APPEAL NO. 12-5273 & 12-5291

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHEATON COLLEGE and BELMONT ABBEY COLLEGE,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia

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BRIEF OF *AMICI CURIAE* GENEVA COLLEGE, LOUISIANA COLLEGE, BIOLA UNIVERSITY, GRACE SCHOOLS, WAYNE L. HEPLER, CARRIE E. KOLESAR, SENECA HARDWOOD LUMBER CO., WLH ENTERPRISES, WILLIAM NEWLAND, PAUL NEWLAND, JAMES NEWLAND, ANDREW NEWLAND, CHRISTINE KETTERHAGEN, HERCULES INDUSTRIES, THE CARDINAL NEWMAN SOCIETY, BENEDICTINE COLLEGE, CATHOLIC DISTANCE UNIVERSITY, CHRISTENDOM COLLEGE, THE COLLEGE OF SAINT MARY MAGDALEN, THE COLLEGE OF SAINTS JOHN FISHER AND THOMAS MORE, DESALES UNIVERSITY, HOLY SPIRIT COLLEGE, THE IGNATIUS-ANGELICUM LIBERAL STUDIES PROGRAM, JOHN PAUL THE GREAT CATHOLIC UNIVERSITY, MOUNT ST. MARY'S UNIVERSITY, ST. GREGORY'S UNIVERSITY, THOMAS AQUINAS COLLEGE, THOMAS MORE COLLEGE OF LIBERAL ARTS, THE UNIVERSITY OF MARY, AND WYOMING CATHOLIC COLLEGE IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, *Amici's* counsel certifies as follows:

A. Parties

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants:

1. Amicus American Association of Pro-Life Obstetricians & Gynecologists
2. Amicus American Center for Law and Justice
3. Amicus American Civil Rights Union
4. Amicus Association of American Physicians & Surgeons
5. Amicus American Association of Christian Schools International
6. Amicus Association of Rescue Gospel Missions
7. Amicus Catholic Medical Association
8. Amicus Cato Institute
9. Amicus Center for Constitutional Jurisprudence
10. Amicus Christian Legal Society
11. Amicus Christian Medical Association
12. Amicus Council for Christian Colleges & Universities
13. Amicus Diocese of the Mid-Atlantic of the Anglican Church in North America
14. Amicus Eagle Forum Education & Legal Defense Fund

15. Amicus Ethics and Religious Liberty Commission of the Southern Baptist Convention
16. Amicus Institutional Religious Freedom Alliance
17. Amicus National Association of Evangelicals
18. Amicus National Catholic Bioethics Center
19. Amicus Association of Pro-life Nurses
20. Amicus Patrick Henry College
21. Amicus Physicians for Life
22. Amicus Prison Fellowship Ministries
23. Amicus Queens Federation of Churches
24. Amicus Regent University
25. Amicus State of Texas
26. Amicus Women Speak for Themselves

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

Except for the following, related cases are listed in the Brief for Appellants:

1. *Autocam Corp. v. Sebelius*, No. 12-1096 (W.D. Mich.).
2. *E. Tex. Baptist Univ. v. Sebelius*, No. 12-3009 (S.D. Tex.).

3. *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489 (N.D. Ga.).

October 12, 2012

Respectfully submitted,

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Circuit Rule 29(b), Rule 26.1 of the Federal Rules of AppellateProcedure and Circuit Rule 26.1, Geneva College, Louisiana College, Biola University, Grace Schools, Wayne L. Hepler, Carrie E. Kolesar, Seneca Hardwood Lumber Co., WLH Enterprises, William Newland, Paul Newland, James Newland, Andrew Newland, Christine Ketterhagen, Hercules Industries, the Cardinal Newman Society, Benedictine College, Catholic Distance University, Christendom Educational Corporation d/b/a Christendom College, the College of Saint Mary Magdalen, the College of Saints John Fisher and Thomas More, DeSales University, Holy Spirit College, the Ignatius-Angelicum Liberal Studies Program, John Paul the Great Catholic University, Mount St. Mary's University, St. Gregory's University, Thomas Aquinas College, Thomas More College of Liberal Arts, the University of Mary, and Wyoming Catholic College make the following disclosures:

1. *Amici* Geneva College, Louisiana College, Biola University, Grace Schools the Cardinal Newman Society, Benedictine College, Catholic Distance University, Christendom Educational Corporation d/b/a Christendom College, the College of Saint Mary Magdalen, the College of Saints John Fisher and Thomas More, DeSales University, Holy Spirit College, the Ignatius-Angelicum Liberal Studies Program, John Paul the Great Catholic University, Mount St. Mary's

University, St. Gregory's University, Thomas Aquinas College, Thomas More College of Liberal Arts, the University of Mary, and Wyoming Catholic College are nonprofit corporations organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

2. *Amici* Seneca Hardwood Lumber Company, WLH Enterprises, Inc., and Hercules, Inc. do not have any parent companies. Furthermore, no publicly held corporation has a 10% or greater ownership interest in these entities. Seneca is a family-owned and operated hardwood lumber company. WLH Enterprises is a Pennsylvania Sole Proprietorship of Wayne L. Hepler. Hercules, Inc., a Colorado corporation, is an HVAC manufacturer.

REPRESENTATION OF CONSENT TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANTS

Pursuant to Circuit Rule 29(b), the above-referenced corporations and individuals hereby declare that all of the parties to this appeal have consented to the filing of the proposed *amicus* brief.

RULE 29(D) CERTIFICATE REGARDING THE NEED TO FILE A SEPARATE BRIEF

1. *Amici* are religious educational institutions, family businesses, and the owners of those businesses.

2. *Amici* are directly impacted by the regulations at issue here requiring the provision of coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling (the "Mandate"). Certain among them have filed their own lawsuits challenging the legality of the Mandate.

3. Although the lawsuits brought by certain of the *Amici* involve different sets of facts, these *Amici* and the others nonetheless have a direct interest in how this Court resolves the pending appeal.

4. Consistent with Circuit Rule 29(d), counsel for *Amici* have consulted or attempted to consult with counsel for entities that it has been advised are also interested in filing amicus briefs.

5. After discussing the possibility of filing a joint brief, it was determined that it was not practicable to do so.

6. To the best of the undersigned counsel's knowledge, no other amicus curiae brief is covering the factual background discussed in this brief.

7. Accordingly, it would not be practicable to file a joint brief with other interested parties.

October 12, 2012

Respectfully submitted,

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Biola University is a Christ-centered institution of higher learning located in La Mirada, California. The mission of Biola University is biblically centered education, scholarship and service — equipping men and women in mind and character to impact the world for Jesus Christ. Biola's "Theological Distinctives" declare, "[t]he Bible is clear in its teaching on the sanctity of life. Life begins at conception. We abhor the destruction of innocent human life through abortion on demand, infanticide or euthanasia as unbiblical and contrary to God's will. Life is precious and in God's hands." The defendants in the instant case are violating the rights of Biola University by forcing it, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. Biola has commenced litigation to protect its rights. *Grace Schs. & Biola Univ., Inc. v. Sebelius*, No. 3:12-cv-459 (N.D. Ind. filed Aug. 23, 2012).

Grace Schools is a Christ-centered institution of higher learning located in Winona Lake, Indiana which operates Grace College, Grace Theological Seminary, and Grace College and Seminary. As such, it believes that God, in His Word, has condemned the intentional destruction of innocent human life. Grace Schools' leaders believe, as a matter of religious faith, that it would be sinful and immoral for Grace intentionally to participate in, pay for, facilitate, or otherwise support abortion, which destroys human life. They believe that one of the

prohibitions of the Ten Commandments ("thou shalt not murder") proscribes payment for and facilitation of the use of drugs that can and do destroy very young human beings in the womb. The defendants in the instant case are violating the rights of Grace by forcing it, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. Grace has commenced litigation to protect its rights. *Id.*

Geneva College is a Christ-centered institution of higher learning located in Beaver Falls, Pennsylvania. As such, it believes that God, in His Word, has condemned the intentional destruction of innocent human life. The College's leaders believe, as a matter of religious faith, that it would be sinful and immoral for Geneva intentionally to participate in, pay for, facilitate, or otherwise support abortion, which destroys human life. They believe that one of the prohibitions of the Ten Commandments ("thou shalt not murder") proscribes payment for and facilitation of the use of drugs that can and do destroy very young human beings in the womb. The defendants in the instant case are violating the rights of Geneva College by forcing it, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. Geneva has commenced litigation to protect its rights. *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207-JFC (W.D. Pa. filed Feb. 21, 2012).

Wayne L. Hepler and **Carrie E. Kolesar** (hereinafter "Hepler family") are

a father and daughter who, with several of Mr. Hepler's other children, own **The Seneca Hardwood Lumber Company, Inc**. Located in Cranberry, Pennsylvania, Seneca Hardwood is a lumber business that Mr. Hepler runs in conjunction with a sawmill that he operates as **WLH Enterprises**. The Hepler family — the owners and operators of these businesses — are practicing Catholic Christians who in their personal lives and their operation of Seneca and WLH adhere to Catholic Church teachings on sexuality and the sanctity of innocent human life. Following these beliefs, the Hepler family has for multiple years omitted abortifacients, contraception, sterilization, and related education and counseling from their health insurance plan covering themselves and their employees and family members. The defendants in the instant case are violating the Heplers' rights by forcing them, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. The Hepler family has commenced litigation to protect their rights. *Id.*

Louisiana College is a Christian college that holds sincere religious beliefs against abortion. In accordance with those beliefs, the College declines to provide health insurance for its employees that includes coverage for abortion-inducing drugs. The defendants in the instant case are violating the College's rights by forcing it, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. Louisiana College has

commenced litigation to protect their rights. *La. Coll. v. Sebelius*, No. 1:12-cv-463 (W.D. La. filed Feb. 18, 2012).

William, Paul, James and **Andrew Newland**, and **Christine Ketterhagen**, (hereinafter "the Newlands") are practicing and believing Catholic Christians. They own and operate **Hercules Industries, Inc.**, an HVAC manufacturer, and they seek to run Hercules in a manner that reflects their sincerely held religious beliefs. The Newlands, based upon these sincerely held religious beliefs as formed by the moral teachings of the Catholic Church, believe that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage. Applying this religious faith and the moral teachings of the Catholic Church, the Newlands have concluded that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization through health insurance coverage they offer at Hercules. As a consequence, the Newlands provide health insurance benefits to their employees that omit coverage of abortifacient drugs, contraception, and sterilization. The defendants in the instant case are violating the Newlands' rights by forcing them, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices. The Newlands have commenced litigation to protect their rights. *Newland v. Sebelius*, No. 1:12-cv-1123 (D. Colo. filed Apr. 30, 2012).

The Cardinal Newman Society (hereinafter CNS) is a nonprofit organization established in 1993 for religious and educational purposes to help renew and strengthen the Catholic identity of Catholic Colleges and Universities. The Center for the Advancement of Catholic Higher Education is a division of CNS which supports mission-centered teaching, policies and programs at Catholic Colleges and Universities, according to the spirit and letter of the Vatican constitution on Catholic higher education, *Ex corde Ecclesiae*. The Center is headquartered on the campus of Mount St. Mary's University in Emmitsburg, Maryland; CNS is headquartered in Manassas, Virginia. CNS and its Center collaborate with many institutions across the country which will be subject to the Preventive Services Mandate, despite the fact that it conflicts with their sincerely held religious beliefs in accordance with Catholic moral teachings that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization through health insurance coverage. The defendants in the instant case are violating these institutions' rights by forcing them, through the Preventive Services Mandate, to pay for or otherwise facilitate the use of abortifacient drugs and devices.

Benedictine College in Atchison, Kansas, is a Catholic college established in 1971 and affiliated with Mount St. Scholastica Monastery and St. Benedict's Abbey, Catholic religious communities of monks and sisters in the Order of St.

Benedict.

Catholic Distance University in Hamilton, Virginia, is a Catholic, degree-granting online university founded in 1983. The board of trustees is chaired by Most Rev. Paul Loverde, Bishop of Arlington, and includes three additional bishops.

Christendom Educational Corporation d/b/a Christendom College in Front Royal, Virginia, is a Catholic college founded in 1977 by Catholic lay people to provide a faithful Catholic education.

The College of Saint Mary Magdalen in Warner, New Hampshire, is a Catholic college founded in 1973 by Catholic lay people to provide a faithful Catholic education.

The College of Saints John Fisher and Thomas More in Fort Worth, Texas, is a Catholic college founded in 1981 by Catholic lay people to provide a faithful Catholic education.

DeSales University in Center Valley, Pennsylvania, is a Catholic university founded in 1965 and affiliated with the Oblates of Saint Francis de Sales, a Catholic religious congregation of priests and brothers.

Holy Spirit College in Atlanta, Georgia, is a Catholic university founded in 2005 by Catholic lay people to provide a faithful Catholic education. Its Board of Trustees includes the Archbishop of Atlanta and is chaired by the local pastor.

The Ignatius-Angelicum Liberal Studies Program, headquartered in San Francisco, California, coordinates with home and distance learning programs to provide online, college-level, liberal arts courses from a Catholic perspective.

John Paul the Great Catholic University in San Diego, California, is a Catholic university founded in 2003 by Catholic lay people to provide a faithful Catholic education.

Mount St. Mary's University in Emmitsburg, Maryland, is a Catholic university for lay students and a seminary for men preparing for the priesthood. It was founded in 1808 and includes four bishops on its Board of Trustees.

St. Gregory's University in Shawnee, Oklahoma, is a Catholic university founded in 1875 and affiliated with St. Gregory's Abbey, a Catholic religious community of monks.

Thomas Aquinas College in Santa Paula, California, is a Catholic college founded in 1971 by Catholic lay people to provide a faithful Catholic education.

Thomas More College of Liberal Arts in Merrimack, New Hampshire, is a Catholic college founded in 1978 by Catholic lay people to provide a faithful Catholic education.

The University of Mary in Bismarck, North Dakota, is a Catholic university founded in 1955 and affiliated with the Benedictine Sisters of the Annunciation, a Catholic religious community of sisters in the Order of St.

Benedict.

Wyoming Catholic College in Lander, Wyoming, is a Catholic college founded in 2005 by lay Catholics in association with the Bishop of Cheyenne, who is a member of the board of trustees, to provide a faithful Catholic education.

FED. R. APP. P. 29(C)(5) CERTIFICATION

No party or party's counsel participated in, or provided financial support for, the preparation and filing of this brief, nor has any entity other than *Amici* and their counsel participated in or provided financial support for the brief.

INTRODUCTION

This appeal concerns, in part, denial of Wheaton College's motion for preliminary injunction. In that motion, Wheaton argued that it was likely to succeed on its Religious Freedom Restoration Act and Free Exercise Clause claims. Among other things, the College argued that no compelling governmental interest justified the Defendants' impairment of its religious exercise. In this brief, the *Amici* urge this Court to reverse the district court's denial of the College's motion for preliminary injunction and instruct that court to promptly and correctly decide that motion, concluding that the Mandate is not the least restrictive means of advancing a compelling governmental interest.

SUMMARY OF ARGUMENT

Forcing employers like Wheaton College, Belmont Abbey College, and the *Amici* to include abortifacients, contraceptives, sterilization, and related counseling in their group health plans does not advance a compelling governmental interest.

The government's stated interest is reducing the incidence of adverse health events associated with unintended pregnancies. The Institute of Medicine (IOM) report upon which the government relied in promulgating the Mandate fails to demonstrate that making the objectionable drugs, devices, and services available through employer-based plans without cost sharing will reduce unintended pregnancies. Moreover, the IOM report even fails to show that the "unintended-ness" of a pregnancy actually *causes* the adverse health events that tend to occur alongside such pregnancies.

A recent comprehensive survey of contraceptive use in the United States further reveals that the Mandate will not advance the government's stated goal of reducing unintended pregnancies. It demonstrates that only 2.3% of women at risk for unintended pregnancies chose not to use birth control for cost reasons. Other research shows that contraceptive mandates enacted by state legislatures have not remotely solved the problem of unintended pregnancy, indicating that the federal government's Mandate will not meaningfully advance its stated interest.

The government's contention that the Mandate advances an interest

sufficiently compelling to survive the strict scrutiny required by the Religious Freedom Restoration Act and the Free Exercise Clause lacks credibility given the "grandfathering" of group health plans covering approximately 100 million Americans. The interest underlying the Mandate cannot be compelling if such an enormous number of individuals are denied its alleged benefits.

Finally, means of pursuing the government's stated interest that do not burden the religious exercise of Wheaton, Belmont Abbey, and the *Amici* are readily available to the government.

Accordingly, the *Amici* respectfully request that this Court reverse the district courts' decisions and remand for further proceedings.

ARGUMENT

Section 2713 of the Public Health Service Act, added by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 30, 2010), requires group health plans and health insurance issuers to cover, without cost sharing, a variety of "preventive health services," including "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4).

The Health Resources and Services Administration (HRSA) turned to the Institute of Medicine (IOM), a non-governmental organization, asking it to recommend the guidelines envisioned by Section 2713(a)(4) of the Public Health Service Act. In a report entitled, *Clinical Preventive Services for Women: Closing the Gaps*, the IOM recommended that the federal government require group health plans and health insurance issuers to cover, without cost sharing, the following preventive services for women: (1) screening for gestational diabetes; (2) human papillomavirus DNA testing to ascertain the risk of cervical cancer; (3) counseling on sexually transmitted infections; (4) counseling and screening for HIV infection; (5) all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity; (6) comprehensive lactation support; (7) screening and

counseling for interpersonal and domestic violence; and (8) well-woman preventive care visits. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011).[1]

IOM released its report on July 19, 2011. A mere 15 days later, the U.S. Departments of Health and Human Services, Treasury, and Labor issued an interim final rule entitled, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act." 76 FED. REG. 46621 (Aug. 3, 2011). The interim final rule referred to "HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines." The HRSA webpage on which those guidelines are found revealed that it had accepted IOM's recommendations without modification.[2] The August 3, 2011, interim final rule announced that HRSA — and thus the Departments — had exempted but a small subset of religious employers from the mandate to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.

[1] The report is available at http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Oct. 11, 2012) [hereinafter *Closing the Gaps*].

[2] http://www.hrsa.gov/womensguidelines/ (last visited Oct. 11, 2012).

I. THE INSTITUTE OF MEDICINE REPORT UPON WHICH THE GOVERNMENT RELIES FAILS TO DEMONSTRATE THAT THE MANDATE WILL ADVANCE A COMPELLING INTEREST.

In its report, IOM sets forth its rationale for recommending that HRSA (and thus the Departments) require group health plans and health insurance issuers to include all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity under the statutory preventive health services mandate. Given that neither HRSA nor the Departments have published any analysis or assessment of IOM's recommendations, it is fair to conclude that the federal government embraced not only IOM's recommendations, but its rationale as well.

A close examination of IOM's rationale reveals that the contraceptive mandate is not a narrowly tailored means of advancing any compelling governmental interest. The problem the contraceptive mandate purports to solve is unintended pregnancy. *Closing the Gaps* at 102 *et seq*. More specifically, the target is the adverse health events often associated with unintended pregnancies. *Id*. at 103–04. The report lists the adverse health events that correlate with unintended pregnancy. *Id*. Compared to women whose pregnancies are intended, women with unintended pregnancies are more likely to be depressed, to experience domestic violence, and to smoke and drink. *Id*. at 103 (citing INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN

AND FAMILIES (Nat'l Acad. Press 1995)). In addition, pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension and cyanotic heart disease. *Id*. at 103–04. IOM implies that pregnancies experienced by such women are likely to be unintended and are thus among those its recommended guideline is designed to prevent.

The report also observes that children born after an unintended pregnancy have higher incidences of certain actual or potential adverse health events. *Closing the Gaps* at 103. For example, women whose pregnancies are unintended are more likely than women with intended pregnancies to smoke and drink during pregnancy, and these behaviors risk harm to the unborn child. *Id*. Studies show increased odds of preterm birth and low birth weight among unintended pregnancies. *Id*. Women whose pregnancies are unintended are less likely to breastfeed their children. *Id*.

It bears noting that the distinction between an intended and unintended pregnancy lies in the subjective mental state of the pregnant woman; the mere fact that a woman did not intend to get pregnant does not by itself have physiological consequences for either the woman or her child. Along the same lines, that women with unintended pregnancies experience domestic violence or depression more frequently than women with intended pregnancies does not prove that the unintended nature of the pregnancy *causes* or explains those discrepancies. In

other words, correlation does not prove causation. As acknowledged by the IOM report itself, other factors contribute to a much greater extent, such as lower income status. Accordingly, measures designed to reduce unintended pregnancy — even if they succeed — will not necessarily reduce domestic violence and depression experienced by the women in question.

The IOM report also fails to demonstrate that forcing employers to cover FDA-approved contraceptives will actually reduce the number and percentage of unintended pregnancies — and thus the adverse health events that may (or may not) be attributable to the unintended nature of the pregnancy. The IOM report observes that private health insurance coverage of contraceptives had increased since the 1990s. *Closing the Gaps* at 109. If insurance coverage of contraceptives were truly the key to reducing unintended pregnancies — as the Mandate presupposes — then one would have expected the rate of such pregnancies to decline as insurance coverage rose. But it did not.[3]

The IOM report nonetheless claims that forcing employers to cover contraceptives without cost sharing will reduce unintended pregnancies. It cites a particular "policy brief" for the proposition that "cost-sharing requirements, such

[3] *See, e.g.*, Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION at 478–85 (2011); Nat'l Campaing to Prevent Teen & Unplanned Pregnancy, *Unplanned Pregnancy in the United States*, http://www.thenationalcampaign.org/resources/pdf/briefly-unplanned-in-the-united-states.pdf (last visited Oct. 11, 2012).

as deductibles and copayments, can pose barriers to care and result in reduced use of preventive and primary care services." *Id.* (citing Julie Hudman & Molly O'Malley, Kaiser Comm'n on Medicaid & the Uninsured, *Health Insurance Premiums and Cost-Sharing: Findings from the Research on Low-Income Populations* (Mar. 2003)). Yet this policy brief simply does not support the contention that forcing employers like Wheaton, Belmont Abbey, and the *Amici* to cover abortifacients and contraceptives will reduce unintended pregnancies.

Most significantly, the paper focuses exclusively upon low-income participants in publicly-financed health programs like Medicaid. One cannot legitimately draw broad inferences from studies focused on this population; the IOM report itself acknowledges that low-income women have much higher rates of unintended pregnancy. *Closing the Gaps* at 102. One certainly cannot assume that the impact of co-payments and deductibles on health care utilization on relatively well-compensated employees of organizations like Wheaton and Belmont Abbey is the same as it is on Medicaid participants. Second, the policy brief itself acknowledges that the effect of cost-sharing varies with the type of health services in question. Third, and relatedly, the studies the paper surveys (with a single 30 year-old exception) do not examine the impact of cost-sharing upon the use of contraceptives, much less the impact on the unintended pregnancy rate or the incidence of the adverse health effects that correlate with unintended pregnancy.

In sum, the government, by uncritically accepting the conclusions and reasoning of the IOM report, has failed to demonstrate that forcing employers like Belmont Abbey, Wheaton, and the *Amici* to cover abortifacients and contraceptives will advance its stated objective of reducing the adverse health events associated with unintended pregnancy.

II. OTHER EVIDENCE SHOWS THAT THE MANDATE WILL NOT ADVANCE THE GOVERNMENT'S STATED INTEREST IN REDUCING UNINTENDED PREGNANCIES.

Again, the Mandate's foundational presupposition is that the cost of contraceptives and abortifacients is a major driver of unintended pregnancies. That presupposition underlies the contention that forcing employers to bear these costs will reduce unintended pregnancies. In addition to the failure of the IOM report adequately to support this presupposition, other evidence contradicts it outright.

First, as discussed below, survey data reveals that cost plays a small role, if any, in decisions about birth control. Second, as also discussed below, state-specific research data conclusively proves that contraceptive mandates do not solve the unintended pregnancy problem. Indeed, the evidence reveals no apparent correlation between the existence of such mandates and unintended pregnancy rates. In fact, as shown *infra*, states *with* contraception mandates have *higher* rates of unintended pregnancy than states without them. Thus, the Mandate almost certainly will not advance the government's interest in reducing unintended

pregnancies. Forcing religious institutions like Wheaton and Belmont Abbey to pay for abortifacients and contraceptives as a means of advancing this interest is indefensible.

Strategic Pharma Solutions recently conducted what it characterizes as a "comprehensive landmark survey of American women's attitudes toward and experience with contraception." The survey is entitled, *Contraception in America: Unmet Needs Survey*.[4] The executive summary of the survey results reaffirms that "[a]ccidental pregnancies remain common despite readily available contraception." *Contraception in America* at 2. Over 40% of the survey respondents were not trying to get pregnant but were also not currently using any method of birth control. *Id*. at 14. When asked why they were not using any method of birth control, only 2.3% of this group stated that birth control was too expensive. *Id*. This reason was dead last among the nine reasons offered by respondents. *Id*. Of the women who were using birth control, only 1.3% reported that they chose a particular method because of its affordability. *Id*. at 16. This reason was second-to-last among the 19 offered by survey respondents. *Id*. Given this data, it is difficult to accept the government's assertion that its mandate will advance its

[4] Strategic Pharma Solutions, *Contraception in America: Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf (last visited Oct. 11, 2012) [hereinafter *Contraception in America*].

interest in reducing unintended pregnancies.

State-specific research data conclusively proves that contraceptive mandates do not substantially ameliorate the unintended pregnancy problem. Over two dozen states have adopted laws requiring group health plans to include contraceptives.[5] Yet these states experience rates of unintended pregnancy that are actually *higher* than in the states without such mandates. In the states with mandates, the average rate of unintended pregnancies in 2006 was 52.58%; the average rate in states without mandates in 2006 was 50.38%.[6] Plainly, contraceptive mandates are not an effective means of noticeably diminishing unintended pregnancies. Therefore, even if reducing unintended pregnancies and the corollary adverse health events might be deemed a "compelling interest" (which is contested) for purposes of the Religious Freedom Restoration Act and the First Amendment, the HHS contraceptive Mandate is simply not an effectual way to advance that interest.

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[5] *See* Nat'l Conference of State Legislatures, *Insurance Coverage for Contraception Laws*, http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Oct. 11, 2012); Guttmacher Inst., *Insurance Coverage of Contraceptives*, http://www.ncsl.org/Issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Oct. 11, 2012).

[6] The Guttmacher Institute maintains and publishes a "reproductive health profile" for each of the 50 states. *See* Guttmacher Inst., State Data Center, http://www.guttmacher.org/datacenter/profile.jsp (last visited Oct. 11, 2012). Each state's profile includes the percentage of pregnancies in 2006 that were unintended.

III. BY EXCLUDING 100 MILLION PEOPLE FROM THE MANDATE, THE GOVERNMENT CONCEDES ITS INTEREST IS NOT COMPELLING.

The Mandate does not apply to group health plans that possess "grandfathered" status. 76 FED. REG. at 46623 & n. 4. The government estimates that in 2013 close to 100 million employees and their dependents will be participating in grandfathered plans not subject to the Mandate.[7] In addition, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the Mandate exempts from its requirements "religious employers" defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. 76 FED. REG. at 46626. The federal government has decided that employers in any of these categories simply do not have to comply with the Mandate.

The government cannot carve out these massive exemptions and simultaneously claim that the Mandate advances a compelling interest. It cannot claim a compelling interest when it "leaves appreciable damage to [its] supposedly

[7] HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans," *available at* http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html (last visited Oct. 12, 2012) (estimating that 55% of 113 million large-employer employees, and 34% of 43 million small-employer employees, will be in grandfathered plans in 2013).

vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Defendants cannot claim a "grave" or "paramount" interest in imposing the Mandate upon Wheaton, Belmont Abbey, or other religious objectors like the amici while allowing nearly 100 million individuals to go "unprotected." No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if institutions like Wheaton and Belmont Abbey are exempted too. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

The Mandate includes an exemption for certain inward-looking churches. 76 FED. REG. at 46626. This raises a question: how can the government claim that exempting institutions like Wheaton and Belmont Abbey would undermine a compelling interest when it has already created a religious exemption? There is no nexus between the Mandate exemption's criteria and the government's alleged interest such that a compelling interest exists in applying the Mandate to non-exempt entities but is absent with regard to exempt ones. Institutions like Wheaton and Belmont Abbey cannot be denied a religious exemption on the premise that the government can pick and choose between religious objectors. *See O Centro*

Espirita, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions" must also be afforded because of RFRA).

In *O Centro Espirita*, the Supreme Court held that no compelling interest justified a law that had a much more urgent goal — regulating extremely dangerous controlled substances — and that had many fewer exemptions than the broad swath of omissions from the Mandate. In that case, the Court dealt with the Controlled Substances Act's prohibition on "all use," with "no exception," of a hallucinogenic ingredient in a tea along with other Schedule I substances. *O Centro Espirita*, 546 U.S. at 423, 425. But because elsewhere in the statute there was a narrow religious exemption for Native American use of a different substance, peyote, the Court held that the government could not meet its compelling interest burden even in its generalized interest in regulating Schedule I controlled substances as applied to the plaintiffs in that case. *Id.* at 433. Even more so here, the government cannot satisfy its burden by pointing to general health benefits of contraception. Halting the use of extremely dangerous drugs is far more urgent than forcing religious objectors to provide contraception coverage in an almost certainly inefficacious effort to reduce unwanted pregnancies. The government's grant of secular and religious exemptions for millions of other employees betrays any alleged compelling interest it may have in forcing Plaintiffs

to comply with the Mandate against their religious beliefs.

IV. THE MANDATE IS NOT THE LEAST RESTRICTIVE MEANS OF ADVANCING THE GOVERNMENT'S STATED INTEREST IN REDUCING UNWANTED PREGNANCIES.

The government has chosen to pursue its stated interest in reducing unwanted pregnancies by compelling employers, including Wheaton and Belmont Abbey, to cover abortifacients and contraceptives. Even if the government's stated interest is compelling (which it is not) and even if coercing employers to provide the coverage would advance that interest (which it will not), the Mandate does not survive the requisite scrutiny unless it has chosen the means of pursuing its interest that is the least restrictive of religious exercise of entities like the Colleges.

Rather than coerce entities like the Colleges to cover abortifacients and contraceptives in their employee health plans, the government could conceivably create its own "contraception insurance" plan covering all the items the Mandate requires, and then allow free enrollment in that plan for whomever the government seeks to cover. Or the government could directly compensate providers of contraception or sterilization. Or the government could offer tax credits or deductions for contraceptive purchases. Or the government might impose a mandate on the contraception manufacturing industry to give its items away for free. These and other options could fully achieve Defendants' goal while being less restrictive of Plaintiffs' beliefs. There is no essential need to coerce Plaintiffs

or other religious objectors to provide the objectionable coverage themselves.

The government cannot deny that it could pursue its goal more directly. The federal government and many states already directly subsidize birth control coverage through Title XIX/Medicaid and Title X/Family Planning Services funding. To be sure, these other options may be more difficult to achieve as a political matter. But political expediency does not justify the government's selection of a mechanism that violates the conscience of the Colleges and other religiously objecting employers. And it certainly does not satisfy the strict scrutiny required by RFRA and the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court reverse and remand the district court's denial of Wheaton College's motion for preliminary injunction and instruct that court to promptly and correctly decide that motion, concluding that the Mandate is not the least restrictive means of advancing a compelling governmental interest. The *Amici* also respectfully request that this Court reverse and remand the judgments below dismissing the cases.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,080 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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