

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

FRANK O'BRIEN, JR.; O'BRIEN INDUSTRIAL HOLDINGS, LLC,
Plaintiffs-Appellants,

v.

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

**Appeal from the United States District Court
for the Eastern District of Missouri**

**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**
in support of Plaintiffs-Appellants, urging reversal

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, 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, 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 David Wagner is Professor of Law at Regent University School of Law who teaches and has written extensively concerning Constitutional Law, including religious liberty. Professor Wagner, a practicing Catholic, is concerned that the HHS mandate that forces employers to provide insurance for contraceptives, abortifacients, and sterilizations despite the employers' religious objections is an unwarranted and unjustified attack on those employers' religious liberty. Professor Wagner is also concerned that the district court's holding that the mandate imposes no substantial burden on Frank O'Brien's religious liberty unduly restricts the protection that the Religious Freedom Restoration Act was intended to provide for the free exercise of religion.

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 RFRA's protections for the free exercise of religion.

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 one argument (without introducing any new *issues*) not made by Plaintiffs-Appellants: 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 with his employees' use of the insurance to obtain contraceptives, abortifacients, and sterilizations and therefore is contrary to his Catholic faith.

The Catholic Church teaches that contraception, sterilization, and abortion are immoral acts. In some circumstances, cooperating with another person's evil act by, for example, providing the means for that person to commit the act, is morally wrong. For example, if a person loans somebody a gun knowing that the person is going to use that gun to shoot somebody and sharing in the shooter's evil

intent, that person would be morally culpable for cooperating with the evil act. This is an example of formal cooperation, which in general 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 by definition it involves intentional participation in another's evil act.

A person who performs an act that assists somebody else in doing evil but does not share the evildoer's evil intent is said to have materially cooperated in that act. For example, a person who cleans operating rooms in which abortions are performed (while not willing those abortions to be performed) materially cooperates with the evil of abortion. 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 could reasonably conclude that providing the HHS-mandated coverage constitutes formal cooperation. The employer, by specifically providing for that coverage in the insurance contract, is deliberately and intentionally acting to provide a pool of money for his employees to use to pay for contraceptives. Thus, this employer could reasonably be thought to be sharing in the evil will 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.

On the other hand, even if providing the mandated coverage is merely material cooperation, a Catholic employer could reasonably find the material cooperation to be illicit. The evils being assisted by providing access to contraception, abortifacients, and sterilization are grave evils, and a Catholic employer could conclude that providing for these goods and services in his employees' health insurance would 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.

While there are Catholics who disagree with the conclusion that complying with the mandate constitutes formal or illicit material cooperation with evil, that is beside the point. The Supreme Court has made clear that federal courts are not competent to determine who is right or wrong regarding religious teaching. A Catholic must follow his conscience after carefully considering the action he should take. For a Catholic employer like O'Brien who concludes that complying with the mandate would violate his Catholic faith, the mandate imposes a stark choice—Do what your conscience tells you violates your faith, or pay enormous fines. The district court's holding that this stark choice imposes no substantial burden on O'Brien's exercise of his Catholic faith is not only wrong; it nullifies the protection RFRA promises for the free exercise of religion.

ARGUMENT

Frank O'Brien is a practicing Catholic who desires to operate his business, O'Brien Industrial Holdings, LLC, in accord with his Catholic beliefs. The Catholic Church teaches that abortion, sterilization, and using contraceptives to prevent pregnancy are gravely immoral acts.¹ As a faithful Catholic, O'Brien accepts the Church's teaching.

The Department of Health and Human Services has issued a regulation requiring that employers (with any number of exceptions, none of which include O'Brien's business) provide their employees health insurance that covers all FDA-approved contraceptive methods and sterilization procedures. Among those FDA-approved contraceptives are drugs (Ella, Plan B) that act as abortifacients.² If O'Brien provides insurance that fails to include the mandated coverage or fails to provide any group insurance plan, he will be subject to fines of up to \$3,000,000. (See Appellants' Br. 9-10.)

¹ See e.g., Pope John Paul II, *Evangelium Vitae (On the Value of Human Life)* ¶¶ 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 Nov. 17, 2012); Pope Pius XI, *Casti Conubii (On Christian Marriage)* ¶¶ 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 Nov. 17, 2012); *Catechism of the Catholic Church*, ¶¶ 2366, 2399 (1997).

² See Michael Fragoso, *The Stealth Abortion Pill*, (Aug. 17, 2010) <http://www.thepublicdiscourse.com/2010/08/1515/> (last visited Nov. 17, 2012).

As a Catholic, Frank O'Brien accepts the Church's teaching that abortion, sterilization, and contraception are wrong. O'Brien also believes that to provide insurance covering those services for his employees is morally wrong. Therefore, O'Brien has concluded that it would be morally wrong—that is, a sin—for him to provide health insurance that covers contraception and sterilization. As a consequence, the HHS contraception and sterilization mandate forces O'Brien to make the following choice: Do what his conscience tells him is contrary to the dictates of his Catholic faith—or, to put it more bluntly, commit serious sin—or pay up to \$3,000,000 in fines.

This stark choice—sin or else pay possibly ruinous fines—would seem to be the quintessential “substantial burden” on religious exercise that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) prohibits the federal government from imposing unless that burden passes strict scrutiny. *See id.* § 2000bb-1(b). It therefore seems strange to characterize this stark choice posed by the HHS mandate as an “insignificant and remote” burden on O'Brien's exercise of his Catholic faith, as the district court did. *O'Brien v. United States Department of Health and Human Services*, No. 4:12-CV-476, slip op. at 9 (E.D. Mo. Sept. 28, 2012) (hereinafter “D. Ct. Mem. & Order”). Rather, it is more accurate to characterize the choice posed by the mandate as “significant pressure which directly coerces the religious adherent to conform his or her behavior

accordingly.” *Id.* (quoting *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F3d. 1214, 1227 (11th Cir. 2004); *see also* D. Ct. Mem. & Order at 10 (“Laws substantially burdening the exercise of religion often discourage free exercise by exacting a price for religious practice . . . [such as] pay[ing] a fine.”) After all, what can be more “substantial and direct pressure” to comply with a government mandate requiring a person to do what his conscience tells him is contrary to his faith than requiring that person to pay enormous fines if he fails to do what the government wants him to do?

While recognizing in the abstract this common sense conclusion, the district court nonetheless reached the remarkable conclusion that the HHS mandate does not impose any substantial burden on O’Brien’s right to practice his faith. *See* D. Ct. Mem. & Order at 9-12. Because the HHS mandate does not prevent O’Brien “from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion,”³ but rather only

³ In its haste to dismiss the burden on O’Brien’s religious exercise as insignificant, the district court wrongly stated that complying with the HHS mandate would not keep O’Brien from receiving Communion in a Catholic Church. O’Brien believes that it is wrong to knowingly and deliberately provide the mandated insurance coverage for his employees. If, as is likely, he believes providing that coverage is a mortal sin (that is, serious or grave), if he provides that coverage, he must not, according to Catholic Canon Law, receive Communion: “A person who is conscious of a grave sin is not to . . . receive the body of the Lord without prior sacramental confession” *Code of Canon Law* 1983, Canon 916 available at http://www.vatican.va/archive/ENG1104/_P36.HTM *See also* 1 Cor. 11:27 (Revised Standard Version Catholic Ed. 1965) (“Whoever, therefore, eats the bread

requires him to “subsidize someone else’s” sterilization or use of contraception and abortifacients, *see id.* at 11, the court believed that the burden imposed by the mandate on O’Brien’s religious practice is too attenuated and indirect to be substantial. *See id.* at 9-13.

It is beside the point, however, that the HHS mandate does not require O’Brien to use contraceptives, prevent him from trying to dissuade his employees from using contraceptives, or prevent him from attending Mass on Sundays. O’Brien’s claim is that his Catholic faith prohibits him from cooperating in or facilitating his employees’ sins (using contraceptives and abortifacients, or undergoing sterilizations) by providing health insurance that covers contraceptives, abortifacients, and sterilizations. The HHS mandate would thus “exact a price for his religious practice,” D. Ct. Mem. & Order at 10, by forcing him to pay enormous fines if he follows his religious beliefs and refuses to comply with the mandate. Again, according to O’Brien’s understanding of what his Catholic faith

or drinks the cup of the Lord in an unworthy manner will be guilty of profaning the body and blood of the Lord.”) Furthermore, O’Brien, as long as he is providing the insurance coverage, would be unable to engage in a valid sacramental confession (the prerequisite for receiving communion after committing a mortal sin) because sacramental confession requires the penitent (sinner) to be “contrite of heart” and resolute in his intention “not to sin again.” *Catechism of the Catholic Church* ¶¶ 1450, 1451. O’Brien, knowing that he would continue to provide insurance coverage, an act that he has determined to be a mortal sin, would not have the requisite intent “not to sin again” and therefore would be unable to make a valid sacramental confession, which in turn would prevent him from participating in the sacrament of Holy Communion.

requires, the HHS mandate puts him to a stark choice: Do what his conscience tells him is a serious sin, or pay enormous fines.

In concluding that the HHS mandate does not substantially burden O'Brien's exercise of his Catholic faith, the district court implicitly decided that O'Brien is wrong in believing that complying with the mandate would violate his Catholic faith.⁴ In doing so, the district court made itself the arbiter of what the Catholic faith requires of employers who must decide whether to comply with the mandate. The Supreme Court, however, has made clear that courts are not to determine whether a believer's understanding of what his faith requires is correct. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 714-18 (1980). This in itself is a reason to reverse the district court's decision on O'Brien's RFRA claim.

In *Thomas*, the Supreme Court noted that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others" to merit protection. *Id.* But O'Brien's belief—besides being the conclusion he reached in his own conscience—is as a matter of Catholic moral teaching, entirely reasonable. While not all well-informed Catholics would necessarily agree that it is wrong to comply

⁴ As we will discuss further, at least one Catholic Cardinal, Raymond Cardinal Burke, disagrees with the court on this point. Steven Ertelt, *Catholic Cardinal: A Sin to Cooperate With Obama Mandate* (Apr. 4, 2012), <http://www.lifenews.com/2012/04/10/catholic-cardinal-a-sin-to-cooperate-with-obama-mandate/> (last visited Nov. 17, 2012). See *infra* at 21.

with the mandate, a reasonable Catholic *can* conclude that complying with the mandate—that is, providing health insurance that covers contraception, abortifacients, and sterilization—would constitute illicit cooperation with the sins of those who used the coverage for these goods and services. This Brief will proceed to explain why this is so.

I. A REASONABLE CATHOLIC COULD CONCLUDE THAT COMPLYING WITH THE HHS MANDATE WOULD BE CONTRARY TO HIS FAITH BECAUSE COMPLYING WOULD CONSTITUTE ILLICIT COOPERATION WITH THE EVILS OF CONTRACEPTION, STERILIZATION, AND ABORTION

A. Cooperating with another’s evil act by facilitating that act can be morally blameworthy.

It goes without saying that deliberately performing an evil act is morally wrong. But in some 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, even if the act providing the assistance is not itself morally wrong. This general concept of cooperation is not difficult to grasp. If Baker intentionally shoots and kills his wife, he has committed murder. But suppose that Baker approaches Able and asks, “May I borrow your gun? I want to use it to kill my wife.” (Baker makes it clear he is not kidding.) 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. Shoot straight.”), it is difficult to

imagine anyone concluding that Able, even though he did not pull the trigger, would not be morally culpable for cooperating with Baker's evil act.

Suppose Able loaned the gun to Baker because Able is a beneficiary of Baker's wife's will and life insurance policy. From the money he hopes to receive from the estate and policy, Able plans to use some to pay for his child's college education and donate the rest to a local soup kitchen. While paying for one's children's education and helping those less fortunate are good things, Able would still be committing an immoral act by cooperating with Baker's act of murder because the object of that act—to kill Baker's wife—is still evil, and Able intends with Baker to see that evil accomplished. Even though Able wants to see good result from Baker's bad act, it is a fundamental principle of Catholic moral teaching that “[o]ne may never do evil so that good may result from it.”⁵

This is not to say that providing the means necessary 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 local shooting range, and Able had no reason to think Baker really 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 act of murdering his wife.

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

⁵ *Catechism of the Catholic Church* ¶ 1789.

of which Catholic moralists speak—formal cooperation and material cooperation. The first example is an example of what is called formal cooperation with evil. 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.”⁶ 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 as well as explicit. 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 that Baker would use it to shoot his wife; why else would Able loan Baker the gun in these circumstances? Formal cooperation is always morally wrong because by definition, “it represents a form of direct and intentional participation in the sinful action of another person.”⁷

⁶ 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 with Evil*] (last visited Nov. 17, 2012); see also Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), available at <http://www.newadvent.org/cathen/011100a.htm> (last visited Nov. 19, 2012) (“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 Nov. 17, 2012) (“Formal cooperation is carried out when the [cooperator] cooperates with the immoral action of another person, sharing the latter’s evil intention.”)

⁷ See *Vatican Statement on Vaccines*, *supra* note 6.

The second example, in which Able loaned Baker his gun thinking Baker was going to use it for target practice at the range, is an example of material cooperation. Material cooperation occurs when a person assists a wrongdoer's act by an action that is in itself good or morally indifferent, but the cooperator does not share the wrongdoer's evil intent.⁸ In the second example, while Able's loaning the gun to Baker assisted Baker in shooting his wife, Able could not have shared in Baker's evil intent because he had no way of knowing that evil intent. As is apparent from that example, material cooperation, unlike formal cooperation, is not always morally blameworthy. It would seem absurd to impute moral blame to Able for his completely innocent act of loaning Baker his gun for target practice just because, without any reason for Able to have thought Baker would do so, Baker used the gun to shoot his wife.

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, even if he does not share the evildoers bad will. Such an example of material cooperation, as we expand upon below, could be a person who performs some menial task like cleaning at a hospital that performs abortions which in some way assists those in the hospital who perform the abortions. Whether that material cooperation is wrong depends primarily on whether the cooperator has a

⁸ Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia*, *supra* note 6.

sufficiently good reason to tolerate the evil that his action is assisting (an evil he does not intend).⁹ That, in turn, requires one to consider the gravity of the evil being assisted and the goodness of the goal the cooperator is pursuing.¹⁰ 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.”¹¹ 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.”¹²

To illustrate, suppose that Charlie and David are both janitors at a hospital whose duties include cleaning operating rooms after surgical procedures, including abortions. Charlie has a large family to support and cannot find another job. He does not approve of abortion but generally keeps his thoughts on abortion to himself. David, on the other hand, is economically well-off and left his job as a stock broker to work at the hospital because he enjoys the hospital environment and manual labor. David is also a professed practicing Catholic who has told all his friends that he opposes abortion.

⁹ See Newton, *Avoiding Cooperation with Evil*, *supra* note 6.

¹⁰ *See id.*

¹¹ Sherif Girgis & Robert P. George, *Morals and Mandates* (Feb. 14, 2012), <http://www.thepublicdiscourse.com/2012/02/4736> (last visited Nov. 17, 2012).

¹² *Id.*

Neither Charlie nor David actually perform abortions. Cleaning up after surgery is in itself not morally wrong and is necessary to prepare operating rooms for any number of morally blameless surgeries. But cleaning up operating rooms before or after an abortion does, in some way, support and assist the performance of abortions at the hospital. Charlie and David, who both oppose abortion, are material cooperators with abortion. Is either's material cooperation immoral?

While one cannot definitely say that either is acting immorally by his work 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 (from a Catholic perspective) carries a greater risk of scandal, which is defined in the Catechism of the Catholic Church as "behavior which leads another to do evil."¹³ Those who know David to be a pro-life Catholic might conclude from his work at the hospital that abortion is not as important to

¹³ *Catechism of the Catholic Church* ¶ 2284.

Catholic teaching as the Church claims; why else would a professed pro-life Catholic be working at a hospital in a way that ultimately helps the hospital perform abortions?¹⁴

Having discussed general principles of cooperation, the next question is whether a Catholic employer like O'Brien could reasonably conclude that providing insurance coverage to his 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 the acts of contraception, chemical abortion, and sterilization). The next section of this Brief discusses that question.

B. It is reasonable to conclude that providing insurance coverage for contraceptives, abortifacients, and sterilizations constitutes formal cooperation or illicit material cooperation.

A Catholic employer like O'Brien could reasonably conclude that providing the coverage required by the HHS mandate constitutes formal cooperation with evil. This is best illustrated by examples. Suppose that as part of his employee

¹⁴ None of this is to suggest that *amici* believe that Charlie's ability to feed his family and the other good he is doing does outweigh the moral harm of the abortions he is in small part helping to accomplish. *Amici* are only suggesting that Charlie's case is a closer 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.

compensation package, an employer keeps a supply of contraceptive devices and drugs on hand so that his employees can have access to them whenever they may need them. The employer has made a conscious intentional choice to make these contraceptives available to his employees. In doing that, it seems, he shares in the will of those who would use the contraceptives (or at least shares in it to the extent that he wills to have contraceptives available for his employees when they need them). It would thus be reasonable to conclude that the employer is formally cooperating with the use of the contraceptives by his employees.

That would be true even if the employer has what he thinks are good reasons to provide the contraceptives. Perhaps he thinks he needs to make contraceptives available to attract competent female employees, both for the good of his business and to provide employment opportunities for women. While neither of these ends is a bad end in itself, the employer is accomplishing these ends by consciously and intentionally providing contraceptives for others. As noted above, the Catholic Church teaches it is wrong to do evil to achieve a good end.

Now suppose an employer, rather than keeping a supply of contraceptives on hand for employees, establishes a fund to reimburse employees for contraceptive purchases. Although this employer is not dispensing the contraceptives himself, he, like the first employer, is still making a conscious, intentional choice to provide access to contraceptives. Contrary to the district court's reasoning, D. Ct. Mem. &

Order at 12-13, creating this kind of fund is different than merely paying an employee a salary that the employee might use to purchase contraceptives (or any number of other things). The only purpose for which employees can use the fund is for contraceptives. While it is not reasonable to say that an employer who pays his employees' wages shares their intent regarding how they use those wages, the employer who creates a fund specifically for reimbursing contraceptive use, like the employer who stocks and dispenses contraceptives to his employees, is acting specifically to assist his employees to obtain contraceptives. Thus, the employer can reasonably be thought to share in the intent of those who would use the fund to help pay for contraceptives (or, again, at least to the extent that he shares the intent to have contraceptives available, or more easily available, for employees who use them). It is thus reasonable to consider this employer to be formally cooperating with his employees' contraceptive use.

If it is reasonable to conclude that the first two employers are formally cooperating with their employees' contraceptive use, it would seem to be reasonable to conclude that an employer who provides health care coverage for his employees that specifically includes coverage for contraceptives is formally cooperating with his employees' contraceptive use. Like the second employer above, this employer is consciously and intentionally creating a pool of money for his employees to use to pay for contraceptives. That he is doing this through a

contract with a third party ought not matter because the end result is the same—in each case, the employer has provided a pool of money for his employees to use specifically to pay for contraceptives. Each has deliberately chosen to make contraceptives available to his employees. Thus, like the second employer, this employer could reasonably be thought to share in the intent of those who would use the insurance to pay for contraceptives.

An employer who concludes that he is formally cooperating with evil by providing the contraceptive, abortifacient, and sterilization coverage the HHS mandate requires has significant support from at least one 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-hierarchy.org/diocese/dxtas.html (last visited Nov. 17, 2012).

¹⁶ Steven Ertelt, *Catholic Cardinal: A Sin to Cooperate With Obama Mandate*, *supra* note 4 (quoting an interview of Cardinal Burke by Thomas McKenna).

Other Catholic thinkers also have argued that providing the mandated coverage constitutes formal cooperation.¹⁷

On the other hand, even if providing the mandated coverage is merely material cooperation, a reasonable Catholic employer could find the material cooperation to be illicit. The evils being assisted by providing access to contraception, chemical abortifacients, and sterilization are seen by the Catholic Church to be grave evils (especially chemical abortion, which takes the life of an already-conceived human being). Moreover, a Catholic employer who takes his faith seriously and makes that commitment known could well be concerned that providing the HHS 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 Jewish authorities not to preach the gospel, responded "we must obey God rather than men." *Acts 5:29*

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 November 17, 2012); Steven A. Long, *The Unthinkability of Compliance* (Sept. 29, 2012), <http://www.thomistica.net/news/2012/9/28/the-unthinability-of-compliance.html> (last visited Nov. 17, 2012).

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* (Feb. 14, 2012), *supra* note 11.

(Revised Standard Version Catholic Ed. 1965). One might argue that the employer could alleviate the 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 take advantage of 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 (including some who are without question faithful to Church teaching) 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 decision dismissing O’Brien’s RFRA claim, the court overstepped its proper role, as the next section will explain.

C. That not all Catholics would agree that complying with the mandate would be morally wrong does not justify finding that the mandate imposes no substantial burden on the religious exercise of employers like O’Brien.

This Brief has used hypothetical examples to help explain the concepts of formal and material cooperation and why a Catholic employer could reasonably conclude that providing the insurance coverage required by the HHS mandate

would be wrong. The hypotheticals could be multiplied. But while it is easy to spin hypotheticals concerning cooperation with evil and to analyze them to determine whether the cooperation is formal or material, or whether material cooperation is illicit, and while there no doubt are obvious cases (see for example, the first hypothetical concerning Able and Baker, *supra* at 12-13) the truth is that “it is often difficult to apply these principles, 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 In fact, two theologians have reported that “in 1958, the moralist Henry Davis noted that there ‘is no more difficult question than this in the whole of Moral Theology,’” and that “in 1923, Jerome Noldin noted that most major moralists were routinely unable to come to agreement on several key points of application.”²⁰

In many cases, there may well be no easy right or wrong answer concerning cooperation. And that may well be true concerning complying with the HHS mandate. There is, in fact, a lively ongoing discussion among Catholic thinkers who oppose the HHS mandate about whether complying with the mandate would

¹⁹ Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia*, *supra* note 6.

²⁰ Rev. James F. Keenan, SJ, and Rev. Thomas R. Kopfensteiner, *The Principle of Cooperation*, *Health Progress*, Apr. 1995, at 27 (quoting Henry Davis, *Moral and Pastoral Theology* 342 (1958) and citing Hieronymous Noldin, *Summa Theologicae Moralis* 134, 137 (1923).

be formal or material cooperation with the evils (according to Catholic teaching) of abortion, sterilization, and contraception or whether, if material cooperation, that cooperation is necessarily illicit.²¹

That there are Catholics who do not agree that the mandate would constitute formal or illicit material cooperation, however, does not justify the district court's holding that the mandate imposes no substantial burden on O'Brien's exercise of his religion. While answers to questions regarding cooperation may not always be clear, what is clear is that Catholic employers like O'Brien must, after considering the matter carefully, follow their own consciences in determining whether it is morally licit to comply with the mandate. In the words of Joseph Cardinal Ratzinger (now Pope Benedict XVI), "[i]t is of course undisputed that one must follow a certain conscience."²² A corollary to that principle is that one must not act

²¹ See, e.g., Janet E. Smith, *Is it Moral to Comply with the HHS Mandate?*, <http://catholicvote.or/discuss/index.php?p=36708> (last visited Nov. 17, 2012) (noting the differing views of various commentators on 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/32774154-20/the-new-catholic-debate-over-the-hhs-mandate (last visited Nov. 17, 2012) (summarizing the debate, setting forth the 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").

²² Joseph Cardinal Ratzinger, *Conscience and Truth* (Address presented at the 10th Workshop for Bishops Feb. 1991 Dallas, Texas), available at <http://www.ewtn>.

on an uncertain conscience. If a person is uncertain whether a particular act is wrong, it would be wrong for him to perform that act. The reason for that is straightforward: one who performs an act not knowing whether it is right or wrong manifests a will to do that act even if it is wrong. Thus, a Catholic employer who is unsure about whether complying with the mandate would be formal cooperation or illicit material cooperation with evil could also conclude he must refuse to comply.

One other thing is certain: A federal court has no business deciding whether O'Brien's conclusion that he could not morally comply with the HHS mandate is correct or incorrect, even if other Catholics would disagree with O'Brien's conclusion. As the Supreme Court stated in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), “[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” Frank O'Brien sincerely (and reasonably) believes that he cannot comply with the HHS mandate and stay true to his Catholic faith. His faith requires him to follow

com/library/curia/ratzcons.htm (last visited Nov. 17, 2012); see also *Catechism of the Catholic Church* ¶ 1790 (“A human being must always obey the certain judgment of his conscience.”). Of course, a person must first properly form his conscience. *Id.* ¶¶ 1783-1785. But while a person may be held culpable for failing to properly form his conscience so that he reaches erroneous judgments about whether an act is right or wrong, he still must follow the certain judgment of that erroneous conscience. See *id.* ¶¶ 1790-1791.

the judgment of his conscience. The mandate thus presents him with the stark choice: Do what you believe is a sin according to your understanding of your religious faith, or pay millions of dollars in fines. Being put to that choice imposes a substantial burden on O'Brien's exercise of religion. The district court's holding that it does not is not just wrong; it nullifies the protection RFRA promises for the free exercise of religion.

CONCLUSION

For the foregoing reasons and for the reasons stated in Appellants' Brief, this Court should reverse the district court's decision dismissing Frank O'Brien's RFRA claim.

Respectfully submitted this 20th day of November, 2012,

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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: November 20, 2012

/s/Steven W. Fitschen
Steven W. Fitschen

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, 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 *Frank O'Brien, et al, v. United States Dept. of Health and Human Services, et al*, No. 12-3357, 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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