No. 13-1118

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS in her official capacity as Secretary of the United States Department of Labor; TIMOTHY F. GEITHNER, in his official capacity as Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OFTREASURY.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota, Civil No. 12-2804
Hon. David S. Doty, Judge

BRIEF *AMICI CURIAE* OF PROFESSOR OF LAW BRADLEY P. JACOB, PROFESSOR EMERITUS OF LAW CHARLES E. RICE, COMMON GOOD FOUNDATION, COMMON GOOD ALLIANCE, AND CATHOLIC ONLINE, LLC

in support of Plaintiffs-Appellants, urging reversal

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, Professor of Law Bradley P. Jacob**,** Professor Emeritus of Law Charles E. Rice**,** Common Good Foundation**,** Common Good Alliance, and Catholic Online, LLC, 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% of stock.

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INTEREST OF *AMICI CURIAE*

Amicus Charles E. Rice is Emeritus Professor of Law at Notre Dame Law School. Professor Rice taught Constitutional Law at Notre Dame and has written extensively on the constitutional and moral issues surrounding abortion and contraception. Professor Rice, a practicing Catholic, is concerned about the HHS mandate's attack on religious liberty and the district court's decision that unduly restricts the protections for the free exercise of religion that the Religious Freedom Restoration Acts, 42 U.S.C. § 2000bb *et seq*. (2012) ("RFRA"), was enacted to provide.

Professor Bradley P. Jacob is Associate Professor of Law at Regent University School of Law where he specializes in constitutional law and religious liberty. From 1991 to 1993, Professor Jacob served as 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 in 1993. Professor Jacob joins this brief because of his concern to see RFRA applied in a way, contrary to the district court's decision, that provides the full protection for religious liberty that RFRA was intended to provide.

Amicus Common Good Foundation, is a not-for-profit 501(c)(3) organization. *Amicus* Common Good Alliance, is a not-for-profit 501(c)(4) organization. Both were founded by Keith A. Fournier, a Catholic apologist,

activist, advocate, and Constitutional Lawyer. Both organizations are informed by classical Christian Social teaching and committed to education, inspiration, motivation, and missionary activity. Both are also committed to building a culture of life, family, freedom, and solidarity while affirming classical Christian teaching concerning personal dignity and personal goods, including religious freedom. Common Good Foundation and Common Good Alliance both have a Legal Defense Fund that provide legal advocacy and support in the form of *Amicus* Briefs or intervention in cases concerning the organizations' missions. To fully engage their missions, Common Good Foundation and Common Good Alliance rely upon a robust interpretation of the First Amendment, and as most relevant in this case, a proper interpretation of the scope of religious liberty protected by the Free Exercise Clause and RFRA. Common Good Foundation and Common Good Alliance join this brief because of their concern that the district court's decision in this case unduly restricts the protection RFRA was meant to provide for religious liberty.

Amicus Catholic Online is a business that serves Catholics, other Christians, other people of faith, and all people of good will by providing news, views, and content over its global integrated media network. Catholic Online's business mission is to provide content and services that educate, motivate, and equip its users to more fully understand and live the teachings of the Catholic faith in their

everyday life. Catholic Online operates its business in complete fidelity to the teachings of the Catholic Church and is thus committed to building a culture of life, family, freedom, and solidarity. Catholic Online affirms classical Christian teaching concerning the person and personal goods, including religious freedom. Catholic Online's business mission depends upon a proper interpretation of the scope of religious liberty protected by the Free Exercise Clause and RFRA as protecting the Church and voluntary associations of Christians (including businesses) in their mission. Catholic Online joins this brief because of its concern that the district court's decision in this case unduly restricts the protection RFRA was meant to provide 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 that amplify points the Appellants make in their brief. First, the Brief argues that this Court should reject any argument that

because the HHS regulation mandating that employers provide employees health insurance covering contraceptives, abortifacients, and sterilization technically applies to Annex Medical and not Mr. Lind, any burden the HHS mandate imposes on Mr. Lind's exercise of his religion is too indirect to be substantial. Second, the Brief argues that Mr. Lind, based on commonly understood moral principles, could reasonably conclude that providing the HHS-mandated coverage would be morally wrong and thus violate his faith and that, in any event, federal courts are incompetent to decide whether the Mr. Lind's conclusion that complying with the HHS mandate would violate his faith is correct.

1. Other district courts have opined, based on arguments by the government defendants, that because a corporation is a legally separate entity from its owners and operators, and because the mandate applies to the corporations (who on a technical legal matter must actually provide the coverage), any burden the HHS mandate imposes on the corporation's owners or operators is too indirect to be substantial under RFRA. This reasoning fails. Annex Medical cannot provide the HHS-mandated coverage to employees unless Mr. Lind, who as President and CEO ultimately makes decisions on Annex Medical's behalf, directs Annex Medical to provide the coverage. The mandate thus effectively commands Mr. Lind to direct Annex Medical to provide contraceptive, abortifacient, and sterilization coverage (or provide no coverage at all in violation of Mr. Lind's

conscientious conclusion that his faith requires him to provide health insurance for his employees). Commanding Mr. Lind to direct Annex Medical to provide contraceptive, abortifacient, and sterilization coverage is in effect no different than commanding Mr. Lind to provide that coverage. Mr. Lind cannot escape moral culpability because Annex Medical technically provides the coverage any more than a corporation's owner-operator can escape culpability for directing corporate employees to kite corporate checks to pay corporate bills or an assassin can escape moral culpability because his gun fired the fatal shot. Thus, the mandate effectively commands Mr. Lind to perform an act he believes violates his faith.

2. Mr. Lind could reasonably conclude that providing contraceptive, abortifacient, and sterilization coverage to Annex Medical employees is morally wrong and therefore contrary to his faith. If Mr. Lind provides health insurance that specifically provides the HHS-mandated coverage, he would be intentionally acting to provide a fund for covered employees specifically to pay for abortifacients. Thus, he would be manifesting an intent to see that Annex Medical employees would be able to pay for, and thus obtain (or more readily obtain), contraceptives, abortifacients, and sterilizations (just as an employer who establishes a "Hitman Compensation Fund" would be manifesting an intent to see that his employees would be able to pay for, and thus obtain, murder-for-hire services). That not all Catholics might agree with Mr. Lind's conclusion that

providing the HHS-mandated coverage would be morally wrong is irrelevant. The Supreme Court has made clear that courts are not competent to determine whether a believer's understanding of what his faith requires is correct.

For employers like Mr. Lind, who believe on religious grounds that abortion is morally wrong and that by providing health insurance that covers contraception, abortifacients, and sterilization, and also believe on religious grounds that they must provide health care coverage to their employees, the HHS mandate imposes a moral catch-22: violate your faith by providing morally objectionable insurance coverage, or violate your faith by providing no coverage at all. The district court's holding, which essentially provides that this catch-22 imposes no substantial burden on Mr. Lind's exercise of his Catholic faith is not only wrong; it nullifies the protection RFRA provides for the free exercise of religion.

ARGUMENT

I. INTRODUCTION

This case poses one fundamental question: May the federal government require an employer who believes his faith requires him to provide health insurance for his employees either to provide coverage the employer believes violates his religious faith or provide no health insurance at all. 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 commands a person to choose between one of two options that violate his sincerely held religious beliefs (in other words, commands a person to choose between committing one sin or another sin) must constitute a substantial burden on that person's religious exercise. That conclusion is consistent with Supreme Court precedent defining what constitutes a substantial burden on religious exercise for Free Exercise Clause purposes (and quite frankly, with common sense). *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (law requiring parents to send their children to school or face small fines and three-months imprisonment imposed a "severe" burden on Amish parents by "compell[ing] 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 (1981) ("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][1] burden on religion exists.")

Stuart Lind is a Catholic who strives to operate Annex Medical in accord with his Catholic faith, a faith consistent with Annex Medical's mission statement,

[1] Whether a burden is substantial is, of course, a critical component of the analysis in this case. Your *Amici* do not insert the word "substantial" into this quotation to stack the deck. Rather, it is derived from the next sentence in the *Thomas* opinion. *Id*.

see *Annex Medical, Inc. v. Sebelius*, No. 12-2304, 2013 WL 101927, at *3-4 (C.D. Minn. Jan 8, 2012) (order denying preliminary injunction). Mr. Lind believes, based on his faith, that contraception, abortion, and sterilization are morally wrong. Mr. Lind also believes that he would violate his Catholic faith—that is, he would sin—if he directed the business he runs to provide employees with health insurance that covers contraceptives, abortifacients, and sterilization.

The Department of Health and Human Services, however, has promulgated a regulation requiring that employer sponsored health insurance plans cover all Food and Drug Administration-approved contraceptive methods and sterilization procedures. Among the approved contraceptives are drugs (Ella, Plan B) that act as abortifacients.[2]

As the district court noted, employers that employ fewer than 50 employees may avoid the HHS mandate if it discontinues its group health plan. *Id*. at *3 (citing 26 U.S.C. § 4980 H(c)(2)(A) (2012)). As the court also noted, Annex Medical employs fewer than 50 employees. *Id*. at *3. But that does not solve Mr. Lind's moral dilemma, because he believes his faith requires him to provide health care coverage for his employees, *id*. at *4, and under the mandate the only coverage he can provide must include the HHS-mandated coverage that he finds morally objectionable according to his faith. Thus, the mandate imposes on Mr.

[2] *See* Michael Fragoso, *The Stealth Abortion Pill* (Aug. 17, 2010) http://www.thepublicdiscourse.com/2010/08/1515/ (last visited Mar. 14, 2013).

Lind a moral catch-22: Either do what your conscience tells you is a sin by providing your employees health insurance that covers contraceptives, abortifacients, and sterilization, or do what your conscience tells you is a sin by providing your employees o health insurance at all. The mandate thus "compels [Mr. Lind] to perform acts . . . at odds with the fundamental tenets of [his] religious beliefs" and puts "substantial pressure on [Mr. Lind] . . . to modify [his] behavior and to violate [his] beliefs." If that does not substantially burden Mr. Lind's exercise of his faith, RFRA is meaningless.

But despite the moral catch-22 the HHS mandate imposes on Mr. Lind, the district court concluded that the mandate imposes no substantial burden on Mr. Lind's exercise of his religion because the court found the burden imposed on Mr. Lind to be too "slight" and "*de minimus*" to constitute a *substantial* burden. See *id.* at *5. In reaching this conclusion, the district court was persuaded by the reasoning first set forth by the district court in *O'Brien v. United States Dept. of Health and Human Services*, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012) (granting motion to dismiss). The *O'Brien* court opined that the HHS mandate did not substantially burden a Catholic employer's exercise of his faith (a faith that led him to conclude that he could not provide health insurance covering contraception, abortifacients, or sterilizations) because the employer would have to subsidize those goods and services only "'after a series of independent decisions'" by

covered employees and their health care providers and thus amounted to "'indirect financial support'" of contraception, abortifacients, and sterilization. *Annex Medical,* 2013 WL 101927, at *4 (quoting *O'Brien*, 2012 WL 4481208 at *6).

The district court's rationale for finding that the mandate imposes no substantial burden on Mr. Lind's exercise of his faith badly misses the mark. Even if insurance would pay for contraceptives, abortifacients, or sterilization only if employees decide to use the coverage to purchase those goods or services, the fact remains that Mr. Lind sincerely believes that it would be inconsistent with his faith—that is, it would be a sin—to facilitate the use of contraceptives, abortifacients, and sterilization by *directing the corporation of which he is President and CEO* to provide employees that coverage. Consequently, the fact remains that the mandate imposes on Mr. Lind, based on his understanding of what his Catholic faith requires, an insolvable oral conundrum: Sin by providing the morally objectionable coverage, or sin by providing no health insurance coverage at all.

If one grants Mr. Lind's understanding of what his faith requires, the HHS mandate does not impose, to quote *O'Brien*, 2012 WL 4481208 at *15, an "insignificant or remote" burden on the exercise of that faith. Rather, by imposing an insolvable moral conundrum on Mr. Lind, the mandate imposes substantial and direct compulsion on Mr. Lind to violate his faith. By finding insubstantial the

significant and rather obvious moral conundrum that the HHS mandate poses for Mr. Lind, the court in effect refused to countenance Mr. Lind's understanding of what his faith requires. In other words, it is fair to conclude that the district court, at least implicitly, decided that Mr. Lind is wrong to believe that providing the HHS-mandated coverage would violate their faith. The district court thus effectively made itself the arbiter of what the Mr. Lind's faith requires of him. Perhaps the court found it difficult to believe or understand that employers like Mr. Lind could conclude it is morally wrong to make health insurance covering contraceptives, abortifacients, and sterilization available to employees who may or may not use that coverage. But a religious belief need not be "comprehensible to others" to warrant protection, *Thomas*, 450 U.S. at 714. And the Supreme Court has made clear that courts are legally incompetent to determine whether a believer's understanding of what his faith requires is correct. *Id*. at 715-16.

Although the district court did not specifically find that the legal distinction between a corporation and its owners or operators led it to conclude that the HHS mandate does not impose a substantial burden on Mr. Lind's religious exercise, other district courts have so reasoned. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d. 1278, 1294 (W.D. Okla. 2012).[3] Therefore, this Brief

[3] The court opined that it "need not determine whether a secular, for-profit corporation, such as Annex, is capable of exercising religion." *Annex Medical*, 2013 WL 101927, at *5 n.9. Presumably, this was because the court believed its

will discuss why the HHS mandate imposes a substantial burden on Mr. Lind's religious exercise even though the mandate technically applies to Annex Medical. The Brief will proceed to explain why employers like Mr. Lind could reasonably conclude that it would be morally wrong (that is, a sin) to provide health insurance covering abortifacients,[4] but that in light of the Supreme Court's admonition in *Thomas*, federal courts must in any event refrain from deciding whether people like Mr. Lind correctly understand what their faith requires.

II. FOR ANNEX MEDICAL TO PROVIDE CONTRACEPTIVE, ABORTIFACIENT, AND STERILIZATION COVERAGE, MR. LIND MUST DIRECT THE BUSINESS TO PROVIDE THAT COVERAGE; THEREFORE, THE HHS MANDATE, ALTHOUGH IT TECHNICALLY APPLIES TO ANNEX MEDICAL, EFFECTIVELY COMMANDS MR. LIND TO PROVIDE THE MANDATED COVERAGE

As noted, the district court in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d., 1278, 1294 (W.D. Okla. 2012) considered any burden on the individual plaintiffs in that case (owners and operators of the corporate plaintiffs) to be

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reasoning applied equally to either Annex or Mr. Lind, given that it denied the preliminary injunction. However, had the court decided the preliminary injunction factors pointed towards granting the motion (as *Amici* believe it should have), it would have needed to address the issue of corporate free exercise.

[4] Your *Amici* do not address this point necessarily to convince this Court that complying with the mandate would be morally wrong, because as we have noted and 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 Mr. Lind's beliefs and to demonstrate that Mr. Lind's understanding of his duty as a Catholic is "not so bizarre . . . as not to be entitled to protection," *Thomas*, 450 U.S. at 715.

insubstantial in large part because "the mandate . . . applies only to [the corporations], not to its owners and operators." Although the district court in *Hobby Lobby* did not spell out exactly why it was important to its decision that the mandate applied directly only to the corporations, an inference one can draw is that the court thought that the mandate did not command or compel the owners and operators to provide the mandated coverage. Another inference one can draw is that the court believed the owners and operators were somehow insulated from moral culpability because the corporations are legally separate entities from the owners and operators. But this reasoning is seriously flawed because it ignores or misunderstands the relationship between a corporation and its owners and operators.

Although considered a "person" at law, a corporation cannot think or act on its own. A corporation can only act through its human agents and at the direction of those who have the responsibility to make decisions on its behalf and manage its affairs. In this case, the person who ultimately has that responsibility for Annex Medical is Mr. Lind. Annex Medical can provide its employees with health insurance that covers contraceptives, abortifacients, and sterilization only if *Mr. Lind* directs the business to provide that insurance. In reality, any decision by Annex Medical to provide the HHS-mandated coverage is a decision by Mr. Lind to provide that coverage. The HHS mandate, therefore, while technically applying

to Annex Medical, in reality commands *Mr. Lind*, the President and CEO, to provide the mandated coverage. The mandate thus commands Mr. Lind to perform an act his conscience tells him is a sin (or to avoid having to perform that act only by performing another act—directing Annex Medical to provide no employee health insurance at all—that Mr. Lind's conscience tells him is also a sin).

Moreover, while organizing a businesses as a corporation may shield the corporation's owners from corporate financial liabilities, it does not shield those who direct corporate affairs from moral culpability for the acts they direct those corporations to perform. A simple example illustrates this. Suppose that Able, who owns and serves as President and Chairman of the Board of a closely-held corporation, directs corporate employees in the course of their employment duties to kite checks to corporate creditors. It would be absurd to suggest that Able is not morally culpable for defrauding the corporation's creditors because it was the corporation, a separate entity, that technically kited the checks. Able is morally culpable for fraud; the corporation is the means he used to defraud the creditors.

Likewise, Annex Medical is the means through which Mr. Lind acts—and lives out his Catholic faith—in the commercial marketplace. Like Able, who used the corporation he directed to defraud corporate creditors, Mr. Lind, by directing Annex Medical to provide contraceptive, abortifacient, and sterilization coverage, would be using the corporation to facilitate use of those goods and services by

Annex Medical employees. Mr. Lind would no more be shielded from moral culpability than would Able.

Another analogy makes the point more starkly. To suggest that Mr. Lind would not be morally culpable because the corporation would actually be providing abortifacient coverage makes no more sense than saying that an assassin is not morally culpable for murder because the gun he used actually fired the fatal shot. For the assassin, the gun was an instrument, the means he used to achieve the end of killing his victim. Likewise, if Mr. Lind were to direct Annex Medical to provide the HHS-mandated coverage, Mr. Lind would be using the corporation—a corporation he controls just as the assassin controlled his gun—as the means to provide the HHS-mandated coverage to the corporation's employees. Mr. Lind could no more escape moral culpability for using Annex Medical as the means to accomplish what he believes is an evil end than the assassin can escape moral culpability for using a gun to achieve his evil end. By compelling Mr. Lind to use Annex Medical in this way, the HHS mandate compels Mr. Lind to act in a way that violates his faith.

Any suggestion that the burden imposed on Mr. Lind is merely "indirect," and therefore not substantial, because the HHS mandate technically applies to Annex Medical, is similarly flawed. For one thing, the burden is not "indirect." As Mr. Lind is responsible for deciding whether to provide the mandated coverage

(a decision his conscience tells him would be morally wrong) or to provide no employee health insurance at all (a decision his conscience tells him is also morally wrong) the mandate imposes on *Mr. Lind* an insolvable moral conundrum. In any event, even if one characterizes the burden imposed on Mr. Lind as "indirect," nothing in RFRA suggests that such an indirect burden cannot violate RFRA. RFRA does not prohibit only "direct" burdens on religious exercise; RFRA prohibits substantial burdens, and the conundrum the mandate poses for Mr. Lind—avoid doing what your conscience tells you is a sin only by doing something else your conscience tells you is a sin—in effect forces Mr. Lind to commit what he believes to be a sin and surely imposes a substantial burden on Mr. Lind's religious exercise.

Furthermore, to hold that the HHS mandate does not substantially burden the religious exercise of a corporations' owners and operators because the mandate technically applies to the corporation would lead to absurd, and even perverse, results. Suppose the federal government enacts a law requiring all food service businesses affecting interstate commerce to be open seven days a week or pay a fine.[5] This law would certainly impose a substantial burden on an Orthodox Jew who operates a deli as a sole proprietorship by forcing him either to open the deli

[5] This hypothetical is adapted from one proposed by Ed Whalen. *See* Ed Whalen, *Re: Another Crazy DOJ Stance Against Religious Liberty* (July 26, 2012), http://www.nationalreview.com/bench-memos/312357/another-crazy-doj-stance-against-religious-liberty-ed-whelan (last visited Mar. 14, 2013).

on the Sabbath or pay a fine. *Cf. Sherbert v. Verner*, 374 U.S. 398, 403-05 (1963) (denying unemployment benefits to a Sabbatarian who refused to work on Saturdays imposed "unmistakable" pressure to violate Sabbatarian beliefs). But if one follows the district court's reasoning in *Hobby Lobby*, if the deli owner incorporated *the very same deli business*, the burden on the owner's religious exercise would be considered only indirect, and therefore not substantial, and therefore not sufficient to state a claim under RFRA.

That result is not only senseless; it also embodies a perverse reading of RFRA, a statute enacted to protect religious adherents from government-imposed burdens on the exercise of their faith. To deny RFRA's protection to religious adherents who incorporate their businesses is to tell those religious adherents that they can be protected from government-imposed burdens on their ability to operate their businesses consistently with their faith only if they are willing to forego a form of business organization—incorporation—generally available to all other business owners. Forcing business owners to forego incorporation in exchange for receiving protection of their right to operate their businesses according to their faith is exactly the kind of burden on the exercise of religion against which RFRA is meant to protect.

There is no logical or coherent reason why Annex Medical being a corporation renders the burden the HHS mandate imposes on Mr. Lind's exercise

of his faith not substantial under RFRA. To conclude the burden on Mr. Lind is insubstantial because the mandate technically applies to Annex Medical could (as demonstrated above) well lead to absurd and even perverse results. Therefore, this Court should reject any argument that the HHS mandate cannot impose a substantial burden on a corporation's owners and operators because the mandate technically applies to the corporation.

III. AN EMPLOYER WHO BELIEVES, BASED ON HIS FAITH, THAT ABORTION IS MORALLY WRONG CAN REASONABLY CONCLUDE THAT SPECIFICALLY PROVIDING OTHERS THE MEANS TO PAY FOR ABORTIFACIENTS IS MORALLY WRONG; AND IN ANY EVENT, COURTS ARE NOT COMPETENT TO SECOND GUESS AN EMPLOYER'S CONCLUSION CONCERNING WHAT HIS FAITH REQUIRES.

As noted in the Introduction to this Brief, it is reasonable to infer from the district court's decision that the court, at least implicitly, decided that Mr. Lind is wrong to conclude that complying with the mandate would violate his faith. The district court was not competent to make that decision. *See Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981). But in any event, it is perfectly reasonable for Mr. Lind to conclude that providing his employees health insurance that covers contraceptives, abortifacients, and sterilization would be morally wrong and thus contrary to his faith.

In reaching his decision that providing his employees the HHS-mandated coverage would be morally wrong, Mr. Lind, whether he would put it this way

himself, was applying a moral principle that Catholic moralists commonly refer to as cooperation with evil.[6] The general principle of cooperation with evil is not difficult to grasp, as a simple example illustrates. Suppose that Baker approaches Able and asks in a way that makes it clear that 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 it to kill his wife, no one would seriously suggest that Able, though he did not pull the trigger, would not be morally culpable for assisting Baker in killing his wife. A like conclusion—that Able has committed a moral wrong by loaning Baker his gun—would hold even if Baker changed his mind and decided not to kill his wife. Able loaned Baker his gun with the intent that Baker would have the gun to kill his wife. Able intended to enable Baker to kill his wife, and this intent made it morally wrong for Able to loan Baker his gun.

Based on this mode of moral reasoning, employers such as Mr. Lind who morally oppose contraceptives, abortion, and sterilization could reasonably conclude that providing their employees with health insurance covering contraceptives, abortifacients, and sterilization would be morally wrong. Another

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[6] *See, e.g.*, 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/ (last visited Mar. 14, 2013); Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), *available at* http://www.newadvent.org/cathen/01100a.htm (last visited Mar. 14, 2013); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), *available at* www.immunize.org/concerns/vaticandocument.htm (last visited Mar. 14, 2013).

example helps to illustrate this. Suppose an employer establishes 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. By creating the fund, 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 reasonable to conclude that even if no employee takes advantage of the hitman fund, 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 would be acting immorally. That would be so even if no employee takes advantage of the hitman fund, because the employer intended to make available the means to pay for those services. It follows that if the federal government were to mandate that all employers establish hitman funds or pay substantial fines, that mandate would impose a substantial burden on the religious exercise of employers who believe that murder is contrary to their religious beliefs.

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 abortion is morally wrong to conclude that intentionally and specifically providing his

employees the means to pay for contraceptives, abortifacients, and sterilization (as the HHS mandate requires) is morally wrong. 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 a fund specifically to reimburse employees who purchase contraceptives, abortifacients, and sterilization is intentionally deciding specifically to provide his employees the means to pay for those goods and services. And as with the employer who establishes the hitman fund, it is reasonable to conclude that even if no employee takes advantage of the contraceptive, abortifacient, and sterilization reimbursement fund, the employer is still acting immorally because of his intent to enable his employees to pay for and thus obtain contraceptives, abortifacients, and sterilization.

As noted above, *supra* at 9, the district court in this case relied upon the district court's opinion in *O'Brien*. Here, as elsewhere, the *O'Brien* court's error (sometimes explicitly, sometimes implicitly) affected the district court's analysis. For example, the *O'Brien* court opined that providing employees with health insurance that specifically covers contraceptives, abortifacients, and sterilization is no different than paying employees wages or salary that they could use to pay for those goods and services. 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, abortifacients, or sterilization), it cannot be a substantial burden on the employer's exercise of religion to provide health insurance that covers those goods and services.

But there is a significant difference between paying an employee a salary and providing insurance that specifically covers contraceptives, abortifacients, and sterilization:

> 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.[7]

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"[8] so a person who believes abortion is morally wrong could reasonably believe it wrong to provide health insurance that can be used to pay only for those goods and services the policy covers and that specifically covers contraceptives, abortifacients, and sterilization. It is not reasonable to say that an employer who pays his employees wages has any specific intent regarding how the employees spend those wages. However, it *is*

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

reasonable to say that the employer who provides a means to pay specifically for contraceptives, abortifacients, and sterilization is acting specifically to assist his employees to pay for, and thus obtain, those goods and services. Therefore, that employer manifests an intent to enable his employees to pay for, and thus obtain those goods and services.

By mandating that Mr. Lind provide Annex Medical employees with health insurance that covers contraceptives, abortifacients, and sterilization, the HHS mandate in effect is commanding Mr. Lind to establish a fund specifically to provide employees the means to pay for, and thus obtain, those goods and services. It is perfectly reasonable for Mr. Lind to conclude that to provide the mandated coverage would be immoral cooperation with the evils of contraception, abortion, and sterilization and therefore contrary to his faith.

Perhaps not all Catholics would agree with this conclusion. And as noted in the Introduction to this Brief, perhaps the district court found it difficult to believe or understand that employers like Mr. Lind could conclude that making health insurance covering contraceptives, abortifacients, and sterilization available to employees who may or may not use that coverage is morally wrong. But that is irrelevant. A religious belief need not be "comprehensible to others" to warrant protection. *Thomas*, 450 U.S. at 715. And as the Supreme Court also made clear in *Thomas*, "[i]ntrafaith differences . . . are not uncommon among followers of a

particular creed, and the judicial process is singularly ill-equipped to resolve such differences . . . . It is not within the judicial competence to decide [who] more correctly perceives the commands of their common faith." *Id*. at 715-16. Mr. Lind, like the petitioner in *Thomas*, drew a line based on his faith regarding whether that faith would allow him to perform an act that would assist others in doing what his faith tells him is a moral evil. As in *Thomas*, "it is not for [the district court or this Court] to say the line [he] drew was an unreasonable one." *Id*. at 715.

Mr. Lind sincerely believes that he cannot comply with the HHS mandate and remain true to his Catholic faith. Because Mr. Lind also believes that his faith requires him to provide his employees health care coverage, the HHS mandate thus presents Mr. Lind with a catch-22: avoid doing what you believe is a sin according to your understanding of your religious faith, only by doing something else that you believe is a sin. Posing that conundrum substantially burdens Mr. Lind's exercise of his religion. The district court's holding that it does not is not just wrong; that holding usurps Mr. Lind's right to follow his own conscientious judgment and thus nullifies the protection RFRA promises for the free exercise of religion.

CONCLUSION

For the reasons stated above and the reasons stated in the Appellants' Brief,

this Court should reverse the district court's decision denying the motion for a preliminary injunction and should remand with instructions to enter a preliminary injunction on behalf of Annex Medical and Mr. Lind.

Respectfully submitted this 14th day of March, 2013,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

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

   This brief contains 5,920 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 Office 2007.

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Dated: March 14, 2013

/s/Steven W. Fitschen
Steven W. Fitschen

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2013, I electronically filed the attached Brief *Amici Curiae* of Professor of Law Bradley P. Jacob**,** Professor Emeritus of Law Charles E. Rice**,** Common Good Foundation**,** Common Good Alliance, and Catholic Online, LLC, in the case of *Annex Medical, et al, v. Kathleen Sebelius, et al*, No. 13-1118, with the clerk of the court via email. I further certify that all counsel of record are registered CM/ECF users and that they will be served via that system upon the Court's approval of the Brief.

/s/Steven W. Fitschen
Steven W. Fitschen