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
Hon. Joe Heaton, Judge

BRIEF *AMICUS CURIAE* OF EMERITUS PROFESSSOR OF LAW CHARLES E. RICE, PROFESSOR OF LAW BRADLEY P. JACOB, THE TEXAS CENTER FOR DEFENSE OF LIFE, AND THE NATIONAL LEGAL FOUNDATION, SUPPORTING APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, Professor Emeritus of Law Charles E. Rice**,** Professor of Law Bradley P. Jacob**,** Texas Center for Defense of Life, and The National Legal Foundation 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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PRIOR AND RELATED APPEALS

The issues presented in this appeal are also pending in *Newland v. Sebelius*, No. 12-1380 (10th Cir.), and in the following appeals:

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3d Cir.)

Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir.)

Legatus v. Sebelius, Nos. 13-1092, -1093 (6th Cir.)

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Tyndale House Publishers, Inc. v. Sebelius, No. 13-5018 (D.C. Cir.)

INTEREST OF *AMICI CURIAE*

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 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 Rice is also concerned that the district court's decision that the mandate does not substantially burden the Greens' religious liberty unduly restricts the protection that RFRA provides for the free exercise of religion.

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.

Texas Center for Defense of Life (TCDL) is a 501(c)(3) organization. It operates to defend life in both state and federal court from conception to natural death. TCDL serves persons, businesses, and non-profits to protect their rights of

conscience on life-related issues. As this case concerns the rights of Plaintiffs not to violate their conscience under their religious liberty on a life-related issue, TCDL believes the district court's decision uncritically conflates the notion of "indirect" with "unsubstantial," as it relates to funding of abortifacient coverage forced upon Plaintiffs' businesses against their sincerely held religious beliefs.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the impact a case such as this one will have on religious business owners who seek to imbue their businesses with their own values, regardless of the business form chosen. The NLF counts such business owners among its donors and supporters.

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 the district court erred in concluding that because the HHS regulation mandating that employers provide employees health insurance covering abortifacients technically applies to Hobby Lobby and Mardel, and not the Greens, any burden the mandate imposes on the Greens' exercise of their religion is too indirect to be substantial. Second, the Brief argues that the Greens, based on commonly understood moral principles, could reasonably conclude that providing abortifacient coverage would be morally wrong and thus violate their faith and that, in any event, federal courts are incompetent to decide whether the Greens' conclusion that complying with the HHS mandate would violate their faith is correct.

1. The district court opined that because Hobby Lobby and Mardel are corporations, and thus legally separate entities from their owners, the Greens, and because the mandate applies to the corporations, any burden the HHS mandate imposes on the Greens is too indirect to be substantial under RFRA. This reasoning fails for several reasons. First, Hobby Lobby and Mardel cannot provide abortifacient coverage to employees unless the Greens, who own and operate those corporations, direct them to provide the coverage. The mandate thus effectively commands the Greens to direct their businesses to provide abortifacient coverage.

Commanding the Greens to direct their businesses to provide abortifacient coverage is in effect no different than commanding the Greens to provide that coverage. And the Greens cannot escape moral culpability because the corporations technically provide 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 the Greens to perform an act they believe violates their faith. Second, the fact that the mandate technically imposes penalties on Hobby Lobby and Mardel is irrelevant. The Greens own Hobby Lobby and Mardel. If Hobby Lobby and Mardel are harmed financially, the Greens' investment in those businesses will be harmed (and possibly destroyed). To threaten substantial harm to the businesses is to threaten substantial harm to the Greens. Therefore, by threatening substantial penalties on the businesses, the HHS mandate directly coerces the Greens to violate their faith. Third, in any event, RFRA prohibits the federal government from imposing "substantial" burdens on the exercise of religion. A threat to harm one person or entity can exert substantial pressure on another person to do something he would otherwise not do. Nobody would deny that the threat "I'll kill your family if you do not kill the mayor" does not exert substantial pressure to comply with the demand even if one considers that pressure "indirect." Likewise,

even if one characterizes as indirect the pressure the HHS mandate imposes on the Greens—the threat of huge penalties being imposed on their businesses if the Greens do not direct those businesses to provide abortifacient coverage—that threat imposes substantial pressure on the Greens to act contrary to their faith.

2. The Greens could reasonably conclude that providing abortifacient coverage to Hobby Lobby and Mardel employees is morally wrong and therefore contrary to their faith. If the Greens comply with the HHS mandate and provide health insurance that specifically provides abortifacient coverage, the Greens would be intentionally acting to provide a fund for covered employees specifically to pay for abortifacients. Thus, the Greens would be manifesting an intent to see that Hobby Lobby and Mardel employees would be able to pay for, and thus obtain (or more readily obtain), abortifacients (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 Christians might agree with the Greens' conclusion that complying with the HHS mandate 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 the Greens, who believe on religious grounds that abortion is morally wrong and that providing health insurance that covers

abortifacients is morally wrong, the HHS mandate imposes a stark choice—violate your faith, or subject your businesses to enormous penalties. The district court's holding that this choice imposes no substantial burden on the Greens' exercise of their Christian 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 business whose owners and operators refuse to act in a way that they believe violates their 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 commands a person to violate his sincerely held religious beliefs (in other words, commands a person to sin) and penalizes him if he does not 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 (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.")

David Green and his family are Christians who strive to operate their family-owned and operated businesses, Hobby Lobby, Inc., and Mardel, Inc., in accord with their Christian faith. The Greens believe, based on their faith, that abortion is morally wrong. The Greens also believe that they would violate their Christian faith—that is, they would sin—if they directed the businesses they own and operate to provide employees with health insurance that covers abortion-causing drugs and devices.

The Department of Health and Human Services, however, has promulgated a regulation requiring that employers (with exceptions that do not include Hobby Lobby or Mardel) provide their employees with health insurance that covers all Food and Drug Administration-approved contraceptive methods and sterilization

[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*.

procedures. Among the approved contraceptives are drugs (Ella, Plan B) that act as abortifacients.[2] If the Greens follow their consciences and do not comply with the HHS mandate, their businesses will be subject to financial penalties that range from $26,000,000 per year to $1,300,000 per day (over $460,000,000 per year) and to possible private law suits. (*See* Appellants' Motion for Injunction Pending Appeal 3; Appellants' Brief at 6). Because the mandate would impose enormous penalties on Hobby Lobby and Mardel if the Greens do not direct those companies to provide their employees with the HHS-mandated coverage, and because the Greens believe that to provide the coverage would violate their Christian faith, the HHS mandate imposes on the Greens a stark choice: Do what your consciences tell you violates your Christian faith—in other words, sin—or subject your family business, your means of livelihood, to substantial and possibly ruinous penalties. The mandate "compels [the Greens] to perform acts . . . at odds with the fundamental tenets of their religious beliefs" and puts "substantial pressure on [the Greens] . . . to modify [their] behavior and to violate [their] beliefs." If that does not substantially burden the Greens' exercise of their faith, RFRA is meaningless.

But despite the penalties the HHS mandate imposes on the Greens' business if the Greens refuse to violate their faith, the district court reached the startling conclusion that the mandate imposes no substantial burden on the Greens' exercise

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

of their religion. While purporting to accept that the Greens are exercising their religion by refusing to provide health insurance covering abortifacients, *see Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d. 1278, 1293 (W.D. Okla. 2012), the court found the burden imposed on the Greens to be insufficiently "direct" to constitute a *substantial* burden.

The district court reached this conclusion primarily because "the mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners." *Id*. at 1294. The court also noted 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). 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. *Id*. at *6; *See Hobby Lobby*, 870 F. Supp. 2d. at 1294 (citing *O'Brien*).

The district court's reasons for finding that the mandate imposes no substantial burden on the Greens' exercise of their faith badly miss the mark. Even if insurance would pay for abortifacients only if employees decide to use the coverage to purchase abortifacients, the fact remains that the Greens sincerely

believe that it would be inconsistent with their faith—that is, it would be a sin—to facilitate the use of abortifacients by *directing the corporations they own and operate* to provide employees that coverage. To say that any burden the mandate imposes on the Greens is too indirect to be substantial because the mandate technically requires Hobby Lobby and Mardel to provide the objectionable coverage ignores the fact that the businesses will provide that coverage only if the Greens, as the owners and operators, direct the businesses to provide that coverage. Hobby Lobby's and Mardel's "decision" to provide the coverage is the Greens' decision to provide coverage. And to say that the burden is too indirect to be substantial because the penalties technically fall on Hobby Lobby and Mardel likewise ignores the relationship between the Greens and their businesses. The Greens own Hobby Lobby and Mardel; therefore harming Hobby Lobby and Mardel harms the Greens (not to mention putting at risk their employees' jobs, which in itself would weigh heavily on anyone concerned with the welfare of his business's employees). The mandate's threatened penalties on Hobby Lobby and Mardel thus operate to coerce *the Greens* to violate their faith.

If one grants the Greens' understanding of what their 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 substantial penalties on their businesses if the Greens do not do what their

consciences tell them is a sin, the mandate imposes substantial and direct compulsion on the Greens to violate their faith.

The district court purported to recognize that "it is not the province of the court to tell the plaintiffs . . . whether their beliefs about abortion should be understood to extend to how they run their corporations . . . or to decide whether such beliefs are fundamental to their belief system or peripheral to it." *Hobby Lobby*, 870 F. Supp. 2d. at 1293. But by finding insubstantial the significant and rather obvious compulsion (possibly millions of dollars in daily fines on their businesses) that the HHS mandate places on the Greens to do what they believe is a sin (that is, compulsion to direct their corporations to provide health insurance that covers abortifacients), the court in effect refused to countenance the Greens' understanding of what their faith requires. In other words, it is fair to conclude that the district court, at least implicitly, decided that the Greens are wrong to believe that complying with the mandate would violate their faith. The district court thus effectively made itself the arbiter of what the Greens' faith requires of them. Perhaps the court found it difficult to believe or understand that employers like the Greens could conclude it is morally wrong to make health insurance covering abortifacients 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.

This Brief will discuss in greater detail why the HHS mandate imposes a substantial burden on the Greens' religious exercise even though the mandate technically applies to Hobby Lobby and Mardel. The Brief will proceed to explain why employers like the Greens could reasonably conclude that it would be morally wrong (that is, a sin) to provide health insurance covering abortifacients,[3] but that in light of the Supreme Court's admonition in *Thomas*, federal courts must in any event refrain from deciding whether people like the Greens correctly understand what their faith requires.

II. ALTHOUGH THE HHS MANDATE TECHNICALLY APPLIES TO HOBBY LOBBY AND MARDEL, THE MANDATE EXERTS SUBSTANTIAL PRESSURE ON THE GREENS TO ACT IN A WAY THAT VIOLATES THEIR FAITH.

The district court appears to have concluded that because the Greens' businesses, Hobby Lobby and Mardel, are corporations, the Greens are somehow insulated from any burden the HHS mandate imposes, so that any burden on the

[3] 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 the Greens' beliefs and to demonstrate that the Greens' understanding of their duty as Christians is "not so bizarre . . . as not to be entitled to protection," *Thomas*, 450 U.S. at 715.

Greens' exercise of their faith could not be substantial. That conclusion, however, makes no sense because it ignores three basic points: First, because the Greens own and operate Hobby Lobby and Mardel, for the businesses to provide the objectionable coverage, *the Greens* must act contrary to their faith. Second, because the Greens own Hobby Lobby and Mardel, harming (or threatening to harm) Hobby Lobby and Mardel harms (or threatens to harm) the Greens. Third, harm threatened to X can impose substantial compulsion on Y to act in a way that he would not otherwise act so he can prevent the harm to X. Even if one characterizes the compulsion on Y as "indirect," that compulsion can still be substantial.

A. For Hobby Lobby and Mardel to provide abortifacient coverage, the Greens must direct the businesses to provide that coverage; the HHS mandate therefore effectively commands the Greens to provide abortifacient coverage.

Although the district court did not spell out exactly why it was important to its decision that the mandate applies directly to Hobby Lobby and Mardel, an inference one can draw is that the court thought that the mandate does not command or compel the Greens to provide abortifacient coverage. Another inference one can draw is that the court believed the Greens are somehow insulated from moral culpability because the corporations are legally separate entities from the Greens. These reasons for finding that the mandate does not substantially burden the Greens' religious exercise are seriously flawed because they ignore or

misunderstand the relationship between the Greens and their businesses.

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. Here, the people who have that responsibility for Hobby Lobby and Mardel are the Greens. Hobby Lobby and Mardel can provide their employees with health insurance that covers abortifacients only if *the Greens* direct those businesses to provide that insurance. In reality, any decision by Hobby Lobby and Mardel to provide the HHS-mandated coverage is a decision by the Greens to provide that coverage. The HHS mandate, therefore, while technically applying to Hobby Lobby and Mardel, in reality commands *the Greens* to provide the mandated coverage. The mandate thus commands the Greens, under threat of substantial and likely ruinous penalties to their businesses, to perform an act their consciences tell them is a sin.

Moreover, while organizing their businesses as corporations may shield the Greens from corporate financial liabilities, it does not shield them 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, Hobby Lobby and Mardel are the means by which the Greens act—and live out their Christian faith—in the commercial marketplace. Like Able, who used his corporation to defraud corporate creditors, the Greens, by directing Hobby Lobby and Mardel to provide abortifacient coverage, would be using these corporations to facilitate abortifacient use by Hobby Lobby and Mardel employees. The Greens would no more be shielded from moral culpability than would Able.

Another analogy makes the point more starkly. To suggest that the Greens would not be morally culpable because their corporations 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 the Greens were to direct Hobby Lobby and Mardel to provide abortifacient coverage, the Greens would be using these corporations—corporations they control just as the assassin controlled his gun—as the means to the end of providing abortifacient coverage to the corporations' employees. The Greens could no more escape moral culpability for using the

corporations as the means to accomplish what they believe to be an evil end than the assassin can escape moral culpability for using a gun to achieve his evil end. By compelling the Greens to use their corporate businesses in this way, the HHS mandate compels the Greens to act in a way that violates their faith.

B. Because the Greens own Hobby Lobby and Mardel, to threaten substantial harm to the businesses is to threaten substantial harm to the Greens; thus, the HHS mandate directly coerces the Greens to violate their faith.

The district court's conclusion that the burden the HHS mandate imposes on the Greens' exercise of their faith is "indirect" also ignores the relationship between the Greens and their businesses and therefore is also wrong. As explained above, the mandate operates to command the Greens, as Hobby Lobby and Mardel's owners and operators, to do what they believe is a sin. Likewise, the means the mandate employs to compel the Greens to act—the threat of substantial and likely ruinous penalties on Hobby Lobby and Mardel if *the Greens* do not direct the businesses to provide the mandated coverage—applies direct pressure on the Greens. The Greens, through a trust, own all the voting stock in Hobby Lobby and Mardel. *Hobby Lobby*, 870 F. Supp. 2d. at 1284. The value of that stock, and thus, the Greens' financial fortunes, depend on the businesses' financial health. If that financial health suffers, it stands to reason that the Greens' stock would be less valuable. And if Hobby Lobby and Mardel suffer financial ruin—not a far-fetched possibility given that failing to provide the mandated abortifacient coverage would

subject the businesses to fines or penalties ranging from $26,000,000 per year up to $1,300,000 per day, *see supra* at 8—the Greens' stock would be worthless.

The harm the HHS mandate threatens to Hobby Lobby and Mardel if the Greens do not direct those businesses to provide abortifacient coverage is thus harm threatened to the Greens as well. The mandate's effective command—"sin or subject your businesses to substantial penalties"—can be reformulated as, "sin or subject the value of your holdings in your businesses to substantial diminution." The mandate in effect seeks to coerce the Greens to act contrary to their faith by threatening them with financial harm. That is not an indirect, insubstantial burden on the Greens' exercise of their faith; it is direct, substantial pressure on the Greens to do that which the Greens' consciences tell them is a sin.

C. RFRA prohibits "substantial" burdens on religious exercise; even if the burden the mandate imposes on the Greens is indirect, it is still substantial.

In any event, even if one characterizes the pressure the HHS mandate imposes on the Greens to violate their faith as "indirect," nothing in RFRA suggests that such indirect pressure cannot violate RFRA. RFRA does not prohibit only "direct" burdens on religious exercise; RFRA prohibits "substantial" burdens, and the burden the mandate imposes on the Greens, even if one characterizes it as "indirect," is still substantial.

There is no question that a threat to harm one person can exert substantial

pressure on another person to do something he would otherwise not do. For example, suppose Baker tells Charlie, "I am holding your family hostage. If you do not kill the mayor, I will kill your family." Although the threatened harm—death—will fall on Charlie's family, it defies reality to suggest that the pressure the threat places on Charlie to kill the mayor is not substantial, even if one characterizes that pressure as "indirect." So it is with the pressure the mandate imposes on the Greens to direct their businesses to provide abortifacient coverage. Even if one considers that pressure to be indirect because Hobby Lobby and Mardel are legally separate entities from their owners, the Greens, it defies reality to suggest that the choice the mandate imposes on the Greens—sin or have substantial penalties imposed on these businesses—does not impose substantial pressure on the Greens to act in a way they believe violates their faith.

The district court's reasoning—that is, that threatening harm to a corporation if the owners do not operate the business in a way that violates their religious beliefs does not substantially burden the owners' religious exercise—leads to absurd 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.[4] This law would certainly impose a substantial burden on an Orthodox

[4] 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/312422/re-another-crazy-doj-stance

Jew who operates a deli as a sole proprietorship by forcing him either to open the deli 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 following the district court's reasoning, 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 that RFRA is meant to protect against.

-against-religious-liberty-ed-whalen (last visited Feb. 12, 2012).

The district court has stated no logical or coherent reason why Hobby Lobby and Mardel being corporations renders the burden the HHS mandate imposes on the Greens' exercise of their faith—sin, or subject your businesses to significant penalties—not substantial under RFRA. The district court's reasoning, such as it is, could (as demonstrated above) well lead to absurd and even perverse results. This Court should hold that a substantial burden under RFRA exists when the federal government attempts to coerce business owners to act contrary to their faith by threatening harm to their businesses, regardless of whether those businesses are incorporated.

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, *supra* at 11, it is reasonable to infer from the district court's decision that the court, at least implicitly, decided that the Greens are wrong to conclude that complying with the mandate would violate their 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 the Greens to conclude that providing their employees health insurance that covers abortifacients would be morally wrong and thus

contrary to their faith.

In reaching their decision that providing their employees abortifacient coverage would be morally wrong, the Greens, whether or not they would put it this way themselves, were applying a moral principle that Catholic moralists commonly refer to as cooperation with evil.[5] While the Greens are not Catholic, the general "moral reasoning behind the Greens' religious exercise is both familiar and shared across faiths." (Appellants' Brief at 27).

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.

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[5] *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 Jan. 31, 2013); Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), *available at* http://www.newadvent.org/cathen/01100a.htm (last visited Jan. 31, 2013); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), *available at* www.immunize.org/concerns/vaticandocument.htm (last visited Jan. 31, 2013).

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 the Greens who morally oppose abortion could reasonably conclude that providing their employees with health insurance covering abortifacients would be morally wrong. Another 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 abortifacients (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 abortifacients is intentionally deciding specifically to provide his employees the means to pay for abortifacients. And as with the employer who establishes the hitman fund, it is reasonable to conclude that even if no employee takes advantage of the abortifacient reimbursement fund, the employer is still acting immorally because of his intent to enable his employees to pay for and thus obtain abortifacients.

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 abortifacients is no different than paying

employees wages or salary that they could use to pay for abortifacients. 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 abortifacients), it cannot be a substantial burden on the employer's exercise of religion to provide health insurance that covers abortifacients.

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.[6]

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"[7] 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 abortifacients. It is not reasonable to say that an

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

employer who pays his employees wages has any specific intent regarding how the employees spend those wages. However, it *is* reasonable to say that the employer who provides a means to pay specifically for abortifacients is acting specifically to assist his employees to pay for, and thus obtain, abortifacients. Therefore, that employer manifests an intent to enable his employees to pay for, and thus obtain abortifacients.

By mandating that the Greens provide Hobby Lobby and Mardel employees with health insurance that covers abortifacients, the HHS mandate in effect is commanding the Greens to establish a fund specifically to provide employees the means to pay for, and thus obtain, abortifacients. It is perfectly reasonable for the Greens to conclude that to provide the mandated coverage would be immoral cooperation with the evil of abortion and therefore contrary to their faith.

Perhaps not all Christians 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 the Greens could conclude that making health insurance covering abortifacients 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 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. As the Greens note in their Brief (Appellants Brief 30), they, like the Petitioner in *Thomas*, drew a line based on their faith regarding whether that faith would allow them to perform an act that would assist others in doing what their faith tells them is a moral evil. As in *Thomas*, "it is not for [the district court or this Court] to say the line [they] drew was an unreasonable one." *Id*. at 715.

The Greens sincerely believe that they cannot comply with the HHS mandate and remain true to their Christian faith. The HHS mandate thus presents the Greens with a stark choice: do what you believe is a sin according to your understanding of your religious faith, or subject your businesses to enormous penalties. Being put to that choice substantially burdens the Greens' exercise of their religion. The district court's holding that it does not is not just wrong; that holding usurps the Greens' right to follow their 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 Greens' motion for a preliminary injunction and should remand with instructions to enter a preliminary injunction on behalf of the Greens, Hobby Lobby, and Mardel.

Respectfully submitted this 19th day of February, 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 6,438 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 2007.

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Dated: February 19, 2013

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I, Steven W. Fitschen, hereby certify that:

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I electronically filed the attached Brief *Amici Curiae* of Professor of Law Brad Jacob**,** Professor Emeritus of Law Charles Rice**,** in the case of *Hobby Lobby Stores, Inc., et al v. Kathleen Sebelius, et al*, No. 12-6294, 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.

Also on February 19, 2013, seven paper copies of the Brief were deposited with Federal Express for delivery to the Court within two business days.

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