APPEAL NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, A VIRGINIA NONPROFIT CORPORATION; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS–APPELLANTS

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the United States Department of Labor, in her official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

DEFENDANTS–APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PLAINTIFFS–APPELLANTS

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March 6, 2013

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amicus curiae* American Civil Rights Union states as follows:

1. The American Civil Rights Union is a Virginia not-for-profit corporation and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

2. The American Civil Rights Union has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Corporation's stock.

3. The American Civil Rights Union is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation.

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INTEREST OF *AMICUS CURIAE*

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long-time policy advisor to President Reagan and architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest because the ACRU wants to ensure all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the rights to freedom of religion and to life, liberty, and property protected by the Due Process Clause of the Fifth Amendment.

RULE 29(C)(5) STATEMENT

ACRU General Counsel Peter J. Ferrara authored this brief. The ACRU's outside counsel filed and served this brief. No counsel for either party authored the brief, in whole or part, and no one apart from the ACRU made a monetary contribution to the brief's preparation or submission.

All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

The individual mandate of the Patient Protection and Affordable Care Act[1] ("PPACA") compels individuals to purchase health insurance providing what the Act calls "minimum essential coverage," complying with all the PPACA's benefit mandates and other requirements, from insurance companies mandated by the federal government to provide the required insurance. 26 U.S.C. § 5000A. The PPACA's employer mandate similarly

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

requires employers of 50 or more employees to buy health insurance providing such "minimum essential coverage" for its employees and dependents, again from such insurance companies. 26 U.S.C. § 4980H.

The PPACA provides only general guidance as to what is required for "minimum essential coverage," stating it must include no-cost coverage for preventive care services, immunizations, and screenings for infants, children, adolescents, and women. The Act granted broad authority to the Secretary of the Department of Health and Human Services ("HHS") to define by regulation the specifics of what is required by the terms "minimum essential coverage" and "preventive care services." 42 U.S.C. § 18022(b).

HHS delegated to the Institute of Medicine (IOM) the authority to provide recommendations as to what should be required by the term "preventive care services."[2] IOM defined "preventive health services for women" as measures "shown to improve wellbeing, and/or decrease the likelihood or delay the onset of a targeted disease or condition."[3] IOM recommended these measures include free "contraceptive" coverage, testing for sexually transmitted diseases and screening and counseling for domestic

[2] IOM (Institute of Medicine), Committee on Preventive Services for Women, Board on Population Health and Public Health Practice, *Clinical Preventive Services for Women Closing the Gaps* 2 (2011), available at http://www.nap.edu/catalog.php?record_id=13181.

[3] *Id.* at 3.

violence.[4] It further recommended "contraceptive coverage" include contraceptive medication, sterilization, abortion-inducing drugs (including abortifacients, such as the so-called "morning after" drugs), and intra-uterine devices (IUDs). But abortifacients and IUDs often cause abortions, and, therefore, cannot be considered merely contraceptives.

The Health Resources and Services Administration ("HRSA") of HHS incorporated the IOM recommendations into its "comprehensive guidelines" on women's preventive coverage, requiring health insurance policies include "the full range of Food and Drug Administration–approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" in order to satisfy the individual and employer mandates.[5]

Such FDA-approved "contraception" includes Levonorgestrel, also known as "Plan B" or the "morning after pill," and Ulipristal acetate, also known as "Ella" or the "week after" pill.[6] Both drugs often act as

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[4] *Id.* at 10–12.

[5] HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, available at http://www.hrsa.gov/womensguidelines (last visited Feb. 22, 2013); 45 C.F.R. § 147.130, incorporating guidelines at *id*. *See* 76 Fed. Reg. 46,626 (Aug. 3, 2011).

[6] FDA Office of Women's Health Birth Control Guide, available at http://www.fda.gov/birthcontrol.

abortifacients terminating the life of an unborn child.[7] Medical professionals presented evidence to the FDA that "Ulipristal acetate is an abortifacient of the same type as mifepristone ("RU-486") and that its approval as an emergency contraceptive raises serious health and ethical issues."[8] They added,

> There is no doubt that Ulipristal acts as an abortifacient because the drug blocks progesterone receptors at three critical areas. These blocking capabilities form the basis of its embryocidal abortifacient mechanism. That mechanism is identical to the action of RU-486 in early pregnancy.[9]

The FDA guide to "contraceptives" states that "Plan B" and "Ella" prevent "attachment (implantation) [of the embryo] to the womb (uterus)."[10] FDA-approved IUDs similarly prevent implantation of embryos, terminating

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[7] American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), Comment to Docket No. FDA–2010–N–0001, Advisory Committee for Reproductive Health Drugs; Notice of Meeting, Ulipristal acetate tablets, (NDA) 22–474, Laboratoire HRA Pharma (June 2, 2010), available at http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf.

[8] *Id*.

[9] *Id*.

[10] FDA Birth Control Guide, *supra* note 6, at 16–17.

human life as a result.[11] The same is true of FDA-approved surgical sterilization.[12]

The amended interim final regulations issued by HHS on August 3, 2011, incorporated the HRSA guidelines on contraceptives into the definition of minimum essential coverage. 76 Fed. Reg. 46,621 (Aug. 3, 2011). That document amended interim final regulations issued by HHS on July 19, 2010, which stated contraceptives would be part of the required no-cost preventive care coverage for women. *Id.* at 46,623. Several religious organizations complained that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom."[13]

In response, HHS granted HRSA discretion to consider a religious employer exemption, saying

> it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the

[11] *Id.* at 18–19.

[12] *Id.*

[13] *See, e.g.*, Letter from General Counsel, U.S. Conference of Catholic Bishops, to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (Aug. 31, 2011), stating that the proposal violates the First Amendment and RFRA, available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf.

> religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate.

Id. But HHS specified it only wanted "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." *Id.* Consequently, the amended interim final regulations provided only that HRSA "*may* establish exemptions" from the contraceptive mandate for "religious employers." *Id.* at 46,626.

"Religious employers" was initially defined as those whom HRSA determined met *all* of the following criteria:

(1) The inculcation of religious values is the purpose of the organization;

(2) The organization primarily employs persons who share the religious tenets of the organization;

(3) The organization serves primarily persons who share the religious tenets of the organization; and

(4) The organization is a non-profit church, integrated auxiliary, convention or association of churches, or a religious order.

Id. But religious organizations complained this exemption did not resolve the violations of right of conscience imposed by the mandate for no-cost preventive care coverage. Finally, HHS granted only a one-year "temporary

enforcement safe harbor" for religiously-affiliated non-profits that cannot pay even indirectly for abortions and abortificients that are abhorrent child murder under their religion, but do not qualify under the Administration's definition of religious employer.

The Administration has suggested allowing religiously-affiliated non-profits, including schools, hospitals, and other activities ministering to the public, to obtain the required health coverage for their employees for abortion and abortifacients without paying for it. The insurance company would have to provide those benefits for free. But somebody would be paying for it somewhere. The Administration has suggested it would allow an offset for the insurer for other costs the insurer would have to pay to the health insurance exchanges. But this still means that the health insurance policy the government would be requiring the religiously-sponsored non-profit to provide its employees would be providing coverage for abortion and abortifacients it finds abhorrent to its religion.

Moreover, that resolution would not provide any solace at all for religiously sponsored non-profits who self-insure, such as Liberty University. The Administration has suggested a third party administrator of these self-insured plans would have to provide the objectionable coverage for abortions and abortifacients for free. But Liberty University, like other

large non-profits, does not have a third party administrator for its self-insurance. So there is no resolution on the horizon for religiously sponsored non-profits such as Liberty University.

Moreover, the PPACA itself promises the public that abortion would not be included in required coverage, and that rights of conscience would be protected, as recognized by the Court below and by Judge Davis in this case. *Liberty University v. Geithner*, 753 F. Supp. 2d 611, 642–43 (W.D. Va. 2010); *Liberty University v. Geithner*, 671 F.3d 391, 450 (4th Cir. 2011) (Davis, J., dissenting). The Act explicitly states no health plan shall be required to include "abortion" as among its mandated health benefits. 42 U.S.C. § 18023(b)(1). Moreover, President Obama reiterated that in signing an Executive Order on March 24, 2010, stating that abortion coverage would not be required under the Act by the individual mandate or the employer mandate. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). President Obama promised the public the Act "maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges," and

> longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of

> an unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Id. These provisions and public statements are now contradicted by HHS implementing regulations precisely requiring mandatory coverage under the individual mandate and the employer mandate for abortion and abortifacients. Subsequently, HHS policies have revealed that such stated protection of the religious rights of those who object to abortion is more limited than indicated, as it would apply only to surgical abortions, and not to abortions achieved by chemical poisoning or IUDs.

Moreover, these provisions and statements protecting religious liberty and conscience are further contradicted by PPACA provisions mandating that health insurers *shall* collect directly from each insured person or family (without regard to the enrollee's age, sex, or family status) a separate payment of no less than $1 per month for separate coverage of elective abortions. 42 U.S.C. §§ 18023(b)(2)(B)–(D). HHS regulations implementing the Act require that all private health insurance plans include free abortifacient drugs and devices. 45 C.F.R. § 147.130.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court ruled the PPACA's individual mandate unconstitutional under the Commerce Clause and held the Anti-Injunction Act (AIA) did not bar suit seeking relief from the Act, nullifying this Court's prior ruling on

that issue. While the Supreme Court did rule the individual mandate constitutional under the Taxing and Spending Clause, it did so on the finding the tax involved in the individual mandate is not punitive. But the tax imposed on the religiously sponsored non-profit employers in this case is punitive, which implicates the Court's warning in *NFIB* that Congress cannot use its taxing authority to destroy. *Id.* at 2600.

The Supreme Court granted Plaintiffs' Petition for Rehearing on November 26, 2012, vacating its prior denial of Plaintiffs' Petition for Certiorari, granting the Petition, and remanding the case to this Court for further consideration in light of *NFIB*. This Court ordered supplemental briefing in this case on January 17, 2013.

ARGUMENT

I. THE EMPLOYER MANDATE IS UNCONSTITUTIONAL UNDER *NFIB* AND AS A VIOLATION OF FREEDOM OF RELIGION.

A. The Employer Mandate Is Unconstitutional Under *NFIB*.

1. The employer mandate cannot be justified under the Commerce Clause.

The Supreme Court in *NFIB* found the PPACA's individual mandate to be without authorization under the Commerce Clause and the Necessary and Proper Clause. This Court should find the same for the employer mandate.

The PPACA's employer mandate PPACA compels employers of 50 or more employees to purchase health insurance providing what the Act calls "minimum essential coverage," complying with all the PPACA's benefit mandates and other requirements, from insurance companies mandated by the federal government to provide the required insurance. The Kaiser Family Foundation estimates this "minimum essential coverage" will cost families roughly $20,000 per year to start. Kaiser Family Foundation, http://healthreform.kff.org/SubsidyCalculator.aspx.

The Commerce Clause grants Congress power to regulate interstate commerce. It does not grant Congress power to compel individuals or employers to enter into interstate commerce in regard to the purchase of any product or service. Congress itself has recognized this for 220 years, as it has never before enacted a law compelling individuals or employers to purchase particular products and services, which the authorities cited below make clear. Anything like that has always before been recognized as a function of the police power reserved to the states. *NFIB*, 132 S. Ct. at 2589.

As the *NFIB* Court said, "The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress' actions have reflected this understanding. There is no reason to depart from that understanding now." *Id.* The Court added the

federal government "does not have the power to order people to buy health insurance." *Id.* at 2601.

The District Court, *Virginia v. Sebelius*, No. 3:10-cv-188 (E.D. Va. Aug. 2, 2010), recognized the same in denying Defendants' motion to dismiss on this issue, saying, "Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." Slip Op. at 25. The Court reiterated, "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." *Id.* at 24. The court's language makes no distinction between the individual and employer mandates.

The court in *Florida v. United States Department of Health and Human Services*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Oct. 14, 2010), concluded likewise, saying in regard to the individual mandate, "[T]he Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent." Slip Op. at 61.

To extend the Commerce Clause as the Defendants seek would leave no principled limit to the federal government's power to regulate under that Clause. If Congress can compel an individual or employer who is not even participating in interstate commerce in the good or service at issue to

purchase the good or service from another citizen or business, which purchase it then regulates in great detail, where is the limit?

The federal government could then require individuals or employers to purchase cars from auto companies it has bailed out, or nationalized. It could compel everyone to purchase cars or housing just to promote the general economy. Any time it wanted to provide a subsidy to any company or industry, it could do so simply by requiring everyone to buy from the favored enterprises. It could require individuals or employers to purchase insurance from companies who contributed to the President's reelection campaign. It could require individuals or employers to purchase goods or services from companies are unionized by the President's supporters. It could mandate individuals buy and take certain vitamins or nutritional supplements. It could require individuals to visit their dentists for annual checkups, or submit to other preventive care, on the ground this would reduce health costs over the long run.

Every economic decision an individual or employer makes, when aggregated with everyone else, substantially affects interstate commerce in the way Defendants assert. Consequently, Defendants are effectively claiming the federal government has the unlimited power to control every economic decision every individual or employer makes.

This is several roads too far from the original Commerce Clause power, which, as James Madison explained,

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

The Founder's Constitution, Vol. 2, Art. I, Section 8, Clause 3 (Commerce). That is why the Supreme Court, in *United States v. Lopez*, 514 U.S. 549 (1995), rejected the notion of unlimited Commerce Clause power, holding that it will strike down regulation under the Commerce Clause that leaves no principled limit to federal power under the Clause. The Court said, "[T]he Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local." *Id.* at 567–68. Justice Kennedy added further in concurrence, in terms quite apt for the present case, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or another level of Government has tipped the scales too far." *Id.* at 578.

Indeed, the unlimited Commerce Clause power Defendants claim here would be indistinguishable from a national police power, with the federal

government authorized to regulate and enforce order to advance any vision of the general welfare, morals, health, and safety. As the Court indicated in *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), "protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power. Historically, that has encompassed state level commands to act to achieve these ends, such as vaccinations and school attendance laws, which are precisely analogous to the individual and employer mandate at issue here.

But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level, with traditional government powers otherwise remaining with the states, would be obliterated. As the Supreme Court held in *United States v. Morrison*, 529 U.S. 598, 618–19 (2000), "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." (emphasis in original). *See also id.* at 619 n.8 ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.").

Congress may not exercise its enumerated powers in a way that "infring[es] upon th[at] core of state sovereignty." *New York v. United States*,

505 U.S. 144, 177 (1992). The *Morrison* Court found the argument that women who are sexually assaulted would need medical care did not provide a sufficient interstate commerce connection under the Commerce Clause. 529 U.S. at 615.

As Justice Kennedy explained in *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010), "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place." (Kennedy, J., concurring). The Court added in *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), "[t]he Constitution created a Federal Government of limited powers [and] withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."

Defendants repeatedly state people without health insurance do actively participate in the interstate market for health care services. But the PPACA's employer mandate does not require employers to pay for health care services their employees have consumed. It requires them to pay for health insurance, a market in which they are free to choose not to participate at all, a freedom protected by the Constitution.

While it is true employers can often be said to be participating in interstate commerce in regard to their own business, that market is not at

issue here. What is at issue is the market for health insurance, in which employers are free to choose not to participate at all under the Constitution.

While the Supreme Court ruled in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), that insurance is interstate commerce subject to Federal regulation, health insurance has mostly been subject to state-by-state regulation, restricting health insurance to sale at the state, rather than national, level. Recognizing that, shortly after *South-Eastern Underwriters*, Congress passed the McCarran-Ferguson Act, clarifying that Congress cannot exercise its Commerce Clause power to supersede, invalidate, or impair state lawmaking and administrative regulation of insurance. 15 U.S.C. §§ 1011–1012; *see Humana, Inc. v. Forsyth*, 525 U.S. 299, 309–10 (1999).

In McCarran-Ferguson, therefore, Congress clarified that federal regulation of insurance is only permissible when it does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime. *Id.* at 310. Yet Virginia, and several other states, have enacted laws providing residents cannot be compelled to purchase insurance nor penalized for failing to comply. Virginia Health Care Freedom Act, Va. Code § 38.2-

3430.1:1. The employer mandate directly conflicts with these statutes in violation of McCarran-Ferguson.

Moreover, the employer mandate does not regulate health insurance. It regulates employers, forcing them to buy a product or service they may not want to buy, in violation of the Constitution.

2. The employer mandate cannot be justified under the Taxing and Spending Clause.

The employer mandate is also not justifiable under the Taxing and Spending Clause under *NFIB*. The *NFIB* Court held Congress cannot command individuals to purchase an unwanted product, but it can tax individuals who choose not to purchase the product. The Court upheld the individual mandate only because the assessment imposed on individuals under the PPACA for violating the individual mandate did not cross the line between a permissible tax and an impermissible punitive penalty under *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922). *NFIB*, 132 S. Ct. at 2596.

The Court found the penalty imposed for noncompliance with the individual mandate was a reasonable financial trade-off for individuals who chose not to purchase health insurance: "First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more…. It may often be a reasonable financial decision to make the payment rather than purchase insurance…." *Id.* at 2595–96. The Court

added, "[T]he shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance." *Id.* at 2597.

But that same *Drexel Furniture* analysis, when applied to the employer mandate, 26 U.S.C. § 4980H, leads to the opposite conclusion, that the employer mandate involves a prohibitive penalty similar to the one struck down in *Drexel*. In *Drexel*, an employer who violated the child labor regulatory prohibition was assessed a penalty of 10 percent of its net income for an entire year. *Drexel Furniture*, 259 U.S. at 36. The Court said, "The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day." *Id.* The Court called that penalty "a heavy exaction for a departure from a detailed and specified course of conduct in business." *Id.* The *NFIB* Court also termed the assessment in *Drexel* a "prohibitory financial punishment." 132 S. Ct. at 2596.

But the penalties imposed for violating the employer mandate are prohibitive and punitive like in *Drexel*. The PPACA's employer mandate requires employers of 50 or more workers to provide government-defined "minimum essential coverage," offering at least "minimum value" of costs and benefits, at a price that is "affordable." 26 U.S.C. §§ 36B, 4980H,

5000A. The penalty for an employer who fails to provide health insurance covering what the Administration calls "minimum essential coverage" for any month is $166.67 (1/12 of $2,000) multiplied by the number of full-time equivalent employees for that month. 26 U.S.C. § 4980H(a), (c)(1). That penalty would apply not only if employers fail to provide any coverage, but if they provide coverage that does not include all the benefits dictated by the government, including those that violate their religious beliefs. *Id.*

As a result, if Liberty University continued to provide health insurance to its employees but refused to provide free abortifacients, it would pay $2,000 per employee per year for not having "minimum essential coverage," besides paying the health insurance premiums for its employees. *Id.* If Liberty University cancelled all employee health insurance policies, it would still pay $2,000 per employee per year for not offering coverage. *Id*.

In addition, another penalty applies if the employer provides the required "minimum essential coverage" but HHS deems it "unaffordable." 26 U.S.C. §§ 4980H(b), 36B. That occurs if even one of perhaps thousands of employees seeks a tax credit or subsidy because the employee portion of the premium is more than 9.5 percent of the employee's household income (the Administration's definition of "affordable"). 26 U.S.C. §§ 36B, 4980H(b). The penalty is $250 per month (1/12 of $3,000) multiplied by the

number of full-time equivalent employees, 26 U.S.C. §§ 36B, 4980H(b), and is adjusted for inflation. 26 U.S.C. § 4980H(c)(5). As with the penalty in *Drexel Furniture*, the penalty here is "not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure" if even one of thousands of employees seeks help for payment of health insurance premiums. 26 U.S.C. §§ 36B, 4980H(b).

Consequently, the penalties for violating the employer mandate go far beyond just a payment in lieu of providing health insurance coverage, as the *NFIB* Court found for the individual mandate penalty. The employer mandate penalty punishes employers for not offering what the government has defined as "minimum essential coverage." Moreover, the penalty applies even for employers offering that coverage but not ensuring it is what the government deems "affordable" for employees at *all* salary levels. *Id.*

Consequently, Liberty University will face millions of dollars of penalties for offering coverage if even *one* employee or "full time equivalent" has a share greater than 9.5 percent of the employee's *household* income. 26 U.S.C. §§ 36B, 4980H, 5000A. (A "full time equivalent" is someone working 30 hours per week.) Just as in *Drexel Furniture*, the penalty for violating the PPACA employer mandate is not proportional since if *only one* employee seeks a federal subsidy because his share of the

premium for coverage is "unaffordable" at the lowest salary level, the employer will be penalized more than if it had denied *all* employees coverage. *Id.*

Such an employer mandate violation can very easily result under the PPACA. A family of four with a single income-earner will easily make the employer's coverage for his entire work force "unaffordable," because that single income for the household will be the comparison income for the cost of the health insurance for the entire household. If the health insurance for each person in the household costs only $2,500, then the single income-earner would need to make over $100,000 to meet the PPACA employer mandate requirements for an "affordable" plan.

These penalties will quickly become "massive," even "destructive," which qualifies them as unconstitutional punitive penalties rather than permissible taxes under *Drexel Furniture*. In 2012, Liberty University employed 6,900 people, with net claims for its self-insured health insurance of $14,214,000. Yet Liberty University would be fined $20,700,000 ($3,000 × 6,900) if only *one* employee meets the 9.5 percent "unaffordable" criterion. That penalty would be on top of the additional penalty of $2,000 per employee ($13,800,000) that Liberty University would have to pay for providing coverage excluding abortifacients, for a total combined penalty of

$34,500,000. That would be in addition to the $14,214,000 that Liberty University paid in claims for its health insurance coverage in 2012. That would tax or penalize Liberty University out of existence.

Or consider the University of Notre Dame, with 16,445 employees. It would face an annual penalty of $32.8 million if it were determined not to offer "minimum essential coverage" with the contraceptive coverage that violates its religious tenets, and $49.3 million if it offers coverage deemed unaffordable, for a total penalty of $82.1 million *for one year alone, to be repeated every year*.

That is a far cry from the individual mandate penalty that cannot be more than the cost of an insurance policy for the individual, or would likely be just a small fraction of that policy cost, upheld in *NFIB* for that reason. These multi-million dollar penalties go far beyond being financial incentives and are "so punitive that the taxing power does not authorize it." *NFIB*, 132 S. Ct. at 2600. With the employer mandate, Congress transformed the power to tax into the power to destroy, which cannot be upheld as a Constitutional exercise of Congress' Taxing and Spending Clause power.

Moreover, the employer mandate also cannot be upheld as a permissible tax as applied to non-profit organizations such as Liberty University, a designated tax-exempt organization under 26 U.S.C.

§501(c)(3). Since the federal government determined that Liberty University shall not be subject to taxation, it cannot now renege upon that promise to save the unconstitutional employer mandate. *Kleinsasser v. United States*, 522 F. Supp. 460, 462 (D. Mont. 1981), *aff'd sub nom. Kleinsasser on Behalf of Kleinsasser v. United States*, 707 F.2d 1024 (9th Cir. 1983); *see also Bob Jones University v. United States*, 461 U.S. 574, 589–91 (1983).

3. The employer mandate cannot be justified under the Necessary and Proper Clause.

The *NFIB* Court reiterated that laws have been upheld as necessary and proper only when they "involved exercises of authority derivative of, and in service to, a granted power." *NFIB*, 132 S. Ct. at 2592–93. In other words, the Necessary and Proper Clause does not involve an independent delegation of power, but only grants authority for actions necessary and proper to another enumerated power. *United States v. Comstock*, 130 S. Ct. 1949, 1970 (2010) (Alito, J., concurring).

But the employer mandate, as well as the individual mandate, is not justified by any other enumerated power, as discussed above. Therefore, the employer mandate, as well as the individual mandate, is not justified by the Necessary and Proper Clause.

B. The Employer Mandate Is an Unconstitutional Violation of the Free Exercise of Religion.

The HHS regulations implementing the PPACA define the "minimum essential coverage" employers are required to buy for their employees under the employer mandate as including abortion and abortion-inducing drugs, or abortifacients. Employers must now purchase health insurance for their employees with such "benefits" or face crippling penalties, as discussed above.

In the present case, if Liberty University fails to comply with the PPACA's employer mandate, and purchases insurance that does not cover abortion and abortifacients for its employees, it will face a penalty of $2,000 per employee, or between $13.8 and $15.2 million, every single year. 26 U.S.C. § 4980H. If that coverage is deemed unaffordable in the case of any employee, it will be fined an additional $20.7 to $22.8 million, every year.

But if Liberty University complies with the employer mandate and purchases insurance for its employees with such benefits, it will violate fundamental religious beliefs that life begins at conception, and that abortion is consequently murder of pre-born children in their mothers' wombs. The PPACA consequently mandates that the University violate its religious beliefs and obey the law, or adhere to its beliefs and violate the Act, 42

U.S.C. §§ 300gg, 18022; 45 C.F.R. § 147.130, with crippling penalties for the violation. 45 C.F.R. § 147.130; 78 Fed. Reg. 8,456.

This amounts to an unconstitutional impermissible burden on the free exercise of religion under the First Amendment. *Thomas v. Review Bd. of Ind. Emp't Sec*., 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). It is "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder*, 406 U.S. at 218.

Moreover, Congress enacted a more stringent version of the compelling interest test under the Religious Freedom Restoration Act (RFRA) than is employed under the First Amendment since *Employment Div. v. Smith*, 494 U.S. 872 (1990). Under RFRA, the government must demonstrate it has a compelling interest in imposing the burden on religion, and that such interest applies to the particular party whose sincere exercise of religion is being substantially burdened. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 430–31 (2006) (citing 42 U.S.C. § 2000bb-1(b)).

To satisfy that test, HHS must show that granting a religious exemption to Liberty University will seriously compromise a compelling interest in administering the PPACA's policy of ensuring the provision of

preventive coverage. *Id.* at 435. But HHS cannot meet that standard, given the sweeping exemptions that have already been granted from the mandated health coverage, including from preventive coverage. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotation marks and ellipsis omitted).

The PPACA itself includes exemptions for small employers and grandfathered health plans. 26 U.S.C. § 4980H(c)(2); 42 U.S.C. § 18011**.** Moreover, HHS already created a religious employer exemption, and now proposes a broader accommodation for religion. 76 Fed. Reg. 46,621, 46,626; 78 Fed. Reg. 8,456. This shows certain employers can be exempted without demolishing the overall Act's functioning. Thus, there cannot be any compelling interest in denying any exemption for Liberty University. *O Centro Espirita*, 546 U.S. at 436–37. As the Court said in *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012), "[t]he government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." Indeed, in the statute's text, 26 U.S.C.

§ 4980H (c)(2)(A), and in practice, the Administration has granted waivers of certain PPACA provisions to more than 1,000 companies, covering millions of employees.[14]

II. THE INDIVIDUAL MANDATE IS UNCONSTITUTIONAL AS A VIOLATION OF FREEDOM OF RELIGION.

HHS regulations implementing the PPACA define the "minimum essential coverage" individuals are required to buy under the individual mandate as including abortion and abortion-inducing drugs, or abortifacients. Individuals must now purchase health insurance with such "benefits" or pay a graduated penalty. 26 U.S.C. § 5000A; 42 U.S.C. §§ 300gg-13, 18022; 45 C.F.R. § 147.130.

This creates the same dilemma for religious individuals the employer mandate imposes on religious employers. Either comply with the individual mandate and violate your fundamental religious beliefs that life begins at conception, and that abortion is murder of pre-born children in their mothers' wombs, or stay faithful to your religious beliefs and violate the individual mandate by failing to purchase health insurance covering abortion and abortifacients, subjecting yourself to stiff penalties.

[14] As of January 6, 2012, the Department of Health and Human Services reported it had granted waivers of various provisions of the Act to 1,231 companies. http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html.

This consequently again amounts to an unconstitutional impermissible burden on the free exercise of religion under the First Amendment. *Thomas*, 450 U.S. 707; *Yoder*, 406 U.S. 205; *Braunfeld*, 366 U.S. at 605. It violates RFRA as well. The PPACA itself exempts two groups of religious adherents from the individual mandate. 26 U.S.C. § 5000A(d)(2). The government cannot have a compelling interest in denying exemptions to those whose religion abhors what they see as the child murder of abortion in the mother's womb, when an appreciable number of individuals are already exempted on religious grounds. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547. Moreover, the individual mandate cannot be the least restrictive means of achieving the PPACA's goals when two groups have already been exempted from the mandate on religious grounds. *Sherbert v. Vernier*, 374 U.S. 398, 407 (1963).

III. THE INDIVIDUAL AND EMPLOYER MANDATES ARE NOT SEVERABLE.

The PPACA does not include a standard severance clause. Consequently, if the employer or individual mandates are found unconstitutional, the question becomes whether the PPACA's remaining parts can still remain fully operative as law and function as Congress intended, and whether Congress would have passed the Act without the individual mandate. *Alaska Airlines v. Brock*, 480 U.S. 678 (1987); *Free*

Enterprise Fund v. Public Co. Accounting Oversight Board, 130 S. Ct. 3138 (2010); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895); *see also R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalid parts "so affect[ed] the dominant aim of the whole statute as to carry it down with them").

The answer in both cases is indisputably no. HHS itself has repeatedly argued in other courts all across the country that the PPACA cannot function without the individual mandate. That is because of the Act's regulatory requirements for guaranteed issue and community rating. The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone who applies, no matter how sick they are when they first apply or how costly they may be to cover. *PPACA, Sections 2702, 2704, 2705.* This is what is known as guaranteed issue.

The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. *PPACA, Section 2701*. This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard

rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease, which the insurer must then cover and pay for, out of the same standard premiums as everyone else pays. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy people, so the costs per person covered soar. The insurer then has to raise rates sharply for everyone just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

If regulation required fire insurers to issue policies to people whose houses were already on fire at standard rates, the fire insurance pool would include only all burned down houses, which would obviously be dysfunctional.

The PPACA tries to counter this problem by adopting the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, the government itself has repeatedly argued, those who would remain uninsured would

substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral.

That financial death spiral would cause the costs of other provisions of the PPACA to soar, such as the subsidies for purchase of health insurance on the Exchanges, which would be even more costly than expected, and the costs for the Medicaid expansion, where more people would qualify given the decline of private insurance.

Indeed, the PPACA itself in its very statutory language recognized the essential role of the individual mandate in the statute's overall framework, saying in Section 1501(a)(2)(I),

> [I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care….The [individual mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

As the court in *Alaska Airlines* said, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently…." 480 U.S. at 684.

Moreover, as *Alaska Airlines* also recognized, in the absence of a statutory severance clause the entire statute must be struck down if Congress would not have enacted the statute without the unconstitutional provision. *Id.* at 678. The narrow margin of passage of the PPACA greatly increases the probability that Congress would not have passed the PPACA without the individual mandate. The loss of that provision so centrally affects the entire structure of the Act that without it the entire structure must fall. Trying to determine what could be salvaged would embroil the Court in rewriting the statutory policy and framework to govern one-sixth of the entire U.S. economy.

CONCLUSION

For all the foregoing reasons, this Court should declare the employer mandate and individual mandate unconstitutional, and, since those provisions are not severable, should declare the entire Act unconstitutional.

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I hereby certify that on March 6, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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