS Mandate Compel Material or Formal Cooperation* (Sept. 19, 2012), http://philosophy.avemaria.edu/post/31860496920/does-the-hhs-mandate-compel-material-or-formal (last visited Jan. 31, 2013); Steven A. Long, *The Unthinkablility of Compliance* (Sept. 29, 2012), http://www.thomistica.net/news/2012/9/28/the-unthinability-of-compliance.html (last visited Jan. 31, 2013).

[18] For a succinct discussion of some of the harms that could be caused by complying with the mandate, *see* Sherif Girgis & Robert P. George, *Morals and Mandates*, *supra* note 9.

men." *Acts 5:29* (Revised Standard Version Catholic Ed. 1965). One might argue that the employer could alleviate any harm to his Catholic witness by explaining to employees the evils of the services he is being forced to cover and expressing his desire that they not use the mandated coverage. But he could well be met by the reasonable response, "If these things are so bad, why do you provide insurance to cover them? Is your business more important than your alleged faith?" An employer need not assume that a typical employee (or others not trained in moral theology or philosophy) would understand the nuances of the Church's understanding of formal and material cooperation.

While not all Catholics would agree that it is immoral for an employer to comply with the HHS mandate, a reasonable Catholic employer could conclude that it is. The district court apparently did not believe this; in embodying that apparent disbelief in its holding that the mandate imposed no substantial burden on the Kortes' exercise of their faith, the court overstepped its proper role, as the next section will explain.

C. Courts Are Not Competent to Determine whether the Kortes' Understanding of Their Duty as Catholics is Correct.

While there are cases in which it is obvious that a person's cooperation with evil is morally wrong (see, for example, the first hypothetical concerning Able loaning his gun to Baker, *supra* at 13), "it is often difficult to apply these principles [concerning cooperation], because it is hard to determine whether the cooperation

is formal or only material, and also whether the reason alleged for a case of material cooperation bears due proportion to the grievousness of the sin committed by the principle."[19] This may be true concerning the HHS mandate. There is, in fact, an ongoing discussion among Catholic thinkers who oppose the mandate about whether complying with the mandate would be formal or material cooperation with the evils of contraception, abortion, and sterilization and whether, if material cooperation, that cooperation is necessarily illicit.[20]

As noted, not all Catholics would agree that complying with the HHS mandate would be morally wrong. But that does not justify holding that the mandate does not substantially burden the Kortes' exercise of their Catholic faith. Catholic employers must consider the matter carefully and follow their own consciences in determining whether it is morally licit to comply with the mandate. As Joseph Cardinal Ratzinger (now Pope Benedict XVI) has written, "[i]t is of

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[19] Joseph Delaney, *Accomplice*, *supra* note 4.

[20] *See, e.g.*, Janet E. Smith, *Is it Moral to Comply with the HHS Mandate?*, http://catholicvote.org/discuss/index.php?p=36708 (last visited Jan. 31, 2013) (noting the differing views regarding the morality of complying with the HHS mandate and explaining her own conclusion that while Catholics should resist the mandate as an unjustified attack on religious liberty, complying with the mandate is not immoral); Joseph G. Trabbic, *The New Catholic Debate Over the HHS Mandate* (Sept. 28, 2012), philosophy.avemaria.edu/post/3277415420/the-new-catholic-debate-over-the-hhs-mandate (last visited Jan. 31, 2013) (summarizing the debate, setting forth various positions, and concluding that "the question . . . is not easily answered" and that "it may be a matter of prudential judgment in which reasonable people will be able to legitimately to [sic] disagree or it may simply be a perplexing matter that is just not clear at the moment").

course undisputed that one must follow a certain conscience."[21] A corollary to that principle is that a person must not act on an unclear conscience. If a person is uncertain whether an act is wrong, it would be wrong for him to perform the act because performing the act would manifest a will to do what is wrong. Thus, a Catholic employer who is unsure about whether complying with the mandate would be morally wrong could also conclude that his faith requires him to refuse to comply.

In any event, a federal court has no business deciding whether the Kortes' conclusion that they cannot comply with the HHS mandate is correct, even if other Catholics would disagree. As the Supreme Court held in *Thomas*, 450 U.S. at 715-16, "[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 . . . . [I]t is not within the judicial competence to inquire [who] more correctly perceive[s] the commands of their common faith."

Thomas is particularly instructive because *Thomas* involved a plaintiff who like the Kortes had to decide whether doing something that ultimately assisted what his conscience told him was wrong was inconsistent with his faith. Thomas, a Jehovah's Witness, worked at a steel foundry and was transferred to a department

[21] Joseph Cardinal Ratzinger, *Conscience and Truth*, (Address Presented at the 10th Workshop for Bishops, Feb. 10, 1991, Dallas, Texas) available at http://www.ewtn.com/library/curia/ratzcons.htm (last visited Jan. 31, 2013).

that fabricated tank turrets. Thomas concluded that he could not work on weapons without violating his faith. He therefore quit his job. *See id*. at 710. At his unemployment compensation hearing, Thomas testified that while "he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms," *id*. at 711, he could not work directly on producing arms. *Id*. Thomas was denied unemployment benefits, and the Indiana Supreme Court, over Thomas's objection that denying him benefits would violate his free exercise rights, ultimately found no free exercise violation and affirmed the benefits denial. *See id*. at 712-13.

In its decision, the Indiana Supreme Court relied largely on what it saw as the inconsistency between Thomas's professed conviction that he could not work directly on armaments and his statement that he would not object to "produc[ing] the raw product necessary for the production of any kind of tank" because he "would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience." *Thomas*, 450 U.S. a 715 (citation omitted). In reversing the Indiana Supreme Court's decision, the Supreme Court rejected the court's reasoning out of hand: "Thomas' statements reveal no more than that he found work [producing raw materials] sufficiently insulated from producing weapons of war . . . . Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id*. at 17.

Like Thomas, the Kortes have had to decide whether their faith would allow them to perform an act that would assist others in doing what their faith tells them is morally wrong. Like Thomas, the Kortes drew a line. As in *Thomas*, it is not for courts to say that the line the Kortes drew was unreasonable or wrong.

The Kortes sincerely believe that they cannot comply with the HHS mandate and remain true to their Catholic faith. Their faith requires them to follow their consciences. The HHS mandate thus presents the Kortes with a stark choice: do what you believe is a sin according to your understanding of your religious faith, or pay enormous fines. Being put to that choice substantially burdens the Kortes' right to exercise their religion. The district court's holding that it does not is not just wrong; that holding usurps the Kortes' right to follow their own conscientious judgment and thus nullifies the protection RFRA promises for the free exercise of religion.

CONCLUSION

This Court should reverse the district court's decision denying the Kortes' motion for a preliminary injunction.

Respectfully submitted this 4th day of February, 2013,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: February 4, 2013

/s/Steven W. Fitschen
Steven W. Fitschen

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2013, I electronically filed the attached Brief *Amici Curiae* of Professor of Law David Wagner**,** Professor of Law Brad Jacobs**,** Professor Emeritus of Law Charles Rice**,** Common Good Foundation**,** Common Good Alliance, and Catholic Online, LLC, in the case of *Cyril Korte, et al*, v. *United States Dept. of Health and Human Services, et al*, No. 12-3841, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served via that system.

/s/Steven W. Fitschen
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