United States Court of Appeals

FOR THE THIRD CIRCUIT

Case No. 16-1275

REAL ALTERNATIVES, INC.; KEVIN I. BAGATTA, ESQ.; THOMAS A. LANG, ESQ.; CLIFFORD W. MCKEOWN, ESQ.,

Plaintiffs-Appellants

v.

SYLVIA BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al*.

Defendants-Appellees.

BRIEF OF APPELLANTS

On Appeal from the United States District Court for the
Middle District of Pennsylvania
Civil Case No. 1:15-cv-00105-JEJ (Judge John E. Jones III)

Kevin H. Theriot
Elissa M. Graves
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

Matthew S. Bowman
David A. Cortman
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690

Randy Wenger
INDEPENDENCE LAW CENTER
23 North Front Street
Harrisburg, Pennsylvania 17101
(717) 657-4990

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Currently pending in the United States Court of Appeals for the District of Columbia Circuit is a challenge similar to the one presented here, in which the District Court granted summary judgment and a permanent injunction to the plaintiffs, and the government has appealed. *See March for Life v. Burwell*, No. 15-5301 (D.C. Cir. filed October 30, 2015). The government requested and was granted a stay in that case from the Court of Appeals, during which the plaintiffs' permanent injunction remains in place.

JURISDICTIONAL STATEMENT

I. JURISDICTION OF THE DISTRICT COURT

The District Court for the Middle District of Pennsylvania had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action against federal governmental entities and officials based on claims arising under the United States Constitution and laws.

II. JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This Court has jurisdiction over this appeal because the District Court issued its final order, J.A. 003, granting dismissal and/or summary judgment to the government Defendants-Appellees and denying summary judgment to the Real Alternative Plaintiffs-Appellants, on Dec. 10, 2015. 28 U.S.C. § 1291. This appeal was timely filed on Feb. 5, 2016. Fed. R. App. P. 4. J.A. 001-002.

INTRODUCTION

Plaintiffs-Appellants Real Alternatives is a small non-profit pro-life organization that is not religious, and that is committed to promoting alternatives to abortion. Real Alternatives' employees Messrs. Bagatta, Lang, and McKeown, are likewise pro-life as a condition of working there, but are personally religious. (Hereinafter, Appellants are referred to collectively as "Real Alternatives," unless otherwise indicated.)

Defendant-Appellees are federal agencies ("the government") that created a mandate requiring many health insurance plans to cover FDA-approved contraceptives, including some items that Appellants believe, and the government concedes, can harm very young human embryos.

In its regulations, the government emphasized that this mandate's purpose is to give contraception to women who "want it," and consequently, it exempted some religious organizations because their employees "likely" oppose contraception. But the government refuses to exempt Real Alternatives even though its employees, by definition, oppose these items. The mandate as applied to these parties serves no government interest, because Real Alternatives and its pro-life employees do not want the coverage. The government's willingness to exempt churches but not Real Alternatives is therefore irrational. Real Alternatives is not

even eligible for the so called accommodation that religious non-profits and for-profit companies owned by religious individuals are afforded.

This makes the mandate, and the government's refusal to extend its exemption to Real Alternatives, a violation of the Administrative Procedure Act and the Fifth Amendment's Equal Protection guarantee. The mandate also violates Real Alternatives' individual employees' rights under the Religious Freedom Restoration Act. In the only other case to consider this specific kind of challenge, the District Court in the District of Columbia awarded similar Plaintiffs summary judgment and a permanent injunction. *March for Life v. Burwell*, --- F. Supp. 3d. ----, No. 14-CV-1149 (RJL), 2015 WL 5139099 (D.D.C. Aug. 31, 2015).

The District Court erred in granting the government summary judgment or, as applicable, dismissal. This Court should reverse and remand with instructions to enter summary judgment and permanent injunctive relief for Real Alternatives and its employees on all of their claims.

STATEMENT OF THE ISSUES

The issues presented are:

1. Whether the government acted arbitrarily, capriciously and contrary to law under the Administrative Procedure Act (APA) by imposing on the pro-life organization Real Alternatives a Mandate that the government claims is only

justified for women who want contraception, and that the government admits is not undermined by exempting entities whose employees "likely" oppose it.

The issue was raised in Real Alternatives' Verified Complaint at J.A. 087-128, and Real Alternatives' Motion for Summary Judgment and Opposition to the government's motion, at DCT Doc. 29. The issue was addressed by the District Court's Opinion at J.A. 004-079.

2. Whether the government acted irrationally under the Equal Protection doctrine by voluntarily exempting certain religious non-profit entities from the Mandate because their employees "likely" oppose contraception, but refusing to exempt (or even attempt to accommodate) Real Alternatives even though it only hires employees who oppose abortifacients.

The issue was raised in Real Alternatives' Verified Complaint at J.A. 087-128, and Real Alternatives' Motion for Summary Judgment and Opposition to the government's motion, at DCT Doc. 29. The issue was addressed by the District Court's Opinion at J.A. 004-079.

3. Whether the government violated the rights of the individual employees of Real Alternatives under the Religious Freedom Restoration Act (RFRA) when it required them either at Real Alternatives or elsewhere to either buy health insurance that covers abortifacients against their religious beliefs or to

forego insurance to the detriment of their and their families' health and to place them at risk of substantial fines.

The issue was raised in Real Alternatives' Verified Complaint at J.A. 087-128, and Real Alternatives' Motion for Summary Judgment and Opposition to the government's motion, at DCT Doc. 29. The issue was addressed by the District Court's Opinion at J.A. 004-079.

STATEMENT OF THE CASE

In this case Real Alternatives, a non-profit, non-religious, pro-life organization, and its three employees challenge a federal regulatory mandate requiring them to have coverage in their health insurance plan of contraceptive items that they believe can destroy early human embryos.

On January 16, 2015, the Real Alternatives plaintiffs filed a Verified Complaint with the District Court for the Middle District of Pennsylvania against the government. J.A. 087-128; DCT Doc. 1. The Verified Complaint alleged that the Mandate violates their rights under the Equal Protection doctrine of the Fifth Amendment, the Administrative Procedure Act, and with respect to Real Alternatives' employees, under the Religious Freedom Restoration Act. J.A. 087-128; DCT Doc. 1. On March 24, 2015, the parties submitted a case management plan agreeing to proceed on the record created by the verified complaint and the government's regulatory record, and then to consolidate the process of the

government's request for dismissal with the parties' cross-motions for summary judgment. Pursuant to this plan as approved by the Court, on May 28, 2015, the government filed a Motion to Dismiss or in the Alternative for Summary Judgment. DCT Doc. 27. On July 1, 2015, Real Alternatives filed its Motion for Summary Judgment and Opposition to the government's motions. DCT Doc. 29. Responsive and reply briefs were filed.

The District Court held no oral argument. On December 10, 2015, the court issued an order and, separately, a memorandum opinion, granting the government's motion to dismiss or alternative motion for summary judgment, denied Real Alternatives' motion for summary judgment, and closed the case. J.A. 003-079; DCT. Doc. 37–38. Specifically, the District Court dismissed Real Alternatives' APA claim, and granted judgment to the government (without specifying whether it was granting dismissal or summary judgment) on Real Alternatives' Fifth Amendment and RFRA claims.

All of the Real Alternatives Appellants filed their Notice of Appeal on February 5, 2016. J.A. 001-002; DCT Doc. 39.

STATEMENT OF FACTS

I. Real Alternatives exists, and hires its employees, to defend the dignity of life of human embryos.

Real Alternatives is a pro-life, non-religious, non-profit organization. VC ¶ 6. It was created to provide life-affirming alternatives to abortion services

throughout the states. VC ¶ 16. Real Alternatives administers such programs in Pennsylvania, Michigan, and Indiana to provide alternatives to abortion services, including abstinence education services, to women and families in those states. VC ¶ 19–20. Real Alternatives requires that the entities which participate in its programs and contracts share its opposition to abortion and to contraceptive items that may harm very young embryos (including all IUDs and hormonal birth control methods (hereinafter "abortifacients")), and refrain from performing, providing, counseling or referring for such practices. VC ¶ 21–23.

Real Alternatives views abortifacient use as morally wrong because of 1) the possibility their use can cause an abortion of an unborn child and 2) the negative health consequences inflicted on the user. VC ¶ 24. Real Alternatives therefore has a moral objection to offering health insurance that covers certain items and methods that can cause the destruction of early human life. VC ¶¶ 31–32. Real Alternatives believes that some items categorized as "contraception" by the government also act to destroy embryos after conception but before (or shortly after) their implantation in the uterus. VC ¶ 24. The government conceded that several such items can prevent implantation.[1]

[1] For Defendants' concession about the implantation-preventing effects of some contraceptive items, see, *e.g.*, Resp's Brief in Opp. to Cert. at 10 n.5, *Conestoga Wood Specialties Corp. v. Burwell*, No. 13-556 (U.S. filed Oct. 21, 2013); *accord* FDA, *Birth Control: Medicines To Help You*, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last visited

Real Alternatives' employees share these beliefs; in fact, Real Alternatives only hires and maintains employees who affirm such beliefs. VC ¶¶ 33, 139. Though Real Alternatives is not religious, its individual employees are Catholic or Evangelical Christians, and base their pro-life beliefs on their faith in addition to science and ethics. VC ¶¶ 39–46. Until a recent federal mandate took effect, Real Alternatives bought, and its current insurance carrier sold, an insurance plan that conformed with its beliefs about human life. VC ¶ 36; *see also* DCT Doc. No. 29-1 (affidavit regarding benefits).

II. Congress decided that a contraception mandate is not important enough to require, nor must preventive services be, universal.

In March 2010, the Patient Protection and Affordable Care Act became law. Pub. L. No. 111-148 (March 30, 2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (March 30, 2010) (together, hereinafter, the "ACA"). The ACA regulates the national health insurance market by, *inter alia*, directly regulating "group health plans" and "health insurance issuers."

The ACA requires that some health plans provide coverage for "preventive health services," including "preventive care" "with respect to women." 42 U.S.C. § 300gg-13(a)(4). The ACA did not specify the content of preventive care for women, but indicated that the Health Resources and Services Administration

---

March 23, 2016) (stating that various items, including Plan B, Ella, and certain intrauterine devices (IUDs) may "prevent" "implant[ation]" of embryos).

(HRSA), within the Department of Health and Human Services (HHS), would promulgate guidelines listing such items. *Id*. at § 300gg-13(a)(4).

Congress also decided that many plans need not cover preventive services. Although all plans must comply with certain ACA rules, like covering dependents until age 26, the ACA specifically declares that "grandfathered" health plans need not comply with the preventive service mandate. *See* 42 U.S.C. § 18011(a)(3)–(4). Based on this fact, the government declared that the preventive services mandate is not "particularly significant." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (quoting 75 Fed. Reg. 34,540 (2010)). It "presently does not apply to tens of millions of people." *Id.* at 2764 (quoting *Hobby Lobby Stores, Inc. v. Burwell*, 723 F.3d 1114, 1143 (10th Cir. 2013)). And "there is no legal requirement that grandfathered plans ever be phased out." *Id.* at 2764 n.10.

III. Government agencies create the contraception Mandate.

In 2010, the government published an interim final rule under the ACA (First Regulation), confirming that HRSA would publish guidelines on August 1, 2011. 75 Fed. Reg. 41,726 (July 19, 2010). On August 1, 2011, HRSA issued guidelines providing that women's preventive care would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011). Among these

items are included hormonal oral and implantable contraceptives, IUDs, and products categorized as emergency contraception, all of which the Real Alternatives Appellants believe (and the government concedes) may prevent the implantation of a newly conceived human embryo. VC ¶ 24; *supra note* 1. Hereinafter the regulatory impositions of contraceptive coverage shall be referred to as the "Mandate."

IV. The government exempts some religious entities if their employees likely oppose contraception, and accommodates others, but not non-religious groups.

Controversy surrounding the Mandate led to a long regulatory process in which the government issued at least nine additional regulations or guidances imposing, discussing, and tweaking their Mandate. These regulations include:

- The "Second Regulation," 76 Fed. Reg. 46,621 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B).
- The "Temporary Safe Harbor," February 10, 2012.[2]
- The "Third Regulation," 77 Fed. Reg. 8,725 (Feb. 14, 2012).
- The "Fourth Regulation," 77 Fed. Reg. 16,501 (Mar. 21, 2012).
- The "Fifth Regulation," 78 Fed. Reg. 8,456 (Feb. 6, 2013).
- The "Sixth Regulation," 78 Fed. Reg. 39,870 (July 2, 2013).

[2] HHS, *Guidance on the Temporary Enforcement Safe Harbor* (updated June 28, 2013), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited March 23, 2016)

- The "Seventh Regulation," 79 Fed. Reg. 51,092 (Aug. 27, 2014).
- The "Eighth Regulation," 79 Fed. Reg. 51,118 (Aug. 27, 2014).

As discussed below, this extensive process reiterated several themes. (1) The Mandate exists for women who want contraception. (2) The government's goals are not injured by exempting entities if their employees likely oppose contraception. (3) The government nevertheless refuses to exempt pro-life groups whose employees all oppose certain mandated items.

The Second Regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines" about contraception, and defined "religious employer" as churches, religious orders, or the like. 76 Fed. Reg. at 46,623, 46,626; 45 C.F.R. § 147.131(a). The Third Regulation explained that their goal in creating the Mandate was to "provid[e] contraceptive coverage without cost-sharing to individuals *who want it*," so as to prevent "unintended" pregnancy. 77 Fed. Reg. at 8,727 (emphasis added). Consequently, the government determined that no harm would come to the Mandate by exempting churches if they "primarily employ[ed] persons who share the religious tenets of the organization," *id.* at 8,728, because such employees "would be less likely to use contraceptives even if contraceptives were covered under their health plans." *Id.* at 8,727. The February 2012 Temporary Safe Harbor gave non-profit religious groups an extra year before needing to comply with the Mandate. Non-religious groups like Real Alternatives

were not exempt, however, even if they "primarily" (or indeed, exclusively) employ people who oppose contraception.

Public controversy continued, causing the Fourth Regulation to discuss whether to exempt more groups. "[A]pproximately 200,000 comments" were submitted just in this one comment period, and by information and belief, several hundred thousand in the others. 78 Fed. Reg. at 8,459. Several comments asked the government to exempt *non-religious*, pro-life, non-profit advocacy organizations whose employees all must oppose certain contraceptive items as a condition of working there. *See, e.g.*, Americans United for Life Comment "AUL" on CMA-9992-IFC2 at 10 (Nov. 1, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0023-59496 (last visited March 23, 2016); AUL Comment on CMS-9968-P at 5 (Apr. 8, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-79115 (last visited March 23, 2016).

In the Fifth Regulation, the government proposed to expand the definition of exempt religious employers, but to still not exempt groups like Real Alternatives. 78 Fed. Reg. at 8,461. The new definition would no longer require church groups to actually "primarily employ" persons who shared their beliefs, as had been required in the Second Regulation. *See* 77 Fed. Reg. at 8,728. Instead, churches would be exempt regardless of their employment criteria because their employees

are more "likely" than the employees of non-churches to share their beliefs against contraception. 78 Fed. Reg. at 8,461-62 (employees of non-church groups "may be less likely than participants and beneficiaries in group health plans established or maintained" by churches "to share such religious objections" against contraception). The government cited no source to justify their view that all non-church groups are less likely than churches to employ opponents of contraception. *Id.* The Fifth Regulation also proposed to "accommodate" non-exempt religious organizations, but not non-religious ones. *Id.* at 8,463.

The Sixth Regulation codified the proposed redefinition found in the Fifth, and the government once again explained that the reason they were choosing to exempt these entities was because their employees "likely" oppose certain contraceptives:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39,874. The exemption for church groups does not, however, require that the church groups actually oppose contraception. *Id.* Additionally, the Sixth Regulation codified the "accommodation" for *religious* non-profit groups. *See id*. at 39,892–93.

In the Seventh Regulation, the government expanded the "accommodation," but again only for religious groups. It also essentially expanded the exemption itself, by choosing not to penalize the health plan administrators of non-church religious entities exempt from ERISA, if they choose to omit contraception from their plans despite not being "exempt." 79 Fed. Reg. at 51,095 n.8. These are the same kinds of entities the government had previously said are "more likely" than churches to employ people who want contraception, yet the government decided to impose no penalty to compel such coverage. There are hundreds of these entities. *See Little Sisters of the Poor v. Burwell*, No. 1:13-cv-02611 (D. Colo.), Complaint ¶ 18, doc. # 1 (filed Sept. 24, 2013) ("more than 200" employers); *Reaching Souls Int'l., Inc., v. Burwell*, No. 5:13-cv-01092-D (W.D. Okla.), Complaint ¶ 39, doc. # 1 (filed Oct. 11, 2013) ("hundreds" of employers).

In the Eighth Regulation, the government reiterated that the Mandate's purpose is to advance "women's health and equality" which occurs when women actually use the covered contraceptive items. 79 Fed. Reg. at 51,123. They also issued proposed rules whereby the accommodation would be extended to include for-profit corporations (but not non-religious non-profits). 79 Fed. Reg. at 51,122.

V. The Mandate is injuring Real Alternatives and its employees.

If an employer provides a non-exempt, non-grandfathered health plan without abortifacients, it triggers massive monetary penalties and subjects an entity

to lawsuits by the Department of Labor. 26 U.S.C. § 4980D; 29 U.S.C. § 1132. Thus, Real Alternatives must cover abortifacients for themselves and their dependents, in violation of their beliefs. VC ¶¶ 39–46. If Real Alternatives' employees attempted not to have health insurance, it would detrimentally impact their health and may subject them to penalties under the ACA. VC ¶ 112.

Before the Mandate, Real Alternatives' health insurance carrier provided it and its employees a plan without abortifacient coverage. VC ¶ 36; see also Exhibit A, J.A. 169-174 . After the Mandate, and directly because of it, the insurer inserted abortifacient coverage into Real Alternatives' plan. VC ¶ 36. The insurer would, however, offer health coverage to Real Alternatives that omits abortifacients again, if doing so was legal. VC ¶ 37. Likewise, if Real Alternatives received a court order protecting its plan, then by definition it could shop for insurance from other carriers, such as the carriers that sell no-contraception plans to churches, which the government already exempts from the Mandate.

Under the Mandate, all of Real Alternatives' choices are untenable. It could transgress its and its employees' pro-life commitment by providing abortifacient coverage. It could risk the Mandate's draconian penalties if it found insurance that omitted contraception. Or it could violate the human dignity of its employees, and harm itself financially and competitively, by revoking the health insurance they

like and sending them into a market where all plans offer abortifacients and many offer surgical abortion coverage. *See* VC ¶ 111, 113.

Real Alternatives' individual employees face a similarly untenable choice: participate in an immoral health plan or deprive their families of health insurance in violation of their religious beliefs and the ACA's individual mandate. VC ¶ 112.

SUMMARY OF THE ARGUMENT

Federal agencies imposed the contraception coverage Mandate haphazardly to the detriment of pro-life organizations that are not religious. Congress did not even impose the Mandate. The government deems other requirements, like coverage for dependents up to age 26, "particularly significant" so that they apply to all plans, but not this Mandate. Thus when the government agencies imposed the Mandate it did not (and still does not) apply to tens of millions of people in various health plans that remain "grandfathered" under the law.

Within the Mandate itself, the government recognized that it only advances a government interest if women "want it," because otherwise, if they do not use it, no health or equality benefits will accrue. 77 Fed. Reg. at 8,727; 79 Fed. Reg. at 51,123. In explicit consideration of those Mandate characteristics, the government exempted churches and their integrated auxiliaries groups because, the government speculated, their employees "likely" oppose contraception.

Real Alternatives exists as a secular non-profit organization to defend human embryos from the time of fertilization. Therefore it opposes certain items the FDA includes in the contraception mandate. As an expressive non-profit group, Real Alternatives also hires people only if they share this opposition to abortion. Thus Real Alternatives is not merely "likely" to oppose the Mandate, they do so in fact.

This means the Mandate advances no interest at all as applied to Real Alternatives and its three employees. But, despite getting specific public comments declaring that an exemption for religious employers should—at minimum—include non-religious groups whose employees oppose some or all contraceptive items, the government refused to exempt groups like Real Alternatives, both in the regulatory process and after this lawsuit was filed.

The irrationality of imposing the Mandate on Real Alternatives shows that the government acted arbitrarily and capriciously under the Administrative Procedure Act, and under the Fifth Amendment's Equal Protection doctrine. As another District Court concluded in *March for Life*, --- F. Supp. 3d. ----, No. 14-CV-1149 (RJL), 2015 WL 5139099, at *5–*6, there is no rational explanation for why religious entities whose employees likely oppose contraception are exempted from a mandate that only helps people who want it, but Real Alternatives, whose employees definitively oppose those items, is not exempt.

Nor is there any rational reason for not even attempting to accommodate groups like Real Alternatives, when an accommodation has been provided for religious non-profits, and for-profit groups owned by religious individuals without any evidence that their employees are unlikely to want contraception. The Seventh Circuit similarly concluded in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 874 (7th Cir. 2014), that the government cannot satisfy rational basis review when it tailors a rule to include religious claimants but not secular claimants if the secular claimants are similarly situated in relation to the rule and its underlying purposes.

For similar reasons the Mandate fails scrutiny under the Religious Freedom Restoration Act with respect to Real Alternatives' employees. They have a religious objection to participating in health insurance that includes the mandated items, and the government's Mandate deprived them of a health plan that was morally acceptable to them. The Mandate now operates to deny them that plan at Real Alternatives and anywhere else they might go to obtain one. Forcing them to choose between health insurance and their religious belief in the sanctity of human life imposes a substantial burden under RFRA. The government cannot satisfy its burden to show the Mandate satisfies a compelling interest pursuant to a least restrictive means as applied to these employees, because, *inter alia*, the Mandate serves no interest at all in regard to them, since the Mandate only helps people who

want it, and the government is content to exempt or accommodate groups whose employees merely likely oppose abortifacients when Real Alternatives and its employees do so in fact.

STANDARD OF REVIEW

The District Court granted the government's motion to dismiss Real Alternatives' APA claim under Fed. R. Civ. P. 12(b)(6). A claim should not be dismissed under Rule 12(b)(6) if it "has facial plausibility," meaning "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir. 2010).

The District Court appeared to enter summary judgment, rather than dismissal, to the government on Real Alternatives' Equal Protection and RFRA claims. "To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015) (quoting Rule 56(a)). The Court "must review the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.* (internal citations omitted).

ARGUMENT

Real Alternatives and its employees are entitled to summary judgment on all of their claims. The District Court erred in denying their motion and granting the government's motion to dismiss or, in the alternative, for summary judgment.

I. The Mandate Is Arbitrary and Capricious Under the Administrative Procedure Act.

Applying the Mandate to Real Alternatives is "arbitrary, capricious, [and] an abuse of discretion" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). This is because imposing the Mandate on Real Alternatives serves no governmental interest whatsoever.

In determining whether agency action is arbitrary and capricious, "a court looks to whether the agency relied on factors outside those Congress intended for consideration, completely failed to consider an important aspect of the problem, or provided an explanation that is contrary to, or implausible in light of, the evidence." *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 190 (3d Cir. 2006) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Agency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215–16 (D.C. Cir. 2013) (*quoting Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999)). The Court reviews whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to*

Pres. Overton Park., Inc. v. Volpe, 401 U.S. 402, 416 (1971). If Real Alternatives should be exempt, the Court "shall . . . compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

The arbitrary and capricious quality of imposing the Mandate on Real Alternatives is demonstrated by the government's explanation of what the Mandate is and why it exempts church-related groups. The government repeatedly declared that the Mandate exists for women who "want" contraception, to prevent "unintended" pregnancies. 77 Fed. Reg. at 8,727. The Mandate's purpose is to advance "women's health and equality" by means of women *voluntarily* using the covered items. 79 Fed. Reg. at 51,123. The government exempted church related groups on the explicit rationale that those entities are "likely" or "more likely" to have employees who oppose contraception regardless of whether they actually do so. 77 Fed. Reg. at 8,728; 78 Fed. Reg. at 8,461; 78 Fed. Reg. at 39,874.

Real Alternatives only hires employees who oppose abortifacients, VC ¶ 33, 139, and thus who do not want the items or coverage for them and will not use the coverage if it is provided. VC ¶ 24, 31–32. But the Mandate only serves the government's interests in relation to women who want abortifacients. The government even concluded that if an entity's employees merely "likely" oppose contraception, the Mandate need not be applied. 77 Fed. Reg. at 8,728; 78 Fed. Reg. at 8,461; 78 Fed. Reg. at 39,874. No government interest is advanced by

imposing contraception on an entity and people who not only do not want it and will not use it, but who are organized for the very purpose of opposing it. Therefore applying the Mandate to Real Alternatives serves no rational interest—in fact it serves no governmental interest at all. Its implementation here is arbitrary and capricious. As the District Court held in *March for Life*, --- F. Supp. 3d. ----, No. 14-CV-1149 (RJL), 2015 WL 5139099, at *6, "it makes no rational sense—indeed, no sense whatsoever—to deny [a non-religious pro-life organization] that same respect" given to churches that may or may not oppose contraception. The government's denial of an exemption "sweeps in arbitrary and irrational strokes that simply cannot be countenanced, even under the most deferential of lenses." *Id.*

Real Alternatives' lack of religiosity and its non-church status church do not create a rational interest where none exists. In *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), the Seventh Circuit held that a state offering the benefit of marriage solemnization to religious persons but not atheist humanists violated equal protection. *Id.* at 874–75. The court explained that the government cannot "favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions." *Id.* at 873; *cf. Welsh v. United States*, 398 U.S. 333, 340 (1970) (holding that an individual who "deeply and sincerely

holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience" was equally entitled to a religious conscientious objector exemption under that statute).[3]

Just as "[i]t is irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a 'religion,'" *Ctr. for Inquiry*, 758 F.3d at 875, it is irrational to allow Real Alternatives an exemption from this Mandate if and only if it claims to be religious and becomes a church. The government's own regulations concede that the underlying Mandate only makes sense for women who want contraception, and the Mandate is not undermined by exempting employees who "likely" oppose the objectionable items. The government acts arbitrarily in withholding an exemption from Real Alternatives just because it is a non-religious non-church when it and its employees actually oppose these items.

The District Court's response to the Mandate's apparent irrationality under the APA missed the mark. It focused on the question of whether exempting churches is rational *in the abstract*. But this fails to explain, as required under the APA, why imposing *this* Mandate *on Real Alternatives* is rational. Whether limiting exemptions to churches is rational must be analyzed in light of what the

[3] The First Amendment does give textual favor to religious claims. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). But this does not prevent Equal Protection doctrine from guarding non-religious groups where the government denies them a privilege merely because they are secular, despite them possessing otherwise equal (or better) footing in comparison to religious groups with respect to the treatment provided.

underlying requirement is, and what interests an exemption serves or impairs. But the government has offered "insufficient reasons for treating similar situations differently" with respect to this Mandate, this exemption, and the rationales underlying both. *Salazar*, 708 F.3d at 216.

Here, the Mandate only advances interests for women who "want" contraception, and the government has explained churches can be exempt because they "likely" employ people who oppose contraception regardless of whether they actually do so. Real Alternatives and its employees definitely, not merely "likely," oppose contraception. The government has offered "insufficient reasons for treating [them] differently" than currently exempt employers and employees who are merely "likely" to oppose contraception. *Nazareth Hosp. v. Sec'y U.S. Dep't of Health and Human Servs.*, 747 F.3d 172, 180 (3d Cir. 2014). In light of what the Mandate is and why exemptions were offered in the first place, the government provided no "satisfactory explanation for" imposing the Mandate on Real Alternatives or denying it and its employees an exemption. *See Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. The Court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Instead, the Court "must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery Corp.*, 332 U.S. at 196. And the regulations in this case say that the Mandate is for women

who want contraceptives and an exemption is appropriate where employees likely oppose them.

The irrationality of applying the full Mandate to Real Alternatives is further demonstrated by the government's decision to provide an "accommodation" even beyond the church group exemption to include all religious non-profit organizations that object to contraceptives, and also for-profit corporations that are closely held by religious persons, but not to any non-religious non-profit groups that share the same objection. *See, e.g.,* 79 Fed. Reg. at 51,122. Recently, in litigation concerning that accommodation as applied to non-profit religious groups, the Supreme Court asked the parties to submit supplemental briefs on whether yet another arrangement might satisfy both the government's interests and the interests of objecting organizations, under which "[objecting groups] would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees." *Zubik v. Burwell*, No. 14-1418 (S. Ct. order filed Mar. 29, 2016). This demonstrates that the government has many ways to pursue its interests fully without forcing Real Alternatives and its employees to violate their beliefs.

Indeed, private organizations submitted comments specifically asking for an exemption for non-religious pro-life groups that exist to oppose abortifacient items

(*see supra* at 12, citations to comments from Americans United for Life ("AUL"). The government's regulations provide no rationale whatsoever for choosing to apply this Mandate to such groups when the Mandate only helps women who want contraception and the regulations say the Mandate is not harmed by exempting people who "likely" oppose it. In ignoring and failing to offer a satisfactory and reasoned response to these comments, the government likewise acted arbitrarily and capriciously.

The District Court declared that Real Alternatives only made a "singular passing reference" in their papers to these comments and the government's failure to address them adequately. J.A. 055. This is simply incorrect. Real Alternatives specifically cited the AUL comments referenced above in their primary District Court brief at pages 6–7, and specifically argued on page 20 that the government failed to provide an adequate rationale to address them. See DCT No. 29. Real Alternatives urged this point in the Statement of Facts and Response to Defendants' Statement of Fact that the court required them to file, specifying that the AUL comments had been submitted, and that Defendants omitted those comments from their proposed factual findings. DCT No. 30 at 6–7, 12. Therefore, Real Alternatives adequately raised both its APA claim that the Mandate's imposition on, and the denial of an exemption to, Real Alternatives violated the

APA, and its APA claim that the government's refusal to issue comments expressing the rationale for doing so likewise violated the APA.

The District Court's dismissal of Real Alternatives' APA claim was erroneous, and should be reversed and remanded with instructions to enter summary judgment on the claim in favor of the Real Alternatives Plaintiffs.

II. The Mandate Violates Real Alternatives' Rights Under the Equal Protection Doctrine.

The Mandate violates Real Alternatives' right to equal protection under the Fifth Amendment. It unjustifiably treats Real Alternatives differently than similarly situated entities that object to providing abortifacients.

A. It is irrational to exempt some entities because their employees "likely" oppose contraception, but not Real Alternatives.

Under the Equal Protection doctrine of the Fifth Amendment, the federal government cannot make a distinction that "bears no rational relationship to a legitimate governmental interest." *See Frontiero v. Richardson*, 411 U.S. 677, 683 (1973); *see also Nazareth Hosp.*, 747 F.3d at 180. The government must demonstrate "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *U.S. v. Pollard*, 326 F.3d 397, 407 (3d Cir. 2003) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[G]overnment [is required to] not treat similarly situated individuals differently without a rational basis."

Noble v. U.S. Parole Comm'n, 194 F.3d 152, 154 (D.C. Cir. 1999) (emphasis omitted) (*citing Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

Because imposing the Mandate on an organization whose employees all oppose abortifacients is arbitrary and capricious, as explained above, it likewise cannot pass rational basis review under the Equal Protection doctrine. The stated purpose behind the Mandate is to offer contraceptive coverage to women who "want it," to prevent "unintended" pregnancies, 77 Fed. Reg. at 8,727, and thus to advance "women's health and equality" when women voluntarily use the items, 79 Fed. Reg. at 51,123. There is no rational purpose to impose the Mandate on those who do not want the items and will not use them.

Center for Inquiry vindicated the kind of Equal Protection claim asserted by Real Alternatives here. The government is treating Real Alternatives less favorably than church organizations, not because the Mandate advances the government's interests differently for people who work at churches, but simply because Real Alternatives is a "non-religious ethical group[]" instead of a church. *See Ctr. for Inquiry*, 758 F.3d at 874. In fact, Real Alternatives is not only "similarly situated" to exempted church groups with respect to the stated reasons for the Mandate and its exemption—it is actually more favorably situated than church groups regarding the government's asserted interest. None of Real Alternatives' employees want abortifacients or coverage thereof, as part of their job mission, whereas the

government exempts church groups that do not oppose, or even disfavor, contraception or abortifacients. Real Alternatives should at least get the same exemption as churches that may or may not even take a position on the issue.

In *Center for Inquiry*, the Seventh Circuit deemed it an Equal Protection violation to give favorable treatment to clergy but not to non-clergy persons in the form of permitting them to solemnize marriages. *Id.* at 874. The general notion that government can give privileges to churches did not save the state in that case. Instead of merely asking whether churches and their clergy can be given special privileges *in general*, the court examined the nature of the legal rule and the privilege offered, and asked whether the state's rationale in fact had any inherent connection to a solemnizer being associated with a church. *Id.*

The government is trying to do the same thing here: give churches a benefit just because they are churches, without any rationale that explains why the government's interest with respect to this particular Mandate and the exemption it offers to churches is furthered in respect to churches that may or may not object to abortifacients but not for non-church groups like Real Alternatives that actually do. The government exempted churches from this Mandate explicitly based on the rationale that church employees "likely" oppose abortifacients. The government offered *zero data in support of that notion*, but nevertheless concluded that the Mandate serves no interest as applied to church groups (since the Mandate only

helps women who want it). The court explained in *March for Life*, "[o]n the spectrum of 'likelihood' that undergirds HHS's policy decisions" to exempt churches because their employees likely oppose contraception, "[Real Alternatives'] employees are, to put it mildly, 'unlikely' to use contraceptives." 2015 WL 5139099 at *6. Therefore, for purposes here, "[Real Alternatives] and exempted religious organizations are not just 'similarly situated,' they are *identically* situated." *Id.*

Indeed, Real Alternatives is *better* situated than church groups with respect to the government's stated interests. Not all churches and their employees oppose abortifacients. But all Real Alternatives employees possess a certain (not merely "likely") belief opposing abortifacients. So while the Mandate theoretically could have served some interest if imposed on churches, it cannot serve any rational government interest with respect to Real Alternatives. Exempting Real Alternatives alongside church groups cannot rationally harm the government's asserted interests. As the Seventh Circuit held, the government cannot "favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions." *Ctr. for Inquiry* 748 F.3d at 873.

Center for Inquiry recognized that the underlying purpose of marriage solemnization placed atheist group leaders and religious clergy in indistinguishable

positions regarding the state's need to solemnize marriages through reliable solemnizers. *Id.* at 873–75. The state's refusal to recognize atheists groups merely because they did not identify as churches was therefore an insufficient rationale in the context of that legal scheme. Here, the government has not offered any rational explanation why the Mandate needs to be imposed on Real Alternatives or its employees, but not on groups that the government merely guesses have employees that "likely" oppose abortifacients. As the Seventh Circuit explained, "[a]n accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." *Id*. at 872. And as the District Court expressed in *March for Life*, "[Real Alternatives] is an avowedly pro-life organization whose employees share in, and advocate for, a particular moral philosophy. HHS has chosen, however, to accommodate this moral philosophy only when it is overtly tied to religious values. HHS provides no principled basis, other than the semantics of religious tolerance, for its distinction." 2015 WL 5139099 at *6.

B. The District Court misapplied Establishment Clause cases.

The District Court's discussion of Establishment Clause cases such as *Corp. of Presiding Bishop v. Amos,* 483 U.S. 327 (1987), incorrectly led it to grant judgment to the government on Real Alternatives' Equal Protection claim. *Amos* involved a restriction on religious hiring that, in turn, implicated the Establishment

Clause concept that the government should not interfere in how a church chooses its governing leaders. *Id.* at 334–35; *see also Hosanna-Tabor*, 132 S. Ct. at 706 ("ministerial exception" recognized with special effect for religious groups because it protects "the internal governance of the church"). *Amos* explained that an exemption for religious organization hiring "minimize[d] governmental 'interfere[ence] with the decision-making process in religions,'" because a religious group's decision to hire based on adherence to religious beliefs is a core component of its mission. 483 U.S. at 336.

The government's interests are of a different nature here. While the church governance or autonomy concept does not apply to secular groups, here the government's exemption rationale does extend to secular groups. The rationale for the exemption is driven by the purposes underlying the Mandate: contraception only helps people who want it, so church groups can be exempt because the government (speculates that) church employees "likely" oppose it. *See* 78 Fed. Reg. at 8,461. Real Alternatives occupies an even stronger position with respect to that government interest, since its employees by definition oppose abortifacients, and thus the Mandate serves no interest when applied to it. Thus, Real Alternatives and churches are not distinct in the current context.

Amos does not apply for a second reason: the plaintiffs in that case were not asking to expand the church exemption, but to negate it. That case was brought by

employees who wanted to force exempted church-related groups not to fire them. 483 U.S. at 329–30. This is a distinct Establishment Clause concern due to its implications for church autonomy and governance. Real Alternatives' challenge is the opposite. It seeks to expand an exemption, not to contract it, so it includes the non-religious Real Alternatives group. Similarly, *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005), involved an attempt to strike down existing religious exemptions as violating the Establishment Clause. That is not the nature of the claim here.

As the Seventh Circuit explained about *Amos*, the general approval of religious exemptions "cannot be a complete answer to plaintiffs' contention that humanists are situated similarly to religions in everything except belief in a deity." *Ctr. for Inquiry*, 758 F.3d at 872. The question the Court must explore is not just whether churches and non-profit groups are different *in general*, but whether they are different regarding the "attribute selected for accommodation," given the nature of the underlying requirement. *Id.* Here, the Mandate and the exemption of churches both admit they only serve women who want coverage, and not groups where their employees "likely" oppose contraception. *Amos*'s Equal Protection analysis regarding church autonomy does not apply to these facts.

The District Court committed legal error in granting the government judgment (it did not say whether it was dismissal or summary judgment) on Real

Alternatives' Equal Protection claim. This Court should reverse that judgment and remand with instructions to enter summary judgment in favor of Real Alternatives.

III. The Mandate Violates Real Alternatives' employees' Rights Under the Religious Freedom Restoration Act.

The Real Alternatives employees are entitled to judgment on their claim under the Religious Freedom Restoration Act (RFRA).[4] The District Court in *March for Life* granted summary judgment to employees of a similar pro-life non-religious organization on their RFRA claim. *See* 2015 WL 5139099 at *10–*11.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. Such a burden is only permissible if the government proves that it: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id*.

Under RFRA the court applies the following analysis: (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby,* 723 F.3d at 1140. If there is such substantial

[4] Real Alternatives, Inc., did not bring a RFRA claim because it is not a religious organization, but its three employees did bring a RFRA claim.

pressure, the government will then bear the burden of demonstrating that the challenged action meets strict scrutiny. *Id.*; 42 U.S.C § 2000bb-1.

A. Real Alternatives' employees exercise religion in their health plan.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Nor does the Court assess whether a religious objection is "acceptable, logical, consistent, or comprehensible." *Id.* at 714. In the cases challenging the Mandate here at issue, the Supreme Court has stated that those opposing the Mandate "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S. Ct. at 2779.

In this case, the Real Alternatives employees believe, as a matter of religious conviction as well as moral beliefs, that a human being's life begins at fertilization/conception; that certain contraceptives end the life of such beings before or possibly after their implantation in the womb; and that they therefore object to participating in a plan that offers coverage of such items. VC ¶¶ 29–34.

B. The Mandate substantially burdens the employees' beliefs.

The Mandate substantially burdens the religious beliefs of the Real Alternatives employees. A substantial burden exists where a law places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. In determining whether or not a burden is substantial, courts must focus on the religious belief itself, and not whether the burden is too "attenuated." *See Hobby Lobby*, 134 S. Ct. at 2777.

The employees believe "the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to maintain the coverage. *See id*. at 2778; VC ¶ 31. "This belief implicates a difficult and important question of religion and moral philosophy. . . . Arrogating the authority to provide a binding national answer to this . . . question, HHS . . . in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, [federal courts] have repeatedly refused to take such a step." *Id*. (internal citations omitted).

The Mandate is a substantial burden on the Real Alternatives employees because it pressures them to violate their sincere religious belief against participating in a health plan that covers abortifacients. The Mandate not only makes such plans illegal for the employees to buy, it has taken away a health plan the employees were participating in, and liked, which did not include such

coverage. The employees are pressured to participate in morally offensive plans because they and their families must now choose between participating in an abortifacient plan on the one hand, or harming their health and the health of their families on the other hand by foregoing health insurance. In addition, this latter option likely invokes individual penalties under the ACA, which requires individuals to purchase health insurance.

The Mandate therefore pits two of the employees' religious beliefs against one another: their belief in the sanctity of preborn human life, and their belief that it is part of God's command to take care of their health and the health of their families by purchasing health insurance. VC ¶ 47. The Mandate's pressure is substantial because it is exerted by means of fundamentally changing something the entire ACA recognizes is an important component of personal health: the employees' insurance plan and compensation package.

Therefore, the Mandate pressures the employees to either abide by their religious beliefs or forfeit benefits otherwise available to citizens—the ability to have health insurance in the United States of America. That is a substantial burden as set forth by the Supreme Court in not only *Hobby Lobby* but also *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* involved a plaintiff who was not required to work on the Sabbath, but was merely denied unemployment benefits for refusing such work, and the Court deemed this an "unmistakable" substantial pressure on

the plaintiff to abandon that observance. *Id.* at 404 (reasoning that the law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," and that "the pressure upon her to forego that practice is unmistakable"); *see also Thomas*, 450 U.S. at 717–18 (finding burden on religious exercise "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith. . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). *Sherbert* and *Thomas* declared that even "indirect" pressure was a substantial burden. *See Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

The fact that the Mandate is a directive on health insurance plans in no way undermines the substantial burden it imposes on Real Alternatives' employees. Through this Mandate, the government took away something the Real Alternatives employees valued: a morally acceptable health plan. Instead, the Mandate now makes them choose between following their religious beliefs about human life or following their beliefs about family health. The Supreme Court has said that a substantial burden exists not merely by "direct" requirements, but when "pressure" is exerted. *See Thomas*, 450 U.S. at 717–18; *see also Sherbert*, 374 U.S. at 404

(deeming it "unmistakable" substantial pressure to violate religious beliefs where a law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

Nor can the employees be told that their conscience is not burdened by buying coverage they object to, as long as they do not use the covered items. The Real Alternatives employees do not merely object to using the items, they object to participating in a health plan that covers them. J.A. 096-097 [VC ¶ 31, 34]. Under *Thomas*, courts have no business judging that the employees are theologically incorrect to object to certain types of coverage in their own health plans. In *Thomas*, the government argued that an employee's objection to making tank turrets was not a burden on his belief against war, but the Court declared that free exercise claims do not turn on the state's "perception of the particular belief or practice in question." 450 U.S. at 714. Whether the claimants' activities are "sufficiently insulated" from religious offense is their decision, not the government's or the court's. *Id.* at 715. When Thomas sincerely determined that his religion precluded manufacturing tank turrets (but not making the steel used to build them), the Court accepted that belief without question, stating: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs …." *Id.* at 715.

March for Life correctly concluded that the Mandate substantially burdens a pro-life organization's employees who have been denied a morally acceptable health plan and the possibility of obtaining one. There the court notes that the employees' exercise of religion is not limited merely to whether they use abortifacient contraception, but whether they and their families participate in a health plan that covers it. 2015 WL 5139099 at *7. Moreover, the mere fact that the Mandate bans an employee's employers and insurers from providing the desired coverage, rather than banning the employee from possessing it, does not negate the substantial burden on the employee, for "health insurance does not exist independently of the people who purchase it." *Id.* at *8. "Substantial pressure" is the standard for a cognizable burden (*id.*, *see also Thomas,* 450 U.S. at 717–18), and that exists here because "[t]he Mandate, in its current form, makes it impossible for employee plaintiffs to purchase a health insurance plan that does not include coverage of contraceptives to which they object." 2015 WL 5139099 at *8. Real Alternatives' employees are deprived of the plan they desire (and actually possessed) from their otherwise willing employer and its insurer, and all such plans are banned from other insurers or the exchange, they are "caught between the proverbial rock and a hard place:" either participate in a plan by which they "violate their religious beliefs, or they can forgo health insurance altogether and thereby subject themselves to penalties." *Id.* This is no mere "incidental" effect,

but one that "has a 'tendency to coerce individuals into acting contrary to their religious beliefs.'" *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

C. The Mandate cannot satisfy strict scrutiny.

The Mandate must face strict scrutiny under RFRA. 42 U.S.C. § 2000bb-1(b). To survive, it "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quotations omitted).

1. The Mandate does not serve a compelling interest.

Because the Mandate substantially burdens the Real Alternatives employees' religious exercise, the government must justify the Mandate under strict scrutiny, the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see also* 42 U.S.C. § 2000bb-1(b). It cannot do so here. "Unless the government demonstrates a compelling governmental interest, and uses the least restrictive means of furthering that interest, the [contraceptive] mandate *must* be set aside." *Gilardi v. U.S. Dept. of Health and Human Servs.*, 733 F.3d 1208, 1219 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014).

Three principles define the compelling quality of an interest under the strict scrutiny test. First, the government must show with "particularity how its [even]

admittedly strong interest[s]….would be adversely affected by granting an exemption." *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972). Second, the government must "look beyond broadly formulated interests and . . . scrutinize the asserted harm of granting specific exemptions to particular religious claimants," *i.e.*, "to look to the marginal interest in enforcing the Mandate in these cases." *Hobby Lobby*, 134 S. Ct. at 2779 (quotation and alterations omitted); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (requiring a focus on exempting the "particular claimant"). Finally, the government must show that its interest is actually served to a compelling degree by its means. It must "specifically identify an 'actual problem' in need of solving" and demonstrate that its coercion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted).

As discussed above with regard to the APA and equal protection claims, application of the Mandate to these particular employees cannot serve even a rational government interest. The Mandate only serves government interests for employees who want the covered items, and the government's regulations deem the Mandate's interests not to be infringed if it exempts church groups whose employees "likely" oppose contraception. Here, Real Alternatives is a pro-life organization whose employees all definitely oppose the abortifacients they wish to take out of their plan. The Mandate serves no government interest at all in such a

circumstance, much less an interest "of the highest order." The government will yield none of this Mandate's alleged "health" or "equality" benefits among people unswervingly devoted to opposing and not using contraceptives items they want omitted from the plan. Therefore, the government cannot show how the Mandate serves an interest for the "particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31 It is impossible for the Mandate to serve a compelling interest as applied to the Real Alternatives employees when its application yields zero practical benefit.

a. The Mandate's vast scheme of exemptions negates any alleged government interest.

The government's many exceptions to this Mandate also show that it "leaves appreciable damage" to its same alleged interests "unprohibited" in many similar circumstances, and therefore that its interests are not "adversely affected by granting an exemption" to this "particular claimant." *See Lukumi*, 508 U.S. at 547; *O Centro*, 546 U.S. at 430–31; *Yoder*, 406 U.S. at 236.

The first exemption that negates the government's interests here is the exemption letting churches and similar groups out of the Mandate. *See, e.g.*, 78 Fed. Reg. at 39,896 (defining the "religious employer" exemption). The government explained that it was exempting churches and related groups because, in its speculative view, their employees are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at

39,887. Even lacking any source for this conclusion, the government found it sufficient to justify an exemption. If an employer's employees are "likely" to object to contraception, according to the government's best guess, then the Mandate need not be applied—since the purpose of the Mandate is to advance "health" and "equality" in women who "want" contraception and will use it. 77 Fed. Reg. at 8,727. The government cannot exempt a category of employees merely "likely" to oppose contraception, but then claim a "compelling interest" in not exempting employees of an entity who are certain to oppose contraception.

A second element of the government's vast series of exemptions is its decision not to impose a penalty when non-exempt groups like religious universities enroll in a "church plan" exempt from ERISA, and their plan omits contraception. *See* 79 Fed. Reg. 51,092, 51,095 & n.8 (Aug. 27, 2014) (explaining that the government cannot coercively impose the Mandate on a third party administrator of a "church plan," since it is exempt from ERISA). To be clear: an ERISA "church plan" is not a church. It is a term of art and covers non-profit, non-church organizations, which, because they are not churches, are not "exempt" from the Mandate. Thus, the government simply deemed that they are "more likely" to have employees that want contraception. But it then decided not to require the

contraceptive coverage to flow to those women anyway.[5] Such church plans cover hundreds of groups like religious colleges. See *supra* Factual Background at IV. This non-penalty decision shows the government has no "compelling interest" in imposing the abortifacient Mandate on Real Alternatives' employees.

A third exemption that destroys the government's alleged compelling interest is its decision to leave tens of millions of women in "grandfathered" plans without this mandated coverage, for purely secular and administrative reasons related to how the ACA is implemented. By Congress' own choice, the Mandate does not apply to "grandfathered" plans that include tens of millions of women. *See Hobby Lobby*, 134 S. Ct. at 2764. Just as in *Hobby Lobby*, 723 F.3d at 1143, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *See also Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012); *Geneva Coll. v. Sebelius*, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013). In fact, the government itself deemed the Mandate not "particularly significant." *Hobby Lobby*, 134 S. Ct. at 2780 (quoting 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)). It is not possible for a requirement to be an "interest of the highest order" and not "particularly significant" at the same time.

[5] Whether existing law allows the government agencies to coerce church plans, Congress could have authorized such penalties in ERISA but chose not to do so.

The government, in other cases, has contended that the grandfathering provisions of the Mandate are merely transitory. However, the government's own data project that grandfathered plans, even as they reduce in number, will cover tens of millions of women. 75 Fed. Reg. at 34,540–53 & tbl. 3. Employers have a "right" to keep their grandfathered plans indefinitely. *Hobby Lobby*, 723 F.3d at 1124; *see generally* 75 Fed. Reg. 34,538. This is true even if they make certain changes that raise employees' costs. *See, e.g.*, 45 C.F.R. § 147.140(g) (2010).

In *O Centro*, the government's ban on hallucinogenic tea had no exemption, but a single exemption for another drug, peyote, showed that the government could not deny an exemption to that petitioner. 546 U.S. at 433. Here, the exemptions for employees of churches, in plans covered by ERISA, and in grandfathered plans, are far more vast and varied. Therefore, the government cannot show that "granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435.

b. The government's interests in health and equality are too broadly formulated and unsupported by sufficient evidence.

"Broadly formulated" interests such as in "health" or "equality" do not satisfy the compelling interest test. *O Centro*, 546 U.S. at 431; *see also Gilardi*, 733 F.3d at 1220 (finding the government's interests here too broadly formulated); *Hobby Lobby*, 723 F.3d at 1143 (same); *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (same). RFRA's inquiry is "more focused." *Hobby Lobby*, 134 S. Ct. at

2779 (quoting *O Centro*, 546 U.S. at 430–31).

The government cannot justify the Mandate by relying on generic studies about contraception. First, because, as explained above, that interest is not served among employees who oppose the coverage on principle, and the government's regulations concede as much in its rationale for exempting churches.

The mere fact that women pay more for preventive services than men is too generic in this particular circumstance. The ACA erases most of this gap by requiring preventive services unrelated to contraception. *See* 42 U.S.C. § 300gg-13(a) (listing other mandated preventive services). The government's evidence fails to specify how much of the preventive services cost gap for women is attributable to contraception. To the extent the evidence claims the existence of such a gap, it almost exclusively refers to a gap caused by items other than contraception. *See* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* at 19 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited March 23, 2016) (link to Read Free OpenBook) (hereinafter "IOM 2011"); R. Robertson and S. Collins, *Realizing Health Reform's Potential* 8–9 (2011), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf (last visited March 23, 2016). Thus the government fails to "specifically identify" how the Mandate serves a compelling need *after* non-

contraceptive preventive services are covered. *See Brown*, 131 S. Ct. at 2738.

The government's evidentiary case rests on eleven pages of a report it commissioned from the Institute of Medicine in 2011 (IOM 2011). The report is not a scientific study; it merely cites other studies (and therefore is apparently inadmissible as qualified expert testimony). But walking through those citations shows that the government does not "specifically identify an 'actual problem' in need of solving," or that coercing religious objectors is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738. The government's evidence is insufficient to satisfy strict scrutiny because nearly all of the research the government cites "is based on correlation, not evidence of causation, and most of the studies suffer from significant … flaws in methodology." *Id.* at 2739 (citation and quotation marks omitted); *see generally* Helen M. Alvare, *No Compelling Interest: The 'Birth Control' Mandate & Religious Freedom*, 58 VILLANOVA L. REV. 379 (2013).

First, the government alleges that health and equality will be achieved by reducing unintended pregnancy. But amazingly, the government's own evidence admits that it *does not know how to define* "unintended pregnancy." The IOM discusses this failure by citing to its own 1995 study. Inst. of Med., *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* 21–25 (1995) ("1995 IOM"), *available at* http://www.iom.edu/Reports/1995/The-Best-Intentions-Unintended-Pregnancy-and-the-Well-Being-of-Children-and-

Families.aspx (last visited March 23, 2016) (hereinafter "IOM 1995"). The IOM admits the "many limitations and ambiguities" that exist in explaining "the concept of intended versus unintended," making that category "more [of] a continuum" than a known quantity. *Id.* Available data on what women "intend" with respect to pregnancy includes significant reporting flaws, and extrapolates from sources that do not claim to show intent, such as whether women get abortions. *Id.*; *see also* Alvare, 58 VILLANOVA L. REV. at 396–97.

Second, the government claims that by reducing "unintended pregnancy," it will achieve compelling health and equality results. But its own evidence admits that "research is limited" about whether and to what extent those results actually follow. IOM 2011 at 103. The evidence admits that researchers do not know whether the alleged negative effects of unintended pregnancy are actually *caused by* it or are "merely associated" with it. IOM 1995 at 65. "[C]ausality is difficult if not impossible to show." Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 STUD. FAM. PLAN. 18, 19–20, 29 (2008) (cited in IOM 2011 at 103). For instance, the IOM concedes merely associative links between unintended pregnancy and delay in prenatal care, IOM 1995 at 68, increases in smoking and drinking, *Id.* at 69, 73, 75, and premature birth and low birth weight, *Id.* at 70–71.

The Supreme Court has forcefully declared that evidence of mere correlation

between an event and a negative consequence is "not compelling" to show a government interest; "a direct causal link" is needed between the harm and what the government is regulating. *Brown*, 131 S. Ct. at 2738–39. The government "bear[s] the risk of uncertainty" on all of these questions and "ambiguous proof will not suffice." *Id.* at 2739. As in *Brown*, here the government's "studies suffer from significant, admitted flaws in methodology." *Id*. Overall, the Mandate was adopted "without high quality, systematic evidence" based on the personal "preferences of the [IOM] committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." IOM 2011 at 232 (dissent by Dr. Anthony Lo Sasso).

Third, even if unintended pregnancy was defined and its reduction was known to cause compelling benefits, the IOM report says that women at risk of this problem are predominantly young, unmarried, undereducated, and low income. IOM 2011 at 102. Women who are in the at-risk category already have access to contraception in large part through existing federal programs.[6] But the Real

[6] The government has admitted that it provides or subsidizes contraception in the following programs: Family Planning grants in 42 U.S.C. § 300, *et seq.*; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq.*; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal

Alternatives employees are religious people opposed to abortifacients, who work for a pro-life group, and who have health insurance. They are the wrong target population. The government has no evidence to show its interest is advanced here.

Fourth, twenty-eight states have enacted contraceptive coverage mandates, IOM 2011 at 108, yet the government submitted no evidence showing those mandates not only increased contraceptive use but actually reduced unintended pregnancies and yielded compelling health benefits statewide. Indeed, unintended pregnancy rates did not appear to change.[7]

In short, the government's interests are not supported by evidence showing that the Mandate imposed here will cause health benefits to a compelling degree in this situation. Its "evidence is not compelling." *Brown*, 131 S. Ct. at 2739.

c. The government's alleged interest in a workable insurance system is fatally undermined by the massive exemptions to the Mandate and the ACA in general.

The government cannot satisfy strict scrutiny by claiming an interest in a workable insurance system. Such an interest makes no sense in this case. Real Alternatives' insurer had already given the Real Alternatives employees a health

---

Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1). *See also* Guttmacher Inst. *Facts on Publicly Funded Contraceptive Services in the United States* (March 2016) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited March 23, 2016).

[7] Michael J. New, *Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes*, 13 AVE MARIA L. REV. 345, 346–69 (Summer 2015).

plan omitting abortifacients until this Mandate came along. No one objected, and no harm accrued to anyone, much less to the "insurance system."

Moreover, the Mandate's vast scheme of exemptions directly contradicts the government's alleged interest in absolute uniformity. The government is glad to let church groups have health plans that do not cover contraception. No injury to "uniformity" is identified in allowing those plans to exist. The government is similarly glad to refrain from penalizing non-church groups in ERISA "church plans" that are not penalized for omitting this coverage—even though those entities may include women who want contraception. And in the grandfathering exemption, the government gladly excuses millions of people from the benefits of this Mandate. No uniformity exists to sustain any alleged government interest.

The Mandate is consequently "self-defeating" because "the government…[has] 'fail[ed] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree' than the regulated conduct, it is underinclusive by design." *Gilardi*, 733 F.3d at 1222 (citing *Lukumi*, 508 U.S. at 543). It is well-established in the Supreme Court's "strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal citations omitted). Where the government has voluntarily

exempted millions of employees, it cannot allege that exempting the employees here will undermine the health care system.

The Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982), does not suggest otherwise. *Lee* rejected a religious exemption to social security taxes. *Id.* at 261. There, the Social Security Act did not contain such widespread exemptions, the law applied generally, and permitting exceptions risked fiscal insolvency. *See Hobby Lobby*, 134 S. Ct. at 2784 ("Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation."). The same is not true here where mass exemptions to the Mandate fatally undermine the government's claim that the ACA "could not function" if individuals could opt out of coverage for particular preventive service for religious reasons. *Cf. Lee*, 455 U.S. at 260. These key differences foreclose the government's argument that it has a compelling interest in maintaining a workable insurance system.

2. The Mandate is not the least restrictive means of furthering the government's alleged interests.

Independent of its lack of a compelling interest, the Mandate fails RFRA because it is not the least restrictive means of furthering any legitimate government interest. Due to their moral or religious views, the Real Alternatives employees are not asking that the government actually pursue the following methods as a policy

matter. But still the options below remain available to the government, and consequently they show that the Mandate cannot survive strict scrutiny.

In *Hobby Lobby*, which dealt with a for-profit corporation's challenge to the Mandate, the Supreme Court held that "HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." 134 S. Ct. at 2780. The Court noted that "[t]he most straightforward way of [achieving its alleged interests] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health insurance policies due to their employers' religious objections." *Id*. at 2780. "This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see 42 U.S.C. § 2000bb-1-(b)(2), that this is not a viable alternative." *Id*.

The government could also expand some or all of the existing federal family planning programs referenced above to include people who work at entities exempted under RFRA. *See supra* note 6. The government gives no reason why it could not, for example, simply eliminate the federal poverty level multiplier for program eligibility for Title X and Title XIX Medicaid family planning, to let in participants regardless of their income level if they work for employers objecting to contraception. Title X alone is "certainly" a less restrictive means, because amending it would merely "increase the efficacy of an already established

[government-run] program that has a reported revenue stream of $1.3 billion". *Beckwith Elec. Co., Inc. v. Sebelius*, 960 F. Supp. 2d. 1328, 1349 n.16 (M.D. Fla. 2013). Alternatively, the government could allow employees at objecting entities to enroll in state exchange plans (covering contraception) and receive a federal subsidy for that plan. The exchanges are the mechanism by which the government is already content to deliver abortifacients to tens of millions of people.

Hobby Lobby roundly rejected the government's argument that the least restrictive means analysis cannot require it to engage in "the modification of an existing program" like one of the existing family planning programs discussed above. 134 S. Ct. at 2781. In fact, the Court said the government could even be required to create new programs. *Id.* Thus, the government bears the burden of showing it cannot provide contraception through other programs, by using the health exchanges, or via some new course.

Notably, in the government's so-called "accommodation," not available to Real Alternatives, it has demonstrated it *is* willing to pay for objectionable contraceptives. In that arrangement, the government proposes that its third party administrator will provide payments for these items and the government will reimburse that TPA at least 110% for doing so. 79 Fed. Reg. at 51,099 (referencing the reimbursement mechanism in 45 C.F.R. § 156.50 & (d)). This money comes out of the government's own pocket, demonstrating that the government cannot

object to an alternative means solely because it will cost the government money to ensure the provision of objectionable items. *Hobby Lobby*, 134 S. Ct. at 2781.

As discussed above, the government offers this accommodation to thousands of religious non-profit organizations that are not churches, demonstrating that the accommodation is, at minimum, a less restrictive means of pursuing the Mandate than it is imposing in the present case. Also, as mentioned above, the Supreme Court recently ordered the government and religious groups that are challenging the accommodation to provide supplemental briefs suggesting a way the government's interest might be served without even requiring the religious non-profits to be involved to the extent required by the accommodation. *See Zubik v. Burwell*, No. 14-1418 (S. Ct. order filed Mar. 29. 2016). The government therefore has many ways to pursue its interests beyond imposing the Mandate on Real Alternatives and its employees.

IV. The Mandate Is Contrary to Law Under the APA.

The APA forbids agency action from being contrary to law or constitutional right. 5 U.S.C. § 706(2)(A) & (B) *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971). In addition to violating the APA for being arbitrary and capricious, as described above, the Mandate also runs contrary to law in violation of the APA, including several federal constitutional provisions and

statutes. First, as discussed above, the Mandate violates RFRA and the Fifth Amendment. This renders it contrary to law under the APA.

The Mandate is also contrary to the ACA provision that states nothing in Title I of the ACA, which includes the provision governing "preventive services," "shall be construed to require a qualified health plan to provide coverage of [abortion] services…as part of its essential health benefits for any plan year." 42 U.S.C. § 18023. The Mandate requires coverage of abortion by requiring coverage of certain "FDA-approved contraceptives" which act as abortifacients, in that they cause the demise of human embryos after conception and before and/or after implantation in the uterus. Destroying a human embryo constitutes an abortifacient action that destroys a new human life, and that terminates a pregnancy.[8]

Furthermore, the Mandate is contrary to the provisions of the Weldon Amendment to the Consolidated Appropriations Act of 2012, Public Law 112-74, § 507(d)(1), 125 Stat 786, 1111 (Dec. 23, 2011), which provides that none of the funds made available in the Act for Appellees the Departments of Labor and

[8] *See* Dorland's Illustrated Medical Dictionary 31st Ed. (2007) ("Pregnancy" is "The condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon.); Mosby's Medical Dictionary 7th Ed. (2006) ("Pregnancy" is "The gestational process, comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth."; "Conception" is "1. the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum and forms a viable zygote 2. the act or process of fertilization."); Stedman's Medical Dictionary 28th Ed. (2006) ("Pregnancy" is "The state of a female after conception…."; "Conception" is "Fertilization of oocyte by a sperm").

Health and Human Services "may be made available to a Federal agency or program…if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." The Mandate was enacted and enforced by these government Departments using funds appropriated under the Appropriations Acts that include the Weldon Amendment, and they are subjecting Real Alternatives to discrimination due to its refusal to cover abortifacient drugs and devices.

The Mandate also violates the longstanding requirement that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d). The Mandate and its implementation are a health service program funded in whole or part by a program administered by HHS, and the Mandate requires the Real Alternative employee individuals to engage in morally objectionable assistance in the performance of part of that program by obtaining health insurance that, because of the mandate, will necessarily give them coverage

of abortifacients. Therefore the Mandate violates their rights under 42 U.S.C. § 300a-7(d).

CONCLUSION

For all of these reasons, the Real Alternatives Appellants respectfully request that this Court reverse the District Court's decision granting the government dismissal or summary judgment, and remand with instructions to enter summary judgment for Real Alternatives and its employees.

Dated: April 18, 2016

Respectfully submitted,

s/ Matthew S. Bowman

Matthew S. Bowman
DC Bar No. 993261
David A. Cortman
DC Bar No. 478748
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
mbowman@ADFlegal.org
dcortman@ADFlegal.org

Kevin H. Theriot
AZ Bar No. 030446
Elissa M. Graves
AZ Bar No. 030670
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
egraves@ADFlegal.org

Randy Wenger
PA Bar No. 86537
INDEPENDENCE LAW CENTER
23 North Front Street
Harrisburg, Pennsylvania 17101
(717) 657-4990
rwenger@IndLawCenter.org

Attorneys for Plaintiffs-Appellants

CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING, AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Sophos Endpoint Security and Control software.

I hereby certify that that this brief complies with the requirements of Fed. R. J.A. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. J.A. P. 32(a)(7)(B) because it contains 13,508 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

Respectfully submitted,

s/ Matthew S. Bowman

Matthew S. Bowman

CERTIFICATE OF SERVICE

I herby certify that on April 18, 2016, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Opposing counsel are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. Paper copies will be served as required by the Local Rules of this Court.

Adam A. Grogg, Esq.
adam.a.grogg@usdoj.gov

Alisa B. Klein, Esq.
alisa.klein@usdoj.gov

Patrick Nemeroff, Esq.
patrick.g.nemeroff@usdoj.gov

Joshua M. Salzman, Esq.
joshua.m.salzman@usdoj.gov

Respectfully submitted,

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Plaintiffs-Appellants